

**TOWARDS A PROCESS THEORY OF LAW:  
THE JURISPRUDENTIAL IMPLICATIONS OF THE 'PROCESS'  
PHILOSOPHY OF ALFRED NORTH WHITEHEAD**

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## ABSTRACT

This thesis examines law from a mainly Whiteheadian, or 'process', perspective. Beginning with the judgement of Lord Justice Ward in the conjoined twins' case, *Re A*, I identify a way of looking at law that centres on the relation between universals and particulars and show how the attempt to understand law in these terms encourages a dualism that results in a shortfall between lived experience and that which can be accounted for by legal representation. As a result, much of contemporary legal theory is, I suggest, effectively the expression of a continuing concern to 'connect' legal research with actual judicial decision making, to bridge the gap between rule-determination and rule-application. But, while legal theory and legal practice are indeed often thought of as if they were two separate but connectable areas, I argue that they are in fact more correctly understood as outlining a mutually constitutive process of becoming, interpenetrating and interrelating. Focussing on the position of judge as institutional actor and decision maker, I describe how the different types of institutional knowledge that exist in law interact with each other and can be seen to be founded on different features of the legal institutional context. Thus, while the 'propositional' structure of legal knowledge is fully realized within formal legal contexts in terms of 'institutions', these formal legal contexts are also 'practices', shared traditions in and out of which legal practitioners live and work, and in this latter sense legal knowledge has a 'narrative' structure. But these two features of legal institutional knowledge sit uncomfortably alongside each other. Drawing on several thinkers in the tradition of 'process' thought, such as Henri Bergson and Gilles Deleuze, and on the idea of 'tacit' knowledge developed by the social philosopher Michael Polanyi, I demonstrate how the judge's role in managing these tensions can be seen to suggest an alternative understanding of the nature of law and legal reasoning that emphasises creative potential, novel adventure and continuous change. This in turn paves the way for a creative reconstruction of law according to process thought, integrating Neil MacCormick's institutional theory of law within Alfred North Whitehead's scheme of metaphysical principles and relating his theory of legal reasoning to Whitehead's analysis of the process of concrescence. In this way, I conclude with a presentation of the thesis in thoroughly Whiteheadian terms: law as process; legal decision making as an actual occasion in concrescence.

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## DECLARATION

I, James Bishop MacLean, certify that this thesis has been composed by me, is my own work, and has not been submitted for any other degree or professional qualification.

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## INTRODUCTION

### Illustrating the Problem

Two things always bothered me when I was a boy. First of all, I puzzled interminably over my inability to ‘catch’ a single moment, to identify anything that I could really call ‘the present’. I had been taught in school that time could be divided up into past, present and future and that these three related to each other in particular ways, but I had great difficulty understanding how this relation worked. I could see what the teacher meant when she said that the past was ‘what was over’: it was like the road already travelled, similar to the long stretch of grey tarmac that I could see out of the back window of my father’s car as he drove along. The future, too, I could understand: it was like the road ahead, perhaps less clear because as yet untravelled but able to be anticipated nonetheless. But what of the present? How was *that* to be understood? Was it the road beneath? My problem was that because the car was always moving I couldn’t fix on anything that I could identify as ‘the road beneath’. Of course, I tried to anticipate the road ahead as it appeared to move towards me (made a little easier by the way it was structured with a series of telegraph poles), but every time I tried to say ‘now’ it immediately became ‘then’, and I could see my ‘now’ out of the rear window. So what was the ‘present’? Was it that part of the road that I could see immediately behind, that we’d just passed over? It couldn’t be: that was ‘past’. Every time I tried to think of this I became very confused. It seemed like everything was changing just a little too quickly for me. Nothing was standing still.

The second illustration takes place the day I came home from school after being told for the first time about fractions and dividing. I remember sitting down in a chair, puzzled, repeatedly drawing my finger slowly to the arm of the chair and thinking all the time: ‘If I bring my finger down to the armrest I can touch it. I know this because if I continue to press then my finger gets sore and it makes a mark on the armrest’. Yet the teacher had only just finished telling us about fractions, and she had explained how, if you keep on halving something, you will always have something left to half that can itself be halved, and so on. ‘So’, I asked myself, ‘am I

not always, at some point, halving the distance between my finger and the armrest? How, then, can the two ever meet?’ At that early age I could find no way out of this: I concluded that either there must be something wrong with the halving rule, or my finger must never actually touch the surface of the chair. Yet when I tried it with a bowl of water, my finger definitely got wet!

In thinking about law, I am continually drawn back to this childhood puzzle, for traditional approaches to the meaning and practice of law appear beset by this problem, forever stumbling on the same difficulty. In seeking to address the events and circumstances of human experience by means of *legal representations* of these events, law abstracts from and ‘freezes’ what is essentially a continuously moving and changing flow, progressing by way of *a series of static representations* of this experience, a collection of ‘snapshots’ of an otherwise ever-changing reality. But, of course, as we know, reality is not static; it only conveniently appears that way. Even the mountains that give the impression of standing firm forever do actually change over time (as, indeed, advances in photography and technology, which supposedly ‘speed up’ time, demonstrate consistently).

This connects with my second puzzle, for if law is, as it is commonly supposed to be, a way of understanding reality that involves abstraction for the purposes of representation, a reduction to role and rule achieved through the application of general rules to particular concrete facts, events and circumstances, then how does it not come up against exactly the same problem as my childhood experiment with the application of the halving rule to the continuous action of my finger towards the arm of the chair? If, in my earlier experiment, the difficulty with the application of the universal rule to the particular facts is that it always results in a ‘gap’, then why should this be any different for law, since law also seeks to achieve its purposes through the application of universal rules to particular facts, events and circumstances? Moreover, if this is so, then how is this crossing of the gap achieved in law, and, if not by legal means, what does this tell us about the legal decision making process and about law in general?

This question of the relationship between universals and particulars against the backdrop of an understanding of reality as constituted by continuous change is really what is at the heart of this doctoral research project. Here, I attempt to examine legal reasoning from a 'process' point of view, beginning with an understanding of reality that necessitates a reversal of the normal ontological prioritising of stability over change, asking what it might mean to represent law in these terms. Identifying a way of looking at law and legal reasoning that centres on the relation of particulars to universals, I focus on the problem of finding justifying reasons for legal decisions in hard cases. The difficulties involved in attempting to articulate the legal decision-making experience in this way are well documented in the contemporary literature, being variously described as 'the particularity void', 'the aporia', 'the phronetic gap'. In order to deal with this, some theories of practical judgement have been developed that are inherently particular while alternative theories that give more weight to the role of universals, rules and principles, are also advanced to validate the decision-making process. Between these limits, of particularism and universalism, yet more theories attempt to find a sort of *via media*, reworking the understanding of the particular/universal relationship; still others claim that although justifying reasons are offered to characterise decisions as legal the reasons that would ground their justification cannot be found or given in law.

What unites all of these approaches is a desire to take seriously the matter of justification in legal decision making and in doing so each may be seen to articulate one or another understanding of the particular/universal relationship. But there is a difficulty. Prevalent as these theoretical approaches are, every time an attempt is made to account for legal decisions, they somehow appear to effect an escape. Every attempt to offer *justifying* reasons for legal decisions appears at best to register only at the level of *explanation*. Why? I suggest that perhaps part of the problem may be that our inherited conceptual framework is tied to a 'static' way of thinking that is now outmoded. We try to understand by objectifying reality, analysing what we objectify. But reality is not static; it only conveniently appears that way. It is not, in fact, composed of simply locatable, separate 'entities' but is more akin to a continuous flux, where things merge into each other and the essential qualities seem

to be more correctly describable in terms of relatedness than separateness. So any articulation of the problem of finding justifying reasons for decisions conceived in static terms may be misconceived in law. In other words, a decision cannot be 'caught' because once a decision is made, it is gone: it is momentous, and all that we observe of it is its trace.

In this sense, law can never deliver the reasons to justify decision, since it is always 'catching up'. In this sense, law is always the observation of the trace left behind, the multiplicity of points through which the movement has passed, rather than the experienced unity of the action. The application of universal rules might reduce indefinitely the distance that must be bridged to cross the 'particularity void' but, like the repeated application of a halving rule, without closing the gap. Understood thus, some gap always remains, the distance represented by the question concerning the appropriateness of *that* universal continuing into *these* particulars.

So, one of the questions I am grappling with is: in what sense, if at all, can this 'gap' be closed? How, given the difficulties mentioned, does a judge acquire knowledge of any particular set of circumstances and link this to rule-like generalizations to formulate a decision? How do the universal and the particular meet? My contention is that judges do not simply use, instrumentally, already existing propositional knowledge, but they also draw upon the reservoir of their own factual knowledge and upon a collective knowledge of which they may or may not be wholly aware, and create new knowledge. In this way, to use the same terminology, the gap *is* closed, but not in the obvious way of bringing together the two extremes or bridging the distance between them: rather, through experience and through participation in a 'community of practice', judges develop a 'sense' of what is going on, of what is at stake, a legal skill that over time becomes instrumentalized. It allows them to reflect on things as they are going on, a skilful intuition that they develop and use as an extension of themselves to focus on the issue at hand. This is what accounts for the moment of decision, and the closing of the gap, and is one reason why it is so important that decisions must then be justified by providing reasons for the decision. But this intuitive, insightful aspect of legal decision making

reflects a knowledge that cannot be told, one that is difficult to put into words let alone be put in the form of propositional statements. In this latter sense, in terms of social practices, legal knowledge has a narrative structure, to complement its institutional propositional form. And what all of this points to, I suggest, is the fact that we need to revise our understanding of what is going on here. The supposedly unreflective practice of applying general rules to particular cases must somehow be transformed into a reflective one. The skill of legal decision making needs to be augmented by an understanding of what judges are doing when they practice that skill. Since *what* we know and *how* we know are recursively linked then we need to begin to think more seriously about how we think about things. Thus, I argue in favour of the importance of creative personal understanding - a method of decision making obtained or employed by judges using the exploration of possibilities rather than by following set rules; that is, heuristic knowledge. And what this implies is an activity that is as much about changing understandings as about changed procedure. It must involve the embracing and articulation of a vision and a definition of a new institutional reality and the ability and expertise to control information imaginatively.

So while my contention is that reality is properly understood only when it is perceived as dynamic, and not static, my task has been to try to provide a thoroughgoing processual account of the nature of legal reasoning to meet this; that is, an account that sees everything in terms of process *all the way down*. In attempting to articulate such a view, I suggest that repositioning law within a processual world-view allows a better understanding of the dynamic between institutions and practices and provides a more adequate description of the nature of law and legal reasoning; in particular, how a legal decision is created, maintained and employed within the decision making system.

There is an overriding conviction identifiably present throughout the thesis. Since reality must always be infinitely more than our ideas about it then it is important always to be critical of abstractions, not interpreting the whole of reality by way of only some of its aspects but trying to remain faithful to the totality of our experience, helping to show the limitations of our way of thinking and identify what

is being ignored. In this way, not only will we understand how the different forms of abstractions that we make relate to each other, but our critical approach may also help to resolve conflicts of interpretations. This means a continuous effort to refine understanding and an implicit acceptance that there can be no final knowledge: there is only progress in the process of discovering the limitations of past understandings and moving beyond them. The thesis is presented in the following way.

In Part I, I begin by looking at a recent case involving a pair of ischiopagus conjoined twins, the questions surrounding their legal separation and the issues arising from these to identify a way of looking at law and legal decision making that centres on the relation between universals and particulars. Demonstrating how attempts to understand law in these terms encourages a dualism that results in a shortfall between lived experience and that which can be accounted for by legal representation, I examine a number of different approaches to legal decision making and legal reasoning and consider how modern legal theorists have sought to address this vexed question of the incommensurability of modern legal decision making.

In Part II, I begin to outline how an alternative approach derived from the tradition of process thought might be developed to better address the problems encountered here. Thus, while much of contemporary legal theory is, I suggest, effectively the expression of a continuing concern to bridge the gap that opens up in legal decision making between the domains of theory and practice, I argue that these should not be thought of as two separate but connectable areas; rather, they should be seen as outlining a mutually constitutive process of becoming, interpenetrating and interrelating. Informed by the works of Alfred North Whitehead, Henri Bergson, Gilles Deleuze and Michael Polanyi, and building upon recent developments in the field of organization studies, and translating these to within law, I demonstrate how such an alternative approach can be constructed.

In Part III, I develop this perspective and focus on the position of judge as institutional actor and decision maker in order to describe how the different types of institutional knowledge that exist in law interact with each other and can be seen to

be founded on different features of the legal institutional context. Employing and building upon the constructionist approach developed and deployed within the context of organization studies to illustrate the links between individual knowledge, organizational knowledge and human action undertaken within organized contexts, I explore within the formal legal context the relation between institutions and practices, propositional knowledge and narrative knowledge, and the difficulties that arise from these.

In Part IV, I draw much of the preceding argument towards its conclusion by demonstrating how the judge's role in managing the tensions that arise in this context may actually be seen to suggest an alternative process-theoretical understanding of the nature of law and legal reasoning, one that emphasises creative potential, novel adventure and continuous change. This paves the way for the integration of law and process, or, rather, a creative reconstruction of law according to process thought, relating Neil MacCormick's institutional theory of law and its associated theory of legal reasoning within Whitehead's scheme of metaphysical principles and his analysis of the process of concrescence. In this way, following an established pattern of processual thought, I offer a description of the way in which a discrete instance of legal judgement is created and maintained within the decision-making process.

I conclude with a brief statement of the thesis in thoroughly Whiteheadian terms: law as process; legal reasoning as an actual occasion in concrescence.

## PART I

### LEGAL DECISION MAKING AND LEGAL REASONING

*'It is a dull and obtuse mind,  
that must divide in order to distinguish;  
but it is a still worse,  
that distinguishes in order to divide.'*<sup>1</sup>

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<sup>1</sup> S. T. Coleridge, see Griggs (1971), p. 810.

## CHAPTER ONE

### LOCATING THE PROBLEM IN LAW: THE CONJOINED TWINS CASE, *RE A*<sup>2</sup>

#### Background

The conjoined twins Jodie and Mary<sup>3</sup> were born in August 2000 to Michelangelo and Rina Attard who lived on the Maltese island of Gozo but had arrived at St Mary's Hospital, Manchester, seeking medical assistance unavailable in their home country. Joined at the pelvis, the twins had separate vital organs.<sup>4</sup> Their circulatory system, however, was shared, being joined at the main artery through which Jodie's heart supplied oxygenated blood to both babies. Critically, Mary's heart and lungs did not work and her brain function was significantly impaired; indeed, had she been born a singleton she would not have survived birth and could not have been resuscitated. After examination by the doctors various options were established, with widely varying consequences: leaving the twins conjoined would result in the death of both;<sup>5</sup> performing surgery to separate them would preserve Jodie's life but prematurely end Mary's;<sup>6</sup> separating only in an emergency would diminish significantly the likelihood of a successful outcome for Jodie.<sup>7</sup> Crucially, although both parents were keen to take advantage of the best medical assistance available they opposed surgery,<sup>8</sup> arguing that they could not 'accept or contemplate that one of our children should die to enable the other one to survive'.<sup>9</sup>

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<sup>2</sup> *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All E.R. 961 (hereinafter, *Re A*).

<sup>3</sup> Real names respectively Gracie and Rosie Attard.

<sup>4</sup> With the main exception of the liver and bladder.

<sup>5</sup> For the time being Jodie's heart sustained Mary, but it could not be expected to do so indefinitely. It was estimated that as the twins grew it would undoubtedly fail and bring about other complications leading to the death of both twins within six months to a few years.

<sup>6</sup> Following surgery, Jodie's prospects for survival would increase significantly and, following reconstructive surgery, she could be expected to lead a relatively 'normal' life; however, separation would involve clamping and severing the shared circulatory system and would therefore result in the death of Mary. While it was possible that Mary could, post operation, be placed on life support, none of the doctors and none of the judges considered this a realistic possibility.

<sup>7</sup> The third option was discounted by all parties.

<sup>8</sup> The Attards were devout Roman Catholics.

<sup>9</sup> *Re A*, at 985.

In many jurisdictions that would have been the end of the matter, and an operation to separate the twins would never have taken place since the parents' wishes would have prevailed. But the Manchester medical experts felt they could not simply stand by while both babies died; especially, since in their opinion they could certainly save one of them. So, unable to secure the necessary parental consent for the operation, the hospital applied to the High Court for a declaration that surgery to separate the twins would be lawful.

In the High Court, with no legal precedent to guide and with very little time available to form a carefully reasoned and researched judgement, Justice Johnson decided to allow the separation.<sup>10</sup> Unhappy with this decision, the parents appealed.<sup>11</sup> However, in the Appellate Court, all their appeals were dismissed: each of the judges,<sup>12</sup> though for vastly differing reasons, finding in favour of lawful separation.<sup>13</sup> In November 2000, surgery to separate the conjoined twins, Jodie and Mary, was performed at St Mary's Hospital, Manchester, England. As expected, Jodie survives, but Mary died.

No doubt, many people would agree that the 'least worst' option was to perform the surgery to separate the twins, to save one at the cost of the other;

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<sup>10</sup> Johnson argued that surgery would not only be in Jodie's but also in Mary's 'best interests' since it would be 'very seriously to her disadvantage' to prolong her very short and hurtful life. Relying on a 1993 House of Lords' decision (*Airedale NHS Trust v Bland*, [1993] 1 All ER 821) that it was not unlawful for mechanical support to be withdrawn from a profoundly injured person, even though the inevitable result of doing so would be death, Johnson suggested that an analogy be drawn between life support offered by mechanical means and the natural life support offered to Mary through connection to the organs of her stronger sibling Jodie. Understood in this way, a decision to allow withdrawal of the blood supply to Mary from Jodie would be an 'omission' rather than an act, analogous to those cases where the courts had authorised the withholding of food and hydration. Thus, it was both permissible and lawful; that is, it would not be murder.

<sup>11</sup> They argued that Johnson J had erred in holding that the operation was (a) in Mary's best interests, (b) in Jodie's best interests, and (c) lawful.

<sup>12</sup> Lords Justice Ward, Brooke and Walker.

<sup>13</sup> However, none concurred with Johnson J's explanation of the law: the judges argued that there was a crucial difference between allowing a separate life, unsustainable without the aid of technology, to fade away after that technology was withdrawn and positive surgical action to terminate life. Separating Jodie from Mary involved clamping the main shared artery, severing the twins at the pelvis and donating to Jodie the whole of the shared single bladder, sex organs and anus. This positive act could not be considered equivalent to the switching off of a ventilator. All three judges agreed that nothing in Article 2 ECHR prevented the court from ordering that the operation be carried out: Mary was not being killed intentionally since her death was not the object of the operation; it was irrelevant that the doctors foresaw her death as a virtually certain consequence of the operation.

somewhat less would have sought to impose that view on parents who resolutely chose the alternate view, refusing to kill one to save the other; few indeed would argue to enforce that solution in a situation where parental responsibility was deemed paramount and where the particular parental choice in question had already been declared legitimate. Yet this was effectively the solution which prevailed in *Re A*.<sup>14</sup> How, then, did the presiding judges in this case reason towards their decision that the twins not only could and should but must be separated?

### The Judgements

Having first established that under the Children Act 1989 the court had authority to override a decision by the parents that was not in the best interests of their child, Lord Justice Ward went on to question where, in relation to the proposed surgery, each of the twins' best interests lay. In respect of Jodie, this was obvious: separation would 'offer infinitely greater benefit' to her than 'letting her die';<sup>15</sup> but what about Mary? Could surgery be in her best interest? He suggested that 'the operation will only be in her best interests if, but only if, it is carried out in order either to save her life or to ensure improvement or prevent deterioration in her physical or mental health'.<sup>16</sup> However, since the only perceivable gain for Mary was the dignity of an independent existence which would be short-lived at best, and result in her demise, then the operation could not be seen to be in her best interests.<sup>17</sup>

However, constructing the problem in this way immediately gave rise to a further problem; namely, since 'the interests of Jodie were in conflict with the

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<sup>14</sup> Somewhat curiously, it was affirmed that had the doctors concurred with the parents' decision, or the Manchester Hospital Trust, in spite of the doctors' views, yielded to the parents' request, then no action would have followed and no fault would have been attached to either party. But, because the medical team were keen to proceed with the surgery, and the hospital agreed, then the hospital acquired the right to challenge the parental decision. But if the parental choice is to all intents and purposes a legitimate one, why proceed? The court's answer was unequivocal: once a case is brought before the court, it must determine independently what is in the best interests of the child. That, the court said, "is what courts are for". And so, 'the parental right to determine the outcome must yield to the judge's independent assessment of the welfare of each child'. *Ibid.*, at 596.

<sup>15</sup> *Re A*, 996-997.

<sup>16</sup> *F v West Berkshire Health Authority (Mental Health Act Commission intervening)*, [1989] 2 All ER 545 per Lord Brandon at 551.

<sup>17</sup> *Re A*, at 1002.

interests of Mary, how were those interests to be balanced?’<sup>18</sup> And, since established law dealt only with the interests of a single child, not comparatively with the interests of two, whose interests were paramount? Ward LJ responded by arguing that although Mary had always been ‘designated for death’<sup>19</sup> the consequences for Jodie of not acting were extremely grave, since Mary ‘sucks the lifeblood out of Jodie’.<sup>20</sup> In these particular circumstances,<sup>21</sup> the best course of action was to sanction the operation that would provide the only viable twin, Jodie, with the best chance of life; it was not the court’s business to engage in a comparative exercise over the worth of each life. Even so, the separation of Jodie from Mary would still involve clamping the main shared artery, severing the twins at the pelvis and donating to Jodie the whole of the shared single bladder, sex organs and anus;<sup>22</sup> in other words, killing Mary. As a result, a deeper legal conflict, between these medical and family law issues and others from a criminal law perspective, began to emerge.

In a nutshell, this was a typical catch-22 situation. On the one hand, in carrying out the operation to separate the twins the doctors would have the intention to kill Mary, which even if it did not imply any desire for Mary’s death would, nonetheless, be murder; on the other hand, failing to carry out the operation might just as easily attract an allegation of the murder of Jodie<sup>23</sup> since both the doctors and Jodie’s parents could be seen to be under a duty to save her life. Each of the judges responded in a different way. Ward LJ considered two criminal law defences: a version of *self-defence* and *necessity*. Engaging the full drama of the courtroom representation of the twins’ dilemma, he suggested that Mary was effectively killing Jodie: ‘If Jodie could speak’, he proclaimed, ‘she would surely protest “stop it, Mary, you’re killing me”’.<sup>24</sup> Besides, he felt that there were significant factors present here

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<sup>18</sup> *Re A*, at 1004.

<sup>19</sup> In other words, every proposed course of action would result in her death (*Re A*, at 1010).

<sup>20</sup> *Re A*, at 1010.

<sup>21</sup> That is, taking into account the condition and quality of life, both actual and prospective, counterbalancing the hastening of Mary’s certain death with the enhanced prospects for Jodie of a full life.

<sup>22</sup> It is surprising, given the complexity of the evidence before them, that none of the judges found any difficulty in distinguishing separate body parts, dividing them between the twins, and referring to them as organs belonging to either Jodie or Mary.

<sup>23</sup> *Re A*, at 1013.

<sup>24</sup> There was therefore no need to consider further either the question regarding the value of Mary’s life or the value of her treatment.

that could bring into operation the defence of necessity.<sup>25</sup> Therefore, the doctors and the court must, in this case, choose the lesser of two evils,<sup>26</sup> allowing Jodie to live by killing Mary.<sup>27</sup> But could one of the twins be sacrificed to save the other? Lord Justice Brooke certainly thought so.<sup>28</sup> For him, it was not a question of choosing Mary to die but of asking whether Jodie must also die with her.<sup>29</sup> Lord Justice Walker, on the other hand, argued that what was at stake here was *not* the question of ‘valu[ing] one life above another’;<sup>30</sup> actually, not separating the twins would violate *both* girls’ rights.<sup>31</sup>

Giving judgement, Ward LJ outlined the court’s responsibilities:

‘This court is a court of law, not of morals, and our task has been to find, and our duty is then to apply the relevant principles of law to the situation before us – a situation which is quite unique’.<sup>32</sup>

In conclusion, he felt it

‘important to restate th[os]e unique circumstances for which this case is authority. They are that it must be impossible to preserve the life of X without bringing about the death of Y, that Y by his or her very continued existence will inevitably bring about the death of X within a short period of time, and

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<sup>25</sup> Namely, that the duty to Mary *not* to operate else she would die conflicted with the duty to Jodie *to* operate else *she* would die. However, for policy reasons,<sup>25</sup> neither duress nor necessity had generally been accepted as defences to murder in English Law (see *R v Dudley and Stephens* (1884) 14 QBD 273).

<sup>26</sup> No relevance could be ascribed to the notion that one course of action involved an action while the other involved an omission.

<sup>27</sup> The doctors would *not* be guilty of murder even though the operation would kill Mary because Mary, however legally innocent, was already causing Jodie’s death, ‘as surely as a slow drip of poison’ (*Re A*, at 1015).

<sup>28</sup> He argued that although the operation appeared to involve murder it satisfied all the requirements for the application of the doctrine of necessity: (a) the act is required to avoid inevitable and irreparable evil; (b) no more should be done than is necessary for the purpose; and (c) the evil inflicted must not be disproportionate to the evil avoided.

<sup>29</sup> In conclusion, he argued that ‘the doctrine of the sanctity of life respects the integrity of the body’ and, contrary to Ward LJ, that the proposed surgery would return to each twin’s body ‘the integrity which nature denied them’.

<sup>30</sup> At best the future held nothing for Mary but the possibility of further pain (*Re A*, at 1065).

<sup>31</sup> *Re A*, at 1065. Under English common law every individual enjoys a right to life and a corollary right to bodily integrity.

<sup>32</sup> *Re A*, at 968.

that X is capable of living an independent life but Y is incapable under any circumstances (including all forms of medical intervention) of viable independent existence ...[T]his is', he repeated, 'a very unique case'.<sup>33</sup>

### Reactions to the Decision in *Re A*

With regard to medical and family law issues, '[t]here are good reasons for removing parental consent', writes Raanan Gillon. For example, 'where the parents are being negligent or where they have really weird views that would result in the deaths of their children'. However, 'these parents ... have very standard views', he exclaims, 'the most important of which is you don't kill one person in order to save another'.<sup>34</sup> Gillon finds no justification for this removing from the parents of their normal right and duty to make health care decisions in respect of their children.

Suzanne Uniacke challenges the decision from a different perspective, questioning the criminal law approach adopted by each of the judges and drawing attention to the difficulties involved in any straightforward application of 'appropriate or applicable law' to relevant or material facts. In particular, she identifies two issues: first, it is not clear that the 'facts' can be unproblematically assigned to type; second, the legal categories are not always as clearly bounded as sometimes they are assumed to be.<sup>35</sup>

Jenny McEwan, is also critical of 'the mood of the Court', and finds it all too 'reminiscent of ... *Bland*', where 'the criminal law appeared to present an inconvenient obstacle to the result desired by all the courts involved'. She cites Ward LJ's observation that '[t]he search for settled legal principle has been especially arduous and conducted under real pressure of time' but contends that on one reading of the case, at least, 'the settled principle was clear; the proposed operation would legally be murder. The only arduous aspect ... was that it was difficult to escape this

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<sup>33</sup> *Re A*, at 1018.

<sup>34</sup> Raanan Gillon, quoted at BBC News Online: Health, Friday 22 September 2000, available at <http://news.bbc.co.uk/1/hi/health/937057.stm>

<sup>35</sup> Uniacke (2001).

apparently unwelcome conclusion ... so that all concerned (except the parents) could feel a comfortable sense of having saved a life'.<sup>36</sup> However, McEwan maintains that there is something more serious at stake here than 'the blatant distortion' of criminal law doctrine; in particular, the attempt to disguise the fact that at every point ... they are engaged in a comparison of the respective rights to life of two human beings', thereby 'adopt[ing] an interpretation ... which relegates Mary's interests to the periphery ...'.<sup>37</sup> All of this, she concludes, 'enables the Court of Appeal to achieve a utilitarian goal (saving one life rather than losing two lives) while talking in terms of the right to life and the sanctity of life. It also allows the judges to impose their views upon the parents from outside the jurisdiction, although those views are highly questionable in terms of law, logic and morality'.<sup>38</sup>

Vanessa Munro<sup>39</sup> highlights what she describes as the 'problematic' nature of employing rights as 'a mechanism for providing boundaries between one[ person]'s interests and those of another', particularly 'where the subjects involved defy conventional separation'.<sup>40</sup> This, she complains, 'foster[s] a strongly separatist agenda' that results in a legal environment 'dominated by demands for individual entitlement'. In such a setting, law is characterized by 'an adjudicative function concerned primarily with evaluating competing claims rather than with meaningfully resolving complex dilemmas'.<sup>41</sup> As a result of this 'assumption of conflict', we visualize the twins as 'competing legal persons locked within a relationship of conflict'<sup>42</sup> and admit a further 'presumption of conflict' between them and their parents, all of which helps to 'undermine the strong connection between the parties involved'.<sup>43</sup> The failure to achieve resolution 'via a separatist agenda' exposes the inability of 'an ideology which conceives of the legal person as radically autonomous, disinterested and self-referential' to engage fully and effectively with

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<sup>36</sup> McEwan (2001), p. 246.

<sup>37</sup> *Ibid.*, pp. 247-8.

<sup>38</sup> *Ibid.*, p. 258.

<sup>39</sup> Munro (2001).

<sup>40</sup> *Ibid.*, p. 460.

<sup>41</sup> *Ibid.*, p. 462.

<sup>42</sup> *Ibid.*, p. 466.

<sup>43</sup> *Ibid.*, p. 467. By 'removing the power of decision from the twin's parents ... the Court undermined the parental rights it had initially ascribed to them' and 'the twins became perceived as in need of protection from the misguided wishes of their parents ...'

the complexity of the twins' entanglement: 'It simply does not have the requisite frameworks within which to fence such experiences of connection nor to render them intelligible'.<sup>44</sup>

But it is always the same with things understood as being 'on the margins', says Alice Dreger: 'the study of conjoined twins allows us to see more clearly the size and shape of the culture contained within those margins'.<sup>45</sup> She claims that 'attempts to separate twins are driven largely ... by a deep-seated concern for cultural norms of individuality', calculated 'to bring the bodies into conformation with cultural norms'.<sup>46</sup> In this way cultural norms which are 'often assumed to be pre-existing and fairly fixed', are in reality 'problematized, negotiated, and then reified by scientists and medical doctors at the loci of the supposedly abnormal person'.<sup>47</sup> Thus, '[t]he separation of conjoined twins is invariably at least in part an issue of the predominant culture's ill ease with continuity'. To address this will require nothing less than 'a paradigm shift' in the way that we understand and view conjoined twins.<sup>48</sup>

Mike Bratton and Steve Chetwynd also see in the Court of Appeal's decision a 'startling example' of the stress in Western ethical and legal thought on 'physical separateness as ... constitutive ... of individual identity'. Like Dreger, they find it provides 'an unusually clear expression of the drive within the law ... to "customise" human anatomy in accordance with norms that associate individuality with the "standard" ... physically separate, body'.<sup>49</sup> But, while the court seemed to assume 'that out of their entanglement of body parts, two singleton individuals could be "liberated"',<sup>50</sup> they would rather 'highlight — where separation is called for — what is lost in separation'.<sup>51</sup> They maintain that 'there is a "given-ness" about [the twins'] conjoined state that makes it difficult to claim they were "meant to be physically

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<sup>44</sup> *Ibid.*, pp. 469.

<sup>45</sup> Dreger (1998), p. 4.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, p. 5.

<sup>48</sup> *Ibid.*, pp. 25-26.

<sup>49</sup> Bratton and Chetwynd (2004), p. 279.

<sup>50</sup> *Ibid.*, p. 280.

<sup>51</sup> *Ibid.*, pp. 279-280. In fact, they maintain that 'separation is detrimental to both twins, since they both lose part of themselves in the process'.

separate" ...<sup>52</sup> While 'most "contractual" relationships ... are premised on arrangements made between physically independent people', Jodie and Mary's relationship is characterised by 'an unbroken history of physical interdependence', which means that 'it does not make sense to pretend that their conjoined relationship was something entered into through negotiation, or to treat it as something that can be broken on the assumption that their physical entanglement was not negotiated, as it were, "at arm's length"<sup>53</sup>. Instead, Jodie and Mary ought to be seen as 'facing a common problem', where separation will mean 'disadvantages for both, even for a survivor who might otherwise have died'.<sup>54</sup> In particular, they are concerned to find a model that would 'attempt to resolve their situation without necessarily pitting them against one another ...', which does not 'assume that the twins are the same individuals before and after this calculation'. In other words, 'two individuals in one body cannot be the same as the two individuals with separate bodies ... created by the separation surgery'.<sup>55</sup>

However, for Sharon Levy, the essential problem is of a different order altogether: 'We can talk all day about what the parents should do, and [about] what we would do if we were in their shoes, but the truth of it is we don't have a clue. Only if it happens to your own blood can you know'.<sup>56</sup> Thus, we are drawn back once more to the Attards' response to the proposal to separate their daughters by surgery: '[W]e cannot begin to accept or contemplate that one of our children should die to enable the other one to survive'. How then, in view of this, did the Court of Appeal reason towards its decision to allow their separation against the firmly held and legitimate objections and convictions of their parents? First, Let us look a little more closely at the decision itself.

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<sup>52</sup> *Ibid.*, p. 281.

<sup>53</sup> *Ibid.*, p. 283.

<sup>54</sup> *Ibid.*, p. 284.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Levy (2002).

## Scrutinising the Decision

Arguably none of the vastly differing responses of the judges provides a satisfactory solution to the problems encountered in this difficult case.<sup>57</sup> But, as we have already noted, there are much more serious matters than the effectiveness of the Lord Justices' arguments at issue here. On one reading at least, what we are concerned with here is not a question about the legitimacy of surgery to separate conjoined twins when the procedure results in the death of one of the twins but the legitimacy of performing such an operation *over the legitimate wishes of the parents*. Looked at in this way it is clear from the beginning that two very different versions of events, and accounts of the situation, run in parallel here: there is an impossible tension between, on the one hand, the parents' real life experience of and concern over the plight of their daughters, and, on the other, its medical and legal institutional representation; moreover, it is equally clear that this tension exists because these two versions really belong to two quite different worlds. The objective events and circumstances to which they refer and from which they derive their meaning are really quite different 'entities' in each, and, to put it succinctly, *ne'er the twain shall meet*. So how do the judges deal with this tension?

In the first place, even though the court had established that it could, legitimately, override a parental decision to consent, or refuse consent, to medical

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<sup>57</sup> First, while self-defence may be extended in exceptional circumstances to include actions taken to protect others (usually close relatives in an emergency), it normally relates to protection of the self; it does not normally stretch to include as self-defence actions taken by medical professionals against an infant assailant in the course of a finely planned surgical procedure. It is also interesting to note the somewhat paradoxical manner in which Ward LJ makes his point.. Having rejected as a 'wholly inappropriate' way to describe the 'sad and helpless position' of Mary any use of 'the American terminology which would paint her ... an "unjust aggressor"', he then goes on to describe her as a 'bloodsucking, parasitic murderer'. Of course this, or some similar, description is fundamental to his assertion that the intervention by the doctors is a lawful act of self-defence; that is, the lawfulness of the action of coming to the defence of an 'innocent victim' is based on its justification as defence against an 'unjust aggressor'. Second, accepting necessity as a defence to a charge of homicide flies in the face of a century of common law reasoning<sup>57</sup> and might be considered by many to be the 'thin end of the wedge' against the sanctity of human life, cf. *Palmer v The Queen* [1971] AC 814; *R v Howe* [1987] 1 AC 417 at 429. Third, as the House of Lords made clear in 1999, 'where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen' (see *R v Woollin* [1999] 1 AC 82 at 90-93). So, while it may be argued that the surgeons did not have the desire to kill Mary, if Mary's death was the natural and inevitable consequence of the surgeons' actions then English common law would normally attribute that intent to them.

treatment for their child, there was no conclusive authority supporting the court's balancing the interests of the two children.<sup>58</sup> This meant that the court was attempting to reason in an area where no law directly applied. It was uncharted territory, a paradigm example of what Herbert Hart has famously described as an area of 'open texture'. Lord Justice Ward, describing the dilemma facing the court as, on the one hand, a choice between the 'lesser of two evils' and, on the other hand, a legal and moral obligation not to kill, concluded that '[p]arents ... placed on the horns of such a terrible dilemma simply ha[ve] to choose the lesser of their inevitable loss'. Yet surely this is simply to beg the question in favour of the judges' preferred option. Furthermore, concluding because it was in the best interests of Jodie that the operation should proceed but not in the best interests of Mary to be killed by the operation that then, in view of this conflict of interests, 'there was no other way of dealing with it than by choosing the lesser of two evils and so finding the least detrimental alternative', merely 'affirms one limb of the moral dilemma, ignores the other, and begs the moral question as to which is "the lesser of the two evils"'.<sup>59</sup> Is there no other way of dealing with this dilemma? What about the parents' argument that *not killing* an innocent baby is "the lesser of the two evils", *despite* the fact that the baby would die in a few months and *even if* the killing would save the other baby's life? - Except that argument has already been ruled out under the guise of fairness in decision making. Ward LJ has secured this with his declaration that because the court is a legal authority the case must be decided on the basis of 'settled legal principles' and not moral, ethical, or religious values.<sup>60</sup>

Ultimately, then, faced with an impossible dilemma, and unable or unwilling to avoid a decision on the merits, the court abandoned its stated position of moral neutrality, bridging the gap that it perceived to exist between the facts and the law with its own moral values and 'cloak[ing] its moral choices as assumptions about the decision-making process'.<sup>61</sup> Since law alone could not cross the gap the court felt compelled to resort to a utilitarian calculus that betrayed its avowedly deontological

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<sup>58</sup> *Re A*, at 1003: 'There is no clear authority on the point.' Per Ward LJ.

<sup>59</sup> See Gillon (2001), p. 3.

<sup>60</sup> *Re A*, at 1016.

<sup>61</sup> Editorial comment on 'Recent Cases' [2001] *Harvard Law Review* **114**, 1800 at 1804.

approach. However, this case demanded far more than a simple assessment of the best interests of each twin, choosing to decide in this way also meant that a decision had to be made about whose best interests should prevail. In addressing this question, the court felt that it was best placed to provide a suitable answer. But why is the assumption so readily embraced that a ‘dispassionate, disinterested observer is necessarily the most capable person to decide what is in a child’s best interests’? What overriding reasons are there to suggest that ‘three people who loved neither child were automatically better-qualified to make such a choice than were two people who loved them both’?<sup>62</sup> In other words, was the decision in *Re A* a responsible application of legal principle that captured the ethical dilemma, or a failure of the ethical and legal imagination?<sup>63</sup>

### **Understanding What is at Stake - The Silencing of Voices**

According to Emiliios Christodoulidis, writing in a different context,<sup>64</sup> cases such as this, involving limit situations, are not exceptions that can be ignored for their infrequency of arising; rather, they expose the characteristics of the observed institution that ordinary cases leave intact and overlooked. He questions the legitimacy of the courtroom as a forum that provides the procedural means to accommodate and resolve disputes and wrongdoing. On this analysis, what we find in *Re A* is nothing less than the expression of an impossible dialogue, a non-engagement with the protestations of the parents that really amounts to a banning of the statement of their objections. In this sense, the further (prior) question that emerges is not whether the parents’ decision was the only correct one, or even if it was well founded, but why it was not and could not be put in law.

This problem is one which arises as a result of the way that we think about law. In electing to confront the twins’ dilemma by resort to the legal institutional

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<sup>62</sup> *Ibid*, at 1805.

<sup>63</sup> See Bratton and Chetwynd (2004), p. 280.

<sup>64</sup> See Christodoulidis (2004). Although his criticisms arise in relation to a wholly different set of courtroom situations and interactions they are nonetheless instructive here.

realm, the Court is effectively shifting the debate into an arena where the choice of language used always-already selects and prescribes the context within which events are to be recognized. In this sense, the official language of the court establishes itself as a privileged vocabulary, determining the context and the form in which claims are to be made. The consequence of this imposition of the institutional upon the experiential is the collapse of the parents' objection through its removal from its living context and its realignment under the terms, conditions and relations of the legal context. On one view at least, what is being engaged with here in the courtroom setting is not the living reality of conjoinment as experienced by Jodie and Mary and their parents, Michaelangelo and Rina Attard, but the highly abstract legal representation of that situation and its construction as a legal issue conceived and presented in pairs of oppositional terms– a conflict of doctrines, principles and values: a conflict of rights between two individual right-bearers, between Mary the aggressor and Jodie the innocent victim; a choice between two distinct alternatives, the lesser of two evils. On that view, the substitution of context is witnessed from the parents' perspective by the double suggestion of a conflict that *never actually is*: first, between the parents (whose 'legitimate' view is somehow construed as not being in the 'best interests' of the twins and from whose care the twins are thus portrayed as being in need of protection) and the twins and, second, between one twin (whose actions, however passive are killing, 'draining the life-blood', from her sister) and the other.

Understood in these terms, there appears to be no way at all for the parents' objection to be heard *in its own terms*. Within the legal institutional setting, the judges effectively control the criteria of what counts as legal and the court's setting and arrangements work together to construct a context that will cater for the judicial as legal but not the living experience of the parents, who are thereby deprived of any means to articulate their claim other than as *extra-legal*. In thus removing any possibility of dispute over the constitution of meaning as a stake of the debate the judges establish the innocence of the legal mode of expression, and, in positing this mode as universal, draw irresistibly both the parents and the twins within the circumference of its jurisdiction.

Through such devices and steps any suggestion of incompatibility between the two discourses and languages apparently disappears and the task becomes straightforward, uncomplicated and clear: choose the lesser of two evils. In this way, too, any threat to the legitimacy of the court's decision is removed and the judge can affirm the autonomy of the parents as addressor and addressee of their own prescriptions, since *any* '[p]arents ... placed on the horns of such a terrible dilemma simply ha[ve] to choose the lesser of their inevitable loss'...' If the parents might still wish to argue '*we cannot*' then they will simply be met with the reply, '*yes, you can*; for the '*we*' and the '*you*' have been universalised, are now the same, and this is fair'.

In this way, the unique living experience of parents and twins is confronted by the court and universalized in law, but not without a cost: the silencing of every one of their objections before they can be raised, achieved through the imposition that if they must be raised then they can only be raised in terms that register in the court's legal context. The crucial point here is that in this sense the parents' objections (and the interests of the twins) cannot be said to really register at all, or, if they do, it is under some other category and in that sense they cannot be said to register *in their own terms*; therefore, they find no representation in law.

According to Christodoulidis, the only response that might be able to provide any normative justification for the passing of a sentence on a citizen is that which includes the citizen in the creation of that norm from which the sentencing originates, giving her a voice during the processes of deliberation as to whether the norm applies to her. He cites Klaus Gunther's 'sense of appropriateness', Jurgen Habermas's 'discourse theory' and Robert Alexy's 'theory of legal argumentation' to suggest how such a response might be constructed.<sup>65</sup> But, for Christodoulidis, even such an

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<sup>65</sup> See Christodoulidis (2004). A related response might be developed on the basis of Michael Detmold's notion of legal reasoning as practical reasoning. For example, he argues that when 'Socrates before his execution was invited to escape ... he said no. He had no law but Athenian law ... Thus the law that authorised his death was his law. It was reasonable, Socrates judged, to accept his lawful execution ... [H]e authorised the law and the crossing of the particularity void to his own death' (see Detmold (1989), p. 436).

apparently credible normative underpinning of legal procedures must ultimately fail under the weight of its own aspirations, because any objection can only be understood as logically cutting across the coincidence of addressor and addressee, ‘we’ and ‘us’.<sup>66</sup> Indeed, presented thus, there appears to be nothing within law that can account for or redeem the subsequent displacement that continues to invoke those who are spoken about, in their absence, usurping the right to speak ‘in their name’ after any possibility of their speaking for themselves has been tactically withdrawn.

If we accept this conclusion, then we must also include within it the Attards’ objection on behalf of their daughters. To be sure, we can see exactly how this happens in *Re A*: first, the right of the parents’ to make health care decisions on behalf of their children is removed; then the court, assuming the mantle of guardian of ‘best interests’, speaks ‘for them’. Ultimately, the parents’ objection must be understood as an objection to the invocation of the ‘we’, but the legal institutional context in which they must legitimate their claim operates to deny them both the opportunity and the means with which to make it; that is, their dissensus immediately puts them on the side of those not seeking the twins’ best interests. Trapped under the terms of this inclusion that simultaneously excludes, they are unable either to step back or to object. In this way, the path opens up for Ward LJ to speak and he does so in dramatic terms. But his appeal to Mary and to Jodie, as it were speaking for them, becomes simply another desperate attempt to legitimate the Court’s law as ‘their’ law:

‘[Mary] sucks the life blood out of Jodie ... [Her] parasitic living will be the cause of Jodie’s ceasing to live. If Jodie could speak, she would surely protest, “Stop it, Mary, you’re killing me”’.<sup>67</sup>

Of course, it is quite incorrect to describe Mary’s physical relationship to Jodie in these terms.<sup>68</sup> But for Christodoulidis this is nothing more than ideology operating at

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<sup>66</sup> As Habermas also puts it: ‘citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees’ (quoted in Christodoulidis (2004), p. 10)

<sup>67</sup> *Re A* at 1010.

a deep level, where the possibility of raising an objection is always-already undercut and the objector is always invisible except as an outsider. Here, with the objection that cannot be heard, we have come to the limits of legal possibility:

“The objection that cannot be raised” is not merely ... side-lined in official discourse [but] the very possibility of raising it, in the courtroom, is structurally removed.”<sup>69</sup>

In this way, the silencing of the parents’ (and, by extension, the twins’) voice is achieved with what appears to be little more than pretence: in the name of reflexivity and representation we find curtailment and exclusion. In effect, it is really an act of ‘violence’ on the free flow and expression of opinions and arguments - all that could be contested is not actually contested – and the result is a critical shortfall that looks difficult to calculate and impossible to remedy. It appears like an impossible passage, an unbridgeable gap.

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<sup>68</sup> As Uniacke points out, ‘Mary was not engaged in any threatening activity [towards Jodie]. *Contra* Ward LJ, Mary was not *killing* Jodie’. Indeed, despite Ward LJ’s insistence that Jodie, if she were able to speak, would say “‘Mary, stop it, you’re killing me,” and that “‘Mary would have no answer to that,” ... we can reply on Mary’s behalf, “‘What is it that you are asking me to stop? *Contra* Ward L. J., I do not suck the life-blood out of you. Rather, it is your heart that is doing the pumping. I am not interfering with or impinging on you, either voluntarily or involuntarily or actively or passively. The fact is that we share an artery in virtue of which I am an *entirely passive recipient* of oxygenated blood.’ (See Uniacke (2001), pp. 211-212).

<sup>69</sup> Christodoulidis (2004), p. 180.

## CHAPTER TWO

### JUSTIFYING LEGAL DECISIONS IN HARD CASES: DIFFERENT APPROACHES

#### 1. Neil MacCormick's Universalisability Thesis

It is 'an important aspect of the rule of law', says Neil MacCormick, 'that courts and judges take seriously the established rules of the institutional normative order'. Precisely because of this the whole business of the justification of legal decisions will 'focus on a syllogistic element, showing what rule is being applied, and how'.<sup>70</sup> According to MacCormick, Ward LJ's final ruling in *Re A* demonstrates clearly that this case must be

'viewed in law as a type-case, as a universally stated situation ... [I]t is not some ineffable particular feature of this Jodie interacting with this Mary that justifies the decision but certain storable aspects of the relationship between them in the context of a particular practical dilemma'.<sup>71</sup>

Thus, while it may indeed be true that 'particular reasons must always exist for particular decisions', the real issue is 'the significance of the justifying relationship between reason and decision, and whether or not this involves the universalizability of grounds of decision'.<sup>72</sup> Ultimately, '[t]here is ... no justification without universalization ... For particular facts – or particular motives – to be *justifying reasons* they have to be subsumable under a relevant principle of action universally stated'.<sup>73</sup>

This account of legal decision making emerges as consistent with the account of law as institutional fact that MacCormick has developed under the idea of an

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<sup>70</sup> Bańkowski (2006), p. 5, hereinafter *UPLR*.

<sup>71</sup> *Ibid*, p. 16.

<sup>72</sup> *Ibid*, p. 3.

<sup>73</sup> *Ibid*, p. 21.

Institutional Theory of Law (ITL).<sup>74</sup> With this updated account, MacCormick both confirms and expands upon the model of legal reasoning that he first presented in detailed form in 1978.<sup>75</sup> There, building upon H. L. A. Hart's linguistic criteria of 'open texture' and his analysis of reasoning in hard cases, he suggested a process of legal decision making made up of several stages: Universalisability; Consequences; Coherence; Consistency. Unlike Hart, MacCormick did not suggest that a judge enjoys an almost unfettered discretion in decision making in hard cases; rather, he outlined a theory about the constraints that govern the exercise of judicial discretion when hard cases occur. Nonetheless, like Hart, MacCormick regarded open texture as an attractive feature, allowing the law an opportunity for advancement. His theory can be stated briefly. First, the principle of 'universalisability' entails that the way a decision is made in a hard case must also hold for decisions in every such case in the future (one must 'treat like as like'; both backward-looking and forward-looking) and involves generalisation as a first step towards identifying the relevant general category.<sup>76</sup> Second, an assessment of the 'consequences' of generalising allows one to balance universalisability, fixing the genus through a subjective judgement of value and permitting a choice between two or more possible rulings to disclose a likely rule. Next, the requirement of 'coherence' operates to ensure that the chosen rule can be subsumed under some principle of generality already present in settled law, that it is not simply an exercise in creative interpretation but is grounded in some general principle of law the existence of which may be described as being like part of the 'glue' that holds law together; in other words, that what is presented is really only a making explicit of some principle already implicit in law such that the relevant 'rule' may be seen as correctly subsumed under it (for example, Lord Atkin's identification of the 'neighbour principle' in *Donoghue and Stevenson*).<sup>77</sup> Finally, 'consistency' tests the non-contradictoriness of this rule in relation to other explicitly formulated legal norms within the legal system.

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<sup>74</sup> See MacCormick (1986), hereinafter *ITL*.

<sup>75</sup> See MacCormick (1978).

<sup>76</sup> For example, 'ultimate consumer', 'manufacturer', and so on, as in *Donoghue and Stevenson* ([1932] A.C. 562; 1932 S.C. (H.L.) 31).

<sup>77</sup> *Ibid*, at 44.

## An Institutional Theory of Law

MacCormick's Institutional Theory of Law<sup>78</sup> claims to offer an ontological basis for the analysis of all social action, including law. Here he adopts the theory of institutional facts as set out by G.E.M Anscombe<sup>79</sup> and John Searle,<sup>80</sup> drawing on their observations that there are some entities that seem to exist in the world independent of our frameworks of thought, will and judgement, which they call 'brute facts', and others which appear not to exist in this way; for example, a goal in a football match. We cannot point to any physical thing or event and say that it, bare and simple, is a goal, and yet we do, nonetheless, talk intelligibly about a goal. Searle calls these facts 'institutional facts', since they 'are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions.'<sup>81</sup>

Institutional facts, then, are explicable given these overarching institutions and exist within their systemic framework. They might be tied to specific physical acts or events but they are not identical with these physical events. Much depends on Searle's distinction between regulative rules and constitutive rules. Whereas a constitutive rule might define what constitutes a goal, a regulative rule would specify what one does next after a goal has been scored. The objects that together make up the physical setting for the football match assume a new form of existence in their being interpreted in terms of these constitutive and regulative rules.

MacCormick develops Searle's distinction to suggest that legal 'institutional facts' (such as the temporal existence of a contract between two persons) exist within the frame of reference of certain organized activities that we may term 'institutions' (for example, the institution of Contract that precedes any particular instantiation of it). In this regard, three features structure our use of these concepts: 'Institutive rules', which lay down 'the conditions which are essential to the existence of an

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<sup>78</sup> MacCormick (1986).

<sup>79</sup> Anscombe (1958).

<sup>80</sup> Searle (1969).

<sup>81</sup> *Ibid.*, p. 51.

instance of each such institution'; 'Consequential rules', which detail the consequences that arise as a result of the establishing of an instance of an institution, and 'Terminative rules', which outline the provisions regarding termination of instances of institutions. Thus, the term 'institutions of law' denotes '[t]hose legal concepts which are regulated by sets of institutive, consequential, and terminative rules, with the effect that instances of them are properly said to exist over a period of time, from the occurrence of an institutive act or event until the occurrence of a terminative act or event'.<sup>82</sup> But there is a difference between the institution *per se* and instances of it: 'The existence of an institution as such is relative to a given legal system, and depends upon whether or not that system contains an appropriate set of institutive, consequential and terminative rules. If it does, then the occurrence of given events or the performance of given acts has by virtue of the rules the effect of bringing into being an instance of the institution'.<sup>83</sup>

So we can envisage such institutions 'as being structured by legal rules',<sup>84</sup> and '[t]his way of conceptualising the matter ... makes clear the diachronic quality ... of our legal arrangements, by virtue of the way it separates or "individuates" institutive and terminative rules ... "Instances of institutions" exist in the eye of the law ... from the moment of an institutive event until the occurrence of a terminative event'.<sup>85</sup> This, in turn, 'makes clear the way in which ... "momentary legal information" connects logically with "diachronic legal information". Diachronic information concerns standing arrangements ... [from which] one can derive by deduction the momentary consequential duties, liberties and powers one has in respect of the given arrangement'.<sup>86</sup> Momentary legal information 'is *normative* in form. It tells us what ought to or must, be or be done ... what can or cannot validly be achieved ... Thus it is choice guiding', on the basis of some 'underpinning value', without which 'the information would lose its practical or normative quality'.<sup>87</sup> But '[s]etting up legal arrangements will help us achieve valued states of affairs only to

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<sup>82</sup> ITL, p. 66.

<sup>83</sup> *Ibid.*

<sup>84</sup> MacCormick, D. N. (1988), p. 76, herinafter IAPI.

<sup>85</sup> *Ibid.*, p.79.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, pp. 79-80.

the extent that we have a reason to suppose that their normative consequences will be mirrored in actual behavioural outcomes’, and ‘it is not worth much if arrangements we make can largely be ignored’.<sup>88</sup> Consequently, ‘[r]elative immunity from arbitrary change is in effect a necessary condition for legal arrangements and legal institutions to have the diachronic quality which ... is one of their characteristic features’.<sup>89</sup> ‘In so far as legal reasoning can be deductive, the model towards which this ... looks would be that of predicate logic. Indeed, institutional facts could almost be re-named as “normative predicates”’.<sup>90</sup>

### Exploring Particulars and Universals

To explain how he now sees all of this relating within the practical decision-making setting, MacCormick recalls two familiar stories, the judgement of Solomon<sup>91</sup> and the death of Cleopatra. He begins his analysis by juxtaposing the Solomonic judgement and the decision of the Court of Appeal in *Re A*: ‘the phenomenon of conjoined twins ... can [easily] pose issues quite as awful as the king’s sword’,<sup>92</sup> he argues. For instance, imagine that before some contemporary tribunal we have established the rule that ‘children should be under the custody of their natural mothers’ and, together with this, we have also developed some ‘reliable evidentiary (DNA) test’. In this event, we will immediately have translated Solomon’s ‘brilliant feat into a routine practice’, albeit ‘the real world will always be capable of throwing

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<sup>88</sup> *Ibid.*, p. 80.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, p. 81.

<sup>91</sup> See 1 Kings 3: 16-28. The circumstances of the story are as follows: within three days of each other, two women sharing a house each give birth to a son. One night, while asleep, one of the women rolls over and suffocates her baby but quickly exchanges him for the other, claiming that it is not her child that had died. Eventually, both women appear before King Solomon, each claiming the live baby as their own: ‘Then said the king, “The one saith, ‘This is my son that liveth and thy son is the dead’; and the other saith, ‘Nay; but thy son is the dead, and my son is the living.’” And the king said, “Bring me a sword.” And they brought a sword before the king. And the king said, “Divide the living child in two, and give half to the one and half to the other”. Then spake the woman whose the living child was unto the king, for her bowels yearned for her son, and she said, “O, my Lord, give her the living child, and in no wise slay it”. But the other said, “Let it be neither mine nor thine, but divide it”. Then the king answered and said, “Give her the living child and in no wise slay it; she is the mother thereof”. And all Israel heard of the judgement which the king had judged; and they feared the king: for they saw that the wisdom of God was on him, to do judgement’.

<sup>92</sup> *UPLR*, p. 15.

up surprises'. However, the point is that '[o]nce the application of law becomes problematized, the problems ... raised ... must be solved'. Then, he suggests, the most immediate issue becomes that of 'how to do so'.<sup>93</sup>

So, suppose we were to regard King Solomon's method as the 'model' for our judgement. In that event, we might consider it right to posit some form of 'instinct or intuition' that would enable us to latch on to the particulars of the case, to indicate 'the answer that the rules fail to yield'. On that basis, our answer in the present case might well be thought of as providing us with a precedent for future cases. However, precedents can only ever be 'analogies for new decisions', since no two sets of events are ever exactly the same;<sup>94</sup> therefore, our intuition might also tell us that it would be right to have a rule and to treat the instant case as a 'rule-case'. But even so, 'anomalous cases' will still appear on occasion, forcing us to ask whether the rule permits a different interpretation or if all the facts are 'appropriately classified'. In which case, we will begin to 'problematize the rule's applicability to the case in hand', 'treating it as a case of first impression' and directing our intuitive judgement once more towards its unique particularity. Within such a scenario, exclaims MacCormick, '[e]very judge ... will have to be possessed of some small share of Solomon's wisdom!'<sup>95</sup>

Effectively, every judge 'has two choices', says MacCormick: either she must regard the instant case as 'a rule-case' or she must concede that it is 'a new problem'.<sup>96</sup> The point is that no matter how routine the case the judge's decision will always be a particular decision. It is not simply a question of universals but of particulars *and* universals, of 'particular persons ... that ... instantiate certain universals'. So in this sense the reasons that a judge gives to justify her decision will always be 'rooted in the particular case',<sup>97</sup> but what an intuitionist approach would do is help a judge to discover her intuitive capacity to determine the features of a

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<sup>93</sup> *Ibid*, p. 5.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid.*, p. 6 (emphasis added).

<sup>96</sup> *Ibid.*, p. 7.

<sup>97</sup> *Ibid.*, p. 9.

decision that make it right. In which case, a good decision-making procedure would be one that

‘maximized opportunities [for] careful attention to all points of a problem situation, and that gave decision-making tasks to appropriate persons ... endowed both with adequate attentiveness to detail and with a fair-minded readiness to make no decision till in possession of all relevant reasons in any particular case’.<sup>98</sup>

But that leaves us with another problem: ‘Does such intuition exist?’<sup>99</sup>

In relation to the judicial act of justifying a judgement, MacCormick suggests that Adam Smith’s model of an ‘ideal, fully informed, impartial spectator’ provides the best example of how to go beyond our immediate reaction to a situation to ‘a view that can be common to all concerned persons’; in other words, to a ‘rationalized response to the whole of a situation in all its particularity’.<sup>100</sup> But he also notes that any ‘fully developed moral agent ... capable of giving allegiance to moral rules ... derived from generalizing responses to recurring types of cases ... would be a member of a community whose members owe allegiance to such rules’. In which case, any ‘fully refined moral capacity would be something supervenient on a more unrefined attachment to rules of a heteronomous character’. Thus, we can see how ‘judging according to rules’ is not inconsistent with ‘judging in a deeper way that confronts the whole complexity of real-life situations’. Indeed, it would seem ‘a mistake’ to overemphasize the ‘particularistic quality of judgement, especially [when] it is rationalized in the manner suggested by Smith’.<sup>101</sup>

This procedure is clearly evident in the Solomonic judgement: First, Solomon ‘infers that she is the mother ... Then his judgement is ... “Give her the child ...[because] she is the mother ...”’ We have to understand that in the procedure

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<sup>98</sup> *Ibid.*, p. 10.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, pp. 12-13.

<sup>101</sup> *Ibid.*, p. 13.

followed here this “because” nexus is all-important’.<sup>102</sup> So not only does the sword-drama expose ‘the true mother’, it also reveals how being the true mother becomes the ‘reason’ for awarding the child. Furthermore, since this ‘motherhood relationship’ is identified as a ‘because-reason’ (‘justifying reason’) in this case, it therefore also becomes a ‘because-reason’ for any future cases. What this amounts to, MacCormick suggests, is just another way of saying that reasons must be ‘universalizable’.<sup>103</sup> That is why Ward LJ, in his closing remarks, determines that *Re A*, ‘however ... unlikely to be repeated, has to be viewed in law as a type-case ... The “because” of justification is a universal nexus...’.<sup>104</sup> Indeed, it is precisely this ‘fundamental property of normative justification, ... its universalisability’, that, together with the requirements of ‘consistency over time’ and ‘an overall coherence of values and principles’, provides the basis upon which ‘the rationality of a system of precedents depends’.<sup>105</sup>

### **Causality: Cleopatra and the Poisonous Snake**

Causes are always ‘particular events, processes or states’, says MacCormick, and, inasmuch ‘as we can discover sets of like cause-and-effect series, we may be able to establish inductive generalisations from them’. However,

‘[t]hat one particular has been shown to cause another particular would be no proof that anything else has ever caused, is now causing or will ever again cause any other thing. Just this is what David Hume classically showed to be the difficulty about causalism ... At the level of ... observation of particulars, we never observe anything. We may see the snake biting, we may see the queen dying. But we do not see this bite causing this death. And if we did ..., that would be no ground at all for supposing that every such bite will be a cause of death’.<sup>106</sup>

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<sup>102</sup> *Ibid.*, pp. 13-14.

<sup>103</sup> ‘To rationalize one’s response by stating it as a reason in an objective sense ... is ... to state it in universal terms’ (*Ibid.*, p. 14).

<sup>104</sup> *Ibid.*, p. 17.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*, p. 18.

Therefore, the relationship between particulars and generalizations is one of ‘potential falsification’; that is to say, ‘ascriptions of effect to cause require recourse to unrefuted generalizations, and ... any explanatory hypothesis ... has also to be capable of forming a consistent part of a coherent general theory’. Thus,

‘[i]t is of course the snake bite, not the theory that snake bites can be fatal because of the properties of snake venom, that causes Cleopatra’s death. But what enables us to conceptualise the death of Cleopatra is that the particular fact of the snake biting belongs as minor premise in an argument of which the major premise is a hypothesis culled from the snake-venom theory and the conclusion is the death’.<sup>107</sup>

Merely to affirm that ‘reasons for particular actions are both particular and factual ... does not show ... that the link ... is not a relevant universal’;<sup>108</sup> on the contrary, to justify an act is ‘to show that ... upon any objective view of the matter, the act ought to have been done ... given the character of the act and the circumstances of the case’. Accordingly, for any reason to be a justifying reason it must indicate ‘the generic nature of the act and the generic circumstances of action ... [T]he moment these are stated, an implicit principle – universal in terms – is revealed’. In this way, we can see how, for MacCormick, justifying reasons are ‘conceptually distinct’ from both explanatory and motivating reasons.<sup>109</sup>

‘There is no justification without universalisation; motivation needs no universalisation; but explanation requires generalisation. For particular facts – or particular motives – to be *justifying reasons* they have to be subsumable under a relevant principle of action universally stated’.<sup>109</sup>

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<sup>107</sup> *Ibid.*, p. 19.

<sup>108</sup> *Ibid.*, p. 20.

<sup>109</sup> *Ibid.*, p. 21.

## Critique

MacCormick argues that '[t]here is no justification without universalisation .... For particular facts to be justifying reasons they have to be subsumable under a relevant principle of action universally stated'.<sup>110</sup> Of course, 'at one level this is irrefutable', says Christodoulidis, '[b]ut it is a level that concerns the delivery of explanation rather than the making of decisions'. Moreover, 'there is an important distinction to be made between the two levels' which, when focussed upon, 'throws the issue of "particularity" wide open'. Echoing Bengoextea,<sup>111</sup> he argues that '*universalization is only justification a posteriori*'; that is, it arrives 'too late' to inform or to guide the judge. Certainly, the decision will 'turn on particulars, address questions of appropriateness, justify the application of universal categories', but such '*justification of the application* cannot draw its reasons from "universalisability" but from the appropriateness of extending the universal ... into *this* set of particulars ... [and] this is a judgement that cannot be carried in the universal category but requires attentiveness to the particular'.<sup>112</sup>

In this sense, law can never deliver the reasons to justify a decision. It always comes too late to inform the moment of its occurrence. In this sense, in the terms stated previously, law is always the observation of a trace left behind, a multiplicity of points through which a movement has passed, rather than the experienced unity of an action itself. Universalisation may reduce indefinitely the distance that must be bridged but, like the repeated application of a halving rule, without closing the gap: some gap always remains, the distance represented by the question concerning the appropriateness of *that* universal continuing into *these* particulars. In fairness to MacCormick, however, universalism is really only seen as doing part of the work here, even if the greater part, and particularism, as in the form of the appeal to consequences, actually concludes the task. At this point, there is always the possibility that the judge will deem the circumstances of the case to present a 'new problem'. But, asks Christodoulidis, in the context of decision making in a hard case,

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<sup>110</sup> *Ibid.*

<sup>111</sup> Bengoextea (1994), pp. 66-80.

<sup>112</sup> Christodoulidis (2006), *UPLR*, p. 98.

when the rules appear to have run out and the judge is faced with what appears as a new problem, how, given the prior commitment to universalisation, will she recognise the problem as a new one? What provides the cue for her recognising the *inappropriateness* of applying the universal rule here? To put in another way, how, he asks, can some particular (or set of particulars) that do not register in law as instances of a general rule register as exceptions to that rule? Given a prior commitment to universalisation and an adherence to the doctrine of formal justice to 'treat like cases alike', how is it possible that any case might be recognized as not always-already instantiating some general rule? Are we not simply brought back once more to a question over the limits of legal possibility?

We will continue to address this question in the next and subsequent sections but, for the moment, let us simply flag up this difficulty and, with it, one possible avenue for developing a response. If the pull to universalisation is grounded in the prior selection from among a variety of possibilities those features that identify a case as always-already instantiating a rule then, by definition, choosing some means not choosing others. The issue then is whether those characteristics that are not chosen thereby become invisible in such a way that their exclusion also prevents their reappearance later on, their subsequent registering as significant within the system.

## 2. Michael Detmold's 'Particularity Void': The Moment of *Indecision*

According to Michael Detmold there are particular situations, practical questions, which universal reasoning cannot answer. For him, part of the meaning of universality, that the rule is always applied when the conditions of its application are met, presents us with a problem. It is not that we cannot use a rule when deciding a case but that rules are not self-applying. There is a gap between a rule and its application, which he calls the 'particularity void'. What he means is that there is a difference between asking whether a rule is reasonable and whether it is reasonable to apply it. In other words, it is in particulars and not in universals that actions must be grounded, so that an assessment has to be made each time a decision is made whether the conditions of application are met. In this way, a judge cannot evade responsibility for her decisions by hiding behind the rules. She cannot meaningfully say that she sentences someone to death and at the same that she does not support the death penalty, since she must decide each time whether it is the right thing to do and also think that it is the right thing to do. In this sense, the particularity void, as he calls it, becomes the place where *I* must take responsibility for *my* decisions.

To reiterate, for Detmold legal reasoning is practical insofar as it is 'reasoning towards a decision for or against action'<sup>113</sup> and his primary concern is with a 'judge's practical reasoning towards the action of giving judgment',<sup>114</sup> what he calls '[t]he particularity of adjudication'.<sup>115</sup> He gives the example of someone seeking to acquire 'judicial office' through examination:<sup>116</sup>

'I am given a problem to solve consisting of facts A B and C. I work it out and conclude, the defendant must pay damages. My conclusion is universal: *a* defendant in circumstances A B and C must pay damages. But am I right? I check my reasoning and conclude I am right. I finish the exam, content. But being rather introspective, I go to my books after the exam to make sure. Yes

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<sup>113</sup> Detmold (1989), p. 436.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*, p. 455.

<sup>116</sup> *Ibid.*

... I am sure. I am now sure that I have the answer to the (universal) question: where A B C must the defendant pay damages?

Nonetheless, this is still not ‘a practical answer’, argues Detmold. It ‘will become practical [only] when it becomes particular’.<sup>117</sup> But is this merely a matter of waiting for a suitable particular to come along that accords this universal judgement? In due course I am appointed and my first case replicates the case of my exam. As I sit alone in my chambers contemplating judgment, why does my will not unleash itself? It is not that I doubt my conclusion: ‘I remember my reasoning very clearly’. But ‘I now have a radically different problem’, he explains, one ‘which universal (hypothetical) reasoning does not solve’; indeed, ‘the whole problem is that no reasoning can solve it. It is particular’. It is something of which ‘nothing can be said (anything I say will be universal)’.<sup>118</sup>

### **The Moment of Indecision**

How should we account for this? We can take this further, Detmold suggests, by looking at the confrontation between Pierre and Davout in Tolstoy’s *War and Peace*. A ‘moment of indecision’ saves Pierre from being shot as a spy on Davout’s orders. Davout, holding his rifle, looks towards Pierre; he hesitates and does not fire. At this moment, according to Tolstoy, many things pass through Davout’s mind:

‘Davout lifted his eyes and gazed searchingly at him. For some seconds they looked at one another, and that look saved Pierre. It went beyond the circumstances of war and the court-room, and established human relations between the two men. Both of them in that one instant were dimly aware of an infinite number of things, and they realised that they were both children of humanity, that they were brothers’.<sup>119</sup>

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<sup>117</sup> *Ibid.*, pp. 455-456.

<sup>118</sup> *Ibid.*, p. 456.

<sup>119</sup> Tolstoy, (1948), p. 1141.

At first, this appears very like universalist reasoning and indeed Tolstoy seems to suggest as much. But for Detmold both the hesitation and the action are deeply significant:

‘Davout, at the moment of practicality entered the unanswering void of particularity, the realm of love, about which only mystical, poetic things can be said ...; or nothing ... Judges enter this realm every day (if only they knew)’.<sup>120</sup>

In this sense, he claims, those theorists<sup>121</sup> who seek to find through ‘the progressive refinement of the categories of law according to experience’ a means by which to settle these issues, are mistaken; in fact, no matter how ‘highly defined A B and C are ... [the] problem [is] exactly the same ... A judgment in respect of A B and C ... cannot cross the void ... [I]t can justify a judgment ... a theoretical/hypothetical ... right up to the void. But the final rationality of practical judgement seems in doubt ...’<sup>122</sup> He notes how Neil MacCormick has attempted ‘to reassert that rationality against ... particularity’ through a reconsideration of the idea of justification. But for Detmold ‘th[is] act of justification is incapable of solving the problem for it immediately raises the question, why justify?; and the answer, like that to the original question, will be ultimately particular, not universal; so it will have its own particularity void’.

Even MacCormick’s attempt to derive the desired universality along the lines of Adam Smith’s postulate of the ideal spectator does not successfully evade criticism, since ‘anyone’s question is anyone’s void’. Ultimately, what MacCormick and Smith fail to show,’ he argues, is ‘how the impartial spectator’s judgment is not also incorrigibly particular’. In this sense, ‘[t]here are two questions of universalisation’ involved in practical reasoning: ‘The first question is whether I am to be universalised to all moral agents judging p ... But the other ... is whether p is universal or incorrigibly particular’. Moreover, ‘it is p which opens the particularity

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<sup>120</sup> Detmold (1989), pp. 455-457.

<sup>121</sup> For example, Herbert Hart and Joseph Raz.

<sup>122</sup> *Ibid.*, p. 458.

void and casts doubt on the truth of all practical judgments, subjective or objective'.<sup>123</sup> 'I want to pursue the idea', Detmold says, 'that the negotiation of the particularity void depends upon the particular in respect of which my action is contemplated speaking for himself'. Although it was reason that 'led Davoût to the acceptance of the norm: execute all Russian spies', nonetheless, 'the void of reason ... stood between this norm and the particular Pierre'. Davoût might just as well 'have said to himself, "it is reasonable to execute the enemies of France, but why should I do it?" So we find 'a second particularity void: ... one for subject as well as object.' Therefore, in the end, 'particularity holds out'. And what this suggests is 'a category leap: the particularity void cannot be crossed by reason'.<sup>124</sup>

In a more recent piece, Detmold has elaborated a little further on the problems of particularity in adjudication. Here, he sees two problems in this respect: the 'in-tray', the matter of what it is that informs a decision and how it will be justified and the extent to which that informing thing is particular or universal; and the 'out-tray', actually making the decision and deciding to whom or to what it applies, the particular or the universal. According to Detmold, all practical judgements are of the out-tray and are radically particular. Even though there are clearly difficulties involved in the notion of deciding something about another person's life, still the common law seeks to address itself to history, an always radically particular history, and judges that history; in other words, it is always a particular person and a particular history that forms the basis of the law's judgement.<sup>125</sup>

Here we see again Detmold's way of understanding the gap that we recognised earlier in *Re A*. On this view, it has at least two aspects: first, in terms of the potential asymmetry between addressor and addressee; second, in terms of the void between determination and application. In general, judges only tend to make law conservatively, says Detmold. However, if judges were to understand law as being found 'in the people', and the people were to change, then, of course, 'the law

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<sup>123</sup> *Ibid.*, p. 459.

<sup>124</sup> *Ibid.*, pp. 464-465.

<sup>125</sup> See *UPLR*, pp. 83-94.

changes'.<sup>126</sup> Thus, 'the fullness of law as practical reason is achieved when the law that judges apply is law that has crossed the citizen subject void; when law is in a true sense the citizen's law, when law is common law'.

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<sup>126</sup> *Ibid.*, p. 467.

### 3. Zenon Bańkowski's 'Inside Outside' Distinction: Occupying 'The Middle'

This distinction between determination and application, and between application and justification, central to Detmold's argument, is also, as Zenon Bańkowski notes, one which Klaus Günther makes. According to Bankowski, Günther, following Habermas, has

' posit[ed] two different discourses. One is the justification discourse where norms are justified and where criteria of universalizability are [used] ... The second is the application discourse which decides whether or not a particular justified norm is to be applied. The criteria used here are different ... We ... note that *prima facie* a distinction has been made between the criteria used to justify the norm and those used to apply it ... opening up a gap in the seamless, universalising rationality of legal doctrine'.<sup>127</sup>

For Bańkowski this separation is not entirely helpful and he attempts instead to 'conceptualise a dynamic form of legal reasoning and process'. He notes first the 'two opposed and irreconcilable positions' in this way of thinking:

'On the one hand the law is static, locked into its universalising criteria and becoming a form of ... legalism. On the other hand, it becomes so open to other criteria that there appears to be no law left; just the contingent decisions of judges. My attempt is to show that law should be seen as the articulation of two systems, the doctrinal and universalising system which has its own internal world and the more arbitrary and contingent application system which is sensitive to the outside. We should not, however, see this as two systems loosely connected but rather one system instantiated in the articulation of the two'.<sup>128</sup>

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<sup>127</sup> Bańkowski (2003), pp. 2-3.

<sup>128</sup> *Ibid.*, p. 3.

On this basis, Bańkowski begins to articulate an 'Outside Inside' distinction, something that can be seen to 'emerge from the fluctuating negotiations at the border posts of identities', where 'the outside', what is not law, is introduced to 'leaven and change the law'.<sup>129</sup> In contrast to Detmold, for whom the moment of particularity 'cannot be covered by any criteria and is forever ... mystical', Bańkowski seeks to 'adduce some criteria and capacities' and to 'get a little more concrete' about judicial reasoning. He suggests that we begin by 'paying attention to the particularity of the situation', considering in the first instance 'whether or not the inside needs to be readjusted with the outside'.<sup>130</sup> But he warns that we must be careful not to understand this as some kind of independent 'sociological thesis as to what sort of extra legal factors influence the law'; rather, what we have is 'a theoretical thesis about how the law is open to the "outside" ... [as] part of the nature of the process of law and thus "inside" ...'.<sup>131</sup> So what we have, in effect, is a new way of conceptualising the legal task:

'the attempt to overcome a dichotomous mode of thinking based on the polarisation of seemingly opposite principles ... It goes on to explore a new construction of the space within and between ... in which two terms co-exist with paradox but without logical contradiction.'<sup>132</sup>

Following Gillian Rose,<sup>133</sup> Bańkowski sees this 'middle' as a 'tension-laden space', so difficult to maintain that we attempt to 'theorise it away'. But this only results in the to and fro of a 'false and distorting polarisation', where we find ourselves drawn 'on the one hand to the soulless force of instrumental rationality and, on the other, to the always frustrated search for immediacy'.<sup>134</sup> Precisely because of this struggle between extremes, we understand this middle as a space to be 'protected', where concepts are held apart without collapsing into 'an unreflective

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<sup>129</sup> *Ibid.*, p. 10.

<sup>130</sup> *Ibid.*, p. 10.

<sup>131</sup> *Ibid.*, pp. 2-3.

<sup>132</sup> *Ibid.*, pp. 34-35.

<sup>133</sup> See Rose (1992).

<sup>134</sup> Bańkowski (2003), p. 35.

mass'.<sup>135</sup> In this sense, the middle is always 'an ambiguous place', where law not only defines the power we possess already but also, at the same time, becomes the precursor of anxiety.<sup>136</sup> We can see this in Martha Nussbaum's reading of *Antigone*.<sup>137</sup> Nussbaum explains how both Creon and Antigone make 'the same moral mistake', attempting to 'run away from the tension and anxiety of the middle ... deny[ing] ... any conflict'. This, Bańkowski asserts, is the 'condition of modernity', the endless attempt 'to seek a "comfort zone" – either by the soulless application of universalism ... or by recognising the "violence" behind the law and going over to the nihilism of love'. That is why the middle is 'risky and unsettled', because here we must 'stake ourselves'. But how do we do this? How do we refrain from giving ourselves over to one or the other polarity?<sup>138</sup>

According to Bańkowski, we do this by 'suspending the ethical', refraining from seeing everything as always-already 'an incarnation of the universal'<sup>139</sup> and 'us[ing] that anxiety creatively'.<sup>140</sup> The starting point for this is 'the distinction that Günther makes between justification and application'. According to Günther, when we justify a norm we use universalistic criteria but when we apply that norm we attend to the particularities of the case; that is, first we decide what the law means and then we decide whether and how that law applies in a particular case. In the former part, 'the criteria will be universalistic', says Bańkowski, and in the latter 'more particular'.<sup>141</sup> But this still leaves unanswered the question of how exactly we decide on the particularities of the case and, here, even Günther 'appears somewhat to nullify' the distinction between justification and application, for 'the idea ... that the judgement must fit and be coherent with all similar instances ... at least on one of the ways that he interprets it ... is just another version of the justification criterion'.<sup>142</sup>

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<sup>135</sup> *Ibid.*, p. 36.

<sup>136</sup> *Ibid.*, p. 36.

<sup>137</sup> See Nussbaum (2001).

<sup>138</sup> Bańkowski (2003), p. 36.

<sup>139</sup> *Ibid.*, p. 37.

<sup>140</sup> *Ibid.* p. 38.

<sup>141</sup> *Ibid.*, p. 39.

<sup>142</sup> *Ibid.*, p. 40.

However, if we think of the middle in terms of ‘what Michael Detmold calls the “particularity void”’ then we can take the argument a little further, says Bańkowski. For Detmold, there is ‘a difference between deciding whether something is reasonable to do and whether some rule is reasonable to apply’;<sup>143</sup> thus, ‘Davoût does not shoot Pierre as a Russian spy, even though those are his orders ...’<sup>144</sup> What this suggests is that the problem must be recast as one of ‘recognition and discernment’. Recognition is ‘what emerges from a held tension between particular and universal ... a means of discerning the path ahead’.<sup>145</sup>

What all of this means, says Bańkowski, is that the law may be seen both as something that in a certain way ‘forms individuals’ and also as something which the individual, once formed, is able to ‘deploy in new and original ways in the diverse situations’; that is, the individual, in turn ‘becomes a lawmaker’. This subsequent ‘encounter between the law and the particular situation’ is what marks out the conditions for the emergence of ‘the singular’. Here, ‘the particular is neither simply subsumed beneath the law ... nor is the law abandoned’; rather, the emergence of singularity depends upon the ‘ability to recognise the particular instance as both consistent with and different from previous instances’. In this way, we recognise our understanding as ‘contingent and limited, continually subject to the revision and rearticulation afforded by fresh encounter’; that is, there is ‘no final judgement; I can always be wrong’.<sup>146</sup> However, notwithstanding this, ‘[I] have to engage and take responsibility’.<sup>147</sup> This is what gives to law its indeterminate character, ‘the fact that in the encounter we enter the place where we have to decide whether to apply it or not’ and that there we must ‘take responsibility’.<sup>148</sup> Contra Detmold, for Bańkowski ‘the “particularity void” is not mystical’ at all, it is simply ‘a statement of the fact that we have to start from the particular situation’ and we should not let the rules make us forget this: ‘Davoût does not start from the rule “Spies are to be shot”’; rather, ‘paying attention to his encounter with Pierre, he sees his affliction and does

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<sup>143</sup> *Ibid.*, p. 40.

<sup>144</sup> *Ibid.*, p. 41.

<sup>145</sup> *Ibid.*, p. 42.

<sup>146</sup> *Ibid.*, p. 43.

<sup>147</sup> *Ibid.*, p. 44.

<sup>148</sup> *Ibid.*, pp. 44-45.

not shoot him, in a sense recreating the law as “All men are brothers and not to be shot””.<sup>149</sup> What is important is our ‘paying attention to the story... But this attention will always be something done within the context of the law. The encounter is a journey which we cannot prejudge although we have a context within which to understand’.<sup>150</sup>

Bańkowski notes how Bernard Jackson also appears to affirm that ‘it is attention to the *stories* of the cases which leads to an understanding of the result, rather than the rules [bestowing on them] a pre-ordained meaning’.<sup>151</sup> According to Jackson, one ‘can understand ... different decision[s] only in terms of paying attention to the story’.<sup>152</sup> For example, it makes a difference to whether and how we apply the law if we are talking about the sale of jewels to ‘a jeweller, who would be presumed to expect at least some fraud’ or if we are talking about ‘a private transaction with two old ladies’.<sup>153</sup> What this tells us, claims Bańkowski, is that ‘getting immersed in the practical details and cross-currents of the story’, reading it from the inside out, is critically important. This is what ‘drives the judgement on’.<sup>154</sup> Looking at things from the perspective of the middle will help us to realise that although ‘the principle is necessary ...it will be the encounter with the case itself that will determine whether the principle will be applied. It will be in that act that the law is suspended and recreated anew on the model that we saw of the encounter between Davoût and Pierre’.<sup>155</sup>

Perhaps we can understand better this idea of ‘suspending the ethical’, Bankowski suggests, if we think of legal reasoning as a form of

‘operating in a sphere which is barred by a thick almost opaque curtain. You sometimes see dimly other things that might be important through it. You lift

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<sup>149</sup> *Ibid.*, p. 45.

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*, p. 48.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*, p. 49.

<sup>155</sup> *Ibid.*

the curtain to look but the curtain is extremely heavy ... You have to drop it and remain on the side you were or move to the new side'.<sup>156</sup>

But how do we know *when* to look beyond? And when we do, how do we balance the reasons while holding the curtain? What informs whether our decision to remain on one side or move to the other? Bańkowski's answer is that we must go back again to the story:

'The key is to pay attention, to let the story speak for itself and not be too quick to apply closure by imposing a principle or pattern on it. This is the sense behind these mystical post-modern utterances like "deferring the undeferrable"; of "saying what cannot be said"; "listening to what cannot be heard"... [It] is the ability to listen; to know when to stop because you know what is before you is a case of x; to know when to continue listening because you see difference. A common mistake is to jump to a conclusion before the story has a chance to reveal itself ... The trick is to explore the story until you know that it is appropriate to stop and make a decision ... when to move beyond; when not to apply a pattern ... [I]n this way one can understand what I mean by living as though there was no outside. We cannot go actively seeking the outside because that would ... negate the point of the routinised activity. It is the anomaly and the interruption that sensitises us to the need for action but we spot it by paying attention *from the inside*'.<sup>157</sup>

But how could we recognise any anomaly? How, for example, would the fact that an injustice was likely to be done by the application of a certain rule pierce the exclusionary curtain privileging that rule in order to make its presence known? It cannot be that this would happen automatically, for the whole point of law is to reduce such complexity and facilitate predictability of results in decision making by the application of rules. This is an important question, since the exclusionary nature of legal reasons would seem to exclude such substantive considerations.

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<sup>156</sup> Bańkowski (2001), p. 174.

<sup>157</sup> *Ibid.*, pp. 180-181.

## Exclusionary Reasons

The idea of an exclusionary reason was first introduced by Joseph Raz<sup>158</sup> in 1975. Adapting a distinction from Herbert Hart,<sup>159</sup> Raz distinguished between first- and second-order reasons. Essentially, a first-order reason is a *reason to perform an act*, a reason balanced against other first-order reasons according to relative weight. A second-order reason is a *reason to act for a reason*, which may be positive (a reason to act on the basis of the weightiest first-order reason) or negative (a reason not to act for a reason). It is this negative second-order reason that Raz terms exclusionary, since it provides a reason for not acting on the basis of a reason that is conclusive (there is no need or possibility of inquiring behind it). Conflict between a first-order reason and a second-order reason that excludes it is unlike the conflict between two first-order reasons: where two first-order reasons compete the actor weighs up the balance of reasons and acts accordingly; where a first-order reason conflicts with a valid exclusionary reason the actor may well be acting against the balance of first-order reasons but the action of the exclusionary reason is better described not in terms of the balance of first-order reasons but as taking that reason out of the balance of first-order reasons altogether, without affecting its weight as a reason. This is the crucial difference between exclusionary and first-order reasons: a weightier first-order reason will override a weaker first-order reason but a valid exclusionary reason will exclude from consideration all those first-order reasons to which it has reference whatever their strength. Clearly, to function properly, exclusionary reasons must be exempt from the need for re-examination with a view to revision on those occasions to which they apply. But this raises the question of whether this exemption operates on every occasion or if exclusionary reasons may sometimes yield to waive the exclusion of disregarded reasons. What, then, is the possibility, having entrenched a reason at the exclusionary level, of opening it up for revision?

Patrick Atiyah<sup>160</sup> uses the example of marriage to show how formal reasoning operates much on the model of Raz's theory of exclusionary reasons. If a reason is

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<sup>158</sup> Raz (1975).

<sup>159</sup> Hart (1994).

<sup>160</sup> Atiyah (1986).

there then it provides us with a reason not to question but simply to act: we don't think about it, we just do it! In marriage, for example, the reasons underlying patterns of interaction between lovers become entrenched into rules informing the marital relationship. As a result, substantive reasons for action become temporarily "frozen" into formal (exclusionary) rules. This facilitates decision making; that is, since the rules are there we don't ask, but just apply them. However, if, or rather when, the rules fail to reflect their underlying substantive reasons we can, says Atiyah, revise them, by going behind the rules and starting to look at the substantive reasons once more. But what gives us the reason to do this?

Frederick Schauer<sup>161</sup> agrees with Raz that rules should be understood as "entrenched generalisations". Rules ensure that the presence of certain operative facts always triggers certain prescribed consequences. So we follow a rule because it is the rule and we do so regardless of any underlying justification. However, Schauer makes a distinction between the idea of exclusion and the force of exclusion to allow that, on occasion, one may look at the first-order reason to determine if it is to control in that particular case:

'Insofar as it is possible for an exclusionary reason to tell an agent to look just quickly, if possible, at the excluded first-order reason to see if this is one of those cases in which the exclusion of that factor should be disregarded ...'<sup>162</sup>

Inasmuch as one is, in this way, always looking at first order reasons, and 'looking just quickly' rather than taking careful consideration, this might not necessarily be regarded as negating the idea of exclusionary reasons.

But the question still remains: how is it possible that a 'signal that revision is needed [could] be received at the exclusionary level given that first-order reasons no longer resound at that level, by the very nature of a reason as exclusionary'? 'Revisability', argues Christodoulidis, 'has been cut off from the concerns that informed the entrenchment of a reason as exclusionary in the first place'. It has been

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<sup>161</sup> Schauer (1991).

<sup>162</sup> *Ibid.*, p. 91.

'removed from the concerns that might have occasioned it'.<sup>163</sup> On this basis, suspensions are not only improbable, they are impossible.

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<sup>163</sup> Christodoulidis (1999), p. 231.

#### 4. Emilios Christodoulidis and the Reductive Reflexive Disjunctive

'[L]aw stands impotent before the particular... It has to address the complexity that confronts it by reducing that complexity and of course it can neither address nor redress its own complexity deficit that results from this. It is that deficit and the blindspot that accompanies it that forces law to miss the particular. At the same time, there can be no legal judgement over the appropriateness of the application of law. There can be no decision within a context as to the appropriateness of the context'.<sup>164</sup>

Emilios Christodoulidis argues that if we want to find a way to incorporate respect for the particular into our thinking then we must look not to law but to ethics. Ethical reason is 'reflexive', he argues, and so it can 'accommodate complexity'.<sup>165</sup> It 'allows for the comprehension of the "other" not as classification in terms of abstract categorisation, but as inseparable from "his" invocation'.<sup>166</sup> In other words, it has more flexibility and freedom in the encounter because 'while it fixes the terms of that encounter ... it keeps open the question of their revisability *as appropriate to the encounter rather than as appropriate to a certain function ...*'.<sup>167</sup> Christodoulidis points to what he calls 'a disjunctive between the reductive and the reflexive', arguing that while 'the reductive works to immunise ... the reflexive remains [open] to ... contingency, the admission that a determination could be otherwise'.<sup>168</sup>

We see an example of how he employs this distinction in his 'Reply' to Roberto Unger's law-as-politics thesis, where he underscores his contention that although law may be 'shaken from within' this surprise cannot carry through to upset the 'constitutive assumptions' underlying law's institutional identity. He sees what Unger calls law's 'institutional imagination' as, on the one hand, both limited and limiting, as a result of the forcing and entrenching of reductions on 'the "plastic"

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<sup>164</sup> Christodoulidis (2000), p. 189.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

world of political possibilities'.<sup>169</sup> To challenge those reductions would be tantamount to dispensing with law altogether.<sup>170</sup> However, on the other hand, he affirms Niklas Luhmann's observation that such reductions, while 'limiting' are also 'empowering':

'Legal institutionalisation is the entrenchment of certain reductions on the possibilities of communication ... to the exclusion of other possibilities ... Institutional imagination is indeed a reduction *achievement* ... to be assessed in the light of the possibilities it offers people to communicate successfully ... in a world that is making it all the more urgent but at the same time all the more unlikely that such communication and the action that depends on it ... will be carried out with success'.<sup>171</sup>

Luhmann, as Christodoulidis notes,<sup>172</sup> both draws upon and then creatively diverges from what Talcott Parsons<sup>173</sup> describes as a situation of 'double contingency'.<sup>174</sup> For Luhmann, the possibility for the interrelating of human behaviour rests on the question of whether and how the complexity of this double indeterminacy can be reduced. One way is through the 'fixing of a context', through its 'structuring into frameworks that have the form of "expectations of expectations"'.<sup>175</sup> Communication becomes possible 'through reductions ... premised on system selectivity ...'.<sup>176</sup> Law achieves constancy through a narrowing of 'the expectability of expectations', he says, and 'by abstracting from the "concrete" parties involved ...: *it allows people to encounter each other as role players, ... as legal actors*'.<sup>177</sup> Thus, '[l]aw provides a context to settle contingencies

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<sup>169</sup> Christodoulidis (1996), p. 383.

<sup>170</sup> *Ibid.*, pp. 378-379.

<sup>171</sup> *Ibid.*, p. 384.

<sup>172</sup> *Ibid.*, p. 385.

<sup>173</sup> Parsons and Shils (1951), p. 105.

<sup>174</sup> Double contingency expresses the dual dependence of ego's actions on *both* alter's behaviour *and* alter's expectation of ego's behaviour. In other words, in order to engage in meaningful interaction with alter, ego not only has to be proficient in making prediction of and provision for alter's behaviour but also of alter's expectation of ego's behaviour, thereby creating a problem of the co-ordination of two self-other cycles in the ego/alter relationship.

<sup>175</sup> Christodoulidis (1996), p. 385.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*, p. 386.

... at the expense of other contexts'. In other words, contra Unger, there can be no negotiation of these roles.<sup>178</sup> But this means that systems, as 'institutionalised versions of society' are 'relatively stable and delineated'.<sup>179</sup> They 'reproduce themselves by projecting *expectations*', permitting the system to 'react, modify [its] expectations and evolve'.

Still, legal expectations are always reductions from 'possible expectations' and this always includes a certain '*immunisation* from challenge'.<sup>180</sup> That is to say, law, as an achievement, is always achieved at 'a cost': some contingencies are admitted and others precluded, the latter being unable, thereafter, to register as expectations. In this way, with conflicts perceived as order and conflicting elements silenced, the 'system is neither static nor insensitive to change' but must continually 'vary the expectations it projects'. It "learns" and *evolves* <sup>181</sup> by means of conflict, without which it would atrophy and die. 'In a nutshell', says Christodoulidis, 'the evolution of a system is structural variation; and what can vary depends on what already exists'.<sup>182</sup>

Of course, all of this has 'major consequences', he warns. In this way, 'already existing structural assumptions [are brought] into play as preconditions to all attempts to push for change' Since the only way that a 'claim for change may register is if it manages to surprise projections of expectations', and 'we can only see what we know how to look for', then, '[f]or a challenge to register ... the system's memory has to be tapped'. Thus, law 'controls the context against which informative surprises may be articulated'.<sup>183</sup> In other words, any challenge that is 'to register in law will only make a difference in the evolution of the system on the basis of its *alignment* to already existing reductions ... against a background of settled meaning'.<sup>184</sup> Now, this radically circumscribes the possibilities for change, he argues, since '[c]hallenges to the structure can only be accommodated by the

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<sup>178</sup> *Ibid.*, p. 387.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*, pp. 387-388.

<sup>182</sup> *Ibid.*, p. 388.

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*, pp. 390-391.

structure as demands to draw new internal distinctions and boundaries ... This assimilation of the extraordinary to the ordinary ... places a wooden hand on the possibility to politicise and contest'.<sup>185</sup> The point is, he argues, that 'Unger's formulation ... is misleading because it refers to what is *not* selected ... what remains an environment to the system ... And that is the crux of institutionalisation, of the drawing of the legal system's boundary'.<sup>186</sup> Consequently, 'structural reductions cannot be employed and defied at once ... [A]t the first-order level ... where complexity is reduced and the world becomes legally observable, the reduction cannot but remain a blindspot ... There can be no structure-defying structures [because] the institution cannot see its blindspot and shake it off'.<sup>187</sup>

To bring this all back to the question of what possibilities for radical change in understanding are present in the encounter between Pierre and Davout, an 'instance of "merciful" legal judgement cannot account for the emergence of a context that names it as "an application of x norm", as "an instance of x commonality", *a posteriori*',<sup>188</sup> says Christodoulidis. 'Norms that inform legal judgement ... must ... *pre-exist their application*'.<sup>189</sup> So, in the encounter between Davout and Pierre, any emergence of 'known commonality' as the criterion for judgement can occur only at the expense of law:

'To law the particularity of the affective encounter is invisible, the particularity could not have pierced the legal terms of its exclusion'.<sup>190</sup>

Precisely because, in law, particularity is abstracted, more-or-less fixed and reduced to role and rule, this involves a reduction to an exclusionary language that both prevents visibility of the particular and is unyielding to considerations of appropriateness; otherwise, law's exclusionary reasons would have to give way to substantive ones, which is impossible due to the limits of revisability of exclusionary

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<sup>185</sup> *Ibid.*, p. 391.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*, p. 393.

<sup>188</sup> Christodoulidis, (1999), p. 224.

<sup>189</sup> *Ibid.*, p. 223.

<sup>190</sup> *Ibid.*, p. 224.

reasons. Thus, for Christodoulidis, while the particular can be meaningfully invoked it cannot be addressed in legal judgement; that is, law cannot cross the particularity void.

Of course, Christodoulidis is certainly correct to insist that '*universalisation is only justification a posteriori*'. Can it ever be anything else? Experience is always experience of the past as it is presented to us in perception and, even at the most, will be experience of the immediate past. So the statement, that it 'comes too late to guide the decision of the judge', while correct, may not necessarily be understood to negate the understanding of justification as, for example, MacCormick uses it. Indeed, in the sense in which we normally understand the reasons given in a judge's judgement as justifying her decision, surely this simply operates to affirm a necessary relationship between her decision and its subsequent justification; that is, as Charles Hartshorne puts it 'memory of E is not memory of something like E ... but of E itself'.<sup>191</sup>

Likewise, Bańkowski's objection that MacCormick's emphasis on the knowing subject and her reasoning seems inevitably to downplay particularity is also, in a sense, correct. Indeed, as Detmold notes,<sup>192</sup> the point is made well by Nigel Simmonds. Simmonds claims that all talk of the particular is misguided since the particular is itself a very abstract description, the 'most abstract of all abstractions'. So, for him, there is really no such thing as the particular, merely different sets of descriptions: all talk of particulars as captured by categories means that particulars are always subject to further description. The real particular, if there is one, always 'slips beneath every description, and escapes every act of judgement'.<sup>193</sup> Correspondingly, for Bankowski, the more universal that one gets in description then the more abstract the reasoning becomes and thus also the more removed from the actual event, person or thing to which one is referring: 'But what does this ... do to the particularities of the situation?' he asks. 'Firstly, the particular being judged disappears and is lost by being brought into the universalizing net of rules ... Take one of MacCormick's examples. In the case of *Ealing London Borough Council v*

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<sup>191</sup> Hartshorne (1970), p. 60, herinafter *CPSM*.

<sup>192</sup> *UPLR*, p. 93.

<sup>193</sup> Simmonds (1993), p. 66.

*Race Relations Board*, the question was whether discrimination “on the grounds of colour, race, or ethnic or national origin” includes legal nationality. MacCormick says that the question asked is not a particular question; that is, it “is not a question about a particular act of discrimination: it is a logically universal question”. But notice what happens: the person discriminated against is now out of the picture. The judges talk of classes of people who might or might not represent him’. In other words, we are no longer dealing with ‘Zesko, the Polish national and ex-RAF pilot’ but with a non-British national: Zesko ‘is no longer there’.<sup>194</sup>

However, the point is that no description of Mr Zesko will ever yield a real, irreducible particular. All attempts to capture or describe Mr Zesko will, to some extent, be abstractions from reality, from process. What we are really talking about, it seems, is not so much real particularity or the objective reality of the universal but, as Hartshorne puts it, ‘the objective reality of the *distinction* between universal and particular’. For in the attempt to simply locate it, the real particular disappears, and, given that it is sensible to suppose coincidence among the contrasts universal-particular and possible-actual, ‘no possibility is literally particular, no universal is literally actual ... but only seems so’.<sup>195</sup>

With ‘[c]ommon sense’, writes Hartshorne, one ‘tends to think of a particular animal or physical thing as the extreme contrary of the abstract or general’. However,

‘a particular person or thing, enduring and changing through time, is really a kind of low-level universal, compared to the momentary states or events in which alone the individual is fully concrete or actual ... The supposition that the indivisible units of concrete reality are single substances rather than single states or events has produced endless confusion’.<sup>196</sup>

But ‘[i]f the extreme of concreteness tends to be missed by ordinary speech, so does the extreme of abstractness’. Therefore, the real task of the legal philosopher is more

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<sup>194</sup> *UPLR*, p. 28.

<sup>195</sup> *CSPM*, p. 61.

<sup>196</sup> *Ibid.*, p. 73.

correctly described in terms of an engagement with endless refinement of the abstractions that she uses, criticising them, attempting to put into words ‘what can be said *universally* about the most concrete levels of reality’.<sup>197</sup> Scott Veitch comes closer to this when he writes that

‘[p]articulars and universals are relative, not just to each other, but to a complex and varied range of institutional settings ... to the demands of a variety of contingently present constituencies, their goals and their relative social priority ... Are there any particulars? Are there any universals? It may well be that while there are undoubtedly universal forms, universal and particular in practical reasoning (including legal reasoning), are no more than relative forms of abstraction or of generalisation - more or less useful tools, stakes in a debate ... always deployable, not categorical. This is arguably what Adam Smith’s model of moral reasoning ... which constantly refers back to a sympathetic mainspring in particular circumstances and spectatorial reactions and works up to general rules, grasped so well. What it saw less clearly ... was that the basic *elements* that he claimed make up this low level particularity ... may themselves be results, *effects rather than causes*, of other processes ...’<sup>198</sup>

We can see then how theories of legal reasoning usually proceed on the basis of an assumption that rule definition is different from rule application, whether this is thought of as problematic, as in Detmold, or not, as with MacCormick. Here, legal knowledge is believed to engage with an explicit, precise and coherent representation of social reality and the real challenge for decision makers is to facilitate the transition or transmission of rules from creation to application without diminution or corruption; in other words, the aim is to maintain the correspondence of law to fact, theory to practice, allowing the dominant rule-definition/rule-application relationship to be founded or confirmed. Such an understanding of the method of applying law is widely held to be the natural and transparent mode of operation of the legal system.

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<sup>197</sup> *Ibid.*, pp. 73-74.

<sup>198</sup> Veitch (2006), pp. 153-154.

In this way, we can also see how traditional thinking about the nature of legal knowledge and the practice of law is generally assumed to proceed on the basis of a simple correspondence between the production of norms, or rules, and their implementation. In this sense, it is in terms of its functional value as a commodity,<sup>199</sup> its meaning and relevance for the legal institutional system, that information is held to be significant.<sup>200</sup> Indeed, it is the assumption about the correctness of this way of thinking that underlies, for example, Detmold's notion of the 'particularity void' as a troublesome gap between rule-determination and rule-application. Nonetheless, it should be obvious that any 'gap' as such can only emerge if we focus first on the abstracted 'ends' of the processes of creating, communicating and applying legal knowledge ahead of any analysis of the nature of such knowledge; any 'bridging' of this gap can proceed only on the basis of an assumption about the possibility of transferring knowledge between those abstracted ends.

Such a view itself presupposes an understanding of reality as composed of essentially static, immobile and discrete 'things'. Understood thus, legal knowledge is considered as the substantial flow of information from point A through point B to point C, and so on, which means that any conception of knowledge as a continuous process that 'goes beyond the simple determination and application of the criterion of truth'<sup>201</sup> seems to have disappeared altogether. Nonetheless, as I will argue, legal knowledge should not be understood merely in terms of an 'informational commodity' whose progressive development can be charted as from points A to B to C; rather, it is properly to be understood more in terms of what happens in-between, the undefined, indeterminate and limitless processes from which these points are but momentary abstractions, frozen from time.

Employing a process metaphysics, informed by the work of Alfred North Whitehead, Henri Bergson and Gilles Deleuze, I will argue that such an ontology of 'being' involves a 'counterfeit' movement, that terms like 'rule' and 'fact',

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<sup>199</sup> See generally Lyotard (1984).

<sup>200</sup> For example, consider again how MacCormick explains his model of legal reasoning according to the stages of universalizability, consequences, coherence and consistency.

<sup>201</sup> Lyotard (1984), p. 18.

‘universal’ and ‘particular’, ‘theory’ and ‘practice’ are really only momentary ‘snapshots’ of reality, images extracted from an otherwise heterogeneous continuity and movement, merely convenient labels that we utilise to describe and illustrate interpenetration by means of side-by-side representation. Thus, I will argue that we cannot say that rules as universals are applied to facts as particulars, neither can we say that legal practitioners somehow reflect upon theory to justify the application of their decisions as if these activities were essentially separate entities. Indeed, such a view only prevents us from seeing the extent to which ‘rule’ and ‘fact’, ‘universal’ and ‘particular’, already actually interpenetrate one another. In fact, on a Bergsonian view, judges reflecting on their decisions for the purpose of giving justifying reasons for their decisions are really only institutional actors giving linguistic expression to a past experience within the terms of an already ordered institutional code. That is why although their justifying reasons may deliver a symbolic representation of experience, an account of it, they do not inform the actual, lived moment of that experience.

## PART II

### DEVELOPING AN ALTERNATIVE APPROACH: THE IMPORTANCE OF PROCESS

*'Words and phrases must be stretched towards a generality foreign to their ordinary usage; and however such elements of language be stabilized as technicalities, they remain metaphors mutely appealing for an imaginative leap'.<sup>202</sup>*

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<sup>202</sup> Whitehead (1929), p. 4.

## CHAPTER THREE

### ALFRED NORTH WHITEHEAD'S PHILOSOPHY OF ORGANISM

#### Introduction

Much of contemporary legal theory is effectively the expression of a continuing concern to 'bridge' this 'gap' that opens up in legal decision making between living reality and legal representation, two supposedly separate and distinct but connectable domains, most obvious in respect of 'hard cases' such as *Re A* where the interface between the so-called 'theoretical' and the 'practical' is revealed as problematic but nonetheless true of other cases where the anomalies are not so obvious or so easily recognised. Such an understanding of the legal task plainly has its roots in a Parmenidean-inspired universe, in particular in the teachings of Democritus of the Eleatic school; that is, with the understanding of an entitative conception of reality in which the ultimate building blocks of reality are atomic entities, basic and undividable, whose relative motions and relationship to each other are regulated and apprehended through the use of general predictable laws.<sup>203</sup> Clearly, only on the basis of such an understanding as composed of fixed, or fixable, and relatively constant entities can we make any further assumption about the accuracy of their linguistic and conceptual representation within a 'correspondence theory of truth'. The counter view to this Parmenidean theory of essentially unchanging reality has its roots in the tales of Heraclitus. Unlike Parmenides, Heraclitus contended that 'everything is in flux, and nothing is at rest',<sup>204</sup> so that rather than it being this outward appearance of stability which most truly represents reality, reality is more accurately thought of as a world of continuous but imperceptible change.

The proposal offered here is that although the minutiae of legal decision making and the relations between them are often thought of in terms as separate but connectable and essentially stable elements in the ongoing process of law they

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<sup>203</sup> While Democritus agreed with Parmenides on the impossibility of qualitative change he nevertheless argued that quantitative change was possible and subject to mathematical reasoning.

<sup>204</sup> See Popper (1989), p. 144.

should not be thought of as 'simply locatable', or isolatable, elements whose forms and functions can be abstracted to imply separate fixed points with connections and correspondences between them. Rather, they should be thought of as outlining a mutually constitutive process of becoming, not reducible to each other or to anything else; that is, interpenetrating and interrelated. But how might we begin, and where should we look to, to develop further such a view of law? According to Alfred North Whitehead,

'creative activity ... is the process of eliciting into actual being factors in the universe which antecedent to that process exist only in the mode of unrealised potentialities. The process of self creation is the transformation of the potential into the actual, and the fact of such transformation includes the immediacy of self enjoyment. Thus in conceiving ... an occasion of experience, we must discriminate the actualised data presented by the antecedent world, the non-actualised potentialities which lie ready to promote their fusion into a new unity of experience, and the immediacy of self enjoyment which belongs to the creative fusion of those data with those potentialities. This is the doctrine of the creative advance whereby it belongs to the essence of the universe, that it passes into a future'.<sup>205</sup>

### **Whitehead's early philosophical interest**

In his early writings,<sup>206</sup> Whitehead's concern was mainly with the problems of modern science and, in particular, with the breakdown of Newtonian cosmology.<sup>207</sup> 'Newtonian physics', he observed, 'is based upon the independent individuality of each bit of matter .... fully describable apart from any reference to any other portion of matter .... [and] adequately described without any reference to past or future[,] .... conceived fully and adequately as wholly constituted within the present moment'.<sup>208</sup> But this concept of the ultimate facts as 'simply located particles' is inconsistent with

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<sup>205</sup> Whitehead (1938), pp. 206-207.

<sup>206</sup> Whitehead (1919), (1920), (1922) and (1929b), hereinafter PNK, CN, PReI and AE respectively. A major shift takes place when his attention turns to metaphysics

<sup>207</sup> Whitehead (1933), p. 200, hereinafter AI.

<sup>208</sup> *Ibid.*, pp 200-1.

the notions of ‘velocity, acceleration, momentum, and kinetic energy, which certainly are essential physical qualities’,<sup>209</sup> proving that ‘there is a fatal contradiction inherent in the Newtonian cosmology’.<sup>210</sup> In providing a different conception, ‘we must therefore in the ultimate fact, beyond which science ceases to analyse, include the notion of a state of change’.<sup>211</sup>

So, in place of the concept of simply located particles of matter, Whitehead attempted to formulate a conception of the ultimate facts consistent with experience and free from the contradictions of the older theory. His proposal was that ‘the ultimate facts of nature in terms of which all physical and biological explanation must be expressed, are events connected by their spatio-temporal relations’.<sup>212</sup> On this basis, taking ‘event’ as the ultimate fact, he included ‘a state of change’ as an intrinsic feature of the ultimate facts and, in recognising that events extend over each other, was able to account for their essential relatedness. However, ‘sense-awareness also yields to us other factors ... which are not events ... with a definite implication in events...’.<sup>213</sup> Clarifying his concepts and working out the relations between events, and between events and objects, Whitehead now entertains problems and issues essentially different from the strictly scientific ones that characterised his early work. Philosophical considerations take centre stage and issue in a comprehensive metaphysical enquiry; in particular, ‘the idea that the relation of extension has a unique pre-eminence’ gives way to ‘the true doctrine, that “process” is the fundamental idea .... Extension is a derivative from process, and is required by it’.<sup>214</sup> Believing that a more complete account of the ‘complex essences’ of events as derivative from their interconnections is discovered through emphasising the ‘prehensive’,<sup>215</sup> rather than the ‘separative’, character of space-time, Whitehead ascribes to events the essential feature of ‘unity’. ‘The event is the unit of things real’.<sup>216</sup> Yet, ‘this abstract word cannot be sufficient to characterise what the fact of

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<sup>209</sup> PNK, p. 2.

<sup>210</sup> Whitehead (1938), p. 199, hereinafter MT.

<sup>211</sup> PNK, p. 2.

<sup>212</sup> PNK, p. 4.

<sup>213</sup> CN, p.15.

<sup>214</sup> PNK, p. 202.

<sup>215</sup> ‘Prehensive’ is Whitehead’s way of describing the way that things are held together in space-time.

<sup>216</sup> Whitehead (1925), p. 189, hereinafter SMW.

the reality of an event is in itself”.<sup>217</sup> Thus, what began as a fairly abstract theory of ‘events’ put forward to replace the older theory of simply located matter now becomes a much more complex, and concrete, investigation into the ultimate nature of reality: ‘The final problem is to conceive a complete fact [παντελής]’;<sup>218</sup> not “being” as such, but “being” in the sense of a fully existing entity, a particular concrete thing.

### **The Formative Elements of a Philosophy of Process**

In contrast to traditional philosophy, then, Whitehead conceives of individual entities as series of moments of experience rather than masses of static substance. Within each moment, an entity is influenced by others, creates its own identity and propels itself into further experiences. Reality, then, is this process of creative advance in which many past events are integrated in the events of the present and, in turn, are taken up by future events. Events particularise ultimate creative power; the world is the realisation of a selection of creative potentials. Process thought is an attempt to elucidate the developmental nature of reality, of ‘becoming’ rather than sheer existence or ‘being’: it seeks unity-in-diversity, the ‘many-becoming-one’, in a sequence of integrations at every level and moment of existence.

For Whitehead, reality is composed of complex combinations of actual energy events. These units of becoming, or ‘occasions of experience’, may be described as dipolar: that is, Whitehead describes each as having a *physical* pole, which is the repeat of past occasions of experience in the present unit of becoming, and a *mental* pole, which represents the element of subjectivity that enables each occasion of experience, in the process of becoming, to entertain novel possibilities and exercise some determination over the shape it will take. The basic idea is the Heraclitean one, that all things are in flux, and that there is no ‘unchanging subject of change’, for the primary feature of existence is not ‘substance’ or ‘being’, but ‘process’ or ‘becoming’. Being is the final outcome of each process of becoming, the result of its instantly ‘perishing’ as the next stage of becoming commences.

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<sup>217</sup> *Ibid.*, p. 116

<sup>218</sup> AI, p. 203.

However, with the perishing of each moment comes the possibility of the present and the advance into the future; everything is in this process of becoming, moving from the past through the present into the future.

This process of becoming of each 'actual occasion' of experience Whitehead terms 'concrecence'. It consists as follows: first, at the physical pole, there is the passive reception of data (or 'physical prehension' of prior occasions of experience); next, at the mental pole, an entertaining of novel possibilities (or 'conceptual prehensions'); finally, a reconciliation of the initial desire to conform to the past and the subsequent desire to achieve new possibility. So, each actual occasion of experience takes on a new form and immediately perishes, to be replaced by a succeeding occasion in *its* first phase: passively receiving data and attempting to maintain the same aim of immediately preceding occasions; entertaining novel possibilities; achieving reconciliation and 'choosing' the form it will take (ie. determining its 'subjective aim' or 'guiding principle'). Finally, to account for where and how these novel possibilities arise, that are 'felt' or 'grasped' through conceptual prehensions, Whitehead develops the concept of 'eternal objects', the pure potentials of the universe that forever remain constant (in the same way that "blue-ness" remains unchanged even though the different things that we refer to as "blue" changes). Thus, logically, each actual occasion prehends all occasions of experience antecedent to itself: 'the many become one and are increased by one'.<sup>219</sup>

It is to be noted that prehension, in Whitehead's terms, does not equate to rational or conscious activity. It is more properly understood as a sort of selective filter, providing emphasis or de-emphasis. Equally, not *all* past occasions and present possibilities may be absorbed in the integration of physical and conceptual prehensions in the process of concrecence: as well as 'positive' prehensions, there are 'negative' ones, excluding certain past occasions of experience and certain possibilities from the process of concrecence; moreover, organic, unlike inorganic, forms of life exhibit modes of behaviour that suggest creative impulses that go beyond a mere physical prehension of the past.

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<sup>219</sup> *Ibid.*, p. 32.

So, in each present occasion of experience, past occasions are synthesised with conceptual prehensions into a subjective aim before being returned to the realm of data to be prehended by future occasions. In this passing from 'subject' to 'object', each occasion achieves an 'objective immortality', an existence that all future occasions prehend and with which they must grapple. But, while all prior occasions of experience internally determine the present occasion in this way, nonetheless, each present occasion is free to come to its own 'satisfaction'; that is, as well as feeling a desire to conform to the past each also contains its own lure to novel adventure.

How then can we make sense of our commonly expressed experience that 'things' change over time? Accepting, on the one hand, the implication that this scheme seems to suggest (that the ultimate metaphysical truth is atomism), Whitehead, on the other hand, appears to evade the same charge by developing a notion of 'societies' or groupings of occasions of experience that together exhibit some sort of enduring order or pattern that is reproduced in each occasion in society. As long as this commonality remains, a society, or a 'society of societies', unlike an occasion of experience, may change over time. Subject to evolution in this way, they too can never really be defined until their existence is totally in the past.

### **'Between Order and Chaos': On The Development of Human Civilisation**

We can appreciate the thrust of Whitehead's scheme by looking at what he says on the development of human civilisation. This tension between the physical and mental poles in an occasion of experience is the tension between order and chaos, a tension between conformity to the past and creativity in the future. Here, chaos is inevitable, for progress demands the forsaking of present perfections for greater possible perfections and without the advance into novelty there is no possibility of achieving higher perfections. Whitehead describes two types of advance into novelty, 'the discovery of novel pattern' and 'the gathering of detail within assigned pattern'.<sup>220</sup>

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<sup>220</sup> Whitehead (1938), p. 80.

The first of these he describes as ‘the condition for excellence’; the second, as ‘stifling the freshness of living’.<sup>221</sup> These are illustrated by reference to the Hellenic mentality of ancient Greece and the Hellenistic mentality of the later Alexandrian and medieval scholastic tradition, respectively. Hellenism was an advance of the first type, beyond known modes of perfection; Hellenistic scholarship was an advance of the second type; that is, within a given state of perfection, exploring new ways to achieve this perfection.

Significantly, this latter form generates only a minor form of chaos, while harmony among the occasions is overwhelming. Eventually, though, the various possibilities for advance within a mode of perfection play themselves out and, at that point, repetition begins to produce a gradual lowering of vivid appreciation - convention dominates, suppressing adventure. Precisely at this point, adventure of the former type, the search for new perfections, becomes essential; there must be a ‘leap of imagination ... beyond the safe limits of the epoch, and beyond the safe limits of learned rules of taste’.<sup>222</sup> A sense of discord occurs, until the contrasts can be resolved into new and larger patterns of harmony. Nothing can prevent this advance into novelty: there is no moment when the process halts or when being can be understood independently of becoming. And there is no end state, ‘no perfection which is the infinitude of all perfections’.<sup>223</sup>

Of course, bad choices can be made as well as good ones, so a civilisation must possess other qualities such as Truth, Beauty and Peace, the highest goal being Beauty: ‘[t]he teleology of the universe is directed to the production of Beauty’.<sup>224</sup> Beauty is the internal conformation of the various items of experience with each other, that is, the perfection of harmony. Thus, an advancing civilisation must integrate in each present occasion three conditions: the infusion of pattern; the stability of pattern; the modification of pattern. What is required is ‘order entering upon novelty; so that the massiveness of order does not degenerate into mere

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<sup>221</sup> Whitehead (1929), p. 338.

<sup>222</sup> Whitehead (1933), p. 360.

<sup>223</sup> *Ibid.*, p. 330.

<sup>224</sup> *Ibid.*, p. 341.

repetition; and so that the novelty is always reflected upon a background of system ... But the two elements must not really be disjoined ... In either alternative of excess, whether the past be lost, or be dominant, the present is enfeebled. This is only an application of Aristotle's doctrine of the "golden mean".<sup>225</sup>

But how does this scheme coordinate other features, such as morality? Whitehead sees morality as an aspect of beauty, it 'consists in the aim at the ideal, and at its slowest it concerns the prevention of relapse to lower levels ...'. In other words, 'stagnation is the deadly foe of morality'.<sup>226</sup> But there can be no universal moral ideals; moral codes are relative to social circumstance, useless when unduly rigid, most useful when they retain a provisional quality that remains sensitive to novel conduct that aims at higher perfections. Here, what is of greatest importance in any social system is the promotion of value experience among individual human beings, a social mingling of liberty and compulsion'.<sup>227</sup>

### **Whitehead's Analysis of the Phases of Concrescence**

*'The creative advance of the world is the becoming, the perishing, and the objective immortalities of those things which jointly constitute stubborn fact'.<sup>228</sup>*

Whitehead maintains that although each actual entity is in fact undivided, rational analysis can understand it as a process: '[t]he analysis of an actual entity is only intellectual ... only objective. Each actual entity is a cell with atomic unity. But in analysis it can only be understood as a process; it can only be felt as a process, that is to say, as in passage. The actual entity is divisible; but is in fact undivided. The divisibility can thus only refer to its objectifications in which it transcends itself. But such transcendence is self-revelation'.<sup>229</sup> We can summarise the basic elements of Whitehead's theory for the simplest case in the following way. Every actual entity,

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<sup>225</sup> Whitehead (1929), p. 339.

<sup>226</sup> Whitehead (1933), p. 346.

<sup>227</sup> *Ibid.*, p. 71.

<sup>228</sup> Whitehead (1929), p. xiv.

<sup>229</sup> *Ibid.*, p. 227.

being dipolar, has both a physical pole (where it experiences other actual entities) and a mental pole (where it experiences possibilities and values). In the simplest case, an occasion's concrescence (or process of becoming) consists of three phases:

(a) The first phase constitutes the physical pole, the phase of physical prehensions, involving:

- (i) something to be received (the objective datum for the concrescence);
- (ii) the act of receiving or inheriting the objective datum (referred to as physical feeling);
- (iii) the way that the objective datum is received (the subjective form of physical feeling);
- (iv) the conformation of feeling (at least in the simplest case), since the subjective form of the physical feeling is the same as the form in the datum.

(b) The second phase constitutes the mental pole, the phase of conceptual prehensions, involving:

- (i) the receiving or grasping of forms of definiteness (which are abstract potentials, or mere possibilities), also known as eternal objects;
- (ii) the act of grasping eternal objects (conceptual feeling);
- (iii) the way that eternal objects are received (the subjective form of conceptual feeling); that is, a valuation of the worth of the various possibilities open to it;
- (iv) the determination of the relative worth of possibilities (the subjective aim of the concrescence). It is the desire to form the subjective aim (the concrescing subject's appetite to make something of and for itself in the present) that drives the process of

becoming. The initial subjective aim guides the process of valuations towards the production of the final subjective aim.

(c) The third phase is the phase of simple comparative feelings: the integration of second phase conceptual feelings (and their valuations) with first phase physical feelings. Here, the actual occasion in the process of concrescence makes a 'decision' about which eternal object it will present in itself, integrating it with its physical prehension and thus terminating the process of becoming. The actual entity becomes what it is - its subjectivity of becoming passing or 'perishing' immediately into the objectivity of being - and propels itself into the future as an objective datum to be taken account of by new concrescing subjects. In the simplest case, where only minimal or negligible novelty is introduced, this third phase forms what Whitehead terms a 'physical purpose', which accounts for the persistence of physical order in the universe.

It will be clear that, even in the simplest case, subjects 'are not simply what the past allows them to be. There is always some measure of self-creation'.<sup>230</sup>

Having summarised the basic elements of Whitehead's theory of concrescence for the simplest case, we are in a position to understand what he says about those more complex, 'higher grade', occasions and his description of the supplemental phases to the process of concrescence. In higher grade occasions, the concrescence does not terminate with the integration of conceptual and physical prehensions; instead, it produces a further datum, called a 'metaphysical proposition'. A metaphysical proposition can be understood as formed by the application of a predicate (a possible form of definiteness), derived from an occasion's conceptual prehensions, to a subject, the actual entity (or entities) grasped in its physical prehensions. Whitehead calls this integrated prehension or feeling a 'propositional feeling'. Such a proposition *lures* the concrescing occasion towards feeling *it*. The proposition merely presents a possibility that may be acted upon; its

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<sup>230</sup> Hosinski (1993), p. 91.

purpose is to influence the concrescence, not to express truth or falsehood. In higher grade occasions, as the concrescing occasion 'feels' the metaphysical proposition, and reacts to it, the third phase of concrescence grows more complex, becoming 'prolonged' into sub-phases. Consciousness, or capability for language, is only a sufficient and not a necessary condition for the prehending or feeling of metaphysical propositions.

Plainly, in everyday life, we often act without conscious forethought, allowing propositions to influence or lure us into action that we might otherwise not have chosen, or which we later regret. Even when we consciously reflect upon possibilities, we often act without exercising rational judgment. Here, propositions attract us through value. We can see this in our aesthetic appreciation of, for example, Hamlet's famous soliloquy. As Whitehead puts it, we react to the proposition 'To be or not to be ...' not on the basis of 'a judgment concerning truth or falsehood but simply as a lure for feeling'.<sup>231</sup> Such a proposition is purely theoretical but it draws us into Hamlet's imaginary life, and from there to a deeper appreciation of the tragedy of all human life and, perhaps, to action. All this is accomplished through feeling of value; rational judgment and criticism arise only later, if at all. Thus, our conscious grasping of propositions and feelings of value, the 'intuitive knowing' that allows us to acquire knowledge without the exercise of the formal process of reasoning, is a more basic form of knowledge than what we call 'rational knowing'. To affirm the existence of 'intuitive knowing' is not to contradict, negate or deny 'rational knowing' but merely to confirm that rational knowing enables us to criticise intuitive knowing and action, thereby deepening and improving our knowledge (and to say this is, perhaps, to do no more than give 'common sense' its rightful place). So, Whitehead differentiates two distinct types of experience (conscious and unconscious) with regard to our feeling of and acting upon propositions, without the exercise of rational judgment.

But the integration of eternal objects with physical prehensions need not always result in propositional feelings. In the simplest case, as we have seen, the

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<sup>231</sup> Whitehead (1929), p.185.

integration terminates the concrescence: a ‘comparative feeling’ is formed but not ‘felt’ as a proposition, since the concrescing occasion perishes immediately. In higher grade occasions, the concrescence does not terminate immediately and the integration of conceptual and physical prehensions is felt as a new datum for the concrescence, which is ‘prolonged’. Without consciousness, however, this amounts to no more than ‘flashes of novelty’<sup>232</sup> at the mental pole of occasions.

Therefore, Whitehead says, ‘a proposition is a new kind of entity. It is a hybrid between pure potentialities and actualities’.<sup>233</sup> Eternal objects, as we have noticed, do not in themselves possess any definite reference to any particular actual entities: ‘... an eternal object refers only to the purely general *any* among actual entities. In itself an eternal object evades any selection among actualities or epochs ... This doctrine is the ultimate ground of empiricism; namely, that eternal objects tell no tales as to their ingressions’.<sup>234</sup> Actual entities, on the other hand, ‘tell no tales’ about what is possible; only what has been. However, propositions, being hybrid entities, bring a new possibility, a new form of datum for feeling: a possibility linked to a concrete circumstance in the real world. A proposition, says Whitehead introduces ‘the possibility of *that* predicate applying in *that* assigned way to *those* logical subjects’.<sup>235</sup> It is an entity, but not an *actual* entity. However, provided the logical subjects of the proposition are found within the ‘actual world’ of the occasion, then *that* proposition will be present in *that* occasion to act as a ‘lure’ for *its* feeling.

Now, a proposition, unlike an eternal object, ‘may be conformal or non-conformal to the actual world’, says Whitehead. That is, whereas an eternal object simply *is*, a proposition, since it refers to determinate actual entities, may be either ‘true or false’.<sup>236</sup> However, considered merely as a proposition (that is, without reference to its logical subjects, the ‘reasons’ determining its truth or falsehood), a

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<sup>232</sup> *Ibid.*, p. 184.

<sup>233</sup> *Ibid.*, pp. 185-186.

<sup>234</sup> *Ibid.*, p. 256.

<sup>235</sup> *Ibid.*, p. 258.

<sup>236</sup> *Ibid.*, p. 186.

proposition, like an eternal object, is indeterminate; it 'tells no tales about itself',<sup>237</sup> proclaiming only its possibility. Metaphysically, what this means is that false propositions represent potential for creative advance: from a 'purely logical aspect, non-conformal propositions are merely wrong, and therefore worse than useless. But in their primary role, they pave the way along which the world advances into novelty. Error is the price we pay for such progress'.<sup>238</sup>

In other words, whereas a true proposition may be regarded as a proposition that conforms to the 'actual world' of an occasion prehending it, a false proposition is one that does not:

'When a conformal proposition is admitted into feeling, the reaction to the datum has simply resulted in the conformation of feeling to fact ... The prehension of the proposition has abruptly emphasised one form of definiteness illustrated in fact'.<sup>239</sup>

But,

'[w]hen a non-conformal proposition is admitted into feeling, the reaction to the datum has resulted in the synthesis of fact with the alternative potentiality of the complex predicate. A novelty has emerged into creation. The novelty may promote or destroy order; it may be good or bad. But it is new, a new type of individual, and not merely a new intensity of individual feeling. That member of the locus has introduced a new form into the actual world; or, at least, an old form in a new function';<sup>240</sup>

which is why:

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<sup>237</sup> *Ibid.*, p. 257.

<sup>238</sup> *Ibid.*, p. 187.

<sup>239</sup> *Ibid.*, pp. 186-187.

<sup>240</sup> *Ibid.*, p. 187.

‘in the real world it is more important that a proposition be interesting than it be true. The importance of truth is, that it adds to interest’.<sup>241</sup>

The subjective form of a propositional prehension, like that of a conceptual prehension, can be described as an 'emotional' reaction to the inherent value of the proposition for the occasion's becoming. The concreting occasion is either attracted or repelled by the possibility of actualising it for itself. In any case, either way, a 'decision' is made. Propositional feelings, presenting the contrast between what is (physical prehension) and what might be (propositional datum) encourage greater subjective intensity of feeling. This contrast, felt in the concrecence, may 'lure' the occasion to 'decide' in favour of actualising the non-conformal proposition and, if this happens, then it does not merely repeat its inheritance from the past but introduces novelty into the world.

We can now begin to compare Whitehead's analysis of intellectual feelings and consciousness with this stage of propositional feelings. To summarise: (a) a propositional feeling 'feels' the contrast between a possibility and a fact; (b) the concreting subject's reaction of the propositional feeling is an unconscious evaluation of its worth to the concreting subject; the concrecence may terminate with the formation of its 'unconscious purpose', that is, the integration of the propositional feeling with the occasion's original physical prehension.

However, the concrecence need not necessarily terminate here. This integration may itself become the datum for a further feeling, evoking consciousness as the dominant subjective form of feeling. This is an intellectual feeling. That is, an intellectual feeling not only 'feels' the contrast ((a) above), but can distinguish possibility from fact. In other words, the intellectual feeling not only apprehends the propositional feeling as possibility ('theory') and the physical prehension as fact but is also aware of the contrast. This awareness is consciousness, the subjective form of the intellectual feeling. Thus, while a propositional feeling merely 'feels' the contrast

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<sup>241</sup> *Ibid.*, p. 259.

between fact and possibility, an intellectual feeling may be said to *know* the contrast between fact and theory. That is:

‘[i]n awareness actuality, as a process in fact, is integrated with the potentialities which illustrate either what is and might not be, or what is not and might be. In other words, there is no consciousness without reference to definiteness, affirmation, and negation. Also affirmation involves its contrast with negation, and negation involves its contrast with affirmation. Further, affirmation and negation are alike meaningless apart from reference to the definiteness of particular actualities. Consciousness is how we feel the affirmation-negation contrast’.<sup>242</sup>

Thus, in the case where a conformal proposition is consciously apprehended and evaluated, there is at the same time an awareness of the possibility that the character of the propositional feeling might be otherwise; that is, even while and although the conscious intellectual feeling compares the propositional feeling with the data of its physical prehensions and judges that it is not, in fact, otherwise. Similarly, in the case of the conscious apprehension and evaluation of a non-conformal proposition, where the intellectual feeling informs the condescending subject that something is not but might yet be.

Moreover, without physical prehensions there cannot be consciousness:

‘Wherever there is consciousness there is some element of recollection. It recalls earlier phases from the dim recesses of the unconscious ... [C]onsciousness enlightens experience which precedes it, and could be without it if considered as a mere datum’.<sup>243</sup>

The conscious intellectual feeling recalls the propositional feeling and the initial physical prehension (both of which are unconscious) to ‘enlighten’ the ‘earlier’

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<sup>242</sup> *Ibid.*, p. 243.

<sup>243</sup> *Ibid.*, p.242.

experience. Just so, 'this character of our experience suggests that consciousness is the crown of experience, only occasionally attained, not its necessary base'.<sup>244</sup>

How do intellectual feelings function and why are they important? According to Whitehead's scheme, 'the primary function of conscious intellectual feelings is to shed light on the grounds for "decision" and so assist in the formation of an occasion's subjective aim. The importance of intellectual feelings rests in the fact that consciousness introduces critical ability into the concrescence of the occasion. It enables the occasion to form a judgment before it commits itself to the possibility contained in the propositional feeling'.<sup>245</sup>

In unconsciousness, 'decisions' involve valuation (the attraction to the possibility embodied in an eternal object or a proposition), but not criticism. 'The primitive form of physical experience', says Whitehead, 'is emotional – blind emotion'. That is, the occasion commits itself to actualising a possibility that it does not visualise. It is consciousness that allows the occasion to evaluate critically a proposition before it 'decides' to actualise it, and also to criticise its own unconscious valuations. Consciousness prepares the way for a formation of judgment: 'an intellectual feeling is aware of the difference between the mere possibility represented in the proposition and the actual facts represented in the physical prehensions. The intellectual feeling integrates these two, the merely possible and the actual fact. The subjective form of this integral feeling must include judgment of what is, what is not, and what might be in its datum'.<sup>246</sup>

'[C]onscious perception is', Whitehead maintains, 'the most primitive form of judgment'.<sup>247</sup> Consequently, the most primitive form of knowledge is conscious intellectual feelings, the form of knowledge that is shared by most animals. Judgment (not, that is, the rational judgment of higher animals but this primitive form of judgment,) allows a concrescing occasion the opportunity to alter its decision

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<sup>244</sup> *Ibid.*, p. 267.

<sup>245</sup> Hosinksi (1993), p. 113.

<sup>246</sup> *Ibid.*, p. 114.

<sup>247</sup> Whitehead (1929), p. 162.

regarding how it will form itself. Intellectual feelings allow the concreting subject to criticise its propositional lures: '[a] judgment weakens or strengthens the decision whereby the judged proposition, as a constituent in the lure, is admitted as an efficient element in the concrecence, with the reinforcement of knowledge. A judgment is the critique of a lure for feeling'.<sup>248</sup> Further, 'consciousness is like a spotlight', says Thomas Hosinski, focussing attention on something that matters to the concreting subject at that moment ... There is a vague awareness of [everything else], but an intense awareness of what matters most at the moment'.<sup>249</sup>

In this sense, then, we can see that the judgment we are concerned with in conscious intellectual feelings<sup>250</sup> relates entirely to the immediacy of the becoming of the judging subject: '[i]n the philosophy of organism, an actual occasion ... is the whole universe in process of attainment of a particular satisfaction ... The final actuality is the particular process with its particular attainment of satisfaction. The actuality of the universe is merely derivative from its solidarity in each actual entity ... [J]udgment concerns the universe as objectified from the standpoint of the judging subject. It concerns the universe through that subject'.<sup>251</sup> Thus, it is not so much the truth or falsity of the proposition that is important in this respect but the question of the possibilities offered through the proposition given the physical data of the immediate situation. In other words, in relation to its 'particular attainment of satisfaction' the concreting subject is concerned solely with the question of *this* possibility and *these* facts: the judgment made will determine *its* self-constitution in *this* moment.

How then, does Whitehead's theory of concrecence contribute to our understanding of the present problem? While Whitehead's theory, as we have seen, is extremely complex, our everyday understanding of the world (and of legal reality) is characterised by the attempt to reduce complexity, to make things simpler and more

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<sup>248</sup> *Ibid.*, p. 193.

<sup>249</sup> Hosinski (1993), p. 116. See Whitehead (1929), pp. 272-273.

<sup>250</sup> Whitehead distinguishes two types: 'conscious perceptions' (or sense perceptions), and 'intuitive judgments' (feelings *about* things not directly given in the sense data or not directly observable through the senses but which are, nonetheless, 'weapons essential to scientific progress', ie. 'insights'. See Whitehead (1929), p. 275).

<sup>251</sup> *Ibid.*, p. 200.

manageable. Is it not a retrograde step, to recognise the achievement that is (for example) law and to then begin to reintroduce complexity? Is this not simply to make our understanding unmanageable again, rather than to aid or improve understanding? We need to recognise that reduction is only a limited achievement that helps us to communicate within boundaries and that, in fact, the greater achievement is to forever push at and expand those boundaries for, as the old saying goes, a horizon is nothing but the limit of our sight. The problem is that our ideas, our conscious awareness of things, are too simple, not that they are too complex. We *train* ourselves to ignore the complexity of the world and our participation in it. ‘In this way’, writes Hosinski, ‘we are like swimmers on the surface of the ocean, aware of a very small area in our immediate vicinity, but unaware of the immense depths beneath us’.<sup>252</sup>

How does this increase of complexity that Whitehead’s theory represents contribute to our understanding? As we have seen, Whitehead’s analysis confirms that it is in the later, responsive phases of concrescence in the higher organisms that sense perception occurs (ie. in the integrative and reintegrative phases of physical, conceptual and propositional feelings). Furthermore, its occurrence here is dependent on the earlier, simpler, unconscious phases. Sense perception is understood, in Whitehead’s terms, within the whole act of perception, which he calls ‘symbolic reference’. Symbolic reference<sup>253</sup> (which corresponds to an intellectual feeling) is the integration of ‘perception in the mode of presentational immediacy’ (which corresponds to the conscious apprehending of a propositional feeling) and ‘perception in the mode of causal efficacy’ (which corresponds to the initial physical prehensions). It functions by the referral of data given in one mode to that given in the other mode. That is, symbolic reference integrates the data in the propositional feeling with the data in the initial physical prehension. It is therefore utterly dependent upon these. Physical prehensions are, then, the more primitive form of ingredients of our experience; sense perception is utterly dependent on ‘perception in the mode of causal efficacy’.

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<sup>252</sup> Hosinski (1993), p. 117.

<sup>253</sup> See PR, pp. 61-82, 123-128, 168-183.

Whitehead maintains that his theory, in showing how a moment of experience includes within itself several types of relations between a concreting subject and the actual world, not only reveals but corrects a defect in modern epistemology. Ever since Hume and Kant, the difficulty of showing a relationship between a knowing subject and an object that is known has plagued epistemology. Both Hume and Kant assumed that the most primitive ingredients in experience are sense perceptions, abstract universals not referenced to any particular. This meant that it became impossible to identify and demonstrate any sort of fundamental, necessary relationship between knower and the known. While Hume concluded that it is doubtful whether we can ever really know anything at all, Kant affirmed that all knowledge is knowledge of things filtered through the structure of our minds (phenomena) and not of things in themselves (noumena). Nonetheless, knowledge as such multiplies! Whitehead's answer to this is his identification of the ontological ground for the possibility of knowledge; the revelation of those of a concreting subject. It is these relations that make knowledge possible: 'all relatedness has its foundation in the relatedness of actualities'.<sup>254</sup> More,

“Actuality” is the decision amid “potentiality”. It represents stubborn fact which cannot be evaded. The real internal constitution of an actual entity progressively constitutes a decision conditioning the creativity which transcends that actuality. The Castle rock at Edinburgh exists from moment to moment, and from century to century, by reason of the decision effected by its own historic route of antecedent occasions. And if, in some vast upheaval of nature, it were shattered into fragments, that convulsion would still be conditioned by the fact that it was the destruction of that rock. The point to be emphasised is the insistent particularity of things experienced and of the act of experiencing. Bradley's doctrine – Wolf-eating-Lamb as a universal qualifying the absolute – is a travesty of the evidence. *That* wolf eat *that* lamb at *that* spot at *that* time: the wolf knew it; the lamb knew it; and the carrion birds knew it'.<sup>255</sup>

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<sup>254</sup> Whitehead (1929), p. xiii.

<sup>255</sup> *Ibid.*, p. 43.

Whitehead's complex ontological theorising only confirms that which, by common sense, we already know to be the case: '[t]he very possibility of knowledge should not be an accident ...; it should depend on the interwoven natures of things'.<sup>256</sup> What '[t]he problem of concrescence solves is, how the many components of the objective content are to be unified in one felt content with its complex subjective form ... [I]n its phase of satisfaction, the entity has attained its individual separation from other things; it has absorbed the datum, and it has not yet lost itself in the swing back to the "decision" whereby its appetite becomes an element in the data of other entities superseding it. Time has stood still – if only it could'.<sup>257</sup>

There is one further consequence of Whitehead's thinking that we need to deal with before we can turn to consider properly its significance for law. That is the relation between rational knowing and ontological knowing. On the one hand, we have already pointed to the distinction between these two forms of knowing. We have seen that, for Whitehead, ontological knowing rests on a judgment concerning the immediate becoming of a concreting subject. What is at stake is not propositional truth or falsehood but self-constitution; that is, how the concreting subject will form itself in *this* moment given *those* propositional and physical feelings. Rational knowing, however, is the product of many moments' inferences, reflections, balancings of weight of evidence, rational judgment. What is at stake here is precisely propositional truth. Here, 'there is abstraction from the judging subject. The subjectivist principle has been transcended, and the judgment has shifted its emphasis ... to the truth-value of the proposition in question'.<sup>258</sup> On the other hand, as Hosinski points out, we can see how 'this distinction also reveals the connection between ontological knowing and rational knowing'.<sup>259</sup> Rational knowledge requires insight (the ability to distinguish between different possible understandings of a problem) and reflective judgment (a decision in respect of the correspondence of possible understandings with facts of experience), both of which are momentary events and a type of intellectual feeling that Whitehead terms

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<sup>256</sup> *Ibid.*, p. 190.

<sup>257</sup> *Ibid.*, p. 154.

<sup>258</sup> *Ibid.*, pp. 191-192.

<sup>259</sup> Hosinski (1993), p. 122.

'intuitive judgments'. Thus, rational knowing 'is based in all of its key points in the more basic ontological knowing' and, further, 'the structure of rational knowing, though it involves many individual moments of experience, is parallel to the structure of a single moment of experience'. Indeed, '[i]t seems clear that the three phases of rational knowing [particular observation; imaginative generalization; renewed observation] correspond to the three phases of concrescence [physical prehensions; conceptual prehensions; integration of prehensions in decision]'.<sup>260</sup> Moreover, the 'correspondence becomes even closer when we consider the concrescence of an actual occasion of higher grade' and, '[i]n an occasion that is conscious, the same correspondence holds, except that in this case the subject is aware of what is mere theory and what is fact ... This ... introduces judgment prior to "decision" and thus is the most primitive form of knowing. Here, the structural correspondence to rational knowing is even closer'.<sup>261</sup>

We have seen that, for Whitehead, rational knowing finds its basis in ontological knowing. What is the purpose of rational knowing? We need to remember that the possibility of knowledge is found in the relations between a knowing subject and the actual world. But every moment of experience is a reduction from complexity, an abstraction from fullness and a selection (which begins in the first phase of concrescence and continues throughout). Further, each decision in an occasion of experience is a decision determined by a concern in respect of its own becoming. This introduces the possibility of error. Rational knowing, stimulated by a concern for self-transcendent truth, for a harmony of truth beyond a simple concern with the self, can be a means of refining, enhancing and correcting an individual's connection with the world of the past and the future (at least to the extent that this might inform acting). Reflective inquiry allows us to examine critically the commitments, decisions, judgments and purposes that condition our aspirations. Nonetheless, without exception, our use of reason always tends towards greater abstraction, a further reduction of, and a increase in, complexity. We look, select and act, grasping truth only incompletely and pursuing our purposes with blissful ignorance; unable to apprehend what does not fall within our field of vision and

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<sup>260</sup> *Ibid.*, p. 122.

<sup>261</sup> *Ibid.*, p. 123.

unable to comprehend that we have not seen it. It is just at this point, then, that critical reason may help to illuminate our understanding of the greater concrete reality from which we habitually abstract:

‘Apart from detail, and apart from system, a philosophic outlook is the very foundation of thought and of life. The sort of ideas we attend to, and the sort of ideas which we push into the negligible background, govern our hopes, our fears, our control of behaviour’.<sup>262</sup>

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<sup>262</sup> Whitehead (1929), p. 63.

## CHAPTER FOUR

### LESSONS FROM ORGANIZATION THEORY

#### The Attack on a Metaphysics of Substance

In the field of organisation studies, several theorists have begun to utilise a process metaphysics to argue against what they describe as a tendency towards reification.<sup>263</sup> By means of a deconstructive analysis of organisation they are beginning to challenge approaches to Organisation theory and management which view organisations effectively as outcomes of forgetting (as constituted by conventional wisdom but pre-existing our experiential knowledge of them) and argue for a refocusing on the practices of organising rather than the features and effects by which we define organisations (boundaries, environments, goals, strategies). Here, we find evidence of an increasing processual awareness of organisations as ‘loose and active assemblages of organisings’<sup>264</sup>, as ever-moving groupings of dynamic acts rather than static structures. Such an understanding, it is claimed, can help to foster a more constructive consideration of organisations than has been possible on the basis of ideas derived from the mechanistic and rationalist assumptions of Newtonian thought.

On this view, the problem as inherited is three-fold:<sup>265</sup> in the first place, Newtonian assumptions have now become ‘so firmly entrenched that they [have] led to the creation of a disciplinary self-image, whereby the field [has drawn] the boundaries around itself so narrowly as to exclude th[os]e ideas and practices ... which [are] not modern’;<sup>266</sup> second, theoretical development is now underpinned by ‘progression’: there is an ‘assumption that we are part of a continuous progress in supplying ever more adequate unifying conceptions’;<sup>267</sup> third, ‘conventional

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<sup>263</sup> For example, Robert Chia, Haridimos Tsoukas, Martin Wood and Stephen Linstead, Mark Dibben and Roland Calori.

<sup>264</sup> Cooper, in Chia and Kallinikos, (1998).

<sup>265</sup> Dibben and Panteli (2000), p. 6.

<sup>266</sup> Tsoukas and Cummings (1997), p. 657.

<sup>267</sup> *Ibid.*, p. 663.

analytical approaches adopted by mathematics and the physical sciences [have proved] impotent in helping us fully understand ... [our] experience of change'.<sup>268</sup> This is because 'commonly held notions of time and sequencing of events ... [together with a] reliance on scientific systems for objective analysis fail to recognise [that] our experience of temporality and change is one of indivisible movement.'<sup>269</sup> Of course it is true that, at one level, 'formal organisations [do] accomplish through an architecture of constraints, ... highly stable and discriminate types of behaviour'<sup>270</sup> but, in organisation studies at least, it is also quite clear that Newtonian terminology is gradually being replaced by a new, and 'significantly less mechanistic than before',<sup>271</sup> Aristotelian or Heraclitian style of thinking more in tune with a processual understanding of the world. This newer way of thinking both encourages a consideration of how a subject may intervene upon the experience of the object and discourages a view of chaos as antithetical to organisation; instead, there is a growing awareness of the importance of unpredictability, multiplicity, novelty and surprise.<sup>272</sup> In sum, such a view 'fosters ... awareness of dynamic processes; it encourages a positive attitude toward unpredictability and novelty; and it invites us to rethink the character of human intervention in the social and natural world'.<sup>273</sup>

Thus, we can discern a significant shift in organisation studies from thinking of organisations as entities to a 'more ontologically and epistemologically aware understanding'<sup>274</sup> of the process of organising as

'a complex and dynamic web of interlocking visual acts of arresting, punctuating, isolating and classifying of the essentially undivided flow of human experiences for the purpose of rendering more controllable and manipulable such phenomenal experiences of the world',<sup>275</sup>

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<sup>268</sup> Chia (1998), p. 349.

<sup>269</sup> Dibben and Panteli (2000), p. 6.

<sup>270</sup> Kallinikos (1998), p. 372.

<sup>271</sup> Tsoukas and Cummings (1997), p. 656.

<sup>272</sup> Tsoukas (1998), p. 292.

<sup>273</sup> *Ibid.*, p. 294.

<sup>274</sup> Dibben and Panteli (2000), p. 6.

<sup>275</sup> Chia (1998), p. 366.

and the act of organising, as 'an interminable ontological quest of carving out a version of reality from what would otherwise be an amorphous and indistinguishable mass'.<sup>276</sup>

Robert Chia maintains that those 'common organizational attributes' that positivists and realists allegedly discover are in reality only 'mirror images of their own deeply-entrenched thought structures'. Alternatively, commitment to a 'process-based *becoming* ontology' would open up possibilities for 'rethinking' organization in terms that better reflect its essential characteristics as a process of 'world-making'.<sup>277</sup> This alternative approach 'draws its inspiration from a vastly different set of ontological and epistemological priorities and ... is more epistemologically robust'.<sup>278</sup>

He identifies six enduring 'instincts', characteristic of positivistic thought:

'First, there is an emphasis placed on the idea of empirical verification or some variant such as "falsification" as a key principle ... [which] requires that all theoretical principles be empirically tested to determine whether or not such propositions are at all true. Second, positivists are strongly observational ... [T]hey believe that what we can see, feel, touch or sense directly provides the best foundation for all forms of knowledge. Third, there is much support for the Humean notion ... for explaining cause and effect ... Cause ... is understood to be the likelihood of one event following another. No attempt is made to seek out any underlying causes or generative mechanisms ... When one event follows another in a regular predictable manner, a causal relationship is said to exist. Fourth, positivists see the task of science as enabling the prediction of events. Explanations of the past are attempted only in so far as they help determine the predictability of the future. The idea of understanding past events for their own sake is underemphasized. Fifth, positivists reject the existence of theoretical entities,

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<sup>276</sup> *Ibid.*, p. 365.

<sup>277</sup> Chia, (1997), p. 685.

<sup>278</sup> *Ibid.*, p. 687.

insisting that primary importance is placed on observable reality ... [rather than] non-observable mechanisms ... Finally, empirically untestable propositions, unobservable entities, deep causes ... belong to the realm of idle speculation ...'

These six instincts, Chia says, provide the 'epistemological justification for a positivist view of scientific inquiry'.<sup>279</sup> However, this positivistic epistemology clearly derives from a set of '*ontological* commitments' with their roots in a Parmenidean cosmology:

'First, reality is made up of discrete, self-identical "things" which are conceptually isolatable and which exist, independently of our perceptual apprehension. Second, these things or entities are primary to process. This means that change and transformation are epiphenomena of entities, not primary processes constitutive of them. Being precedes and is primary to becoming ... Third, the state of rest, stability and equilibrium is a natural state. Movement only occurs when things are "disturbed" or "pertubated". Fourth, an external force is required to initiate change, movement or adaptation ... This imputation of the requirement of an external force is what precipitates the widely-assumed notion of "causation" and its attendant effects. Finally, the commitment to a being ontology precipitates a subject-predicate mode of thought in which linguistic terms and categories are deemed to be more adequate to the description of reality. Literal, precise and parsimonious language is encouraged because these are deemed to be more able to accurately "capture" and represent reality as it is in itself'.<sup>280</sup>

Chia maintains that contemporary organizational theorizing 'tacitly presupposes' this notion of the necessary pre-existence of enduring presentational forms in that it more or less assumes such an 'entitative conception of reality' in which 'clear-cut, definite things ... occupy clear-cut, definite places', a style of thinking 'in which the "thingness" of things, social entities, and their properties and

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<sup>279</sup> *Ibid.*, pp. 688-689.

<sup>280</sup> *Ibid.*, p. 690.

attributes are taken to be more fundamentally real than ... interactions and relationships'.<sup>281</sup> Nonetheless,

'this very act of "foregrounding" organizations as clearly circumscribed, legitimate objects of analysis, whilst at the same time denying the status of the network of organizing from which this theoretical object has been abstracted, is itself an ontological act of organization. Organization ... now refers to these inclusive and exclusive divisional acts of "reality-constituting" or "world-making" ... which necessarily precede any form of ... theorizing ... [E]ven "individuals" have to be constructed and legitimized before they can enter ... discourse as legitimate objects of knowledge ... Knowledge about organizations and organization of knowledge ... implicate and explicate each other and are thereby irretrievably intertwined. Only by a dogmatic and intellectually convenient process of "forgetting" its "other" can positivistic organization theory proceed in the way it has done'.<sup>282</sup>

We can see how this 'forgetting' happens from an explanation that Steve Woolgar provides.<sup>283</sup> Woolgar identifies a five stage 'splitting and inversion model of discovery' in the scientific research process: (i) first, there is the production of (often speculative) documents; (ii) this is followed by the projection of the existence of that object that will become the legitimate focus of investigation; (iii) at the same time, perception of this 'object' grows until it attains an existence of its own, independent of all notions of it; (iv) next, the relationship becomes inverted, and the idea forms that it is in fact the object itself that stimulates attention towards it; (v) and, finally, this inversion becomes so embedded in the research process that stages (i)-(iii) are either 'forgotten' or denied. Woolgar believes that this model is sufficiently robust as an explanatory device to be generally applicable and useful for understanding the practice of all forms of representational thinking. Chia maintains that any 'findings' obtained in this way will simply mirror the 'unquestioned

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<sup>281</sup> *Ibid.*, p. 690.

<sup>282</sup> *Ibid.*, pp. 691-692.

<sup>283</sup> Woolgar (1998), p. 68.

predisposition to think in static, structured and discrete terms', thereby reinforcing a belief in the validity of those findings.

This is precisely the point that Michael Baxendall makes in relation to Kenneth Clark's account of Piero della Francesca's *Baptism of Christ*:

'[W]e are at once conscious of a geometric framework; and a few seconds' analysis shows us that it is divided into thirds horizontally, and into quarters vertically. The horizontal divisions come, of course, on the line of the Dove's wings and the line of the Angel's hands, Christ's loin-cloth and the Baptist's left hand; the vertical divisions are the pink angel's columnary drapery, the central line of the Christ and the back of St John. These divisions form a central square, which is again divided into thirds and quarters, and a triangle drawn within this square, having its apex at the Dove and its base at the lower horizontal, gives the central motive of the design'.<sup>284</sup>

Baxandall's point is that Clark's use of language represents not so much a description of the picture itself as Clark's own thoughts about the picture and his attempt to provide an explanation of it: 'what one offers in a description is a representation of thinking about a picture more than a representation of a picture'.<sup>285</sup> So, for Chia, if we really want to understand the complexity of the world, we need to acquire a more dynamic understanding of complexity that will improve our awareness of the indivisibility of movement and change, the interpenetration of past, present and future. He suggests embracing a qualitative awareness of duration as an indivisible flux and becoming, a fusion of heterogenous instants; a corresponding relinquishing of the dominant spatialized conception of time that conceives of movement as a set of rests along the line of a trajectory. To think complexly is, he claims, 'to avoid the seductive appeal of the metaphysics of presence, to resist the

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<sup>284</sup> Baxandall (1985), p. 5.

<sup>285</sup> *Ibid.* Whitehead makes the same point when he says that all attempts at offering descriptions and explanations are necessarily self-referential (see Chia (1997), p. 693).

overwhelming tendency to think in terms of simple location, and to recognize the immanent, enfolded and implicate character of phenomena'.<sup>286</sup>

Nonetheless, social life becomes possible only when it is seen as 'simple location', when entities are in fact posited as discrete isolated systems existing in space-time. Understood in this way, organization becomes a simplifying ontological activity in which

'subjective phenomenal experiences are simply located, fixed, externalized, and objectified into isolatable elements ready for reconstitution by the intellect'.<sup>287</sup>

That is, we perceive the world as the outcome of an organizing process: 'All our belief in objects, all our operations on the systems that science isolates, rest in fact on the idea that time does not bite into them'.<sup>288</sup> However, the point is that we need to balance this realization with a deeper one, thinking in a complex way that will overcome this self-imposed simplification.

In several recent contributions to organisation studies, Stephen Linstead, Anthony O'Shea, Roland Calori and Martin Wood have adopted Henri Bergson's thinking to present a fresh challenge to the notion that punctuated equilibria can ever form an adequate basis for understanding radical novelty or creative advance. As their arguments suggest, whereas Bergson's thought on the importance of intuition as a form of knowing allows normative concerns for the production and use of knowledge to be reconceived in terms of essentially dynamic movements of enfolded meanings relating all things at all places and times, organisation theory has failed to take this into account. Wood, for example, following Bergson and Deleuze, suggests

'an alternative *becoming* ontology, in which theory becomes part of practice at the same time as practice becomes part of theory. There is a practice-

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<sup>286</sup> Chia, (1998), p. 357.

<sup>287</sup> *Ibid.*, p. 365.

<sup>288</sup> Bergson (1911), p. 9.

becoming of theory and a theory-becoming of practice, a double capture since “what” each becomes changes no less than “that which” becomes ... The production-use relationship is therefore not one of integration between extrinsically distinct entities, but one of *internal difference* with a focus on differentiation and division’.<sup>289</sup>

This substitution of a Parmenidean-based theory of unchanging reality with a rediscovered ‘Heraclitean-inspired’ world-view, where ‘everything is in flux, and nothing is at rest’ is simply the realization that ‘we are living in a world of change whose processes are imperceptible: there is change but there are no things that change’. Reality cannot be analysed purely in terms of ‘spatialized and localized end-states ... [I]nformation and communication do not merely convey representational contents that bridge the various stages of an evolutionary process but also contribute to the fabrication of new *assemblages* of movement, flows, stimulation and connections that cannot be simply located’.<sup>290</sup>

Wood adopts the idea of ‘creative involution’<sup>291</sup> to express this ‘relaxation of natural, obvious and reified forms, and the creation ... of heterogeneous combinations and novel alliances ... cut[ting] across and beneath ... assignable relations’, and to emphasise ‘modes of “transversal communication” ... that scramble simple, genealogical lineages and allow heterogeneous assemblages to develop and break out across closed thresholds and species’. In this way, he is able to represent these in Deleuzian terms as ‘rhizomic web[s] of continual transversal communication ... involv[ing] “unnatural” combinations, mergers, incorporations and associations ...’ Thus, ‘strictly speaking, the points are not real positions [but] a non-localizable line of *becoming*, a middle, an in-between that recognizes the continual participation of points *within* each other, even though in reality one does not become the other, or achieve any necessary correspondence with it.’ As Deleuze and Guattari put it,

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<sup>289</sup> Wood (2002), p. 157.

<sup>290</sup> *Ibid.*, p. 159.

<sup>291</sup> Following Deleuze and Guattari (1988).

‘A line of becoming is not defined by points that it connects, or by points that compose it; on the contrary, it passes between points ... [It] has neither beginning nor end, departure nor arrival, origin nor destination ... A line of becoming is only a middle. The middle is not an average; it is fast motion, it is the absolute speed of movement. A becoming is always in the middle; one can only get at it from the middle; it is the in-between, the border ... no man's land, a nonlocalisable relation sweeping up the two distant or contiguous points, carrying one into the proximity of the other’.<sup>292</sup>

But ‘[w]hy’, Wood asks, ‘is involution creative?’ Essentially, because it ‘has to do with communications that cut across distinct lineages, ... that have a tendency to break out of fixed or stable determinations ... [I]ts inventions do not exist in advance but involve rhizomic modes of becoming ... bound up with [what Bergson calls] the creation of forms ... [and] the continual elaboration of the absolutely new’.<sup>293</sup> The contrary idea that knowledge can be produced and subsequently used involves ‘abstractions from an idealized space foreign to real movement’,<sup>294</sup> a notion which, as Chia points out, is a ‘confusion [that] results from a total misunderstanding of *movement* and *trajectory*, conflating one with the other’;<sup>295</sup> in other words, a confusion of ‘lived time’ with ‘clock time’. For Bergson, intellectual analysis customarily proceeds on the basis of a reduction of the object of interest to an *a priori*, already established, set of conceptual elements; that is, a translation into pre-defined symbols of representation and organizing codes. But this type of analysis can only ever express an object as a function of something other than itself, alienating it from itself. It ‘multiplies without end the number of its points of view in order to complete its always incomplete representation, ... ceaselessly var[ying] its symbols that it may perfect the always imperfect translation’.<sup>296</sup> Intuition, on the other hand, attempts to help make contact with the reality of change and movement. It is a method of thinking in duration; a temporal synthesis of passing images into one coherent whole. He illustrates this point with the example of an artist visiting Paris.

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<sup>292</sup> Wood (2002), p. 160, quoting Deleuze and Guattari (1998), p. 293.

<sup>293</sup> *Ibid.*, quoting Bergson (1911), p. 259.

<sup>294</sup> *Ibid.*, p. 160.

<sup>295</sup> Chia (1999), p. 212.

<sup>296</sup> Bergson (1913), p. 7.

The artist makes numerous sketches of the city, writing underneath each the word 'Paris'. Because he has actually been there, he will be able to place this multiplicity of created images within his original intuition and synthesize them within his original intuitive experience of Paris as a unique whole. But only because he has been there: it would be impossible to achieve this synthesis otherwise. So, for Bergson, intuition is not mysterious; rather, it is a discipline, something we can all develop to a greater or lesser degree.<sup>297</sup> Nonetheless, in our favouring of the intellect as the more useful faculty, we have thereby neglected the status of intuition:

'It is a lamp almost extinguished which only glimmers now and then for a few moments ... whenever a vital interest is at stake ... [I]t throws a light, feeble and vacillating, but which none the less, pierces the darkness of the night in which the Intellect leaves us'.<sup>298</sup>

Chia suggests that we should see here, in this comparison of these two modes of thinking, the beginnings of 'a more complex and dynamic' mode of inquiry. 'What are subliminal about Bergsonian intuition are its fleeting characteristics' says Chia, and this is something that 'finds sympathetic resonance with what the art theorist Norman Bryson calls the *logic of the glance*'.<sup>299</sup> For Bryson, 'the dominant factor in shaping our current forms of knowing is that of ocular vision and in particular the "method" of the *Gaze*'. However, comparing Western and Chinese painting methods, Bryson comments that whilst the former is predicated on the '*disavowal of deictic reference*' the latter is predicated on the '*acknowledgement and indeed the cultivation of deictic markers*'. What 'deictic' refers to is that characteristic where '[t]he work of production is constantly displayed in the wake of its traces', where 'the body of labour is on constant display'.<sup>300</sup> But this characteristic, Bryson insists, is almost impossible to retrieve in Western paintings, where 'the viewer cannot ascertain the degree to which other surfaces lie concealed

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<sup>297</sup> *Ibid.*, p. 18.

<sup>298</sup> Bergson (1911), p. 282.

<sup>299</sup> Chia (1998), p. 360.

<sup>300</sup> Bryson (1982), p. 92.

beneath the planar display'.<sup>301</sup> There, in Picasso's paintings, for example, the work of erasure stops only when the original image becomes totally invisible, indistinguishable behind the view of the completed picture. We can see then, says Chia, how '[i]n one case the process of becoming is incorporated into the painting whilst in the other the process has been eliminated' and '[t]he painting is placed outside duration'.<sup>302</sup> Bryson develops this distinction between these two attitudes

'to reflect on two logics of presentation: the Gaze which is fixing, prolonged and contemplative, and the Glance which is "a furtive or sideways look whose attention is always elsewhere". Painting of the Gaze attempts to arrest and extract from the fleeting process. It is a vision disembodied ... [T]he painter: "arrests the flux of the phenomena, contemplates the visual field from a vantage-point outside the mobility of duration, in an eternal moment of disclosed presence". The Gaze is penetrating, piercing, fixing, objectifying. It is a violent act of forcibly and permanently "present-ing" that which otherwise would be a fluxing, moving reality. Painting of the Glance, on the other hand, addresses "vision in the durational temporality of the viewing subject"; it does not seek to bracket out the process of viewing, nor in its own techniques does it exclude the traces of the body of labour ... calligraphic work cannot be taken in all at once ... since it has itself unfolded within the durée of process'.<sup>303</sup>

We can see, then, says Chia, how 'Bergson's attempt to deconstruct the symbolic systems of representation in order to achieve an Intuition with mobile reality is a form of thinking in duration not unlike that exemplified by Bryson's logic of the Glance ... [B]oth these intellectual attitudes presuppose reality to be mobile, fluxing and flowing'.<sup>304</sup> The glance takes in 'dispersal – the disjointed rhythm of

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<sup>301</sup> 'The image that suppresses deixis has no interest in its own genesis or past, except to bury it in a palimpsest of which only the final version shows through, above an interminable debris of revisions'. See Bryson (1982), p. 92.

<sup>302</sup> Chia (1998), p. 361.

<sup>303</sup> *Ibid.*, p. 361, quoting Bryson (1982), p. 94.

<sup>304</sup> *Ibid.*, p. 362.

the retinal field'<sup>305</sup> and it is precisely this 'peripheral vision', a 'corner-of-the-eye form of knowing', that constitutes our everyday unconscious perception of reality.<sup>306</sup>

### **The Deleuzian Inheritance**

Clearly, it is the assumption in favour of the 'simple location' of 'things' and their causal mechanisms that makes possible a 'correspondence theory of truth' between linguistic terms and the external world of objects they are used to represent. Yet, this 'representationalist epistemology' clearly involves a transfer of focus away from the processes of change and towards the outcomes of change. Understood thus, change is really not much more than the temporary bridging of a series of various evolutionary stages. The basic ontological assumption here is that reality is essentially separate, substantial and stable. Without this assumption the correspondence theory of truth falls and, with it, potentially at least, the whole structure of causal and explanatory linkages and categories upon which it is built. This way of thinking, as we have seen, still dominates mainstream legal theory. MacCormick's institutional theory of law with its framework of legal concepts regulated by a tri-partite structure of institutive, consequential and terminative rules, with its articulation of the requirement of formal justice in terms of the universalisability of reasons and a dependence on the idea of the possibility of wholesale rational resolution to rational dispute, owes much to this post Enlightenment-inspired world-view.

Chia notes three dominant emphases that characterize the process-metaphysical approach of writers such as Bergson and Whitehead. These are: firstly, 'an unequivocal commitment to a process epistemology and to ... the heterogeneous *becoming* of things'; secondly, an adherence to 'the logic of otherness'; and, thirdly, a 'principle of immanence'.<sup>307</sup> The French writer Gilles Deleuze is clearly in the process tradition of Bergson and Whitehead. Deleuze's main interest is with the articulation of a theory of change and transformation that, with the aid of a new vocabulary free from

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<sup>305</sup> Bryson (1982), p. 122.

<sup>306</sup> Chia (1998), p. 362.

<sup>307</sup> Chia (1999), pp. 217-218.

‘identitarian pressures’,<sup>308</sup> will help develop an understanding of pure heterogeneous becoming. His choice of the idea of a ‘rhizome’ offers an alternative conceptualization that, at first sight at least, appears resistant to the reductionist trends of modernist theorizing. As a ‘subterranean stem’, the rhizome is ‘absolutely different from roots and radicles’, says Deleuze. It ‘assumes very diverse forms, from ramified surface extension in all directions to concretion into bulbs and tubers. The rhizome includes the best and the worst’.<sup>309</sup>

This ‘rhizomic’ model appears to incorporate a way of thinking that is consistent with the main features of process thought identified above: heterogeneous becoming; otherness; immanence; indeed, rhizomes epitomize indeterminacy and heterogeneity. Whereas the growth of tree roots commonly exhibit a predictable pattern according to the principles of binary logic, ‘any point of a rhizome may be connected to anything other, and must be’, and this random connecting of any point to any other forms a bulb, or tubers. Here, change spreads by variation, is restless, opportunistic and sudden. This subtle, agglomerative, often subterranean and heterogeneous form of change<sup>310</sup> shows how ‘[r]hizomic change is *anti-genealogical* in the sense that it resists the linear retracing of a definite locatable originary point of initiation’.<sup>311</sup> Change is ‘multiple, unending and unexpectedly other. There is no unitary point to serve as a natural pivot for constructing subject and object, for drawing boundaries that define inside and outside and that distinguish “macro” from “micro”’.<sup>312</sup> Such terms, which both derive from and are the foundation of a logocentric analysis, give way to multiplicities that ‘have only densities, determinations and lines of connections that ripple outwards’.<sup>313</sup> The pattern is not linear, but a three dimensional networking of change representing the opportunities for the actualization of possibilities for becoming.<sup>314</sup> Change, transformation, is not pre-determined by any prearranged pattern.

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<sup>308</sup> Deleuze, in Boudas (1993), p. 5.

<sup>309</sup> *Ibid.*, p. 29.

<sup>310</sup> See Boudas (1993), pp. 28-36.

<sup>311</sup> Chia (1999), p. 222.

<sup>312</sup> *Ibid.*, p. 222.

<sup>313</sup> *Ibid.*, p. 223.

<sup>314</sup> See Boudas (1993), p 31.

This probabilistic approach to the dynamic of change is, as Chia observes, ‘reminiscent of Prigogine’s powerful explanation of irreversibility and indeterminacy. Prigogine expressed deep unease about the inconsistency between the idealized, stable predictable world described by modern physics and the unstable, unpredictable world of living organisms. The real world, he claimed, evolved its ‘most delicate and complex structure’ only through irreversible processes of nature: ‘Life is possible only in a nonequilibrium universe’.<sup>315</sup> Therefore, life, nature, the world must all be understood in terms of possibilities and not certainties. Change does not take place along a single trajectory, but in multiple trajectories of ‘probability clusters’.<sup>316</sup>

In the same way, ideas of causality require to be replaced with notions depicting the ‘coupling of events loosely analogous to the coupling of sounds by resonance’. This means developing a new, non-Newtonian vocabulary wholly ‘*incompatible with a trajectory description*’, which requires instead a ‘probabilistic description’.<sup>317</sup> Importantly, there is no determinism involved here. Outcomes can always be surprises, other than expected. As Hart<sup>318</sup> observed, the nature and limits of thought and language can serve as the precursor of an element of the surprising: surprise, novelty, creativity are all in-built, of the very essence and meaning of change and transformation. Precisely because we insist on encoding our experiences of reality into explicitly articulated rules and symbols, shortcomings are thereby built into our working model of reality. However, this is not because our model is incomplete, and must continually be updated with an explicit rendering of what is already implicit within it; on the contrary, it is because our models tend to distort and misrepresent the changing nature of reality. True change has something of the unexpected, unpredictable, and therefore unanticipated nature of surprise about it; something of the character of ‘otherness’.

According to Chia, the point is that ‘chance and necessity are not polar opposites’; rather, they ‘implicate and structure the possibilities for one another’. In

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<sup>315</sup> Prigogine (1996), p. 27.

<sup>316</sup> *Ibid.*, p. 37.

<sup>317</sup> *Ibid.*, p. 42.

<sup>318</sup> See Hart (1958), pp. 593 ff.

other words, they ‘are other to each other and express themselves through the operation of change. In the language of process metaphysics, we can say that *chance leans towards otherness, necessity leans towards immanence*. Thus, the change in continuity (otherness) and the continuity in change (immanence)’.<sup>319</sup>

At least from the standpoint of a process metaphysics change, surprise and novel adventure are all essential conditions of reality, in particular of living systems, without which existence would not be possible. Therefore, conventional dualistic notions ought to be rejected:

‘[c]hange implicates its other ... [N]ot a “thing” or “entity” with established patterns, *but the repetitive activity of ordering and patterning itself*. It is the active intervention into the flux and flow of the “real” in order to abstract pattern and coherence out of an essentially undifferentiated and indifferent whole’.<sup>320</sup>

This is what MacCormick’s theory fails to accommodate, preferring instead to identify institutions as objects, albeit ‘thought’ objects, but ‘things’ nonetheless with predefined arrangements and patterns of relations. Yet, for process thought, law is not only the outcome but also primarily the very *act* of stabilizing and simply locating, this ontological act of halting, holding and handling what is otherwise the indeterminate flux of lived experience. In this sense, law is inherently simplifying: the taxonomic complexity<sup>321</sup> of theories of law and legal reasoning is a contradiction of process, rendering it as ‘substance’ by the application of pre-structured formulae and symbols of representation. Nonetheless, as law acts to constrain, constrict and control these otherwise unpredictable forces, the tension between law as simplification and reality as complexity acts as a creative mainspring for novelty and progress.

So we can see how the social reality that we think of as existing independently is really a construct, comprised of artificial arresting and stabilizing institutional acts

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<sup>319</sup> Chia (1999), p. 223.

<sup>320</sup> *Ibid.*, p. 224.

<sup>321</sup> See Chia (1998) for a detailed analysis of ‘taxonomic complexity’.

and simple location. Each act ‘simply locates’ as it halts and holds outside of the durational experience a *version* of a moment of changing reality. As many such versions merge, creating denseness, we see the emergence of phenomena of familiarity and social habit. In this way,

‘[a] socially constructed reality, *alienated* from our raw experiences, is achieved in which all those practical norms that govern the stance of human beings toward one another and towards their particular historical environment become more and more established. The slow and complex evolutionary formation of modes of thought ... serve to orient us toward our environment and towards others in our social interactions. These are all effects of modern social organizing. Organization exists as islands of order in a sea of chaos and change’.<sup>322</sup>

In this way, process thought understands law as a complexity-reducing and reality-constituting enterprise that constitutes and coordinates a world of its own making via an *un-natural* stabilizing of these natural forces. Nonetheless, it is also an extremely successful one: it is only in and through this mechanism for command and control of reality that any ‘things’ as such appear at all. So it is important to remember that

‘[t]he concept of the entity can be preserved only by an optic that casts around each entity a perceptual frame that makes a cut from the field and immobilises the cut within the static framework’.<sup>323</sup>

Indeed, weaken the frame and the object merges with its past and future in a changing field that defies rational alteration and refinement.

Perhaps we can see this if we think, for example, of a flower. A flower is only a phase of evolution and transformation, ‘a continuous exfoliation or perturbation of

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<sup>322</sup> Chia (1999), p. 224.

<sup>323</sup> Bryson (1998), p. 97.

matter'.<sup>324</sup> It cannot occupy a single place, for it 'is always implicated in the field of transformation of which it forms a part'.<sup>325</sup> It is always changing, from seed to flower to dust:

'[t]he present state of the object appearing as the flower is inhabited by its past as seed, and its future as dust, in a continuous moment of postponement, whose effect is that the flower is never presently *there*, any more than seed or dust are there'.<sup>326</sup>

Thus, we understand that change is immanent in every quantum moment of the process of an entity's becoming and perishing. Understood in this way, law is an ongoing activity of resisting change, maintaining and stabilizing as 'real' a moment *snatched* from the continuing flow, preserving it sufficiently for persons to act and further their purposes against a barrage of competing external inducements. Simplification, complexity reduction and economy of effort in control of reality are the aims of law. In this way, as a result of their institutionalisation in law, all the multifarious aspects of our experience, including the self as person, obtain immediate self-identity and become malleable.

However, what this also suggests is the possibility that legal 'change' might be effected without orchestrated external intervention; indeed, merely relaxing the constraints and ingrained behaviours that contribute to the perception of legal institutions as substantial may be enough to encourage change of itself. It is this relaxation of entrenched generalisations that a process approach would advocate and can explain. Utilizing a metaphor of 'creative involution', such as Wood employs, can help demonstrate such an alternative understanding of how legal change can and does occur.

From a process perspective, law as an attempt to halt, hold and handle what is essentially a ceaseless flow, is a reduction achievement. It is an important and

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<sup>324</sup> *Ibid.*, p. 97.

<sup>325</sup> Chia (1999), p. 225.

<sup>326</sup> Bryson (1982), p. 99.

necessary attempt to create a more secure, regular and predictable world from a fundamentally indiscriminate reality. In this sense law as institutionalization is primarily about legitimating social worlds, only subsidiarily about coordinating activity. Counter-intuitively, perhaps, law is the exception, change is the rule.<sup>327</sup> Change always implies ‘surprise’ and otherness because of its essentially indeterminate character, a unique and never-to-be-repeated coalescence of a multiplicity of potentialities. Law, as essentially ‘rhizomic’ in nature, is the outcome of this creative tension between institutionalization and change.

Thus, if we assume Chia’s distinction between dynamic and taxonomic complexity, we can see how the latter more correctly describes the method of ordering of modern Western legal thinking.<sup>328</sup> Conversely, dynamic complexity recognizes that human experience can be much more complex and fluid than any descriptions based on static states account for. Dynamic complexity is qualitatively different from the discrete and stable states preferred by the taxonomic urge. Here, ‘complexity arises from the increasingly bewildering array of possible combinations, but from the immanent *in-one-anotherness* of moments of experience and hence their intrinsic non-locatable and interpenetrative nature’.<sup>329</sup> The past is inextricably bound up with the present. There is ‘a real persistence of the past in the present, a duration which is, as it were a hyphen, a connecting link ... Continuity of change, preservation of the past in the present, real duration’.<sup>330</sup> The difference between these two attitudes is analogous to that between qualitative and quantitative change. ‘I must willy-nilly, wait’, says Bergson, ‘until the sugar melts’; which implies that my sense of time in conscious experience is not that of mathematical time but ‘coincides with my impatience, that is to say with a certain portion of my own duration, which I cannot protract or contract as I like. It is no longer something *thought*, it is something

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<sup>327</sup> As Bergson (1911) says, ‘the intellect aims, first of all, at constructing. This fabrication is exercised exclusively on inert matter ... If, therefore, the tendency of the intellect is to fabricate, we may expect to find that whatever is fluid in the real will escape it in part, and whatever is life in the living will escape it altogether’, pp. 161-162.

<sup>328</sup> Various explored in great detail by Weber, Foucault and Elias.

<sup>329</sup> Chia (1998), p. 349.

<sup>330</sup> Bergson (1911), p. 24.

lived. It is no longer a relation, it is an absolute',<sup>331</sup> indivisible and inseparable from our own sense of becoming.

So we think of time much like we think of space, as a homogeneous medium, but only because of a 'trespassing of the idea of space upon the field of pure consciousness'.<sup>332</sup> Only by the importation and imposition of spatial metaphors do we construe mathematical time. Our conscious experience of time is otherwise:

'nothing but a succession of qualitative changes, which melt into and permeate one another, without precise outlines, without any tendency to externalize themselves in relation to one another, without any affiliation with number'.<sup>333</sup>

Experience, thought about in spatial terms, is translated as homogeneous. But duration

'prolongs the past into the present, the present either containing within it in a distinct form the ceaselessly growing image of the past, or, more probably, showing by its continual change of quality the heavier load we drag behind us as we grow older'.<sup>334</sup>

Absent this endurance of the past in the present, there could be only instantaneous instants.

We see much the same picture in relation to movement, when motion is thought of in spatial terms as divisible into discrete moments that represent the area traversed. But, as Bergson says,

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<sup>331</sup> *Ibid.*, p. 10.

<sup>332</sup> Bergson (1913), p. 98.

<sup>333</sup> *Ibid.*, p. 104.

<sup>334</sup> *Ibid.*, p. 38.

‘the process by which [a body] passes from one position to the other, a process which occupies duration and which has no reality except for a conscious spectator, eludes space. We have to do here not with an *object* but with a *progress*; motion, in so far as it is a passage from one point to another, is a mental synthesis, a psychic and therefore unextended process ... We are thus compelled to admit that we have here to do with a synthesis which is, so to speak, qualitative, a gradual organization of our successive sensations, a unity resembling that of a phrase in a melody’.<sup>335</sup>

We need therefore to distinguish between travelling over the ground and the ground over which we travel. Reduction to the latter is a denial of ‘duration’. This is precisely what lies at the root of the confusion in those childhood puzzles presented earlier. Analysis on the basis of static states may make it possible to focus and act but it is nonetheless a mistake to think of reality as essentially stable and with only intermittent periods of change.

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<sup>335</sup> Bergson (1911), p. 111.

## CHAPTER FIVE

### TOWARDS A PROCESS RECONSTRUAL OF 'THE MIDDLE'

We need now to bring this processual understanding to bear on the approaches to legal reasoning outlined above and the problems presented for analysis in *Re A*. As we have seen, a fundamental tenet of any process-philosophical approach is the idea that knowledge cannot be simply located as the successive quantitative movement from one homogenous, stable, or independent, state to the next; on the contrary, knowledge is a relational effect and fixed states are but specific cases in point. On this view, legal knowledge is not something that travels across the 'gap' between one pole and another; instead, the institutionalization of knowledge in law constitutes a particular context that emerges to mediate the tension between these two poles and within which individual terms (such as universal and particular, rule-determination and rule-application) assume subsequent and relative meanings. Thus, where knowledge is institutionalized in law, this should not be understood as the outcome of some pre-existent structuring or patterning of positions but as an establishing of 'internal resonance'.<sup>336</sup> It is this 'fixing of tensions' that creates the abstracted structure that is subsequently commanded and controlled according to the conceptual categories of legal thought and representation.

What this suggests is a sense in which what we have called the institutionalisation of law should properly be understood in terms of the means by which participants make sense of their social interactions.<sup>337</sup> In this sense, institutionalisation comprises *both* the forces and tendencies that promote order and stability *and* the mechanisms that tend towards change and de-structuring.<sup>338</sup> It is the continual fluctuation between these that momentarily results in an appearance of order, some thing achieved through reduction, but the two are really inseparable. Law, as a *process* of institutionalising information, is always-already the *outcome* of a previous process of institutionalising.

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<sup>336</sup> Wood (2003), p. 226.

<sup>337</sup> See Weick (1996).

<sup>338</sup> See Deleuze and Guattari (1998).

## Two Views of Legal Knowledge and its Production

Commonly, when we think of law we think of it as a coherent resource, as something to be applied. As we saw in *Re A*, there are three aspects to this: first, practical problems are confronted, recognized and addressed in a context governed wholly by the interests of the legal institution, problematised entirely as legal issues; second, all of this, including language, context, concepts and interpretations, is commanded and controlled in an essentially homogeneous, largely hierarchical manner; third, this hierarchical legal institutional structure prevails over the communication of outcomes, disseminated through legal institutional channels.<sup>339</sup> In these ways, by its use of either/or distinctions, its courtroom terms and procedures and its control of the flow of decisions (through the doctrines of *ratio decidendi*, *stare decisis* and legal precedent), the legal community defines and deploys the criteria and measurements of its own success.<sup>340</sup>

It is against this background that we must understand Bankowski's suggestion that law's external audience should become more involved in decision making: as the site of legal decision making becomes more important so it becomes necessary to seek a more collaborative approach. What we find here is much less a sense of the fixed separation of theoretical and practical and more the recognition of a managed flow back and forth between the two with a movement across disciplines and fields incorporating within legal decision-making ideas, methods and procedures otherwise considered as outside.<sup>341</sup> In this way, knowledge sites become more dispersed and new knowledge producers begin to emerge.<sup>342</sup>

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<sup>339</sup> In this way, the creation of norms, or rules of law, is always held to occur as it were upstream of their point of application, with little or no reference to the specific personal interests of their addressees.

<sup>340</sup> It is therefore not surprising that only a very few commentators bother to take time to note the effects on, and the state of, parties to cases afterwards. Even the most sympathetic of theorists and commentators all appear to accept that the legal significance of a case ends when the decision is communicated; it is the significance of the outcome for law that predominates. In this way, too, original case decisions once applied begin to evolve ever more esoteric understandings and uses in lines of legal argument, an evolution of legal sense-making from which lay audiences continue to be largely excluded.

<sup>341</sup> For example, in the discovery of different forms of dispute resolution run by people with the skills and capacities necessary to engage in them. This move towards a more collaborative mode is reflected

According to this approach, law requires a more flexible, relational, context-based approach realised through the coming together of heterogeneous assets and continually shifting institutional forms and structures. This is something to be arrived at through participation, negotiation and mediation, and where results are communicated in and through the contexts in which they are to be applied. In this sense, this way of thinking about law might be considered more in keeping with the complexities of situations that law seeks to address. Here, legal practice becomes the difficult task of maintaining the middle position that opens up between abstracted representations and exacting contextual requirements, refusing simply to go one way or the other but always maintaining both the separation and the link, the continual movement or conversation to and fro, between them.

However, from a process perspective, two problems emerge with regard to this. In the first place, those advocating a new understanding of the relation between universals and particulars tend to overestimate the extent to which the determination of legal knowledge, and not simply its confirmation, may originate from outside the limits of the legal institutional structure. Notwithstanding the increased recognition of extra-legal influences, it is still the highly structured, hierarchically-ordered institutional framework that is the main site for generating, developing and refining legal knowledge. Changes in law take place by law and according to law's *legal* structure, governed by the procedures and mechanisms that limit, order and subjugate according to law's institutional practices and routines.<sup>343</sup> That is why, in reality, very few of the advances predicted ever amount to anything very novel or surprising.

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in other disciplines too; for example, in medical science, it used to be, until very recently, the received wisdom that brain cells did not re-grow. However, as a consequence of the results of the rehabilitation of patients outside of the clinical and research environments, this has been shown not to be the case. Consequently, medical science research has had to take this on board and adjust and adapt its research priorities and teaching practices accordingly.

<sup>342</sup> Thus, the legal task becomes seen as much more of a blend of theory and practice, structure and fact; old ideas increasingly thought of as having become worn and imprudent to hold are having to give way to newer ones. A clear illustration of the two different approaches can be seen in the judges' opinions in *MacLennan v MacLennan* 1958 SLT 12.

<sup>343</sup> Christodoulidis notes this. One way he puts it is in terms of the difference between law's simple and structural inertias. Because of the strength of influence of law's structural inertia, few real gestures are made towards novelty and change, which only amount to simple inertia gestures, no matter that law will continually, because of this, have to prove its worth and importance beyond itself to a wider audience (see Christodoulidis (1996)).

Superficial changes in the institutional context of law make little impact on the basic assumptions underlying and characterising law. Besides, while a more socially distributed form of legal knowledge might well be expected to generate a more relevant and socially applicable type of law, the degree of difference in the legal power/knowledge rhetoric always works, as we saw in *Re A*, to prefigure what counts as knowledge.<sup>344</sup> It is precisely this ideological aspect of law that we found to be its most disturbing feature. Very little of what appears succeeds in altering law's privileged and self-legitimizing, autopoietic, standpoint.

The second problem concerns the assumption, introduced earlier, of a one-to-one relation of correspondence between living experience and legal representation. In common law decision making, legal practitioners have to provide justification for their legal decisions, attempting to turn thought back upon action. In doing so, they appear to engage in a sort of action-reflection, a process of *re*-deliberation or justification of the situations in which they perform.<sup>345</sup> However, as Detmold and Bankowski show, with their depiction of the 'anxious judge', judges inevitably face a crisis of confidence and legitimacy closely related to the adequacy of their legal knowledge reservoir. This crisis of confidence highlights a disparity between traditional representations of knowledge and lived experience, and thus the impossible complexity and the incommensurability of legal decision making. While assumed forms of technical rationality are based on the presupposition of a correspondence of means to ends, those same means and ends often appear confused and conflicting.

In this way, a gap opens up that must be closed. This is why, for Bankowski, judges need to attend to the 'outside', to bridge the gap between their professional knowledge and the demands of the real world. But even here, a judge's reflection on

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<sup>344</sup> Witness, the recent very public argument in Scottish criminal law between the Lord Justice General and the Lord Advocate over the collapse of the 'World's End' murder trial.

<sup>345</sup> MacCormick demonstrates how this overwhelmingly instrumental rationality may be understood to be premised on scientific technique, leading to a view of legal knowledge as hierarchically governed, with general principles at the top and explicitly formulated legal rules, concrete problem-solving legal norms, at the bottom. It is in this way that a separation of theory from practice, rule-determination from rule-application, is effected and institutionalized according to which the two can then be re-related and re-connected, with the 'transfer of 'knowledge' between them tirelessly demarcated and controlled.

action is still always directed towards verbal descriptions, deliberate constructions that must be tested.<sup>346</sup> It is in relation to these that Bankowski suggests that a judge, in deliberating, must remain open to the unfolding story; letting the story speak for itself, talk back. It is here, with selected information, that the judge works reflectively, always leaving things open to change. We find a similar notion underlying MacCormick's sense of determining what the ratio of a decision is; that is, it is only when the enacted environment responds and a future judge answers the first that any real decision can be made about what the fuller meaning of the ratio is, what information will be retained for future use.

This distinction between law and its external environment as a critical separation that must be closed is also one which Christodoulidis refers to. With him, too, we can discern a form of attending to the outside that underpins his idea of an enacted environment; however, here, it is more correct to say that any 'outside' is created by the decision to 'draw a distinction'. For Christodoulidis, following Luhmann, a system's environment is not so much something already external to be reacted to but it is created by the actor through the processing of information according to her focus on a particular task, by the process of selection. Selecting has to do with deciding what is relevant, what to deal with and what to leave alone. Something can only become the object of attention *after* this selection has occurred. This is how everything becomes noticeable and noticed, registering as occurring only after it has occurred. In decision making something is always acknowledged retrospectively, related to the specific concerns and motivations of the individual. In this sense, he is quite obviously correct: 'justification is always justification *a posteriori*'.

Given the disparity brought about by the lack of correspondence between living experience and legal representation, even paying attention to the particularities of a situation cannot fully account for the mutual inter-relatedness of elements in the originary assemblage. To achieve this will necessitate greater sensitivity to the

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<sup>346</sup> That is, in the anxious judge thinking about it later.

temporal dimension; in other words, it is crucially important that ‘paying attention’ always occurs retrospectively.

### **Understanding Relatedness: Employing a Method of Creative Involution**

To think about creative involution is, as Wood suggests, to think differently. It is to treat relations as the primary objects rather than as linkages between separate things. However, this does not involve moving ‘from one actual term to another actual term along a single line, but from a virtual term to the heterogeneous terms that actualize it along lines of divergence’.<sup>347</sup> It is this that Bergson refers to as intuition. For him, the key to true knowledge and understanding lies much more in asking new questions than in providing answers to already existing questions. While the latter practice is closed and regulated, the former is open-ended, its movement and flow forever resisting representation and regulation.<sup>348</sup>

Traditional understandings of legal knowledge as institutional continue to follow along the route of an ordered, linear progression characterised by the procedure of applying general rules to particular circumstances. Here, and within the hierarchical structure that emerges on top, each discrete part has its own place, function and methodology, and is organised in relation to all other parts. A flow of information is facilitated, enabling predictability. However, even within this tightly

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<sup>347</sup> Wood (2002), p. 161.

<sup>348</sup> An example may serve to illustrate. Not far from my home town, about ninety minutes drive by car, lies a magnificent beach. It is an awe-inspiring, magical place – about one and a half miles of pure white sand curved gently into a bay and swept out round a grassy headland – a place where the ebb and flow of the tide and the rhythmical crashing of an endless succession of tiny waves upon the sand combine to produce an unrivalled sensual experience. There, in that tiny, unspoilt corner, ear and eye, nose, mouth and hand are all excited together: the sounds of wind and wave, the colour and movement of grass, sand and sea, the smell and taste of pure, salt sea air. In the midst of this continuous creative movement to and fro, between the ebbing and the flowing and the crashing of each tiny wave, something mysterious appears: a calm, something that forever hints at something beyond itself. There are no beginnings and no ends, just one continuous and creative process. Each wave is simply the continuation of another wave or set of waves. Objects bob about on top, passing from one wave to another without interruption. There is really not any point which one can identify as a beginning or an end: the idea of a wave is an abstraction from the continuous process or flow. There is silence, and the silence seems to indicate a break, but there is no break: each wave passes effortlessly into the next and as one ends another is promised. Within this constructed space, the silence expands from within and forms its own pattern. New patterns are made, of waves and silences and waves and silences together, with new contrasts; in effect, a symphony erupts from within, bursting forth in every direction, always new and always different. It can be heard and understood, but there is never any question of identifying a beginning, middle or end.

fitting structure, legal practitioners and legal consumers all experience legal knowledge as a complex web of opinion, supervision, guidance, claim and control. In reality, all experience law, at some times more obviously than at others, as ‘a continuous and unfinished process whose intrinsic nature resists the regulative model .... self-organizing, non-linear and multi-stranded’.<sup>349</sup> In this sense, contrary to received wisdom, law grows from the bottom up and not from the top down and there is really no settled structure or definitive order that we can identify absolutely as legal institutional knowledge. Rather, legal institutional knowledge appears as a continuous becoming naturally resistant to this attempt to identify rule and application, law and fact, universal and particular, or the relations between them. In other words, law appears more as a communication that cuts across our carefully guarded distinctions, expanding forever outwards.

In a hierarchical model of structuring legal knowledge, the main emphasis is on the relative positions of distinct phases, stages or states. In this way, the method of investigation proceeds by way of the splitting up of a whole complex experience of interdependent and interpenetrating aspects into separate, immobile and distinct objects and behaviours with the assumption of the possibility of transfer between them. In contrast, on the alternative understanding outlined above, any investigation does not rely on some assumption about a whole being the sum of its connectable parts but on something beyond this, a middle place that is not defined, as in Bankowski’s model, as between set points, but is rather a pre-existing in-between where is nothing but tensions and fields of force, continuous movement. It is this incessant fluxing of the real which points to the intuitive, sympathetic understanding of which Bergson speaks. So, instead of assuming *that* the distinctions we observe between ‘things’ are straightforwardly given, the real problem is to understand *how* this division has come about in the first place, on the basis of which we assume that the subsequently divided pieces can be combined and recombined. Why has reality been divided this way rather than that, why have we given knowledge this shape and not that? In other words, the entrance of essential knowledge into our experience

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<sup>349</sup> Cooper (1998), p. 143.

requires the introduction of our consciousness within the continuity of the world.<sup>350</sup> Everything depends on the relative weight we assign to each quantum of reality arrested from the flow of direct experience.

If we understand the structuring of legal institutional knowledge in this way, theories, concepts, doctrines, principles, values, rules and the rest, all become less clearly circumscribed. Knowledge no longer occupies clear-cut, stable positions adequately described and defined by clear-cut, established terms; rather, a complexity of real inter-connections, cleavages and coincidences intersect above, through and below the relative locations and meanings of all terms. What this means is that there is no single controlling mind, no hidden hand, no quantitative linear progression. In its place, we find that the mediums of information created by the institutional and institutionalising structure of law give way to a real interchange of ideas, a continuous swapping and substitution of meanings in which the limits of ideas, concepts and expressions are relentlessly in process of being shaped and reshaped. In this sense, the concrescence of legal institutional knowledge is forever ongoing, essentially transitive. Its continual reproduction and use is inextricably linked with the interpolation of our consciousness into the continuous succession and flow of the real world. This is the essential point that ‘institutional theories’ of law often ignore and, instead, impart to the creation and utilization of legal knowledge a concreteness that is misplaced; thus, legal ‘institutional facts’ appear to benefit from an independent existence and the relations between them are considered as connection (and, crucially, all of this is assumed prior to any discussion about their individuation).

In reality, legal institutional knowledge is always an amalgam. Its outwardly homogeneous appearance as something defined and distributed, developed and deployed is always the result of a blend, a composite: it is both the sum of its parts *and* the degrees of difference of its terms. As such, legal knowledge is always indeterminate. Here, we cannot talk about applying a rule to factual circumstances, or even really of universals to particulars, because this derives from and depends on

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<sup>350</sup> In Whiteheadian terminology, all knowledge is an immediate and continuous decision for the concrescence of an actual occasion, divisible but not divided.

notions of substance and immobility where we address ourselves towards ‘the ends of the intervals and not ... the intervals themselves’.<sup>351</sup> Legal institutional knowledge understood in terms of creative involution is law understood as an ‘open system’.

### **Exploring the Temporal Dimension: Experiencing Duration**

According to Bergson we can conceive of time in two ways: either as pure duration or in spatio-temporal terms. In the latter, time fragments into separate parts, so that what we experience are characteristically bounded and distinct but connectable elements. We obtain this awareness by withdrawing ourselves from our involvement in the flow of experience and, having stepped out of it, then directing our attention back towards it. In contrast, pure duration is the experience of time as a ceaseless movement of flowing and fluxing,

‘[a] succession of qualitative changes ... melt[ing] into and permeat[ing] one another ... without any tendency to externalize themselves in relation to one another’.<sup>352</sup>

When we reflect on the particularities of lived situations we do so by trying to comprehend action in terms of a simple, straightforward, uncomplicated state rather than by following the continuity of its real movement. It is really this spatio-temporal idea of time that Bankowski and Detmold, and MacCormick too, mobilize in their decision-making models. This presupposes the practitioner withdrawing to a position outside of the experience before and in order that her attention can be directed back to it and she can enter within it. Paradoxically, however, in directing attention to already lived experience Bankowski and Detmold, as well as MacCormick, appear only to reinforce this sense of a ‘gap’ between legal representation and actual lived experience, a view altogether at odds with Bergson’s notion of pure duration or *durée*.

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<sup>351</sup> Bergson (1911), p. 9.

<sup>352</sup> Bergson (1910), p. 104.

As soon as we begin to focus on relations as things in themselves, rather than as linkages between separate things, then it also becomes clear how we should understand what we call the present; that is, as a temporal distinction between two horizons. Each present moment of experience is a tension between actual and potential, past and future: the present does not exist except in these terms. To better understand how the past as experience or memory endures in the present, we can note this passage from Deleuze:

‘[W]e believe that the past is no longer, that it has ceased to be. We have thus confused Being with being-present. Nevertheless, the present is not; rather it is pure becoming, always outside itself. It is not, but it acts. Its proper element is not being but the active or the useful. But it has not ceased to be. Useless and inactive, impassive it IS, in the full sense of the word: It is identical with being in itself. It should not be said that it “was” since it is the in-itself of being, and the form under which being is preserved in itself’.<sup>353</sup>

Because the present never actually *is*, all our assertions about reflecting on actions in the midst of acting become, in this sense, merely evidence of a dependence upon an intellectual practice that reduces experience from the totality of lived experience in order to make it manageable. In this sense, a judge’s reflections in the midst of decision making are really no more than her experience converted into words, a way of presenting thought and action as if these were ontologically discrete and independent or autonomous categories. On this basis, even Bankowski’s attempt to provide a thoroughly pragmatic solution with his integrating and synthesizing ‘inside-outside’ approach must ultimately break down. The dialectical model can never complete its task because we cannot ultimately and irrevocably say that either inside or outside exists prior, alongside or subsequent to the other, or that or how one is similar or dissimilar to the other. For this to be the case, we would need to be able to identify a boundary between the two, an edge or border that specifies their difference. But they are not identifiably separate. Our reflections in this way can produce useful knowledge, but not knowledge that provides an exact copy of the real

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<sup>353</sup> Deleuze (1991), p. 55.

movement of living experience to which it refers. The point is that all such understandings of reality are inevitably based on a falsity. While it might be convenient to reflect upon an event as if the whole of the event occurred as an instantaneous revealing, so that we might look at a situation as a whole from its beginning to its end with all its separate parts laid out, as if somehow at some earlier point we could even suggest what it will contain in its later parts, in fact, reality unfolds only gradually, as a living experience.

Charles Hartshorne makes the point that we cannot say about anything that it was possible or impossible beforehand because there is then no 'it' to which any such label might be attached. The object of the discourse is simply not there to be referred to in either way.<sup>354</sup> What we are dealing with here, Hartshorne claims, is the law of the excluded middle. The criteria of the actual cannot empirically discover possibility. Taking something that exists now and reading it back into the past as if to say that it was possible then will not tell us anything about the past that could have been discovered by us then. To put it another way, there is always something more in the actual than in the possible; otherwise, why bother to actualize anything?

Understood thus, reality is the continuous and qualitative accumulating of actuality. But this presents us with a further problem: on this basis, how does it make sense to talk in terms of reflecting on one's decisions? A judge looks back on her own act of making a decision, but all this continuous qualitative accumulating of actuality is surely too much to carry forward repetitively: we have too much abstraction, too much reduction. Nonetheless, just because we abstract does not mean that anything ceases to exist. If we remember deciding then we also remember the process of deciding. The way to make sense of this is to think of the present in terms of subjective immediacy. Here, we can usefully employ a process/product distinction. A product is something positively prehended as an abstraction from process, a reduction. But this means that something else is always left out, negatively prehended. Product, as a reduction from process, cannot be properly understood apart

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<sup>354</sup> In this sense, it is quite wrong to talk in terms of there being 'possible particulars' or 'possible worlds': necessity ought not to be explicated in terms of possibility. There is a possibility of further particularization but this is a different thing from saying that there are possible particulars.

from this act of negative prehension.<sup>355</sup> Without it or a similar notion any process/product distinction would be untenable. This is just another way of saying that being cannot be abstracted from becoming: the two are inseparable. In other words, we can deal with particulars only in terms of universals and not otherwise. This indivisible continuity is what Bergson refers to as real knowledge. It is the forever becoming of living experience. But to be known it must be grasped under the forms of what is concrete.

Somewhat counter-intuitively, what is concrete is not and cannot be real. It is a perspective on the movement of reality, its symbolic reconstruction.<sup>356</sup> Put simply, there is always more in reality than we can apprehend through the concrete. Every reconstruction by which we try to reveal the real movement of experience is inevitably incommensurable with the experience to which it refers. Where we often go wrong is in our assumption that there is as much or more in our concrete representations of reality than in reality unrepresented. However, no matter how sophisticated our reasoning, there will always be more in experience than our accounts of it can record. Our perennial problem is how to stop ourselves confusing the two.

We can get close to an answer to this question if we recall that what we have termed the real is inseparable from the movement from potentiality to actuality in which it is realized.<sup>357</sup> That is, it is only as we struggle to understand the real that we can discover ourselves as standing within the real: it exists, is present, precisely in the manner in which it is actualized. Everything hinges on this irreducible interpenetrating relatedness, this mutual constitution of the temporal and the spatial. The way that we understand the whole of something as comprised by the sum of its parts is only a perspective taken on it. The simple fact that this division into separate parts is something that must then actually be performed implies a temporal relationship between these; that is, the whole and the parts do not exist together at the

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<sup>355</sup> This is just another way of saying that being cannot be abstracted from becoming, the two are inseparable; in other words, we can deal only with particulars in terms of universals and not otherwise.

<sup>356</sup> See Bergson (1911).

<sup>357</sup> See Deleuze (1988).

same time, except as potentiality. The division must be made or at least be capable of being made. Hartshorne puts it this way:

[t]he belief in a wholly determinate future is not translatable into action, and neither is belief in a wholly indeterminate one ... Action can only consist, not in simple foreseeing, but in step by step deciding, of the future, with each step in its concreteness left open until the previous step has been taken, and even then not simply predicted but created, settled by *fiat* ... The future, for all life, is what the past implies *plus* step by step decisions, none of which is concretely given until it has actually been taken ...'.<sup>358</sup>

Hence, '[m]odal distinctions are ultimately coincident with temporal ones. The actual is the past, the possible is the future'.<sup>359</sup> On this view, 'our ability to understand universality or possibility, as well as particularity or actuality, is the same as our ability to grasp temporal distinctions ... [I]f temporal distinctions are modal distinctions, and if temporal order is independent of our thought and language, then so are the modal aspects of reality. And these are in part universal, not exclusively particular, aspects'.<sup>360</sup> Moreover, 'the precise qualities of particulars are themselves particular and unrepeatable ... irreducibly relational and historical'.<sup>361</sup> Just so, we can distinguish between the two: particularity is determinateness, universality is determinability. That is, '[o]nly the past alone is fully determinate within the limits of causal possibility. These limits are just the determinateness of the past as capable of being superseded by some kinds of successors but not by other logically conceivable kinds'. Alluding to an example of Bergson's, he describes this as follows:

'Before one cuts an apple in two, although there is not a possibility as determinate as either half which later results from such a cut, there is clearly the possibility of "somehow halving the apple". Actualizing a possibility is

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<sup>358</sup> *CSPM* pp. 92-94.

<sup>359</sup> *Ibid.*, p. 61.

<sup>360</sup> *Ibid.*, p. 62.

<sup>361</sup> *Ibid.*, pp. 63-64.

providing a determinate for a less definite antecedent determinable. Actuality is thus truly more than antecedent possibility, given a proper understanding of the latter ... [P]ossibilities are determinables not determinates. The apple can be halved *somehow*, but to suppose that the determinate *how* that subsequently results is included in the *somehow* is just to deny the distinction, determinable-determinate ... Given a determinate *how* we can relate it to the *somehow*, but given only the *somehow* we cannot relate it to a determinate *how* ... The "this" of an actuality simply has no advance status, modal or otherwise. Creativity does not map the details of its future actions, even as possible'.<sup>362</sup>

What Bergson's illustration proves is that both elements must be experienced or be capable of being experienced and this is only possible in the middle; that is, in the midst of a singular unifying temporality.<sup>363</sup> Insofar as this may be understood to coincide with the creative advance in and through which we experience our own duration, our own continuity as living selves, then we can be relatively confident of correctly distinguishing the virtual and the concrete. We simply have to enquire as to whether what we are addressing can be qualitatively experienced and to situate ourselves in its flow, its unfolding continuity. It is this wholly qualitative conscious awareness of our reintegration into the duration of the things that marks out the difference between this and any quantitative representational scheme.

### **Thinking Beyond the Determination and Application of Rules**

We can see then how we need our abstractions; they are useful constructs, tools. The problem arises when we begin to think of them as real, when we forget that they are symbols pointing to and participating in a reality beyond them. But we have forgotten how to think beyond the 'things' arrested from experience. As Deleuze puts it: 'Proceeding "by dissociation and division", by "dichotomy", is the essence of life'.<sup>364</sup> So the real problem becomes how to uncover the different processes by way

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<sup>362</sup> *Ibid.*, pp. 64-65.

<sup>363</sup> Cf. Deleuze (1988).

<sup>364</sup> *Ibid.*, p. 94.

of which legal institutional knowledge becomes actualised, rather than how the terms of any dualism are associated or integrated.

What is the relation of the universal to the particular? How do we decide whether a general rule applies in a particular case? How do the two meet? It is precisely this way of thinking, which understands the relation of particulars and universals as a meeting of oppositional terms or a synthesis of opposites, which is at issue here, proceeding as it does by way of linear progression from one immobility to another. Whether we think that it is by universals or by attention to particulars that our decision is controlled, or by any combination of these, any way of thinking that understands inner qualities or processes as determinate is not so much a discovery of movement and change as a slowing down of it; in other words, as we *define* we *confine*.

Bergson's real contribution here is his identification of two ways of thinking: the first assumes the possibility of reflecting on what is near, conceptualising reality and shaping it into credible and distinct objects;<sup>365</sup> the second proposes that we allow ourselves to be placed within the flow of experience, to 'enter into' it and identify ourselves with it. It is this second way that Bergson calls intuition, which is similar to the way in which we might identify ourselves with a character in a novel.<sup>366</sup> But the essential difference between our reading a novel and our reflecting on a decision in a court of law is that the former unlike the latter can actually be understood as present experience. Once this difference is grasped, Bergson's model of 'intuition' may be seen to open up a way for the reconstruction of legal institutional knowledge: first, legal theory and legal practice should be understood as imminent within each other; second, the differences between them are not external relations but should be understood in terms of internal resonance; third, our understanding of legal knowledge finds its basis in our awareness of *durée*.<sup>367</sup> Perhaps the most important difference between representations of knowledge as real movement and relative

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<sup>365</sup> MacCormick's "thought objects", institutions, are an example – as are techniques and categories such as identifying the problem, the situation, the criteria, and so on – a procedure curiously at odds with the continuous nature of the living reality of experience itself.

<sup>366</sup> See Bergson (1911).

<sup>367</sup> Wood (2003), p. 235.

movement concerns the latter's notion of movement as instrumental, quantitative and transitional as opposed to the former's idea of it as continuous, indivisible and transitive.<sup>368</sup> Of course, this does not mean that real movement is without composition or arrangement, only that it is a 'fuzzy aggregate'.<sup>369</sup>

## Conclusion

The dominant highly structured, hierarchical model of institutionalising knowledge as law assumes almost unhesitatingly the ontological and epistemological inheritance from the rationalist tradition. Based largely on immobile and instrumental notions, law as structured institution orders a world of distinct states, stages or phases and, to analyze these, attempts to reduce the real movement of knowledge to its relative positions and functions between these. Because the flow of knowledge is a complex movement of ever-changing, immanent relations, it seems less demanding to analyze its singular, unifying flow in terms of discrete, immobile and stationary objects. But the flow of knowledge is not discrete, neither does it exist apart from the system of social relations in which it occurs. So we need to constantly remind ourselves of the uninterrupted nature of this flow, its lines of becoming that allow for and reveal the continual participation of every point within every other. This alternative approach based on process theory is not restricted by the number of connectable points that describe or compose it; it has no origin or destination, only middle. However, this middle is not to be understood as a position relative to other points, and from which these can be observed and negotiated; rather, it is a field of interactive tensions and stresses where, entering into the flow, we can follow its movements and changes. In this sense a process reconstrual of law can be both useful and practical. But this shifting of emphasis is really no more than a rediscovery of hidden tradition, in the absence of which we have all too often allowed ourselves to assume uncritically, often unwittingly, the idea of knowledge as instrumental, always-already convenient and available. We need to rediscover this healthy alternative understanding.

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<sup>368</sup> See Deleuze (1991).

<sup>369</sup> That is, 'without division into shares, in a space without borders or enclosure' (Deleuze and Guattari (1988), p. 380).

However, even the more socially aware forms of understanding the legal decision making process still rely to some extent on this idea of separate but connectable domains. Paying attention, as Bankowski calls it, requires more than simply identifying prior positions and taking up a mediating position in between. It must also include an understanding of how this 'middle' pre-exists as a field of interrelations and interpenetrating tensions, ontologically prior to any of the abstracted points that we then describe and attempt to 'connect'. Engaging with and immersing ourselves within this complex flow of knowledge and experience will require a more sophisticated understanding than the idea of any transfer and exchange of knowledge between two separate but connectable poles allows. It will require thinking about the way we think about law, thinking from *within* the flow, not so much adopting the position of an ideal, impartial spectator as adopting the position of each and every ordinary, partial, involved participant, understanding a narrative's flow *from within*. And what this suggests is a thorough-going empiricism in which primacy is conferred on process, change, movement, complexity, transformation and flux: the becoming of things over being, process over substance, change over order and stability. This is what Bergson refers to as *durée*: the indeterminate region in which there is no longer any sense of connections but where the interrelations exist in their own right prior to any identification of abstracted points. It is this field of relations that must, if anything, be understood substantially. Law, understood simply in terms of the institutionalizing of patterns of behaviour in terms of a system of rules, can never be anything more than this structure that is created and utilized retrospectively. In what follows I will demonstrate how process thought can provide an adequate alternative conception with a prospective orientation.

## CHAPTER SIX

### TWO WAYS OF THINKING; TWO TYPES OF KNOWLEDGE

Traditional notions of law rely on familiar dichotomies: thought and action, meaning and application, rule and fact. One example of this is the dialectical relationship of correspondence between universals and particulars. When law is conceived in static terms, the legal task is understood in terms of negotiating the gap between these two essentially separate but connectable domains; that is, securing the flow of knowledge, the delivery of communications, between them. Informed by this substance-based immobility, an important challenge for legal theorists and practitioners is to maintain the integrity of legal knowledge involved in this ‘transfer’ between one domain and the other. We can see how Ward LJ attempts to do this with his concluding remarks in *Re A*, offering his description of the justifying relationship between reason and decision that helps to secure and seal the gaping hole that has opened up in the seamless web of law (though nearly undoing himself as he appears to set *Re A* in a category of its own but not quite: ‘this is a very unique case’).<sup>370</sup>

As a result of this, much of any sense of urgency within the legal theoretical arena has naturally gravitated towards the need for a more sophisticated understanding of the relationship between these separate poles (rules and facts, universals and particulars). But the problem with such an understanding, sophisticated as it is, is, as we have seen, that the underlying notion of legal knowledge on which it is based is still one of correspondence between connectable positions. Legal knowledge is still understood as something to be passed on, expanded and developed to meet the practical requirements of everyday life, a ‘form’ of knowledge directly ‘applicable’ to action in practical situations. Such a view unashamedly confers ontological priority upon categories of order, stability and communicability, constructing and categorising a world of disparate entities to which legal knowledge can then be applied in a top-down hierarchic, causal mechanistic way. This type of approach to legal decision making precludes us from seeing the

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<sup>370</sup> *Re A*, at 1018.

extent to which rule determination and rule application, universals and particulars, legal categories and living experience, already permeate each other, benefiting from this interpenetrative difference.

However, taking our cue from Henri Bergson, I have argued that we should *not* say that law is a system of rules applied to facts or, indeed, any form of reflection on this. On the contrary, rule determination and rule application, legal universals and legally relevant particulars, the ways in which we understand certain particulars as instantiating certain universals, our system of laws and our processes of decision making, are all ‘snapshots’ of reality, images extracted from an otherwise continuously moving and changing flow, simply ways that we break into this, halting, holding and handling what we abstract, in order to try and make sense of its elusive, enigmatic, otherwise inexpressible qualities. We can understand this as we realise that even our attempts to ground the act of giving justifying reasons for a legal decision in the particulars of the lived situation to which that decision refers is already something beyond the decision itself. A decision cannot be ‘caught’ because once a decision is made, it is gone: it is momentous, and all that we observe of it is its trace, the multiplicity of points through which the movement has passed, rather than the unity of the action experienced. In this sense, law can never deliver the reasons to justify a decision. Some gap always remains, the distance represented by the question concerning the appropriateness of *that* universal continuing into *these* particulars. (In the same way, we cannot capture the living experience of conjunction in the legal representation of it). Rather, we always miss the target we aim at, the decision making act always remaining a decision already presented. Clearly, there is a flow of knowledge, but, on Bergson’s view, not in the sense of some derived relationship connecting discrete spatial positions. For that to be true we would have to be able to completely isolate the different elements that occupy those positions so that we could identify them conclusively as like or unlike each other, spatially distinct and bounded (and to be connected they must be separate, they must each have a boundary and there must be a space between them). In spite of this, we continue to adhere to precisely this sort of unrealistic approach when we think about law as a system of known rules applied to facts. In addition, I have suggested

that utilizing Deleuze and Guattari's concept of the rhizome can help us to see how the movement or spread of information in law is best described as a forever jumbling up of distinct phases, stages and patterns, a complex form of growth like that associated with the roots of certain plants.

### **Employing Deleuze and Guattari's Metaphor of Rhizomic Communication**

Christine Battersby<sup>371</sup> highlights five features of Deleuzian 'rhizomatics' that may help to show the relevance of this way of thinking about legal knowledge. First, the rhizome involves the bringing together of diverse elements. Second, the rhizome brings together elements that are not usually thought of as belonging together: it is based on heterogeneity. Third, the rhizome is not reducible to a series of points or individual parts: it is 'a non-localisable relation sweeping up the two distant or contiguous points, carrying one into the proximity of the other'.<sup>372</sup> Fourth, the rhizome is 'subject to ruptures, breaks, discontinuities anywhere within it while retaining its self-organizing structure. Fifth, and finally, the rhizome cannot be traced back to a principal root or source. Rather, it is a form of nomadic mapping that 'moves across the landscape without fencing in the land'.<sup>373</sup> Rhizomes appear without recognisable beginnings or ends but are always an in-between; a middle that allows for the continual participation of all points within each other, even if in reality one point does not become the other, or achieve correspondence with it. In this way, the apparent stabilities of universals and particulars might be exchanged for the awareness that although we live in a world of change the processes of change are imperceptible to us. In this sense, the relationships between universals and particulars, rule-determination and rule-application, operative and evidentiary facts, legislation, adjudication and enforcement are not simply connective; rather, they involve the becoming of law through a movement that is neither universalist nor particularist, neither containing nor instantiating but always somewhere in-between. In this way, the assumption of a boundary between the legal and the extra-legal, law

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<sup>371</sup> Battersby (1998), p. 192.

<sup>372</sup> Deleuze and Guattari (1988), p. 293.

<sup>373</sup> Battersby (1998), p. 192.

and life must give way to an understanding based on interconnections between different patterns of relations.

As an institution, law relies on explicitly formulated rules for its functioning, but law's institutional context relies on much more than explicitly formulated or formulatable rules. Through socialisation, judges internalise law-specific distinctions and their legal expertise is learned within the context of their discursive practice. This forms an unarticulated background that undergirds a judge's representation of their decisions. In this sense, the application of a rule is really not an individual achievement at all but derives essentially from collectively shared meanings, within a tightly related network of communications in and through which these shared meanings are attained. In this chapter I suggest that attempts to manage judicial decision making actually involve *rhizomic systems of communication* rather than series of linear connections. My aim is to demonstrate that the kind of continual movement being alluded to here already permeates the practice of law, at all levels, thus helping to prepare the way for a novel understanding of the diffusion of legal institutional knowledge.

It is often said that law is the prime example of a hierarchical institution, where normative procedures structure, order and shape all of its aspects. A taxonomic and classificatory urge controls the admissibility of its constituent parts - its formal and substantive rules, its rules of evidence, its requirements of coherence and consistency, its customs and practices, principles and values - all neatly ordered from the top down. Accordingly, legal professionals can be seen to approach their work in a pseudo-scientific manner, with judges in particular concerned to find the best possible 'fit' of rules to facts, bridging the gap under the watchful eye and guidance of their peers and counterparts, whose control is exercised through procedural techniques such as the doctrine of precedent, *ratio decidendi*, and so on; indeed, any appreciation of law as an institution depends on a proper understanding of this hierarchical ordering of decisions. Simply looking to an individual judge's decisions in isolation will tell us very little. In such an environment only those aspects of a decision that can properly be said to form part of the *ratio* of the decision

are authoritative, everything else is *obiter dictum*. The more that a form of reasoning can be considered part of the *ratio* of a decision, the more chance it has of being taken up in future decision making. The more impressive an individual judge's justification of their decisions, the greater the impact and the more authority their reputation acquires.

But there is a flip-side to all of this, too. As we see in *Re A*, decision making takes place under pressure of time and a lack of resources (and there is the inevitable threat of one's decisions being scrutinised by one's peers on appeal). The peculiar nature of the rules of evidence, and burdens of proof, and their corresponding impact on the public acceptability of decisions all, from time to time, provide sources of frustration for the judicial decision maker. Therefore, in the real world of judicial decision making there is a true sense in which, in tailoring his decisions, a judge 'cut his suit according to his cloth'. So law is a system of rules, yes, but it is a *very peculiar* system of rules, with the hierarchical ordering of its doctrine of precedent and *ratio decidendi*, examples of this. Precisely because of this, frustrations appear over and over again, and we find that from time to time a decision is 'justified' where the facts and the rules do not overlap but public opinion or social mores have moved on to a position where the reasons given are deemed *sufficient to persuade* that the decision is acceptable, or a decision is deemed right and proper and in line with modern understanding, but that *cannot* be justified purely on legal grounds.<sup>374</sup>

In this way, much of a judge's work in judicial reasoning can often involve cutting across recognised boundaries, developing new lines of precedent. Sometimes it will seem appropriate to question whether this is a new line of thought or a development of a previous one. Here, there is always a tension between the universal and the particular and, in such an environment, where the direction of the task seems co-determined by the interaction of these, this can often lead judges and others to reflect, as we have seen, that definition and the application, theory and practice, are perhaps not really quite as far apart as they are sometimes thought to be.

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<sup>374</sup> For example, see the conflicting opinions of the judges in *Lord Advocate's Reference No. 1 of 2001*, 2002 SLT 466; 2002 SCCR 435.

But it can be rather unsettling to consider theory and practice as something other than two distinct things, two poles apart. In the first place, this presents a challenge to the dominant, hierarchical theories of law as institution. In the second place, this may also suggest that the ideological reading of the 'communicational transparency'<sup>375</sup> of law as a cumulative flow of information between areas of production and exploitation is itself a false one; that is, law, its manufacture and use, has always operated rhizomically. We can see how such a challenge to traditional understandings of law might be presented by looking at Edward Levi's study of legal decision making.

### **Edward Levi and the Façade of Formal Justice**

According to Levi,<sup>376</sup> the notion 'that the law is a system of known rules applied by a judge' is no more than pretence; rather, 'the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied'. Moreover, 'the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them'.<sup>377</sup> So in this sense, 'the basic pattern of legal reasoning is by example. It is reasoning from case to case' by means of a 'three-step process' whereby 'a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation'.<sup>378</sup>

As Levi points out, this method of reasoning brings to view 'characteristics which under other circumstances might be considered imperfections', in particular, that 'change in the rules is the indispensable dynamic quality of law'.<sup>379</sup> And yet, although 'it cannot be said that the legal process is the application of known rules to diverse facts', nonetheless 'it is a system of rules; the rules are discovered in the process of determining similarity or difference', and 'the existence of some facts in common brings into play the general rule' even though 'no such fixed prior rule

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<sup>375</sup> See, generally, Lyotard (1984).

<sup>376</sup> Levi (1948).

<sup>377</sup> *Ibid.*, p. 503.

<sup>378</sup> *Ibid.*, p. 501.

<sup>379</sup> *Ibid.*, p. 502.

exists'.<sup>380</sup> Moreover, 'there is an additional requirement which compels the legal process to be this way .... The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas'. In this way, 'laws come to express the ideas of the community .... molded for the specific case'.<sup>381</sup>

Levi maps out the development of *danger* as a legal category, and the flow of ideas and definitions in and out of the legal system. First, a distinction is drawn, observed (though not articulated), and then refined. Afterwards, in a later case, the distinction finally achieves code value within the system. As Sean Smith observes: '[p]atent dangers are illegal: they give rise to liability. Latent dangers are legal: they give rise to no liability. The one distinction is superimposed on the other ...., the distinction between patent and latent re-enters the legal system. It now has orientation value' and 'can be used to guide further operations of the system'.<sup>382</sup> But it is important to realise that this '[r]e-entry cannot "solve" the paradox [of observation]', writes Smith, 'it merely disguises it'.<sup>383</sup> Although the concept 'is treated as fixed and unchanging .... the context or precise nature of the distinction is constantly shifting'.<sup>384</sup> Indeed, by explicit reference, implicit reference and an 'additional distinction (!) between explicit and implicit case reference' we now learn 'how to reconstruct the history of these cases. The "authority" is *Dixon*. The "development" is *Winterbottom*. The *Longmeid* case, therefore, represents the re-entry of the distinction between patent and latent dangers in the legal system'.<sup>385</sup> Finally, in the next phase, the distinction 'becomes condensed and confirmed .... Not only are different cases treated as identical, but the same distinction gains in authority from its repeated application in ... new contexts and acquires additional meaning'. Eventually, '[e]ven the confirmations ... get condensed', the distinction is 'turned ... into a contradiction', and there is 'a crossing of the code values themselves'. In other words, what was once the exception now becomes the rule.<sup>386</sup>

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<sup>380</sup> *Ibid.*, pp. 502-503.

<sup>381</sup> *Ibid.*, p. 503.

<sup>382</sup> Smith (1995), p. 195.

<sup>383</sup> *Ibid.*

<sup>384</sup> *Ibid.*

<sup>385</sup> *Ibid.*

<sup>386</sup> *Ibid.*, p. 196.

Particular ‘attention must be paid to the process’,<sup>387</sup> says Levi, what is important is the mechanism of transformation. The law is both certain and uncertain, changing and unchanging. It is an example, we might say, albeit a sophisticated one, of an ancient abstraction, the *unchanging subject of change*: ‘[t]he law forum is the most explicit demonstration of the mechanism required for a moving classification system’ based on ‘the presentation of competing examples’.<sup>388</sup> So, while it is true that, ‘[i]n case law, when a judge determines what the controlling similarity between the present and prior case is, the case is decided’, nonetheless, it is with ‘a set of .... satellite concepts that reasoning by example must work’. And, crucially, ‘no satellite concept, no matter how well developed, can prevent the court from shifting its course, not only by realigning cases, but by going beyond realignment back to the overall ambiguous category written into the document’, a procedure which, ‘in other words, permits the court to be inconsistent’.<sup>389</sup>

Levi’s account of the process is clear and precise: the ‘movement of concepts into and out of the law’ begins with the recognition of similarities and differences, and the emergence of a word which, when accepted, ‘becomes a legal concept’. Even so, ‘its meaning continues to change’, since ‘the comparison is not only between the instances which have been included under it and the actual case at hand, but also in terms of hypothetical instances which the word by itself suggests’. At this point, ‘reasoning may ... appear to be simply deductive’, though ‘[i]n the long run a circular motion can be seen’<sup>390</sup> where concepts are built up and fixed before finally breaking down again. During breakdown, ‘there will be the [inevitable] attempt to escape to some overall rule which can be said to have always operated and which will make the reasoning look deductive’. But ‘[t]he statement of the rule’ is mere ‘window dressing’, and ‘it can be very misleading’, for ‘it will have to operate on a level where it has no meaning’.<sup>391</sup> For instance, ‘[p]articularly when a concept has broken down and reasoning by example is about to build another, textbook writers, well aware of the unreal aspect of old rules, will announce new ones, equally

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<sup>387</sup> Levi (1948), p. 503.

<sup>388</sup> *Ibid.*, p. 504.

<sup>389</sup> *Ibid.*, p. 505-506.

<sup>390</sup> *Ibid.*, p. 506.

<sup>391</sup> *Ibid.*, p. 507.

ambiguous and meaningless, forgetting that the legal process does not work with the rule but on a much lower level'.<sup>392</sup>

In seeking to expose the “lower level” operations of the common law process’, Levi, Smith observes, ‘stresses the contingency of change’, noting ‘how the legal system fumbles its way in an environment which is in principle inaccessible to it and can only be reconstructed using its own categories, its own distinctions’. Through its use of ‘distinctions, the legal system ... break[s] up the “seamless web” of decisions based on decisions, construct[s] lines of argument, trends and patterns of development ... observes everything, including itself’.<sup>393</sup> Here, with the construction of trends and patterns, the system receives its pedigree, and we discover ‘one way of neutralising the paradox of the legal system’.<sup>394</sup> To put it another way, as cases are ruled in and out as authority, ‘history has to be rewritten’.<sup>395</sup> ‘The key thing to note’, says Smith, ‘is that these are not separate operations but separate ways of looking at the same operation – they occur simultaneously ... This is redundancy ...., the attempt to reduce the element of surprise in the system ... to convince that a particular decision is compelled by the history of the system’.<sup>396</sup>

For Levi, therefore, the attempt to ‘soar above the cases and find some great overall rule which can classify the cases as though the pattern were not really a changing one’<sup>397</sup> is ‘mere window-dressing’.<sup>398</sup> But, for Smith, Levi ‘dramatically underplays the significance of legal reasoning’ being always ‘at pains to stress the contingency of the system’. For Smith, rather, ‘the decisional structure of law requires a certain style of reasoning’, and systems theory describes this ‘particular account of reasoning as taking place within the context of the common law process, and of the common law process within the legal system as a whole’.<sup>399</sup> It thus ‘compels us to look at the role of law in society and therefore, here, the role of

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<sup>392</sup> *Ibid.*, p. 507.

<sup>393</sup> Smith (1995), p. 192.

<sup>394</sup> *Ibid.*, p. 197.

<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*

<sup>397</sup> Levi (1948), p. 510.

<sup>398</sup> *Ibid.*, p. 507.

<sup>399</sup> Smith (1995), p. 200.

common law and legal reasoning in society ... [L]egal reasoning is important not because it is caught up in resolving the internal paradoxes of the system, but because it ultimately provides the link between law and community, between system and lifeworld'; ... although 'there is good evidence that courts do resolve paradoxes, and ... this distinction between law and community ... is just another way of resolving the paradox. But ... the question for systems theory now becomes whether this is a good way of solving the paradox, and to ask whether there are not better ways'.<sup>400</sup>

What Levi shows us, concludes Smith, is that '[l]egitimation does not come through legal reasoning but through the legal process. It is law as system ... that legitimizes itself'. What this means is that 'there is no simple exchange of ideas between law and its environment. Any idea has to be read together with the past and the future decisions of the system which gives it its legal sense ... What is important is not so much the substantive values of the ideas themselves, but the institution of a procedure of revisability ... a procedure [that] provides the forum for the making and the unmaking of ideas ...'.<sup>401</sup>

Taking account of Levi, we can affirm the notion that judges' actual experience of decision making better resembles a Deleuzian rhizomic web than an hierarchically ordered structure of linear progression, its natural tendency to resist systematization, to spread out, integrate and incorporate in all directions, a 'self-organizing, non-linear, and multi-stranded' organism, growing, as it were, 'from the *bottom up* and not from the *top down*'.<sup>402</sup> In this way, the metaphor of the rhizome helps to promote this sense of an assemblage of incongruent parts, the bringing together of elements not normally considered as belonging together. This might help us to understand how it seems that so much of a judge's work in decision making actually involves developing lines of thought that cut across boundaries. Just as the rhizome is not reducible to an ordered sequence of individual component parts but is 'a non-localisable relation sweeping up the two distant or contiguous points, carrying

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<sup>400</sup> *Ibid.*, p. 201-202.

<sup>401</sup> *Ibid.*, p. 203.

<sup>402</sup> Cooper (1998), p.143.

one into the proximity of the other',<sup>403</sup> so, in the courtroom, the rule that is, supposedly, to be 'applied' to the facts is actually just as much in wait of its appearance on the basis of these facts. In this way, the process of judicial decision making as a whole is perhaps more accurately described under the metaphor of the rhizome given this inherent vulnerability to irruption, disruption or interruption, all without fatally undermining its continuing capacity for self-organization.

Furthermore, in the same way that a rhizome does not appear to have any identifiable start point, so, as Levi claims, concepts, definitions and lines of reasoning seem to move freely across the judicial landscape without identifiable start or end points. In constructing their opinions, judges can actually be seen to use deliberate engagement strategies within their *obiter* remarks to achieve this. For example, a point of view is expressed that does not contribute to the overall ratio of the case, and may even be part of the minority view, but which is intended to set out an alternative strategy. While it might not impact on the case at hand in any significant way it may nonetheless be picked up later and used by another judge somewhere else in support of a future decision. In this way, although it does not have the force of a ratio in terms of the doctrine of precedent, it is accorded informally and assumed unofficially to have some credible force simply by way of the reputation of the judge, and, by extension, the status of the court in which it was delivered. Like the analogue of the rhizome, it is simply not possible to reduce the organization of legal knowledge in common law reasoning to a single source; instead, it cuts across established lines creating, combining and integrating.

While such a view may be considered a challenge to both dominant hierarchical and ideological theories of legal institutional decision making there is really nothing new in this. The simple fact is that legal knowledge has always operated as a rhizomic system of interconnections and intersections across and between professional groups. It is simply quite false to think that law consists in the simple application of known rules to legally relevant facts.

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<sup>403</sup> Deleuze and Guattari (1988), p. 293.

## The 'Becoming' of Law in Legal Decision Making

A second effect of viewing the organization of legal knowledge as a continuous process of communication follows on from this. As we have seen, under a traditional common law model of legal reasoning, legal institutional knowledge is understood as a connecting of two or more separate points. Yet, as Bergson states, and as our look at Levi and *Re A* has confirmed, we cannot say that knowledge progresses in any uniform way along a pre-arranged pathway. rather, instead of some rigid adherence to the dogmatic assertion that a rule is applied wherever the conditions of its application are met, where the emphasis is on the halts, 'universals' and 'particulars' as in some way ontologically prior to our understanding of the nature of the relationship between them, we should perhaps more correctly say that 'there is a becoming of law from universals to particulars'. In this way, our attention is drawn away from any suggestion of a transition between two definite points, or, indeed, of any notion of simple correspondence, and only towards that 'irreducible line that passes in and between the two ... carrying them both away in a creative process whose inventions and forms do not exist in advance'.<sup>404</sup>

For legal decision makers the continuity of becoming from rules to decision is realized through engagement with particular local fact situations. In this way, not only does the decision and its effects, both legal and personal/social, get communicated but a whole network of interrelations works together to make this happen. It is not just about communicating decisions, it is more about a type of personal, social and political engagement: reasons need to be accessible and meaningful for law's audience, its users. In Levi's study we can see this emerging. Legal decision makers, at whatever level, mostly do try to relate their decisions to the concrete situations before them. In this sense, the development of law and legal change does not occur in abstraction, but in and through the real world where men and women live and work. In reality, rule determination and rule application,

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<sup>404</sup> Wood (2003), p. 63.

universal and particular, actually ‘melt into and permeate one another, without precise outlines’.<sup>405</sup>

## Conclusion

Perhaps we need to reassess our adherence to the logic of institutionalization that segments legal knowledge into separate phases. There is a good case to be made for an account of law and legal decision making that cuts across these quite arbitrary divisions and focuses more on their immanent relations. This is important because while it is true that we do act and think in law as though we possessed a storehouse of ready-made, clearly defined legal knowledge awaiting its application and implementation, nonetheless, as we have seen this idea is not as helpful as we sometimes think, for the delineation of legal knowledge is not quite as distinct as it appears. In our examination of both the macro and micro levels of decision making, in *Re A* and in Levi’s account of decision making, we can begin to see how this comes about.

First, an obvious tension appears in law’s prescriptive framework: from the beginning it is clear that there is an *uncomfortable coupling* of two very different versions of events running in parallel. There is a deep suspicion that this tension exists because these two versions or understandings of what is going on belong to *two quite different worlds*, and that the objective events or circumstances to which they refer and from which they derive their meaning are really quite different ‘entities’ in each. While decision makers continue to profess adherence to the established institutional order to satisfy the burden of decision making beneath the weight of an ever-changing social, political, cultural and religious climate that relentlessly requires results under pressures of time, etc, it is clear that, in making those decisions, judges actually articulate a wider, more complex, more openly receptive approach than is often suggested by the simple and straightforward application of rules to factual situations. There is more to decision making than is accounted for in the ‘official’ version.

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<sup>405</sup> Bergson (1911), p. 104.

Second, as we saw in *Re A* and in *Levi*, the connections between legal concepts, doctrines and procedures described in legal judgements are not always as straightforward and obvious as they are assumed to be. Therefore, alongside of the official, hierarchical, institutional version of how law operates appears a more pragmatic account that better corresponds to what we actually find to be the case, an ‘unofficial’ version that helps to engender trust, legitimate and domesticate the official version. As well as being institutions, formal legal contexts are also ‘practices’, shared traditions in and out of which legal practitioners live and work, and in this latter sense, the structure of legal knowledge takes on a more narrative form.

Third, by utilizing the notion of *becoming*, it is possible to cast a spotlight on some of the difficulties involved in the making of decisions in real-life situations. For example, there is a problem in deciding where exactly thinking, deliberating, reasoning *about* a case ends and acting *within* it begins, and a gap between rule determination and rule application that has important implications for decision makers and addressees of decisions alike. We have seen how, in rule-based law, law’s decisional imperative and the collapse of the supposed symmetry between addressor and addressee that alone could redeem the rule-based form, collapses and how, then, because of this, a continued adherence to rule-based law-giving performs a travesty that cannot be compensated for. Here, we see how law is violent, a double-edged sword, cutting into and out of the continuing flow and flux of life with its requirement for the rational resolution of rational conflict and its use of abstractions and representations to perform this; manipulating, controlling and transferring across fields, misrepresenting on the one hand and silencing on the other. But it is precisely because of this that judges must then begin to equip themselves bravely with abilities honed through experience and training to translate ideas across fields and disciplines, blurring boundaries, entering into the living narratives that are coldly set before them, frozen from time. Any judge will need to be ‘a man for all seasons’ if he is to sit straddling all the different social, cultural political, cultural, religious and even legal boundaries that this entails.

In this sense, perhaps the most urgent task facing judicial decision makers, law makers and other legal professionals is to re-engage with legal institutional knowledge as it really is, and not just as it is sometimes supposed to be; that is, not in terms of an either/or preconception of reality as separated into prior domains that structure and prefigure reality determining what is experienced, but as a simultaneously ‘not only/but also’, interpenetrative, relational account of legal determination and legal application. But this is not as easy a prescription to follow as might at first appear. We are much more inclined towards order, stability and predictability than we are to opening ourselves up to experience and entertain elements of the novel and the surprising, its irruptions, disruptions and interruptions. Most of all, what this suggests is that we need to stop thinking about law under the terms of its decisional imperative and more in terms of a forum for encouraging free and unrestricted dialogue, an opportunity for distilling and discovering ideals that will lure us into future commitments.

Is this still “Law”? On one reading, Christodoulidis’s perhaps, maybe not. But if we are able to harness such a *re-constructive* understanding of ‘law’ in this way it might be possible to find a way in which to illuminate some current disputes while also remaining continually open to the possibility that some of our most deeply held doctrinal commitments no longer offer living possibilities. Perhaps the incommensurability of legal decision making with which we have been struggling is not so much a herald of the undoing of law as it is a statement of the conditions for its progress. In the next chapter I consider one way in which we might develop this approach.

## CHAPTER SEVEN

### MICHAEL POLANYI'S 'TACIT KNOWLEDGE'

#### What is 'Tacit Knowledge'?

In his seminal volume, *Personal Knowledge*, Michael Polanyi writes that

'[t]he act of knowing includes an appraisal; and this personal coefficient, which shapes all factual knowledge, bridges in doing so the disjunction between subjectivity and objectivity'.<sup>406</sup>

One of the strengths of Polanyi's thought is its strong rejection of dualistic tendencies; such as between theoretical and practical knowledge.<sup>407</sup> For him, '[a]ll knowing is personal knowing – participation through indwelling'.<sup>408</sup> Therefore, the idea that there could be such a thing as 'objective knowledge' is mistaken and destructive; rather, all knowledge involves the active participation of the knower. The act of knowing is skilful action.

For example, imagine that I wish to construct a model airplane. In order to achieve this from a boxful of plastic pieces of different shapes and sizes I might make use of a set of diagrams and instructions. Each diagram is an explicit representation of something other than itself, a model airplane. It is, in this way, similar to a system of rules, aimed at bringing about purposeful action. But in order to utilize the potential of those diagrams I will first need to be able to relate them to the physical world outside of them: I must *read* the diagrams. In fact, I must do three things: identify the pieces that I have, choose what I want to make, and decide how to put them together. According to Polanyi, all such acts are acts of skilful judgement

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<sup>406</sup> Polanyi (1962), p. 17.

<sup>407</sup> See Tsoukas (2003), pp. 412ff. Tsoukas account of Polanyi's understanding of tacit knowledge and his assessment of its implications for an epistemology of organizational practice informs much of the argument in this chapter and the examples employed here, if not taken directly from Polanyi, are either freely adapted from or inspired by Tsoukas's argument.

<sup>408</sup> Polanyi and Prosch (1975), p. 44.

and they are both cognitive and sensual.<sup>409</sup> The diagrams assist me in constructing the model, matching individual pieces to their diagrammatic representations, but this still requires some personal judgement on my part to match the two, a mental and physical effort, in short, a skilful action. Personal judgements such as this are involved whenever we try to bring together our experience of the world and our abstract representations of it.<sup>410</sup> We often say that certain laws can predict certain outcomes, but what we really mean is that *we* can predict certain outcomes by *using* these laws as *tools*. The outcomes are not given; rather, they need to be calculated, checked and authenticated, comparing expectations with results, calculating margins for error and assessing and reassessing the reliability of our rules.<sup>411</sup>

In arguing that our tools of perception, intuition and reasoning are not self-applying but require an action on our part in order to apply them, Polanyi, like Whitehead,<sup>412</sup> emphasizes the importance of the physical body in the act of knowing:

‘the way the body participates in the act of perception can be generalized further to include the bodily roots of all knowledge and thought ... Parts of our body serve as tools for observing objects outside and for manipulating them’.<sup>413</sup>

In this sense, Polanyi argues that all acts of knowing are skilful presentations by the human agent which involve a ‘personal coefficient’.<sup>414</sup> Moreover, each skilful performance ‘is achieved by the observance of a set of rules which are not known as such to the person following them’.<sup>415</sup> Consider the driver of a motor vehicle. Although not well-acquainted with the scientific principles of internal combustion such a driver may nonetheless be quite capable of driving proficiently. She will move

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<sup>409</sup> Polanyi (1962), pp. 10-20.

<sup>410</sup> In just the same way, in MacCormick’s example of ‘queuing’, I must make a personal judgement as to when and where a ‘queue’ begins and trust in my skill to do this.

<sup>411</sup> Polanyi (1962), p. 19, which is just another way of affirming the point made earlier that rules are not self-applying but involve the personal judgement of a human agent to assess if and how, and in what sense, the gap between representation and experience may be closed.

<sup>412</sup> Whitehead (1929) suggests that I touch ‘with’ my hand.

<sup>413</sup> Polanyi (1969), p. 147.

<sup>414</sup> Polanyi (1962), p. 17.

<sup>415</sup> *Ibid.*, p. 49.

off, effortlessly, from a stationary position and continue driving along a busy road, maintaining the car in a forward direction with good speed and with minimum discomfort to her passengers, accelerating and decelerating, changing gears up and down as necessary. Of course, if she were able, she might formulate rules based on scientific principles to explain why it is that the car responds in particular ways to the different actions she performs but it is not at all obvious that knowing any of these scientific rules would necessarily make her a better driver; much less, that she would require to know anything about these rules simply to drive. As she learns to drive and becomes more proficient at driving any such knowledge will usually be held 'at the back of her mind', not *focused on* but taken for granted, accepted and held unconsciously. Just so, we might say that skills such as driving are not normally held to be accountable fully in terms of their particulars; indeed, these are often unknown to the person exercising the skill. Knowing *how* a car works will not of itself make someone a good driver.<sup>416</sup>

According to Polanyi, every 'mental effort ... tends to incorporate any available elements of the situation which are helpful for its purpose', even without the actor knowing them in and of themselves. Thus, it has a heuristic effect:

*'we feel our way to success and may continue to improve on our success without specifically knowing how we do it – for we never meet the causes of our success as identifiable things which can be described in terms of classes of which such things are members'*.<sup>417</sup>

Here, two types of awareness are involved. Polanyi uses another example to explain. Suppose that I am engaged in hammering a nail into a piece of wood. While I am aware both of the hammer and the nail, my awareness of the hammer is different to my awareness of the nail. Driving the nail into the wood is the main object of my concentration and I watch and correct my action as the effects of my hitting the nail drive it further into the wood: I am focally aware of the nail. I am also aware of the

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<sup>416</sup> *Ibid.*, pp. 88-90.

<sup>417</sup> *Ibid.*, p. 62.

hammer: I feel it clenched tightly in my hand. However, feeling the hammer in my hand is not the main focus of my concentration:

‘I know the feelings in the palm of my hand *by relying on them for attending to the hammer hitting the nail*. I may say that I have a *subsidiary* awareness of the feelings in my hand which is merged into my *focal awareness* of my driving the nail’.<sup>418</sup>

In other words, in performing an action, I am aware of some things that are not the main focus of my attention. More precisely, ‘in an act of tacit knowing we *attend from* something for attending *to* something else’,<sup>419</sup> which is why we always ‘know more than we can tell’.<sup>420</sup>

We can compare this understanding of skilful engagement with the legal method of deductive syllogism. On the one hand, we should note that on this understanding tacit integration cannot be undone: it is certainly possible to shift one’s attention away from the object of one’s concentration while driving a motor car or hammering a nail, often with significant results, but this will not take one back to the point of not knowing how to drive a car or hammer a nail. On the other hand, in the deductive syllogism we find that we can proceed step by step in a logical way from premises to conclusions and back again always without loss. In other words, because all the logical connections hold the direction is reversible. Now, if we think of a particular instance of judicial decision making, it should be clear that the moment of decision in which the judicial decision is made is essentially one of tacit integration, while the subsequent act of providing justifying reasons for that legal decision is essentially, as MacCormick argues, of the nature of explicit or deductive inference. Clearly, the two are not the same. While the latter may build upon the former and may even explain it for legal purposes, this, as Christodoulidis observes, comes too late to justify it, for there is no going back. What is purportedly a justifying reason may indeed provide a reason to explain why the decision, already

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<sup>418</sup> Polanyi and Prosch, 1975, p. 33.

<sup>419</sup> Polanyi (1966), p. 10.

<sup>420</sup> *Ibid.*, 4.

made, may now be used as a relevant datum for new decisions, but that is a quite different thing to saying that it provides the *justifying* reason in and through which *that decision* was made.

Clearly, much of this also taps into the familiar debate concerning the ‘judicial hunch’<sup>421</sup> and, in that respect, precisely what part is being played here by ‘discovery’ and what by ‘justification’. This distinction was first made by H. Reichenbach in order to differentiate between the description of the origin of a proposition (the ‘context of discovery’) and the demonstration of it (the ‘context of justification’); indeed, Reichenbach argued that

‘[t]he act of discovery escapes logical analysis; there are no logical rules that could be applied to the construction of a “discovery machine” that would assume the creative function of genius. But it is not the logician’s task to explain scientific discoveries; all the logician can do is analyse the relation between the facts as given and a theory that is presented to her or him that claims to explain this relation. In other words, logic is not concerned with the context of discovery’.<sup>422</sup>

All of which brings us back once again to the problem highlighted by Christodoulidis.

### **The Structure of Tacit Knowledge: Similarities with Whitehead**

As Polanyi describes it, the character of tacit knowing as ‘vectorial’<sup>423</sup> appears to embody the same sense of creativity that we find in Whitehead’s analysis of the three phases of concrescence in the becoming of an actual occasion of experience.<sup>424</sup> Polanyi explains what he means by reference to the way that a blind person might

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<sup>421</sup> See Modac-Truran (2001).

<sup>422</sup> Reichenbach, (1955), p. 199. See also, (1938), pp. 6-7.

<sup>423</sup> Polanyi (1969), p. 182.

<sup>424</sup> Polanyi (1966), p. 13.

feel their way by tapping with a stick, or the way that one might use a probe to explore a darkened cavern:

‘Anyone using as probe for the first time will feel its impact against his fingers and palm. But as we learn to use a probe, or to use a stick for feeling our way, our awareness of its impact on our hand is transformed into a sense of its point touching the objects we are exploring ... . [A]n interpretative effort transposes meaningless feelings into meaningful ones, and places these at some distance from the original feeling. We become aware of the feelings in our hand in terms of their meaning located at the tip of the probe or stick to which we are attending’.<sup>425</sup>

Of course, we could illustrate this with numerous examples from everyday experience. Tacit knowing permeates all of our daily living, from casual acts of observation to performing simple physical tasks. But the point is that, as we take on more specialized tasks, in order to accomplish these we find that we must first have internalized<sup>426</sup> new knowledge:

‘when we learn to use language, or a probe, or a tool, and thus make ourselves aware of these things as we are our body, we *interiorize* these things and *make ourselves dwell in them*’.<sup>427</sup>

In other words, by ‘indwelling’ in the tools that we use, we are able to use them as extensions of ourselves to increase our own powers and press outwards to further extend the boundaries at which we make contact with the world around us.<sup>428</sup> But for this to come about, for our use of such tools to become ‘natural’, this must be something in relation to which we necessarily offer uncritical acceptance: we do not and cannot question their usefulness. On the contrary, their usefulness is always

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<sup>425</sup> *Ibid.*, p. 13.

<sup>426</sup> Polanyi (1962), p. 101.

<sup>427</sup> Polanyi (1969), p. 148.

<sup>428</sup> Polanyi (1962), p. 59; (1969), p. 148; Polanyi and Prosch (1975), p. 37.

something presupposed, taken for granted, something which cannot be stated; otherwise, we could make no claims and assert nothing. As Polanyi puts it,

‘assertion can be made only *within* a framework with which we have identified ourselves for the time being; as they are themselves our ultimate framework, they are essentially inarticulable’.<sup>429</sup>

So, internalizing a tool to use it instrumentally in pursuit of some aim or goal enables the user to obtain new experiences that facilitate greater efficiency in carrying out appropriate tasks. Consider the novice rider. She has been told how to hold the reins, how to maintain balance and posture in the saddle and stirrups, where, when and how to give pressure when she wishes the horse to move and change direction or movement in a certain way. She feels the reins in her hands, her feet in the stirrups, the body of the horse beneath; but she has not yet learned how to correlate the responsive movements of the horse with their own bodily actions. Again, by contrast at the other end of the scale, an experienced equestrian will appear so much more skilled in riding, moving gracefully with her horse as if they were one. This is because all those skills that appear to the novice as things to be remembered and attended to with concentration have become actions of which the experienced rider has become unconscious. They are skills that have been mastered and need no longer to be focussed upon but are now used ‘naturally’ for the purpose of guiding and instructing the horse. Having thus developed an *unawareness* of certain actions the experienced rider is now able to concentrate more on what is going on around, to notice changing conditions underfoot and to observe the actions and positions of others, and generally to move on to perform and enjoy an ever-expanding horizon of equestrian experience. As Polanyi states,

‘by the effort by which I concentrate on my chosen plane of operation I succeed in absorbing all the elements of the situation of which I might

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<sup>429</sup> Polanyi (1962), p. 60.

otherwise be aware in themselves, so that I become aware of them now in terms of the operational results achieved through their use'.<sup>430</sup>

This, then, is how we get things done, becoming efficient and proficient through developing an *unawareness*. We can learn all there is to know about the working mechanisms of a motor car or the anatomy of a horse, and how to make proper use of these, but until we have actually succeeded in putting all of this into 'the back of our minds', we will not finally have acquired the skilful ability necessary to master and experience fully the art of driving or riding. As Polanyi says,

'[t]his lapse into unconsciousness is accompanied by a newly acquired consciousness of the experiences in question, on the operational plane. It is misleading, therefore, to describe this as the mere result of repetition; it is a structural change achieved by a repeated mental effort aiming at the instrumentalization of certain things and actions in the service of some purpose'.<sup>431</sup>

This is not to suggest that Bańkowski is wrong to say that we must 'pay attention' to the story; on the contrary, it is to affirm that in order to be free to 'pay attention to the story' we have to develop an *unawareness* of the methods and the tools that we employ. Focussing on the methods and tools of legal argument simply causes us to stare at a situation and to deal clumsily with it.<sup>432</sup> Instead, we need to develop the ability to glance rather than gaze and to recapture the dynamic of movement in each story by skilfully entering into in this way. As our consciousness of some things in a certain context contracts, so our consciousness of other things expands and enlarges. In the same way that particulars such as 'releasing the clutch' and 'keeping your heels down' are known subsidiarily to those persons involved in the skills of driving and riding we must also learn and develop the skills to enable us to attend with confidence to the art of judicial decision making.

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<sup>430</sup> Polanyi (1962), p. 61.

<sup>431</sup> Polanyi (1962), p. 62.

<sup>432</sup> Which is effectively the type of criticism that we noted earlier from a number of commentators in relation to the decision of the Court of Appeal in *Re A*.

In this sense, then, we can affirm all knowledge to be contextual and operational, related to action within that context: in the context of driving I know about releasing the clutch; in the context of riding I know to keep my heels down in the stirrups. Moreover, it is in these contexts that I have a subsidiary awareness of these. Of course, if I were also a bicycle designer, or a motor car engineer, or a riding instructor, the focus of my attention would be significantly different, and rightly so. But that is just another way of saying that in some situations, and depending on context, I have a subsidiary awareness of certain particulars; in others situations, and depending on context, they constitute the focus of my attention. In this sense, my knowledge may be described correctly as recursive.<sup>433</sup> Depending on context, I must have the ability to absorb, internalize and use unconsciously certain things in pursuit of some other purpose or goal; changing context, I must be able to turn or *re*-turn back on my self and concentrate on these.

In mathematics, the recursive application of a function to its own values will generate an infinite sequence of values. So here, too (in theory at least, though there are institutional checks to limit it), if a judge also happens to be a mother and a driver, she will have acquired different bodies of knowledge in respect of each of these, and each of these, with their own relevant degree of abstraction, come together to provide the judge with her depth of knowledge and understanding and expertise. But the extent to which an individual judge will draw upon each of these depends on the present context of decision making. Each of her various bodies of knowledge and understanding exists independently and cannot be replaced by or reduced to any other. That is to say, her practical knowledge cannot be replaced by theoretical knowledge.

### **MacCormick and ‘Tacit Knowledge’**

Although MacCormick agrees that legal reasoning is a form of practical reasoning his use of the metaphor of communication whereby ideas are understood as objects

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<sup>433</sup> See Tsoukas (2003), p. 418.

that can be extracted and packaged or communicated to other people by means of a structure or channel of communication appears to reduce legal reasoning to a sort of technical knowledge. For him, the form of legal reasoning associated with his institutional theory of law is that of deductive reasoning. Clearly, judges do learn a technique for the presentation of the results of their decision making in their formal legal training but they also learn and gradually assimilate more than technical knowledge, even if they don't realize this. They not only learn how to present and represent their decisions in the accepted institutional forms but also begin to acquire rudimentary forms or basic skills for decision making that will later be further developed and refined, skills in the art of decision making that represent a knowledge that cannot be precisely formulated in propositions but which will, nonetheless, become manifest in their decision making (which is one reason why judges tend to develop recognisable 'styles' in decision making). To regard such practical knowledge as having content capable of being defined with precision so that it may be converted from a thought in the head of the judge to explicitly formulated propositional knowledge is to confuse the distinction between knowledge and articulation and to diminish the idea of practical knowledge.

Michael Oakshott<sup>434</sup> puts the point very well when he says that

'a pianist acquires artistry as well as technique, a chess-player style and insight into the game as well as knowledge of the moves, and a scientist acquires (among other things) the sort of judgement which tells him when his technique is leading him astray and the connoisseurship which enables him to distinguish the profitable from the unprofitable directions to explore'.

But Polanyi goes even further. For him, since a judge could not possibly know all the rules pertaining to the activity she is engaged in, then, although these 'rules ... can be useful ... they do not determine the practice ...;' rather, 'they are maxims, which can serve as a guide ... only if they can be integrated into the practical knowledge of

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<sup>434</sup> Oakshott (1991), p. 15, quoted in Tsoukas (2003).

[decision making]. They cannot replace th[at] knowledge'.<sup>435</sup> In other words, it is because the knowledge necessary to the activity of decision making is not able to be stated in any detailed way that it must be handed down from master to apprentice. That is why, for him,

‘[t]o learn by example is to submit to authority. You follow your master because you trust his manner of doing things even when you cannot analyse and account in detail for its effectiveness. By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules of the art, including those which are not explicitly known to the master himself. These hidden rules can be assimilated only by a person who surrenders himself to that extent uncritically to the imitation of another’.<sup>436</sup>

Thus, to the young law student, for example, everything is alien, because the relevant and requisite knowledge for how to do law has not yet been internalized. Nonetheless, over time the student does begin to assimilate that knowledge and becomes subsidiarily aware of what they are doing in answering legal problems. In this way, they can also begin to turn their attention to and become focally aware of what is really going on in the case at hand, instead of simply trying to ‘answer’ the question. Now, a different type of understanding develops and knowledge is used instrumentally: it is tacitly known and unquestioningly used.

Just so, it is clear that the activity of thinking about decision making is different from decision making, just as the activity of finding justifying reasons for decisions is qualitatively different from the moment of making of those decisions. In seeking to present justifying reasons for her legal decisions, a judge is no longer involved in precisely the same activity; namely, the making of the decision. Contra MacCormick, Polanyi argues that, ‘the particulars of a skill appear to be ... *logically*

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<sup>435</sup> Polanyi (1962), p. 50.

<sup>436</sup> *Ibid.*, p. 53.

*unspecifiable*’;<sup>437</sup> in fact, ‘the specification of the particulars would logically contradict what is implied in the performance or context in question’.<sup>438</sup>

However, we do still speak of a judge, afterwards, reflecting on the decision that she has made, discussing her decision making with and for her colleagues, and articulating it in written judgement as explicit legal knowledge. But this is surely mistaken. Of course it is the same decision that is referred to, but here the judge is no longer describing the decision-making event, the moment of decision, in its entirety, but only that technical part of it that can be articulated in the form of rules, principles, values, and so on; that is, embedded and embodied in propositional statements. In contrast, what is tacitly known cannot be put into words, it is the ‘ineffable’<sup>439</sup> part of the skill that is performed in the event of the decision as it is made. We can see, then, the force of Polanyi’s argument that subsidiary particulars are unspecifiable, that they always exist in conjunction with the focus to which one attends from them:

‘Subsidiary or instrumental knowledge ... is not known in itself but is known in terms of something focally known, to the quality of which it contributes, and to this extent it is unspecifiable. Analysis may bring subsidiary knowledge into focus and formulate it as a maxim or as a feature in a physiognomy, but such specification is in general not exhaustive. Although the expert diagnostician, taxonomist and cotton-classer can indicate their clues and formulate their maxims, they know many more things than they can tell, knowing them only in practice, as instrumental particulars, and not explicitly, as objects. The knowledge of such particulars is therefore ineffable, and the pondering of a judgement in terms of such particulars is an ineffable process of thought’.<sup>440</sup>

Thus, tacit knowledge cannot be transferred or transformed into explicit knowledge.

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<sup>437</sup> *Ibid.*, p. 56.

<sup>438</sup> *Ibid.*

<sup>439</sup> *Ibid.*, pp. 87-95.

<sup>440</sup> *Ibid.*, p. 88.

Contrary to MacCormick's argument in relation to the instance of Solomonic wisdom, stating Solomon's act of judging in propositional form does not capture in any detailed form the essence of Solomonic wisdom or, even, its moment of decision. Such skilful knowing has in it an ineffable element based on personal insight (intuition, call it what you will) and will not submit to (/admit of) articulation. But does this mean then that we cannot speak about decision making as a practical activity, and that such skills will inevitably be 'mystical' experiences outside the forum of reasoned debate? <sup>441</sup> Of course not: what we actually do when we engage in reflection on our practical activities of judging is re-visit the distinctions underpinning them, highlight previously unnoticed or unconnected aspects, understand afresh and relate to the situation we are in, in a new way.

What all this points to is that our engagement in the practical activities of decision making takes place in and through our participation in social practices under the tutelage of those more experienced than us. <sup>442</sup> This is how we come to know the 'hows', the 'whats', the 'wherefores' and the 'whys' of that practice: we acquire its knowledge and gain its understanding by having our attention directed, through a hidden 'persuasion'. In this way, we keep getting re-told what we already know, we are taught again a language that we have already learned but cannot yet speak. Perhaps this is what Augustine meant when he complained that although, when he thought about time he knew what he meant, if someone were to ask him to give an account of time he could not, and what Wittgenstein also understood and put so perceptively, when he wrote: 'Something that we know when no one asks us, but no longer know when we are supposed to give an account of it, is something that we need to *remind* ourselves of'. <sup>443</sup> Quite possibly this is why the practice of decision making continues to fascinate us: we constantly practice it but we need forever to be reminded of it. Indeed, when we recursively interpose our understandings in the process of finding justifying reasons for legal decisions we do in fact give light to previously unseen or un-emphasized distinctions that our everyday use of language

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<sup>441</sup> Cf. Detmold (1989).

<sup>442</sup> MacIntyre (1985), pp. 181-203.

<sup>443</sup> Wittgenstein (1958), no. 89.

often easily passes over.<sup>444</sup> In this way, the simple, familiar, but often unnoticed aspects of decision making, the things that are there but always remain hidden, can be talked about; the 'ineffable' can be described and previously unnoticed or forgotten aspects viewed afresh in new connections, in a new way and in a new light. By such means we find that decisions are assisted and the law helped to relate to new circumstances in new ways and to provide new directions.

I think we misunderstand tacit knowledge, which is at the heart of judicial decision making, if we think of it as MacCormick does as knowledge awaiting articulation. Tacit knowledge is ineffable; it cannot be reduced to what is articulated or articulate-able. It exists in our subsidiary awareness of something when we are focally aware of something else. We cannot attend to subsidiary particulars or examine them directly. If we try, their meaning escapes and it becomes like trying to catch a moment of time. If we do focus on particulars, it is only in the sense that we are engaged in activities in which we have a subsidiary awareness of them; for example, we are focussed on the flight of an arrow in its unitary motion but subsidiarily aware that it is forever occupying different positions. If we try to focus on any one of its positions independently, our awareness of its flight disappears. In other words, in trying to focus on the particulars of a decision after that decision has been made we are not focusing on them as they are in the original moment of decision, for they derive their meaning from their association to that original focus of decision. When we focus on the particulars of a decision we do so in a new context of decision under which lie a new set of subsidiary particulars. Thus, the notion that we can focus on a set of subsidiary particulars and transform them into explicit knowledge cannot be sustained. So we can talk about the decisions which we make and our reasons for making them, but only in so far and to the extent that we refrain from insisting that in so doing we are somehow transforming tacit knowledge into explicit knowledge; instead we must understand this whole process as an ongoing process of considering how we give consideration to certain things. That is, not so much in terms of a process of providing rational conclusions to rational arguments

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<sup>444</sup> Hence, also, the debate over what a ratio actually is and how to determine it. Judges use ratios in precisely the way that the distinction between tacit and explicit knowledge suggests.

but as the continual uncovering and discovering of ideals that will lure us into further commitment.

In this way, written judgements help us understand how we relate to each other and the world in the web of legal settings that we have woven for ourselves. They help not only to remind us of how but also of why we do things in the ways that we do and they encourage us to develop our understanding of this in order that we might do these things differently, with more clarity and better. In this way, previously unnoticed distinctions emerge and we can highlight their importance. So, what we need to promote in considering justification of judicial decisions is not the institutional explication of tacit knowledge, which is something of a contradiction in terms, but this process itself; that is, the opportunities it offers for new ways of doing dialogue and interaction, new ways of making distinctions, of connecting and re-connecting. In other words, 'the end of the process is the process itself'.

In conclusion, tacit knowledge in the context of decision making cannot be stated in a captured form; it cannot be transformed or transferred, only demonstrated in what we do. New knowledge comes about not when what was hitherto tacit is made explicit but when our judicial decision-making process is interrupted and shot through with new social forms of mutual and reciprocal action and influence. So the important question that we must now consider is how, if at all, this can be said to take place?

## PART III

### EXPLORING FORMAL LEGAL CONTEXTS

## CHAPTER EIGHT

### LEGAL INSTITUTIONAL KNOWLEDGE

In this chapter I will describe the different types of institutional knowledge that exist in law, how they interact with each other and how they may be seen to be founded on different features of the legal institutional context. I will argue<sup>445</sup> that while it is true that the propositional structure of legal knowledge is fully realized within formal legal contexts this tells us only part of the story. As well as being institutions, formal legal contexts are also *practices*; that is, *shared traditions* in and out of which legal practitioners live and work. In this latter sense, legal knowledge has a narrative structure, maintained by story, anecdote and example. However, these two features of legal institutional knowledge sit uncomfortably alongside each other: there is an uneasy tension between the propositional form of legal knowledge fundamentally associated with law as an institution and the narrative form of legal knowledge associated with law as a shared tradition or practice. In order to survive as a practice, law requires its institutions to be strong but these same institutions, by their very nature, as they strengthen and become more autonomous, begin to act as a corrosive influence on the shared tradition; nonetheless, without its foundation in a shared tradition law as an institution is weak and unproductive and incapable of functioning. Thus, some equilibrium must be achieved, its tension negotiated and maintained.

#### The Propositional Structure of Legal Knowledge

Examples of propositional statements in statute are :

‘If a person –

(a) drives or attempts to drive a motor vehicle on a road or other public place,

or

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<sup>445</sup> For a more elaborate demonstration of how the argument that informs this present discussion is pursued in the context of organization studies, illustrating the links between individual knowledge, organizational knowledge and human action undertaken within organized contexts see, generally, Tsoukas (1996), (1998b) and (2001).

(b) is in charge of a motor vehicle on a road or other public place,  
After consuming so much alcohol that the proportion of it in his breath, blood  
or urine exceeds the prescribed limit he is guilty of an offence’,<sup>446</sup>

and,

‘Any person who, being a person to whom [Civic Government (Scotland) Act  
1982, s. 57] applies –

(a) has or has recently had in his possession any tool or other object from the  
possession of which it may reasonably be inferred that he intended to commit  
theft or had committed theft; and

(b) is unable to demonstrate satisfactorily that his possession of such tool or  
other object is or was not for the purposes of committing theft, shall be guilty  
of an offence and liable, on summary conviction, to a fine not exceeding  
...’,<sup>447</sup>

At common law, the following statement by Lord Sutherland exhibits a similar  
structure and has been taken for the purposes of decision making in Scots Criminal  
Law to provide a working definition of ‘wicked recklessness’:

‘If you act in such a way as to show that you don’t really care whether the  
person you are attacking lives or dies, then you can constitute this degree of  
wicked recklessness which is required to constitute murder. It may, in the end  
of the day come as a considerable surprise to you, and indeed a matter of  
regret too that your victim dies, but that doesn’t alter the fact that you have  
committed murder’.<sup>448</sup>

In each of the above examples, the preceding conditional statements operate  
to identify as significant recurring events or behaviours that serve to provide a basis  
for the formulation of rules to guide future adjudication. Such recurring events are

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<sup>446</sup> Road Traffic Act 1988, s. 5 (1).

<sup>447</sup> Civic Government (Scotland) Act 1982, s. 58 (1).

<sup>448</sup> Per Lord Sutherland in *H. M. Advocate v. Hartley* 1989 SLT 135 at 136.

assumed to be patterned, ordered and non-random, made up of elements that are objectively available and which can be re-presented in an abbreviated form. That is, the elements are seen to be ordered according to a pattern that can be replaced with a rule to capture its information content, doing away with the need to list repeatedly the whole contents of that pattern. In this way, the mass of observed events and the statements made about them can be compressed into a small number of propositional statements with the same informational content, permitting economy of effort, transferability, and remote control.<sup>449</sup>

However, for social reality to permit its abbreviated representation in this way, and for propositional knowledge to be possible, the world must first be capable of being understood in such regular, patterned and non-random terms. In what sense might we affirm this to be the case? According to Peter Berger and Thomas Luckmann,

‘[a]ll human activity is subject to habitualization. Any action that is repeated frequently becomes cast into a pattern, which can then be reproduced with an economy of effort and which, *ipso facto*, is apprehended by its performer as that pattern. Habitualization further implies that the action in question may be

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<sup>449</sup> See Cooper (1992). For example, as I sit in front of my computer typing this page I am acutely aware of different needs: to cross-reference between different pieces of work; to have several pieces of work to hand at a time; to be able to transfer material between documents and computers. And I can do this because I am to maintain several pages on my computer screen at the same time, to cut and paste sections of my work, and even to send my work from one location to another. I can enlarge or decrease the size of different pages depending on which ones I am focussing on at any given moment, I can reproduce work already done without the need to retype all of its contents, and I can transmit this work to any number of different file locations on any number of different computers with the minimum of effort. All of this is feasible because of the possibility of re-presenting my work in an abbreviated, digitized, symbolic form. I am able, for instance, to manipulate and move portions of my work efficiently and with relative ease across different media and between different contexts because this abbreviated, digitized, symbolic form in and through which my work is re-presented is, to a large extent, independent of the context in which it is set. And I can achieve all of this without any more than a basic understanding of how and why this happens and is possible, though if I want then to be able to use this material, to make sense of it and with it, in each changed context, I will need to supplement it with a particular understanding relevant to each new setting. But the point is that when we think of law as a system of rules we are thinking of it in this way: rules, as abbreviated representations, serve to minimize the interpretative burden and thus allow personal and professional adjudication to be made in respect of behavioural decisions.

performed again in the future in the same manner and with the same economical effort'.<sup>450</sup>

For Berger and Luckmann, institutionalization provides the context for linking habitualization and typification: it occurs 'whenever there is a reciprocal typification of habitualized action by types of actors'.<sup>451</sup> Within such contexts, intentions and purposes are assigned to actors and, when certain actions recur, these intentions and purposes are also held as recurrent. Reducible to role and rule, behaviour becomes to a large extent routine and predictable and '[t]he institution posits that actions of type x will be performed by actors of type x'.<sup>452</sup> In this way, the social world is seen as submitting to an ordering and regularity that makes it possible for us to arrest from it patterns and routines and to represent these formally, in an abbreviated way.

Clearly, the more that human social life becomes institutionalized, the more concentrations occur, then so the more accessible to regular pattern and ordering it becomes and the easier it is to represent this in an abbreviated form as propositional statements.<sup>453</sup> In this way, rules become a means for the prescriptive ordering of human behaviour in specified circumstances.<sup>454</sup> As Twining and Miers put it, a rule 'prescribes that in circumstances X, behaviour of type Y ought not to be, or may be, indulged in by persons of class Z'.<sup>455</sup> Therefore, rules, as *generalizations*, connect *types* of behaviour by *types* of actors to *types* of situations.<sup>456</sup> To affirm that a rule exists is to generalize, to institutionalize behaviour is to affirm the existence of rules.<sup>457</sup> Between rules and propositional statements there exists a sort of mutually dependent relation.<sup>458</sup>

## Legal Rules and Facts

<sup>450</sup> Berger and Luckman (1966), p. 70.

<sup>451</sup> *Ibid.*, p. 72.

<sup>452</sup> *Ibid.*

<sup>453</sup> Cf. Berger and Luckmann (1966), p. 22.

<sup>454</sup> Taking the form 'If X, then Y in circumstances Z'. See Schauer (1991).

<sup>455</sup> Twining and Miers (1991), p. 131.

<sup>456</sup> See Schauer (1991), ch. 2.

<sup>457</sup> See MacCormick (2007), chapter 2.

<sup>458</sup> Propositional statements presuppose the existence of rules governing human behaviour. The existence of rules can be inferred via observation and formal methods of deduction relating factual predicates to consequents.

What, then, is the relation between general categories and the particular instances they seek to relate? Obviously, any particular object, action or event is subsumable under a whole range of separate, though not mutually exclusive, categories; for example, I am Scottish, white, married, middle-aged, bespectacled, driver, ex-army officer, dog lover, keen gardener, and so on. However, not all of these or my other attributes are always necessary in order to offer a full and relevant description of me in every situation. Only a very limited set of descriptors will often be all that is required, and my choice of action in any given situation will not depend so much on any of these generalizations as on the type of situation that I find myself in or the discursive context in which I am described.<sup>459</sup> Indeed, we may go even further and say that I am not always the same person in all of my different situations in life: there is not one over-arching community to which I belong and by which I am adequately or completely described but I belong to a number of different communities and I am a different person in each one of them. Within these situations, I as I am in these situations make my choices and my possibilities for future choosing are shaped by and depend on the possibilities that I choose to actualize, make concrete, in each present moment of choosing.

This is an important point. Through my ability in any given situation to generalize in one direction, to choose A and thus to actualize its possibilities, I not only accept the consequences for my future choosing that are given by my choosing A but also, by default, I choose not to actualize other possibilities,  $\sim A$ . Therefore, in this sense, we can say that particular situations or discursive contexts make institutional action possible, for saying that I am a white married male is quite different from saying that I am a bespectacled driver, and the presence of these different particulars will assume greater or lesser significance depending on the context chosen. In some contexts, the fact that I share particular characteristics with other persons will have significant consequences;<sup>460</sup> in a different context, and

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<sup>459</sup> As Schauer has put it, none of these ‘simultaneously applicable categories of which any particular is a member has a logical priority over another’ (Schauer (1991), p. 19).

<sup>460</sup> A light-hearted example is provided in a recent TV advert for a well-known building society that makes interesting play on this. A confused customer at a rival bank is seen to get increasingly annoyed as she is told why she is not getting offered the same terms as a friend had been. She argues that she

depending upon the context, they might assume greater, lesser or no significance at all.

Put differently, generalizations as category descriptors are necessarily selective: inclusive as well as exclusive, suppressing as well as revealing. But, what determines which generalization will constitute a given rule's factual predicate is its purpose: the goal prescribed or the evil proscribed by it. What is significant about institutional rules is that while their consequents are forward-looking (meant to be applied to future instances) their factual predicates are backward-looking (in the sense of having been derived from regularities viewed retrospectively) or forward-looking in the limited sense of being based on current assumptions about future behaviour. But there is a difficulty here. While propositional knowledge can provide an explanation retrospectively as to why a social system functions as it does, it cannot prospectively inform actors as to how to apply any given set of rules or how to create new ones.<sup>461</sup>

The reasons for this have been famously stated by Herbert Hart<sup>462</sup> and developed by others. First, there is the inherent instability of language and representations of meaning. Any illusion of stability is only temporary, and new definitions and new symbolic representations are forever emerging to overtake, overshadow or erode old established ones.<sup>463</sup> In other words, while on the one hand a social system such as law tries to fix its definitions and representations with regard to its purposes, inevitably, at some point, definitional control passes over to the context in which it is set. Thus, if we affirm the inherent and ultimate instability of

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should get the same terms as her friend because to all intents and purposes the two women are the same. But she is told that she is not the same as her friend, she does not have the same hair style or colour, the same cardigan, etc. She leaves in disgust and is next seen passing the building society branch's premises, stopping to view a large sign that promises the same rate for everyone.

<sup>461</sup> This creates an asymmetry that can be removed only if it is acknowledged that the future will only ever replicate past instances. And yet this is impossible, for novelty, surprise, the unexpected, always creeps in; otherwise, systems atrophy and die. Thus, even overtly deterministic and supposedly closed social systems such as law cannot achieve this desired bias absolutely but must remain essentially open systems, where this asymmetry is only temporarily averted or avoided.

<sup>462</sup> See Hart (1994).

<sup>463</sup> For example, definitions can be eroded from within, with legal interpretations and definitions changing (for example, *Riggs v Palmer* 115 NY 506; 22 NE 188 (1889)) but also from without, with social and scientific advances (see *MacLennan v MacLennan*, 1958 SLT 12).

knowledge representations in institutional contexts then we must also acknowledge the same in respect of its functional rules. Second, as Charles Taylor notes,<sup>464</sup> if it is to be suggested that a rule must always be followed in the same way repeatedly in the future, then what determines this cannot itself be a rule.<sup>465</sup> Rules, as guides for social action in open social systems, are fundamentally imperfect tools. Since a definition of a rule cannot itself determine how, on every occasion, it is to be applied, and there is no point in pursuing the argument *ad infinitum* by formulating ever more new rules to determine the use of the first rule, we must conclude that the application of rules cannot itself be determined through a rule; that is, it must be rule-less.

To put this more concretely, suppose that law books containing codified rules were issued to all judges.<sup>466</sup> The abstract representations of actual situations imagined behind these codified rules will be only weakly related to the actual situations that later confront the individual judges. The application of rules falls to take place in social contexts the details of which can not possibly be known in advance and fully to the rule codifiers. Moreover, simply because some generalizations are selected, it does not mean that those that have been suppressed are irrelevant. This will depend on the circumstances within the context. In certain combinations of circumstances, these may become central,<sup>467</sup> and there is no way of knowing beforehand what particular combination or type of combination of circumstances will make a certain feature salient. Only the decision maker faced with making the decision in respect of the actual circumstances of the case before them will be able to make that decision and make judgement accordingly.<sup>468</sup>

So not only is what is going on in an institutional context not static and indeterminate, but the rules governing situations are bound to be to some extent of limited utility. That is to say, all sorts of things are going on at the same time that

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<sup>464</sup> Taylor (1995), p.57.

<sup>465</sup> See Wittgenstein ((1958), the application of rules is rooted in practices) and Gadamer (1980), to understand *in concreto* one requires practical wisdom or *phronesis*).

<sup>466</sup> As has often been suggested in the United States in relation to sentencing practice.

<sup>467</sup> See Schauer (1991), p. 22.

<sup>468</sup> Detmold (1989) makes a similar point when he talks of the anxiety of encounter that a judge faces when confronted with a real situation demanding a real decision with real consequences rather than its hypothetical representation.

cannot be described in advance, and can only be known at the time from the particular perspective of the observer as an involved participant.<sup>469</sup> In this way there is no escaping the difficulty that arises from new circumstances and even the most informed and imaginative codified systems will always come up against the same problem in the end.<sup>470</sup>

MacCormick agrees that if we can identify regularities of behavioural patterns then it should be possible to state these in the form of conditional, 'If, Then' propositional statements which will be valid under certain stated conditions. This introduces a dimension of certainty and formality into the equation producing 'explicitly articulated norms', or rules, with the general form: 'Whenever *OF* [operative facts], then *NC* [normative consequence]'.<sup>471</sup> This accords well with the idea that we noted above; namely, that propositional knowledge is necessarily concerned with generalizations, connecting 'types' of behaviour, circumstances and environments. However, the 'actual' circumstances of any behaviour are always bound to be in some sense unrepeatable, so that the particular decision-making context within which adjudication is made in respect of any such behaviour is also itself always bound to be, in that sense, unique. So how can a judge acquire the necessary knowledge of any particular set of circumstances to link these to rule-like generalizations in order to formulate a decision? In judicial decision making, how do the universal and the particular meet?

We might suggest, to begin with, that rule-like generalizations could be subjected to ever more refinement and in this way shaped to meet the specific requirements of a particular situation. But as we have already seen this does not solve the problem: even conditional generalizations are *universal within the scope of their applicability*.<sup>472</sup> In other words, universal statements, as generalizations - where time and space have effectively been removed - cannot be made to 'touch' the local

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<sup>469</sup> Therefore, not as an *impartial* spectator.

<sup>470</sup> 'Regardless of scope, any rule uses its generalizing factual predicate to make it applicable to *all* of something', (Schauer (1991), p. 24).

<sup>471</sup> MacCormick (2007), pp. 24-25.

<sup>472</sup> See Schauer (1991), p. 24.

knowledge of conditions of time and space. Therefore, I will argue<sup>473</sup> that in decision making judges do not simply use instrumentally already existing propositional knowledge in the form of explicitly articulated norms, or rules, but they also draw upon the reservoir of their own factual knowledge and upon a collective knowledge of which they may or may not be wholly aware, and create new knowledge. These sources of knowledge are used differently by different judges in different decision-making contexts, and the variety of ways in which such resources can be used to inform decisions can potentially create an almost limitless pool of new knowledge.

My claim here is significantly different from MacCormick's, who suggests that judges construct the rules upon which the justification of their decisions is based on the basis of principles and values underlying legal institutional normative order and are thus not really creating new knowledge or rules but rather making explicit what was hitherto only implicit in that order and system of rules. This attempt to classify institutional knowledge and to continually draw out its implications exemplifies a positivistic view of law. Here we find legal analysis in decision making concerned primarily with the construction and testing of ideas, the introduction of new ways of understanding the system and its environment. On this basis, knowledge is articulated explicitly or implicitly and more or less abstracted from practice. Thus, in MacCormick's model of legal reasoning, 'new', or explicitly articulated knowledge is created in precisely this sense, by extracting or revealing implicit knowledge through a process of drawing out and testing possibilities (universalisability and consequences) and converting this into concepts (rules) that are justified in terms of the institution's overriding mission or purpose (principle). Those concepts are then made more tangible (legal rule coherence) and disseminated (consistency, non-contradictoriness).

Such a model undoubtedly advances our understanding of legal institutional knowledge, helping to demonstrate the interaction of various aspects of legal knowledge, but at the same time it possesses some severe limitations which stem

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<sup>473</sup> In doing so, I suggest that the argument presented by Tsoukas (see above n. 445) should be extended to inform our understanding of what is going in formal legal contexts and in the practice of judicial decision making generally.

from a tendency to think in terms of 'forms'. That is to say, the taxonomic urge that produces systems of classification is based on the assumption that it is possible to identify similarities and differences between distinct, independent objects of study, and for this type of thinking to be possible conceptual categories are also assumed to be discrete, separate, and stable; yet, they very rarely are.<sup>474</sup>

### **Beyond Thinking in Forms: Relating Tacit and Explicit Knowledge**

According to Ilya Prigogine, 'order and disorder are created simultaneously'.<sup>475</sup> By the same token, tacit knowledge and explicit knowledge are not two different types of knowledge but they are mutually constituted.<sup>476</sup> While explicit knowledge is always grounded in tacit knowledge, tacit knowledge is not explicit knowledge 'internalized', something rather weakly and precariously held; rather, tacit knowledge, or the tacit dimension, is a dimension of all knowledge. One cannot split knowledge into tacit and explicit knowledge: they are inseparable. My knowledge is possible precisely because of the social practices in which I engage: they are mutually defined. What we call the 'social' is not an aggregate of individuals' experiences, but a set of background distinctions undergirding individual action.

In this way, we can see how a judge's decisions are really part of a complex practical activity involving both language and procedures. Looking at a judge's decisions over time we can observe how she follows certain rules and procedures and how these rules and procedures do not just lend shape to her decisions but function as normative constraints, criteria against which her decisions are assessed and guided. As a judge, she knows to follow these rules and, because she has been trained to follow them, she possesses certain skills that make it possible for her to engage in such norm-bound activity. This is just another way of saying that she engages in a particular 'discursive practice'. Such practices are what they are by virtue of the background distinctions embodied within them and whose meanings are established

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<sup>474</sup> See Chia (1998).

<sup>475</sup> Prigogine (1989), p. 398, quoted in Tsoukas (1996), p. 16.

<sup>476</sup> See Tsoukas (1996), pp. 15f.

through their use in the discourse.<sup>477</sup> Thus, in a courtroom, for example, much of the interaction between counsel and judge would likely be unintelligible and futile unless one had some idea of the meaning of the words, phrases and gestures used and how have tended to be used within that discourse over time. So not only does a judge possess certain skills that make it possible for her to engage in norm-bound activity, but she also knows how, when and in what relation to use them because there is something in her mind that tells her how, when and in what relation to do so. In this sense, a judge is 'primarily a subject of representations ... about the world outside and depictions of ends desired or feared'.<sup>478</sup>

But if a thought lies in the mind of a judge telling her how to follow a rule, how is it possible that some rules have been misapplied, or misunderstood? As we have seen, it is unsatisfactory merely to say that a further rule is necessary to determine how the first rule should be applied. It is equally unsatisfactory to suggest that all possible interpretations and misinterpretations of a rule could shown in advance, for that would mean every judge having an infinite number of thoughts in their head even to follow the simplest of instructions.<sup>479</sup> The only reasonable option is to accept that 'the application of rules cannot be done by rules';<sup>480</sup> rather, as Tsoukas claims, we have to accept that every act of human understanding must be seen as based on some 'unarticulated background of what is taken for granted'.<sup>481</sup> A judge's understanding finds its roots in the practices in which a judge participates; misunderstanding might be seen to arise from a lack of or inadequate engagement with a common background. Thus, knowing and understanding how to follow a rule and procedures is implicit in the activity in which a judge engages: it comes with familiarity. We might say that it is the social and professional activity of judging, not the individual thinking judge, which is where the ultimate ground of such understanding lies.

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<sup>477</sup> See Taylor, (1993), pp. 45ff.

<sup>478</sup> *Ibid.*, p. 49.

<sup>479</sup> *Ibid.*, p. 46

<sup>480</sup> Gadamer (1980), p.83.

<sup>481</sup> Tsoukas (1996), p. 16. See Taylor (1993), p. 47.

At this point, let us recall Polanyi's notion of how this unarticulated background is related to human understanding. When I have an awareness of something, I have a focal awareness of it; I know it as a whole. But I know something by integrating particulars that are known to me subsidiarily; that is, I tacitly integrate those particulars.<sup>482</sup> In this way, tacit knowledge has a 'from-to' structure. This is important: the subsidiaries remain 'essentially unspecifiable'.<sup>483</sup> The moment I gaze at them I lose sight of their meaning.

Tsoukas<sup>484</sup> identifies three themes in his discussion of the industrial firm as a distributed knowledge system that bear directly on our present argument and may be adapted in relation to judicial decision making. First, following Polanyi, 'all articulated knowledge is based on an unarticulated background', a collection of subsidiary particulars resident in the forms of life or social practices that we participate in and which are tacitly integrated by us as participants in those forms of life or social practices; thus, a judge's decision, her opinion or declaration, is made possible because and only because of the tacitly accepted background that she inhabits. Second, a judge's capacity for rule-following is founded on her own unarticulated background; in other words, the rules that an observer would be able to identify or represent in a practice are different from the rules that actually operate to guide the judge as an agent in that practice.<sup>485</sup> Third, our awareness of this unarticulated background through our having been socialized into a practice by others is 'not only cognitive but embodied'.<sup>486</sup> The skills that we usefully employ are acquired 'through training our bodies to relate in certain ways to the world'. Thus, 'the process of learning is constitutive of what is learnt'.<sup>487</sup> Through socialization into a practice we internalize a set of background distinctions constitutive of that practice and, through dwelling in these, live both in our own memory and in all of those experiences through which that language has been acquired by us.

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<sup>482</sup> In this way, tacit knowledge has three elements: subsidiary particulars, a focal target, and an agent that links the two (Polanyi (1975), p. 36).

<sup>483</sup> *Ibid.*, p. 39.

<sup>484</sup> See Tsoukas (1996).

<sup>485</sup> Which Tsoukas, following Taylor (1993), characterizes as the difference between 'rules-as-represented and 'rules-as-guides-in-practice' (see Taylor (1993), pp. 55-57; Bourdieu (1990), p. 39).

<sup>486</sup> Taylor (1993), p. 50.

<sup>487</sup> Tsoukas (1996), p. 17.

## Law as a Social Practice: Understanding How and Why Judges Decide

Viewed as a social practice several features of legal decision making are important. First, the normative expectations associated with being a judge and held by others above, below, and across legal systems. To enquire about these is to ask questions about how a judge has been socialized into her particular role, both formally and informally. Second, the patterns of recognition, discernment, and adjudication acquired by an individual judge and brought to bear on particular decision-making situations, which, we might call the ‘dispositional’<sup>488</sup> element. Bourdieu<sup>489</sup> refers to this as ‘the habitus’ which, as

‘a product of history, produces individual and collective practices – more history – in accordance with the schemes generated by history. It ensures the active presence of past experiences, which, deposited in each organism in the form of schemes of perception, thought and action, tend to guarantee the “correctness” of practices and their constancy over time, more reliably than all formal rules and explicit norms’.

For Bourdieu, the ‘active presence of the whole past’ ensures for social practices both continuity and ‘a relative autonomy with respect to determinations of the immediate present’.<sup>490</sup> In simple terms, every contact leaves a trace: history leaves its mark on us and every time we act we do so through the habits of thinking acquired through past socialization; our habits of thinking are formed ‘through our participation into historically constituted practices’.<sup>491</sup> So to find out why a judge decides in a certain way we really need also to ask about the past socializations to which she was subjected to in and through her involvement in a number of social practices (for example, family, school, religion, and so on); in other words, her *habitus*. Third, to complete our investigation into how and why the judge decides as

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<sup>488</sup> *Ibid.*

<sup>489</sup> Bourdieu (1990), p. 54.

<sup>490</sup> *Ibid.*, p. 56.

<sup>491</sup> Tsoukas (1996), p. 18.

she does, we will also need to ask about the particular context within which the normative expectations and the habitus are triggered, the active unfolding of her concrete interactions with others within a specific socio-temporal context.<sup>492</sup>

Looking at a judge's behaviour in decision making as a whole we will observe regularities: actions and patterns of actions in decision making will be repeated. The normative expectations associated with being a judge, together with her past socializations, will have developed ways of thinking and deciding that are triggered every time she engages in decision making. In which case, we might be tempted to develop rules about her behaviour and to conclude that these rules completely describe, or represent, her practice. But these rules will be created from the point of view of a spectator and there is always something more to an actual practice than can be conveyed by any representation of it, a persistent asymmetry between 'rules-as-represented' and 'rules-as-guides-in-practice'.<sup>493</sup>

Of course, our spectator might well be able to infer the existence of certain rules and procedures (doctrines of *ratio decidendi*, *stare decisis*, precedent, and so on) that inform a judge's decision making from studying that judge's decisions, but there will also be much else that a judge does that will not be adequately represented by these. Ostensibly, she is a member of an independent judiciary but she will, nonetheless, also be conscious of a wider, more complex network of human social and political relationships that will be just as important to her and bear directly on her ability to do her job efficiently and well. There is, indeed, something about a judge's role that cannot be captured simply with rules, however regular and patterned it might appear. To assume otherwise would presuppose that we had the ability to foresee all future occasions of decision making and were endowed with a language through which to faithfully reflect it unequivocally. But we do not know all the answers to all the future questions, much less do we know beforehand what questions will later be asked.

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<sup>492</sup> *Ibid.*

<sup>493</sup> *Ibid.*, see above n. 465.

So, in decision making, judges make use of the explicit rules provided for them by the law as enacted, but the actual activity of decision making takes place in a social context the actual details of which cannot be known beforehand. Consequently, in striving towards a decision, a judge needs to attend not only to those strict and rigid aspects of the law as laid down, or what Bankowski calls its machine-like quality, but also to the human social and political context within which her decision making is set, the wider effects of applying a particular rule *here and now*; for example, the impact of that law on the life of the accused. At the same time, she will be acutely aware of the need to create and maintain public trust in the law and the legal system and also of the need to maintain her own reputation in the community of judges. In any given situation of decision making any or all of these (and other) concerns might appear as relevant and important, but there is no way that she can say in advance which or when.

We can see then, how, in spite of the normative expectations and social dispositions associated with being a judge, a mix of consistency and diversity will still be found across decision making generally: different judges will negotiate the tensions between role expectations, dispositional attitudes or habitus, and the actual situations where these interface with each other, in different ways. Through explicit rules formally associated with being a member of the judiciary, together with training and socialization, the law seeks to define the normative expectations of an individual judge's role and homogenize decision making, but these normative expectations are rarely if ever identical to an individual judge's habitus, since each judge's dispositional attitudes or habitus is the result of past socializations that are different for each judge.<sup>494</sup> So, when normative expectations and dispositional attitudes are triggered, and interface with each other within actual decision making situations, how this happens will always be unrepeatable and unique. A judge will always be confronted with specific choices under specific conditions and the way that those conditions are made relevant will always be distinctive to each specific context and situation. She will select out what she considers to be relevant in relation to her role-related expectations and relevant in relation to the local context or conditions and

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<sup>494</sup> Moreover, habitus is persistent, as Bourdieu points out (see. Bourdieu (1990), p. 56).

fuse the two together, which is precisely what she does when she attempts to identify the ratio of a previous decision and use it, or not, in the present case. In this way, every moment of her decision making contains within it the essence of the past, the whole of its social structure, but how that structure is instantiated in the present unique moment of deciding is always a local matter. This is what Whitehead understood so well when he stated that ‘the many become one and are increased by one’.<sup>495</sup>

In light of all of this, one might be tempted to conclude that decision making must become an impossible task, if concrete situations are infinitely concrete, particular situations are infinitely particular, relevant features are infinitely relevant, and there is no limit to the ways that a social practice can be described from an infinite number of viewpoints and perspectives. But the reason that this does not paralyse us is precisely because the legal institutional context within which these are articulated acts as a halt on this,<sup>496</sup> imposing limits on how each of these may be described. However, merely because some descriptions are selected and others are not does not mean that those others are not also present or that they may not be relevant in other sets of circumstances. I may choose to select as relevant in the present circumstances features that I will disregard in a future circumstance depending on my purpose in any given case. Equally, I may choose to disregard now features that in another instance and under different conditions I will later consider to be relevant. The point is that I cannot know in advance what those relevant descriptions are going to be: my characterization and my reasons for decision are inseparable from the occasion of my deciding.

### **‘Closing the Gap’ in Judicial Decision Making**

We can pull much of this together by considering, for example, the role of *ratio decidendi* in relation to the Common Law doctrine of precedent. Here, courts draw upon a shared pattern of decisions in relation to particular types of situations and the system of precedent is closely tied to the legal situation in which it is generated to

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<sup>495</sup> See above n. 190.

<sup>496</sup> See Schauer (1991), p. 18-22.

enable judges to make sense of their particular environment. In other words, it arises because of the judges' need to communicate by word and act and because of the uncertainties of the institutional set-up in which that communication is to take place. Thus, a system of precedent is essentially a discourse developed over time within a particular judicial context, and consists of a set of background distinctions tied to a particular field of law. Those distinctions relate to a number of characterizations and issues<sup>497</sup> that a judge must comprehend if she is to be able to deliver a justified decision and, through a process of socialization, a judge internalizes those law-specific distinctions. But judges are also presented with an almost infinite number of meanings unrelated to their legal-specific roles but which they must nonetheless familiarize themselves with if their roles are to be efficiently pursued. Internalizing these distinctions is not simply a matter of learning by rote or of gaining knowledge from law books but is learned within the context of the discursive practice. Legal expertise in this sense is gleaned from and embedded within legal conversation, interaction and institutional procedures; that is, it forms an unarticulated background that underlies and undergirds a judge's representation of their decisions and operates to allow the justification of decisions, a form of 'tacit knowledge' that permits a judge to construct within an otherwise dis-ordered array of conflicting or unrelated circumstances some sort of institutional ordering. It is the judge's habitus, the set of dispositions acquired over time which ensures within the present the active presence of past experience.

But a system of precedent offers decision makers more than just a language, it also provides structure, syntax. That is, the core of a system of precedent is much more than can be represented by the sum of its parts. It concerns not just the accumulation of individual decisions but also the way that these cohere within a rational structure and, in this sense, such a system can never be wholly rigid; indeed, it must guide as much as direct in order to allow for finely balanced shiftings of emphasis and meanings as necessary.

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<sup>497</sup> For example the distinctions between types of crimes, excuses and justifications.

Now precisely because of the unique character of every new decision making situation every judge will inevitably have to improvise. Those uniquely different circumstances may prevent a judge deciding in the way that the system of precedent implies, and a case may have to be ‘distinguished’. It is in this way that a judge is called upon to close the ‘phronetic gap’,<sup>498</sup> to cross the ‘particularity void’;<sup>499</sup> that is, through a personal judgement about the relevance of a ratio to her present decision. This tension between the legal-specific habitus and the particular local circumstances of decision making explains why a judge’s decision is not always, or ever, either a simple replication of previous decisions or an altogether completely new invention by the judge. It is created by a judge out of the tensions experienced by *that* judge with *those* resources in *this* particular situation.

However, it is important to note that what is being suggested here is not that a judge’s habitus is tied solely to the legal system but it also includes the whole of her entire history of past socializations and the tensions that these may produce; for instance, the personal private experiences of a judge or the tensions between normative role expectations and dispositions acquired through extra-legal socializations. An example would be Lord Atkin and his presentation of the ‘neighbour’ principle in *Donoghue v Stevenson*. To understand this fully would also require some understanding of Lord Atkin’s religious disposition, his historically formed habitus. The neighbour principle is the outcome of a correspondence of appropriatenesses.<sup>500</sup> It is a contingent outcome of decision making in a specific situation with a particular set of circumstances.

## Conclusions

In this chapter I have utilized the analysis employed by Tsoukas in the field of organization studies to note how the different types of institutional knowledge that exist in law may be seen, similarly, to be founded on different features of the legal institutional context. While the propositional structure of legal knowledge is fully

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<sup>498</sup> Taylor (1993), p. 57.

<sup>499</sup> Detmold (1989).

<sup>500</sup> Cf. Gunther (1993).

realized within formal legal contexts in terms of law as institutions, these formal legal contexts are also practices, shared traditions in and out of which legal practitioners live and work, and, in this latter sense, legal knowledge has a narrative structure that is maintained by story, anecdote and example. In this way it has been possible to extend that analysis to demonstrate:

(a) The resources that a judge uses in decision making are, to a large extent, constructed by that judge in the process of decision making.<sup>501</sup> How they can be used depends on how they are viewed, which, in turn, is a function of the knowledge applied to them. In this sense, we can see how law functions as system in which the bearer of legal institutional knowledge is law's customs, habits and practices.

(b) As institutional actors, judges make use of a knowledge that is not and cannot be known completely and entirely by any single judge.

(c) Legal institutional knowledge is itself inherently indeterminate: not only can the factual knowledge of particular circumstances of time and place not be envisaged as a whole, but no-one can know in advance what legal institutional knowledge is or can be. In this sense, judges cannot know what they need to know.<sup>502</sup>

(d) Legal knowledge is dispersed in another sense, too, in that it is partly derived from the wider context in which a judge is set and is continually reconstituted (in Levi's terms, 'the classification changes as the classification is made') through its decisions. Therefore, it is not and can not be self-sufficient. This is because of the nature and structure of social practices within law, which are made up of the following: role-related normative expectations, dispositions acquired by past socializations, and the local circumstances in which a decision is made. While law has some control over normative expectations, with procedures constraining judicial discretion ensuring a degree of consistency across decision making contexts, it has no control over the dispositions acquired through past socializations in extra-legal settings. Moreover, these role-related normative expectations and dispositions of

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<sup>501</sup> Cf. Levi (1948).

<sup>502</sup> A lacking which the system of appeals attempts in some measure to make up for.

judges are instantiated within particular contexts the character of which may not be known in advance in any detached way but is fashioned only in and through a particular judge's encounter with them. In this sense, not possessed by any single judge, partly dependent on or originating within extra legal contexts and always incomplete, law's knowledge is forever continually evolving.

(e) There is an inevitable tension between role-related normative expectations, dispositions acquired through past socializations, and contexts of decision. This results in a persistence of shortfalls, deficits, or gaps between them: between 'universalist' and 'particularist' practices;<sup>503</sup> between 'formal' and 'substantive' rationality;<sup>504</sup> between the ideal and the actual; between 'rules-as-represented' and 'rules-as-guides-in-practice';<sup>505</sup> between 'the model of reality' and 'the reality of the model'.<sup>506</sup> Such aporias, gaps, or voids are closed only through judges exercising their discretion in judgement, selectively including and excluding<sup>507</sup> different features of each of these three characteristic elements of social practices and attempting to link them together. It must also follow, therefore, that how these elements are linked together in decision making is always contingent and evolving, vague and indeterminate: judges will inevitably differ. However, understood in this way, what requires explanation is not divergence of opinion in decision making but the processes and procedures that ensure similarity or conformity and the progressive development of consistent and coherent judicial action; in other words, how, the tensions are negotiated and brought under control by the system.

(f) Understanding law as a dispersed knowledge system in this sense helps us to understand what legal institutions are and, consequently, what legal decision making is about. Subject to constant change, law as an institution is inherently creative. Its institutional agents, the judges, adhere to a practice of rule-following that is contingent and context-related or situational. Thus, throughout, both rule-following and novel adventure, continuity and change, uniformity and creativity, are always

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<sup>503</sup> Detmold (1989).

<sup>504</sup> Weber (1964).

<sup>505</sup> Taylor (1993).

<sup>506</sup> Bourdieu (1990), p. 39.

<sup>507</sup> Cf. Luhmann and Christodoulidis. See also Norrie (1996), (2001).

present. In this way the practice of law becomes a never-ending process of harmonizing purposeful decision makers whose particular decisions stem from their own application of their (at least partly) distinctive interpretations to the situations confronting them. Those decisions can often presage unanticipated consequences and precipitate paradoxical interpretations that are further interpreted, and so on. In this way, given the dispersed nature of legal institutional knowledge, co-ordinated decision making depends not on the accumulation of knowledge within the higher echelons of the legal institutional structure, but on ordinary decision makers forever inventing new ways of tapping into and sharing each other's knowledge. To acknowledge this is to recognize the importance of maintaining law as a discursive practice, a common form of life in which individual judges as decision makers share an unarticulated background of shared understandings.

In the next chapter I will develop this approach to an institutional perspective on law to reveal further aspects of the judge's role as institutional actor and decision maker and how these impact on her role in negotiating the tensions inherent in legal decision making.

## CHAPTER NINE

### THE JUDGE AS INSTITUTIONAL ACTOR AND DECISION MAKER

Stanley Fish argues that contemporary thinking about law, as with thinking across all disciplines, has fallen victim to what he calls ‘theory–hope’. In the end, all ‘the troubles and benefits of interpretive theory ... disappear in the solvent of an enriched notion of practice’.<sup>508</sup> According to Fish, all that theory can ever hope to do is offer an after-the-fact explanation of already firmly held beliefs which function to allow and confirm within an ‘interpretive community’<sup>509</sup> those convictions which its rhetoric asserts. The reason that we are able to interpret a text is because we belong to an interpretive community which supplies us with a particular way of interpreting it. Moreover, because we can never escape our communities our readings of a text are always in this sense culturally constructed. So we can never know of each other whether we belong to the same interpretive community, for that would require that each act of communication itself be interpreted. Thus, what is important is how an utterance affects a hearer, not any question about locating the meaning that is assumed to reside within it. In this way, arguments appear intelligible and convincing.

Fish’s response to Ronald Dworkin’s rendering of the process of constitutional interpretation, the judicial use of precedent, demands mention here. According to Dworkin,<sup>510</sup> the interpretation of the constitution, and therefore the role of precedent in judicial decision making, can be likened to the production of a serial or ‘chain novel’, in which judges take turns consecutively to add one chapter upon another. With the steady accumulation of chapters each subsequent writer’s freedom and choice in interpretation becomes increasingly constrained: the author of the last chapter is more constrained in relation to that task than her fellow authors, since she

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<sup>508</sup> Fish (1989), p. ix.

<sup>509</sup> As Balter notes, Fish’s notion of ‘interpretive community’ may be understood as exhibiting similarities to Perleman and Olbrechts-Tytecha’s notion of the universal ‘audience’ against whose primary criteria we determine whether an argument is reasonable (Balter (2001), p. 384).

<sup>510</sup> Dworkin (1986).

has to contribute her chapter under the accumulated burden of their chapters; the first author is unconstrained.

For Fish, however, this understanding of what is going on is erroneous. A reader's approach to a text can never be completely subjective. On the contrary, an internalized understanding of language shared by native speakers generates normative constraints in respect of their experience with language. In this way, Fish's argument questions Dworkin's understanding of the role and function of a doctrine of precedent. Indeed, for Fish, since all our attempts to gain access to the meaning of a text stumble on the fact that our interpretation is based upon the interpretive community of which we are a part, then a system of precedent cannot truly constrain judges; rather, constraints in judicial decision making must arise out of the process of judging itself. Moreover, since all judges appear equally constrained, we are left with the question of whether, at any point in this process, there is really any text as such that awaits interpretation.

According to Balter,<sup>511</sup> 'Fish's theory of interpretive communities provides valuable insight into the norms of the legal community' and how the legal interpretive community 'legitimizes a way of thinking about the law that is inculcated into its practitioners at each level of participation from law school through judgeship. Central to this socialization is the judicial opinion ... studied by law students, read by lawyers, and written in respect to other opinions by judges'. In this manner, a judge 'begin[s] the discourse with a particular case' and 'past cases are read in relation to the present circumstances'. While the legal community 'expects that the present case will be understood in relation to the past, ...the present case also molds the past'. That is to say, a writer is free to manipulate a text on which her opinion is based, provided this manipulation can be justified within the bounds of the expectations of her interpretive community.<sup>512</sup>

'Interpreters are constrained by their tacit awareness of what is possible and not possible to do, what is and is not a reasonable thing to say, what will and will not be heard as evidence in a given enterprise; and it is within these same

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<sup>511</sup> Balter (2001), p. 384.

<sup>512</sup> Fish (1989), p. 98.

constraints that they see and bring others to see the shape of the documents to whose interpretation they are committed.’

### **Tacit Knowledge and Socialization: Understanding Interpretation**

As we have characterised it, modern accounts of legal decision making proceed on the basis of an assumption that a judge will look at an ordered sequence of events, produce a context-based arrangement of these showing the relations between them and make a judgement as to their significance in respect of that context or theory. In this judgement process, what appears as straightforwardly presented to the senses is subjected to our craving to *re-order*, *re-arrange* and *re-design*, to create new perspectives on knowledge and new knowledge.<sup>513</sup> However, this attempt to see things differently and to disclose hidden meanings always takes place from within a particular standpoint or tradition. We draw distinctions against shared backgrounds, within a particular ‘form of life’,<sup>514</sup> ‘practice’<sup>515</sup> or ‘horizon of meaning’<sup>516</sup> where certain evaluative criteria are found to control, and we do so by bringing to the fore the parts we are interested in and ascribing significance to them.<sup>517</sup> Training and practice allow us to produce ever more delicately balanced and nuanced distinctions and judgements until, over time, we acquire an ability to make judgements on the basis of very finely tuned accents and emphases. Polanyi<sup>518</sup> makes this point when he describes the training of a medical student:

‘He watches in a darkened room shadowy traces on a fluorescent screen placed against a patient’s chest, and hears the radiologist commenting to his assistants, in technical language, on the significant features of these shadows ... [H]e can see nothing that they are talking about. Then as he goes on listening for a few weeks, looking carefully at ever new pictures ... a tentative understanding ... dawn[s] on him ... [E]ventually, if he perseveres

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<sup>513</sup> See Bell (1999), p. Ixiv, quoted in Tsoukas (2001).

<sup>514</sup> Wittgenstein (1958).

<sup>515</sup> MacIntyre (1985).

<sup>516</sup> Taylor (1985).

<sup>517</sup> *Ibid.*

<sup>518</sup> Polanyi (1962), p. 101. Fish (1989), p. 98.

intelligently, a rich panorama of significant details will be revealed to him ... He still sees only a fraction of what the experts can see, but the pictures are definitely making sense now and so do most of the comments made on them’.

This understanding is the result both of personal exposure to the material and of the specialized terminology that the student is taught to apply to it. What appears initially to preconceptual experience as a mere shadow is gradually processed through successive stages of revision and refinement, as the student relates his knowledge to the picture and to the words of his instructor. In this way, he progressively *rearranges*, *reorders* and *redesigns* his descriptions, and his descriptions of descriptions, recursively modifying and transforming every successive representation. Over time, newer distinctions are created and, as a result, so too is new knowledge.<sup>519</sup>

As we have already noticed, we find a similar thing takes place in the legal context. For any judge to be able to discern a legally significant pattern of events from a collection of data, she must draw upon a collectively produced and sustained body of legal knowledge. This is because the significant categories implicated in her individual action as a judge derive their meanings from the ways in which they have been used within that particular form of life that we refer to as the legal community. For example, as a student of the law she learns how to recognize certain features of the law of contract because she is taught to use the category contract within a certain domain of action. Knowing how to act and judge according to law is assumed to be precisely this: learning how to make proficient use of the categories and distinctions that constitute the domain of law. In other words, judges, as students of the law, learn first of all, upon entering the legal sphere, to assimilate the distinctions appropriate to law; that is, they engage in a discursive practice and learn how to use its normative system to influence a course of events.<sup>520</sup>

This capacity to exercise judgement derives from an understanding of context, and of having become knowledgeable in respect of the significance of

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<sup>519</sup> See n. 61.

<sup>520</sup> See Taylor (1993).

certain acts within particular contexts, achieved as a result of having undergone a process of socialization.<sup>521</sup> We know how to recognize and do certain things because we have learned how to recognize and to do them. We have an awareness of the normative expectations relevant to them and an intuition of the consequences that follow from breaking these. We might say that our ability to exercise judgement comes in large part with our appreciation of theory, our ability to generalise a finding across contexts.<sup>522</sup> This application of a set of generalizing principles across contexts involves judgement, and the capacity to do this is knowledge. So, when a judge applies a set of legal principles to a particular factual situation, she uses theory to generalize across contexts, which then becomes an additional basis for exercising judgement.

### **Working with Rules**

Judges apply rules in specific decision-making contexts. However, there is nothing within a rule itself that can fix its application in a particular case:

‘there is no “fact of the matter” concerning the proper application of a rule, ... what a rule is actually taken to imply is a matter to be decided, by contingent social processes’.<sup>523</sup>

In a passage bearing similarities to Edward Levi’s argument, Barry Barnes argues that to follow a rule is to extend an example:

‘To understand rule-following or norm-guided behaviour in this way immediately highlights the normally open-ended character of norms, the fact that they cannot themselves fix and determine what actions are in true conformity with them, that there is no logical compulsion to follow them in a

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<sup>521</sup> Berger and Luckmann (1966).

<sup>522</sup> See Bergson’s (1913b) discussion of *Laughter*. Also Dibben’s article, drawing on Bergson’s discussion and modifying Whitehead’s position to emphasize the subjective aspect of our perception and understanding of reality, arguing that our expectations are our theories and that we use these necessarily to understand reality.

<sup>523</sup> Barnes (1995), p.202.

particular way. Every instance of a norm may be analogous to every other, but analogy is not identity: analogy exists between things that are similar yet different. And this means that, although it is always possible to assimilate the next instance to a norm by analogy with existing examples of the norm, it is equally always possible to resist such assimilation, to hold the analogy insufficiently strong, to stress the differences between the instance and existing examples. If norms apply by analogy then it is up to *us* to decide where they apply, where the analogy is sufficiently strong and where not'.<sup>524</sup>

In this way, the application of a rule derives essentially from and contributes to a collectively shared meaning. But for this to occur, members of an institution 'must be constituted as a collective able to sustain a shared sense of what rules imply and hence an agreement in their practice when they follow rules';<sup>525</sup> in other words, the justification or purpose beneath a rule needs to be made clear and its meaning integrated within the institutional collective. Law exists as an institution as a tightly related network of communications in and through which shared understandings are attained.<sup>526</sup> On this view, it is institutional knowledge as the *collected and collective* wisdom or knowledge of the judges as a whole that enables each individual judge to put the sources of law to their respective uses and to develop and employ their own distinctive ways of thinking and acting.

This essentially Wittgensteinian view of rule-following bears close similarities to Polanyi's idea of personal knowledge, since no matter how abstract the formalistic notions that judges use are their effective use depends ultimately on social definitions.<sup>527</sup> For Polanyi, all abstract systems, however simple or

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<sup>524</sup> *Ibid.*, p. 55

<sup>525</sup> *Ibid.*, p. 204.

<sup>526</sup> We can see how this collective understanding of institutional knowledge exists and operates with regard to law by looking at the Common Law doctrine of precedent. The key to understanding the development of the Common Law is found not so much in the resources that it uses as in what are rendered by these: judicial decisions. Because judges view and use their resources differently, this implies that judges have some degree of discretion over how they view and use their resources, and therefore also over the *ratios*, or rules of law, which they will construct and/or identify in decision making.

<sup>527</sup> For Polanyi (1962), human judgement is involved both at the level of historically evolved collective understandings and at the individual level, so that all knowledge is personal knowledge. Even in the sciences, what we find is 'a set of formulae which have a bearing on experience' (p.

comprehensive, involve an essential element of human experience; that is, an encounter with the real world mediated through human judgement:

‘even the most exact sciences must therefore rely on our personal confidence that we possess some degree of personal skill and personal judgement for establishing a valid correspondence with – or a real deviation from – the facts of experience’.<sup>528</sup>

In other words, if we affirm some degree of ‘personal participation as the universal principle of knowing’<sup>529</sup> then all knowledge becomes, in one way or another, an art, a skilful achievement.<sup>530</sup> Inasmuch as judicial decisions, like abstract mathematical formalisms, require formal justification by the comparison of predictions with measurements there will be gaps between theory and observation that require to be assessed by the personal judgement of the judge.<sup>531</sup>

### **How should we understand this skill?**

As we have seen, to gain knowledge of something is, according to Polanyi, to integrate a set of particulars of which one is subsidiarily aware. So, to make sense of something, we depend on some aspects of it subsidiarily and concentrate on our main aim focally; that is, we tacitly integrate certain particulars in order to comprehend something focally as a whole. In this way, knowing has a ‘from-to’ structure: the particulars bear on the focus *to* which we attend *from* them. Nonetheless, subsidiary awareness and focal awareness are mutually exclusive, so that if we shift our focal attention towards the particulars that we had previously been aware of only subsidiarily then our acting becomes confused.<sup>532</sup>

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49).Cf. Toulmin (1999), who argues that abstract systems do not sustain themselves but are grounded on collective definitions and depend on human judgement).

<sup>528</sup> *Ibid.*, p. 31.

<sup>529</sup> *Ibid.*, p. 44.

<sup>530</sup> We could perhaps extend this to include the idea that law advances by means of a ‘working hypothesis’.

<sup>531</sup> Polanyi (1975), p. 30.

<sup>532</sup> For example, instead of banging on the nail we hit our thumb with the hammer!

We may recall that there are three elements present here - subsidiary particulars, a focal target, and a linking agent.<sup>533</sup> – and, because ‘the relation of a subsidiary to a focus is formed by the *act of a person* who integrates one to another’,<sup>534</sup> then practical knowledge is always ‘personal knowledge’, knowledge that has to be applied as a tool.<sup>535</sup> As we become more familiar with the use of such a tool so our awareness and understanding of how to use it instrumentally increases and we begin gradually to feel it as an extension of our own body. Through this process of assimilating the tool, ‘indwelling’,<sup>536</sup> we begin to make sense of our experience and, as we become more *unaware* of using our tools, so our awareness of the uses to which they may be put increases and we develop and refine our ability and skill to use them instrumentally. This refinement in the purposeful use of our skills and abilities provides a form of ‘justification’, which enables us to develop further our understanding of the situation before us. Thus, we can see how, in this way, a judge might properly develop the ability to ‘read’ a situation before her. In Polanyi’s terms, we do this through the ‘pouring of ourselves into the subsidiary awareness of particulars’.<sup>537</sup>

Bringing this to bear more directly on our present discussion of decision making, we might say that the particular type of knowledge that a judge possesses could be described as the capability to draw distinctions within a certain area of operations based on her grasp of context and theory. In decision making we are concerned with three things: the concrete settings within which decision making occurs (the ‘facts’); the normative background against which decision making takes place (‘the ‘rules’); the historical continuity of the community of decision makers (the judge(s)). Legal institutional knowledge is the capability that individual judges have developed as members collectively of the judiciary to draw distinctions in the process of decision making in respect of particular concrete situations through the use of generalizations whose application is tied to shared understandings and experiences previously acquired and developed within and by the professional

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<sup>533</sup> Polanyi (1975), p. 36.

<sup>534</sup> *Ibid.*, p. 38.

<sup>535</sup> ‘Hammers and probes can be replaced by intellectual tools’. See Polanyi (1962), p. 59.

<sup>536</sup> Polanyi (1975).

<sup>537</sup> Polanyi (1962), p. 64.

community of decision makers to which they belong. As propositional statements and shared communal understandings are used and experiences are processed individually and collectively in a reflexive manner so they are pushed into subsidiary awareness and individual judges, as members of this community, dwelling more and more in them are able to progress and turn their attention towards new experiences within their own particular area of operations.

In particular, we can see how opinions expressed *obiter*, remarks and ideas shared in extralegal contexts, together with the provision of more formal justifying reasons for decisions all come together to create an environment in which communal professional judicial ties are strengthened, collective memory improved and individual knowledge augmented. Within this environment, individual judges draw upon the wealth of each other's accumulated experience and knowledge of decision making, consulting with each other on professional judicial decision-making matters and also communicating less formally and naturally with one another, creating a culture and an environment of 'storytelling' that reflects and reinforces communication.

In this way, a shared background, individual learning and storytelling are all linked together in decision making. Judges draw upon a generally accepted body of law provided in the form of statutory texts, printed decisions, rules of evidence, court procedures, and so on, much of which is codified in one way or another, officially or unofficially. So if, for example, a defendant in criminal proceedings pleads guilty in relation to a particular offence she will often receive a standard sentence, which suggests that lesser crimes are capable of being handled lower down the judicial ladder. At these lower levels, often the most difficult question requiring answer is how quickly this workload can be shifted.<sup>538</sup> Here, justices and magistrates may be expected to draw on all the resources available to them, whether printed in official documents or taken from their own life's experience, to find the answers to nearly all

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<sup>538</sup> This is partly due to the fact that, at this level, the efficiency of the criminal justice system is often viewed by the general public in terms of how 'clogged up' the court system has become. At the time of writing, this is a serious problem for both Scottish and English courts, with articles and reports appearing frequently in the UK press.

of the questions likely to be posed. In diverse ways they are encouraged and expected to draw upon each others' experiences and upon their own knowledge of the judicial process and decision making. Here, an environment of story telling strengthens the bonds between decision makers and reinforces community ties and the collected and collective memory, thereby enriching and enhancing individual knowledge.

Nevertheless, not all of the questions or legal issues presented in cases before a court are straightforward and unambiguous. Where ambiguity occurs, judges need to be proficient at articulating the facts before them to clarify the precise nature of the legal questions being addressed and requiring answer. For example, is a skateboard a vehicle under the terms of a regulation prohibiting vehicles in the park? Most experienced judges would be aware of the reasons for the regulation and how these relate to its proper functioning in society and, through proper questioning, would be able to ascertain the extent of the uncertainty that required to be addressed. A judge's ability to discern the nub of the problem in this way, to determine the crux of the legal issue by making ever finer distinctions, is a skill that is acquired, developed and refined through training and experience in the practice of legal decision making.<sup>539</sup> In other words, through experience and through participation in a 'community of practice', a judge develops a 'sense' of what is going on, and of what is at stake, which is properly a legal skill that over time becomes instrumentalized. It is something that allows her to reflect on things as they are going on, a skilful intuition that she can develop and use as 'an extension' of herself and which permits her to focus on the issue at hand.<sup>540</sup>

Over time, judges develop a greater degree of sophistication in relation to these perceptual capabilities and the structure of authority and responsibility that we find in the judiciary develops. They learn how to recognize how certain concrete facts bring to light certain legal issues and how then to think in appropriate terms and

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<sup>539</sup> However, it should also be noted here, how this process may also be seen to legitimate the ignoring of otherwise linguistically relevant information, and how his homing-in on aspects through the making of ever more refined distinctions permits the silencing of aspects ignored through absurdity; for example, see the earlier discussion of *Re A*.

<sup>540</sup> See also Alfred North Whitehead's discussion of 'foresight' as a product of 'insight' and understanding in Whitehead (1933), pp. 119 ff.

categories. In this way, more experienced judges will often become admired for their ability to discern instrumentally nuances of difference, to draw ever more refined distinctions and decide on the basis of these: even their *obiter* remarks are referred to as if authoritative and quoted as such. Recognizing nuances and being able to come to a decision quickly on the basis of these becomes an important part of a judge's skill. As part of the 'tacit' dimension of a judge's knowledge, it goes a long way to account for why a judge decides a certain issue in a particular way. It is, in a proper sense, 'intuitive', 'insightful'. It is, in fact, what accounts for the moment of decision in which a judge decides and is one reason why her decision must then be justified by way of providing justifying reasons for her decision. But, as part of the 'tacit dimension' of a judge's decision making, it reflects a knowledge that cannot be told; hence, Ward L.J.'s confession in *Re A* that he 'found it exceptionally difficult' and 'especially arduous',<sup>541</sup> struggling to his description of the case as 'very unique'.

What we are dealing with here is knowledge that is difficult to put into words, let alone into the form of propositional statements. Of course, Ward L. J. does make use of a form of words and a recognised structure of argument, and he draws on the sources of law to justify his decision, but does so in a manner that makes it clear that it is his personal professional judgement that is being exercised to identify the problem, however much that judgement has been moulded by the prevalent legal culture.<sup>542</sup> All of this reflects the fact that in law we are just as much concerned with the act of decision making as with the decision maker and the decision itself; that is, it is *that* decision maker who is *here* making *that* decision in respect of *these* persons, events and circumstances in *this* case that is of significance, not just the bald decision itself.

One important aspect of the doctrine of precedent that is of relevance here is the way in which the course of legal decision making goes on regardless of the choice of decision. This is not simply because it flows on like a river forever

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<sup>541</sup> See his introductory remarks in *Re A*.

<sup>542</sup> For instance, 'We are also very grateful for the very considerable research undertaken ... and for the powerful submissions counsel have advanced which have swayed me one way and another and left me at the conclusion of the argument in need of time, unfortunately not enough time, to read, to reflect, to decide and then to write' (Ward L. J.'s final introductory remarks in *Re A* ).

coursing along the path of least resistance but because each new case presents a new and unrepeatable opportunity for decision making with its own unique set of possibilities that might be actualized. Each decision is, to a degree, influenced or constrained by what has gone before and is now received as data, but there is freedom to choose not determinism; indeed, judges are drawing on a whole variety of different sources of data and information provided for them in written and oral form. Such data is offered as separate items of fact and information. What we see in decision making is the transformation of this data and information into legal knowledge by the judges: its conversion and presentation into propositional 'If, then' statements.

To create 'If, then' statements, judges must take into account the particular context of the instant case and make a judgement under pressure of time<sup>543</sup> as to what the proper outcome must be. In doing this, they are not mindlessly applying general rules to particular facts but making an appropriate judgement as to how the body of rules must be adapted to include the circumstances at hand, however obvious that might sometimes appear to be. All of which is really just another way of saying that a norm requires a decision to claim its instances or that, to put it in Whitehead's terms, 'the many become one and are increased by one'.<sup>544</sup> Thus, formal rules, as data in this encounter of experience, demand the exercise of human judgement to create new experience that is subsequently drawn upon and appealed to in later moments. If we accept Polanyi's claim here that all knowledge is personal, then, as far as institutional knowledge is concerned, there is *always* a question of appropriateness involved in the harnessing of knowledge for decision.<sup>545</sup> This is precisely what distinguishes knowledge from information in legal decision making: the former necessitates an active rearrangement of the latter on the basis of context or theory.

Consider this example: a judge hears a case knowing through experience that cases of a certain type with facts of a certain order present legal issues that fall to be

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<sup>543</sup> See Ward L. J.'s comment that 'the search for legal principle has been ... conducted under real pressure of time' (see above n. 575).

<sup>544</sup> See n. 190.

<sup>545</sup> See Gunther (1993).

determined in a particular way. But the same judge knows from her own experience of previous cases, and to some extent also from the collected and collective experience of the community of decision makers to which she belongs, that there are difficulties that are often experienced by parties to such cases that are not apparent from a simple reading of the facts that fall for legal determination under the rules as prescribed. There may also be problems in relating the appropriate legal rules to those facts that could not have been envisaged by those responsible for making previous decisions, far less by those who constructed the relevant statutory authority. To decide in the obvious way would clearly be to create an injustice,<sup>546</sup> and the judge knows this. But how does the judge know this? If we follow Christodoulidis's argument then we must acknowledge that 'the incalculability of justice is a result of the elision that every exercise of judgement enacts, of what finds no adequate register in judgement'?'<sup>547</sup> However, this 'knowledge' is not to be found in or derived from official written legal sources; on the contrary, it is knowledge derived from the judge's personal experience of encountering particular types of problems and, having worked those out, heeding their lessons. It is part of the development of her skill of understanding how to recognise and utilise appropriate responses in making decisions.

All of this implies that judges may have to improvise to meet the demands of decision making under pressure of time and lack of resources and the expectations of their public and political audiences. In doing so, they may often have to use cases selectively to 'construct' the legal authority for the decisions they are making.<sup>548</sup> In this sense, the 'sources of law' being appealed to as authority are not the formal, officially recognised sources of law but are more correctly described as informal, since in a very real sense law is being constructed 'on the hoof'. The type of knowledge involved here is a form of knowledge that is generated in the process of

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<sup>546</sup> See *Riggs v Palmer* and *Donoghue v Stevenson*. Christodoulidis (2006) asks what is it that lets the judge know that an injustice would be created, and refers to Ricoeur, stating that the cry that this is unjust cannot itself be heard in law (*UPLR*, pp. 110-111). This argument can only be sustained on a view of law that, on the argument presented here, gives too much to law in the sense of its determinism. As Hartshorne (1970) and (1987) has shown, absolute determinism is a logical impossibility.

<sup>547</sup> Christodoulidis (1995), p. 38.

<sup>548</sup> Cf. Levi (1948).

decision making, fuelling decision making and carrying it under its own momentum, rather than some pre-existent body of knowledge that forms a basis for decision making and from which decision making proceeds.

To press this point further, legal knowledge in this sense is not merely something that is to be found in the formal written sources of law but is rather something that continually evolves in the minds of individual judges and through the stories that they tell and share and which sustain their community of practice. Of course, such knowledge is often eventually given symbolic representation as institutional knowledge, cast in a relevant form through its structured use in decision making, and presented as propositional knowledge.<sup>549</sup> Nonetheless, while all of this happens, and quite properly so, it is equally clear that what this points towards is the fact that abstract generalizations, however necessary, are not and cannot in themselves be sufficient to capture the complexity of institutional knowledge in its entirety. In legal decision making, *some creative element always accompanies every decision.*

What makes knowledge institutional is its codification in the form of propositional statements. However, institutional knowledge is always put into action in particular concrete situations and contexts. Therefore, the possibilities for individual judgement to be exercised and for novel adventure to emerge and be entertained are always open. That is to say, the world is not a closed system. It permits of new experiences and more advanced forms of learning and progression, and this gives knowledge its forever temporary and always provisional, ready-but-not-ready character. In this way, every application of general rules to particular facts, events or circumstances involves the instant case particularities in the constitution of its general principle in the sense of its being applicable to an instance that never before existed: the rule is supplemented, increased, by those instant case particularities and also in a very real sense determined by it. Levi understands this when he says that the classification changes as the classification is made; Gadamer makes the same point, maintaining that a general principle is 'always supplemented

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<sup>549</sup> See, for example, MacCormick's arguments (ch. 2 above) in respect of Lord Atkin in *Donoghue v Stevenson* and Ward in *Re A*.

by the individual case, even productively determined by it<sup>550</sup> so that each 'application is neither a subsequent nor merely an occasional part of the phenomenon of understanding, but codetermines it as a whole from the beginning'.<sup>551</sup> This suggests that what is at stake is not really the application of general rules to particular facts, but that we understand generalizations only as and when we connect these generalizations to particular concrete circumstances of the cases under consideration. We know and understand the general rule in and through the act of connecting it, relating it, to the present particulars. Thus, every act of applying a general rule to particular facts is a creative act, an act of creative interpretation in decision making.

What is more, a condition for any judge to undertake decision making is that she belongs as a bona fide member of the relevant legal institution. This professional organization that has its own intricate conceptual structure and theoretical framework of understanding, comprising generic categories and their interrelations, something that every judge must keep in mind when engaging in decision making. But even this does not deny the fact that each act of decision making is a personal, interpretive, expository and creative act; indeed, it helps to underline it. In characterizing or categorizing a situation before her in a particular way, a judge already begins to explore the question of suitable responses:<sup>552</sup> she decides to characterize it this way rather than that way because she 'feels' it to be of a certain kind or 'type'. Of course the situation may be a new one, and in some sense it is always bound to be. However, it might strike her as new not just in the sense in which all situations are new but also in the significant sense that it does not quite exhibit those characteristic features that would suggest its 'fit' with previous instances of a similar type. Here, in starting to characterize the situation before her in a certain way she is already making a difference both to the category to which she refers and also, at the same time, to this new instant situation by the very fact of viewing it through, framing it with and imposing upon it, this template. Quite often (and quite likely) she may be wrong: her initial judgement is but a tentative 'shout', a well-educated guess. It is merely a

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<sup>550</sup> Gadamer (1989), p. 38.

<sup>551</sup> *Ibid.*, p. 324.

<sup>552</sup> MacCormick's (1978) explanation of the method of exploring universalisability and consequences in the reasoning of Lord Atkin in *Donoghue v. Stevenson* is a good example.

hypothesis by which she attempts to extend an already formed analogy or theory to include this instance as an example. All she can do is test her hypothesis by considering the consequences. What results? She needs to consider these. Perhaps she must revise her hypothesis and test again, and so on. All of this abstract categorizing and re-categorizing, first this way and then that way, is a necessary part of her search for a decision and its formal legal ‘justification’. In the end, her universalizing may fail to find a ‘match’: the particularities of the present case may evade capture by her categories if only just because they are abstract categories. The question is: can she close the difference? Yes, of course, she will. This is what she is trained to do, personally skilled to do. It is *she* who *must* close the difference; indeed, it is *only* she, or another such as she who *can* close the difference.

Now what all of this points to, is the fact that we need to revise our understanding of what is going on here: somehow the idea of an unreflective institutional practice of applying general rules to particular cases must be transformed into a reflective one.<sup>553</sup> The skill of legal decision making needs to be augmented by an understanding of what judges are doing when they practice that skill. If legal judgement is, as surely it is, a form of practical judgement then this is entailed in affirming that. Legal decision making must not be thought of as simply an unreflective practice, for it involves judges determining, often with great difficulty, how to observe the rules of their practice and the practice of their rules (the abstract rules of law and the historically formed, collected and collective, understandings of the community of which they are a part and to which they belong). Bankowski<sup>554</sup> alludes somewhat to this when he talks critically of the person who says ‘I know nothing about art but I know what I like’. If such a person was asked to explain what they meant by the statement that they knew what they liked, they would have to resort to, for example, indicating what it was about a particular painting that they liked. In doing this they would have to state it in terms appropriate to the art work, which would in fact show that they knew something about art after all. Their liking of a piece of art would show that they liked it but they could not know this unless they were able in some way to articulate it; that is; unless they knew something about

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<sup>553</sup> Cf. Günther (1993).

<sup>554</sup> Bankowski (2001), p. 165.

art. So judges do not simply apply rules to facts, they also have to think about what they are thinking about and about how they are thinking about it. It is not enough just to make a decision, it must also be justified; it is just not acceptable for a judge to say 'I can't tell you why this is the right decision, but I know that it is'. Equally, the idea that a judge could become a judge having mastered *unreflectively* the practice of judging is a non-starter. The practice of judging as involving the production of justifying reasons for decisions entails that the deciding should be able to be carried over, understood and employed by other judges: finding the ratio, articulating and elucidating the reasons for a decision, amounts to an engagement with and not blind observance of the rules and principles of law. All of this relates to what we have argued about communal understandings, practices, habitus, and so on, and it is primarily about turning an unreflective practice into a reflective one.

Today, technological advances and mass communication make possible ever more refined forms of abstraction that demand ever more sophisticated forms of codification of general rules for efficient and effective decision making. In this ever-changing environment, our institutional abstractions must be able to help us navigate and negotiate the difficult pathways of life's experience. Yet this is only one side of legal decision making. The other side, which I have been arguing for here, is that of the importance of *creative personal understanding*, a method of decision making obtained and employed by judges using the exploration of possibilities rather than by following set rules: heuristic knowledge. MacCormick is forever pointing towards this but always stops short of openly acknowledging it; Detmold thinks of it as mystical; Bankowski actively seeks a way of articulating it; Christodoulidis argues that it belongs to the realm of ethics and denies its possibility in law. It is a sense in which judges depend on much more than a structure of general rules, principles and procedures of law, but engage their own personal experiences, skills, outlooks and understandings as well. It is precisely because of this that law as an institution in a sociological sense must endeavour to encourage, promote and sustain a sense of communal understanding, its collected and collective spirit, to harness the provisional and improvisational inventiveness, expertise and creative imaginations of individual judges within an overarching and undergirding sense of corporate,

communal, membership and responsibility. Here, the effective development of legal institutional decision making requires that the relation between personal creative knowledge and propositional knowledge be mutually supporting and sustaining: propositional knowledge is utilized by judges and instrumentalized in appropriate application within particular cases, thereby achieving representation as tacit; individually held and exercised creative knowledge must also be set forth in a way that can make it (institutionally) accessible to a wider audience. Therefore, developing legal institutional knowledge is not simply about the proper ways of handling or manipulating difficult 'pieces' of information, but also, and perhaps more importantly, about the nourishment and fortification of the social practices that make this possible.

## CHAPTER TEN

### LEGAL CONTEXTS AS 'PRACTICES'

One widely accepted understanding of the institutional control of law is in terms of its capacity to stabilise and maintain relationships and expectations over time.<sup>555</sup> In this sense, almost paradoxically, it is the dynamic nature of law as a social institution that is being highlighted. On the one hand, as a result of its application over time, and given the unpredictable nature of contingent social life, law is forever being confronted with new problems and new situations that it must constantly respond to.<sup>556</sup> On the other hand, this dynamic nature of law as a responsible and responsive institution stems from the social values that undergird the legal system; thus, changing societal values will result in or be evidence of a restructuring and reorienting of law over a certain period of time.<sup>557</sup>

Every individual judge is appointed to occupy a particular place within this legal institutional setup which, according to constitutional theory, is subject to regulation in two separate but related ways. First, the *legislature* as a political body sets the norms underlying legal institutional functioning and in this way the legal institution is made to adhere and correspond to the purposes and desires set for it by the body of elected representatives of the people. Second, the *executive* maintains the legal system to permit it to function within the circumference of the norms set by the legislature and to implement these. In this political conversation over the nature and performance of the *judiciary*, two different but interrelated sets of judgements are continuously being made: the first concerns the reality of the legal system, its proper purpose and function; the second is more instrumental and concerns its operation. In Parliament, this endless conversation concerning these two judgements takes place all the time under the shadow of an acceptance that the final say will always be with the former. In performing the duties of her office every individual judge, as a

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<sup>555</sup> MacCormick, IAPI, p. 80.

<sup>556</sup> Crime and criminal justice throws up numerous examples here. In legal cases, see the majority reasoning in *R v Brown* [1993] All ER 75. *Re A* is also a good example, as is *MacLennan v MacLennan*.

<sup>557</sup> See Lord Justice General's opinion and that of Lady Cosgrove in *Lord Advocates Reference No 1 of 2001*.

member of the judiciary, has in mind this endless political conversation and, to an extent, is constrained by it.<sup>558</sup>

Now since the problems that legislatures deal with are always a problem *for someone*, then, in responding to a given situation, or the threat of one, we might reasonably assert that politicians, as elected representatives, will generally have in mind questions concerning how these actual or potential situations might be shaped in relation to their own particular purposes or goals. In this way, lawmaking by the legislature may be thought of as a socially grounded method of perception and action, founded in social practice but reflecting particular change-resistant self-understandings. So while, on the one hand, the subjective side of lawmaking may be seen to embrace the idea of creativity and change, on the other hand it exhibits a profound resistance to change due to its inherently self-referential nature. As a result of this contrast, the role of a judge must be understood not only to involve taking account of the reality judgements of lawmakers but also, in view of the endless political conversation referred to above, assisting in the redefining and introducing of new self-understandings through control of data and the way it is interpreted and presented.

Law, as Niklas Luhmann<sup>559</sup> reminds us, is a social system, and social systems are constituted by self-understandings expressed through commonly held and articulated sets of background distinctions. According to Charles Taylor, 'the language is constitutive of the reality, is essential to its being the kind of reality it is'.<sup>560</sup> In so far as our theoretical frameworks may be said to alter the background distinctions that make up the self understandings of our social systems, they may also be said to modify the social systems themselves. In other words, there is an internal relationship between the categories of thought that we use to approach reality and the practices that we seek to address and manipulate. In an important sense, our theoretical frameworks, our models and categories of thought help to constitute the

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<sup>558</sup> See MacCormick's emphasis on the evaluative and subjective factors taken into account by a judge in legal decision making.

<sup>559</sup> Luhmann (2004). Here, more correctly, we should perhaps speak in terms of a hybrid of law and politics.

<sup>560</sup> Taylor (1985), p. 34.

world that we then experience. Thus, a social practice, such as the way that fellow judges within a common legal system relate to each other and each other's decisions, is what it is in and through the main self-understandings that practice embodies; that is, these self-understandings are 'constitutive of the social matrix in which individuals find themselves and act'.<sup>561</sup> As the former change, so also do the latter. This means that the distinctiveness of a social system originates, at least partly, from the frameworks of understanding and categories of thought that have grown up in particular circumstances over time. But where do these self-understandings come from? How do they develop? What sustains them?

Alasdair MacIntyre's concept of a 'practice' helps point a way to an answer:

'By a "practice" I am going to mean any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically *extended*'.<sup>562</sup>

For example,

'Tic-tac-toe is not ... a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the enquiries of physics, chemistry and biology, and so is the work of the historian, and so are painting and music'.<sup>563</sup>

In the context of our discussion here, two features of a practice emerge as specially significant. First, a practice is a complex, cooperative and coherent association of

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<sup>561</sup> Taylor (1985), p. 36.

<sup>562</sup> MacIntyre (1985), p. 187.

<sup>563</sup> MacIntyre, 1985, p. 187.

human beings bound together by rules and persistent across time. Second, every practice creates what MacIntyre calls ‘internal goods’; that is, goods that cannot be known or acquired in any way other than by participation in that particular practice,<sup>564</sup> which means that ‘[t]hose who lack the relevant experience are incompetent thereby as judges of internal goods’.<sup>565</sup>

Obviously, internal goods are distinct from ‘external goods’, which are only randomly associated with practices and may be obtained in ways other than by participation in a particular practice; for example, wealth, rank, notoriety, and so on. In this way we can see how the key features of a practice originate from within; that is, the practice is self-referential. Those ‘internal goods’ that make a practice that particular practice and not any other practices are grounded in the particular experiences that its participants gain from their involvement in the practice and, insofar as this is true, the values and cognitive categories that have evolved within a practice will specify and dictate the way in which its members relate, jointly and severally, to their external environment.

We might compare, at this point, MacIntyre’s understanding of practices with Luhmann’s account of social systems. For Luhmann, social systems interact with and relate to the environment that they perceive to exist externally. But while changes in its environment may trigger a response within a social system, this response is conditioned by the system’s own significant structure. That is to say, social systems, through their own ‘internal goods’ (to use MacIntyre’s phrase), allocate significant patterns and pattern variations to their environment and react to these patterns and pattern variations. Knowledge emerges within a system as a result of this activity; not as a passive response to an objectively given environment but through a system’s interaction with its environment. When faced with a change in its environment, a system will react in terms that reflect its own internal organization: a change in one part of a system is coupled with changes in other parts. In this way, a system will always react to preserve itself, facilitating its own self-production by establishing continuous patterns of self-referential interaction. Thus, law as a social system in

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<sup>564</sup> Eg. ‘*playing*’ chess, ‘*nursing*’ patients, etc.

<sup>565</sup> MacIntyre (1985), p. 189.

this sense will always react to its environment in relation to its own internal organization.<sup>566</sup> It will determine what it perceives and, likewise, what it perceives will thus determine the system. Therefore, wholesale change is difficult: a system will always react to preserve itself. Alternatively, significant change may take place generally across a system if the system continually receives information or generates information internally *about itself*.<sup>567</sup>

## Changing Social Practices

To the extent that we might agree with this analysis, we may say that new practices and new ways of doing things are mutually constituted in a recursive manner; or, to put it another way, when new descriptions gain acceptance among actors then new ways of doing things arise; when new ways of doing things arise then new descriptions also emerge; and so on. Thus, new ways of thinking about a practice will give rise to new ways of articulating it and thus also, potentially, to new ways of acting. In this sense, there can be no permanent character to social practices; rather, since they consist of the articulation of a set of self-understandings, then, when the underlying way of articulating how those practices' functions change, so will the self-understandings communicated in and through them.<sup>568</sup> So, if we view what judges do as a social practice in these terms, then we can perhaps begin to understand in a new light the *obiter* comments that judges make in delivering their judgements. What we find is a set of 'internal goods' developed over time, the main features of

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<sup>566</sup> That is, in relation to the cognitive categories, values and settings it has developed within itself over time.

<sup>567</sup> According to Luhmann (1995), we can think of information in terms of difference. Information is a difference that makes a difference. We can understand what this means as we consider how a system deals with a regular receipt of information concerning its environment, other systems, and its own functioning. In this situation a system will create what amounts to a set of differences, both between its knowledge of itself and of other systems and between its knowledge of itself at one particular point in time and again at some other point in time. Consequently, a system may act to restructure itself. See also, Maturana (1980): 'Through language we interact in a domain of *descriptions* within which we necessarily remain even when we make assertions about the universe or about our knowledge of it. This domain is both bounded and infinite; bounded because everything we say is a *description*, and infinite because every *description* constitutes in us the basis for *new orienting interactions*, and hence for *new descriptions* ... The *new* then is a necessary result of the historical organization of the observer that makes of every attained state the starting point for the specification of the next one, which thus cannot be a strict repetition of any previous state, creativity is the cultural expression of this unavoidable feature' (pp. 50-51).

<sup>568</sup> In this way, both the aim and the operation of the practice will change too.

which are those associated with the work of judicial decision making. To disturb the system, and thus activate it with a new set of self-understandings as to what judging is all about, would require the influence of one who ‘straddles’ the threshold between inside and outside, and who might therefore be described as from the outside but with a recognized or legitimate authority and a far-reaching plan.<sup>569</sup>

But how might this be brought about? In the UK, for example, we have seen how the use of tools such as statistics on clear-up rates, league tables and waiting list targets have shaken up not only the criminal justice system but also the education system and the National Health Service. This has taken place by forcing participants to respond to the messages expressed through these tools in ways that focus on these tools themselves. With attention directed more towards the tools than the essential workings of the systems, these rates, tables and targets gradually assume an importance independent of their initial projected use, and instead are thought of as important in and for themselves. As can be seen from the political fallout<sup>570</sup> generated by these measures in the UK, they can have quite unanticipated effects, changing the systems quite radically in the long run.

In such cases those seeking to effect significant change commonly (a) have a particular goal and purpose in mind that they are able to articulate in a relevant way, and (b) are able to provide the system with information about its operation and about other systems. In this way they are able to create the conditions necessary for the implementation of the changes they wish to see taking effect. What is happening here is that a discourse is being founded to structure the debate that necessitates the use of their key categories. When that debate becomes so structured as to necessitate the use of their key categories, change becomes inevitable. From this point on, any attempt

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<sup>569</sup> Cf. Bankowski’s alternative understanding of the jury as an example of what he terms ‘straddling institutions’ (Bankowski (2001) and (2001)).

<sup>570</sup> In an interim report, Sir Ronnie Flannagan, Chief Inspector of Constabulary for England and Wales has criticised the present setup, saying that it meant police officers were ‘over-recording and under-delivering’. See article entitled ‘Police “bogged down by red tape”’, which can be found at <http://news.bbc.co.uk/1/hi/uk/6990144.stm> (last accessed on 21/10/2007). A spokesperson for the Home Office has warned that ‘officers should not pursue detection numbers for numbers’ sake ... This amounts to hitting the target, but missing the point’. See article entitled ‘Police condemn “target culture”’, which can be found at <http://news.bbc.co.uk/1/hi/uk/6656411.stm> (last accessed on 21/10/2007).

to object will fail to register since the very language in which any objection is composed and through which it is articulated will have to be consistent with those objects that the resistance strives in vain to oppose. In other words, when the way a participant talks and acts changes the practice changes too.

We can see then how institutions such as law may be seen as more than simply viewpoints onto the world; rather, they are collectively recognized methods of perception involving a set of cognitive categories, values and interests that originate in social practices, which are themselves founded on internal goods and self-understandings that have evolved historically and which are manifested as sets of background distinctions shared among members. Such practices are, of course, self-referential.<sup>571</sup> Interaction is with members' *perception* of their environment rather than with any objectively identifiable environment, these perceptions emerging from the way that the practice is ordered and structured; that is, from the cognitive categories, standards and interests in terms of which it has evolved over time. In other words, to put it rather bluntly, in terms of the way that law functions as a practice, judges decide the way they do because they think the way they do, and they think the way they do because they decide the way they do. Law is a self-referential system, concerned with the persistence and survival of its own identity.

Therefore, to interrupt this cycle and to change practices, one would first have to recognize how it is that social practices are dependent on the language through which they are expressed, how it is that they may be said to be impressionable, for it is in this sense, if at all, that we might affirm it to be possible to introduce novelty; that is, through developing a coherent, credible and justifiable discourse equipped with those novel distinctions, definitions and self-understandings that will constitute the new institutional identity of the practice under modification. This battle over ideas, over the form and content of communication, must be engaged in with a vision of a new institutional identity, with a new conversation and a new purpose in terms of which those proposed changes could be conceived as possible.

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<sup>571</sup> We might also note the point of comparison between MacIntyre and Luhmann here.

In the second place, as we have already noted, regular information about the functioning of other systems or about the system itself might also offer the potential for challenging or changing this customary self-preserving behaviour of a social system. How? Not through any coercive behaviour but by means of 'persuasion'. Such information, regularly received, might harbour the possibilities for institutional change through its potential for encouraging a system to be introspective to the extent of precipitating new descriptions of itself to engender new possibilities and patterns of acting. This reflexive aspect of institutions may resonate within that institution and lead to transformation, or at least prepare the way for future transformation. In this sense, institutional change, at least in terms of law as an institution, may be seen then to be as much about changing understandings as about changing procedure: it must involve the embracing and the articulation of a vision and a definition of a new institutional reality and the ability and the expertise to control information imaginatively.

## CHAPTER ELEVEN

### CHAOS AND COMPLEXITY

Some years ago, towards the end of the Balkan conflict, I was stationed in Sarajevo with the NATO peace implementation force. As a result of the hostilities, much of the city's infrastructure supporting its public services was totally destroyed and daily life had either ground to a halt or become utterly chaotic. In particular, driving along the city's main highway and neighbouring streets was like manoeuvring around a giant-sized fairground dodgems track. With no electricity supply, there were no traffic lights: a large number of vehicles travelled at dangerously high speeds, their drivers negotiating not only junctions but also pot-holes, other vehicles, pedestrians, and many other obstacles. Nonetheless, seldom was there ever a serious accident or collision. Left to itself, the traffic had become a self-regulating system. So much so that when the traffic lights were eventually made to work the drivers had become so used to this self-regulating system that they appeared to have forgotten what to do. Sometimes, nearly all of the drivers ignored the lights completely: as they changed from red to green and back again they made little impact on the continuous flow of traffic. At other times, the flow of traffic simply petered to a halt, everyone unsure whether or not anyone else was observing the changes. In fact, it seemed that when everything was chaotic the traffic flowed well, but when the lights operated everything became *dis-organized*: its settled state was a form of *organized chaos*.

Perhaps we might more correctly describe it as *undesirably* organized. The problem was not that one system represented order and the other disorder, but that one kind of order appeared undesirable but worked and the other kind of order although desirable clearly did not. Left to their own devices, patterns emerged among the drivers that satisfied everyone's criteria, and the resulting (dis)order appeared fair and efficient. It may not have equated to what we commonly expect in terms of a properly ordered traffic flow but it was ordered, nonetheless. The point is that our natural instinct in social life is always towards establishing some sort of pattern, or order.

MacCormick's discussion of the social practice of 'queuing' and its subsequent institutionalization deals with precisely this issue. However, the main point that I want to highlight here is not *that* this happens but *how* and *why* it happens, and *for what purposes*. MacCormick's discussion illustrates well our common impulse to recognise, impose and institutionalize patterns but results in a way of thinking that regards order and disorder as opposites. The upshot of this is that what becomes institutionalized is what appears to be classifiable and generalizable according to institutional categories, expected and predictable by a controlling agent. Behaviour at variance with this becomes thought of as incomprehensible, unpredictable or chaotic. However, on the view being argued for here, institutionalization and surprise are not polar opposites. Because something could not have been predicted does not necessarily imply a lack of order any more than its predictability would imply order. Which is simply another way of affirming that pattern does not exclude novelty. Indeed, far from being polar opposites, order and disorder, like universals and particulars, appear to implicate each other.

To many legal theorists, law appears to fall naturally on one side of this pairing. But if the argument being presented here holds then the dualism is a false one and law might well be less deterministic than it appears to be. In this sense, far from reinforcing the Newtonian, mechanistic world-view underlying modernist legal theory, this argument would suggest that a revision of that understanding is urgently required. The suggestion being presented here is not that our idea of reality as a unity needs to be abandoned, but that the version of that idea of unity as derived from and expressed in a predominantly Newtonian mechanistic vocabulary needs to be discarded in law as it appears to have begun to be in other disciplines.<sup>572</sup> As Tsoukas<sup>573</sup> observes, diversity, change and adaptability, rather than hierarchy, rigidity and standardization are coming much more to the fore within contemporary scholarship. Gradually, a new language with a new attitude towards and an appreciation of ideas such as non-linearity, disorder and noise, fragmentation, unpredictability and marginalization is emerging. We find a change in attitude that

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<sup>572</sup> See Toulmin (1990).

<sup>573</sup> Tsoukas (1998), p. 293.

appears much more receptive to a sense of the chaotic and an awareness of dynamic process, an outlook more in sympathy with notions of the unpredictable and the novel and much less ready to impose a division of order and disorder. But with this new outlook we need to radically rethink our ideas concerning the use of law as a tool for intervening in the world.

Much has been said here about the Newtonian approach, but this now needs to be augmented with a fuller description of what that approach entails. In the first place, as Toulmin points out, the Newtonian style is characterized by the search for the universal, general, timeless ‘decontextualized ideal’.<sup>574</sup> The ontological description is that of discrete, objective units linked through norm-like associations discoverable through abstract conceptual representation that can aid predictability and help to minimize elements of surprise. In this way, the subject under consideration becomes controllable. As Tsoukas argues, such a view ‘assumes an objectivist ontology, works with a mechanistic epistemology, and enacts an instrumental praxeology’.<sup>575</sup>

Such a view makes use of idealized models, created through abstraction, to estimate the complex behaviour of real entities. This assumes both that the behaviour of real entities will permit such an assessment of their various contingent factors and that by abstracting from the time dependent historical pathways of their causal relations fairly accurate prediction is nonetheless possible. And all of this rests on that rather sweeping generalization that we considered at length earlier; namely, that within institutionalized forms every activity of a certain type *can* be treated in the same way *and* that it is legitimate to do this.

To take an example, consider Mrs Donoghue in *Donoghue v. Stevenson*.<sup>576</sup> In MacCormick’s account of the reasoning in *Donoghue* we find an argument being constructed in reverse to account for the judges’ reasoning. We are directed to understand how it is Mrs Donoghue as ultimate consumer, not Mrs Donoghue as a

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<sup>574</sup> Toulmin (1990), pp. 30-36.

<sup>575</sup> Tsoukas (1998), p. 294. See also Tsoukas and Cummings (1997), p. 656.

<sup>576</sup> *Donoghue v Stevenson* [1932] SC (HL) 31.

vulnerable old Scottish lady or any other combination of actual real time background qualities and descriptions, that is significant. But Mrs Donoghue the ultimate consumer does not exist in a social vacuum in the way that this abstract conceptual reconstruction of her would seem to suggest. She, Mrs Donoghue, is not this a-contextual and a-historical representation that is given of her; indeed, one is almost tempted to interject: '*Will the real Mrs Donoghue please stand up!*' In a similar way, we might argue that in respect of the conceptual reconstruction of the manufacturer of the bottle of ginger beer containing the offending snail.<sup>577</sup>

What is clear from MacCormick's account of the reasoning in that case, is that it is the purpose for which the institution of law is intended that determines the ways in which the various purposes of the characters involved are related; that is, their relative positions within the legal institutional structure. But what this implies is that the legal institutional answer does not arise as a solution to the social problem from which it derives; rather, the institution *reconstructs* the problem according to its own aims and purposes and defines and modifies the limits of its relations, thus making it more malleable. However, none of this can be discovered from a simple viewing of these objects in their institutional incarnations. Such an analysis would reveal only the 'fact' that the system or institutional answer was created by and given in response to the environmental conditions; it would not reveal the underlying process by which one is modified or adapted by the other.

So we need to ask what demands the institutional perspective is making of the real life scenario that gives rise to it. Why does it abstract from concrete reality sometimes this way, sometimes that, and what are the implications of this? On the basis of the analysis engaged in earlier in terms of the importance of 'practices', what other factors, both within and without the story influence the decision? How is this particular set of real-life concrete relations related to the broader issues of legal structures and doctrines and social cohesiveness in which this particular scenario is set? If we choose to focus solely on the decontextualized abstract model we will not even begin to find a way to address any of these questions.

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<sup>577</sup> See also Bankowski's discussion, referred to earlier, of Mr Zesko, the Polish ex-RAF pilot (Bankowski (2001), p. 147).

Clearly, some degree of generalization is unavoidable. Here we notice again the movement from what we might describe as *simple data* (the multitude of descriptions and items of information that could be given in respect of a particular situation) to *legally relevant facts* (facts that can register in the legal decision making context) to *legally significant facts* (those facts that are important to the actual decision or its future authority and use; that is, as part of the *ratio*). In MacCormick's view such generalization is not only inevitable, it is essential<sup>578</sup> and the very idea of legal institutions presupposes this. But the problem is that in order to see with any degree of clarity *how* and *by what means* that real-life concrete situation that is before the court *can* be represented in these a-temporal non-specific terms much of what makes that real-life event exactly what it is, its uniqueness, has to be dropped from view. The open-ended life narrative that gives rise to a particular episode has to be transformed into a scenario that is presentable before the court. In this process, the episode loses some of its particular features and characteristics and gains others, at least in the sense that the narrative structure imposed upon it by its institutional representation embellishes it with a beginning, middle and an end. Within this structure, individual facts are relevant and important in relation to and in terms of the aims and purposes for which the court is constituted. Thus, it is not difficult to see how, in this context, generalization and abstraction, this consequent reduction to role and rule, might be seen as an obstacle to a fuller understanding of the complexities of real-life situations, rather than an aid. Thinking about a situation in a legal context provides the thinker with a way of thinking that structures how that situation is thought about. The narrative structure imposed by law corresponds with the a-contextual, a-historical mode presupposed by law but not with the time-bound, context-specific situation experienced by those involved. In this way, the mode of thinking allows the thinker to construct certain expectations but it limits them to a certain type: those that can be expressed as universalistic expectations. Such a privileging of the a-temporal, a-historical, and generalizable comes at a price; namely, the loss from view of the temporal, the contextual and the historical. Accordingly, theorizing about law that finds its roots in a post Enlightenment–

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<sup>578</sup> See generally MacCormick (2005), ch. 5.

inspired mechanistic model of the universe generally assumes that the actual situations which are represented by legal institutions as institutional phenomena operate in a social vacuum. The narrative structure that they are assumed to have is in fact a narrative structure imposed by law, and this is the only narrative structure they are permitted to have. Without this, as we have seen most clearly in relation to *Re A*, they cannot be heard in law.

Legal decision making illustrates very clearly how this rational translation of multi-faceted, open-ended, real-life phenomena into the data appropriate to legal speech and then into legal decisions and thereafter into legal justifications that validate, corroborate and legitimate the institutional mechanism and structure, takes place. But we are only beginning to understand how such decision making is decidedly self-referential and why this is a problem. Judges must justify or ground their decisions in law. But, as we have seen, at some point the infinite regression brought about by thinking of law as a system of known rules that can be straightforwardly applied to factual circumstances, persons or events must be called to a halt; which is partly why we are then able to see how judges' decisions must be rooted in their forms of life, within a historically developed body of collective knowledge that cannot be fully represented. It cannot be otherwise, for, as Derrida, observes, ultimately 'incalculable justice *requires* us to calculate'.<sup>579</sup>

### **Chaos Theory and Contemporary Theorising about Law**

The world that is being depicted now in much of contemporary philosophy is a very different one from that represented by the Newtonian mode of thought. We can illustrate this difference by referring to some of the distinctions already mentioned which map the difference between Newtonian ideas and chaos theory. Chaos theory is a mathematical theory with widespread application. It has been described as '*the qualitative study of unstable aperiodic behaviour in deterministic nonlinear dynamical systems*'.<sup>580</sup> According to Chaos Theory,<sup>581</sup> each complex system is

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<sup>579</sup> Derrida (1992), p. 28.

<sup>580</sup> Kellert (1993), p. 2, quoted in Tsoukas (1998), p. 297.

*unique*, with multiple interactions and feedback loops between elements. They are *dynamic*, which means that they exist in changing environments and therefore need to be adaptable. They evolve and, as they do, become more complex. Here, each element responds to *local* information and not to broader system information, and interactions are *non-linear*; that is, they contain multiple components that are rarely explainable in simple cause and effect relations.<sup>582</sup> Moreover, because complex systems constantly change in unpredictable ways as a result of non-linearity, it is impossible to make accurate predictions;<sup>583</sup> instead, they contain *attractors*<sup>584</sup> which operate like magnets for chaos, attracting and causing turbulence like rocks in a stream. Therefore, we study them and how they emerge as a means for understanding; that is, we study *how order emerges from chaos in the form of self-organisation*: as patterns, habitual activity, and so on.

More exactly, a system is termed dynamic when the state of the system,<sup>585</sup> changes with time. Normally, '[t]he rules specifying how the system changes ... are ... written in the form of differential equations which represent the rate of change of its variables ... [which] allow[s] one to calculate the state of the system at other times, given its state at one specific point in time. The rate of change of each variable is expressed in either linear or non-linear terms'. In this respect, while linearity dictates that 'a unit change in variable X will always cause a specific change in variable Y ...', non-linearity means that the change in variable Y brought about by a unit change in variable X will depend on the magnitude of variable X'. In other words, 'non-linearity means that a small change in a system variable can have a disproportionate effect on another variable'.<sup>586</sup>

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<sup>581</sup> For a fuller explanation of terms and a discussion of how these are understood in relation to Organization Studies, see Mary Jo Hatch and Ann L. Cunliffe, (2006) *Organizational Theory*, 2<sup>nd</sup> ed. Oxford: Clarendon.

<sup>582</sup> For example, as in Lorenz's famous 'butterfly effect'.

<sup>583</sup> As with, for example, the weather.

<sup>584</sup> Called 'strange attractors' because of their irregular shape patterns. Cf. Deleuze and Guattari (1988).

<sup>585</sup> That is, how the system is, what the numerical values of the variables describing the system are, at a point in time.

<sup>586</sup> See Tsoukas (1998), p. 297

The character and utility of linear equations may be regarded as corresponding to that of syllogistic or propositional statements in law; propositional statements can also be reduced to a general formula from which, provided the initial condition and temporal duration of the period being studied are known, the future state may be calculated. Contrastingly, non-linear equations are not subject to any general formula from which solutions for successive temporal points may be obtained; therefore, rather than being concerned with the prediction of future states from present ones, mathematical formulae for non-linear systems are focussed more towards the various accounts of their broad patterns of continuing behaviour.

To say that a system behaves in an unstable and aperiodic manner is to say that ‘it never repeats and it continues to manifest the effects of any small perturbation. Such behaviour makes exact predictions impossible and produces a series of measurements that appear random’.<sup>587</sup> In this way, the question of how such an unstable system will evolve depends on these ‘small perturbations’, and small changes in original conditions can produce unpredictable results.

When the variables indicating a chaotic system are represented as Cartesian coordinates, with a single point describing the whole system, then as the system changes the point traces out a trajectory. The state towards which a system tends – the set of points in phase space “attracting” the trajectories - is called an *attractor*. For a chaotic system, the attractor has ‘an irregular shape’; thus, it is called a *strange attractor*. Moreover, ‘[t]he existence of strange attractors shows that chaotic systems combine pattern with unpredictability, determinism with chaos, order with disorder ... [C]haos theory has made it possible, as well as legitimate, to overcome hitherto accepted conceptual dichotomies’. Finally, ‘[t]he pattern of a strange attractor is produced by the systematic operation of *feedback* ... the iterative operation of a function upon itself’, which results in the emergence of properties that could not have been predicted beforehand. That is to say, ‘chaos theory shows mathematically

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<sup>587</sup> Kellert (1993), p.4, quoted in Tsoukas (1998), p 298.

that with simple non-linear deterministic equations ... small changes in initial conditions can generate unpredictable outcomes'.<sup>588</sup>

The important point for our purposes here that we might draw from this introduction to the basic elements of chaos theory is that prediction in relation to non-linear systems is impossible, since this would require an element of accuracy in relation to initial conditions that simply cannot be given, and this has clear implications for legal reasoning.<sup>589</sup> What this means is that institutional actors do not enjoy the efficient capacity for decision making that institutional theories of law have often credited them with. The institutional capacity for reasoned judgment is founded on the *un*-reasoned corpus of shared understanding that the context-dependent social institution of law has developed over time. A judge's reservoir of knowledge evolves from a set of initial conditions that, however capricious, nevertheless provide the foundation for all her understanding. It is thus that concrete communal tradition, not its a-contextual and a-historical abstraction, which is the *condition sine qua non* for judicial comprehension, decision and action.

What this suggests is that the boundary between law and politics is actually much more blurred than is usually supposed. It is precisely because our knowledge is incomplete that politics is possible. If we could gain an objective standpoint, some Archimedian point from which to survey all that happens in the world, then perhaps there would be no need for collective deliberation or communal action. Much of what we recognise as political activity would, along with the courts of law in which we seek agreement despite dispute and dissatisfaction, would likely disappear. Therefore, in this sense at least, we can see how courts of law are inherently political entities, how judicial decisions are always political compromises; that is, they are always imposed as matters of opinion, not of knowledge as such.

Really, it is only because we do in fact affirm the impossibility of any kind of accurate prediction that we are able to acknowledge any sense of human freedom:

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<sup>588</sup> Tsoukas (1998), pp. 298f.

<sup>589</sup> Cf. Jackson's criticism of MacCormick's idea of law as machine-like deductive reasoning where everything is, potentially, calculable, which Bankowski (2001) refers (see chapter 9).

freedom is meaningless if we affirm determinism; determinism makes no sense if we affirm freedom. Rather, freedom is what helps us to make sense of the world and our place within it. That we are free to act really implies a non-deterministic world, but one in which acts, however unpredictable, are nonetheless intelligible. We do things and we make things happen. We make intelligent decisions and we make sense of them afterwards. That is why legal reasoning is a form of practical reasoning.<sup>590</sup> Not because we are able to represent our decisions according to some symbolic code but because in and through them we are able to progress, to navigate and negotiate our passage through this world of which we are a part. As Aristotle was acutely aware, understanding, imagination and practical judgement skilfully supersede the ability to predict.

Why do we find this so terribly difficult to come to terms with? One reason is that we have erected a barrier of propositional statements, deductive syllogism, 'If X, then Y, in circumstances Z', that stands in the way. We cannot operate this system without dividing the world up into separate pieces, transforming what is essentially an undivided flow and flux into objects, re-presenting process as manipulable substance. Without such modes of abstraction, the instrumental application of propositional statements would not be possible. In this sense, law makes freedom, choice and creativity epistemologically redundant and dispensable, since all that decision making involves is instrumental application. Between these two worlds, the world as experienced and the world as explained an unbridgeable chasm exists.<sup>591</sup>

## The Temporal Dimension

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<sup>590</sup> Compare with MacCormick's argument why legal reasoning is a form of practical reasoning.

<sup>591</sup> The significance of the problem that is being suggested here is the highlighting of what Christodoulidis calls law's inherent deficiency. But a further question is whether law, however deficient, must be understood in this way. That is, whether the charge against law, as deficient when put in these terms, is one that necessarily accepts the (Newtonian, or mechanistic) mode of thinking underlying such a conception, or whether law, as law, can be conceived otherwise. Perhaps it is not law but the way of thinking that necessarily understands law in this manner that must be replaced. Others, Bankowski for example, encounter a similar problem, in trying to find a way, within a framework that is still overly dependent upon a mechanistic mode of thinking, of accommodating freedom, choice, creativity, etc. In other words, while Christodoulidis does not appear to accept that law can be thought of in other terms, according to another mode of thinking, Bankowski appears to assume that law can be made to work and be seen to work without changing its mode of thinking.

Karl Popper has described the temporal characteristic of Newtonian determinism as being like in a movie, where ‘the future co-exists with the past; and the future is fixed, in exactly the same way as the past’.<sup>592</sup> But our experience of the world is different: we do actually experience the world as change, as emergence and recession, as the embracing of real choice and real possibilities, as actualized potential, as a contingent becoming. Moreover, this affirmation of complexity permits a much more accurate and coherent understanding of temporality, one that corresponds with our experience of lived time. In short, the irreversibility of the arrow of time need not signify lack of order or of *dis*-order, but can in fact also be understood as a source of order. As Prigogine states:

‘Recent developments in nonequilibrium physics and chemistry point in the opposite direction. They show unambiguously that the arrow of time is a source of *order*. This is already clear in simple experiments such as thermal diffusion ... [C]onsider a box containing two components (such as hydrogen and nitrogen) where we heat one boundary and cool the other ... The system evolves to a steady state in which one component is enriched in the hot part and the other in the cold part. The entropy produced by the irreversible heat flow leads to an ordering process, which would be impossible if taken independently from the heat flow. Irreversibility leads to both order and disorder’.<sup>593</sup>

Moreover, ‘it is precisely through irreversible processes associated with the arrow of time that nature achieves its most delicate and complex structures. Life is possible only in a non-equilibrium universe’.<sup>594</sup>

### **The Historical Dimension**

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<sup>592</sup> Popper (1998), *The Open Universe*, p. 5. See also Ilya Prigogine (1997), *The End of Certainty*, p. 18, where he argues that such symmetry makes the temporal aspect a redundant feature, since the future and the past operate to the same effect except that one is prefixed with a positive and the other is prefixed with a negative, +t and -t. Cf. Hartshorne (1970), p. 180.

<sup>593</sup> Prigogine (1997), p. 26.

<sup>594</sup> *Ibid.*, pp. 27-27.

Associated with the temporal dimension, the historical dimension precipitates a similar problematic. A spectator joining friends at a soccer match some time after the start will usually ask, ‘What’s the score?’ or ‘What’s happened already?’ Likewise, a dinner guest arriving late at the table could not expect to understand the point of a story being told if joined half-way through, at least not without also having some knowledge of the patterns of conversation that led up to it, from which it arose, and of which the present story is but the latest chapter. Likewise, no judge can ever hope to understand the full significance of a particular case without having some background knowledge and understanding of, or at least familiarity with, the historically developed patterns of behaviour and interactions that form the backdrop to its current *re*-production. As Whitehead argues conclusively, our present experiences are brought about our previous actions and the choices that we now have are dependent on the choice path that precedes them: actions to actualize possibilities from the scope of potential choices before us delimit the scope and range of succeeding choices. In other words, the form and direction of our present choices depends on the sequence of events preceding them.

In this sense, we might also say that not only do our legal problems require legal answers, but our legal answers are searching for the questions that will host them. That is to say, the institutional structures and interrelations that we set up in law, and the way we set them up, may be seen to reflect not simply our need and desire for a deterministic universe, but the central cultural self-understandings of our society as they have evolved over time. As Robert Cooper puts it,

‘Representation ... shows that the inside is always a doubling of the outside, that the inside is always an inversion of the outside ... . [R]epresentation displaces the outside of the remote and “beyond” into the inside of the near and familiar ... it displaces the outside of the dispersed and macroscopic into the inside of the compact and manageable. Representation displaces the outside inside. In contrast, bounded rationality, as a singularity, must always be an inner resource which acts on an outer problem; it is allied to intentions and goals which are also presumed to be integral to the organizational

decision-making apparatus directed from the “inside” of the individual. For representation, however, intentions and goals are themselves displacements in the topological folds of organizational space’.<sup>595</sup>

In this way, law in the sociological sense, as a social institution, may be seen to reproduce in law in its philosophical sense, in its institutional legal practices and doctrines, the practices and beliefs of the social environment that surrounds it and of which it forms a part. Thus, we can see how it might make more sense to emphasize *patterns* and *relationships* rather than values. We can see how this might be worked out if we consider, as an example, recent calls for more engagement with narrative understandings of legal cases, institutional practices and doctrines.<sup>596</sup> Qualitative descriptions are much better suited than their quantitative cohorts to reveal the unfolding nature of historical narrative, how and why the relationships, choices, actions and interactions combined to produce the complex unity of each particular case. Reducing the complex unity of the qualitative whole to a quantitative assessment of its individual parts is a vain attempt to discover and apply governing norms, for it cannot do justice to this historicity or evolution. The whole is more than the sum of its separate parts. There is something other, ineffably present in all social phenomena that cannot be captured in this way. In answer to the question, what then is the point of the process that we are beginning to describe as law, the answer must be that the end or point of the process, like its beginning, is the process itself. It is the discovery of meaning in concretization, in the actualization of potentialities; that is, law must be understood not simply in terms of rational conclusions to rational problems but in more aspirational terms as the continual uncovering of ideals which will operate to lure us into further commitment. In this way, law actually becomes understood as part of the ongoing process of life: not just as a tool for helping us to live, or even to live well, but to live better.

### **In What Sense, if at all, is Law as an Institution a Chaotic System?**

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<sup>595</sup> Cooper (1992), p. 270

<sup>596</sup> See, for example, Nussbaum (1990) and (1995); cf. Williams (2002) and (2005).

At first sight, law is typically non-chaotic. What is being argued here, however, is that law is not one way or the other. In other words, neither those who have argued for metaphors of complexity and chaos in legal theory nor those who have argued against such conceptions have grasped the essential point. Metaphors describe, they do not represent. *Law* is not one way or the other, but we describe the world from within those historically conditioned social, cultural and linguistic environments in which our use of language makes sense. We cannot escape that: there is no Archimedean point in respect of our use of language. For example, Bankowski argues: 'Let the story speak to you'. But the story doesn't speak: only we do.<sup>597</sup> The story, once we allow ourselves to read it in a different way, even to get inside it, may cause us to entertain different viewpoints, and to want to suggest things that we would not otherwise have suggested, but it can only speak through us if we first have a language to speak about or for it in. So really we can *never* be sure that the language through which we attempt to capture the nature of an event, an act, a person, and so on, and by which we represent it in legal decision making, will actually capture its essential qualities. Language is a tool that provides us with indirect access to reality: analogical truth is a construct that stretches only as far as the analogy holds; metaphors do not disclose prior meaning, they shift our focus from the stared at to the glanced over features so that they may become clothed with meaning as and when they reverberate with the echo of another's experience.<sup>598</sup>

So why then should we use metaphors of chaos and complexity to describe law? Simply and principally because they help to draw out aspects of and about law and legal decision making that have for too long been overlooked or overshadowed. Terms such as non-linearity, sensitivity to initial conditions, iteration, feedback loops, novelty, unpredictability, process, emergence, help to equip us with a new vocabulary, necessary if we are to begin to describe and re-describe law and legal institutions according to the manner proposed here. Understanding law through these

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<sup>597</sup> As Richard Rorty argues, 'the world does not speak. Only we do. The world can, once we have programmed ourselves with a language, cause us to hold beliefs. But it cannot propose a language for us to speak. Only other human beings can do that'. Rorty (1989), *Contingency, Irony and Solidarity*, p. 6.

<sup>598</sup> In this respect, see again Veitch's (1996) description of the emergence of commonality in Tolstoy's account of the encounter between Pierre and Davout (pp. 220-234).

lenses may not endow us with 20/20 vision but it will provide us with a storehouse of alternative imagery that may help to make different things appear interesting and interesting things appear different.

Understanding law's aporia, the particularity void, the phronetic gap, in terms of chaos may help us to see how it is that the unbridgeable gap is crossed, without doing violence either to law or to reality. Order and chaos are not so much polar opposites as two sides of the same coin – flip it and see! If we need, as we do, to find a way of understanding law and legal decision making that accommodates the contextual, historical, temporal, processual, meaningful, political, evolving, contingent, reflexive, novel, complex and changing aspects of reality, this alternative imagery provides us with a wealth of resources that help point to a workable way forward.

## CHAPTER TWELVE

### CLOSING THE GAP: NARRATIVE AND THE LAW

*'[I]ntelligence organizes the world by organizing itself'.<sup>599</sup>*

How can we uncover the assumptions and presuppositions of ITL that will enable us to understand better its underlying reality? This question addresses and forces us to acknowledge something that is easily and often forgotten when we start to think about and analyse law and legal reasoning; namely, that there is a difference between thinking of law as a structured institution and our thinking about thinking of law as a structured institution. So it may well be that although the propositional form of statements is characteristic of our thinking about law as a structured institution, precisely as MacCormick suggests, a narrative form might still be the more appropriate way to consider law in relation to practices. Indeed, if this is the case, then it may well be that the logic of ITL is not incompatible with a narrative methodology. This chapter aims to explore these possibilities and to examine the usefulness of narrative as a means for understanding law.

Similarities between legal reasoning and literary studies have been noted often by a number of legal scholars; notably, Martha Nussbaum.<sup>600</sup> However, just as interesting as the question of the similarities between the two is the extent to which narrative theory may actually be applied to the study of law and legal reasoning. In this respect, what is being suggested is an extension of the argument presented above; that is, that the significant features with which we are concerned are not those which we entertain on account of their propensity to predict a certain future but which will act as signposts, pointing out a way forward by disclosing hitherto hidden associations and suggesting novel relations and connections. Rather than understanding the structural functioning of law as something which aims at a

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<sup>599</sup> Jean Piaget (1937). *La construction du réel chez l'enfant*. Neuchâtel: Delachaux et Niestlé (p. 311). Quoted in von Glasersfeld, 'An Introduction to Radical Constructivism', available at <http://srri.nsm.umass.edu/vonGlaserfeld/onlinePapers/html/082.html>, last accessed on 26/05/06.

<sup>600</sup> See above, n. 596.

reduction of complexity by means of an underlying system of unifying doctrines and complementary principles, we are more concerned to look for ways of pushing at law's boundaries, expanding its horizons of possible thought and action and generating new insights through the operation of a narrative view-point and a metaphorical use of the idea of complexity.

According to MacCormick,

'It is of course the snake bite, not the theory that snake bites can be fatal because of the property of snake venom, that causes Cleopatra's death. But what enables us so to conceptualize the death of Cleopatra is that the particular fact of the biting snake belongs as minor premise in an argument of which the major premise is a hypothesis culled from the snake-venom theory and the conclusion is the death'.<sup>601</sup>

But does this explanation really capture the essential difference between the two modes of thought operating here? In the logical proposition, 'If X, then Y', the word 'then' operates differently than it would in, for example, 'the snake bit, and then the queen died'. While the first precipitates a search for universal truth conditions, the second looks for probable connections between the two. In the first there is an assumption of conjoinment; in the second, connection; that is, the first emphasises separation while the second emphasises continuity. How can we understand these two modes of thinking and how are they related?

A friend, a senior army officer, was sometimes heard to say to his junior officers when asked for their assessment of a situation and possible courses of action: 'Great idea, bad plan!' In other words, there is a difference between saying that something sounds good and that it argues well. Good stories do not always make sound arguments (but, arguably, sound arguments are always good examples of a particular kind of story)! Murray Gell-Mann defines complexity as

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<sup>601</sup> MacCormick (2005), p. 97.

‘the length of the shortest message that will describe a system, at a given level of coarse graining, to someone at a distance, employing language, knowledge and understanding that both parties share (and know they share) beforehand’.<sup>602</sup>

Thus, in the first place, complexity relates to the ease or difficulty with which information that conveys a sufficient and correct account of an experience of some phenomenon can be transmitted; it is linked directly to the subject experiencing the phenomenon, and is dependent on their ability to represent it. In this sense, complexity is

‘necessarily context dependent, even subjective ... In actuality, then, we are discussing one or more definitions of complexity that depend on a description of one system by another, presumably a complex adaptive system, which could be a human observer’.<sup>603</sup>

In the second place, complexity relates to the compressibility of information, so that information that can be condensed into short, sharp phrases will be less complex. Thus, complexity, on this account at least, has more to do with the experiencing of complex phenomena and the amount of work involved in communicating this experience than with independent and objective complex states of affairs. That is, it has to do with the compression and transformation, the reduction for simplification of complex sense experience into commonly recognized and accepted forms of speech.

Tsoukas calls this ‘algorithmic compressibility’,<sup>604</sup> and uses this to help convey the basic difference between ‘propositional knowledge’ and ‘narrative knowledge’ as that between conditional ‘if, then’ statements derived from empirical observation and knowledge expressed through stories, anecdotes and examples. He argues that while the former can be represented via an abbreviated formula the latter

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<sup>602</sup> Gell-Mann (1934), p. 34.

<sup>603</sup> *Ibid.*, p. 33.

<sup>604</sup> Tsoukas (1998).

can not, since no abbreviated formula exists by which it may be properly represented. In this way, what we experience may be considered simple or complex depending on how readily our experiences submit themselves to ‘algorithmic compressibility’; that is, how easily they can be described and analyzed. Notice then, that propositional knowledge, which is algorithmically compressible, is inherently reductionistic and therefore ill-suited to accommodating non-propositional forms of understanding, or complex experiences, at their own level of communication and how this then results in a deficiency, or deficit, that propositional knowledge cannot overcome.<sup>605</sup>

Much of the recent trend in legal theory towards emphasizing reflexivity, paradox, ambiguity and contradiction may, in this way, be seen as an attempt to overcome this difficulty by further complicating the language of law; that is, as an attempt to render it more complex. But, against this, consider for example, Christoudolidis’s argument in response to MacCormick’s ‘updating of the Solomonic tale with a number of contemporary maternity disputes’. How, he asks, in this situation, would a judge ‘know that she was faced with a new problem?’ That is, ‘[h]ow, *given universalizability*, would she know that “she has two choices?”’ Christodoulidis explains that

‘[t]his is an argument directed at the potential of surprise and at how law might harbour this potential. Stated in the form of a paradox ...: every case is *prima facie* a case of “first impression”, and yet none is ... On the one hand ... every case is unique in its particularity ... and thus at some level always a “case of first impression”. On the other hand ... the recognition of a maternity dispute ... already occurs in terms of classifications available in the law, so that *any “first impression” is over-determined* by classifications – impressions – already in place’.<sup>606</sup>

In other words, how could the complexity deficit resulting from law’s inherent tendency to reduce complexity possibly be overcome? By resort to what vocabulary could a legal practitioner even begin to make sense of it? What mode of thought

<sup>605</sup> Cf. Christodoulidis’s observation about law’s inherent ‘blindspot’, its ‘deficiency deficit’.

<sup>606</sup> *UPLR*, p. 106.

could she utilize to accommodate it? This is a question that strikes right to the heart of any attempt *within law* to increase the complexity of our understanding so as to mirror the complexity of the situation before us. However, it also a question that while presupposing law's institutional and propositional structure appears to ignore the significance of its existence *as law* in terms of the narrative structure associated with law as practice.

Might judges be able to increase the complexity of their *legal* understanding so as to mirror the complexity of the situation they are contemplating through equivocality; that is, through the formulation and accumulation of multiple inequivalent descriptions? How, if at all, *in law and as law*, might it be possible, in Bankowski's terms, through 'paying attention to the story' to get inside it, to 'lift the veil'? The difficulty with the argument being presented here is that features such as non-linearity, recursiveness, sensitivity to initial conditions, emergence, and so on, can be understood and articulated only from a position of second-order complexity; that is, by moving from a position where every focus is on the system's reductionistic tendency to one where we can entertain descriptions of the system as complex. For Christodoulidis, this is not possible: law's 'structural inertia' operates to cut off this possibility. However, for the moment, let us simply note how, by moving from propositional statements to interpretative or narrative statements, we move from talking about properties of the system to understanding our statements in respect of the system as a part of a vocabulary that describes the system, and in this sense they cannot, as Taylor argues, be separated from our beliefs and goals.<sup>607</sup> In the propositional mode, this is not obvious; in the narrative mode, the dependence is openly acknowledged.

### **How Might a Property of the System Become Accepted as a Descriptor?**

In the first place, this must involve bringing the teller of the story actively into the focus of the story itself. Take, for example, the case of Lord Justice Ward's rendering of *Re A* as 'very unique'. It is precisely because we expect linearity here that the

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<sup>607</sup> Taylor (1985), p. 23.

lack of proportionality between what we would normally identify as cause and effect secures our interest. So, we interpret the non-linearity of complex systems as surprising. However, the surprise itself is not part of the system but is down to our expectations not being met or fulfilled and depends on our perspective; similarly, it is our concepts that are indeterminate, not the system they describe. To alter our perspective on something, to try and define where an event or occurrence begins and where it ends, or to suggest that a certain coincidence of features mark it as systemic, each of these is an interpretative move: it does not identify system properties. Moreover, if we reveal complexity by using these methods, it is precisely because of our involvement that this is introduced. How, then, in law, can we gain access to second-order complexity, and how might a narrative approach help to do this? Here we will try to answer these questions by looking again at a Newtonian style of thinking and how it has influenced directions in legal theory.

As we have already noted, the Newtonian approach involves the adoption of a particular attitude towards the world. First, there is an emphasis on what is quantifiable and measurable. Second, in line with this, it operates by constructing ideal models, providing a method of analysis that is both a-contextual and a-historical so that the construct is released from the stimulation of temporal and situational influences. In this way, the phenomenon under investigation may be thought of as complete in itself, and regarded as a self-sufficient bounded entity, at the point in time when the investigation takes place.<sup>608</sup>

Examples of this style abound throughout the legal theoretical literature. However, for our purposes here, we will confine our interest to noting the relation of ITL to this mode of thinking. As we have seen, MacCormick moves effortlessly from

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<sup>608</sup> An interesting line of criticism here involves the extent to which any phenomenon, subject, may be said to represent at one point in time itself in its entirety; that is, both its present, past *and* future states. Charles Hartshorne (1970) has shown convincingly that, contra Leibnitz, a present subject may not be said to contain a definite specification of its successors: 'I believe this is part of the very meaning of temporal versus spatial distinctions. If the child is only potentially, i.e., somewhat indefinitely, destined to become an adult, but the adult has perfectly definitely been such and such a child, then to call the child and the adult the identical concrete entity is erroneous. Identity is directionless, symmetrical. The adult is more determinate, and in this reasonable sense more concrete. The more can contain the less, the less cannot contain the more' (p. 180). So also, in terms of the ability of rules to encompass, explain and predict future circumstances that would count as being within their ambit (see below).

talking about law as an institution to the institutions of law and their underlying structuring principles. If we ask how we discover these principles, the answer is that we discover them from the accumulation of identifiable, self-contained life-situations. In other words, abstracted from context and from diverse contingent influences we can proceed to discover the relevant universal, or generally applicable, principles. But notice how, in effecting this transition, we move effectively from the experience of events in their uniqueness to a theoretical construction of them that swaps contingency for necessity.

The methodological procedure adopted by MacCormick in his ITL is that of seeking out regularities within situations marked by set limits and conditions. Under this procedure, rules can be constructed and codified, and their validity established, that can then be followed by legal subjects and legal practitioners alike. MacCormick's account of his ITL may be seen to conform to what Jerome Bruner has described as logico-scientific thought. Bruner presents a comparison of 'two modes of cognitive functioning', the logico-scientific mode and the narrative mode.<sup>609</sup> According to Bruner, while 'each provid[es] distinctive ways of ordering experience, o[r] constructing reality', they are nonetheless 'irreducible to one another', so that '[e]fforts to reduce one mode to the other or to ignore one at the

<sup>609</sup> See Bruner (1986), pp. 11-43 and Tsoukas and Hatch (2001b), pp.981ff., where these are discussed and represented in tabular form:

	Logico-scientific mode	Narrative mode
Objective	Truth	Versimilitude
Central Problem	To know truth	To endow experience with meaning
Strategy	Empirical discovery guided by reasoned hypothesis	Universal understanding grounded in personal experience
Method	Sound argument Tight analysis Reason Aristotelian logic Proof	Good story Inspiring account Association Aesthetics Intuition
Key characteristics	Top-down Theory-driven Categorical General Abstract Decontextualized Ahistorical Non-contradictory Consistent	Bottom-up Meaning-centred Experiential Particular Concrete Context-sensitive Historical Contradictory Paradoxical, ironic

expense of the other inevitably fail to capture the rich diversity of thought ...'<sup>610</sup> Conversely, those tendencies within ITL which may be thought of as discouraging, or at least constraining, are those that find representation within Bruner's narrative mode.

For MacCormick, as we have already noted, legal institutional knowledge is organized around a propositional form of statements that relates a factual predicate to a consequent. These conditional statements are used to explain the recurrence of certain institutional phenomena and they also provide the basis for the framing of legal norms to guide subsequent behaviour. Here knowledge operates recursively inasmuch as it is used for both explanation and prediction of behaviour and for the guidance of legal practitioners; that is, events that occurred in the past form the basis for the factual predicate that will guide questions relating to future action. Thus, when the legal system is disturbed by encountering a 'new' situation, that new situation is reduced to and described by reference to those constituent parts that can be accounted for in the familiarity of past situations so that the behaviour in question may be examined by legal norms (rules). Therefore, in this sense at least, time is made redundant: the future is reducible to the past, in whose terms it is understood.

Of course, as MacCormick is quick to point out, regulating life by subjecting human behaviour to the governance of rules has its advantages, for once a particular interpretation has been assigned in a particular case they become applicable across a range of contexts. Nonetheless, as we have seen, with generalizations it is difficult to properly account for particular circumstances or experiences. Propositional statements have reference to purposes and motives that cannot be articulated propositionally. Moreover, because the propositional form makes time redundant this often results in paradoxes.<sup>611</sup> In these ways, the propositional structure and form on which ITL is made to depend may be considered to be limited.

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<sup>610</sup> Bruner (1986), p. 11.

<sup>611</sup> In fact, almost anything can be articulated in the form of a paradox, and the real point is to show what paradoxes are fatal to understanding (Hartshorne, *CSPM*, p. 88)

Just so, it is in order to address these limitations that the complementary capabilities of a narrative approach are being considered here. The main point is to ask in what ways, if at all, a narrative approach may be thought to act in tandem with the sort of approach suggested by ITL so as to address the complexity deficit highlighted above; that is, in what ways may a narrative mode be considered to complement rather than to conflict with the mode of thinking engaged in ITL? MacCormick describes his model of legal reasoning as utilizing the following method: universalizability; consequences; coherence and consistency. Here, the aim is to demonstrate the usefulness of the narrative approach as a necessary supplement, or corrective, to counter the perceived shortcomings of ITL. In other words, to ask how we may ally to those methodological features of MacCormick's approach, the following features characteristic of a narrative mode that MacCormick's approach seems to preclude: contextuality and reflexivity; the articulation of purpose and motive; sensitivity to the temporal aspect.

To say that a rule exists is necessarily to generalize: rules connect types of behaviour by types of actors to types of situations. Thus, to speak about human action as institutionalized is, MacCormick argues, necessarily to imply the existence of rules.<sup>612</sup> But rules find application within particular local situations and in contexts where the configuration of events found to exist may not be seen to replicate those specified in the rule's factual predicate. In this practical sense, at least, law is indeterminate, because one can never escape the 'tyranny of the particular'.<sup>613</sup> In this sense, too, the only person capable of undertaking effective action in any situational moment is one with 'the knowledge of the particular circumstances of time and place'.<sup>614</sup>

However, rules are not self-applying and neither are they simply applied in a mechanistic way through reference to other rules. Therefore, judges, in applying rules, can be seen to be dependent upon a historically derived knowledge concerning

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<sup>612</sup> See MacCormick (2007), ch. 2.

<sup>613</sup> See MacIntyre (1985), Taylor (1993).

<sup>614</sup> Hayek (1945), p. 521. MacCormick really affirms this when he says that legal reasoning is a form of practical reasoning.

the previous application of these and other rules. Even so, all of this collected and collective historically derived knowledge cannot encompass the problem of the particularity of each new situation. Each new situation has its own history of how it came to be there, and no amount of institutional understanding can account for or encapsulate this: a judge cannot understand a situation at a certain point in time without some knowledge of how it got to be there.<sup>615</sup> Consequently, every judge must appreciate and take of account two divergent historical ‘tracks’, and the one, the institutional, cannot render the other, the experienced, intelligible and articulate. To do so, must involve the utilization of the narrative mode and its understanding of contextual sensitivity, which, as MacIntyre, Bruner and others remind us, requires a ‘story’ with a ‘plot’. So the problem that we are faced with is one of how, if at all, this narrative mode of thinking may be utilized within the legal institutional context, without contradicting, negating, or denying it.

Fundamental to the success of rule application is the bringing about of a pre-arranged state of affairs, which Schauer calls ‘justification’.<sup>616</sup> This is the reason why law is composed not just of rules but also includes rule-like exceptions to those rules.<sup>617</sup> Thus, in the criminal law, for example it is a defence to the charge of unlawful homicide that the accused acted in self-defence. The accused might have committed the *actus reus* of unlawful homicide but her use of fatal force becomes justified and her act of killing is permitted if it is used to counter unjustified and life-threatening aggression from her assailant. The justification for this rule and the consequent rendering of a notional infringement of the criminal law as lawful is the desire not to hold a person placed in such a situation, without other means of defence or escape, criminally liable. In this way we can see how the justification is related to the sort of society that we want to be, or to become, and the rule’s factual predicate (the definition of the reasonable application of the defence) causally related to its justification; in other words, we believe that our preferred social order is brought about or hastened by adherence to the rule. Therefore, justifications lie hidden

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<sup>615</sup> See Prigogine (1980), p. 106.

<sup>616</sup> Schauer (1991), p. 26.

<sup>617</sup> For example, for Hart (1968), an act is justified which ‘the law does not condemn, or even welcomes’ (p. 13).

behind the rules: they are the reasons why we have such rules<sup>618</sup> and they exist in the rules only by implication, not by explicit formulation. To try to include such a requirement within the propositional structure of legal norms would lead to unmanageable paradoxes.<sup>619</sup>

To this extent, we might say that a rule's justification exists in a rule like Polanyi's tacit knowledge; that is, it is 'essentially unspecifiable'.<sup>620</sup> We cannot focus on it and expose its meaning because to try to render it articulate in propositional form would introduce a never-ending dependence of explicit rule on implicit justification similar to that which we noted earlier. In this sense, then, it is completely wrong to think that a rule and its justification exist as two opposite ends of a continuum that can somehow be joined or connected. They relate more as east does to west than as north does to south: by reference to each other. One is the shadow side of the other, as it were. Thus, *why* we follow a legal norm cannot be expressed in legal propositional form: the rule is the instrument of the purpose, not the purpose itself. To engage with such assessment, with *thinking about thinking about ...*, takes us beyond law as we know it, which is perhaps why Christodoulidis insists that it takes us into the realm of ethics.

So, we have seen how law in its institutional context operates through governing by a set of rules. We have also seen how this leads unavoidably to paradoxes that cannot be contained within law's logical structure, and how this is due, in part at least, to the exclusion of the temporal aspect from that logical structure;<sup>621</sup> moreover, the circularity associated with causal statements cannot be conveyed in logical propositions without generating paradoxes. How, then, if at all, might a narrative mode of thought be legitimately utilized to provide support for the temporal dimension of experience, and so prevent the reduction of causality to logic?

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<sup>618</sup> It is 'because normative generalizations are ordinarily instrumental and not ultimate, and justifications are what they are instrumental to' that 'justifications exist' (Schauer (1991), p. 53).

<sup>619</sup> The requirements of consistency and non-contradiction and the idea that a conclusion should follow on deductively from the premises is constitutive of this mode of thinking. See Hayek (1992), p. 10.

<sup>620</sup> Polanyi (1975), p. 39.

<sup>621</sup> Whereas the actual sequence of events in the real world are time dependent, the logical 'if, then', of the syllogism excludes time. See, in this respect, Prigogine (1992), pp. 23-25.

In this next part, I will engage more particularly with the narrative mode and consider how it might be said to offer an alternative to the propositional mode that both complements and supplements it,<sup>622</sup> helping to overcome the difficulties created by law's institutionally formed complexity deficit.

There is a difference between something talked about and what is said about it. Thus we can rightly mark a distinction<sup>623</sup> between, on the one hand, the meaning of what is said, the story, and, on the other hand, the particular situation in which it is interpreted, both by the teller and also by the hearer. When both the story and the story-teller are taken into account, the whole background of the story-teller, those purposes and dispositions alluded to earlier, must be brought into view. What do we mean when we talk about the story? In the context of judicial decision making this might be taken to refer to the written legal judgement containing a judge's reasons for the decision; or it might refer to the actual events and relationships, the facts; or it might even refer to the actual moment of decision in which the judge by reference to those facts comes to a decision which will later be reported upon in the written judgement. Obviously, when we take into account both the written judgement and the relevant events and relationships to which the judgement refers, there is a gap that appears that concerns issues of application, interpretation and context.

According to Ricoeur, 'narrative [is] exactly what Aristotle calls *muthos*, the organization of events'<sup>624</sup> by which a story is 'pulled forward',<sup>625</sup> by the 'successive actions, thoughts, and feelings in the story inasmuch as they present a particular "directedness"'.<sup>626</sup> Thus, the constituent parts of a narrative are organized sequentially according to a 'plot', and we understand one in terms of our understanding of the other: they are recursively ordered, mutually constituted, not

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<sup>622</sup> My argument here in respect of proposals for an engagement within law of the narrative mode of thinking is informed by the case for a narrative approach to organizational complexity presented in Tsoukas and Hatch (2001b).

<sup>623</sup> See Genette (1980).

<sup>624</sup> Ricoeur (1984), p. 36.

<sup>625</sup> *Ibid.*, p. 150.

<sup>626</sup> *Ibid.*

reducible to each other or to anything else.<sup>627</sup> But what Ricoeur then takes up with his notion of ‘emplotment’ and what Bruner takes up with his idea of the narrative mode is not simply the identification of similarities between narratives and plots or plots and their structural elements; rather, it is the deeper question of how, in constructing plots, we create and employ narrative thinking. Ricoeur notes how ‘the definition of muthos as the organization of events first emphasizes concordance ... characterized by three features: completeness, wholeness and appropriate magnitude’. Here, it is ‘[t]he notion of a “whole” that is the pivot ...’ for this

‘fix[es] on its logical character. And it is precisely at the moment when the definition skirts the problem of time that it distances itself most from time: “Now a thing is a whole if it has a beginning, a middle, and an end” (50b26). But it is only in virtue of poetic composition that something counts as a beginning, middle, or end. What defines the beginning is not the absence of some antecedent but the absence of necessity in the succession. As for the end, it is indeed what comes after something else, but ... [o]nly the middle seems to be defined just by succession ... If succession can be subordinated in this way to some logical connection, it is because the ideas of beginning, middle, and end are not taken from experience. They are not features of some real action but the effects of the ordering of the poem’.<sup>628</sup>

On the one hand, thinking in the narrative mode can be seen as a way of connecting and imputing meaning to what would otherwise appear as separate and detached events. Plots give meaning through connecting, sequencing and relating, events within a context; that is, situating events. On the other hand, thinking in the propositional mode, what Bruner calls logico-scientific thought, connects not particular events but universal categories: *types* of actions to *types* of actors to *types* of situations. However, once the plot is assigned, those events and actions are no longer simply instantiations of categories, but they are real: they have real, local, situational effects and consequences. We might think of the narrative mode as breathing life into these ‘emplotted’ elements. Nuances of relationships, reciprocity

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<sup>627</sup> See also Taylor (1985), p. 18.

<sup>628</sup> Ricoeur (1984), pp. 38-39.

and purpose, all of those features denied expression by processes of abstraction, categorization and correlation are able to register within this more concrete, historical and specific portrayal. Recalling Whitehead's phrase, '*that* wolf ate *that* lamb at *that* spot at *that* time: the wolf knew it; the lamb knew it; and the carrion birds knew it'.<sup>629</sup> In this respect, narrative thinking bestows and communicates context, in terms of situation and circumstance, instead of contingency. Indeed, without such an understanding of context it is difficult to see how the narratives that take place or are contextualized in institutional settings can be properly understood. A narrative mode of thinking encourages or even demands an awareness of the concrete, local, particular and situational aspects denied by propositional thinking. And since narratives not only *refer* to contexts but also *have* a context – that of the narrator and the act of narrating that goes towards interpretation of the narration - then we can see how, in fact, a recursively symmetrical contextualizing is built up with each new act of interpretation: it is impossible to escape from context, no matter how many times the interpretive act is engaged in.<sup>630</sup>

Likewise, every decision presupposes a decision maker. Each decision presented in judgement is constructed by a human judge; it is not a product of logical necessity but contingent. A judge is not simply some passive computational device, a machine designed to compute decisions already decided, but an active, perceptive and reflective agent who forms, and performs, the decision, and, in forming that decision, creates something new in the present out of the materials received from the past. In this way, narrative thinking may be seen to provide a semblance of reality considered lacking in propositional thought, since it provides a resonance with experience; that is, between the persons and events addressed by the decision and their appearance within the address in which the decision is given by the decision maker. There is thus coherence between the decision as delivered, the decision maker and the decisional moment.

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<sup>629</sup> Whitehead (1929), p. 43.

<sup>630</sup> MacIntyre makes a related point when he says that 'the story of my life is always embedded in the story of those communities from which I derive my identity ... [R]ebellion against my identity is always one possible mode of expressing it'. See MacIntyre (1985), p. 221.

In our previous discussion, we noted how a proper understanding of the significance of complexity requires us to be aware of the importance of the notion of thinking about thinking about complexity. For law, then, we might say that every judge not only engages with the practice of legal decision making but must also deal with the matter of her own complexity. In other words, every judge is a part of the decisions that she makes and subject therefore to narrative analysis. Here we might, as Bankowski does, allude to the distinction between coming to a decision from a perspective of being inside, of ‘paying attention’ to the story, and that of being outside of it, and also of whether or not the decision maker counts themselves in this sense as a part of the story that is told and whether that will be represented in the decision, the story that is told (which of course brings us back yet again to that sense of the recursively symmetrical layering of context). Narrative thinking discloses a legal decision delivered by a legal decision maker in a particular legal position, interpreted by others, some of whom are legal practitioners in the same sense, who are also occupied collectively in the narrative act. Sequences of events, relationships, persons, etc, are contextualized by legal decision makers whose positions as legal decision makers offer the context by means of the insight that operates within the context of the legal decisional making process. To the extent then that a legal decision maker’s thinking is part of the situation to which the decision relates, a decision maker who is aware of this interaction and dependence between their thoughts and decisions will be able to generate more descriptions of that situation.

In narrative, it is not simply a question of what comes next, but why. A plot implies more than mere sequence. ‘The snake bit and then the queen died’ narrates a sequential order through time. But ‘the snake bit and then the queen died of poisoned venom’ narrates a plot. While, according to the propositional mode characteristic of ITL, a particular event is accounted for by demonstrating that it instantiates a universal rule, in the narrative mode an event is accounted for by connecting it to purpose. This is possible because, as we have seen, although the propositional form excludes time, a narrative form accommodates time.

We can observe how the difference between propositional and narrative modes in relation to purpose operates by considering Alan Norrie's analysis of how motive and intention are handled in criminal law.<sup>631</sup> The starting point for Norrie's critique is the Enlightenment ideal of the abstract juridical individual. This ideological form places the individual at the centre of moral and legal discourse, and is replicated in criminal law doctrine through principles of individual responsibility and rules respecting individual freedom. But, Norrie claims, as the product of a particular historical period it has distinct and severe limitations. Made possible only by the abstraction of the individual from her concrete reality, this ideological form ignores the social nature of criminality and so we find that, as a result, law must continually be searching for new ways to exclude this nature from its view. Moreover, at the same time, this individualism is political:<sup>632</sup> while the individual is presented as a rational, intentional, voluntary actor uninhibited by random political interference, this freedom is guaranteed only as long as, for example, the rational, deductive system that controls the state can constrain the judges within their politically neutral and value-free role. Judges, however, appear to form a value-laden socio-political class of their own, operating openly contradictory standards and moving, almost unreflectively, from rules that assert a more rigorous requirement of individual responsibility to rules that appear less scrupulous and exacting; moreover, their judgements can often appear unconstrained or ambivalent towards the requirements of logic.<sup>633</sup> So, Norrie concludes, it is a mistake to suppose that law can be understood as a politically neutral system of rules: having evolved out of the struggle for power between conflicting social classes, criminal law functions as a mechanism of social control mediated through an ideology of psychological and political individualism. Thus, it operates both to condemn and to protect individuals. Crucially, however, this contradictory, paradoxical state of affairs is maintainable only through the systematic operation of conflicting inclusions and exclusions of acts and contexts, individual and socio-political concerns. This becomes especially clear when we consider the relationship between motive and intention in the criminal

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<sup>631</sup> See Norrie (1991).

<sup>632</sup> Norrie (2001), pp. 28-31.

<sup>633</sup> Ibid., pp. 26-28.

law.<sup>634</sup> During criminal proceedings, an appeal is often made for the motive of the accused to be taken into account in relation to the crime committed; however, this is met every time with a stubborn refusal. Motives, it is said, lead to the formation of intentions and, as such, are psychological, not socially formed. No surprise, here, perhaps, for were the law to recognize the social context within which an individual's actions take place, and thus to understand motives as arising out of the locations of individual acts, it would then be extremely difficult to attach blame and to convict.

A similar result may be observed if we consider the defences of duress and necessity,<sup>635</sup> where a claim is made that the accused is not responsible for her motive, which results from circumstances beyond her control. What causes a person to form motives to commit crimes? Is it duress or necessity, threats of violence or their situation? Clearly, any attempt to reconcile the idea that 'she was forced to do it' with the free will notions of intention and rationality ('she intended it and her reason was unimpaired') is fraught with difficulties. And if a loaded revolver pointed at her head could excuse her action, why would 'an evil system' not do so? Law's contradictory location may have 'its provenance in the enlightenment representation of a world of free individuals coming together in civil society', Norrie says, but 'crime is a social problem generated in ways that can be statistically correlated'. This 'social context is refocused through law into a matter of individual responsibility, justice and deterrence' as '[e]ach act of crime is relocated from the social sphere, where crime is produced, to the individual criminal agent ... It is the consequences of this translation, which is also a repression, a refusal to see the individual as always-already social, that lie behind the dilemmas of legal justice and criminal law. What is suppressed always returns ... [s]urfac[ing] and resurface[ing] across the terrain of criminal law's "general part"'.<sup>636</sup>

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<sup>634</sup> Ibid., pp. 35-38.

<sup>635</sup> Ibid., pp. 153-173.

<sup>636</sup> A Norrie (1996), 'The limits of Justice: Finding Fault in the Criminal Law' 4 *Modern Law Review*, 540 at 551. See also N Luhmann (1998) 'The Third Question: The Creative Use of Paradoxes in Law and Legal History', 15 *Journal of Law and Society*, pp. 153-166.

Motives, as the interpretation<sup>637</sup> of reasons for acting, permeate the narrative mode of thought being structured by and finding expression in the discourses in which they are set. However, they resist expression in the propositional mode since they cannot be fixed in propositional form but depend instead on viewpoint and perspective, where any number of different interpretations may be considered equally valid. Law, as a discourse in the propositional mode, provides the vocabulary for all human agents to justify their actions and decisions in ways that the institutional discourse dictates or allows. Just so, as the discourse changes so will the justifications; by the same token, as our use of language evolves and develops, so must the terms in which we express our motives.<sup>638</sup> Nonetheless, while law can accommodate the first type of change, it is unable to accommodate the second type: it can accommodate change from one relatively fixed and stable position to another relatively fixed and stable position but not change rooted in interpretation, whose meaning is dependent upon context. Attempting to understand motive in relation to legal discourse would be an impossible complication of our understanding of law in the propositional mode: it quite simply could not be undertaken because this standpoint is not equipped to handle such levels of complexity. And yet, as we have already noted, a narrative mode of thinking is not only equipped for but best suited to handling these levels of second-order complexity. Indeed, to talk of law as narrative *is* precisely what it *means* to understand and to talk in terms of motive. Narrative thinking not only provides the vocabulary for conveying this but it also structures the discourse in precisely the ways that would accommodate it. Thus, narrative thinking can convey motive, and structure it, even though propositional thinking can not. While propositional thinking aims at reducing complexity but in doing so forever increases its own complexity, creating an unbearable paradoxical burden, narrative thinking allows us to think recursively, providing for us a way of entertaining and encouraging complexity.

In light of this, we can understand Whitehead's point, referred to earlier, that it is much more important that something be interesting than that it is true, for the narrative style is much more concerned with the power of a story to evoke a response

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<sup>637</sup> See Taylor (1985), pp. 23-28.

<sup>638</sup> To reiterate a point stressed earlier, 'the same thing said at a different time is a different thing'.

by the way it is put together than with analytic questions and debates over the veracity of claims. And here, in a sense, we pick up again Ricoeur's notion of 'emplotment', for inasmuch as a narrative style emphasizes the sequential ordering of component parts then in that sense it may be said to be much more concerned with time than with truth *per se*. It is at this level, in the idea of emplotment, that we discover the means by which judges are able to perform the link between what they find in the rules on the one hand and the events, persons and relationships they must address on the other.

Ricoeur claims that time is essential to narrative. He refers to Augustine:

'Suppose that I am going to recite a psalm that I know. Before I begin my faculty of expectation is engaged by the whole of it. But once I have begun, as much of the psalm as I have removed from the province of expectation and relegated to the past now engages my memory, and the scope of the action which I am performing is divided between the two faculties of memory and expectation, the one looking back to the part which I have already recited, the other looking forward to the part which I have still to recite. But my faculty of attention is present all the while, and through it passes what was the future in the process of becoming the past. As the process continues, the province of memory is extended in proportion as that of expectation is reduced, until the whole of my expectation is absorbed. This happens when I have finished my recitation and it has all passed into the province of memory'.<sup>639</sup>

In other words, the past that is memory and the future that is expectation interact to produce the present, and this coming together of the past and the future in the present means that memory and expectation can potentially reach across time to bring to consciousness in the present those things that belong to both memory and expectation.<sup>640</sup> Thus, our *experience of time* is created out of a galvanizing of memory, expectation and attention.

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<sup>639</sup> See Ricoeur (1984), p. 20.

<sup>640</sup> In this way, we often talk about different presents: the past present, the (present) present, the future present.

In this sense, since the present is what exists between the horizons of past and future, and can be evoked by us in its various modes, then our experience of time is something that is created by us, and which, in narrative thinking, we can create and utilize by attending to the present as that which we hand on from expectation to memory and so consign to the past. In that sense, creating and employing an experience of the passing of time, narrative thinking allows us to do what Bankowski asserts we must do and to ‘pay attention to the story’; that is, in the terms of our earlier discussion, narrative thinking permits us to increase complexity by expanding our sense and understanding of the present.<sup>641</sup>

We can see how all of this is relevant to our discussion of law as institutional. As we saw from Levi, making connections across time, situations and decisions, enables decisions, definitions and meanings from the past to be brought forward into the present, their importance re-presented in such new ways as allow for even wider implications and meanings. Thus meanings are stretched and widened across ever longer stretches of time and connections established in this way impart greater scope and flexibility to decisions. But the point is that this evolution of the collective mind, the collected and woven pattern of judicial decision making, is really possible only on the back of a narrative mode of thought. As we have already noted, the propositional mode is unable to accommodate such levels of complexity.

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<sup>641</sup> But we must be careful in this to maintain a proper perspective on the future. As expectation, the future can only ever really be to the present as potentiality is to choice, as envisaged possibility for actualization. It is always only the past, as actualized potential, that can ever properly be said ‘to be’. It may be instructive to refer once more to Hartshorne at this point:

‘[I]f there is real novelty of qualities each moment, then it is the different self which includes the self that was there all along, not *vice versa*. The contrast between my present reality and my past reality includes this past reality, for “contrast of *B* to *A*” includes *A*. But it is my present which contrasts itself with my past, not the other way; hence one cannot use the reverse argument, that the contrast between the old reality and the new includes the new. The old reality enjoyed or suffered no contrast with what came later; life is cumulative, and hence asymmetrical in its relatedness. Thus the self as numerically the same is an abstraction, the latest self as new is the total concrete reality containing the former’, Charles Hartshorne (1970), *Creative Synthesis and Philosophic Method*, La Salle, IL.: Open Court Publishing Company, p. 187.

But how is this judicial savvy managed? How do judges enrich and make more complex the collective mind of the law? Not by any way associated with the propositional mode, clearly, but by the harnessing and developing their individual skills associated with thinking in the narrative mode. In this way institutional knowledge can become ever more complex, transposing and interweaving of past, present and future, make multiple connections across multiple time frames. In this way legal knowledge *can* be brought to bear on particular situations in a legitimately legal way. But the point is that it is not propositional thinking that provides the connection; rather, it is thinking in the narrative mode. Such connections are only possible on the basis of features that the propositional, generalizing mode of thinking denies absolutely. There is something *qualitatively* different, and *dynamic*, about this moment, right now, immediately after I have pressed the space-bar on my computer that cannot be accounted for in any other moment(s), just as there is in the moment that followed immediately the snake's biting of Queen Cleopatra. Narrative thinking, narrative time, allows us to experience such complexity in a way that propositional thinking never can. In fact, it is in the narratives that we construct about the situations that we confront in and with law, and in the narratives that we construct about law itself, that our understanding of law is rooted. From this law derives its meaning.<sup>642</sup>

So, also, in another sense, it really does matter when, where and how we ascribe initial conditions when we look at situations in an institutional context. When, where and how we do this can have radically different effects in terms of how we then see and characterize the system's development, and this introduces an element of surprise. The more that this happens, the more complex a system is and the more situations, events, actions and interactions that we have to accommodate the more intricate are the patterns of behaviour that develop. With this increase in complexity comes a theorizing that we can understand as thinking in the narrative mode, as thinking about our thinking about complexity.

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<sup>642</sup> As Tsoukas and Hatch (2001b) observe, 'a narrative approach to complexity theory suggests that our understandings of complex systems and their properties will always be grounded in the narratives we construct about them' (p. 1005).

When does a line of people become a queue? asks MacCormick. He suggests that what we perceive, at the simplest level, is in fact only a grouping of persons, and that when we think of that grouping of persons as a queue we are in fact following a somewhat complex chain of inference from which we draw a conclusion. The way that this happens is that we recall the experiences and the training of past situations and we compare this to the present where, in order to satisfy a formed intention to travel, we conclude that this present grouping of persons is in fact a queue, and we move forward to join the queue in order to satisfy our intention to travel:

‘To the extent that people “take their turn”, there is an orderly movement through ... From nearly everybody’s point of view a kind of fairness and efficiency prevails ... Clearly, there can be a successful practice ... without perfect conformity to the practice. But there must be some minimum threshold of compliance below which the practice would be unsustainable’.<sup>643</sup>

‘Turn-taking or queuing is then normative’, concludes MacCormick, so that ‘where there is a queue for something you want, you ought to take your turn in it’, which of course requires a decision that it is in one’s best interest to queue. Of course, ‘[t]his does not mean that there is a single quite specific or explicit norm that everybody cites when queuing’, and ‘[q]uite likely, my articulation of the queuing norm will differ from what you might offer in an attempt to make explicit what is implicit in a common way of acting’. Nonetheless, ‘queuing is an intrinsically personal activity aimed at a common point ... at attaining a service or opportunity that others seek at the same time, and at facilitating its attainment in mutual civility rather than through open conflict’.<sup>644</sup> Yet, when does a queue begin? How do people get to this position? What happens prior to this? How does what has gone before relate to identifying the ‘start’ of the queue, and how will identifying a particular point as the start impact in determining the significance of what follows? How do we perform the separation of this newly-formed ‘queue’ from all that happens before, and what determines this? In one sense, if we really think about it, a queue has no identifiable ‘beginning’ as such. Queuing is an abstraction from process. Granted, we habitually and necessarily

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<sup>643</sup> NIFF, p. 304.

<sup>644</sup> NIFF, p. 305.

abstract in precisely this way in order to negotiate our passage through the multifarious day to day tasks of modern living. But we make a mistake if, after abstracting, we begin to treat our abstraction as if it were ultimately real instead of continually referring it back to the real and changing concrete situations from which it is abstracted. Why does this matter? Well, in the first place, as we have already implied, there is *history trailing behind* 'the queue', a history that is now in danger of being obscured, forgotten or overlooked. MacCormick acknowledges this, 'From nearly everybody's point of view a kind of fairness and efficiency prevails ...', but then appears to forget those other points of view not included there. What of those others? How are their voices to register? To identify the character of the activity that constitutes the queuing process is one thing, to go on and treat the abstraction that we then term a 'queue' as if it were a precisely bounded independent entity without continually referring it back to the continuous process from which it is abstracted would seem mistaken. So we need to find ways to think about and question the abstractions that we make from reality, and to refine them, in order to gain a better understand of what is happening, how and why.

In this respect, imagine for a moment, that I am a photographer, or an artist or a writer. I may or may not have a formed intention to travel? But, instead of going over to the queue, I stop, take out my camera, sketch-pad or notebook and proceed to try and capture an image of the situation before me. What is happening here? As a photographer, an artist or a writer I am using my acquired ability and trained eye to contemplate the relative positions of persons standing in front of me. It takes effort of the imagination and not a little developed skill to resist the lure of that complex chain of inference that would lead me to the conclusion that what I see before me is a queue. This, perhaps, is what Bańkowski is arguing towards when he cites Gillian Rose's notion of 'suspending the ethical' and says that '[t]he action taken when I suspend the ethical is not one of self-assertion but of self-renunciation ... There is no final judgement; I can always be wrong'.<sup>645</sup> In other words, '[w]e have to work from where we are ... engage and take responsibility'.<sup>646</sup> In this sense, 'our decisions whether to apply the law or not [will] always ... be arbitrary ... [W]e will never

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<sup>645</sup> Bańkowski (2000) p. 43.

<sup>646</sup> *Ibid.*, p. 44.

know for sure whether we are right ...' However, '[w]e must realise that our life is never clear-cut and clean and is always something of a mess. But we must get hold of it as it is ... and we must use that anxiety creatively'.<sup>647</sup> In this sense, contra Christodoulidis's caution in terms of the absolute force of law's exclusionary rules, we can affirm a way of understanding Bankowski's suggestion that '[r]easoning can be thought of as operating in a sphere which is barred by a thick almost opaque curtain ... You lift the curtain to look but the curtain is extremely heavy ... You have to drop it and remain on the side you were or move to the new side'.<sup>648</sup>

In this way, despite law's inherent tendency towards exclusivity in terms of its propositional mode of its thinking, reinforced through a strict understanding of the exclusionary force of second order reasons, thinking in the narrative mode can encourage and develop that very approach to law that the propositional mode denies. In complementing and supplementing law's preferred mode of thinking in this way narrative thinking can extend law's reach into and find a foothold within the concrete, local particularities which it seeks to address. Moreover, not only is thinking in the narrative mode possible alongside of thinking in the propositional mode, but law as an institution (its sociological sense) supporting institutions of law (its philosophical sense) actually presupposes this. While law's propositional mode achieves reduction of complexity, this results in an increase in internal complexity that law's preferred mode is not equipped to handle. So it is narrative thinking, about law and in law, which provides a bridging of the gap here.

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<sup>647</sup> *Ibid.* p. 38.

<sup>648</sup> Bańkowski (2001) p. 174.

## PART IV

### INTEGRATING LAW AND PROCESS

*‘What really exists is not things made but things in the making. Once made, they are dead, and an infinite number of alternative conceptual decompositions can be used in defining them. But put yourself in the making by a stroke of intuitive sympathy with the thing and, the whole range of possible decompositions coming into your possession, you are no longer troubled with the question which of them is the more absolutely true. Reality falls in passing into conceptual analysis; it mounts in living its own undivided life – it buds and burgeons, changes and creates’.*<sup>649</sup>

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<sup>649</sup> James (1909/96), pp. 263-4.

## CHAPTER THIRTEEN

### LAW'S INSTITUTIONAL BECOMING: NOVELTY, CREATIVITY AND CHANGE

*'[U]sually we look at change but we do not see it. We speak of change, but we do not think about it. We say that change exists, that everything changes, that change is the very law of things: yes, we say it, and we repeat it; but those are only words, and we reason and philosophize as though change did not exist. In order to think change and to see it, there is a whole veil of prejudices to brush aside, some of them artificial, created by philosophical speculation, the others natural to common sense'.<sup>650</sup>*

Clearly, in terms of the philosophical approach that we have been pursuing here, traditional thinking about law, even more contemporary theories of law such as MacCormick's 'institutional theory of law', approach the idea of law and legal institutional change from the point of view of stability rather than continuing change. It seems important, then, to ask why and how it might benefit such views if institutional change, both as an object of investigation and as an everyday legal reality were approached from the point of view of continuous change rather than stability; in other words, if the ontological priorities were reversed and change was seen as the normal state and not just a special case or deviation from the stable and routine?

The argument being pursued here is three-fold. First, it would provide legal theorists and other legal researchers with a more comprehensive view of the micro-processes of change that may be operating. That is to say, what makes institutions change? How are new templates and models discovered and legitimated? How does this happen? Who does it? What this suggests is an enquiry into whether there is any alternative to the linear model of change characteristic of traditional legal theory.

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<sup>650</sup> Bergson (1946), p. 131.

How might we account for the possibility of non-linear processes, of surprise? What connotations and consequences might this suggest for our ideas of law?

Second, although change in law is often understood as the change from one stable condition or state to another, expressed in terms of often quite detailed descriptions of *what* these states and the differences between them are, there is little in the legal literature on *how and why* what happens, comes about. Even if we can say that a decision must be justified by the giving of justifying reasons for that decision (a movement from state A to state B), such reasons, as we have seen, do more to *explain* the decision rather than *justify* the decision making. This 'justification' explains and describes the effect of the decision on the legal system and on the parties involved; however, it does not admit us into the experience of how and the why and by what means the decision was actually achieved: for example, how those legal rules were translated into, *became*, that decision, and how, in the process of being translated thus, they underwent change, modifying and being modified, adapting and being adapted. Justification for legal decision making is always viewed retrospectively, more as a *fait accompli*, when understood in terms of the giving of justifying reasons for a decision that has already been made. In this sense, something important is lost: its vibrancy, its revelatory, evolving qualities are not only lost from view, obscured or denied, but perhaps also contradicted and even negated.<sup>651</sup> When we view change in law as something exceptional to the stable state, we lose sight of the fact that change is happening all the time. On the micro level change is all pervasive; what we find is continuous change. In this sense, far from being repeatable and repeated patterns remaining essentially unchanged from instance to instance, institutions of law are actually perpetually moving waves or currents of ideas that act and interact and change in acting. Therefore, in so far as habitual patterns of behaviour are human actions then they too contain potential for change, since change is there all the time, unrecognized and unseen.

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<sup>651</sup> In this sense, the objection that Bankowski makes in respect of the effect on the particular by its subsumption under a general or universal rule may also be seen to extend to an effect on the rule itself, since no clear-cut distinction between theory and practice, rule-determination and rule-application, universal and particular, is assumed or allowed.

Perhaps the main stumbling blocks to any attempt at a re-conceptualization of law and legal change are the ontological and epistemological assumptions undergirding our thinking about law. Nonetheless, there are inklings of a push towards a new way of thinking, or at least a restless dissatisfaction with the old way. Levi, for example, stresses how a legal concept changes as decision makers respond to previous decisions in the context of new decision making situations. He notes how ideas develop, appear and reappear in different guises, and how the classification changes as the classification is made. In this sense, every decision in law is a change in law. Others<sup>652</sup> note how in law the decisions that are made cannot be separated from the decision makers who are making them. Generally, legal institutional change remains part of an ongoing process of legal decision making, grounded in the decisions taken by legal actors, and arising out of their encounters with contingent everyday situations. Indeed, as long as human judges act in decision making, the potential for continual change and institutional creativity always remains. Moreover, the development of an emphasis on the authority of the decision maker rather than that of the decision itself is a further part of this same trend.

Here, our purpose is to show that and how it might be possible to build upon and develop these trends by proposing and explicating the philosophical basis that would sustain them. Our starting point is the recognition that to understand legal institutional change we need first of all to cease ascribing ontological precedence to the outcomes of institutionalization, a view that understands change as something exceptional, a temporary aberration, deviation or unbalancing, that is produced by certain persons under certain conditions. Rather, change must be seen as the standard, base-line condition, permeating reality through and through, the inseparable, undividable, continuous character of reality and thus also of legal institutions. But this effort to push further at the boundaries of our present understanding cannot and will not follow without a reversal in the ontological precedence of institutional stability over change. Institutionalization must be seen as a function of change; change as ontologically prior to institutionalization, the condition of its possibility.

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<sup>652</sup> Variousy., Bernard Jackson, Michael Detmold and Zenon Bankowski.

What, then, must institutions of law and law as an institution be like if change is constitutive of reality? Here, I will show that change is the result of the reflexive, recursive, inter-weaving of an institutional actor's intricate web of thoughts, values and routine behaviours as a consequence of new experiences obtained through interaction in concrete situations. Inasmuch as this is a continuing process, that is, in so far as it is an institutional actor's attempt to understand, comprehend and act coherently, change is intrinsic to human acting. Law is an attempt to try to make sense of this continuous tide of human activity, its to-ing and fro-ing, and to channel it, and shape it, through generalizing and institutionalizing meanings and rules. Yet, at the same time, law and legal institutions are patterns arising out of change. So, law is an accomplishment, an achievement, in two ways: first, it is a set of norms utilised in order to attempt to stabilize expectations over time of an always altering reality; second, it is a product, a pattern arising out of the reflexive application of these same norms in concrete situations, over time. Law aims at controlling change; it is also the product of change.

### **Thinking about Change**

In law, thinking about change usually centres around the idea of change as a resultant state, whose significant features, causes and consequences require explanation and elucidation. This is the view underlying MacCormick's account of institutional concepts: change is approached from the standpoint of external observation. His institutional model therefore takes on a '3-stages' form with transition taking place between these stages over a period of time. In this way, 'frozen' pictures of key aspects along a temporal sequence are accompanied by explanations of the route traced. Nonetheless, however crucial such knowledge is to enabling our understanding, it has certain limitations; not least, because it is an overview, a series of frozen pictures. In this sense, it can never capture the inherent unpredictability and variability that we have been highlighting, the extent to which the continuity of connected micro-processes underlying the routes traced are characterized by indefiniteness and essential un-dividedness. But why is it that stage models, such as

that of MacCormick's institutive, consequential and terminative rules, cannot encapsulate the significant characteristics of change?

The beginning of an answer is to be found in the age-old paradoxes of Zeno. Take, for example, the story of Achilles and the tortoise. The problem, as Zeno presents it, is that Achilles cannot ever catch up with and overtake the tortoise because every time that he reaches the tortoise's starting point the tortoise has already moved forward from it. But the real problem with this is not that Achilles cannot ever catch up with the tortoise; rather it is that Zeno's paradoxes arise on the back of a misplaced assumption that space and time are infinitely divisible. MacCormick has the same problem in respect of the story about the poisonous snake's venom and Cleopatra's tragic demise. Why do we assume that space and time are infinitely divisible? The answer is found in our impulse to intellectualize everything. We try to make sense of what we experience by imposing on our perception a conceptual framework, a template through which to understand. We conceptualize perception in order to make sense of experience but, in so doing, freeze what is an otherwise essentially continuous, moving, ever-mutating phenomenon. It is, of course, our use of concepts that necessarily demands we impose such an arbitrary 'halting' on the continuous flow. Nonetheless, the result is that we impose on the essentially fluid our notion of a series of static positions; we understand movement in terms of immobility.

Bergson, on the other hand, claims that to understand movement in terms of a series of successive points in space and time fails to capture what is distinctive about movement. Here, movement from A to B is understood in terms of the positions that something occupies in getting from A to B, in spite of the fact that none of these static positions contains any elements of mobility at all. Conversely, Bergson argues that

‘the stages into which you analyze a change are *states*, the change itself goes on between them. It lies along their intervals, inhabits what your definition fails to gather up, and thus eludes conceptual explanation altogether’.<sup>653</sup>

This is exactly the problem that we encounter in MacCormick’s theory with his attempt to understand legal change by breaking it down into a series of stages understood in terms of the transition from institutive to consequential to terminative rules. There, too, we perform a reduction of change by converting it into a linear sequence of relatively static positions. But the point being argued here is that, in so doing, we actually lose its essential character and important quality. Instead of capturing what is significant about change, change itself eludes us and remains unexplained and unrecorded. The paradox is this: the conceptual apparatus by which we try to make sense of change fails to get to grips with change. We are unable to understand change *qua change*; that is, change in changeful terms. This is because we attempt to understand it using the language and terms of what it is not; in other words, we attempt to understand change through the use of a conceptual apparatus that denies change. In this sense, to understand change in terms of law is not a question of categories of universal and particular and how to communicate between them, but what both fail to grasp; that is, change, continuous process. To assert that what we need to do, since the universal cannot ever capture the particular, is to focus on the particular, itself misses the point, because that is still the same attempt to understand movement, change and process, in terms of immobility, stability and state. Put differently, we might try to represent change by a series of boxes, marked A, B, C, and so on, and explain that change is the process by which we move from A to B to C and so on. But the problem is that change understood in this way sees the boxes, not what happens between them (change); or, at best, it sees the boxes first, which amounts to the same thing.

If our customary methods of employing our conceptual apparatus in order to understand change continually issues in paradoxes that only serve to deny change, is there another way? Can we understand change in a way that does not contradict,

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<sup>653</sup> James (1909/ 96), p. 236.

negate or deny change? Bergson<sup>654</sup> suggests that we must re-enter the flow, approaching reality with our senses and connecting through our intuition. For him, we must get to know reality from within. In this sense, only an *unmediated* perception of reality can glimpse its essential features –constant change, undivided continuity, the continual reiterative action and interaction of sameness with difference over time. But how do we get to know something ‘from within’? For Bergson, this happens when we experience it directly. Through placing ourselves at the centre of something we can experience something directly and know it from within. We identify with something through intuitive sympathetic understanding; for example, drawing on the resources of our own experience to understand the complexity of someone else. Bergson cites the example of a man with photographs of Paris, arguing that he could ‘feel’ it from the photographs because he already knew it from being in it, but without that intuitive sympathetic understanding he could not. Similarly, when we listen to music, we do not hear simply a succession of static, individual notes but the continuing movement of the melody. We move with its flow, listening to it from within. Intuition, direct unmediated experience, insight, paying attention from within, sensual perception rather than intellectual conception, really are all pointing to the same thing: holding both continuity and difference, the homogeneous and the heterogeneous, together. But we are still left with the question: how?

### **Conceptualising Change: The Problem with Universals and Particulars**

On the one hand, generalizations, or abstract universals, deny differences and seek to hide them; on the other hand, perception recognizes difference and is responsive both to difference and to modification. Just so, when everything is the same, even very familiar, its essential character goes unnoticed. Thus, the visitor to a beautifully scenic place will often gasp in awe at the beauty to be experienced all around, while the local inhabitant hardly notices it or takes it for granted. For the one, difference heightens awareness; for the other, sameness dulls perception through the senses. In recent years, we have witnessed increasingly how the ability to produce a work, or

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<sup>654</sup> Bergson (1946).

technique, of art that shocks at the very least ensures that its author gets noticed. For Bergson<sup>655</sup> we might say that this is the sign of a good painter, one who has the ability to bring to the forefront of our attention something that had hitherto gone unnoticed. But how does this happen?

One way in which this might happen is through encouraging a sense of detachment; that is, by resisting the obligation to ‘look straight ahead in the direction we have to go’<sup>656</sup> and to engage instead what Chia calls our ‘peripheral vision’,<sup>657</sup> to notice fully what is on the fringes of our everyday life and experience in order to really see and understand. But we are too used to looking at things instrumentally, as means rather than as ends in themselves, as examples or instances of general categories, instantiated universals. By contrast, the artistic spirit naturally engages with reality in a different way:

‘when they look at a thing they see it for itself, and not for themselves ... It is because the artist is less intent on utilizing his perception that he perceives a greater number of things’.<sup>658</sup>

So we can gain greater awareness and appreciation of the dynamic complexity of reality by glancing at things rather than gazing, seeing them in and for their ever changing selves rather than in terms of their utility. But of course our minds and senses are not equipped like electron microscopes, to scan almost everything at once. There is a limit to our awareness and our abilities to perceive and to recognize difference and continuous change. We can only perceive to a certain degree of nearness and distance. How and at what point we perceive and come to recognise the effects of global warming on the polar ice cap, the rising of sea levels and the changes of climate that take place over tens and hundreds of years is certainly not comparable to manner or the degree of perception involved in our experience of the difference between a heavy rainfall or a single day of scorching sun. For the former

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<sup>655</sup> Bergson (1946), pp. 135-6,

<sup>656</sup> *Ibid.*, pp. 137.

<sup>657</sup> Chia (1998), p. 362.

<sup>658</sup> Bergson (1946), p. 138.

we cannot but utilize our conceptual apparatus. Therefore, our conceptual apparatus and our direct perception of reality must work together, one supplementing the other.

Looked at from the point of institutions, reality appear deceptively stable. Indeed, from a certain point of analysis stability appears to be correct: I am the same legal person I was yesterday, last month, last year. But I do not have the exactly the same body throughout my life, it changes entirely, and from that point of view I am a totally different person. The apparent stability of institutions of law at a certain level of analysis, that of repeated patterns, is a function of the underlying and continuously changing character of all things. In this sense, stability, the static, divided nature of reality, presupposes change, process, *un*-dividedness. Thus also, in the same way, in relation to the distinction and relation between ‘universals’ and ‘particulars’, we can see clearly how it is that what we call the universal is an abstraction from the particular, and we can also see that what we call the particular is itself also an abstraction, from process, or continuous change; therefore, far from denying change, presupposes it. In this way, as Scott Veitch rightly suggests:

‘[i]t may well be that while there are undoubtedly universal forms, universal and particular in practical reasoning (including legal reasoning) are no more than relative forms of abstraction or of generalization – more or less useful tools, stakes in a debate (or in the lack of a debate), always deployable, not categorical’.<sup>659</sup>

At one level of analysis, that of explanation and *ex post facto* justification, it is pattern, repetition, substance, stability, and so on, that are assumed; at another level, that of the actual moment of decision, where the human judge as agent ‘intuits’ the answer to the legal problem, performs or decides (which is really the unrepeatabe, fleeting moment that justifies the decision), it is continuous change, process, that we observe. The patterns that we so readily identify and continually refer to are really no more than momentary haltings of that process, which keeps on changing ceaselessly; in other words, reduction achievements that depend, for their

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<sup>659</sup> UPLR, p. 152.

intellectual acceptance, on a certain view of the dialectical relationship between facts and rules, particulars and universals, a view that only exists and is given credence through the action of the human agent that links the two.

So we can see how, for the purposes of analysis and explanation, focussing both on universals and also on particulars is necessary. In this way we are able to keep in our vision both the big picture of things, the extended horizon of reality where time is arrested and concepts are constructed, related, transferred and used, where things and patterns appear as stable and repeatable, and also the nearer picture where momentary but significant decisions are made and time unfolds in a never-to-be-repeated way. But focussing on both particulars and universals and their relatedness in this way is really to focus not on different accounts of things, as if to differentiate between how they are in themselves and how they appear when viewed through the lens of abstraction, but it is really to focus on different *accounts of change*. 'Rules' and 'facts', 'universals' and 'particulars', appear and come together in the moment of decision, the decision *performed* by the human judge as agent, in a synthesis that is directly connected to that human judge's lived experiences. The change in law and by law that is later represented by this made decision, accounted for by way of *ex post facto* explanation or legal 'justification', is actually experienced by the judge as a continuous process, an unfolding in time of possibilities, events and interactions. It is not a process that can be adequately represented in terms of a shift from one stable position to another stable position; rather, change is fundamental. Therefore, it is not sufficient if we are to take continuous change and process seriously in this way, that we then produce an account of legal change that is represented in terms of decisions that shift the state of affairs from state A to state B (that is, from afar, as abstract concepts). Instead, we need to find a way of understanding and re-presenting change as it is when experienced from within; that is, of re-presenting change in changeful terms, taking seriously the full import of Levi's injunction that the classification changes as the classification is made. So we need now to try and address the difficult problem of how to do this: how can those ideas that we have been contemplating be expressed in

law? How would we begin to describe a processual model of legal institutional change and decision making?

All of the legal and social philosophers whose writings we have been considering here accept the idea that law as a social system is to be regarded in terms of its capacity for reducing differences between human agents. In MacCormick's terms it is the procedure of generating repetitive behaviour through institutional categories and structuring thought: for something to be an instance of institution A implies A-typical behaviour. As we have noted, following Searle and Berger and Luckmann, MacCormick relates types of behaviour to types of situations and types of actors. In this way, a legal institution, say, contract, provides legal persons with a thought framework with corresponding and appropriate choices of action.

Clearly, on the one hand, decision making implies generalization and the subsumption of particulars under generic categories which, although not objectively available to institutional actors at every different point in time, are defined socially by context. On the other hand, as we have seen, those same categories and their contents and their meanings are always changing. In this way, therefore, we can see how the legal institution is both a recognizable and *relatively stable framework* or *structure* and also an unfolding, evolving or *continuously changing pattern* in and to which new descriptions are constantly being added. As categories are utilized by institutional actors and drawn upon by human judges as agents so the generalizations change in ways that are not always predictable.

This occurs because although the definitions relevant to those categories are to some extent set by the institution they are not set conclusively: law lacks full control over these definitions. In order for legal institutional action, in terms of established and recognizable recurrent behaviour patterns, to be possible there must be some stability or control exercised over definitional categories, some form of closure of these categories, however impermanent. We can appreciate this when we realise that legal institutions do not exist in a vacuum but are set within a wider social context where change occurs more obviously; in this way, social change

affects legal institutions through constant interaction. Changes occur in society that challenge and stretch legal definitional categories to their limits, and beyond. Categories which are clearly helpful in many, even most, contexts and situations appear to be of more limited use in others. In these latter situations potential challenges occur that could not be foreseen and so ideas about rules and definitions and their relevant applications must be revised. To make the point in another way, legal institutional action necessarily presupposes both bounded, rule-attracting behaviour and activity and also the non rule-like behaviours of those involved in ongoing and evolving non-bounded contextual activities.

Just so, we know what we mean when we refer to theft as a category of acts that correctly attract criminal sanction: what we mean by this is derived from a shared cultural background of understandings and experiences. But what about certain types of white collar theft, different types of tax fraud or theft of intellectual property, patents, and so on? We can see that as we begin to move further and further away from the stable core of shared meanings represented by the models belonging to or utilized by our common cultural background variations appear to challenge the core of settled meanings and the categories in which these are represented, and these must then be addressed individually to determine their inclusion or exclusion. However, the point is that we are still able to do and do this through extension of our stable categories, to make reasoned and reasonable decisions regarding these because we can see how it is that we are able to differentiate, mark a distinction and extend the scope of application of our generic categories to include or exclude and thus to alter or modify these. Hart's famous example of the question of what exactly is included and what excluded in an order banning wheeled vehicles in the park illustrates this clearly; as, indeed, for vastly different reasons, does the question of whether artificial insemination by a donor constitutes adultery and provides grounds for divorce in the case of *MacLennan v MacLennan*.<sup>660</sup> Here the judge is not simply clarifying the content of relevant categories and sorting out the allocation of particulars to universals but making a value judgement that changes, re-defines, re-

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<sup>660</sup> *MacLennan v MacLennan* 1958 SLT 12.

creates and re-determines the law at that point. As Taylor<sup>661</sup> maintains, applying a concept is always a performative and normative act in the sense that it involves a functional determination of how the rules apply in practical situations, an extension of the rules through use of the imagination: every application of a rule in a marginal case noticeably transforms the rule. Thus, institutional concepts themselves throw up marginal cases: by their very nature as incompletely circumscribed entities their edges are blurred.

But we can also see how the control of institutional categories and definitions by law is limited in another way. While it is true that our interaction with the world we live in often throws up situations and events that could not have been foreseen, our ability to interact with our own thoughts about the world and to interact with our interactions can also lead to new distinctions, the awareness of ever newer possibilities and potentials, albeit as they are imagined or described through simile and metaphor. Thus, we are back once again with the recursive application of descriptions and descriptions of descriptions, with our reflexive capacity to usher up new descriptions that are themselves the result of our reflection on our own behaviour and thought, and our thoughts about these, as if these were real, independent entities observed objectively by us from a distance. In such 'worlds within worlds' almost everything could always be otherwise. Does law accommodate and encourage, can law ever permit, such institutional reflexivity? Are the conditions necessary for such reflexivity to occur to be found in law? In Bankowski's terms, à la Schauer, and bearing in mind Christodoulidis's arguments about the force of exclusionary reasons, can the curtain be lifted? And, if so, how?

The first thing to notice is that, whatever positivistic claims may be made from time to time to suggest otherwise, even legal institutional categories are only closed temporarily. Human interactions, with events, objects and people, as with oneself, are not individually distinct but intermingle and are woven together with other interactions, current and previous, forever altering. Moreover, we do not ever cease to weave this web of beliefs and habits and actions such that any part of it

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<sup>661</sup> See Taylor (1985).

could be said to be identifiably and individually distinct; rather, we continually struggle to maintain some coherent sense of it all both in spite of and because of its forever changing, reconfiguring nature. Thus, our ability to forever generate new forms and patterns of meaning, new descriptions and configurations and reconstructions is unceasing. We repeatedly generate new patterns. Even our memory of past events is not simply a repetition, but a repetition that is constructed in terms of and constrained by our present sense of what is important or significant. Each adjustment may be miniscule, but every repetition is an adjustment that represents a change. This becomes obvious when we consider how the same thing said at one point in time and then again at a different point in time are two different things. Thus, in every case some change, however small, occurs and the categories are altered and reconfigured. Every decision according to law is a change in law and every case changes the rule; every fact, every inclusion and every exclusion, every time. Repeated applications of a rule do not simply affirm its stable, unchanging correctness of application, but effect a modification, or refinement, even if only by the simple fact of each further application operating to accommodate what is significant in each new case, which must also, in turn, do something new to alter the sense of established expectations. Therefore law must always have an improvisational character, consisting more in terms of a working hypothesis, accepted and utilized by legal institutional actors struggling to make sense of and to act in a coherent way in the world.

So we need first to be able to see through the smokescreen that is presented by the way we use the terms ‘particulars’ and ‘universals’, ‘rule-determination’ and ‘rule-application’, ‘legislation’ and ‘adjudication’, to give an appearance of institutional stability, if we are to begin to uncover any sense of this underlying reality of continuing change. Law and legal institutions are not in states of being but in a perpetual process of becoming: legal institutional categories are always on the threshold of change, modifying and altering to allow new experiences and new facts to be accommodated. We may indeed talk of particulars and universals as if these were ‘real things’ and abstractions from ‘real things’ but, as Whitehead rightly notes, ultimately there is no such object that undergoes change, no unchanging subject of

change. Instead, there is only change and the choices, actions and decisions of change: reality as such does not change but, in Bergson's terms, change constitutes reality.

What, then, might an idea of legal change mean? How does it make sense to talk in these terms? Is change in law something exacted on law from without, or is it more properly something internal to law? If we accept what has been said so far we can see that far from being characterized in terms of the former, as some conscious creative effort or external application of force, change, as underlying reality, is very much an inherent feature of law as, indeed, it is of all reality. Even the most passive accommodation of new experiences already is and is potential for further change. But the degree to which such change will be institutionally effective is, of course, dependent on the extent to which institutional actors, in particular the agents of institutional decision making, take up its opportunities for interaction.

So we can see how a process perspective on legal institutional decision making, in light of all of this, will place strong emphasis on the situational aspects of judicial action and on social relations as the source of structure and order. That is to say, legal institutions are contexts of decision making structured locally through social interaction, possessing durable institutional force. Within such settings and contexts, human legal institutional actors are always confronted with distinct circumstances and choices. These circumstances condition the situations in as much as they are included or excluded as relevant or not by the human agent. It is precisely this emphasis on perceiving institutional life as continually changing and forever evolving contingently that marks the character of process thought as pertinent to our discussion here. Legal institutional phenomena are not considered as entities, bounded states, but as unfolding processes, happenings, events in which decision makers make choices from out of the various alternatives presented to them, choosing to actualize certain potentialities and not others, and where the further potential choices and possibilities for actualization depend on those previous choices made for the range of new possibilities open to choose from. Legal decisions *are* unfolding processes, in which judges interact with unavoidably local conditions

through recourse to rules, etc. What, from an external observation point, seems like decision making controlled by legal rules and other norms is, in fact, experienced internally as a subtle yet dynamic succession of finely tuned actions and interactions in a continuously evolving realization of what is really happening and being made to happen. That is to say, legal institutions do not exist or operate independently of the human actions and decisions that constitute their working out, but in and through them. We might also say that legal rules and legally relevant facts, universals and particulars, operative facts and evidentiary facts, and so on, do not exist prior to and thus determine the existence of the decision making event; rather, they appear as a part of the process of engaging with the tensions and the fields of force that come characterise it.<sup>662</sup>

On this understanding, legal institutions are indeed sites of human activity and decision: institutional actors draw upon the structure and framework of interrelated legal institutional categories that function to make their behaviour predictable but, in so far as it is within and upon inescapably local concrete conditions that their activities of reflecting upon these and seeking to adapt and apply them takes place, such categories are always unavoidably altering and modifying. Of course, this may be minimal, in the sense of dealing with decisions where the question of rule-application is obvious, not in the least bit complicated or problematic, but it may also be maximal, where such certainties do not hold. Nonetheless, every time that a legal institutional actor acts imaginatively to extend the circumference of application of a rule or institutional category significant change occurs. This is really only another way of saying that change is immanent in legal institutions through the inescapable interaction of institutional actors with their environment, in the accumulation of new experiences. Such actors are inherently

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<sup>662</sup> Cf. Luhmann's (1995) idea about the disappointment of expectations of expectations is relevant here. A system's temporal horizons are revealed through expectations: futures and pasts can be calculated on the basis of what is anticipated. Indeed, 'time becomes flexible through anticipation' (p. 308). But it is also clear that '[t]ime multiplies contradictions ...: it both increases and decreases them', and 'by varying temporal horizons one can regulate what appears and disappears as a contradiction ... The present future multiplies contradictions. Future presents, by contrast, open up the possibility of referring something. One temporal perspective increases pressure; the other ... reduces the tension'. And '[t]hese two possibilities of reflexive temporal modalization ... mutually imply each other in the unity of time ... Yet one can separate both perspectives analytically' and examine how these orientations and associated contradictions 'correlate with other structural characteristics ...' (pp. 378-379).

reflexive: they are forever drawing new distinctions, creating fresh and lively metaphors, making new connections. There is no escaping this: the world around a judge is not closed off from the potential for new experience and every action and interaction with it and in it is pregnant with creative potential. New meanings, new actions, new decisions, all create a constant need and increasing momentum for creating and recreating, weaving and interweaving webs of beliefs and habits and attitudes.

Certainly, throughout, our use of conceptual abstractions from concrete reality is unavoidable. We could not navigate our way around or begin to act coherently within the world of everyday living without recourse to these useful and necessary aids. How could I possibly eat my breakfast if I did not first accept that at some level of analysis that yellowy-white object that I call an egg has some sort of objective existence. But all that this really implies is that not only is change immanent in institutions, but it is also pushed along by them; in other words, it is institutional change. For instance, in MacCormick's understanding of the dual meaning of institution: law as an institution in a social sense is the locus of forever evolving human actions and interactions; institutions of law in the philosophical sense are ways of creating meaning through the patterns of repeated, reiterated human behaviour, decisions and action. So the use of the term institution can be used in respect of law to encompass both the input and the outcome of human action. In one sense, it is the conceptual tool, the structure and framework of thinking, *for* human action, while, in another sense, in terms of pattern, it is generated *by* it. What MacCormick shows us is how law operates both as an institution(s) to enable us to observe change and an institutionalizing activity in which we actively work to make and discover meaning out of the otherwise continuous and somewhat chaotic flow and flux of life, and in all of this judges to some extent have to 'make do' or improvise in the activity of judicial decision making.

In a sense, this is what the common law doctrines of *ratio decidendi* and precedent are all about. Judges, in making legal determinations, must attempt to negotiate the tensions inherent in the activity of legal decision making by

accommodating, adapting and altering legal understandings both in response to past and in view of future accommodations, adaptations, and alterations. The inevitable ‘gap’ that then appears to open up between our use of abstract generalizations and the concrete facts of individual cases that we seek to relate these to simply reinforces this view that judges must improvise as they reflect on their own understandings and those of their fellow judges. However, the point is that this description is not a description of the exceptional case, the occasional irksome departure from an otherwise stable system; rather, it is the norm. In this sense, change is not an imposition on an otherwise fixed and constant state of affairs, but it takes place all the time that judges and others in legal institutions do what they are trained and paid to do, applying the law as legal professionals in concrete settings. Moreover, none of this should be taken to suggest that because of law’s inherent indeterminacy, it is somehow bound to be incoherent. Indeed, quite the opposite, since all of this activity concerning the interrelating of one’s thoughts, decisions and actions with those of others produces, from concrete situations, precisely those patterns that interrelate over time to bring about an emergent institutionalization.

Of course, law as a system must respond to changes in its external environment. But how law responds is a complex, evolving, many textured affair determined internally by law itself, by its own historically created self-understandings. If there is a significant question to be posed here perhaps it should be set in terms of how it is that particular aspects of law’s self-understandings are made to seem relevant in particular and changing contexts over time. For example, changes in society put pressure on legal decision makers’ legal understandings in order to improve the response of the legal system to the problems and social pressures that arise. Societal changes may lead to calls for a better determination of criminal law and its many applications and enforcements through the criminal justice system, but, if anything, it is the legal decision maker’s understanding and appreciation of societal changes that will in the end influence her response.

So, to reiterate, each new decision changes law and, as legal decision makers act later, they do so in the wake of previous decisions. In turn, this must also generate

different understandings of the possibilities of legal decision making, different opportunities for imagining newer possibilities not previously intimated. In other words, when viewed from an external position, the changes represented by new legal decisions may seem like discrete, simply locatable closed or bounded episodes that effect a technical shift from one stable position to another, but, seen from inside the decision making process, they will be experienced more in terms of the ongoing flow of creative potential, choices arising in and through opportunities for decision making that could not have been predicted or anticipated before. Decisions, once made, may yet have to be presented as based on legal principles, but each relatively discrete legal decision, taken in respect of its own concrete historical circumstances, all unrepeatable in time, must to some extent alter, adapt or modify those legal principles. To put it another way, the decision in *Re A*, despite Lord Justice Ward's insistence on its 'very unique' character, effects change in the legal situation: it expands the criteria merely by being there.

What all of this amounts to is different ways of making the same point: change is not something external to law, imposed on it from the outside. Change is ongoing, in law as in all else, a fundamental feature law. Levi has showed through a number of case histories (referred to earlier) how a momentum for change can gradually build up and increase to be continually modified and adapted by those involved in the decision-making process. Not all of the opportunities for decision that opened up could have been anticipated or foreseen, but unfolded gradually, some triggering others and opening up new discursive contexts that would then allow them. Where legislative enactments are made to work in local concrete situations, there is always some adaptation, alteration or modification, some improvisation by the human agent as decision maker, whether this occurs by way of inclusion or exclusion as the terms and categories of law are imaginatively considered and extended and put into effect.

So change in law should not to be understood merely in terms of deliberate, measured change; that is only a small part of the whole situation, at least under the argument being put forward here. Changes in law as an institution and in its legal

institutions occur all the time. There is no need to posit an intentional actor, a calculating, purposeful author of change, in order to account for legal change. Such changes as might arise in this way occur only on the back of, and because of, law's always-already changing nature. But without a recognition of this fundamental character of change at the heart of reality as undergirding, overarching and permeating law we will be unable to appreciate law's underlying processual nature. It is only because law is, at root, one expression of an otherwise ongoing activity in which individuals are forever trying to make sense of new experiences and to actualize new possibilities that we are able to appreciate how the more obvious aspects of planned change also come about.

What is the role of judicial discretion and a judge's deliberation in all of this? It should go without saying that judges must be able to see clearly what is transpiring in the facts of the case before them and be able to discover and identify among these the coherent and legally sustainable pattern of persons, events and circumstances that accommodates and reflects what is going on. Significant changes in law often take place when a judge or judges consider the circumstances of the case before them and, holding these together with their own experiences of similar cases, effect an intervention in law by agreeing to distinguish the present case on particular grounds. In such cases, these locally significant facts become amplified in terms of their legal significance and their specific differences become institutionalised depending on the structural context envisaged by the judges. Seen from this perspective, as it were from the inside, judges must be attentive to the nuances of the discursive context appropriate to their deliberations; that is, they must keep in mind how certain legal codes have been shaped historically and how these codes and the practices associated with them have developed and changed over time as a result both of others' and of their own thinking and decisions. In other words, in terms of our previous discussion, judges need to acquire the skills relevant to attuning their thoughts to recognize those subtle legally specific differences and sensitive nuances.

Thus, we can see then how change in law or, more correctly, deliberate change in law may come about not so much by the realization of a conscious desire

and plan to effect particular change(s) but as the subtle introduction of new ways of thinking or understanding. Such new ways of talking are, effectively, new forms of legal interpretation; in short, a new language, a new discursive context. We can see something similar happening as a result of the new methods of quality assessment in higher education. Here new ways of assessing and recording allow some but not others of the methods, practices and goals of teaching already in place to be amplified. In this way, they work to reinforce certain interpretative codes that in turn will be more likely to allow other novel ways and aims to be more easily and subtly introduced and to become established. In this way, recursively, over time, a whole new system can be created, almost imperceptibly. Here, again, this is not so much about introducing wholesale change as an interruption to an otherwise stable system; really, it is more about recognizing the underlying processual nature of reality and discovering the already-existing ongoing changes. In this way, a changing of the terms of the discussion or debate, even altering the accepted meanings of the same terms, will eventually create a new context of discussion.

What all of this suggests is the constant need to be aware of the resources that decision makers require to be able to interpret and reinterpret their own experiences and of the availability of a common language to enable them to interrelate their decisions. In this sense, change in law is not simply something imposed on from without, as legislative response to growing political unease or social disquiet, but something effected through the locally significant acts and responses of judicial decision making. Nor is this simply to understand the power of judges to effect change in law as limited to the exercise of some technical device akin to the declaratory power of the High Court in Scots Law, its institutional power to authorize and thereby effect ‘a change in the world by representing it as having been changed’.<sup>663</sup> This sense of ‘declaring’ change is precisely the reason why the catchphrase ‘You’re fired!’ in the current popular television series *The Apprentice* has become so captivating for contemporary audiences. By the simple utterance of these words the new state of affairs that they describe is brought about. Likewise, judges’ powers to make and deliver decisions in law are powers to permit fresh

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<sup>663</sup> To employ Searle’s (1998) notion of what it means to ‘declare’ (p. 150).

observations from everyday reality, to draw new distinctions and to see new relations and interrelations, to compel others to restructure their systems of thought, and to re-pattern or re-weave their webs of belief, habit and action. However, from the perspective of the underlying processual nature of reality, and already ongoing change, these so-called 'declaratory powers' are merely institutional interruptions: they may indeed introduce new ways of thinking and speaking and understanding and provide revised templates for judicial decision making, but it is the local circumstance of actual decision making situations, real cases whose outcomes must be decided under the pressures of time and lack of resources, that will ultimately provide the authentic basis for understanding change, being the places where these new codes and interpretations are further interpreted and re-interpreted according to the local concrete circumstances of the cases they are made to address and brought to bear upon.

As far as the argument being advanced here is concerned, we might conclude that a major part of the legal theoretical task must include a sense in which legal theorists should give a theoretical priority to the natural, incremental, and relentless aspects of microscopic change that produce change by adaptation, variation, unexpected and unforeseen opportunity.<sup>664</sup> Why? Well, not least because such change reflects the actual becoming of things, the underlying nature of reality. This, then, is what it might mean to observe change from within: to look at the different ways in which all institutional actors (including but not only judges) modify, alter and adapt their webs of habit, thought and acting in response to new experiences in new situations and the many different ways in which decision makers can be said to influence and thus interrupt the otherwise ongoing flow of institutional activity. Making sense of the process of the institutional becoming of law must inevitably mean a bringing together of several dynamics of the experience of legal decision making that have hitherto been considered separate; that is, not just the legal but the political, the ethical, the cultural, and other dimensions, too.

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<sup>664</sup> Cf. Deleuze and Guattari's notion of 'rhizomic change'.

## CHAPTER FOURTEEN

### LAW AS PROCESS; LEGAL DECISION MAKING AS AN ACTUAL OCCASION IN CONCRESCENCE

#### Introduction

We have seen how, for Whitehead, an actual occasion is a whole, undivided occasion of experience that 'becomes' immediately in a quantum of time but which, for the purposes of analysis may be distinguished into several logically successive and mutually related phases of its concrecence. In its initial receptive phase, the present occasion of experience comprises a double inheritance from the past, which Whitehead terms the 'conformation of feeling'. But each moment of human subjective experience not only involves a reception of data from the immediate past; it also involves some personal response to what is inherited. And while no control can be exercised over *what* is received, *how* it is responded to will involve some measure of choice. The responsive and integrative phases of the process of concrecence are where the personal decision about this reaction is formed. While no restatement of the previous summary description of Whitehead's philosophical scheme will be presented here, the earlier definitional discussion of nomenclature should be assumed throughout the following analysis. At this point, then, we may attempt some preliminary integration of Law and Process.

The sum total of Whitehead's contribution to thinking about law amounts to no more than a few brief comments on common law, legal systems, legal determinations, legal organizations, legal agencies, and legal contracts,<sup>665</sup> and to one slightly longer passage on the foundations of property and contract law.<sup>666</sup> However, this lack of a sustained treatment of the subject of law may be due rather more to the unavailability of any systematic, or sufficiently detailed, theory of law which it could address than to the inapplicability of his philosophy to law as such. Indeed, absent such a theory, it is difficult to see how Whitehead himself could

<sup>665</sup> See AI, pp. 20, 23, 80-81, 104, 105, 113, 120, 246, 351, 374.

<sup>666</sup> AI, pp. 80-81.

possibly have provided, with respect to law, the sort of analysis that, for example, he does in his treatment of the intellectual, scientific, religious, economic and political history of Western civilization,<sup>667</sup> and that might, in turn, have presented the evidence for, and confirmed, his doctrine of the self-creativity of actual entities and his metaphysical system. Nevertheless, recent developments from a variety of theoretical perspectives, particularly those that can be represented collectively under the banner of an ‘institutional theory’ of law, appear to adopt precisely the sort of common strategy that, given their shared emphasis on the nature of law as a normative institution combining norms affecting general conduct with those providing authorization to officials, may now allow that hitherto unavailable form of access into the internal apparatus and dynamics of society’s most potent and most powerful forces.

In what follows, I aim, first, to recall my earlier discussion of the institutional theory of law as propounded by Neil MacCormick, noting how this fully worked out institutional theory of law defines and deploys its basic unit of explanation, ‘the institutional fact’: second, with recourse to a mainly Whiteheadian process theoretical model, to provide a theoretical description of the institutional theory of law and its practical application in terms of the meaning structure of process thought and, in so doing, to explore more fully how a legal decision is created and maintained within the legal decision-making process; and, third, by this means, to extend the application and thereby broaden the appeal of process thought beyond its existing boundaries. This will, hopefully, pave the way for a more extensive discussion, which will follow.

### **Integrating Law within a Philosophy of Process**

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<sup>667</sup> Essentially, Whitehead argues that the rise, fleeting brilliance, decay, and replacement of human civilizations, religious institutions, and scientific paradigms is a powerful macroscopic confirmation of a reality conceived of as a series of discrete occasions of experience, each receiving the past, transforming the past into the present by choosing its own perfection, and perishing into a datum for occasions in the future.

The discussion presented earlier<sup>668</sup> outlines MacCormick's theory of the development of institutional normative order and its relation to the common law system of judicial decision-making through its interaction with a theory of legal reasoning that stresses 'the significance of the justifying relationship between reason and decision'. However, although this institutional theory of law highlights the importance of understanding the temporal development of law as normative in a way that affirms its dual aspects as momentary and dynamic, and of seeing this as evolving in and through a decision-making process which 'in no way entail[s] a denial that particular reasons must always exist for particular decisions' but which 'presents universalization as essential to justification within practical reasoning',<sup>669</sup> no attempt has yet been made to relate this institutional theory of law to any wider theory of process (Whiteheadian or other) or, indeed, to suggest whether or not this might be possible.

This chapter argues that not only is such integration possible, it is also desirable and necessary. In order to comprehend more fully the deeper complexities of the process under consideration, to increase our awareness of the likely constitution and structure of the judicial decision-making experience, a more detailed analysis of the interaction of the different types and levels of influence will be attempted. This analysis will present an outline of the basic elements of process described by Whitehead himself and use these to explore the way in which a discrete instance of legal judgement is created and maintained within the decision-making process.

In 'Trust as Process',<sup>670</sup> Mark Dibben suggests that:

'[t]he accuracy of a theory of process to trust development depends, ultimately, on selection of the appropriate unit of analysis. Given the concreting actual entity as the central concept, or irreducible unit of analysis, in Whitehead's explication of the process of the development of

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<sup>668</sup> See chapter 2.

<sup>669</sup> *UPLR*, p. 3.

<sup>670</sup> Dibben (2001).

experiential existence, ... integration is made easier by the establishment of four simplifying conditions:

(1) a purposeful distinction can be made between an actual entity and an actual occasion, whereby (a) the actual occasion is the unit under immediate discussion (that which is in the process of becoming) and (b) the actual entity is the unit which is formed, 'is immortal in the past', and which the actual occasion prehends in its coming into existence;

(2) following from the first condition, that the appropriate units of analysis for the actual occasions in concrescence are selected;

(3) the appropriate actual entities affecting the concrescences are identified and discussed and;

(4) the appropriate eternal objects are identified and discussed'.<sup>671</sup>

Assuming Dibben's 'simplifying conditions', it should now be possible to outline a proposal for how this model might usefully be employed in law (how the legal system might legitimately be understood as a society of societies of actual occasions and how the various phases of the theory of concrescence of an actual entity might be seen to map on to the different phases of the process of judicial decision-making) and submitted for confirmation/refutation by a more extensive study of legal decision-making and the decision-making process.

If the attempt to integrate law within a theory of process can be understood as an attempt to explore how a legal decision is created and maintained within the decision-making system, then the accuracy of applying a theory of process to law will, as intimated above, depend on the selection of appropriate units of analysis: identifying the levels of actual occasions and actual entities that can be isolated for

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<sup>671</sup> Dibben (2001), p.5.

analysis and the enduring traits or forms that can be termed eternal objects. That a legal decision can be understood in this way, as an actual occasion of experience affected in its concrecence by a set of actual entities, really follows from what has already been said regarding types of knowledge and complex occasions of experience, made possible through the adoption of a process terminology and a processual meaning structure. The persistence, regularity and significance of legal decisions across the legal system may then be seen to arise from the creative impulse which determines that an actual occasion in the process of concrecence will, in passing from subject to object, immediately become part of the world of entities affecting future concrecing occasions. That is, law's creativity arises from the continuing creativity of new legal decisions.

Following Dikken, we can attempt an integration of a theory of legal reasoning based on MacCormick's institutional theory of law with a process-theoretical model derived mainly from Whitehead's Philosophy of Organism in the following way. We can isolate for the purpose of analysis:

a. the following levels of actual occasion:

- (i) the current quantum moment of the decision-making process upon which situational cues will act to modify expression;
- (ii) confirming/conflicting behaviour towards a decision (universalising/consequences);
- (iii) confirming/conflicting action towards decision (coherence/consistency);
- (iv) the formed (justified) decision.

b. the following four levels of actual entity:

- (i) previous decisions, including the previous moment of decision in the immediately prior occasion, combining to form a set (S) to

affect the concrescence of the actual occasion that is the quantum under discussion;

(ii) criteria for decision making as separate actual entities combining to form a set (C) which, along with the actual occasion of level (i), now a complex actual entity, affect the concrescence of the actual occasion that is the confirming/conflicting (consequential balancing) behaviour of each of the universalised features under discussion;

(iii) the actual occasions of level (ii) now each a set of actual entities which are the cooperative behaviours which combine to affect the concrescence of the actual occasion that is the coherent/consistent action that takes place among the rules

(iv) the set of actual entities that are the situational judgements (J) which combine to affect the concrescence of the actual occasion that is the altering justified decision of the judge.

#### c. enduring and eternal objects

justified decisions and precedent, rules, principles and values, may be identified as enduring objects due to their semi-permanent nature dispositional aspects associated with *habitus* are identified as simple eternal objects or universals being both transtemporal<sup>672</sup> and ‘unanalysable into a relationship of component eternal objects’.<sup>673</sup> This affects the level (i) actual occasion, where such eternal objects are prehended by the actual occasion in the absence of the enduring object (rule or precedent).

### Application

This attempt to integrate the institutional theory of law and its associated method of legal reasoning within a processual understanding is made in order to explore how a discrete instance of legal judgement is created and maintained throughout the legal

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<sup>672</sup> PR, p. 44.

<sup>673</sup> SMW, p. 240.

decision-making process. The purpose of this section is to explore how a legal decision might arise and how it might be maintained throughout the period of its concrescence. To do this, we rely partly on Whitehead and partly on the conclusion reached previously that law is a form of tacit knowledge ‘invoked’ in order to overcome a lack of explicit knowledge about a situation. That law may be considered to be a type of knowledge in these terms is confirmed by Whitehead:

‘[knowledge is] conscious discrimination of objects experienced ... derived from, and verified by, direct intuitive observation’<sup>674</sup>

We have already noted that conscious perception may be understood in terms of ‘affirmative judgements’<sup>675</sup> that arise in some circumstances in relation to ‘propositional feelings’<sup>676</sup> (an actual entity which makes ‘incomplete abstraction from determinate actual entities’<sup>677</sup>). Here, ‘the entertainment the mind gives ... is called a belief ... admitting or receiving ... any proposition for true, upon arguments or proofs that are found to persuade us to receive it as true, without [explicit] knowledge that it is so’.<sup>678</sup> This is the general ‘rule’ of process that allows us to understand and accept law in terms of the positive expectations that an individual holds towards another’s motives and acts in a situation entailing risk and which thus allows some general prediction to be made of it regarding both its capacity for endurance (consequential rules) and its decline (terminative rules). However, Whitehead insists that the ‘triumph of consciousness comes with the negative intuitive judgement ... produced by the definite exclusiveness of what is really present’.<sup>679</sup> Here, the lack of explicit knowledge and the feeling of absence which cannot be addressed lead to the need for law. In this sense, there is a double deficit with regard to law, both in terms of explicit knowledge and of the implicit

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<sup>674</sup> AI, p. 176.

<sup>675</sup> PR, p. 273.

<sup>676</sup> PR, p. 259.

<sup>677</sup> PR, p. 257.

<sup>678</sup> PR, p. 267.

<sup>679</sup> PR, p. 273.

knowledge required as a result of this. This double deficiency is experienced by the decision maker as a strong emotion.<sup>680</sup>

In this sense, the making of a legal decision is properly a type of knowledge, a complex occasion of experience whose concrescence is affected by a set of actual entities (set S). The justification of this legal decision (its determination as a ruling for this case) is the actual occasion in concrescence emerging from the conscious integration of the situational decision (complex actual entity) with the dispositional threshold that is the result of a simplifying abstraction of individual prehensions of another set of actual entities (set C). We can now attempt to unpack these processes in more detail.

### **A Process-theoretical Description of the Development of Legal Decision Making and Legal Rules**

We can explicate the creation of a discrete instance of legal judgement (ie. a level (i) actual occasion) in a judge's mind, its continuity over time throughout the period of the decision-making process, and the development of coherence and consistency thresholds (level (ii) actual occasions), by following Dibben's lead with a substantial paraphrasing of Whitehead's own description and illustration of the three phases of the process of concrescence of an actual occasion.<sup>681</sup> For example, let us suppose that a judge, J, is presently involved in the process of decision making with respect to the facts of a case, K. According to normal usage, we might say that she has come to (intuited) her decision and now she must justify it. But how does she come to her decision, how does she know that it is valid and how can she be sure that her subsequent accounting for it will actually correspond to her intuited decision? This is really another way of asking how *she* knows that *she* has been making *this* decision in *that* way throughout. How is it accounted for in her experience now? In one sense, the answer is obvious, she remembers. But since it is really memory that is at issue here, then this statement explains very little. Whitehead's answer is that the judge experiences it now with the same subjective form of experiencing that she felt a

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<sup>680</sup> AI, p. 176. Cf. Detmold and Bankowski's 'anxious judge'.

<sup>681</sup> See esp. AI, pp. 235-236, 248-249; also Dibben pp. 7-8

fraction of a second ago. This is the first phase in the immediacy of the new concreting occasion, concerned solely with physical prehensions.

Whitehead, as we noted earlier, uses 'feeling' as a way of describing this 'basic generic operation of passing from the objectivity of the data to the subjectivity of the actual entity in question'; that is, the 'variously specialized operations' that effect its 'transition into subjectivity'.<sup>682</sup> In other words, the 'feeling' our judge enjoyed in her past moment of decision making is present in her new moment of decision making as a datum felt, with a subjective form conformal to the datum. So, if A is the past occasion, and E is the datum felt by A with a subjective form describable as A deciding, then this feeling is felt initially by the new occasion B with the same subjective form of deciding. The feeling enjoyed in the new occasion in this initial phase of concrescence is thus grounded in the experience of causal efficacy; that is, it arises from the data themselves as the past is inherited by the present, rather than as subjective notions read into, or imposed upon, the data of experience. The experienced decision (which MacCormick represents in terms of these evidentiary facts being deemed instances of those operative facts such that certain normative consequences then follow) is continuous throughout the successive occasions of experience within the same decision-making situation. In so far as this feeling is a conscious one, J enjoys a subjective perception<sup>683</sup> of the past emotion towards K as both 'belonging to the past, and ... continued in the present'.<sup>684</sup>

In the event of J hearing a new case involving either a recognized context with unforeseen facts or an unrecognized context with foreseen facts then the enduring object which is this decision of J takes the place of the past occasion A; equally, where both the context and the facts are new and unforeseen then the relevant eternal object takes the place of the past occasion A. In the case of the conformation of a settled decision of J, the process is the same, with the descriptors A, B and E varying accordingly. Thus, the first phase is concerned solely with the

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<sup>682</sup> PR, p. 41.

<sup>683</sup> I use Dibben's phraseology here in preference to Whitehead's use of the phrase 'non sensuous perception of the past emotion'. For an explanation, see M R Dibben, 'Trust as Process'. p. 7.

<sup>684</sup> AI, p. 236.

conformation of feeling in respect of the actual entity (now datum D) that was the past actual occasion A.

The influence of K occurs in the second, intermediate phase, when unpredictable or uncharacteristic behaviour by K may give rise to the prehension of variations in the situational prompts and so introduce a novel content of positive conceptual prehensions which affect the concrescence of the new actual occasion B:

‘Th[is] intermediate phase ... is a ferment of qualitative valuation ... [C]onceptual feelings pass into novel relations to each other, felt with a novel emphasis of subjective form’.<sup>685</sup>

In this way, each of the level (i) actual entities ( $x$  situational prompts) is understood as an objective datum  $F(x)$  felt by A, bringing about B’s concrescence.

So, again, if A is the past occasion of decision making (now the actual entity, datum D), and F is the different datum felt by A with subjective form describable as A deciding, then this feeling is, to begin with, felt by the new actual occasion B with a different subjective form of deciding; namely, as correlative to K. That is, it is the subjective form in A, of J, that feels and transforms F to concresce as the new decision-making moment B of J with respect to K.

Clearly, this new decision is also continuous throughout successive occasions of experience within the decision-making situation; that is, J continuously embodies the immediate past decision as a datum in the present and, absent the introduction of yet more novel content via other data, maintains in the present that decision that is a datum from the past. However, the level (i) actual entities felt by B may be felt as a single prehension, arising from the set of actual entities (Set S) and taken into account as the objective datum F, through ‘[t]he transference of the characteristic from the individuals to the group as one ... [whereby t]he qualities shared by many

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<sup>685</sup> AI, p. 269.

individuals are fused into one dominating impression'.<sup>686</sup> Again, inasmuch as this novel feeling of decision is a conscious one, judge J now enjoys a subjective perception of the emotion affected by past emotions (the objective data  $F(x)/F$ ) toward K. In relation to the concrescence of a new level (iv) actual occasion, or justified decision, the introduction of novel content would be through the level (iv) set of actual entities (Set T) that are the past moments of decision.

The final phase in the concrescence of the new actual occasion B is that of anticipation, in respect to the necessities it lays on the future to embody it in the concrescence of future actual occasions:

'Thus the self-enjoyment of an occasion of experience is initiated by an enjoyment of the past as alive in itself and is terminated by an enjoyment of itself as alive in the future'.<sup>687</sup>

Thus, if D is the future actual occasion that is the decision of J with regard to K, this is affected by the prehension of what is now the level (ii) complex actual entity B' (from the previous level (i) actual occasion B) along with the set of actual entities C as a limiting condition for application. This limiting condition is a dominating impression arising from the intuitive blending of a number of the characteristics of individual members of the set of actual entities (set C) detailed above, though there is no necessary relation between the limiting condition and the complex actual entity B' since they are contemporaries.<sup>688</sup> Nonetheless, they are indirectly related, in that they 'originate from a common past and their objective immortality operates within a common future'.<sup>689</sup> The valuation of subjective forms yields both the limiting condition and the type of decision that, depending on their values, affect the concrescence of the level (ii) actual occasion as either a rule-determining or non rule-determining applied decision of J in respect to K. Significantly, this whole process of the concrescence of consequent and contemporary actual occasions will occur on the

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<sup>686</sup> AI, p. 273.

<sup>687</sup> AI, pp. 248-249.

<sup>688</sup> That is, the one is not dependent on the other's prior existence.

<sup>689</sup> However, 'the immediate activity of self-creation is separate and private, so far as contemporaries are concerned'. AI, p. 252.

part of K also, so that the level (iii) actual occasion is the action resulting from the combination of J's behaviour towards K and K's behaviour towards J.

For Whitehead, to be an actual entity is to be a self-created, fully formed, fully definite, fully determinate, entity with nothing left unresolved. From the whole mass of possible determinations, each actual occasion decides what it will become: actualizing some potentials and excluding or rejecting others, and thus taking up some position in relation to everything, both ideal and actual. It is, by virtue of its decision, a new fact in the world, 'externally free',<sup>690</sup> but *limited* in its freedom by past achievement and *limiting* by its conditioning of future process. In other words, it is a decision that arises out of previous decisions and provokes future decisions. Indeed, decision amid potentiality constitutes the very meaning of actuality.<sup>691</sup>

Clearly, the concrescence of an actual occasion in the actual world is limited by the factor of order, the limited possibilities available for synthesis in the data settled and given for it by its antecedent world. In simple terms, one can only create the future out of present circumstances. But order is not the same as mere givenness. The actual world given to an actual occasion for its concrescence also contains elements of disorder. So while the latter certainly gives rise to a satisfaction, it is the former that promotes different levels of intensity in satisfactions relative to the initial objective data. That is, it is through the balance of contrasts, the creative synthesis of conflicting elements in an aesthetic unity, that intensity of satisfaction, and thus value, is achieved.<sup>692</sup>

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<sup>690</sup> PR, p. 41.

<sup>691</sup> PR, p. 68.

<sup>692</sup> Compare, for example, harmony with cacophony or variation with monotony.

## CONCLUSION

I began this thesis with recollections from personal experience in order to illustrate the type of difficulties I consider to be involved in any notion of a straightforward application of legal rules to particular facts, events and circumstances. Having defined the problem in terms of the articulation of the relationship between universals and particulars in legal decision making I undertook an examination of the difficult case of the conjoined twins, Mary and Jodie. In attempting to address the situation before it by means of abstract legal representations of those events, law is found to encourage a dualism that results in a shortfall between lived experience and that which can be accounted for by legal representation. The result is an obscuring from view of otherwise relevant information, producing a deficit that is, effectively, a silencing of voices. In this way, and under its compulsion to reach a decision, law is seen to commit an act of 'violence' on the free flow and expression of opinions and arguments. This critical shortfall appears difficult to calculate and impossible to remedy, attempts to provide justifying reasons for legal decisions forever stumbling on the question of time. It seemed like an impossible passage, an unbridgeable gap.

Considering how a number of different theorists attempt to deal with this problem, I suggested that the seeming impossibility of finding a way of bridging this gap that opens up between theory and practice, rule-determination and rule-application, is in fact symptomatic of a far deeper, underlying problem; that is, while much of contemporary legal theory appears as the expression of a continuing concern to 'connect' legal research with actual judicial decision making, this effort is misplaced. Instead, although legal theory and legal practice are often considered as if they were two separate but connectable areas, I have argued that an alternative understanding based on the notion of a mutually constitutive process of becoming provides a more adequate and correct way of interpreting the interpenetrating and interrelating aspects of this relationship.

This alternative approach was traced through the tradition of process thought, in philosophers such as Whitehead, Bergson, Deleuze and Polanyi. Taken together,

their complementary insights were found to offer precisely the sort of alternative approach by way of which such a reconfiguration of the problem can be effected and a reconstruction of legal decision making begun. Informed by attempts from within the field of organization studies to engage in a similar way, I outlined a way of approaching legal decision making based on Bergson's notion of 'creative evolution'. I tested this approach using Levi's understanding of the process of legal reasoning, in which he portrays it as proceeding on the basis of a pattern of extending examples. Levi's analysis, and his outlining of the mechanism that drives legal decision making lends itself well to a process interpretation when taken together with Deleuze and Guattari's metaphor of rhizomic communication.

Having outlined the mutually constitutive nature of the relation between institutions and practices in terms of formal legal contexts I focussed on the role of the judge as institutional actor and decision maker. Employing Tsoukas's analysis of the links between individual knowledge, organizational knowledge and human action undertaken within organized contexts, I was able to demonstrate how, while the propositional structure of legal knowledge is fully realized within formal legal contexts in terms of institutions, legal knowledge in terms of practices (that is, as shared traditions in and out of which legal practitioners work), exhibits a narrative structure. In this latter sense, informed by Polanyi's notion of tacit knowledge, it was possible to demonstrate how legal knowledge is essentially unspecifiable, maintained by anecdote, story and example. Attempts to harness a narrative approach within law can thus be understood to suggest a way of reconceptualizing what is involved in the task of legal decision making as a skill that judges use, a tool to enable them to get at the essential features of the situations before them and of which they are necessarily a part in their role as decision maker. I explored this further through ideas associated with chaos theory and complexity.

All of this was brought together to suggest an alternative understanding of law: law's institutional becoming, the becoming of law in institutions. Finally, having negotiated a way through all of this, and with the aid of the process-theoretical approaches mentioned above, I attempted a necessary integration of law

and process thought, integrating MacCormick's institutional theory of law, referred to continuously throughout the argument, within Whitehead's scheme of metaphysical principles, relating his theory of legal reasoning to Whitehead's analysis of the process of concrescence.

Thus, it is now possible to give a presentation of the thesis in thoroughly Whiteheadian terms: law as process; legal reasoning as an actual occasion in concrescence. In doing so, I believe I have provided a way of introducing a much-neglected and hitherto relatively unexplored (at least within law) philosophical approach within one of the most complex social processes associated with modern living. Now, in turn, this should potentially open up numerous opportunities for further exploring and meaningfully unpacking many more of the otherwise hidden and inaccessible aspects of law and legal reasoning.

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