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Persuasion  
A historical-comparative study of the role of persuasion within the judicial  
decision-making process

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## Abstract

Legal theory has failed to fully explore the rhetorical in the judicial decision and, in doing so, has misunderstood the key role played by reasons that seek to legitimate and justify while expressing emotion and commitment. This thesis sets out to understand why legal theory has failed to do so and what role rhetoric plays in the judicial decision.

Three legal theorists, Chaim Perelman, Bernard Jackson and Neil MacCormick are used to show that it is seeking to be philosophically acceptable that has led legal theorists to avoid the emotional and character-based aspects of the judicial decision. Two historical studies, of the *Talmud* and Aristotle's *Ars Rhetorica*, demonstrate that rhetoric can be seen as closely related to the limits of authority in the system and the character and identity of the decision-maker. These insights are then applied to the common law, exemplified by six cases from the law of negligence. This highlights the importance of the commitment of judges to their own sense of role and the way limitations on reasoning help to create this sense.

The thesis concludes by considering the relationship between philosophy and judgment and argues that they can be seen as different forms of understanding and that there are strong ethical reasons for rejecting attempts to see either as a paradigm for all understanding.

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## List of abbreviations

### 1. Law reports

AC	Law Reports, Appeal Cases (House of Lords and Privy Council) 1890-
All ER	All England Law Reports 1936-
App Cas	Law Reports, Appeal Cases (House of Lords) 1975-1890
B	Beavan's Rolls Courts Reports (48-55 ER) 1838-66
Bing	Bingham's Common Pleas Reports (130-1ER) 1822-34
Ch.D	Law Reports, Chancery Division 1876-1890
CLR	Commonwealth Law Reports (Aus) 1903-
KB	Law Reports, King's Bench Division 1900-1952
LR Ex	Law Reports, Exchequer Cases 1866-1875
M & W	Meeson & Welsby 1836-1847
M	Macpherson's Session Cases 1862-1873
Mor	Morison's Dictionary of Decisions
NZLR	New Zealand Law Reports 1883-
Paton	Paton's House of Lords Reports 1726-1821
QB	Law Reports, Queen's Bench Division 1891-1901, 1952-
QBD	Law Reports, Queen's Bench Division 1875-1890
Rob	Robertson's Law Reports, 1707-1727
SC (HL)	House of Lords Cases in Session Cases 1907-
SC	Session Cases 1907-
SLT	Scots Law Times 1894-
WLR	Weekly Law Reports 1953-

### 2. The works of Aristotle

<i>Const</i>	Constitutions
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<i>Met</i>	Metaphysics
<i>NE</i>	Nicomachean Ethics (Ethics)
<i>Pol</i>	Politics
<i>Prior An.</i>	Prior analytics
<i>Rhet</i>	Rhetoric
<i>SE</i>	Sophistical refutations
<i>Top</i>	Topics

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## Chapter 1

### Introduction and methodology

Persuasion is the power of the weak:

Appeal to facts shared by all parties, the claim to speak in accord with the canons of reason universally compelling for every side - these serve in particular the polemical requirements of the weak. The strong decline logic for themselves and declare what is reasonable (Neusner 1983, 123).

Although the judiciary are usually associated with power it is the contention of this thesis that it is persuasion that is the key to understanding the process of judicial decision-making.<sup>1</sup> This is because it is in seeking to persuade that judges reveal where they feel that they need to provide reasons to legitimate and justify their own decision-making processes. This highlights aspects of the decision-making process that are linked to ethics, emotion and character which are often hidden and which legal theory has both ignored and helped to hide.

This introduction chapter starts by setting out the main themes of the work before exploring in more detail the problems not simply of understanding but of describing that process

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<sup>1</sup> Michelman (1986) points out that in using justifications judges are presupposing that they will be judged according to certain standards and that judgment is an activity which can be so judged. A similar point is made by Kraemer see chapter 5 below, p 246.

## An overview

### 1. Persuasion, legitimacy and legal meaning

Derrida has said of law:

law is always an authorised force, a force that justifies itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable .... It is the force essentially implied in the very concept of '*justice as law (droit)*', of justice as it becomes '*droit*' (Derrida 1992, 5)

The stated goal of this thesis is to understand the process by which judges legitimate and justify their decisions and it concentrates on the limitations, the boundaries which define what is and is not persuasive. These are the areas where the judge reveals the limits of his/her own power within the system and the limits of the power of the system itself.

In concentrating on persuasion the thesis deals with an aspect of language which has often been discredited or ignored, dismissed as rhetoric:<sup>2</sup>

... a speaker's or writer's self-conscious manipulation of his medium with a view to ensuring his message as favourable a reception as possible on the part of the particular audience being addressed. (Cole 1991, ix)

Yet it is these aspects of judicial decision-making which look outward and which seek to be acceptable which, it will be argued, are where the judicial role can be best seen and understood. In the way that they present their decisions judges are primarily seeking to persuade a legal and narrowly a judicial audience that the decision should live on and become part of the system either by becoming a precedent or simply by being protected from

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<sup>2</sup> See Plato's *Gorgias* (1953) which is the foundation of much anti-rhetorical philosophy. See also Vickers' influential *In Defence of Rhetoric* (1988) for a historical overview and a contemporary reevaluation of rhetoric.

appeal. The way they structure and use language in these decisions reveals what they believe the system will find acceptable.

For the legal system what is relevant about each judicial decision is the text that is recorded and can therefore be reused not the subjective reason why the judge made that specific decision. The judge does claim in the text of the decision that what is being presented are the reasons why s/he made that decision. This may be true or it may not but the reasons that are used publicly tell us about what the legal system regards as appropriate reasons, as reasons that can legitimately justify the judicial use of power and make the decision enforceable. In doing so they also reveal what is legally meaningful, what statements have meaning within a legal context and this is why the judicial decision, the structures within which it is contained, and the language used within it are the subjects of this thesis.

These limitations should not be understood as negative as they allow the judges access to a space where they can gain power and authority, help to generate a strong sense of individual role and purpose and create a legal community within which the values and ethics of justice and the rule of law are worked out. These aspects of the process encourage the judge to absorb some of the character of the system into his/her own character and sense of identity. This provides a strong foundation of commitment to the system which permeates the way individual judges present their role to themselves and others in their decisions.

Yet although these limitations are significant they have been generally ignored, Cyrus Tata (1997) in an article on representations of sentencing recognises they exist but limits their role:

The giving of publicly declared reasons for a decision tend to be couched in legal analytical terms. Has this more to do with the necessity to fulfil a popularly held expectation of the principles of justice than a revelation of the stream of consciousness in the decision process?

... in fact these accounts tell us little about the actual sentencing decision process itself and more about the demands of legal rhetoric. However, this is not to say that legal rhetoric is unimportant or should be ignored, but that we should recognise that it has a symbolic role of legitimisation rather than an instrumental role. (1997, 415)

Tata is correct in arguing that legal rhetoric has a symbolic role but in arguing that rhetoric has less to do with decision-making he is failing to understand the significance of this statement. Claims to legitimacy are used to authorise the use of power. The problem of legitimacy, therefore, is how to justify the use of power within society<sup>3</sup> and is linked to a central aspect of the judicial role, the power to make decisions which will be followed, indeed this could be seen as the defining aspect of what makes reasoning recognisably judicial. The rhetoric they use therefore, however symbolic, contains a wealth of information about the judicial role and the process of decision-making. It also allows an exploration of the place of character and ethics in law while taking the structures and languages of law seriously.

The thesis then attempts to describe the architecture of the judicial/legal space that is created by these limitations and to understand in some detail how it generates authority and is therefore an attractive space which has benefits for those who choose to submit to its rules. It concentrates on persuasion rather than the more acceptable viewpoints of “legitimacy” and “justification” in order to uncover aspects of the context, specifically the ethical and emotional aspects, which are neither rational nor logical and

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<sup>3</sup> Some thinkers, notably Habermas (1988), have identified a legitimisation crisis. They argue that the move to a post-modern, pluralist society with its competing truth claims have made it harder for states to justify their use of power. See also Teubner (1989) and Unger (1976). Douzinas and Warrington (1994) argue that the crisis is occurring because the split between public and private law is becoming less clear. Their identification of the problem has not been uncritically accepted. Rottleuthner (1989) has argued that there is no evidence of a crisis of legitimacy caused by a change from modernity to post-modernity. This is a specific criticism of the picture of social change portrayed by Habermas and others and does not mean that legitimacy is an issue that legal theorists should not consider.

which tend to be missed by legal theorists.<sup>4</sup>

## 2. The problems of legal theory

Underlying the contention of this thesis that persuasion is the key to the judicial decision-making process is a critique of the failure of legal theory to fully consider the rhetorical and symbolic elements of legal decision-making.<sup>5</sup> This is despite the fact that the focus of twentieth century philosophy on the production of meaning by rendering the rational and logical problematic encourages a consideration of these aspects of law.

This movement within philosophy is of particular significance for a thesis which aims to understand legal meaning because the growing interest in the production of meaning within western philosophy is closely linked to the collapse of any philosophically objective worldview and has generated an entirely new field of analysis - cultural theory. Initially, under the influence of Marx, the aim of such theories was to discover the defining structures that underlay and determined societies but, in the latter half of the twentieth century, structuralism was widely rejected and, in the collapse of structuralism that is contemporary post-structuralism, meaning is found to be more fluid, more organic, hierarchical structures have been rejected in favour of webs of significance.<sup>6</sup> This more complex view of the way in which

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<sup>4</sup> Almost every legal theorist has at some time considered judicial decision-making. In recent years, Dworkin (1986) has been particularly influential but he is only the latest in a long line which could include Cardozo (1926), Wasserstrom (1961) and Fuller (1966) amongst many others.

<sup>5</sup> Fish is perhaps the most extreme example of this. He has gone so far as to state that theory has no consequences other than "rhetorical" ones in his attempts to explain its limited impact. (1989, 15) This thesis will attempt to answer this by showing the way in which rhetorical consequences can be significant and in chapters 2 and 5 will consider the relationship between theory and judgment.

<sup>6</sup> Milner (1994) has identified three dominant strands within the post-structuralist movement, Derridean which revels in the tensions of the collapse of structures and seeks to demystify and deconstruct, Lacanian, which is Freudian and focused on the creation of the subject and Foucaultian which seeks to describe an interplay of relative cultural schemes of signification. This description of the movement of cultural theory is clearly not the only one see Chaney (1994) which is similar in some respects but concentrates on the roots in sociology rather than philosophy. There is though agreement that turning to cultural

meaning is created and sustained provide opportunities for a re-evaluation of the role of the symbolic and rhetorical in law.

Chapter 2 contains an analysis of the work of three theorists, Chaim Perelman, Bernard Jackson and Neil MacCormick which describes their attempts to create theories of legal reasoning within the shadow of these shifts in philosophy. It will be argued that although interesting these theories fail to understand why judicial decisions are grounded and compellable and that this is because they have concentrated not on understanding the decision within its own context but in translating it in a “philosophically acceptable way”. Although they are attempting to rethink how philosophy should understand judicial decision-making they are still attempting to fit the decision into philosophical paradigms and concentrate on providing solutions to philosophical problems rather than seeing in them the opportunity to reunderstand legal decision-making.

This concentration on methodology and on the relationship between the theorist and the material reflects the concerns of contemporary philosophy which has become increasingly self-referential. All three theorists are working within the tradition of philosophy and Emmanuel Levinas has argued that the strength of philosophy, which he describes as speaking Greek, is its ability to say anything but that this is also is the source of its problems:

I believe that Greek philosophy cannot be eliminated. Even in order to criticise the ultimate character of Greek philosophy, one needs Greek philosophy ... The Greeks have taught us how to speak. Not to speak, not the saying but to rediscover ourselves in the said. Greek philosophy is a special language which can say everything to everyone because it

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theory has been largely about attempts to understand the ways in which meaning is produced and created.

never presupposes anything in particular. Greek philosophy is the way that people speak in the modern university the world over ... It is a certain way of presenting things. It is a way of using a language which everyone can enter. The second quality of this language is that one is not obliged to take the forms of the language for the actual forms of the meaning it represents. In spite of the fact that something has been said in a certain way, the forms of this saying do not leave a trace in what has been shown. And consequently, one can show what goes beyond the universality of comprehension. It is a form which leaves no trace in the matter it presents. You can unsay what you have said. (Ainley, Hughes and Wright 1988, 178)

This means that there can be problems within philosophy with founding theories and making those theories compellable. This is a particular problem for these three theorists who are seeking to understand a form of reasoning which seeks to be both grounded and compellable and further exacerbated by the loss to philosophy of the ways it has generally sought to be so, logic and rationality.

The theorists chosen have all explored reasoning and rationality and share the view that the traditional methods of describing law and the way in which people reason within the legal process is in some way inadequate. They therefore deal with the problems raised by twentieth century philosophy and this is one reason why they have been chosen.

Although their interests in reasoning and in finding new ways to describe the reasoning process makes them suitable for this study, they are not alone. Many others have looked at these issues. These three have been chosen because of the way they relate to the texts which are being considered here.<sup>7</sup>

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<sup>7</sup> It may appear that there are others who are equally relevant. Notably, Dworkin, who has dominated the discussion of judicial reasoning since *Law's Empire* (1986); and Goodrich (1987) who has written on rhetoric. These theorists, though, do not show the range of interests which has led to the decision to focus on the three theorists chosen here. They

Chāīm Perelman's work cuts directly across the concerns of this thesis. Perelman has developed a new theory of reasoning that borrows heavily from Aristotle's theory of rhetoric and that puts persuasion at the very heart of reasoning. His theory, thus, shows one way in which an historical theory that is being considered can be adapted to fit modern practice as well as centring on the central concept of the thesis - persuasion.

Bernard Jackson also has a strong link to one of the traditions being studied here. He has published widely on biblical law and the early stages of Jewish legal development.<sup>8</sup> This alone would make him of special interest to this study but his theory of legal reasoning adds extra weight to this. Like Perelman, Jackson has sought to find new ways to describe law. He has turned to semiotics to provide a model for legal meaning. Unlike Perelman, he does not stress the relationship between persuader and persuaded but his work is based on language and communication.

Neil MacCormick was chosen, partly, to contrast with these two theorists. He has worked in legal reasoning for some years and has been interested in the process of justification as well as the nature and status of legal reasoning itself. Unlike Perelman and Jackson, he has tried to work within the positivist view of legal reasoning. He has updated and adapted this to take account of problems in this view and has described himself as a post-positivist. Despite this he still remains within the traditional paradigm of legal reasoning. Although he has no direct links to the two traditions that the thesis analyses, he is a Scots jurist and this does link him to the section that explores contemporary practice.

These three then show different aspects of legal theory and provide three

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will be dealt with where relevant.

<sup>8</sup> Some of these are dealt with in chapter 3 below though this thesis will not deal in detail with Jackson's recent application of his semiotic theory to this field - see n 43, chapter 2. A full list of all of Jackson's published works can be found at [http://www.legaltheory.demon.co.uk/lib\\_biblioBSJ1.html](http://www.legaltheory.demon.co.uk/lib_biblioBSJ1.html)



different models for explaining law and legal reasoning. The analysis of their work concludes by arguing that at the core of the failure of all of these models is the person. They all use individuals at key moments in their theories but this person is a construct fulfilling the need of the system and they fail to explain why a real individual becomes committed to and works within the system of legal reasoning. It is in seeking to understand these questions and to provide legal theory with a form of analysis which can include the emotional, ethical and character-based aspects of reasoning that the thesis turns to a comparative analysis of very different models of law in practice.

### 3. Developing a theory of judicial decision-making.

Chapter 3 contains an analysis of decision-making presented in two very different texts, the *Talmud* and the *Ars Rhetorica*. This methodology has been chosen in response to the problems described in chapter 2. Instead of seeking to approach legal theory with an abstract or generalised theory the studies of these texts allows a theory to be developed which, by staying close to the details of reasoning and using a comparative approach, seeks to understand the aspects of legal decision-making which a more philosophical approach which encourages a focus on the rational and logical elements obscures.

The study of the *Talmud*, a work of legal reasoning that evolved over centuries and whose schematic restrictions are highly developed, generates a complex understanding of the traditional within law. Aristotle's work on rhetoric deals with decision-making in a legal context where the impact of law was minimal and highlights the influence of character on the process of persuasion.

These two studies were chosen in part because they both deal with law in the context of a lack of authority, the *Talmud* developed a system that remain authoritative without a state and Aristotle considers persuasion in a system which had few limitations on what could be said. The other reason behind the choice of these two texts is the recognition of the central role that Greek and

Jewish tradition has had on western thought and philosophy.<sup>9</sup> As has been said:

Such was the acquisitive reach of Hellenistic and Hebraic articulation, that genuine additions and new finds have been rare. (Steiner 1998, 23)<sup>10</sup>

Recently Greek and Jewish approaches have been used as exemplary paradigms and given this and their influence on western philosophy a study of them should also help to illuminate some assumptions which might otherwise go unchallenged.<sup>11</sup>

There is a need though to be careful as Rose has pointed out in becoming symbols in the post-modern debate about philosophy Jerusalem and Athens are in danger of being misused:

Jerusalem against Athens has become the emblem for revelation against reason, for the hearing of the commandments against the search for first principles, for the love of the neighbour against the explanation of the world, and for the prophet against the philosopher. (Rose 1993, 1)

Stone (1993) argues in particular that in such debates Jerusalem is being used because of the perceived failure of liberal philosophy represented by Athens.<sup>12</sup> This, though, has led to Jewish thinking being deliberately misinterpreted to suit contemporary needs. Rose (1993) makes the same point and argues further that the conflict that is set up also misinterprets western philosophy:

In their attempts to find a way to voice commandment and commentary, these rediscoveries of Judaism at the end of the end of philosophy are

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<sup>9</sup> See Tully (1988) for the argument that both these traditions affected canon law and through this English common law. (Leites 1988, 3; Sampson 1988, 88).

<sup>10</sup> Handelman makes a similar point: "Matthew Arnold, in the nineteenth century, defined the tension between "Hebrew and Hellene" as the essential creative dialectic of western culture." (1982, 3)

<sup>11</sup> Kuczewski (1994) outlines the main movements in Aristotelian influenced works on ethics. Kronman (1993) has used Aristotle's concept of *Phronesis* to generate the concept of the lawyer-statesman. Stone (1993) details the use made by American constitutional theorists of Jewish law, the most influential of whom has been Robert Cover (1983).

<sup>12</sup> Kronman (1993) turns to Aristotle because of the same perceived failure.

*deeply* misleading: they misrepresent the rationalism or knowledge against which they define themselves; they misrepresent Judaism; above all, they misrepresent the modernity and the history in which they and Judaism are implicated the 'nature' and the 'freedom' so cavalierly cashiered in both approaches. (1993, 16)

This argument that philosophy is misunderstanding its subject in order to solve its own problems is similar to that which will be made against the legal theories presented in chapter 2. It is hoped that by using these texts as models and seeking not to abstract from them but to use them as examples of persuasive strategies this thesis will avoid some of these dangers.

At the end of this chapter these studies are used to present a view of persuasive reasoning which includes the ethical, emotional and character-based aspects of reasoning that legal theories have often missed. This concentrates on identity formation and the way in which structures which seek to be persuasive stay close to the particular and define the distance from the text. The chapter concludes by considering the implications of this for legal theory and introducing the approach taken to the study of common law reasoning that follows.

#### 4. The common law

The study of the common law in chapter 3 highlights six influential decisions in which judges have explicitly considered their methodology and what forms of reasoning should be considered persuasive. These all come from the area of negligence an area where the judiciary have had to explicitly consider their understanding of the role of law in society.

The chapter concentrates on the limitations that the judiciary impose on their own decision-making. It starts by exploring the concept of precedent and the way in which this founds the authority of the judge. It then considers the development of the law of negligence in Scotland and in England and the way

in which different views of the limitations on law affect the arguments which are possible. The chapter concludes with an indepth exploration of two methodologies, case based and principled reasoning. This exploration looks at the way in which these strategies reveal, hide and enforce the personal commitment of the judge to the law. This is revealed by the use of language and persuasive techniques.

## 5. Conclusion

The thesis concludes by revisiting the core themes of the thesis. It considers the relationship between philosophy and persuasion and judgment and persuasion and the ethical choice that is made between choosing to undertake either philosophy or judgment. It also reexplores in the light of this the reasons why legal theory has so often failed to consider the importance of the emotional and the symbolic. It, and the thesis, concludes by arguing that judgment should not be seen as a paradigm of understanding and although philosophy has made us aware of our limitations in understanding there is a need to both understand the power that limitations provide and the need to see beyond them. This chapter introduces the problem of understanding which this conclusion seeks to resolve.

## Methodology

### 1. Understanding

The process by which we understand each other or texts often appear immediate and even unmediated but it is clear, especially since Gadamer's *Truth and Method*,<sup>13</sup> that all understanding requires a set of preconceptions. The speed with which we are able to understand someone or some text is dependent on how many preconceptions are shared. It is not possible to come to any topic without preunderstanding:

The mere recognition of a fact is theory-impregnated and guided by a number of anticipations. (Bleicher 1980, 102)

The rise of cultural analysis has participated and resulted from the extension of this problem to all knowledge. For Foucault:

The breakdown of philosophical subjectivity and its dispersion in a language that discourses it while multiplying it within the space created by its absence is probably one of the fundamental structures of contemporary thought. (1977, 42)

This raises questions about any attempt to understand. If the subject is determined, preconceptions cannot be avoided. Gadamer (1994) suggests that they can be limited:

The important thing is to be aware of one's own bias, so that the text can present itself in all its otherness and thus assert its own truth against one's own foremeanings. (1994, 269)

Thus, to understand, the interpreter must be aware of his/her own bias. This leads to the problem of representation and of self-representation as to

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<sup>13</sup> The original *Truth and Method* was published in German in 1960. The text that will be referred to is the English second revised edition (1994) which translates not the original 1960 edition but the fifth German revised edition of 1986.

understand requires the interpreter to be able to represent his/her own bias. This though is impossible: *"To be 'historically' means that knowledge of oneself can never be complete."* (Gadamer 1994, 302) This is not simply because, as Gadamer suggests one is embedded in history but because every attempt to understand and in particular to understand one's own preconceptions changes that understanding. The difficulties of representing a process whereby the process itself changes the subject is one that will be returned to throughout the thesis and is a particular one for theorists who in seeking to understand have to freeze a process which keeps moving. George Steiner (1998) has asserted that any act of understanding is an act of translation and that if the ideal translation is the one that recreates the other's thoughts in my own terms with as little interference as possible, the goal of translation would appear to be replication and in this sense:

any genuine act of translation is, in one regard at least, a transparent absurdity, an effort to go backwards up the escalator of time and to re-enact voluntarily what was a contingent notion of spirit. (1998, 75)

He (1998, 264) has though helpfully pointed out that:

The defense of translation has the immense advantage of abundant, vulgar fact.... Somehow the 'impossible' is overcome at every moment in human affairs. Its logic subsists in its own rigorous limbo, but it has no empirical consequences.

Steiner's description of translation is not of a structure but of a four step process. He describes the four steps as: trust; aggression; incorporation; and reciprocity.<sup>14</sup> Trust refers to the basic assumption that the text is meaningful and that there is something there from which we can learn. Aggression is the moment of appropriation where choices are made about what the text means.

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<sup>14</sup> Although Steiner and Gadamer agree on the basic structure of understanding, their methodology is different. Rather than agreeing that understanding requires "loss of self", Steiner seems to suggest it requires a strong awareness of self. Not only of the preconceptions that are brought to the text but also of the ethical dilemmas that arise in the way that the text is appropriated. The reader needs to know not only what influences him/herself but also what the act of interpretation does to texts.

Incorporation is the natural result of this understanding where the knowledge taken from the text is incorporated in to the world-view of the interpreter. Reciprocity is the overtly ethical step where the original source is dignified.

This process is similar, though in more detail to that described by Gadamer (1994) who argues that understanding does not mean trying to think the same as the other but rather:

... understanding always involves something like applying the text to be understood to the interpreter's present situation. (1994, 308)

This is a temporal process where "past and present are constantly mediated" (1994, 290). This though leads to the danger that the past is not questioned and this is why Gadamer has been criticised, by Apel amongst others (Bleicher 1980, 147), for failing to consider the question of justification, for abandoning "normatively relevant critique" and settling for mere description. It is alleged that Gadamer can explain but not question the tradition.

This is a slightly unfair critique. In *Truth and Method* (1994) Gadamer clearly maintains that participation in the process of understanding requires critique. Using law as an example he argues that:

... judging the case involves not merely applying the universal principle according to which it is judged, but co-determining, supplementing and correcting that principle. (1994, 39)

In law, critique is supplied by the participation of the interpreter or judge. In applying the law to his/her present situation the tradition is altered by it. Gadamer uses law as a paradigm because of the necessity within law to reunderstand previous principles and it could be argued that it is because of the power of the principle to ensure that it is noticed that leads to it not only being applied but criticised.

Thus Gadamer does provide for the possibility, indeed necessity, of critique within any structure of understanding. He does not seem to allow room for

fundamental critique of the principles that form that structure. Fundamental critique requires the capacity to go outside, to use something from beyond the tradition as a guide to critique. Implicit in any such critique is the assumption that the standards used to judge the traditions are somehow more universal and not as historically determined. For Gadamer no text can do this as “The text that is understood historically is forced to abandon its claim to be saying something true.” (1994, 303) After all, texts are written and edited and read by historically determined subjects.<sup>15</sup> If understanding can be seen as a process where an established law, truth, principle or text is understood in a new context the question becomes how does one establish what is relevant, what needs to be reunderstood.

## 2. Relevancy

The moment when a translator decides that a text is relevant s/he assumes not only that it can be understood but that understanding is useful and specifically that it can somehow speak to their present. This section looks at two aspects of this, what a reader looks for in the text and the impact of texts which are defined as relevant.

Any reader starts by assuming that the text in front of him/her can speak to him/her. This leads them to consider what in the text s/he should be expecting to hear. Traditionally, s/he would be expected to look for authorial intention.

For Derrida (1988) the name attached to the piece of writing is not the same as the person who wrote it. It is not the person's thoughts that live on in the text but:

Only the name can inherit and this is why the name, to be distinguished from the bearer, is always and a priori a dead man's name, a name of

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<sup>15</sup> Gadamer (1994, xxxiv) makes the point that historically determined consciousness means not only that consciousness is determined by history but that consciousness is aware of being so determined.



death. (1988, 7)

The name at the end of the text is as much a creation of the reader as it was of the real person who had that name. Derrida (1988) makes this point directly with reference to Nietzsche:

To hear and understand it one must also produce it, because, like his voice, Nietzsche's signature awaits its own form its own event. This event is entrusted to us. (1988, 51)

It is up to the reader to decide then what should live on. There is reason though to suggest that the reader is not completely free in this process. Whenever a text is approached there is an instinctive urge to go beyond it, to find out what the author really meant, or if it relates to the 'real' world

Hillis Miller (1987) argues that:

... reading is subject not to the text as its law, but to the law to which the text is subject. This law forces the reader to betray the text or deviate from it in the act of reading it in the name of a higher demand that can yet be reached only by way of the text. This response creates another text which is a new act. (1987, 120)

The effects of this law that seems to transcend the text can be seen in a number of ways e.g., the tendency of the reader to generalise from the text, to make of it an example or to see it as a moral law. Hillis Miller (1987) describes this as a linguistic necessity rather than a transcendental one. The need to see more in a text than there is, the search for relevance or the elusive 'author', comes from within the language itself.<sup>16</sup>

Foucault (1972) sees this need to go beyond as deriving from the poverty of language, from its failure to say enough and therefore:

To interpret is a way of reacting to enunciative poverty, and to

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<sup>16</sup> Chapter 5 will return to this need to see beyond the text in exploring philosophy.

compensate for it by a multiplicity of meaning; a way of speaking on the basis of that poverty, and yet despite it. (1972, 120)

Readers then have a need to generate meaning from the text to apply it beyond its own context. This is particularly true for those readers who are aware that the text they are reading is traditional, a text that has been passed down to them as relevant or “classic”.<sup>17</sup> Classic texts in all disciplines exert a certain amount of dominance. They are regarded by those working in the field as important and this regulates what is and is not studied.<sup>18</sup> Conal Condren (1985) has studied the effect in political theory of designating some texts ‘classic’ and has found that:

As a field, they structure our judgements on an extraordinarily wide range of intellectual enterprises past, present and future. (1985, 3)

These texts came with a set of readings which have already defined what in them as relevant and this not only limits the way the reader approaches these texts but in doing so affects the way all other texts are approached.<sup>19</sup> Critchley’s (1992) definition of the Derridean concept of *Clôture* or closure echoes this. “Closure is the double refusal both of remaining within the limits of the tradition and of the possibility of transgressing the limit.” (1992, 20)

Such texts then impact on the context within which they can be understood. They still though need to be reinterpreted to live on and though the reader will be given a text with a set of readings they will still need to apply it to their own context. There remains then a need to see something more in the text. The gap between the reader and the text still needs to be dealt with, in Steiner’s structure this is not a question of meaning and understanding but as a choice is a matter of ethics.

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<sup>17</sup> Handelman (1982) points out that it is from Judaism that we have the concepts of a canon or “classic” texts.

<sup>18</sup> In some ways they operate in a similar way to the structure of precedent considered in chapter 4.

<sup>19</sup> Although Dworkin’s chain novel metaphor (Dworkin 1986) would appear to be related to this point. Dworkin does not fully explore the way in which such texts can limit the way they are understood and interpreted.

### 3. Ethics

The question of ethics and in particular how it is revealed through the language and structures used in persuasive reasoning will appear as a concern throughout this thesis. This section looks at the role of ethics in the decision made to understand or reunderstand a text. When research is dealing with human beings, ethics is usually considered at an early stage.<sup>20</sup> This is rarely the case with texts.

Human beings have developed thousands of languages. George Steiner (1998) believes that languages proliferated to protect societies:

There have been so many thousands of human tongues, there still are, because there have been particularly in the archaic stages of social history, so many distinct groups intent on keeping from one another the inherited, singular springs of their identity, and engaging in creating their own semantic worlds, their 'alternatives'. (1998, 243-4)<sup>21</sup>

This extends right down to individuals each of whom has, to an extent, his/her own language. It can also be applied to each work that an interpreter or commentator is attempting to understand. Translation of all sorts seeks to break through the barrier of language, to make what is personal and unique belong to all:

in this sense there is in every act of translation - and especially where it succeeds - a touch of treason. Hoarded dreams, patents of life are being taken across the frontier. (Steiner 1998, 244)

Simon Critchley (1993) points to the choices inherent in all translation or

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<sup>20</sup> The British Sociological Association for example has produced a statement of Ethical Practice which considers the ethics of doing research with human subjects in some detail.

<sup>21</sup> That language is integral to the identity of a culture or society can clearly be shown in the way that attempts have been made to control societies. Following the '45 rebellion in Scotland, the government amongst other provisions banned Gaelic in an attempt to undermine highland culture and there are numerous contemporary examples; eg. prohibitions on Kurdish in Turkey.

interpretation and concludes that:

*Betrayal is the fate of all commentary.* For commentary is never neutral, it employs a meta-language which always derives from a *choice* or a *decision* - in short, a critical judgement which focuses upon certain texts, themes, and authors to the exclusion of others. (1993, 60)

This appears to be another way of stating the problem of relevance but it is possible to see this also from the writer's point of view. Derrida (1988) has looked in some detail at the proper name and finds that it contains a dichotomy within itself. A proper name both proclaims its uniqueness, in that it cannot be understood as other than itself, and yet it appeals to be interpreted for that is how it endures:

On the one hand, don't translate me, that is, respect me as a proper name, respect my law of the proper name which stands over and above all languages. And, on the other hand, translate me, that is, understand me, preserve me within the universal language, follow my law, and so on. (1988, 102)

Writers and the texts they produce are subject to the same law as readers, they want to live on and to become exemplary. Gadamer argues that it is possible to limit the betrayal and allow the text priority over the translator's views:

Translation allows what is foreign and what is one's own to merge in a new form by defending the point of the other even if it is opposed to one's view. (1994, 94)

This approach respects the otherness of the text but it may be asked if it is possible to approach the text so neutrally? Steiner (1998) feels that the translator owes something to the text with which s/he works but that this consists of giving back to the text and comes at the end of the process:

The translator, the exegetist, the reader is *faithful to* his text, makes his response responsible, only when he endeavours to restore the balance of forces, of integral presence, which his appropriative comprehension has disrupted. (1998, 318)

As Boucher (1985, 27) puts it:

The prejudices which afford us our initial entry into a text become modified by being recognized and confronted with what is identified as other. But this confrontation always occurs in the world of the interpreter, and the modification brought about in the encounter is not of the complete suppression of the self, but one of the assimilation in and broadening one's horizon by the appropriation of a text's meaning.

Thus focused understanding illuminates the text and, if the interpreter takes the text seriously, s/he dignifies it and thus the text remains relevant. The paradox of the name has to be maintained rather than avoided. The otherness of the text and therefore the difficulties in presuming to speak for it need to be recognised. Yet if it is to continue to exist it needs to be interpreted.

This description of the process explains a need to go beyond that exists in both the text and the reader but does not deal with the gap, the distance between the text and reader, the details of the relationships. Steiner has described two poles - critic and reader - and describes how they relate:

The critic argues his distance from and towards the text. To "criticize" means to perceive at a distance, at the order of remove most appropriate to clarity, . . . to communicate intelligibility. (1979, 423)

It is the distance that allows the critic to understand the text, Steiner uses the example of the movement of stepping back from a painting and argues that the "good critic makes this motion conscious to himself and to his public". This relationship is ethical because it is open to argument, the good critic is the one who allows this motion to be revealed, who makes the distance clear, Steiner describes this as "responsible", in the sense of open to a response. This is certainly a relationship that can fill the content of the process of translation.

The relationship between reader and text is very different. The goal of the reader is to repeat the text.

The reader attempts to negate the space between the text and himself.

He would be perpetrated by, immersed in its presentness. The reader strives for fusion with the text via internalization ... At its primary and most radical level, the thorough act of reading, the full apprehension of the *présences transcendantes* in language ... entails memorization. The act of learning *by heart* - an idiom of notable precision - is no technical auxiliary or carry-over from liturgical or pedagogical practice. It is of the essence of the reader's attempt to abolish or sublate that very distance which the critic stakes out. (1979, 445)<sup>22</sup>

The reader seeks to allow the text to become part of him/her and although this may seem to be a more ethical approach than that of the critic, it is perhaps a less responsible one. The reader cannot communicate fully this experience, indeed it has to be unique - it cannot be shared, cannot be translated. This suggests that translation is not the only approach to a text and that taking it assumes a specific ethical approach.

It also brings to light an aspect of methodology that has not yet been dealt with - the power of the text itself. So far what has been considered has been the way in which the text ought to be approached, not what lies within the text itself, Steiner's description of the reader suggests an openness to something in the text, and clearly that is something powerful. Umberto Eco (1989) takes a less mystical approach but also argues that the way texts are written will affect how they are approached and in themselves generate different sorts of relationship to the text, something which helps to fill the content of not only the ethical final step, but the first step of the process of translation - trust.

Eco starts from the author rather than the reader and points out that in order to communicate authors too need to consider their methodology or, as he

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<sup>22</sup> This brings to mind the Borges short story, *Pierre Menard, Author of the Quixote* where Pierre Menard is described as seeking to "reconstruct, word for word, the novel that for him [Cervantes] was spontaneous." (1998, 92).

expresses it, in order to communicate an author pictures a model reader who shares a series of codes or underlying assumptions. These codes go beyond a shared language and would include shared knowledge of society and even of textual interpretation. Indeed the way the author sets out the codes in the text can limit the approach that can be taken. Eco describes two types of texts, the closed text which sets out with an average reader in mind and is resistant to other interpretations and the open text which will retain a closed text at its heart but is open to other interpretations. Eco uses as an example of the way authors can close texts the discovery of perspective in art:

The scientific and practical development of the techniques of perspective bear witness to the gradual maturation of this awareness of an interpretative subjectivity pitted against the work of art. Yet it is equally certain that this awareness has led to a tendency to operate against the “openness” of the work, to favour its “closing out.” The various devices of perspective were just so many different concessions to the actual location of the observer in order to ensure that he looked at the figure in *the only possible right way* - that is, the way the author of the work had prescribed, by providing various visual devices for the observer’s attention to focus on. (1989, 5)

It appears that the author of a closed text does not trust the reader’s own subjective point of view and it is interesting that the phrase Eco uses “the only possible right way” has strong echoes of judicial decision-making. Judge’s often use rhetoric to make their decision seem inevitable, to make their text closed, and indeed later in this thesis it will be shown how the systematic restraints on their reasoning helps to impart this sense of certainty. The closed text would seem to be closer to Steiner’s reader in that it seeks to restrain points of view, the *raison d’être* of the critic but Eco links openness to interpretation and subjectivity and it is this that allows the reader to approach the text in such an individual way. The author of a closed text is worried about the way it may be used, while the author of an open text is happy to trust the many interpretations that may be placed on it, indeed as the text gives no hints of a point of view, all are justifiable, no reader can ever judge

the text or others' view of that text. Steiner indeed refers to "the judicial authority of the critic" (1979, 438) and links criticism directly to judgment.<sup>23</sup> The ethical nature and place of judgment and its relationship to understanding will be considered in more detail in the conclusion of this thesis. This will be in the light of the analysis of the way in which judges deal with texts and the way in which philosophers/theorists understand judges.

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<sup>23</sup> Gadamer (1994) also uses the judge as a model and it may be that it is the judicial element which has appealed to so many theorists in using Judaism as a model - the final chapter will consider whether judicial decision-making can or should be used as a model for all reasoning.



## Conclusion

In seeking to understand judicial decision-making, this thesis goes far from the original subject, to works on legal theory, historical studies and in the last section on methodology to the problems of understanding. All though are used to build up a picture of the process of judgment that is revealed through the language of the judiciary.

Hannah Arendt has described judgment as a twofold process, the individual first establishing a proper distance between him/herself and the object and then reflecting on the object in the light of common sense. This thesis will be considering the many ways in which this common sense can become established and how it is revealed in the way that judges communicate their decisions. This is similar to the role of the critic described by Steiner but according to Curtis, Arendt can be understood as arguing that this process always creates a strong emotional response:

As we travel in imagination through the public, the light from our visits floods the thing in question, more deeply illuminating its distinctive and complex particularity. ... Having taken the beat of the world, we feel we have achieved a community sense, a feeling for how our world should look, sound and feel; what should be in it; and what it is to which we collectively belong. ... Yet this feeling has a paradoxical quality. Having performed, in relation to an event or issue in need of our judgment, the difficult task of representative thinking, we emerge with the feeling that others ought to agree with us, the issue just as we see it. Indeed we emerge feeling *compelled* to make such a claim on others. And yet the mode in which we do so is persuasion, as if, though compelled by the rightness of our judgment, we are nonetheless oddly aware that it is uniquely and vulnerably *ours*. (1999, 119-120)

This thesis seeks to represent this emotional aspect of judgment and to explain not only how the judges use their reasons to legitimate their decisions but why.

## Chapter 2

### Contemporary theorists

These three theorists are being used to show the ways in which legal theory has tried to come to terms with difficulties raised by twentieth century philosophy. Each theorist is approached in the same way. First the problems that they are seeking to solve is set out, then their general theory of reasoning and finally their view of a legal theory of reasoning. This approach recognises that this is a standard philosophical or theoretical pattern and one, indeed, which can be seen in the theorists own work as well as within this thesis itself.<sup>1</sup>

One of the reasons why they have been chosen is because they have all responded to a specific problem, the broader sense of a problem with theory, in a different way. Perelman's response is the most personal coming from his desire to end violence. Jackson and MacCormick are both responding to the change in the philosophical world view that has occurred since the war, the experience of which escalated the break with previous philosophical certainties such as the nature of objectivity and the independence of the subject. All in effect are responding to a change in what can be considered meaningful and reasonable.

Although the problem is a shared one, each theorist identifies it differently and seeks to solve it differently, Perelman turns to rhetoric; Jackson to semiotics and narrative theory and MacCormick has redeveloped positivism. Despite this, this study will show that there are similar themes through all three theorists. The clearest is the centrality given to the person, which may seem odd given a philosophical climate where the subject is under threat. Yet for all of them the person fulfils two roles. One is as a construct essential to the theory but effectively created by the theory, whether it be discourse in

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<sup>1</sup> Chapter 5 below discusses this structure in more detail.

Jackson, the committed participant in MacCormick or the audience in Perelman. There are problems with this use of the person in all three theories, they are not real people all are constructs based on the system within which the theorists are working. They fulfil a theoretical need. Jackson's theory almost seems to describe not people but a space through which discourse occurs and MacCormick's committed participant is a construct of assumptions about the nature of reasoning used to persuade those actually involved in a legal system to mimic its motivations.

The second role is a more vital one where real people reappear. All of these occur at what could be described as crisis points, for Jackson and MacCormick the person appears at the limits of the system and indeed can be seen to save the system, for Jackson the integrity of an individual links the semiotic world to some form of real world, and for MacCormick it is also a virtuous individual, a judge, who saves his system from infinite regress. Perelman's core concern is the impact of his theory on real people because he wishes to change behaviour and the problem is his recognition that they can choose to turn their back on justice. A good example of the possibility of people to simply reject or turn their back on others and refuse to found a community of spirit can be seen in the exploration of a debate between MacCormick and Jackson about the syllogism at the end of the chapter. MacCormick and Jackson simply reject each others foundations and end up talking about and being destructive of the others theories rather than to each other.

Yet in dealing with the person all are brought back to the problems they are trying to solve and which are linked to the contemporary philosophical climate in which humans are both created and controlled by systems, where there is no objective view point but no independent subject. The chapter concludes by arguing that it is their inability to understand the role of aspects of individual character, ethics and emotions which are the real problems with their own theories.

Chaim Perelman (1912 - 1984)

In *Traité de l'argumentation, la nouvelle rhétorique*, which he co-wrote with Lucie Olbrechts-Tyteca and published in 1958, Chaim Perelman updated the traditional study of rhetoric and transformed it into a general theory of reasoning.<sup>2</sup> This was Perelman's solution to a problem with theory, the problem of the subjective/objective split which had dominated western thought since Descartes. Later he used legal reasoning as a paradigm example of this general theory. The driving force behind his work was the need to restrict violence. This ethical choice led both to his rejection of the contention that it was impossible to reason about values and led to a focus on the individual and relationships within reasoning.

### 1. The problem with scientific reasoning

Perelman developed his theory of rhetoric as a response to his profound dissatisfaction with a study of justice that he published in 1945. Perelman was hoping to find a way to avoid the conflict that disagreement about such powerful concepts could create. This is why he chose not to subscribe to one of the six forms of justice that he identifies in the work:

Whatever our reasons for choosing one formula, antagonists would advance equally valid reasons for choosing another. The debate, far from bringing about agreement, would serve only to provoke a conflict, which would be the more violent in so far as each party was more bitter in defence of his own conception. And anyhow the analysis of the idea of justice would be little forwarded thereby. (Perelman 1963, 11)

Written in the immediate aftermath of World War II, in which Perelman had

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<sup>2</sup> Mme Olbrechts-Tyteca also co-wrote a number of essays with Perelman that were published after the *Traité*. But Perelman very quickly became the main proponent of this theory and, although his main work was co-written, it is still fair to regard him as mostly responsible for this theory.

fought as a member of the resistance,<sup>3</sup> his desire to avoid conflict and seek agreement is understandable. This was though considerably hampered by his acceptance that the only route to knowledge was the scientific, objective one. This meant the only way that he could generate agreement about justice was to take it from the arena of philosophy and place it in the field of science:

In seeking to secure agreement on the conceptual meaning of an idea of this kind, one will inevitably be led to play down its affective role: only so will one succeed, if ever, in solving the problem. By the same token, the idea will cease to be philosophical and will admit of a scientific analysis which is devoid of passion but yields more satisfaction to the logician.<sup>4</sup> (Perelman 1963, 4-5)

He also accepted that values were subjective and it was not possible to have knowledge of values or to reason about them. In his study he set out a formal definition of justice:

Formal justice consists in observing a rule containing an obligation to treat all the members of a given category in a certain way. (1963, 43)

Perelman then considered the place of rules in formal justice. He argued that, in order to solve problems of interpretation and arbitrariness in their application, they form a hierarchical structure.<sup>5</sup> This led him to compare formal justice to scientific theories whose rules can also be structured hierarchically. This not only allowed him to link his theory to science, thus fulfilling a key aim of the study, but also showed up the limitations of his

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<sup>3</sup> Autobiographical information comes from Foss, Foss and Trapp (1991)

<sup>4</sup> Perelman (1963) argues that this would not affect the size of the field of philosophy. "By this very fact the field of science will be enlarged, without however, that of philosophy being diminished. As will be seen from the example of this study, the emotive colouring which is dissociated from an idea that has become more scientific will attach itself to some other idea which will enrich the field of philosophic controversies. As an idea is denuded of all emotive colouring, the emotivity is reflected back on to another idea which is complementary to the first. Thus it is that the efforts of philosophic thought, which opens to science a new domain of knowledge, recall those of the Dutch engineers, who, in order to hand over to the ploughman a pocket handkerchief of dry land, drive back the waters of the sea without causing them to disappear." (1963, 5)

<sup>5</sup> Note that Perelman (1963, 43) argues that justification in this rule-based structure would be syllogistic.

attempt to objectify justice.

In Perelman's view of science, scientific rules can be shown to form a structure of explanation with the higher rules explaining the lower rules. This structure is not infinite and comes to a halt at the barrier of our present capacity to understand reality. The rules of justice can also be shown to form a hierarchy. This structure is a normative structure. The rules are linked not by "is" but "ought" and they form a justificatory schema. The higher, more abstract rules justify the lower more particular ones.<sup>6</sup> This structure ends, not at a barrier which can be overcome by improving our understanding, but with some arbitrary value about which it is impossible to reason. Even when describing its most formal aspects Perelman could not fully exclude values from the concept of justice and argued that:

A system of justice constitutes no more than the development of one or more values whose arbitrary character is linked to their very nature. (1963, 53)

The requirements of formal justice that Perelman sets out does mean that these values can be applied rationally but the values themselves cannot be discussed rationally. They are simply a matter of choice and:

If we regard a rule as unjust because it accords pre-eminence to a different value, we can only note the disagreement. No reasoning will be able to show that either one of the opponents is in the wrong. (1963, 53)

The result is that only a limited aspect of justice, its application, can become scientific and open to rationality. This will reduce conflict only where there is substantive and irrational agreement about values. Perelman's study on justice fails in its aim to generate consensus and agreement. He does try to suggest that this does not necessarily mean that conflict is unavoidable and argues that if people were made aware that their values were arbitrary it might

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<sup>6</sup> There are similarities between this structure and MacCormick's described below.

incline them to tolerance:

No system of justice should lose sight of its own imperfection. Every system should thence conclude that an imperfect justice, without charity is no justice. (1963, 60)

Perelman spent the rest of his career creating a way to explain how people could and do reason about values.<sup>7</sup> In a 1963 edition of his study on justice he appends a footnote to the phrase “There is no value which is not logically arbitrary.” (1963, 56) - “Since these lines have been written, the author has tried to present through his theory of argumentation, a way of reasoning about values.” (1963, 56)

Although the first signs of the answers that he found to resolve these problems can be seen in an article in 1949, it was only in 1958 with the publication of his *Traité de l'argumentation* that his full theory of reasoning was revealed. A theory explicitly dedicated to finding a way beyond the subjective/objective split and which would clearly need to see law in a non-hierarchical non-scientific manner.

## 2. General theory of reasoning

### 2.1 Rhetoric

Perelman could have retained the subjective/objective structure and simply tried to reclassify values as objective. He chose not to do this as he believed that giving values objective status would lead to people arguing that their views on values were conclusive and that they should, therefore, be imposed on others. By rejecting objectivity he felt that there was an instant gain in the status of the individual in reasoning:

Le rejet des critères objectifs, en toute matière, revalorisant, à la fois, la

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<sup>7</sup> Dearn (1989) has argued that Perelman's attempts to solve the issue of justice are at the core of all his work and this is why the juridical model is such a constant theme.

liberté d'invention, a fait de l'individu humain, dans son unicité, l'élément central de la philosophie. (1989, 297)<sup>8</sup>

Perelman found his answer in the ancient theory of rhetoric which had been influential until the Middle Ages but had since fallen into disrepute.<sup>9</sup> In rhetoric, and particularly in the rhetoric of Aristotle, Perelman found a middle way, a way of reasoning about values that was rational and not purely arbitrary but that did not give its conclusions the invariant force of objective truth:

L'étude de la rhétorique, conçue comme une logique des jugements de valeur, portant non sur le vrai, mais sur le préférable, où l'adhésion de l'homme n'est pas simplement sousmission, mais décision et engagement, introduirait un nouvel élément dans la théorie de la connaissance, et ne limiterait pas le débat à l'acceptation entière d'un rationalisme inspiré des procédures scientifiques ou à son rejet complet.

L'introduction d'une technique intellectuelle qui permettrait de rompre les cadres de l'alternative "objectivisme sans sujet" ou "subjectivisme sans objet" ne peut que contribuer d'une façon appréciable à la compréhension des conditions d'exercice de notre liberté spirituelle. (1989, 299)

Having found the answer, Perelman set out to develop the theory of rhetoric and bring it up to date. His methodology was inspired by Gottlieb Frege's study of mathematical logic. Frege had sought to understand mathematical logic not by looking at it in the abstract but by cataloguing the practice of mathematicians. Perelman, with Lucie Olbrechts-Tyteca, undertook a ten-year study of how people reason about values in practice and used this as the basis of their theory. The result was the large and influential *Traité de*

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<sup>8</sup> This article was first published in 1949 and contains the earliest reference that I have found to rhetoric and Aristotle in Perelman's work. (1989, 299) This shows how soon after publishing his work on Justice (1945) that Perelman started to rethink the foundations of his philosophy.

<sup>9</sup> Eubanks (1989, 233) cites the talmudic theory of truth as a source. Perelman accepted this (1979, 12) but Aristotle remains the major influence on his work.



*L'argumentation. La Nouvelle Rhétorique* (Perelman and Olbrechts-Tyteca 1988) - the foundation of all his later work.<sup>10</sup>

The depth of the shift that his thinking had taken since 1945 can be seen in the very first line of this book:

La publication d'un traité consacré à l'argumentation et son rattachement à une vieille tradition, celle de la rhétorique et de la dialectique grecques, constituent *une rupture avec une conception de la raison et du raisonnement, issue de Descartes*, qui a marqué de son sceau la philosophie occidentale des trois derniers siècles. (Perelman, 1988 1)<sup>11</sup>

Perelman is careful to point out that he is not rejecting all aspects of western philosophy since Descartes but he does insist that the achievements of logic and science should not be allowed to deny the benefits of reason to other aspects of life:

Faut-il tirer de cette évolution de la logique, et des progrès incontestables qu'elle a réalisés, la conclusion que la raison est tout à fait incompétence dans les domaines qui échappent au calcul et que là où ni l'expérience ni la déduction logique ne peuvent nous fournir la solution d'un problème, nous n'avons plus qu'à nous abandonner aux forces irrationnelles, à nos instincts, à la suggestion ou à la violence ? (1988, 3)<sup>12</sup>

This contrasts directly with his earlier goal to bring philosophy into closer contact with science. But despite this shift, his primary goal remains the same, the need to avoid violence and reduce conflict and this can be allied to a related desire to protect and dignify the individual.

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<sup>10</sup> In this thesis, I will be using the French fifth edition of this work, published in 1988. Wherever possible, I include footnote references to each quote pointing to the equivalent page in the English edition published in 1969. Although the English (Perelman and Olbrechts-Tyteca 1969) edition is a translation of the French first edition rather than the fifth, (Perelman and Olbrechts-Tyteca 1988) the core text has changed little.

<sup>11</sup> (Perelman and Olbrechts-Tyteca 1969, 1)

<sup>12</sup> (Perelman and Olbrechts-Tyteca 1969, 3)

Perelman's theory borrows most heavily from Aristotle's theory of dialectical arguments. Indeed his reliance on this theory is so strong that he has to explain why he uses the word rhetoric rather than dialectic. He has two explanations for this: the first is simply to avoid confusion with the very different Hegelian dialectic; the second takes us to the heart of Perelman's theory:

Le raisonnement dialectique est considéré comme parallèle au raisonnement analytique, mais traité du vraisemblable au lieu de traiter de propositions nécessaires. L'idée même que la dialectique concerne des opinions, c'est-à-dire des thèses auxquelles on adhère avec une intensité variable, n'est pas mise à profit. On dirait que le statut de l'opposable est impersonnel et que les opinions ne sont pas relatives aux esprits qui y adhèrent. Par contre, cette idée d'adhésion et d'esprits auxquels on adresse un discours est essentielle dans toutes les théories anciennes de la rhétorique. Notre rapprochement avec cette dernière vise à souligner le fait que *c'est en fonction d'un auditoire que se développe toute argumentation*; l'étude de l'opposable des *Topiques* pourra, dans ce cadre, s'insérer à sa place. (1988, 7)<sup>13</sup>

Therefore, although Perelman is concerned with "*les preuves qu'Aristote appelle dialectiques*" (1988, 6)<sup>14</sup> he believes his approach and focus is different from Aristotle.<sup>15</sup> He is concerned less with the relationship between dialectical and analytical reasoning and instead emphasises the role of the audience which becomes a central concept to his theory of argumentation. This is why Perelman prefers the word rhetoric to dialectic as rhetoric implies a relationship. At its simplest this is the relationship between a speaker and an audience but Perelman's theory is much broader than a theory of public speaking. He is seeking to produce a general theory of reasoning.

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<sup>13</sup> (Perelman and Olbrechts-Tyteca 1969, 5)

<sup>14</sup> (Perelman and Olbrechts-Tyteca 1969, 3)

<sup>15</sup> This can be clearly seen from the study of Aristotle's work on rhetoric below.

This general theory of reasoning is what he calls the new rhetoric or argumentation.<sup>16</sup> As can be seen in the quote above, Perelman defines argumentation by contrasting it with *raisonnement analytique*, which he also calls *démonstration* or *logique formelle*. Thus, although a general theory of reasoning, it is not a comprehensive theory as it does not cover scientific reasoning or fully explain the relationship between the two forms of reasoning.<sup>17</sup>

Argumentation has two aspects that differentiate it from the scientific form of reasoning - a distinct domain and a distinctive purpose. The domain of argumentation is the same as that of dialectic and is "*celui du vraisemblable, du plausible, du probable, dans la mesure où ce dernier échappe aux certitudes de calcul.*" (1988, 1)<sup>18</sup> The purpose of argumentation is to persuade. By persuasion Perelman means "*de provoquer ou d'accroître l'adhésion des esprits aux thèses qu'on présente à leur assentiment.*" (1988, 5)<sup>19</sup>

Perelman's general theory of reasoning covers not only the written word as well as public speaking but "*la discussion avec un seul interlocuteur ou même la délibération intime relèvent.*" (1988, 8)<sup>20</sup> In his study he chose to focus on the written word as he felt that this was the most general form.

As a result of this study Perelman produced a detailed analysis of reasoning in practice. This analysis forms the bulk of the *Traité*, comprising two of the three sections. Yet despite the size and comprehensiveness of these two sections titled *le point de départ de l'argumentation* and *les techniques argumentatives*, this analysis has been largely ignored. Instead the first

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<sup>16</sup> When referring to Perelman's theory, I will use the term argumentation rather than rhetoric as rhetoric is being used as a general term throughout the thesis.

<sup>17</sup> This relationship is discussed in Perelman's work on legal reasoning. (Perelman 1976, 1-4) See n 36. below.

<sup>18</sup> (Perelman and Olbrechts-Tyteca 1969, 1)

<sup>19</sup> (Perelman and Olbrechts-Tyteca 1969, 4). Persuasion also includes persuading to act.

<sup>20</sup> (Perelman and Olbrechts-Tyteca 1969, 6)

section *les cadres de l'argumentation*, the theoretical section in which Perelman shows how he has updated and adapted Greek rhetoric for the modern age, has dominated the discussion and debate that this new theory of rhetoric inspired. This is even true of much of Perelman's own later work.

It is hard to say why this is so. Certainly the first section contains most of the ideas of the book and the later sections can be a bit dry. It would be surprising if this were the sole reason why Perelman's academic audience has chosen to ignore these sections. Perhaps the simple answer is not that the last two sections are more boring but that the first section is much more interesting. This is because it is in this theoretical section that Perelman sets out his general theory of reasoning. But whatever the underlying reason, this study will follow this trend and in considering the *Traité* only the first section will be dealt with.

## 2.2 *Les cadres de l'argumentation.*

The theoretical section of the *Traité* deals mainly with the concept of audience, which Perelman uses to differentiate his approach from dialectic. Perelman's theory is as much concerned with the people involved in reasoning as the structures of reasoning that they use and in the theoretical section he mainly considers how reasoning fits into social and personal life and impacts on relationships. In this Perelman's key aim of avoiding violence and conflict within relationships comes to the fore.

Argumentation does not occur simply because people have to make decisions. It can only occur when there is a relationship. Argumentation does not necessarily involve more than one person. An individual can reason with him/herself but to do so the individual needs to conceive of him/herself as two persons. All persuasive reasoning requires a relationship of some kind. Perelman argues that, for argumentation to occur, this relationship must be based on respect there must be a *communauté effective des esprits*. (1988,

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This relationship is created by the decision of the speaker to use argumentation. By choosing to use persuasion the speaker implicitly recognises that the view of the other is not only valid but that it is important. S/he is allowing the audience to be the judge of the worth of his/her argument. S/he is also excluding violence. As the goal of argumentation is to gain the adherence of the other and not just influence the behaviour of the other the speaker will fail to achieve this goal if s/he uses violence to force the audience to accept his/her argument.

Yet, although this form of contact excludes violence, Perelman is aware that this openness to the other may be negative:

Il faut, en effet, pour argumenter, attacher du prix à l'adhésion de son interlocuter, à son consentement, à son concours mental. C'est donc parfois une distinction appréciée que d'être une personne avec qui l'on discute. ... Mais, on l'a dit maintes fois, il n'est pas toujours louable de vouloir persuader quelqu'un: les conditions dans lesquelles le contact des esprits s'effectue peuvent, en effet, paraître peu honorables. (1988, 20-21)<sup>22</sup>

Having set out the minimum conditions and fundamental moral content of argumentation, Perelman spends most of the theoretical section exploring the speaker/audience relationship in depth. He is particularly interested in how this relationship impacts on the form of reasoning used in argumentation. As the goal of reasoning is to gain the adherence of the audience, any argumentation must be relative to the audience that it is trying to influence. The audience dictates the form of reasoning to be used.

This does not mean that the role of the speaker has become diminished.

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<sup>21</sup> (Perelman and Olbrechts-Tyteca 1969, 14)

<sup>22</sup> (Perelman and Olbrechts-Tyteca 1969, 17-19)

Although the nature of the audience affects the nature of reasoning used, it is the speaker who identifies the audience. The speaker forms an idea of the audience in his/her mind and this is the audience that s/he tries to persuade. This may seem rather abstract but it should be noted that persuasion is not only conducted face to face. The writer of an opinion piece, for example, will not have an audience before him. S/he will create an imaginary audience and persuade them. But the reasoning s/he uses will only be successful if the audience s/he imagines corresponds closely to a real audience. (1988, 22-25)<sup>23</sup>

If it is the audience, described by the speaker, which dictates the form that reason takes, what does this mean for those who seek the highest abstraction, for those who look for universal truths? It could be thought that in seeking to move beyond the subjective/objective split that Perelman can avoid this question but his core aim is to find a way to reason about values and thus the ability of argumentation to deal with truth claims in these fields is key and Perelman not only does not ignore this group of people, instead he focuses on those who seek universal audiences - philosophers.

### 2.3 Philosophy as conviction by persuasion

In seeing philosophy as a form of argumentation, Perelman is bringing together two old adversaries - philosophy and rhetoric:

En fait, nous assistons ici à la reprise du débat séculaire entre les partisans de la vérité et ceux de l'opinion, entre philosophes, chercheurs d'absolu et rhéteurs, engagés dans l'action. C'est à l'occasion de ce débat que semble s'élaborer la distinction entre *persuader* et *convaincre*, que nous voudrions reprendre en fonction d'une théorie de l'argumentation et du rôle joué par certains auditoires. (1988, 35)<sup>24</sup>

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<sup>23</sup> (Perelman and Olbrechts-Tyteca 1969, 17-19)

<sup>24</sup> (Perelman and Olbrechts-Tyteca 1969, 26-27)

In highlighting these two aspects of reasoning, persuading and convincing, Perelman is trying to show that they can be reconciled and do not constitute two profoundly different ways of thinking. Indeed they cannot do so because if he were to accept that they are he would simply be accepting that there are some areas where one can be objective and others where one cannot. Instead he argues that what the difference between them lies in their different audiences. Persuasion is the term used for an argument aimed at a particular audience, convincing is that which seeks to obtain "*l'adhésion de tout être de raison.*" (1988, 36)<sup>25</sup>

This audience of all reasonable beings clearly does not exist and so is completely a construct of the speaker. It is perhaps the most subjective of all audiences yet it is this audience that Perelman describes as playing "*le rôle normatif.*" (1988, 39)<sup>26</sup> The speaker who approaches such an audience seeks not to persuade but to convince. In addressing such an audience, the speaker lays claim to a high level of rationality. Concrete others judge these standards not according to how much they personally are persuaded but as to how well the speaker fulfils these claims to be convincing. This judgement will include a judgement of how well the speaker has understood the nature of this universal audience, or to put it another way, how well the speaker understands what it means to claim to be rational.

Perelman identifies two other audiences in which this form of thinking appears and which are, therefore, also central to his thought: the audience of one in a dialogue; and the audience of oneself. In relating to these audiences, Perelman argues also that the speaker is trying to convince not persuade. It should be noted that Perelman does not believe that it is possible fully to convince any audience because argumentation can never achieve the level of rationality that is seen in the sciences. Ultimately the speaker will only persuade others that his/her reasoning is convincing, s/he will not *be*

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<sup>25</sup> (Perelman and Olbrechts-Tyteca 1969, 28)

<sup>26</sup> (Perelman and Olbrechts-Tyteca 1969, 30)

convincing.<sup>27</sup>

Perelman analyses each of these three audiences separately. Only two points from this analysis will be considered here: his rehabilitation of self-evidence as an aspect of argumentation and his positive view of rationalisation. These points are the ones that best reveal aspects of Perelman's wider theory.

Perelman links self-evidence to the universal audience, which is the most important of the three models. The universal audience does not exist in reality:

Il s'agit évidemment, dans ce cas, non pas d'un fait expérimentalement éprouvé, mais d'une universalité et d'une unanimité que se représente l'orateur, de l'accord d'un auditoire qui devrait être universel, ceux qui n'y particient pas pouvant, pour des raisons légitimes, ne pas être pris en considération.

Les philosophes prétendent toujours s'adresser à un pareil auditoire, non pas parce qu'ils espèrent obtenir le consentement effectif de tous les hommes - ils savent très bien que, seule, une petite minorité aura jamais l'occasion de connaître leurs écrits - mais parce qu'ils croient que tous ceux qui comprendront leur raisons ne pourront qu'adhérer à leurs conclusions. *L'accord d'un auditoire universel n'est donc pas une question de fait, mais de droit.* C'est parce qu'on affirme ce qui est conforme à un fait objectif, ce qui constitue une assertion vraie et même nécessaire, que l'on table sur l'adhésion de ceux qui se soumettent aux données de l'expérience ou aux lumières de la raison. (1988, 41)<sup>28</sup>

Although Perelman has made it clear that there can be no *assertion nécessaire* in argumentation, arguments which are aimed at the universal audience seek

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<sup>27</sup> There appear to be similarities between this and the distinction made in law between the standards of proof; beyond reasonable doubt and on the balance of probabilities. Neither of these require absolute proof.

<sup>28</sup> (Perelman and Olbrechts-Tyteca 1969, 31)



this standard. A philosopher will never fulfil the strict criteria of self-evidence but his/her ability to convince others that the reasoning used has achieved this standard is the measure of his/her success.

The universal audience is a constructed audience. Each philosopher appeals to a slightly different version but, to be successful in convincing other philosophers that s/he has achieved self-evidence, this imagined audience must have a substantial amount in common with those imagined by the majority of the philosophic community. This shows that although Perelman stresses the place of the individual within reasoning he is aware of the impact of socially generated knowledge and opinions.

Rationalisation would appear to be the opposite of self-evidence. Whereas self-evidence suggests rational, impartial and almost scientific reasoning, rationalisation seems to be a dubious form of reasoning that occurs after the event to justify past behaviour. Yet Perelman discusses rationalisation in the context of arguments that, like self-evidence, aim to be convincing and compelling rather than merely persuasive.

Rationalisation is the form of argumentation that the individual undertakes when s/he considers past actions. Perelman argues that it need not be dishonest and that it fulfils an important function in the life of an individual:

Notre thèse est que d'une, part une, croyance une fois établie peut toujours être intensifiée et que, d'autre part, l'argumentation est fonction de l'auditoire auquel on s'adresse. Dès lors, il est légitime que celui qui a acquis une certaine conviction s'attache à l'affermir vis-à-vis de lui même, et surtout vis-à-vis des attaques pouvant venir de l'extérieur; il est normal qu'il envisage tous les arguments susceptibles de la renforcer. Ces nouvelles raisons peuvent intensifier la conviction, la protéger contre certaines attaques auxquelles on n'avait pas pensé dès le début, préciser sa portée. (1988, 58)<sup>29</sup>

Unlike scientific facts, which are accepted as true or false, values can be

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<sup>29</sup> (Perelman and Olbrechts-Tyteca 1969, 44)

accepted in part. In this case rationalisation, justifying a decision after the event, is not hypocrisy but is necessary for the individual to improve his/her understanding of values. This may be needed to increase his/her adherence to values and to ensure that in the future the individual will be able to act in according with those values. It will also allow a speaker aiming to convince to become more convincing in line with communal values and Perelman goes from his consideration of rationalisation to consider not the relationship between the reasoning individual and his/her own values and action but the relationship between the reasoning society and its values and action.

Argumentation aims not just to persuade in isolation but to generate a tendency to act within an audience, or as he puts it, *elle se propose de provoquer une action ou d'y préparer, en agissant par des moyens discursifs sur l'esprit des auditeurs*. (1988, 62)<sup>30</sup> It does this by using the values that the audience already adheres to and persuading them to follow the implications of those values. When this is done within a social context, it takes the form that Aristotle called epideictic rhetoric.<sup>31</sup>

## 2.4 Epideictic rhetoric

Epideictic rhetoric is one of Aristotle's three categories of rhetoric but has traditionally been the least respected form and has largely been ignored. In contrast to this the other two forms of rhetoric that he identified, forensic rhetoric which looks at the language of the courtroom and deliberative rhetoric which looks at debate, have been studied in depth. Perelman feels that this is a mistake and that epideictic rhetoric is at the heart of rhetoric not the fringes.

Epideictic or display rhetoric was the term Aristotle used to cover exhibition

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<sup>30</sup> (Perelman and Olbrechts-Tyteca 1969, 47)

<sup>31</sup> See chapter 3 below for a full exploration of this and the other forms of rhetoric identified by Aristotle.

speeches that were common in ancient Greece. The speaker aimed to please the audience by a flamboyant use of language and by supporting opinions that were already widely held. It was often used to praise local heroes or to commemorate feast days.

Why does Perelman see this rhetoric as the key to persuasive reasoning? After all it simply persuades people to believe what they already believe. It is this that interests Perelman. Like rationalisation, which allows the individual to understand his/her values and motivations better, epideictic rhetoric helps society to understand its values better.

By reiterating the society's values, epideictic rhetoric reinforces them. This not only protects those values but also increases the likelihood that the values will be translated into action. It protects society as a whole by generating agreement around the nature and identity of these values. In doing so, it pushes language to its highest forms:

C'est dans l'épidictique que tous les procédés de l'art littéraire sont de mise, car il s'agit de faire concourir tout ce qui peut favoriser cette communion de l'auditoire. C'est le seul genre qui, immédiatement, fait penser à de littérature, le seul que l'on aurait pu comparer au livret d'un cantate, celui qui risque le plus facilement de tourner à la déclamation, de devenir de la rhétorique, dans le sens pérjoratif et habituel du mot.(Perelman 1988, 67)<sup>32</sup>

The power of language can be seen as dangerous. It could be used to persuade people to do things that we may see as evil. Perelman cannot rid rhetoric of this danger. His theory of reasoning means that he cannot condemn those who try to persuade us on the grounds that their arguments are true or false according to some objective standard. We can only oppose them on grounds that are more or less persuasive. That is, we can only use the same power of language against them.

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<sup>32</sup> (Perelman and Olbrechts-Tyteca 1969, 51)

Although Perelman cannot deny the danger of rhetoric, there is an answer to this problem within his theory. Perelman cannot protect us from the power of persuasion but he can protect us from the power of violence. As s/he is involved in argumentation, the speaker must respect the people that s/he is trying to persuade and cannot force them to agree with his/her point of view. This respect implies other values, openness and tolerance, that a society that used argumentation rather than violence would espouse. Epideictic rhetoric would be used to enhance these values and, in doing so, would tend to create a liberal society.<sup>33</sup>

An example of this can be seen in the way Perelman approaches the problems of scepticism and fanaticism. Both of these could be seen as possible results of the misuse of rhetoric. Scepticism could be the result of being persuaded to believe nothing and fanaticism the result of being too well convinced. Perelman argues though, that in the same way as violence is excluded, argumentation excludes both of these extremes. Argumentation allows us to be committed whilst remaining open:

La preuve rhétorique n'étant jamais tout à fait nécessaire, l'esprit qui donne son adhésion aux conclusions d'une argumentation, le fait par un acte qui l'engage et dont il est responsable. Le fanatique accepte cet engagement, mais à la manière de quelqu'un qui s'incline devant une vérité absolue et irréfragable; le sceptique refuse cet engagement sous prétexte qu'il ne lui paraît pas pouvoir être définitif. Il refuse d'adhérer parce qu'il se fait de l'adhésion une idée qui ressemble à celle du fanatique: l'un et l'autre méconnaissent que l'argumentation vise à un choix entre des possibles; en proposant et justifiant leur hiérarchie, elle vise à rendre rationnelle une décision. Fanatisme et scepticisme nient ce rôle de l'argumentation dans nos décisions. Ils tendent tous deux à laisser, à défaut de raison contraignante, libre champ à la violence, en

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<sup>33</sup> It has been argued that to be involved in argumentation requires such rigorous standards participants would have to undertake a specific course of instruction or education (Fischer 1986; Ede 1988; Scult 1989 and Dobel 1986).

récusant l'engagement de la personne. (1988, 82-83)<sup>34</sup>

While it is possible to accept much of this with regard to debate about values, it does seem that Perelman might have a problem when it comes to areas where people need to act following debate, when irrevocable decisions need to be made how is it possible to be committed while remaining open, and what of law, where decisions are enforced. Perelman though did not see law as a problem for his theory but as a paradigm example of argumentation.

### 3. Legal reasoning

Legal reasoning has featured in Perelman's published work from the start and it has a key place in Perelman's early work on justice.<sup>35</sup> (Perelman 1963) In that study he defined justice as essentially a system of rules working out a value or values and he linked this explicitly to a legal system. The effect of his shift in thinking on his view of law can be seen in the way he approaches the problem of equity.

In his 1945 article on justice (Perelman 1963), equity is used in cases where application of the rules of the system would lead to a result that is seen as unjust. This sense of injustice is not related to the working out of the rules and is arbitrary and subjective. Perelman explains that it occurs in cases in which the rules fail to take into account certain characteristics which are felt to be important to considerable sections of the population. It arises from a conflict between values held by the community and the rules applying the values that have been built into the legal system. (1963, 30-35)

Following his shift in thinking (Perelman 1979) equity remains a tool that is used to ensure that the order itself is seen as just, but Perelman's view of the

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<sup>34</sup> (Perelman and Olbrechts-Tyteca 1969, 62)

<sup>35</sup> Abott (1989) suggests that law is Perelman's model rather than rhetoric and certainly Perelman sees law as paradigmatic.

sense of injustice that triggers this resort to equity has changed. It no longer results from the clash between rational and irrational justice but between formal justice, justice in the sense of impartial rule-application, and justice as defined by the core values of the system which are reasonably held. Equity is used to protect the core values, but it does not simply void the rational result. Instead equity interacts with formal justice:

... the idea of the reasonable in law corresponds to an equitable solution, in the absence of all precise rules of adjudication. But it can be that recourse to the reasonable only gives a provisional solution, waiting for the elaboration of a new legal construction which would be more satisfying. The reasonable guides this endeavour toward systematization toward the rational systematic solution. (1979, 123)

Law is neither a wholly rational nor a wholly reasonable structure. Instead it is both and legal systems have to find a balance between the formal rule-application that insures equality and impartiality which are important legal values and a specific, reasonable response to the concrete situation before them.

Perelman sees the relationship between these two forms of reasoning as both complex and reciprocal. This means that the demonstration of legal reasoning is never as scientific as that of the sciences, and its persuasive reasoning can appeal to a judge other than the audience - legal rules.<sup>36</sup>

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<sup>36</sup> In *Logique juridique* Perelman focuses mostly on law but he does use the work to rethink the relationship between science and argumentation. (1976, 113-114) He refers to the works of Kuhn and others which had put scientific reasoning under the same pressure that the social sciences had been and concludes. "Si l'on rejette ce nihilisme, si l'on croit que tout ce qui concerne les valeurs n'est pas arbitraire, et que les jugements de réalité n'ent sont pas entièrement indépendants, on écartera, comme non fondé, le fossé établi par le positivisme entre le jugements de réalité et les jugements de valeur." (1976, 114) This brings science in to his structure of general reasoning but does not require a radical rethink of the relationship between the rational and the reasonable in his view of legal reasoning. Science, although now a form of argumentation can still have a very different methodology to law. "On arrivera, au contraire, à la conclusion que, au sein d'une étude générale des raisonnements pratiques, des considérations propres, à la méthodologie feront prévaloir certains modèles et certains critères dans les sciences, et, que d'autres considérations caractériseront le raisonnement juridique et la méthodologie propre aux différents systèmes de droit." (1976, 114)

This mixed form of reasoning is not distinct to law. The rational and the reasonable appear in other aspects of human thought. Law, as a form of reasoning about values, sits alongside philosophy and morality and like these two it is a form of practical reasoning. Practical reasoning for Perelman is reasoning in situations where the answers are not necessary, the reasoning is not conclusive but persuasive or convincing and the reasoning has to do with action. Practical reasoning is, in short, another way of saying argumentation.

Perelman sees law as the prime example of this mixed sort of reasoning, which is a clear development from the *Traité* and brings us back to his early work which set out the rational approach. Law, like these other fields, has developed techniques and methods for reasoning about values that allows it to appear impartial and rational as well as reasonable but does so in a highly developed way and in his last article, published posthumously in 1984, he goes as far as to say that law has the same place in practical reasoning as maths does in science. (Perelman 1989)

What makes law different is its specific context which helps to solve the problem identified at the end of the exploration of the *Traité*. Legal reasoning has a fixed goal. It has to arrive at an answer. Philosophers may seek a decision but they are not time-limited in the same way that judges are and, whilst they may want to enforce that decision or close the debate in some way, they cannot. In legal reasoning, once the decision has been made, the authoritative nature of law ensures that this decision is carried out.<sup>37</sup>

In some ways, it is strange that Perelman is so enthusiastic about law. Legal reasoning is backed up by authority and by force. Surely this would disconcert Perelman? Yet Perelman never even seems to see this as a problem. It could be that he sees legal authority as fundamentally different from forcing other people to accept opinions. Perelman, though, never makes this clear. He does

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<sup>37</sup> The implications of the way in which law seeks to make its decisions compellable are discussed in more detail in chapter 5 below.

though set out a detailed analysis of legal reasoning - *Logique juridique* - in which he sets out his views both as to why legal reasoning is so significant and why argumentation is the only form of reasoning acceptable in a legal context. In *Logique Juridique* (Perelman 1976), Perelman links historical, theoretical and practical studies of legal reasoning. He uses all these different techniques as a way of testing his own and other theories against practice, both historical and current. This contrasts with his purely empirical approach to general reasoning in argumentation.

As a result of this study, he believed that he had drawn attention to the heart of legal reasoning:

Les pages qui précèdent ont suffisamment attiré l'attention sur le fait que le raisonnement judiciaire vise à dégager et à justifier la solution autorisée d'une controverse, dans laquelle des argumentations en sens divers, menées conformément à des procédures imposées, cherchent à faire valoir, dans des situations variées, une valeur ou un compromis entre valeurs, que puisse être accepté dans un milieu et à un moment donnés. (1976, 135)

For Perelman then, legal reasoning is reasoning under pressure. There is a need to justify the decision according to core values and to make the decision within strict time limits. As Perelman's view of reasoning is person-led, this means that legal reasoning puts a person under pressure. He makes this clear at the very start of his exploration of legal reasoning:

Celui qui est chargé de prendre une décision en droit, qu'il soit législateur, magistrat ou administrateur, doit prendre ses responsabilités. Son engagement personnel est inévitable, quelles que soient les bonnes raisons qu'il puisse alléguer en faveur de sa thèse. Car rares sont les situations où les bonnes raisons, qui militent en faveur d'une solution, ne soient pas contrebalancées par des raisons plus ou moins bonnes en faveur d'une solution différente: c'est l'appréciation de la valeur de ces raisons - que l'on ne peut que très rarement réduire à un calcul, une pesée ou une mesure - qui peut différer d'un individu à un autre, et qui souligne le caractère personnel de la décision prise. (1976, 6)



Whatever the law, it is the person who applies it that makes the decision and must justify that decision by reasoning. Perelman shows that even in a situation where law is regarded as divinely given, the *Talmud*, there are times when the law is seen to be open to numerous interpretations and the judge has to make an authorised decision:

Quand les autorités s'opposent, on peut établir une hiérarchie entre elles, ou l'on peut tenir compte du nombre des avis autorisés, mais rien ne prouve que la décision devant laquelle il faudra bien s'incliner soit effectivement la seule solution juste du problème soulevé. (1976, 7)

As a result of this, formal logic is always insufficient to describe legal reasoning. Formal logic may control the inferences made in judging but it does not deal with the value of the decision which is the core of legal reasoning:

C'est le rôle de la logique formelle de rendre la conclusion solidaire des prémisses, mais c'est celui de la logique juridique de montrer l'acceptabilité des prémisses. Celle-ci résulte de la confrontation des moyens de preuve, des arguments et des valeurs qui s'opposent dans le litige; le juge doit en effectuer l'arbitrage pour prendre sa décision et motiver son jugement. (1976, 176)

The judge is not though completely free in the choices he can make. The authority he uses to enforce his/her decision is based on traditions or laws that bind the judge's use of that authority. The judge does not solve problems by simply using his/her authority to prefer one argument to another. The judge is aware of his/her responsibilities towards the law that has given him/her that authority and needs to justify the decision in a manner acceptable to the legal system that s/he works within.

The key to this for Perelman is his/her view of the relationship between society and law. In the very final paragraph of *Logique Juridique* Perelman states that:

La logique juridique, et spécialement judiciaire, que nous avons cherché à dégager par l'analyse du raisonnement des juristes et plus

particulièrement des Cours de cassation, se présente, en conclusion, non comme une logique formelle, mais comme une argumentation qui dépend de la manière dont les législateurs et les juges conçoivent leur mission, et de l'idée qu'ils se font du droit et de son fonctionnement dans la société. (1976, 177)

This sense does not belong to the judge alone, in coming to a decision informed by this sense the judge has to persuade not one but three audiences, a complex form of epideictic rhetoric:

Il ne faut pas oublier, en effet, que les décisions de justice doivent satisfaire trois auditoires différents, d'une part les parties en litige, ensuite les professionnels du droit et, enfin, l'opinion publique, que se manifesterà par la presse et les réactions législatives aux arrêts des tribunaux. (1976, 173)

There is a form of communal values at work here and in his historical study, Perelman identifies the dominant views of the function of law that have existed in continental Europe and the impact of this theory on practice.<sup>38</sup> These views have affected the way legal reasoning has been undertaken and presented and individual judges would have evolved their own particular sense of the function of law within these dominant paradigms.<sup>39</sup>

Perelman identifies three phases in the continental view of legal reasoning. The first saw law as:

mettant l'accent sur le caractère juste de la solution, et n'accordant guère d'importance à la motivation, était néanmoins lié par la règle de justice exigeant le traitement égal de cas essentiellement semblables. De là l'importance accordée aux règles coutumières et aux précédents. (1976, 136)

This changed considerably under the impact of the French revolution and

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<sup>38</sup> Although, Perelman speaks about the whole continent, he shows a francophone bias and most of his examples come from the French and Belgium systems.

<sup>39</sup> A parallel process can be seen occurring in other jurisdictions. See the study of Scottish and English attitudes towards negligence in chapter 4 below.

enlightenment philosophy.

Enlightenment theory led to the doctrine of the separation of powers which Perelman describes thus:

La doctrine de la séparation des pouvoirs est liée à une psychologie des facultés, où volonté et raison constituent des facultés séparées. En effet, “la séparation des pouvoirs” signifie qu’il y a un pouvoir, le pouvoir législatif, qui par sa volonté fixe le droit qui doit régir une certaine société; le droit est l’expression de la volonté du peuple, telle qu’elle se manifeste par les décisions du pouvoir législatif. D’autre part, le pouvoir judiciaire dit le droit, mais ne l’élabore pas. Selon cette conception le juge applique tout simplement le droit qui lui est donné ... Cette conception conduit à une vision légaliste; la passivité du juge satisfait notre besoin de sécurité juridique. Le droit est un donné, qui doit pouvoir être connu par tout le monde de la même façon. Cette vision du droit conduit à un rapprochement du droit avec les sciences. Qu’on le considère comme un système déductif ou qu’on assimile le fait de rendre la justice à une pesée, le juge semble participer à une opération de nature impersonnelle, qui lui permette de peser les prétentions des parties, la gravité des délits. etc ... Mais pour que cette pesée se fasse d’une façon impartiale, dépourvue de passion - ce qui veut dire sans crainte, sans haine et aussi sans pitié - il faut que la justice ait les yeux bandés, qu’elle ne voie pas les conséquences de ce qu’elle fait: *dura lex sed lex*. Nous voyons ici une tentative de rapprocher le droit sous d’un calcul, soit d’une certaine pesée, en tout cas de quelque chose dont l’exactitude rassurante devait pouvoir nous protéger contre les abus d’une justice corrompue d’Ancien régime”. Cela nous donnerait l’idée que nous ne sommes pas à la merci des hommes, mais à l’abri des institutions, plus ou moins impersonnelles. (1976, 24)<sup>40</sup>

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<sup>40</sup> The extended quote in this passage is cited as: Perelman, Chaïm. 1973. Droit, logique et épistémologie. In *Le droit, les sciences humaines et la philosophie*. 227-228. Paris: Vrin.

This philosophy not only impacted on French legal theory but also on French legal practice. Following the French revolution, it was adopted by the legislature. Laws were seen to embody the will of the people and were to be applied and not interpreted by the judges. Judges were servants of the law and their job was seen as purely logical and rational. The person of the judge was not to be involved in the decision-making process and if a situation arose that had not been foreseen by the law then the judge had to refer that matter back to the legislature. In effect, the judges had lost their authority to decide.

In practice this was unworkable and the legislature was flooded with references. In the Code Napoléon this problem was solved by article four which expressly states that the judge must give a decision:

Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice. (1976, 17)

Perelman sees in this justification for his view that a purely logical law could never deal with the complexity of practical legal reasoning.

The third phase of continental legal theory brings us to the present day. Perelman sees the reaction against the view of law that characterised the enlightenment continuing to the point where continental theorists are being led to accept the common law view of legal reasoning:

Nous assistons depuis quelques dizaines d'années à une réaction qui, sans aller jusqu'à un retour au droit naturel, à la manière propre aux XVII<sup>e</sup> et XVIII<sup>e</sup> siècles, confie néanmoins au juge la mission de rechercher, pour chaque litige particulier, une solution équitable et raisonnable, tout en lui demandant de rester, pour y parvenir, dans les limites de ce que son système de droit l'autorise à faire. Mais on lui permet, pour réaliser la synthèse recherchée entre l'équité et la loi, d'assouplir celle-ci grâce à l'intervention croissante des règles de droit non écrites, représentées par les principes généraux du droit et la prise en considération des topiques juridiques. Cette nouvelle conception accroît l'importance du droit prétorien, en faisant du juge l'auxiliaire et

le complément indispensable du législateur: elle rapproche inévitablement la conception continentale du droit de la conception anglo-saxonne, régie par la tradition de la *common-law*. (1976, 137)

This move requires a new form of reasoning and Perelman argues that the form of reasoning that is most appropriate for this new situation is his own new rhetoric or argumentation.

Common law reasoning, which he identifies as a form of argumentation, does exist within a similar context to that which he is describing. It does not, though, yet exist in continental legal reasoning at least not in the written records of decisions with which this thesis is primarily interested.<sup>41</sup> Although Perelman set out to describe legal reasoning in *Logique Juridique*, what he has done is set out the contexts within which legal reasoning can occur. This fits with his theory of reasoning which is heavily context-based. However, in looking at the reasoning appropriate for the contemporary legal context he does not look at what happens within that context, as he has done in his general theory, but suggests a form that is more appropriate.<sup>42</sup>

Despite this tension between description and explanation the implications of Perelman's study are clear. Thus in looking at the history of legal reasoning Perelman suggests that argumentation is inevitable in a legal context. This means that there must be aspects of the legal context that solve the problem of the why of argumentation, why undertake such reasoning. Perelman has already suggested that education could encourage people to do so but in law such reasoning is inevitable which suggests that in law the perfect or optimal

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<sup>41</sup> John Bell (1991) has pointed to the similarities in reasoning styles between what occurs behind the scenes in the Conseil d'Etat and the common law which suggests that common law reasoning may occur in this civilian tradition but he also points out: "If the content of justifications and legal arguments put forward in the course of the decision-making process have great similarities to common law judgments, then the source of difference in the content of the judgment relates essentially to tradition and, more importantly, to the function of the judgment itself." (1991, 227)

<sup>42</sup> The tendency of legal theory to become normative as well as descriptive is a common criticism.

circumstances for argumentation are created.

The aspects of the context which Perelman has concentrated on are two-fold, the sense of social roles and values which are akin to epideictic rhetoric and the presence of rules and situations to which they need to be applied to within a time limited process of reasoning which brings us back to his first works and his attempts to be scientific. The judge combines the two, reasoning about values that can use some of the appearances of a science. It could be argued that Perelman, for all his denial that argumentation needs such a structure ultimately recognises its power.

It is notable that Perelman, although recognising the limitations of authority does not deal with laws' violence. Previously argumentation prevented violence and extremes because of the priority given to the other but in legal reasoning violence is ever present and even exists in the way in which the individual and the problem are depersonalised and classified in the process of reasoning itself. This return to an "objectifying" view brings back the problem he first identifies, that where one view is considered correct, or in legal terms enforceable, the time for debate is over and yet it is this that gives law its power and makes it the paradigm view because the person exercising the violence is not free but controlled by a wider community view, the judge has to persuade others that his convincing, rational argument contains appropriate legal values. Perhaps Perelman finally accepted the place of violence in reason but felt the limited and constrained nature of legal reasoning controlled that.

#### 4. Conclusion

Perelman's return to rhetoric allowed him to concentrate on the role of the individual within reasoning. This allowed him to dignify the individual and places ethics at the heart of his theory. His turn towards law though signals a desire to find a way to ground this theory in something other than the choice of an individual, whether encouraged by education or not, to treat the views of

another with respect. He wishes to show that this argument is inevitable and is not dependant on the individual by stressing the importance of the community point of view and the limitations on the judge. Yet he does not fully develop some of these aspects of his theory, he refers to the importance of the judge's own sense of role but not how this is formed. He recognises the importance of the wider communities view of law but not how this relates to the judicial role. His use of the judge as a model is undermined by the way he fails to focus on the judge and thus shows how the judge is constrained but not why the judge accepts these constraints. His resurrection of the rational is also intriguing. After seeking to get away from a scientific, hierarchical style of reasoning, he praises law for its ability to combine the two. This use of the rational gives law legitimacy and makes it seem impartial. Perhaps law's appeal for Perelman lies in part in the opportunity it gave him to return to his goal to see values understood in a scientific manner.

Perelman's theory does though begin to attempt to understand what it means to be involved in seeking to be persuasive. His explorations of rationalisation and epideictic rhetoric start to set out a model which could describe why an individual finds arguments persuasive and compellable even in circumstances where no one has the authority to impose a form of reasoning. His description of the universal audience is an interesting concept with which to explore the way apparently impartial standards can be created by individuals within certain contexts but he remains bound to his own need to persuade others that his view of reasoning is compellable and this leads him to placing limitations around the individual reasoner without considering how that conflicts with his core aim to dignify the individual and prevent violence being done to him/her.

## Bernard Jackson

Bernard Jackson's work on legal theory is predominantly concerned with legal meaning. Legal meaning is the process by which law makes sense - the process that enables it to understand and structure the world. This section concentrates on Jackson's narrative theory.<sup>43</sup> It follows a similar pattern to that taken with Perelman. It looks first at the problems that Jackson wants his theory to solve and then at his general theory before looking at his legal theory.<sup>44</sup> Jackson's work contrasts with Perelman's in that he sought to draw on one of the new philosophical theories, semiotics, as a way of dealing with the issues raised by contemporary philosophy. As a result he is less interested in the problems philosophy poses which he feels he has dealt with but rather the problem he identifies lies with the failure of legal theory, specifically positivism to face up to them and incorporate their insights.

Jackson has found traditional theories of sense making in law unsatisfactory because they do not take into account developments in the theory of knowledge and truth that have rendered some of their assumptions

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<sup>43</sup> Jackson has not only turned to semiotics but has sought to find answers in everything from linguistics to cognitive development. This study will concentrate on his use of semiotics rather than attempting to explore the full breadth of his work. In particular his most recent work on semiotics and Jewish law (Jackson 2000) will not be dealt with as its interpretation of Jewish law is still being evaluated and would have dominated the discussion of the *Talmud* in the next chapter without adding greatly to this study of his view of contemporary legal reasoning, though, some aspects of his interest in Jewish law will be dealt with. A good introduction to the many other aspects to Jackson's work is *Making Sense in Law*. This is based on a course Jackson gave in law, linguistics and psychology. (1995, x) This includes a brief section on rhetoric (1995, 60-67) which he describes as a speech act without illocutionary force ie that does not claim that their very utterance performs some action but that has a perlocutionary effect - a psychological effect which the utterance seeks to produce but cannot guarantee by its mere utterance. This could be simply described as words which aim to have effect but do not have authority, a concept which will return throughout the rest of this thesis.

<sup>44</sup> Unlike the study of Perelman's theory, this study will not look at the development and evolution of Jackson's work. Jackson's published works on semiotics and legal theory, although showing signs of development, do not display the same rupture that occurs in Perelman's work. In looking at his theory of reasoning, therefore, the cumulative effect of his work will be considered rather than the process. This means that although *Law, Fact and Narrative Coherence* (1988) will remain the focus of this exposition, it will be supplemented with later works, especially where these show a shift, development or refocus of ideas presented therein.



problematic.<sup>45</sup>

In contrast to this, Jackson takes the problems created by linguistic scepticism seriously and, although he finds directions within contemporary legal theory interesting, he chooses to look outside legal theory to find answers. (Jackson 1995) The core of his narrative theory lies in his adaptation of Greimasian semiotics. (Jackson 1997)

### 1. The problem with positivism

Jackson has specific problems with what he identifies as three of the central tenets of positivism: the concept of the unified legal system; the belief that there is a strong and indeed determinative connection between decision-making and interpretation which normally consists of the interpretation of law determining its application to facts; and the doctrine that there is a specific legal form of interpretation.

In identifying these problems Jackson is attacking positivism at the point where it understands its subject and its relationship to the world.<sup>46</sup> He is thus attacking the way positivism understanding legal meaning. His attack on the concept of a unified legal system is based on his argument that it demonstrates that positivists are actually accepting a metaphysical claim that law exists somewhere out there. As Jackson puts it:

“the law” or “the norms” are not objects external to particular forms of discourse, to which those discourses refer; they are constructed within those forms of discourse, and form part of the system of signification which makes such discourse meaningful. Of course, the content of the message includes the claim that “the law” or “the norms” do have some form of metaphysical existence external to particular forms of legal

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<sup>45</sup> Many of these are echoed in the discussion in the previous chapter on methodology.

<sup>46</sup> The philosophical tendency to attack foundations will be discussed in more detail in chapter 5 below.

discourse. But that is simply part of the message of the discourse, which we have to study; it is not a condition of accounting for the meaning of the discourse itself. (1988, 141)

The idea that there is something “external” or “out there” which the theorist can objectively view has been one of the first casualties of philosophy’s own concern with how meaning is created and Jackson’s own critique of positivism is grounded in his acceptance of a “non-referential” theory of language which makes any claim to either an autonomous form of legal reasoning or to a unified legal system impossible.

As a student of discourse Jackson does not though dismiss the way law describe itself but instead argues that it has been misunderstood. These tenets are reunderstood as part of how law imagines itself, they are not part of the way that legal sense is created. This can be seen in his critique of the concept of the unified legal system. For Jackson, the idea of the unity of the legal system is founded on a simple error. The positivists have believed the image put forward by those who work in the system. This image is not a description of how the system operates but is projected by the system and is designed to generate dignity. It fulfils a goal of the system. Legal theorists who support this image have failed to dissociate what law says it is from its real nature. Law can refer to itself as an object but given the philosophical world in which Jackson is operating this can not be true, this statement therefore needs to be evaluated not as how law makes sense but as part of the stories generated by the sense-making process.

This argument is used, with a little variation, against the third tenet of positivism that Jackson finds problematic - that there is a separate and autonomous form of reasoning. The variation lies in a shift in focus, from the discourse itself to the source of the discourse. (1988, 147)

Jackson sees legal decision-making as exemplified by the judge in a courtroom. In coming to a decision the judge will reflect the view of the

professional community within which s/he works as to what reasoning is acceptable in that context. The decision will also reflect the forms of reasoning that are recognised by the wider community within which the judge lives and ultimately it will also contain a mix of conscious and unconscious elements. The judge as an individual cannot block off these different parts of him/herself from influencing each other. As long as there is no such thing as a purely legal person, there will be no such thing as purely legal reason. Semiotics for Jackson is not purely language in the abstract but language as used.

The place of the individual in reason lies behind his attack on the second tenet of positivism, the way it portrays the relationship between interpretation of law and the determination of facts. Specifically, Jackson's target is the normative syllogism. As this is the subject of a later section in this chapter it will not be dealt with here in detail. It should be noted, though, that Jackson feels that this view of interpretation excludes the place of the person who has to make a decision:

Interpretation, at least as it is conceived in the positivist tradition, depends exclusively upon the relationship between propositions (their semantic and syntactic relations); decision-making contains a necessary pragmatic element: what to do with people. (1988, 144)

Though he rejects these views, he does point out that they fulfil the important doctrinal purpose of justifying interpretation by suggesting that it is predictable and a matter of logic rather than a subjective process and show the areas where he believes his own work can be more effective. (1988, 131)

Jackson expands his critique by arguing that the failure of legal theorists to recognise the semiotic nature of law has led them into confused debates about the nature of hard cases, a core jurisprudential debate. This confusion is caused by the fact that they have not been considering why cases are hard but have been creating strategies for solution:

The methodology of "core" and "penumbra" is really a strategy of

persuasion, a rhetoric, relevant to the resolution of cases, and it thus provides an answer to the questions of the second type. Similarly, Dworkin's particular form of justificatory argument is a rhetoric of persuasion in relation to the solution to problems; it does not tell us why these problems are generated in the first place. (1988, 146)

Positivism here is confusing part of the discourse of law, which is about solving problems, with the "reality" of the creation of legal meaning. Indeed, in this area, positivism has become part of the discourse.

In rejecting these three aspects of positivism, Jackson is committing himself to seeing the legal system as complex, legal reasoning as an aspect of general reasoning and to finding a new non-syllogistic way of describing the process of legal reasoning.

## 2. General theory of reasoning.

### 2.1 Truth

In turning to semiotics Jackson confronts the problem of whether discourse has anywhere to stand, whether there is any viewpoint which can be privileged as true. In accepting the semiotic view that language is a construct Jackson has rejected the view that language relates to something "out there". This means that he cannot accept a correspondence theory of truth, that things are true depending on how accurately they relate to the "real world" or to "facts". If truth is not to be found somewhere out there, then where does it lie, or does semiotics presuppose a rejection of the concept itself?

Jackson accepts that a strong reading of semiotics could lead to this conclusion but he prefers a weak reading and supports a coherence theory of truth. Truth relates to how things are fitted into the semantic narratives. It has to do with how plausible the presentation is and how well the story fits together. Truth does not relate directly to individual facts. It is not an absolute

but a relative concept.

Jackson is aware that this view of truth has led to him being criticised as a nihilist. He seeks to counteract this argument by bringing into this structure the notion of integrity:

“integrity”... may now be viewed as an alternative to the truth. The focus here is in trust in people not in the relationship between what they say and eternal reality. (1988, 193)

In introducing the concept of integrity, Jackson highlights four elements: truth telling; telling the whole truth; honesty in seeking out the values implicit in the material; and honest communication. This is similar to Steiner’s structure of interpretation though its basis is not trust but faith.<sup>47</sup>

We have an interesting model for this form of activity. Many theologians doubt the literal truth of the Bible. Yet they write *as if* the Bible were literally true. We may understand such activity in a number of different ways. One might be to distinguish the degree of fulfilment of the sincerity-conditions of the act of making a truth-claim as between such a theologian or our historian and the enunciator of a truth-claim about an event which s/he has actually perceived (such as the witness in court). Alternatively, the theologian might simply respond that truth here is a function of faith, not reason. Moreover, s/he would assuredly add, it is *useful* to propagate such a faith, in that it adds to our cultural heritage and has beneficial effects on society. Essentially, I believe, the claims which may legitimately be made by the historian are of a comparable order. (1988, 167)

Jackson argues that truth telling in this context simply means telling the truth that the individual is capable of, the truth about his/her own feelings about the process:

In short, we are telling the truth of the fulfilment of the sincerity-

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<sup>47</sup> This grounds his theory not in others but in the self.

condition of the particular performative act in which we are engaged.  
(1988, 173)

Integrity is very much an “academic” virtue in the sense that it is perhaps best exemplified by the work of academics. Jackson uses the example of a historian to explain its practical implications. For the historian this would mean explaining how believable s/he thought the evidence before him/her was and how well it fitted with his/her experience of other historical documents and his/her interpretation of standards accepted by the profession.

Telling the whole truth in this context would mean that the historian would reveal all the data presented to him/her, including that which may conflict with his/her theory of events. The historian should try to be aware of the political and power relations that may influence his/her views and be honest that there are value assumptions in his/her work.

Finally, the historian should be honest about the importance of what is being said. In communicating his/her view of the truth, the historian needs to be honest about the value of that communication.

There is a great deal of similarity between Jackson’s view of integrity and some of the discussion in the previous chapter in methodology. Jackson even calls his process an “ethics of reading”. (1988, 193)

This similarity occurs because, like the theorists considered in the methodology section, Jackson takes the current scepticism about truth and knowledge seriously and like them he wishes to see a way forward. Perelman, who for different reasons finds himself dealing with the same problem, similarly places his faith in people and bases his persuasive reasoning on their abilities. This concept of truth requires a great deal of self-awareness on the part of the individual which at times may seem to conflict with Jackson’s own general theory of reasoning which stresses that we are often unaware of the way we use language and that we are bound by the discourses in which we participate.

This, though, is not Jackson's final word on the subject. In considering the role of truth in the criminal verdict he focuses not on individuals and whether or not we can trust their relationship to facts but on pragmatics. Pragmatics is part of Jackson's narrative theory and will be dealt with more fully in the next section but what should be noted here is that it contains more detail on the performative conditions that an individual needs to achieve for his/her propositions to be accepted as true.

In stating that "truth is not a quality inherent in propositions, but is attributed to those propositions in accordance with the perspectives of the users of these propositions." (1998, 259). Jackson directs attention to what influences those perspectives and these are found in socially generated narratives of the way we expect the truth to be told:

The persuasiveness of a story is a function not only of the narrative told in the story (the semantic level), but also of the narrative of the telling of the story. We have narrative typifications of persuasive story telling which involve not only such factors as style and setting but also the ascribed authority of the story teller. (1998, 265).

These typifications are internalised and to an extent will be unique to the individual but the dominant influence will be the discourse within which the individual is making truth claims and thus it is possible that in one situation different discourses and different perspectives will lead to different standards of truth claims which may well conflict. Integrity, thus, would simply mean that an individual had fully internalised and understood the standards required in that discourse. This, of course, may well be inevitable given the semiotic perspective from which Jackson is considering truth and perhaps then the truth of his theory of legal reasoning should be judged by how well his description fulfils the truth conditions of semiotics. Jackson though is engaged not only in semiotics but in legal theory and is seeking to show that a semiotic theory can fulfill the truth conditions of legal theory and in a more effective way than that of the positivist.

## 2.2 A narrative theory of reasoning

Semiotic theory regards sense as a construct. Sense is a creation of humans and not something that exists “out there.” Although sense is created through all forms of communication, it is essentially a linguistic value and is created primarily in and through language.

Greimas, a foundational semiotic theorist, argued that narrative structures were fundamental to this form of sense making and it is this aspect of his theory that Jackson has used. Jackson is not the only contemporary theorist who is interested in narrative theory. He himself cites MacCormick, Twining, White and Van Roermund but he finds all of these theories lacking to varying degrees and argues that he pursues a very different form of narrative theory. (Jackson 1988, 18-26) certainly although these others see a place for narrative structures it is only Jackson who has placed them so centrally and foundationally in his work.

Jackson's theory is based on the works of Greimas and Saussure and he accepts their basic assumption of semiotics that the relationship between words and meaning and words and reality as matters of social convention. There is no reason why one word should refer to one object or concept. It is merely social convention that keeps the relationship between words and meanings stable. Words, therefore, do not exist on their own and do not simply relate to individual pre-existing concepts. They relate primarily to other words and their value comes from this relationship.

According to Saussure, two principle types of relationship exist between words: syntagmatic, and associative or paradigmatic. Associative or paradigmatic relationships look at what other words are associated with that word in memory - what words are brought to mind by that word.

Theorists, following Saussure, have argued that these associative relationships are not arbitrary but related structurally in small groups that they have called



semes.<sup>48</sup> The content of a seme is limited by its semantic field. The semantic field links the phenomena normally associated together in a particular context. The example Jackson uses is of boy which in a seme could be associated with not man or not girl or both dependant on its semantic field or context. Opposition is not the only relationship of association, Jackson also refers to hyponymy. In a hyponymatic seme classes are structured by subordinate relationships, man and boy would both belong to the seme - male - and would be related by age.

The context tells us which relationship is being communicated. This context need not be outside the langue. Sentences and larger textual structure can provide the context and this is what Saussure called the syntagmatic sphere or axis.

Greimas wanted to see how these micro features combined to produce large-scale effects and, from Saussure's theory, he generated a universal model. In this model, sense is constructed at three levels. The most foundational level is a universal level and is essential for sense making to exist at all. It reflects the structure of meaning at word level and has both syntagmatic and paradigmatic levels.

At this deep level the syntagmatic axis – the contextual axis – consists of underlying patterns that make sense of all discourse. Greimas used the analysis of Russian folk-tales by Vladimir Propp to show what these underlying patterns would look like. Jackson summarises this:

Every human action, for Greimas, begins with the establishment of a goal, which thereby institutes a semiotic object as “subject”. In realising the action, the subject will be helped or obstructed by other actions of other social actors. The desired action itself will be achieved, or not achieved. But it is a characteristic of human action that the sequence does not finish there. Man, as a thinking being, reflects on past actions.

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<sup>48</sup> It should be remembered that all of this is conventional and socially constructed.

As a consequence, the syntagmatic axis of Greimas concludes with the concept of recognition (or “sanction”). Human action (whether real or fictional) thus appears meaningful in terms of a basic (“narrative”) sequence, which consists in the setting of goals (“contract”), “performance” (or non-performance) of those goals, and “recognition” of that performance (or non-performance). These goals may be of any kind. (1988, 28)

Although this deep level is essential for sense, it is not enough and only contains the broadest and most foundational aspects of sense making. The top two levels provide much of the content of sense making. The second or middle level is called the thematic level and deals with the social aspects of sense making. It consists of social knowledge organised into narrative structures. These socially generated narrative structures help us to make sense of the environment, both “natural” and “man made.” They are also associated with social evaluation and arrange stories according to type, e.g., a funny story, a sad story. The first level is the level of manifestation and, as the name would suggest, this is the level that covers language as it is used and brings us back to Saussure’s description of language use.

These three levels; deep, thematic and manifestation combine and interact to generate sense. In an article published in 1996, Jackson suggests that only the top two levels of manifestation and thematics may be strictly necessary for sense making. (Jackson, 1996) Though he accepts that the universal level of narrative structures obviously plays an important structural role it is the interaction of these two top levels of meaning that generates sense making in everyday life.

This process is not mechanical, a case of slotting one structure into another.<sup>49</sup> Language and sense-making structures are affected by the way they are

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<sup>49</sup> In *Law, Fact and Narrative Coherence*, (Jackson 1988, 170) Jackson suggests that this comparison would be based on a loose resemblance and would have similarities to analogy.

presented and used and how this process is understood. To get a full picture of sense making in practice rather than at an abstract level this semantic structure needs to be combined with an understanding of the pragmatics of discourse. As Jackson puts it, it is not enough to understand the story in the trial, there is a need to understand the story of the trial. (Jackson 1988, 84-88)

Pragmatics mediates the narrative structures that process linguistic sense. Jackson considers how people are persuaded to do something new, something that almost seems precluded by the structure of sense making that he has related. He argues that individuals are only open to new ways of acting if they are persuaded to do so in a way that they recognise. The mode of communication of this new knowledge must fit into a pragmatic pattern that they recognise as a way that new knowledge is communicated.<sup>50</sup> This suggests that there is something similar to second level narrative typifications in the pragmatics of language. (Jackson 1996, 186)

Jackson does not deal in any great detail with the relationship between pragmatic and semantic narrative structures but he does suggest that this relationship will not be a purely mechanical one. Instead he prefers the “negotiated interactional model” presented by Sbisá and Fabri in an article in the *Journal of Pragmatics*. (Jackson 1996, 186)

If the how of presentation is important then so is the who and another important part of sense making covered by pragmatics is the existence of semiotic groups. A semiotic group will have its own discourse:

networks of people who communicate messages to each other, using codes and other semiotic devices particular to those groups. (1988, 31)

This discourse will differ from standard discourse not only at the level of

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<sup>50</sup> Jackson does not deal with pragmatics, the story of the trial, in the same detail as the narrative structures of semantics. He does use the phrase “narrativisation of pragmatics” which suggests that there is a parallel structure. (Jackson 1996, 177)

manifestation but the group will also have its own social typifications at the thematic level. This does not mean that each semiotic group is closed to all the others - an individual may be part of several groups and there will be substantial overlap between these groups. A scientist will be part of a larger, culture-wide semiotic group as well as part of a more specific scientific semiotic group.

Thus, although Jackson rejects the positivist stance that law is totally separate, he can accept that there could be a distinctive form of legal discourse. It is not enough, though, that lawyers say they have a separate discourse. Their claims need to be empirically investigated and he does consider whether law contains one or more semiotic groups when he looks more closely at legal theory. (Jackson 1997, 283-310)

### 3. Legal discourse

In discussing the possibilities of a separate legal discourse, which suggests specialisation of meaning rather than separation of meaning. Jackson considers two aspects of language use by lawyers that suggests that legal use of language may be sufficiently autonomous to justify the identification of a separate legal discourse; language used by lawyers and closure rules.

Jackson uses socio-linguistic studies of legal language to show that lawyers, in legal settings, use a higher number of multi-member semes and that there is a greater degree of monosemicity than would be seen in normal language. (Jackson 1997, 39-46)

Multi-member semes and monosemicity are aspects of the paradigmatic axis. They restrict what can be substitutable at points along the syntagmatic axis. They, therefore, deal with what vocabulary is understandable within different sentence structures.

Semes link together vocabulary in relationships that show how that

vocabulary is understood in that context. The most common seme relationship is the binary or oppositional relationship. Take the sentence "It was dark." A semiotician could say that the seme dark/light is present. This simply means that we understand dark by opposition to light. Multi-member semes do not use oppositional relationships but are structured by "hyponymy." Hyponymy puts the components of the seme into a hierarchy. These components are understood according to where they fit in that hierarchy. To use a legal example, rules created by delegated legislation will be understood according to the legislation which creates the power to make those rules.

Monosemicity simply means words that have only one meaning. Most words have polysemicity and will mean different things in different contexts. In legal language, though, words are often given a very definite meaning that applies no matter what the context. For example, the word "partner" can have a number of different meanings but in a legal context it always refers to a particular business relationship that is governed by specific rules.

In using more of these law does differ from the every day use of language, and this use of specialised vocabulary almost suggests a code. This is even more so in the case of closure rules.

The closure rules which constrain the construction of sense in particular forms of legal discourse may be regarded as part of the "code" which defines the identity of particular communicational systems. (1988, 135)

Closure rules limit what meaning is possible. Jackson shows the importance of these rules by using them to illuminate the debate between Hart and Dworkin. Not only are they part of legal discourse but even more they are part of subdiscourses:

The Hartian model fitted legislative discourse in the sense that it reflected the intentions of the draftsmen of legislation, and the determinacy and finitude of their intentions. The Dworkinian account fitted doctrinal as opposed to judicial discourse, in the sense that it insisted upon a restriction to legal principle as opposed to legal policy

(despite considerable evidence that the judges do indulge also in the latter), and utterly neglected to take account of the strictly adjudicatory aspects of judicial discourse, namely its necessary inclusion (whether explicit or implicit) of consideration of the possible impact of any decision in the particular circumstances of that case, for the particular parties before the court. (1988, 139)

Legal discourse can first be identified by legal language but within this closure rules allow us to restrict this even more. These semiotic groups do not work in splendid isolation. The same legal texts and the same communication may be received by different groups simultaneously. Jackson identifies judicial discourse as the most complex discourse within law as it addresses at least three different audiences - litigants, other judges and the wider legal audience. Each of these can be seen as comprising a separate discourse or semiotic group but this is recognised:

We may therefore expect the discourse of the judgement to mediate between (set constraints to, impose closure rules upon) the relations between the different discourses which it contains. The judgement is thus both a discourse and a meta-discourse, and to understand the latter we need a theory of meta-discourse. (1988, 96)

This theory of meta-discourse is likely to resemble much of Jackson's general semiotic theory.

Despite the specialised vocabulary and closure rules, it is the place of the unconscious in rationality that further undermines the argument that law could be autonomous. Jackson argues that it shows that law can never isolate itself from other forms of reasoning:

Legal rules are linguistic expressions of narrative models, the latter loaded with tacit social evaluations. The translation of these narrative models into conceptual language may conceal their origins, but interpretation based upon the language of the propositions is likely to prove unstable to the extent that it runs counter to the social evaluations of the narrative models underlying the text. In short, subconscious

rationality, reflecting social knowledge and values, may actually threaten to subvert legal doctrine. (1988, 103)

In place of a unified legal system, Jackson presents a model of interacting semiotic groups and instead of an autonomous system of legal reasoning, he presents a form of reasoning that is general and will apply whenever people reason.

The question for Jackson's theory is whether he has himself been persuasive in the discourse of legal theory. Jackson has criticised positivism for confusing the strategies of persuasion with structure of meaning but could be argued much of what he describes as meaningful could also be described as persuasion, not in what stories are told but in the way that the narrative pattern is used to make arguments inevitable. Jackson would probably not dispute this but would argue that he understands why these strategies are used, how they relate to the structure of language and meaning itself and that he is not falling in to the mistake that positivists make by regarding them as telling the truth about law. It seems from his work that the standards he is trying to achieve is that of increased clarity. This then for Jackson is the goal of legal theory, to clarify the legal process and this is not a purely scientific goal, returning to the concept of integrity, the academic virtue, the legal theorist would be expected to be aware of the impact of prejudices and of perspectives on his/her study and this could be seen as an ethical goal. It would also mean that s/he would have to have some understanding of the social typifications that had been internalised and how they operated on his/her thinking.

This could lead to the problem of infinite regress but it is likely that the ultimate discourse would be semiotics and that these assumptions would be the ones that could not be questioned if a theorist wanted to play this particular game.<sup>51</sup>

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<sup>51</sup> Thus although it is possible to translate almost any structure into Jackson's terminology this is based on an acceptance of its foundations.

#### 4. Conclusion

Jackson turns to semiotics because of its descriptive value. He is arguing that it explains the process and experience of legal reasoning better than traditional positivism. His theory is certainly all-encompassing and can contain much not only of legal practice but legal theory. It thus fulfils one of the core aims of any philosophical theory - the ability to describe everything. The disadvantage of such attempts are though clear. All a critic has to do to reject this as compelling is to deny the validity of the basic assumptions.<sup>52</sup> Jackson's theory also contains a dichotomy at its core it is dependant on his own integrity and yet this appears to be created by the structures he describes. The individual is both made responsible for being aware of his/her part in discourse and is controlled and limited by it. There are clearly ways in which this could be understood in a complex manner but Jackson is seeking to clarify and the result is that real individuals disappear and become simply carriers of discourse. His view of legal discourse portrays it as almost as autonomous and unified as the positivist view that he criticises and it is not clear how it can deal with time. He seems to be taking a snapshot of discourse but cannot explain how it evolved or how it could develop. It makes law and discourse philosophically acceptable but at the cost of making it seem unreal. Like Perelman he seems to be happier when seeing it as almost scientific, structural and unemotional.

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<sup>52</sup> The implications of this for philosophy and theory in general are considered in chapter 5 below.



## Neil MacCormick

Neil MacCormick is also playing the legal theory game and like Jackson and Perelman is responding to the concerns of contemporary philosophy but he seeks to improve the work of legal positivism not bypass it. This section follows the structures of the last two and primarily considers two aspects of Neil MacCormick's theory, his institutional theory of law and his defence of the normative syllogism.<sup>53</sup>

These two aspects of his theory reveal MacCormick's central goals. His defence of the normative syllogism is based on his belief in the ethics of the rule of law and the need for government to be subordinated to rules while his institutional theory seeks both to establish a "respectable" theory of law and to fulfil the ethical goal of providing a reconstruction of law to which it is possible to be committed.

### 1. The problem with legal theory

Unlike Jackson and Perelman, MacCormick's work is not founded on a strong sense of the problems of legal theory. His work is a continuation of legal theory and seeks in his defence of the normative syllogism to defend aspects of positivism. He does though see his work as a development of theory and his normative theory of law is based on a sense that theorists have tended to extremes. Idealists have seen norms as non-factual, as entities separate from the natural world and purely human constructs. Reductivists have taken the opposite approach. They have seen norms as purely factual - a way of describing human behaviour and views. What is more, reductivists tend to argue that norms get in the way of understanding the human behaviour that they describe and should be replaced with a sociological analysis. This split is reminiscent of both Perelman's earlier work and Jackson's adoption of

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<sup>53</sup> These are the aspects that are most relevant to this theory. They do also provide a good overview of MacCormick's work.

semiotics and has been a response to the problems with discussing the reasonable that Perelman discusses. MacCormick, writing with Ota Weinburger,<sup>54</sup> criticise both of these views for failing to appreciate the complexity of social life.

Idealists, they maintain, fail to fully appreciate the importance of the social setting in which norms operate whilst reductivists fail to appreciate the importance of norms to the social setting. In trying to put forward a “socially realistic development of normativism,” MacCormick and Weinburger are explicitly seeking a middle route between these two theories in order to consider both together. This, therefore, accepts, that to an extent previous theorists were right in identifying important aspects of law but were simply too exclusive. They also argue that seeing law in this way invests sociology with meaning and rehabilitates the view of law put forward by legal academics:

Thus we can claim that our aim is, precisely, to present a socially realistic development of normativism; ... As a development of a normativism theory, then, ITL offers to the sociology of law (and to sociology more generally) an ontology which we claim to be essential for any realistic analysis, explanation or description of the legal sphere and indeed all of those distinctly human and social institutions and phenomena which correlate with, depend upon, or presuppose legal or other rules or norms. At the same time, however, our ontological theses also lead on to a suitable theory of knowledge for legal dogmatics (‘black letter law’) as a wholly respectable and indeed valuable domain of human knowledge. (MacCormick and Weinburger 1986, 7)

This institutional theory of law then claims not just to provide a legal theory but a general theory of normativity and, specifically, a theory that sees

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<sup>54</sup> In 1986 MacCormick and Weinburger published a series of articles which they had written separately in the decade before but which they felt showed a similar understanding of law. They also wrote a joint introduction and that is cited here as MacCormick and Weinburger. Individual articles within the collection are cited to the respective author.

normativity as an important aspect of social life.

## 2. General theory of reasoning

MacCormick's institutional theory has evolved through a series of essays that were written over a number of years.<sup>55</sup> In them MacCormick is guided in his central belief:

All human life is implicitly normative, in the sense that whatever a person is doing at any time, either as an individual or in common with others, it is an open question whether she or he is doing the right thing, or doing it the wrong way. (2000, 39)

This suggests that at the core of human nature is the tendency to judge and this requires "grounds of judgment" – norms. Further MacCormick's desire to understand normativity beyond the narrow confines beyond law comes from his belief that positivists have been too statist, too focused on only on state law and instead "once we clarify the concept of the institutional normative order, we are able to see that state law is simply one species of this genus". (2000, 43) This allows him to reject the views of those such as Derrida who see violence as implicit in the very structure of law. (2000, 45-46)

MacCormick's understanding of normativity appears in two forms. In his earlier work including that published with Weinburger his approach is strongly analytical whereas in more recent institutional theory it is more practical and ethical. These are not necessarily incompatible as will be seen in the consideration of his ethical upholding of the rule of law. First though to his early exposition.

### 2.1 Normativity

In seeking to avoid the dangers of reductivism and idealism, MacCormick

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<sup>55</sup> They were first published in the mid 1970's-1980's.

adopts what he describes as a hermeneutic approach. (MacCormick and Weinburger 1986, 15)

Hermeneutics evolved out of biblical interpretation. The reformation had challenged traditional interpretations of the Bible and encouraged a focus on the text and how it should be understood.<sup>56</sup> Schleiermacher and Dilthey, reflecting the concerns of nineteenth century philosophy, extended the sphere of hermeneutics by concentrating on meaning itself. (Warnke 1987, 5-6; Bleicher 1980, 12-26) The goal of these early explorations of meaning was to generate objective interpretations, to make the process more rigorous. Gadamer's *Truth and Method* (1994), reflecting the concerns of twentieth century philosophy, reinterpreted hermeneutics by making clear the impossibility of objective interpretation. This view has since become dominant and contemporary hermeneutics no longer seeks to find a way to produce objective interpretations but to achieve a clearer understanding of the process of interpretation itself.<sup>57</sup>

Contemporary hermeneutics seeks to understand the world in an intersubjective manner. It seeks to find a middle ground between subjective and objective approaches and to formulate a method of understanding that recognises that knowledge can never truly be one or the other. As such, it concentrates on the boundaries at which individuals interact with the outside world and places interpretation; the way individuals structure and understand their experiences, at the heart of knowledge.

What this means for a legal theorist is that when attempting to understand law s/he needs to look at how the legal process is understood by the people who

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<sup>56</sup> This is a complex process because the Bible is authoritative but needs to be applied to everyday life. A similar, though less philosophical, exploration of meaning occurs in the *Talmud's* interpretation of the Bible and of the *Mishnah* another authoritative text that needed to be applied.

<sup>57</sup> See Warnke (1987) for a brief history of hermeneutics and a consideration of Gadamer's role in this process. Bleicher (1980) considers the history in more detail. Both consider the current state and future of hermeneutics.

apply, interpret and follow the rules and not simply to consider the texts. This should avoid the two extremes because in relating to the everyday use of rules it avoids abstraction and the rules are not simply a code for behavioural patterns.

The most fundamental requirement of rationality in action is this: that every act or forbearance to act ought to be justifiable by reference to some reason for action. (1986c, 190)

The most basic form of reason is desire. These reasons are so primitive that MacCormick describes them as non-rational. To simply follow these with no further reasoning would lead to chaos. This is why reasoning is needed:

Such purposes have, therefore, to be subjected to the discipline of higher orders of rationality, that is, to the business of setting them in order through higher-order principles of preference sustained consistently over time and universalisability over persons and cases. (1986c, 195)

Reasoning, then, is based on an innate aspect of human nature. This does not mean that it is simple, there is a hierarchy and this structure needs to be consistent and applied universally. This can seem like rather a large jump from simple desire. MacCormick builds the structure by first identifying two basic forms of reason, reasons which are good in themselves or 'value-rational', and reasons which tend to bring about a desired goal or are 'purpose-rational'. These two forms of reasons can be used to help us organise our desires. Clearly these reasons may collide and thus, a higher level is needed and soon a system is formed with higher reasons providing a rational way of choosing between conflicting lower-order reasons. Underpinning all this is the simple fact that this order is better than chaos.

Reasons are used in everyday life. They have a temporal aspect and need to adapt over time. Rationality requires that the long-term pattern of reasons is also rational. So, from a simple structure which just requires reasons for every action, MacCormick generates a structure of rational action which requires a hierarchy of reasoning that is applied consistently in the long-term:

Thus rational thought, whether about what to do or about what is the

case, must exhibit the qualities of consistency over time and of universalisability over cases, and must accordingly be systematic. In my opinion the province of formal logic is none other than the elaboration of the detailed implications of these requirements of consistency, of universalisability and of systematic quality in discourse. It accordingly follows that formal logic is no less applicable to the topics of practical reasoning than to those of theoretical or speculative reasoning. In neither case however does consistency mean or imply non-revisability; ... (1986c, 193)

This again echoes Perelman's early work, to apply one system of rationality throughout the field of human knowledge. The system of rationality has its own structure and system goals. These system goals relate to different parts of the system. Consistency is a logical system value whilst coherence relates to the "standing ends" of the system and allows them to be evaluated:

This depends on treating the standing aims or ends legitimated within the system as constituting general justifying aims of the system; that is, as values or goods which its observation in practice tends to realise. In cases of difficulty, adjustments to or corrections in lower order principles or rules may be justified in view of the desirability of further or more firmly upholding such values. (1986c, 196)

If these standing aims are treated as values, it appears that value-rational reasons form the highest point of the hierarchy, the highest purposes being transformed into the highest values:

Hence our principles cannot be deemed merely instrumental to realising some extraneous or ulterior end; rather, they are means only in the sense of that whose realisation is an intrinsic part of the overall good to be realised. At this level, the initial analysis of two distinct categories of rational grounds for action is better seen as revealing two aspects of what is in reality a complex unity. For a fully rational being, the capacity to adopt means which are well adjusted either instrumentally or intrinsically to ends of action must be conjoined with a capacity for

reflection upon the value of ends, and of taking a coherently systematised view of a variety of ends valuable in themselves within a system of practical reason. (1986c, 197)

The hierarchy of reasoning is generated by society and culture. The individual reasons within this system and, the individual desires must clearly be constrained by the system,<sup>58</sup> is still capable of criticising the system. This is because the system itself creates room for critique. It does so through the system goals of consistency and coherence. Such a system, however complex, can not have all the answers to every question:

So far as one can judge at present, from the best and most thorough accounts of practical discourse or practical reasonableness hitherto achieved, it is not in fact the case that the requirements that we be rational generates for any given individual or group but one single system of practical principles. Thus the most significant limit of rationality is that, although it may exclude many putative principles of action as ‘discursively impossible’, it yet leaves open the possibility that there may be a plurality of equally rational schemes of practical reasoning, different in their practical substance though not in their rational form. Rationality is then a common element in all acceptable systems of practical reason, but not one which can determine the choice among equally rational possibilities. (1986c, 199)

This is where MacCormick ceases to be a traditional philosopher and echoes the problems that Perelman identifies as part of all post-descartesian philosophy. Unlike Perleman, though, MacCormick does not see this problem as so unsurmountable that there is a need to reconsider the entire project. Instead MacCormick argues that there may be virtues beyond rationality which help to choose between rational choices.

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<sup>58</sup> It should be noted that MacCormick simply sets out the start and then goes on without too much more explanation, having established a basic context he becomes more interested in the structure itself.

There are four virtues which MacCormick feels would be valued within any rational system and that could go beyond that system to fill the gap that rationality alone cannot fill. These virtues are wisdom, farsightedness, justice and humanity: wisdom is the ability to learn from experience; farsightedness is the ability to see consequences; justice is the ability to balance values; and humanity allows us to see things from the point of views of others:

That it is rational to cultivate such virtues, that they themselves generate rational grounds of choice, and that their value can be expressed only within rational systems of practical reason, does not imply at all that these virtues are in some deep sense either identical with, or simply aspects of, rationality. (1986c, 200)

MacCormick makes it clear in his own work that law should be understood from one point of view that of the committed participant. This is a person who regards the law as real and valid and s/he is central because it is the committed participant who provides structure to law, legal knowledge resides in them.<sup>59</sup>

Legal knowledge is knowledge of what for the committed participants are the norms of the order, and of the institutional facts constituted by the interpretation of natural events within the schemata which the norms provide. (1986a, 105)

This privileging means that the views of these “committed participants” are central to legal knowledge but this does not mean that the person seeking legal knowledge needs to share that view. As MacCormick puts it, the

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<sup>59</sup> MacCormick’s acceptance of hermeneutics may suggest that there is more than one form of legal knowledge, which may vary from society to society. Yet he is trying to create an ontology of normativity. This suggests that norms fulfil similar roles wherever they are found and that there is a form of understanding that is peculiar to norms. These two positions are not necessarily incompatible. It could be argued that a large degree of variety of legal knowledge could occur within a structure that recognises only one way of understanding norms. Law is after all about the interaction between norms and society. There is nothing about the goal of institutional theory that implies that this interaction could not be complex enough to generate many forms of legal knowledge. MacCormick does not follow this line and it should be noted that he seems to assume the existence of a highly developed and indeed western legal system.



observer who seeks to understand law can remain “volitionally external” but not cognitively external. What this means is that the observer needs to understand what the committed participant understands but need not choose to accept the value structure that that knowledge may contain. For example, the observer may accept that the committed participant is committed to a certain definition of justice that affects the way s/he applies norms. In doing so s/he cognitively enters the reasoning of the participant. However, s/he need not agree that this is a valid definition of justice.<sup>60</sup> (MacCormick 1986a)

MacCormick uses the “committed” participant to link together the normative reasoning and institutional facts in creating the legal system, normative reasoning comes from his/her own nature (see next section) while institutional facts come from his/her interpretation of the real world.

### 3. Legal reasoning

For MacCormick the reason legal reasoning exists is because of the problems with normativity. Law exists to deal with the point at which reasoning becomes problematic:

Alexy’s theory of rational practical discourse is a refutation of scepticism which shows that we have discursive procedures and criteria for discriminating between sound and unsound practical arguments. ... The trouble, however, is that too much remains possible. For many courses of action, more than one outcome is justifiable. In a political setting this can mean that two or more conflicting courses of action are equally reasonable – but then the conflict will have to be resolved. ... The upshot is that one discovers from general practical discourse the incompleteness of general practical discourse and the necessity of some institutionalised forms of practical discourse, most notably legal discourse. The relative indeterminacy of general practical reason

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<sup>60</sup> This is not MacCormick’s only view of law as shall be seen later when he roots his theories in ethics.

determines a need for law, constitution and constitutionalist politics.  
(1989, 187)

As an institutional order law reflects the basic normative structure but goes further, MacCormick describes the difference between informal and institutionalised orders as the institutional order is authority the ability to make authorised interpretations and at the base of this is not simply raw power but an acceptance of that authority:

All institutional order has in fact a customary foundation, in the sense that the ultimate reason for accepting some ultimate source as authoritative must be a shared sense of the normative among those who acknowledge the ultimate authority. (2000, 41)<sup>61</sup>

What this means is that the committed participant must regard legal norms in a certain way:

They provide a standing set of exclusionary reasons excluding acting even upon purposes which at the first level it would or might appear rational to act. (1986c, 202)

The impact this has on the system is that as well as applying the basic rules that apply to all rational systems, the rules and structures of legal reasoning need to fulfil the requirements of rationality. Norms need to be consistent and coherent. Like other forms of reasoning, though, legal reasoning is rarely simple. Norms can conflict and where this happens there is a need for second-order justification. The reasons that are acceptable will come from within the legal system and its principles. When there is a conflict between low-level legal norms, the participant looks to a higher level where norms are generalised:

What has to be done is to evaluate the merits and demerits of the types of decision in other similar cases to which the court will be committed by its ruling in law upon the disputed point in this case. We are thus out

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<sup>61</sup> This quote follows his open acceptance of the ethics involved in his theory.

of the realm of the particular purposes and into the realm of those generalised values which are supposed to be upheld by the general observance of legal rules and principles. Nevertheless, as legal values they are in effect generalised statements of the purposes which under law it is legitimate to pursue, as moral values, they are generalised statements of the purposes which the norms of our general system of practical reasons authorise us to pursue. Their appeal to us, as distinct from their legitimacy within a scheme of practical rationality, is a matter of the strength of our emotional or affective commitment to this within the constraint of our presupposed commitment to rationality. (1986c, 204)

Like all systems of rationality, law will eventually come to a point where rationality is not enough to solve certain problems and in law this occurs at the point of the judicial decision. This is not surprising, it is the judge, after all who has to apply the law to daily life. Following Alexy, MacCormick considers that legal reasoning is primarily concerned with the justification of decisions but legal decisions can rely on the authority of the judge. This puts specific pressure on legal reasoning and limits the place of rationality:

As with general practical rationality, we come to that point at which it is values or virtues other than rationality itself which furnish us with rational but not conclusive grounds of choice. The virtues we seek in those who make such choices include of course practical rationality and high intelligence in appreciating complex arguments (and disentangling their strength from their rhetorical trappings). But to those must be added also wisdom and far-sightedness, together with a sense of justice, humanity, and the courage of one's convictions (or considered preferences). (1986c, 205)

In applying law, the judge needs to possess these virtues so that they can be used when s/he is deciding between interpretations of norms. This brings us to an aspect of legal normative structures that differentiate them from other such social structures, the need to make authoritative decisions, the need to find an

authoritative way to fill the gap.<sup>62</sup>

Although the place of authority will limit the need to reason, judges have only circumscribed authority. (MacCormick 1982) They are required to justify their decisions and the scrutiny that those decisions are given means that, although outcomes can be determined conclusively by an individual judge, the judge cannot decide what is or is not a good reason for justifying that decision. This is why their pronouncements are 'discursive' as well as authoritative. (1982, 277) MacCormick argues that in discursive dialogues arguments are accepted by the authority of speaker's reason not by reason of speaker's authority.<sup>63</sup>

What then are good reasons for justifying such a decision? Clearly, judges will work within the general system of reasoning described above. They also need to work with the core value of any legal system - justice.<sup>64</sup>

Justice leads judges to treat like cases alike. This fulfils one of the basic requirements of rationality by ensuring consistency. It also means that the judges tend to universalise their decisions.<sup>65</sup> This occurs because judges have to determine what similarities between cases are to be regarded as important not just for the case before them but for future decisions as well. In the simplest cases, though:

The norms of the legal system supply a concrete conception of justice which is in ordinary circumstances - where deductive justification is sufficient in itself - sufficiently fulfilled by the application of relevant

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<sup>62</sup> Although he accepts that the context does affect legal reasoning, MacCormick does not believe that there is a separate and autonomous form of legal reasoning. (MacCormick 1993)

<sup>63</sup> The role of authority in law will be explored more fully in chapter 3 when systems with different forms of authority are considered. MacCormick borrows this terminology from Habermas and Alexy. (MacCormick 1982)

<sup>64</sup> Justice is used in two ways in this section. There is the general, formal value which requires that all normative systems be coherent and consistent and the more specific legal value which relates to a specific conception of the rule of law.

<sup>65</sup> In the new edition of *Legal Reasoning and Legal Theory*, MacCormick states that he has moved away from his early views on the centrality of universalisability of law and needs to deal more with the "particularity of practical judgement." (1994, xv)

and applicable rules according to their terms. (1986b, 73)

This view of justice is closely linked to the rule of law which requires impartial application of the rules. MacCormick maintains that in straightforward cases this occurs through deductive reasoning or the normative syllogism. This point will be considered in detail in the next section, but what should be noted here, is that MacCormick feels that, where the case is straightforward, the judge simply needs to apply deductive reasoning.

The legal system works within a generalised theory of norms but also within a generalised sense of social morality that links it to the wider society and which will help the committed participants to be committed to the legal structures and institutions. By making the focus, a person, in whom can reside a number of systems and non-rational elements, MacCormick absorbs the non-rational into his theory, explaining the emotional element, after all at root of all reason is desire. Thus, although MacCormick refers to a legal system, it should not be argued that he means a closed system.

Law, for example, has a very close relationship with the non-legal world. Judges, to justify their decisions fully, need to show that they are consistent with the non-legal world as well as with the legal system. MacCormick calls such arguments consequentialist.<sup>66</sup> These ensure that law is coherent and consistent with the judicial experience of the world as well as the judicial experience of law.<sup>67</sup>

Although MacCormick has grounded his theory in the nature of an individual it could still be argued that it remains in the field of ought, that it remains an

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<sup>66</sup> Bernard Rudden (1979) has argued that MacCormick seems to limit such arguments to their normative effect. He maintains that such arguments are used in a much wider way by the judiciary.

<sup>67</sup> More recently, (2000, 52) MacCormick argues that following comparative studies in contemporary legal systems three sorts of arguments are used in interpreting statutes and precedents, (1) arguments that deal with the meaning of the words, (2) arguments focusing on the legal context (coherence), and (3) arguments concerning justice or utility or consequences.

idealistic system. MacCormick himself accepts this and further that more is needed than reasoning, to avoid idealism he needs facts.

MacCormick argues that if it is not possible to show that such facts exist legal knowledge itself is not possible:

If there are no legal facts it is our duty to admit candidly that there are none, resign our posts and deliver ourselves to the mercy of public prosecutors, confessing freely and openly the imposture in which we have hitherto been engaged. (1986a, 96)<sup>68</sup>

Bringing facts into law creates another problem.

The embarrassment of accepting the other conclusion, that there *are* legal facts is of a different sort. It does not expose us to the charge of fraud, but to the charge of intellectual confusion. For it is an accepted truism that laws are normative, indeed that laws are norms. Yet it is equally a profound article of analytical faith that norms are *not* facts; that norms express the *sollen*, the *devoir être*, the ought to be, which must be rigorously distinguished from the *sein*, the *être*, the is. (1986a, 96)

He argues for a different sort of fact, institutional facts.<sup>69</sup> According to MacCormick facts are simply things that have an existence and about which statements can be made which can be described as true or false. Using this definition of facts, MacCormick argues that this can include the non-material:

They are facts in virtue of being statable as true statements. But what is stated is not true simply because of the condition of the material world and the causal relationships obtaining among its parts. On the contrary, it is true in virtue of an interpretation of what happens in the world, an interpretation of events in the light of human practices and normative

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<sup>68</sup> See chapter 4 for a consideration of the way in which the judiciary seek to use facts to ground their decisions in the “real” world.

<sup>69</sup> MacCormick is dependant on Searle for this concept. (MacCormick and Weinburger, 1986)

rules. (MacCormick and Weinburger 1986, 10)

Institutional facts form the foundation of legal knowledge. Such facts are identified by an act of interpretation.<sup>70</sup> This is an act that links natural events, which clearly would include social behaviour, with the norms already recognised. This means that institutional facts straddle the divide between norms and social behaviour and this places them at the core of MacCormick's normative ontology.

These facts are true or false according to a complex process that involves not simply observation but interpretation. Norms are used to interpret facts and this allows them to become institutional but, though dependent on norms, institutional facts are distinct from them.

In contemporary legal terminology, what MacCormick would identify as legal institutions are often described as legal concepts. He cites contract, ownership, trust, marriage and others as concepts which, under his theory, would be termed institutions:

Let me try to say what those concepts have in common. Most importantly, they all denote things which for legal purposes we conceive of as existing through time. (1986b, 52)

Institutions are not ideal but factual. Institutions have a starting point, an end point and consequences, all of which are regulated by rules. MacCormick calls these institutive, consequentialist and terminative rules. These rules create and regulate the institution but do not exhaust the limits of the institution.

A general institution can be created simply by legislation and law-creating rules but a particular institution is created by acts in the world that activate

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<sup>70</sup> Committed participants do not recognise all social norms as legal norms. There must be something that distinguishes legal norms from other norms. MacCormick does not deal with this point in depth, but it is likely that there is some kind of Hartian rule of recognition in operation.

the law-creating rules in specific circumstances. These particular institutions will not be exact copies of the institution created by legislation.

This flexibility is not unique to creative rules and both helps the system to achieve the goals of constancy and coherence and to regulate the nature of the relationship between people and norms. Legal norms provide reasons for action and if too precise will fail to foresee all circumstances. Norms, though, can be too flexible for if they are too imprecise they will fail to direct behaviour.

This is not left to chance instead there are recognisable limits to flexibility which MacCormick argues are ordinarily necessary and presumptively sufficient conditions.

Ordinarily necessary conditions are the conditions that, in ordinary circumstances, will ensure that rules apply. For a creative rule, they will lay down conditions in which an instance of the general institution will be created. There are, though, circumstances that legislation will not have foreseen and in some cases, even though the ordinarily necessary conditions are present, these conditions will not generate an institution. This usually occurs when a legal principle conflicts with the rules. The principle, higher in the legal structure, will then apply. MacCormick uses administrative law to show how this works in practice:

It would scarcely be an exaggeration to say that the whole of the law of judicial review of administrative action consists in the judicial elaboration and use of wide principles of law which are presented as justifying an open-ended range of implied exceptions to the expressed statutory institutive rules of administrative adjudication, decision-making and legislation. (1986b, 70)

As well as ordinarily necessary conditions, rules lay down presumptively sufficient ones:

Presumptively sufficient conditions are sufficient unless and until challenged either on points of interpretation, or by arguing for the



recognition of some new vitiating circumstances on grounds of principle. (1986b, 72)

This brings facts into line with values and MacCormick's structure of norms can thus be created as dependant not only on the nature of the individual but also from the nature of institutional facts and the rules that apply to them.

.... the necessary flexibility of the law depends upon the elaboration and acceptance of arguments from policy and from principle, we see at the same time why the concept of law cannot be tied down to being simply an institutional concept in the philosophical sense, covering simply the criteria of validity and the rules valid in terms of them. .... The legal principles are the meeting point of rules and values. (1986b, 73)

MacCormick's theory keeps returning to boundary points, this is perhaps inevitable with his concern to avoid extremes and his interest in hermeneutics which in itself deals with boundary points. This concentration continues with his defence of the deductive syllogism which is the boundary between facts and law which for MacCormick is at the core of legal reasoning. It deals with the moment when the judge has to make and justify his/her decision.

### 3.1 The deductive syllogism

The deductive syllogism is only one part of MacCormick's theory of legal reasoning but it is for his defence of the normative syllogism that he is perhaps best known. In *Legal Reasoning and Legal Theory* (1994) he places it at the centre of legal theory which he describes thus:

It accounts for legal reasoning as one branch of practical reasoning, which is the application by humans of their reason to decide how it is right to conduct themselves in situations of choice. It expresses a simple, widely denied, but essentially sound idea. The idea is that the process of applying rules is central to legal activity and that studying the rational structure of this process is central for explaining the character of legal reasoning as a branch of practical reasoning. Despite recurrent denials by learned persons that law allows scope for deductive reasoning, or even for logic at all, this book stands foursquare for the

idea that a form of deductive reasoning is central to reasoning. (1994, ix).

The deductive syllogism is, therefore, central to all normative reasoning and not just legal reasoning. It sits at the point of contact between the norm and the world outside the norm. It has particular significance in the legal context because it is linked to the process of justification:

... logic does not determine what we decide to do or say; it determines only the relation between the content of our sayings - what do they entail, are they self-contradictory, or tautological or whatever? Logic concerns not what we can say, but what we can justifiably say, given respect for a certain very basic form of rationality in discourse. (1992a, 218)

MacCormick is suggesting that if our reasoning is to be rational it must be justified according to a form of logic. Many aspects of this logic have been seen in the discussion of his view of legal reasoning above and include consistency and coherence. At its core, though, reasoning that uses norms will apply the deductive syllogism. It is the simplest way of applying rules and is, logically, the most convincing form. Even in cases of legal reasoning where the structure is not immediately present it can still be found:

Thus a rational reconstruction of the reasoning in a strictly deductive form is well adapted to showing why it is compelling, even though the informal presentation is more elegant and persuasive rhetorically. (1992b, 184)<sup>71</sup>

At its most basic, MacCormick defines the deductive syllogism thus:<sup>72</sup>

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<sup>71</sup> See chapter 3 for a similar point made in considering Aristotle's *Rhetoric*.

<sup>72</sup> MacCormick's definition of the syllogism has evolved over the years from its first appearance in *Legal Reasoning and Legal Theory*. The version portrayed here is that which comes from his more recent articles in the *International Journal of Semiotics* (MacCormick 1992a and MacCormick 1992b) in which he carried on his most recent debate with Jackson (1992). This version is much more complicated than the original. In the most recent edition of *Legal Reasoning and Legal Theory*, MacCormick accepts that his original description of the deductive syllogism was too simple. In fairness to MacCormick this could be seen as a development of his general theory rather than a

you postulate a general hypothetical rule, you establish facts in a particular case subsumable within the rule's hypothesis, and you draw the logical conclusion for the particular case from rule plus facts. (1992b, 182)

This makes deduction appear simple but the process of generating statements to fit into the deductive syllogism also has to be considered:

Certainly, my thesis is only that once certain information is supplied, the process of reasoning with that information is a deductive one. That it is supplied by a process involving judgement does not entail that it lacks truth-value as supplied, or therefore that it cannot form a premise or premises of deductive reasoning. Moreover, even information about "brute facts" requires a process of determination or judgement to supply it. It does not follow that the information-providing function requires its own justification, and that this justification cannot itself be wholly (or, in some cases, at all) deductive. But that is perfectly compatible with my thesis that legal reasoning can be and always is in part deductive. (1992b, 194)

Deduction happens after information finding, evaluation, interpretation and other forms of legal reasoning. This complex process of reasoning that precedes the syllogism and that ends by providing predicates that can be used as major and minor premises. (1992a) These premises are predicates and legal reasoning can be distinguished from other forms of deductive reasoning because it only admits four types of predicate as premises; descriptive,

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departure. Though he argues that the deductive syllogism is central he has always seen it as part of a wider structure and the development of his theory that is seen in the *International Journal of the Semiotics of Law* does fit the syllogism into this structure much more closely.

descriptive-interpretative, evaluative and normative. The major premise will generally consist of a normative predicate and state a legal rule. The minor syllogism will generally consist of a number of premises and will be of the other three forms of predicates. The simple case, where all that is needed is a deductive justification, appears to be an impossibility.

Jackson argues that MacCormick's places the normative syllogism at the heart of his legal theory because he believes in a very specific conception of the rule of law:

that legal decisions are justified insofar as they conform to the rule of law as the (deductive) application of rules to facts. But to this, there are two major types of objection: the first, that the deductive syllogism, as applied to the judicial application of law, cannot in fact justify in terms of the ideal of the rule of law; the second, that there are alternative, perhaps preferable, models of the justification of the judicial decision, which are suggested in part by MacCormick's own work elsewhere. (Jackson 1992, 211)

Jackson maintains that MacCormick is mistaken in seeing the rule of law, the impartial application of law to facts, as the only possible form of justification and further that even if the rule of law was accepted that the deductive syllogism can not fulfil its requirements.

This latter point is central to the argument between Jackson and MacCormick and is based on Jackson's rejection of reference. In rejecting reference, Jackson accepts that language does not refer to objects outside of itself. The syllogism, though, requires reference for it to fulfil the requirements of the rule of law. The problem is a temporal one. The rule of law requires predictability. The application of a law must be determined in advance if it is to fulfil its behaviour-guiding function but the relationship between the major and minor premise in the syllogism is a-temporal. In order for the minor premise to be valid it needs to be intended by the major premise but the major (normative) premise cannot refer to a minor (factual) premise that has not yet

occurred. It cannot predict that a certain set of facts will be interpreted in this way.

Jackson does not totally exclude the syllogism from legal reasoning, it may have a place in doctrine where it could be a-temporal, but he strongly argues that it has no place in adjudication.<sup>73</sup>

In replying to Jackson, MacCormick agrees that his view of reasoning is linked to his view of the rule of law:

The Rule of Law, with all that it entails in terms of stability of expectations, *Rechtssicherheit*, and the rest of it, require that prosecutors, police and citizens at large direct their interferences in other people's lives to the prosecution of wrongs and the vindication of rights pre-established through the system on some reasonable interpretation of it, and above all that the judges who decide upon charges laid and claims made relate these rigorously to the rules of the system so understood. (1992a, 222)

Elsewhere he has described this as providing an ethical basis to law, and in accepting this, the normative syllogism becomes inevitable:

This leads to a normative conception of justification of decisions. On the given understanding of law and legal system, a decision is justifiable only if it is supported by a well-grounded proposition of law, at least stating a general principle but preferably a more concrete rule, and if facts can be proven or otherwise established so as relevantly to connect the decision to the legal proposition. The deductive model of justification is reconstruction of justificatory argumentation which exhibits with particular clarity the connections between the law, the facts and the conclusion that the decision proposed is the right one, that

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<sup>73</sup> Jackson makes a related point on Jewish law which he argues is not a unified system though it is often taught as if there were one: "Intellectual unity, at the level of human doctrine is required, even while it may be inappropriate for divine epistemology on the one hand, and human adjudication on the other." (1989, 32)

which legally ought to be handed down. The deductive element in justification is thus indeed central to it. (MacCormick 1992a, 223)

MacCormick feels that the problems that Jackson has with reference simply do not exist:

... it is claimed that I fatally overlook the distinction in both cases between abstract theory and particular application. I do not think this is sound as an objection. Nobody doubts that logical relations obtain among abstract theological propositions. But there is simply no reason to suppose that logic ceases to be applicable the moment that we move from abstract law-like universals to the deictic sentences of particularly-referring statement of fact, the statements that establish instantiation here now of a relevant universal. Applied engineering discourse can be illuminatingly reconstructed in those terms, and so can the discourse of law-application. There is no need to repeat this. (MacCormick 1992a, 220)

MacCormick and Jackson are working within profoundly different paradigms of thought. MacCormick, despite bringing complexity into the old structures by turning to hermeneutics and institutional facts, remains within a paradigm of thought that is recognisably that of twentieth century positivists from Kelsen to Hart. Jackson has turned away from this structure and into semiotics. All the criticisms that Jackson makes of MacCormick and indeed that MacCormick makes of Jackson relate to this fundamental difference. Jackson does though identify the ethical element in MacCormick's work which he has explored in more detail recently.

### 3.2 Law and ethics

Neil MacCormick's work has evolved over time and generally been set out in a series of essays. This means that it can be difficult to set out his definitive views. For example, the study of normative reasoning based on institutional law above suggests that he sees law as almost a natural part of human nature

and that his study is purely descriptive but when considering the ethics of law he states:

There ought to be a descriptive science of law which describes and rationally reconstructs the legal order as (in the sense indicated) an order distinct from that of ideal morality or political ideals. But the order so rationally reconstructed should not be represented as a predetermined necessity which exists wholly independently of the descriptive science. Perhaps even more than usually, here is indeed a science which constitutes its own object. (1989, 189)

What does this mean for his own reconstruction of law as an institutional order? MacCormick maintains that that representations of law have political effects and these effects come from their nature:<sup>74</sup>

The kind of object which law is or law are, ... is that of "thought objects," or "ideal objects" .... In a significant sense, they exist by being believed in, rather than being believed in by virtue of their existence. Theories therefore do not stand or fall on the issue of their independent existence or non existence. We have to ask: *Should* they then be believed in and brought into existence by our beliefs? (1989, 191)

This does not contradict his own reconstruction. After all it is based on the way in which human beings interpret the world, but it does raise the question why should the committed participant be committed.

MacCormick's support of the rule of law is his answer to this question:

The point of law is to generate adequate determinacy in practical discourse in community or polity. . . . The ethics of legalism as I propound them are simply a restatement of well known versions on the case for the Rule of Law as a moral and political value. For me as for Lon Fuller this crucially involves subjecting human conduct to the "governance of rules" and these rules count for the ethical purposes in

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<sup>74</sup> See Peters (1997) who seeks to justify judicial decision-making by showing its participative and democratic nature.

issue only if they combine clarity with generality, constancy over time with coherence in time .... (1989, 188)

In reconstructing law he is seeking to show why the committed participant should be committed nor does he forget the need to avoid both idealism and reductivism:

... legalism does not have to postulate the existence of a world of reportable rules absolutely independent of the activity of reporting them. Legislation, judicial precedents and doctrinal ("dogmatic") writings about the legislation and the precedents and the general background theories thereof are all part of the legal world, and none is comprehensible or perhaps even imaginable apart from the others. Legal certainty and clarity are systemic virtues which certain approaches to each of the relevant activities can help to generate. Reconstructions of law which are its *rational* reconstructions generate in a high degree law with these virtues. The ethics of legalism are the principles and values which advocate and commend us to those elements in the professional and academic tradition which promote them. (1989, 192)

This suggests MacCormick is undertaking a form of epideictic rhetoric to reinforce the values of the rule of law and the audience to whom he is speaking is a doctrinal one. A reconstruction of law to generate these rational virtues may well be different in a judge and this may be why he refers to the difference between rhetorical and logical forms of persuasion when discussing the normative syllogism.<sup>75</sup> The more persuasive form may be more appropriate for a more general audience but this would not rule out a logical reconstruction for a scientific purpose. This would not be simply for the purpose of scoring point in academic discourse as for MacCormick all of these help to generate an atmosphere in which the rule of law is accepted and his reconstructions are simply one part of that. By showing law as logical and rational he is helping to support judges who argue that their decisions are not

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<sup>75</sup> Such a difference is explored in Aristotle's work and is set out below.



simply the result of personal whim or prejudice.

#### 4. Conclusion

MacCormick's ethical turn helps to save his theory from appearing to be simply a reconstruction of traditional legal theories. It also allows the theorist to appear within the theory and sets out clearly the gap between him and the material he is describing. MacCormick does not set himself out to be distant from the material instead he defines himself as a committed participant, he is one for whom the law has a normative force and his structure is an attempt to justify it to a philosophical or theoretical audience. Specifically, he wishes to protect law against the charge that it is subjective, to protect the rule of law. He does so by showing the structures of reasoning that surround law. This, to an extent, undermines his argument that it is possible to cognitively understand law while remaining uncommitted to its basic tenets. It could be argued that this does not commit him to any specific law but rather to law as structure. It is certainly true that not any content could be fitted into this structure though Perelman does point to the danger of arguing with those who espouse extremist views, MacCormick does not see the danger of using these tools to legitimate and justify law in the absence of any way of assessing the individual laws and people who apply them. Yet MacCormick requires judges to have virtues. The virtues that MacCormick is committed to - consistency and impartiality reveal him to be at heart still a philosopher. These are philosophical rather than theoretical goals and perhaps suggest that beyond the structures of law it is a philosopher who is allowed to judge.

## Conclusion

As philosophers all three theorists are seeking to satisfy Perelman's audience of all reasonable beings and to be convincing. Their commitment to this philosophical goal is revealed in the tendency of all three to start with definitions of human nature, to try and describe their theory in universal terms, and in their preference for structural models. In doing so they are describing not only law but how the phenomena that they define as law can be translated or reunderstood in a philosophically acceptable manner. This means that they are subject to the problems and concerns of contemporary philosophy and in seeking to solve these they find it difficult to comprehend areas of legal reasoning, such as judicial decision-making which deal not with conviction but persuasion.

In this context persuasion is being used to refer to the way in which a judge demonstrates his/her commitment to the law and seeks to persuade others in an individual decision that his/her reasoning is legally and not philosophically acceptable. Perelman's description of the context within which a judge must make that decision is the most successful but he does not take the opportunity to explore this in any detail. Jackson's theory could be used to explain why certain arguments make sense semiotically but he does not seek to detail the pragmatic structures which would make that legally meaningful. MacCormick shows how his theory could be used to justify law but not why this would make sense in a legal context. In seeking to be philosophically acceptable all three lose sight of the need for a judge to produce arguments that will be acceptable to the legal system within which s/he operates.

All three do though place a person at the heart of the structure but this person is less a participant in the system than a construct of that system which is used to fill in certain gaps, usually to prevent the problems of infinite regress. MacCormick is perhaps the most radical in his reconstruction of the law in a philosophically acceptable manner as ultimately he steps into the gap that is the committed participant and fills it with a philosopher. His commitment as

such to a view of law as structural and strongly rooted in a definition of human nature as reasonable is understandable but does it explain the actual committed participant, the judge? Jackson's man of integrity performs a similar role and again it is a philosophical or academic person whom Jackson uses to ground his theory. Lawyers and judges appear to be trapped in their own discourse and to be legally acceptable must simply apply its semiotic rules. Perelman does use the judge but again this is an attempt to fulfil a gap in his own system rather than to fully understand the way in which a judge relates to a specific system or structure of law.

The chapter that follows seeks to develop a theory that can explain why and how a judge generates legally acceptable arguments. It tries to take a different approach from these theorists by avoiding the tendency to universalise and abstract from the law and instead uses the details of two models of reasoning in practice. It concentrates on areas of law which, though recognised by one or more of the theorists at times as important, are usually not fully explored, this includes the role of authority and compulsion in the system and the way in which character and identity or role are constructed within the system. Issues that have arisen in this chapter concerning the nature of philosophical arguments and how this can be understood in relation to judgment will be considered in chapter 5.

## Chapter 3

### Historical studies

The aim of this thesis is to understand the role persuasion plays in the judicial decision. It is thus concerned with the methods judges use to legitimate and ground their decisions. This relates persuasion to the perceptions individuals have of their place in the legal system. In the last chapter it was shown that legal theory often has problems with dealing with real people.

This chapter uses two studies of law and judicial decision-making in very different contexts to provide a more complex awareness of the experience of the individual who makes decisions in a judicial area. This is then used in chapter 4 to provide a framework for an analysis of judicial decision-making by common law judges.

The *Talmud* is a series of volumes which structures the concerns of a whole culture around a legal text. Aristotle's work on rhetoric, the *Ars Rhetorica*<sup>1</sup> attempts to provide a theoretical understanding of the place of rhetoric within Athenian society.

In exploring these very different subjects this chapter both reveals how traditional reasoning can be used to provide an individual with access to authority by allowing him to hide his particularity and how, where the particularity of an individual is all important, the relationship between emotions and character can play a decisive role.

It begins by considering the *Talmud* which as the core text of Rabbinic Judaism<sup>2</sup> is an example of traditional reasoning both in the way it structures

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<sup>1</sup> *Rhetoric* in italics is used to refer to this work

<sup>2</sup> Rabbinic Judaism was the dominant form of Judaism for nearly a millennium from the fifth or sixth century CE to the eighteenth century. As well as including many aspects of the Judaisms that preceded it, it is influential in the contemporary Judaisms who define

the relationships of its readers and in the way they relate to the text. It considers the way this structure generates acceptable and authoritative legal rulings in the absence of any state structures to enforce those rulings.<sup>3</sup>

The *Rhetoric* contains Aristotle's attempts to both understand this important social phenomena and provide his students with the skills required to be persuasive in Athens numerous public forums where citizenship both required participation and centred around public speaking. Athenian democracy provided a strong state structure but one within which all could be said and no one individual could gain authority without persuading others to follow him.<sup>4</sup>

The chapter concludes by considering the relationship between the two studies and showing how this exploration can provide a useful supplement to legal theory and generate the methodology for the study of the common law in the next chapter.

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themselves in relation to it. It is therefore suitable when a representative form is sought. It should be remembered, though, that it is not an exclusive representative of Jewish thought and equally that, although still influential, that it is an historic form of Judaism. For more information on contemporary forms of Judaism see Jacob Neusner (1995)

<sup>3</sup> This is an absence caused by external factors. The *Talmud* itself contains the details of a complicated court structure complete with hierarchy. It can though survive without this structure. It should though not be forgotten that its authors would prefer it to be part of a state sponsored legal system.

<sup>4</sup> The original bias in these texts which dealt with woman but did not see them as active participants and spoke only to men will be reflected in the language used in this chapter.

## The *Talmud*<sup>5</sup>

The *Talmud* reveals the structure of traditional reasoning which evolved to generate authoritative interpretation of the laws within this context. To do so it had to ensure that its methodology was both grounded and compellable in the absence of state imposed sanctions. This introduction briefly describes the text itself and then the traditional structure within it. In this the main themes of identity, responsibility and character which will be explored in more detail in the sections which follow are set out.

### 1. The *Talmud* - an introduction<sup>6</sup>

The *Talmud* is not a single book but a series of volumes:

The *Talmud* is not a book, it is a literature. It contains a legal code, a system of ethics, a body of ritual customs, poetical passages, prayers, histories, facts of science and medicine, and fancies of folklore.  
(Abrahams 1975, 17)

The problem the *Talmud* sets out to solve is a complex one. From the earliest days laws were central to the identity of the Jewish people and their religious life. These laws were regarded as divinely given but included reasons which allowed future generations to adapt them to new circumstances. When the monarchy existed there was a single authority which could issue authoritative rulings on the adaptation of these laws, however, conquest after conquest destroyed not only the monarchy but the courts and religious structures and institutions. This meant that no one group could rely on power to enforce their

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<sup>5</sup> There are two *Talmuds*, one of which was produced in Palestine and one in Babylon. The *Babylonian Talmud* is more developed than the Palestinian and is referred to simply as the *Talmud*.

<sup>6</sup> I am using the 1948 Epstein translation of the *Talmud*. The letter T before the tractate name will identify quotes from the *Talmud*. Quotes from the *Mishnah* will be cited simply by tractate name and, unless stated otherwise, will come from the Neusner translation (1988). I am not using the translation of the *Mishnah* in the Epstein translation to try and recreate better the sense of these being texts in different languages and idioms. Biblical quotes come from the Jewish Publication Society's translation of the *Tanakh* (1985).

interpretation and the expulsion of the community from Palestine meant that they had lost even the link of proximity. Paradoxically this increased the importance of the laws, religion and education, as these were all institutions which could move with the people. The *Talmud* needed to provide for the authoritative development of laws without a state or other authority to impose interpretations. This was made easier by its own history as part of the oral torah.<sup>7</sup>

The word *Talmud* itself means teaching or study and it combines the text of the *Mishnah* – a law code - with commentary or *Gemara*. For Rabbinic Judaism it is the central part of the oral torah. The oral torah consists of texts which have the status of the written torah, the Bible, and are regarded as holy works but which unlike the written torah form part of a living tradition to which each generation is expected to add and was first transmitted in oral form.

The *Talmud* is only part of this oral tradition and was collected and compiled over six centuries by generations of scholars.<sup>8</sup> The first known as the *tannaim* or teachers compiled the core text - the *Mishnah* (from the word *shanah* meaning to repeat completed c. 200 CE) and later generations known as the *amoraim* (commentators) added to this by a series of debates and arguments based on the text. (220 CE to the end of the fifth century CE) The final generation the *savoraim* (sixth century) or thinkers added the debates to the text of the *Mishnah*. They did so by physically combining the debate to the text, if you look at a page of the *Talmud* in the middle lies a section in Hebrew. That is the *Mishnah*. The commentary or *Gemara* is in Aramaic and physically surrounds it in on the page and sometimes continues for many pages. The names given to the generations is telling and describes a decline in the authority of the scholars. The first generations could set out definitive

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<sup>7</sup> See Neusner (1985) for a full analysis of the complexities of this term and the way it was understood at this time.

<sup>8</sup> See Stemberger (1996) and Lifschitz (1996) for an introduction to the history of these texts. Segal (1996) deals with the early period.

teachings - later generations could only add to this using the reasoning of the teachers as a starting point and thus absorbing some of their authority.<sup>9</sup>

The *Mishnah*<sup>10</sup> the core of the *Talmud* and from which later generations derived authority comprises a series of tractates<sup>11</sup> on various aspects of Jewish law. It is a very simple text consisting of code-like statements of laws and is a summary of the attempts of generations of scholars and judges to apply and adapt the laws written in the Bible. It was the first part of the oral torah to be written in an authoritative form after a revolt against Roman occupation led to a massacre of scholars leaving the original oral system of transmission in tatters. It became the law code for the community under the Patriarchate. Having achieved written form the interpretation of the oral torah itself became the focus for future legal development and interpretation and despite the range of literature contained within it, the *Talmud* remains a work of interpretation<sup>12</sup> of laws and primarily its authors were jurists whose core concern remained the application of the basic code:

The Talmud is a commentary written by philosopher-lawyers, men of extraordinary power to explain and amplify legal words and phrases, to generalize about rules, to theorise about matters of law as about mathematics. The reason that the sages deemed it urgent to do so, and with such extraordinary vigour and energy, must surely be that the document in hand, the *Mishnah* was the authoritative code for their courts. (Neusner 1991, 67)

Yet, although the roots of the *Talmud* and its complex legal structure lie in its use in courts at times the laws it contains needed to be applied where there were no courts or those courts had no power beyond social pressure, as

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<sup>9</sup> The system of precedent absorbs authority in a similar way - see chapter 4 below.

<sup>10</sup> See Goldberg (1987) for a detailed introduction to this text and an exploration of its historical context.

<sup>11</sup> Tractate simply means treatise and is the name generally used for sections of the *Mishnah*. The *Mishnah* is divided into six main sections; *sedarim* lit. orders. These are divided into 63 subsections; *massektot* literally texts or tractates.

<sup>12</sup> "Interpretation" is a term which has been the subject of much discussion (see Marmor 1995) in this context it is being used to refer to a form of reasoning which is based on an authoritative text.



Menachem Elon states at the start of his monumental study of Jewish law:

Not only did the Jewish legal system not shrivel and die in the absence of a homeland, but its most vigorous development occurred during the period where the people were widely scattered throughout the diaspora. (Elon 1994, 2)

It is the ability of the *Talmud* to remain persuasive and to develop in these circumstances that is at the core of its significance for a study of persuasive reasoning. It did so primarily by creating a traditional system of law and legal reasoning that was built on a strong sense of individual responsibility for the laws. Although no individual had authority the *Talmud* creates a space where an individual can, by showing the correct character and virtues and by applying rules, make authoritative rulings that will be accepted by the community.

### 1.1 The *Talmud*'s traditional structure

The roots of this tradition predate the *Talmud* and evolved as the interpretation of laws became problematic in times when there was no central authority. The biblical codes themselves were written down in an authoritative form following the loss of state structures and the collapse of the monarchy in the Babylonian conquest of 587 BCE and it is from this time that the oral torah itself evolved as a way of coping with problems in that text.

A nation thirsting for unity could not tolerate divergences in religious behaviour. It was crucial that unequivocal and binding instructions be given. At the same time, craving continuity, the nation would not tolerate editorial tampering with the texts of its inheritance, even if these texts diverged from the binding instructions of the leadership. Therefore, the several textual strands – gathered from the various quarters in which they were considered holy – were preserved, each in its own peculiar form, even as corrective instructions were issued to smooth the textual differences. .... Uniformity of practice and a sense of common inheritance, embracing all groups despite textual

divergences caused by dissimilar histories – these were the guiding concerns of Ezra's canonisation. Ezra's work retained the people's torah even if that meant canonising a given law in two or more divergent forms. Such occasional inconsistencies were overcome through oral instruction, fostering unity while preserving holy writ intact. (Halivni 1998, 201)<sup>13</sup>

As has been pointed out the *Mishnah* was also redacted in response to a crisis and ultimately the *Talmud* was compiled at the end of a long period of persecution and coincides with the start of the diaspora. There is thus a direct link between the importance of the text to the people's identity and the need to issue authoritative interpretations. This is a circular structure as in turn the tradition within the *Talmud* creates the identity of the people.

The *Talmud* is founded on a system of education which transmits knowledge and authority by a series of hierarchical and historical relationships and it is primarily this which defines it as traditional. The dominant relationship is that between teacher and disciple.<sup>14</sup> This relationship is designed to make each subsequent generation of scholars feel bound by the one that came before and also provides a basic stability to the structure as in such a system rapid changes are unlikely. Thus although the structure is circular its roots lie not in the current but previous generations and this prevents it from appearing too obviously tautological. Indeed one of the strengths of this structure is its ability to hide its dependence on the consent of the community. The teacher/disciple relationship was not limited to talmudic scholars as all male members of the community were educated within the same system. This ensured that the system of reasoning used to generate authoritative rulings of law was understood and accepted by the wider community. This combination

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<sup>13</sup> Guttman (1970) shows how the Ezran reforms fit into the history of Rabbinic Judaism. See Cohen (1937, XX) for a discussion of the traditions associated with Ezra and Westbrook (1996) for a discussion of the history of biblical law and the role of Ezra within this.

<sup>14</sup> This is not the same as a teacher/pupil relationship as it implies a much stronger sense of submission to the teacher.

of a hierarchical structure which encourages incremental rather than radical change, where knowledge is passed down in a way where authority is retained by teachers and a community where all have a place within this system of transmission provides a way of ensuring the current generation of the community consent to the application and interpretation of laws while hiding the extent to which the structure is based on that consent.

The relationships set up by the system of education impact on the individual's own sense of identity and create a sense of responsibility for the laws throughout the community. The *Talmud* itself impacts on these levels of context by giving itself a religious history and ensuring that to be understood it requires external information and therefore cannot be completely decontextualised. These structures, traditional and textual, increase the likelihood that the interpretations of the *Talmud* will be persuasive by directly affecting the context within which they will be heard.

The structures of reasoning themselves impose further limitations and rules of interpretation are then used to ensure both structure and a consistency to reasoning. They limit what can be said and ensure that scholars will present their interpretations in a standard manner, this makes them appear less partial and more likely to seem like a logical outcome from the text and almost automatic.

It is the subtle interaction of all of these factors that ensured that the *Talmud* remains a highly influential and persuasive text for those who believe in its fundamental precepts. It also provides a very dense model of legal reasoning in an environment without a state structure.

This study concentrates on the aspects which generate this persuasive structure. Under the heading creating a tradition it considers identity, responsibility and relationships. Then, under the heading content of a tradition, it looks at the way memory and the dominance of the particular help to both teach and hide the individual's approach to reasoning. In the

conclusion this structure will be compared with Aristotle's understanding of persuasion within the Athenian legal system and be used to generate a complex understanding of the role of persuasion with law.

## 2. Creating a tradition

The *Talmud* is part of a tradition that forms the communities sense of its own identity. This section considers aspects of this which can be seen in the text itself. It starts with the nature of the laws which impact on every aspect of life and specifically on aspects of life that set the community apart, before showing how all members of the community are encouraged to take responsibility for the application and development of these laws and finally describing how their relationship to these laws are constrained by a system of education which seeks to generate not only a system of reasoning but the character of each member of the community.

### 2.1 Identity<sup>15</sup>

From the earliest times laws were to play a definitive role for the community. The earliest law codes are contained in the *Pentateuch*<sup>16</sup> and contain both laws which were "natural" and covered all humanity and specific laws which related to the ways in which the community defined themselves as separate this included the mosaic laws which defined clean and unclean but also dealt with clothing and with religious imagery.<sup>17</sup> Bernard Jackson has suggested that:

It is these dimensions of sense construction – the construction of the sacred through the dimensions of loyalty, visual images, body language,

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<sup>15</sup> For reasons of clarity identity in this thesis will be used primarily to denote an individual's own awareness of themselves whereas character will be used for the way in which that identity is seen by others and is a mediated version of identity.

<sup>16</sup> See Cambridge Companion to the Bible for a more detailed analysis of the *Pentateuch* (Klee et al, 1997) and Westbrook (1996) and Walzer (1989) for an introduction to the codes themselves. Walzer considers the importance of the reasoning style within the codes.

<sup>17</sup> Holiness in Jewish culture implies separation of the clean and the unclean, as such it can be applied to any area where discernment or choice is possible.

smell, taste, speech and time – which the Bible here views as constituting the particular identity of the people of Israel, rather than its ethical teaching. (1995, 191)

Law then was central to the way people looked, ate and interacted with each other. It is this that set the people apart. The importance of the laws to identity led to a stress on the practical application of the laws. Indeed, the *Talmud* makes it clear that the practical implications of commandments are much more significant than the theoretical ones:

R. Eleazar said: When the Israelites gave precedent to *we will do* over *we will hearken* a heavenly voice went forth and exclaimed to them, who revealed to my children this secret, which is employed by the Ministering Angels (*T Shabbat* 88a)

The *Talmud* expands the laws of the Bible by emphasising rules that bring the practical elements into everyday life and further strengthening their importance. The altar in this vision of Israel, is identified as much with the kitchen table, as with the temple. In Jackson's terms it extends the limits of sense construction, every aspect of life is now used to define and separate the community. This was to prove its strength when the laws needed to be applied following a loss of institutions which occurred at the time of the compilation of this material and would previously have provided additional support to the communities sense of its own identity.

The *Talmud* is divided into six orders<sup>18</sup> - 1 Seeds, agricultural law relevant only to the holy land of Israel; 2 Festival days which regulates behaviour on the sabbath and other holy days and gives the community a calendar which defines time as separate from that of the seasons; 3 Women, which includes family law and succession; 4 Damages which deals with civil law, criminal

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<sup>18</sup> Stemberger (1996, 109-114) sets out the structure of the *Mishnah* and considers whether the structures were original and whether any structuring principle can be seen. I have used his translation for the title of the six orders.

law and procedure;<sup>19</sup> 5 Holy things, the law relating to temple dues; 6 Purities, laws relating to the purity of persons, things and places (including the best known laws which limit what can be eaten).

The laws do not only regulate every day life but are strongly linked to the religious life of the community and retain an aspirational quality. This can be particularly seen if the law code, the *Mishnah* is briefly considered as a separate text. The *Mishnah* is a-historical. Everything is expressed in the present tense. Individual events, however dramatic, are not significant. History is only considered when there appear to be patterns emerging.<sup>20</sup> This is particularly notable because of the time of its compilation. The *Mishnah* is the most important work produced in the aftermath of a disastrous attempt to overthrow the Roman occupation, yet it ignores it completely. In the midst of what must have been a chaotic situation, it portrays a motionless, perfect Israel.<sup>21</sup> This Israel clearly did not exist but what is implicit in the *Mishnah* is the responsibility of those who accepts its precepts to bring this world about.

... the God of Israel acts and wills only in reaction to the action and intention of his Israelite partner on the Land. ... As in the time of the Temple, then, God remains Lord of the Land of Israel and owner of its fruits. But when His Temple no longer stands and His Land has been defiled, His status as Lord depends upon the action of His remaining people. ... Those who impose upon themselves the task of reconstructing the human and social fabric of Israelite life make effective the holiness of the Land and make real the claims of its God.

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<sup>19</sup> This includes details of the court structures as well as substantive law.

<sup>20</sup> E.g. *Sotah* 9:15 There is a list of important sages, each of their deaths corresponds to a loss i.e. "When R. Meir died makers of parables came to an end. When Ben Azzai died diligent students came to an end. When Ben Zoma died exegetes came to an end." The list goes down the generations showing a gradual decline in holiness. This is therefore not a historical pattern but a spiritual one.

<sup>21</sup> This interpretation of the laws in the *Mishnah* is heavily dependant on Neusner who points out that though the text is based on a tradition the structure of the *Mishnah* itself is anti-traditional in founding everything in an eternal present. (1989) It also does not put forward a conservative picture, it is a contemporary book this is demonstrated in its use not of Biblical but contemporary Hebrew and its reference to Rabbis from the most recent generation of scholars as the primary authorities.

(Neusner 1989, 174)<sup>22</sup>

This combination of laws which regulate everyday experience alongside moral and religious elements are a powerful source of identity in that they dictate how the community sees itself, its sense of time and place the way in which it becomes visible not only to itself but to others. By setting the people apart it allows them to define and describe themselves. The *Talmud* further embeds itself within the community by also ensuring that all feel responsible individually for the system.

## 2.2 Responsibility

It has already been stated that in the structure of the *Mishnah* is rooted the idea that the community is responsible for creating the world described in the laws, as well as following rules which define them as separate. This responsibility is extended down to each individual member.

The *Talmud* itself describes the moment when all individual members of the community became responsible for the law. It relates the biblical story of the entrance by the people into the land promised by God to Moses.<sup>23</sup> The people, which included woman and foreigners, all face each other and accept the law.<sup>24</sup> The *Talmud* takes this story and makes a complex series of calculations to find exactly how responsible every individual was for each law. It describes how for each commandment there was a curse and a blessing, a positive obligation to obey the command and a negative one not to breach it. It goes

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<sup>22</sup> In his essay on the oral torah, Safrai (1987) deals with conflicts that arose when the *Mishnah* was written.

<sup>23</sup> The biblical source text is in *Joshua* (*Jos* 8:30). Moses is portrayed in *Deuteronomy* (*Deut* 27:11) telling the people that they must perform this ceremony once they have entered the promised land and this is the fulfillment of that command. This is therefore linked to the Deuteronomic code and to the founding of the Jewish state. It is in accepting the law in the land that the state is founded.

<sup>24</sup> This is not portrayed as God giving the law (and each time God gave the law there were different codes). Instead this is portrayed as in obedience to a command without God having to intervene and this perhaps explains why it is this giving that is associated with responsibility.

further and argues that for each command there was a general and a particular form of obligation and four distinct duties, to learn, teach, observe and do. This comes to sixteen duties and aspects to each law and as they were given not once but three times during the wandering this equals 48. One Rabbi goes further and argues that there were 48 times 603,550 commandments made and accepted:

it follows that for each Israelite there are 603,550 commandments. What is the issue between them - R. Mesharsheya said: The point between them is that of personal responsibility and responsibility for others. (*T.Sotah* 37b)

Emmanuel Levinas has said:

The real meaning of this apparently particular ceremony performed by a people whose members can all look upon one another, a community which one gaze can encompass is that all human beings are included in the legislation in whose name the pact is concluded. (1989, 217)<sup>25</sup>

The individual is responsible not only for their own obedience but for the others and indeed it is this shared responsibility under the law which binds the community together.

in the society which fully deploys all the dimensions of the Law, society becomes a community. (1989, 226)

The community then is defined by the acceptance of the individual member for the laws which in turn define the community and, given the nature of the laws, the way the individual relates to others within that community and the world. The sense of responsibility for not only one's own but others submission to the laws helped to generate social sanctions which applied even where the community had no formal court structures and a sense of

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<sup>25</sup> Levinas (1989) points out that the question in the *Mishnah* that prompts this *Gemara* has to do with the correct language to be used in matters of ritual. This example is used because as foreigners were present during this recovenanting it was believed that all 70 known languages were used. Levinas interprets this as meaning that the responsibility extends beyond Judaism and to all humanity.



disapproval within the individual themselves, they are encouraged to use these as standards to judge their own behaviour.

This responsibility extends not only to the laws as they are but to ensuring that they remain relevant to the community. This can be seen in the description of a similar moment of acceptance of the biblical Deuteronomic code. Moses is portrayed reading the laws to the people before they enter the new land. These laws are described as those given to the previous generation who left Egypt. Moses makes it clear to those present that these laws are the responsibility of not just one generation:

The LORD our God made a covenant with us at Horeb. It was not with our fathers that the LORD made this covenant, but with us, the living, every one of us who is here today. (*Deut. 5:2-3*)<sup>26</sup>

It is notable that the laws Moses gives, although similar to and clearly a version of the earlier laws contained in the Covenant code also in the Bible, are not the same as the earlier laws. They have been expanded and adapted to better suit life in a state whereas the earlier laws were more concerned with a nomadic existence. These are laws which though seen as identical have been adapted to the new context. This point, that responsibility for the law lies with the current community and that the law can be reunderstood for each new context is emphasised frequently within the *Talmud*. A phrase often used to express this is that on the one hand, it is a basic article of faith that “the Torah is *from* Heaven”; and on the other, it is also a basic principle that “the Torah is not *in* Heaven.” The source of the law is heaven, but the place of the law and its life and development, are not in heaven but in human society. (Elon 1994, 242) This helps to extend the responsibility not just for the current laws but for its future development to all members of society.

Although these laws which generate a sense of communal identity and individual responsibility allow the law to be fully grounded it does create a

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<sup>26</sup> Note that in this version Moses says he received the laws at Horeb not Sinai.

problem that can be seen when the court structure, which generated definitive rulings and which had been supported by successive imperial rulers, collapsed.<sup>27</sup> Shortly thereafter the schools of Hillel and Shammai, two rival schools with rival interpretations of law, appear. To begin with this plurality was tolerated but, over time, it became clear that it was unsustainable. It was particularly difficult when the two groups diverged on practical matters and there were dire warnings about what would happen if one, authorised ruling was not found. It was said that there was a risk of losing the torah itself - “the words of God would not be found throughout the land.” (*T. Shabbat*. 138b) Given the close link between law and identity this would mean the end of the community. The problem was that, in the absence of the *Sanhedrin*, there was no authority. No one group had the power to impose its interpretation. It is related that this problem was resolved by divine intervention which authorised the decisions of Hillel but carefully did not condemn Shammai.

The words from heaven are reported as having been:

The words of both are the words of the living God, but the law is in accordance with the School of Hillel! (*T. Erub* 13b)

This statement makes a clear difference between a true decision and an authorised one. The authorised decision is the law but contradictory opinions can come from God. This means that they can both be true. By allowing the status of truth to divergent opinions, the “voice from heaven” only insisted that there be conformity in practice not in ideology and this allows a large degree of intellectual freedom. It also explains why the *Mishnah* and the *Talmud* like the *Pentateuch* record contradictory and dissenting views. These are part of the truth.<sup>28</sup> This allows a distinction to be made between responsibility for the law’s development which all can still contribute to and contribute to as individuals with different opinions and the ability to make

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<sup>27</sup> Perelman argues that the *Sanhedrin* provided the authority that allowed the Rabbis to be creative, following the abolition of the *Sanhedrin*, there was a return to stricter interpretation. Certainly shall see later the rules of interpretation did become more and more prescriptive. (Perelman 1976, 153)

<sup>28</sup> It is the flexible attitude to truth that has led to a recent interest in Rabbinic interpretation. (Handelman 1982)

authoritative rulings. The individual is allowed to express himself within the structure and to reveal aspects of truth but is still expected to obey authorities in practical matters.

### 2.3 Relationships

The authorisation of Hillel over the school of Shammai privileged one line of transmission over another and turns the focus towards the structure of relationships by which the laws and the authority to interpret the laws were passed on.

If the laws themselves generated a sense of identity by regulating the way the individual and the community related to the world this was further reinforced by the relationships through which the laws and the sense of responsibility for them was passed down by generation to generation and it is notable that the last section to be added to the *Mishnah* and which could be described as its first section of commentary provides it with a history and a tradition.<sup>29</sup>

*Abot*, or the sayings of the fathers, moves the a-historical mishnah towards a traditional structure by describing its history as a line of transmission of the oral tradition starting with Moses at Sinai. Clearly not all of the torah was passed down from this point. One passage in an early rabbinic text explains how the whole of this structure, not only the written was given to Moses by saying that “God taught Moses the general principles.” According to *Abot*, each generation was expected to add to it but any additions made needed to be authoritative.

*Abot* itself does not deal with the methodology of the oral torah but it does deal with who can apply it, this is not limited to Rabbis but it is limited to those who have had a specific education, the scholars and a specific

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<sup>29</sup> *Abot* is placed at the end of the legal section, linking the virtues expected of judges close to the rules they are likely to apply.

relationship between teacher and pupil.

Rabban Gamaliel says: (1) Set up a master for yourself. (*Abot* 1:16)

Even the relationship to God is mirrored in attitudes to teacher and to the torah:

R. Eleazar b. Shammua says, "the honour owing to your disciple should be as precious to you as yours. And the honour owing to your fellows should be like the reverence owing to your master. And the reverence owing to your master should be like the awe owing to heaven." (*Abot*. 4:12)

Outside the teacher-disciple relationship is the wider community. Attitudes towards it are more ambivalent.

Two aspects of communal life are regarded as positive. The community is a place for learning. ("Who is a sage? He who learns from everybody," *Abot* 4:1) It also provides opportunities to carry out torah precepts. It should be remembered that the student of the torah would not have seen a distinction between theory and practice. As to say implied to do, to study implied practice. Indeed to study the torah without practice was futile:

Anyone whose deeds are more than his wisdom – his wisdom will endure. And anyone whose wisdom is more than his deeds – his wisdom will not endure. (*Abot* 3:10)

The first step to gaining authority is to show that one understands the practical implications of the principles:

The Halakha is bound to actual practice, and a precedent established by a sage who is recognised for his wisdom and for his practical behaviour in the eyes of most or all of the community has the power to establish and determine halakha. (Safra 1987, 180)

Those seeking to enforce new interpretations would have had to show that they regarded themselves as ruled by them.

Danger came from inappropriate relationships. (This is the reverse side to the stress placed on finding the appropriate relationship.) The danger is of contamination, of being infected by something unholy. Thus contact with an evil neighbour,<sup>30</sup> all women<sup>31</sup> and the ruling power are to be avoided. It should be remembered though that this was not written for a small bookish elite. Education evolved at the same time as the courts and legal reasoning and they are closely linked. It was in the schools that the future decision-makers would have learnt how to make acceptable interpretations. All adult males would have been expected to have been educated in this structure and brought into these relationships. *Abot* goes further and seeks not only to regulate relationships but to impose a specific character and virtues on those who seek to study the laws.

*Abot* uses analysis of character types to show which virtues were expected of the scholar. It generally does this by a fourfold comparison of different examples of each type. E.g.:

There are four sorts of personality: (1) easily angered, easily calmed – he loses what he gains; (2) hard to anger, hard to calm – what he loses he gains; (3) hard to anger and easy to calm – a truly pious man; (4) easy to anger and hard to calm – a truly wicked man. (*Abot*. 5:11)

That there are positive attributes in those who fall short suggests that *Abot* seems to wish that those who follow its precepts should do so with an awareness of complexity. It is clear though that certain virtues are expected of talmudic scholars and that having made the people responsible the *Talmud* now seeks to generate character and ethics which again would impact on the communities sense of identity and how the *Talmud* is regarded and applied. The virtues encouraged, piety and patience are both virtues that would be expected of a good judge.

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<sup>30</sup> "Keep away from an evil neighbour." (*Abot*. 1:6)

<sup>31</sup> "In this regard did sages say, 'So long as a man talks too much with a woman, (1) he brings trouble upon himself, (2) wastes time better spent on studying Torah, and (3) ends up an heir of Gehenna.'" (*Abot*. 1:5)

The relationship between teacher and disciple was used then to reinforce the commitment of the community to the text and ensures not only that all those who obeyed the law would have been able to understand the reasoning used by the judges in their interpretations of the law but would have had a character which encouraged them to be do so. This though again raises the issue of authority. If all are capable of making reasoned interpretation why are some privileged over others?

The next step was to have been handed down the authority to make decisions. After the conflict between Hillel and Shammai the authority to make binding interpretations of law was passed down and transmitted separately and in practical matters only halakhic authorities could interpret laws in ways which required to be followed and their authority was absolute.<sup>32</sup> In a biblical midrash it is said that “even if they point out to you that right is left and left is right, obey them.” (Sifre Section 154)<sup>33</sup>

*Tractate Sanhedrin* describes how authority is held and passed down from one scholar to another in a process that parallels *Abot*’s passing of knowledge. “I hold it from my father who had it from Rab, and he from R. Hiyya, son of R. Huna.” The passing of authority from teacher to disciple is not straightforward, a person who has authority can withhold some aspects and allow others and there are also geographic restrictions. The reason for all of these is the need to avoid contradiction not in theory but in practice:

Since he was learned in the law, what need had he to obtain permission?

– Because of the following incident, for it has been taught: Once Rabbi went to a certain place and saw its inhabitants kneading the dough

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<sup>32</sup> Elon (1994) uses the phrase halakhic authorities throughout his work on Jewish law to mean those people who can make authorised rulings both in court and without. These would be scholars probably Rabbis who would generally have had community support in their role.

<sup>33</sup> (Hammer 1986, 190) The full quote is as follows with the biblical phrase being considered in italics. “... and according to the judgement which they shall tell they to do – a negative commandment – *to the right hand, nor to the left* – even if they point out to you that right is left and left is right, obey them.” Later scholars have found this phrase difficult. Elon (1994, 247-261) presents the main points of the debate.

without the necessary precaution against levitical uncleanness. Upon inquiry, they told him that a certain scholar on a visit taught them. Water of *bizeim* [ponds] does not render food liable to become unclean. In reality, he referred to *bezim* [eggs] but they thought that he had said *bizeim* [ponds]. . . . There and then it was decreed that a disciple must not give decisions unless he was granted permission by his teacher. (*T Sanhedrin* 5a-5b)

This may seem a minor point but in a community with such strict rules of cleanness and where these performed the central role of defining the community there was a need to ensure that all would be able to eat the food prepared by other members without fear. This became an even greater problem in the diaspora when without a state this was the central way of defining membership. Although all would have the knowledge transmitted down to them only selected individuals were given the authority to make decisions. They though would have been constrained by the knowledge that all members of the community were well aware of the standards they were expected to live up to.

## 2.4 Conclusion

The tradition created by the *Talmud* is designed to place it at the heart of the community. The laws it seeks to interpret describe and dictate the relationship of the community to the world. The *Talmud* then supplements these by seeking to generate specific character and moral values in the people that follow the laws, embedding the laws even deeper in the individual's own sense of identity. The relationships it describes control the way that each individual receive this knowledge and the power that they have in relation to it. By ensuring that all the community will be scholars it also allows them all to judge and in doing so to be open to being judged. All the community at this level are equals even though there is a distinction made between those who have the power to make authorised decisions and those who do not.

This power is though very circumscribed not only by the need of these individuals to demonstrate a certain character which would tend to encourage moderation but by structures of reasoning which ensure that their reasoning is not individual but communal.

### 3. Content of a tradition

The individuals who have the authority to make decisions within the tradition of the *Talmud* can only make decisions based on acceptable reasoning and justification and this brings us to the reasoning contained within the tradition. Reasoning developed alongside the loss of authority, those who have power do not need to give reasons, and become increasingly complex. The *Talmud* is almost more concerned with the process of debate than the answers that are produced. Many sections of the *Talmud* will search through related issues before coming to a conclusion. Incorrect arguments are explored in depth simply to show why they are wrong. For the *Talmud*, the answer to the question is not the only reason for asking it. The *Talmud* is not just a guide to behaviour. According to Neusner (1991, x):

its importance ... lies in supplying us with a model of how to use our minds in thinking about our lives: the rigorous intellect in search of the well-criticised life through the instrumentality's of practical reason and applied logic.

By studying the *Talmud*, the student acquires a way of thinking. This way of thinking corresponds to the talmudic view of the truth. The *Talmud* states that the divine will can be known only through the constant interpretation of sacred texts:

The Rabbinic Tradition,...based itself on the principles of multiple meaning and endless interpretability, maintaining that interpretation and text were not inseparable, but that interpretation - as opposed to incarnation - was the central divine act. (Handelman 1982, xiv)

Interpretation is not only the practice but the meaning of the *Talmud*. As well as providing a law code with a memory it impacts on the context by showing not only what to remember but what to forget.



These structures of interpretation apply not only to rules that were legally binding such as *halakhah* but also to *aggadah*, the moral rules and stories contained in the *Talmud*, thus this was a form of reasoning that applied to all aspects of life and this in turn allowed these other aspects of life to support the legal reasoning:

the fact that legal norms and moral imperatives both have a common source and background in the halakhic system has an important consequence: the legal system itself functioning as such, from time to time invokes, even though it does not enforce, the moral imperative. (Elon 1994, 144)

This section looks at four aspects of this system of interpretation; sources of law; memory; the dominance of particulars and rules of interpretation.

### 3.1 Sources of law<sup>34</sup>

the tannaitic innovation of the creation of *halakah* – a system in which the force of law is given to norms based upon rational deduction from a legal source, without relying upon the institutional authority of the medium through which the law is expressed even the authority of the supreme court. ... This then is the method by which the Tannaim laid the foundation of the jurisprudence of the *halakhah*, and gave binding authority to the corpus of law known as ‘the oral law’ which they themselves ruled to be based upon rational scholarship. (Segal 1996, 108)

Using rational scholarship as a basis not only grounded the reasons of the scholars but was in part a rejection of the long tradition of prophecy. In rejecting prophecy, the idea that only special individuals touched by God could interpret the law, they reinforced the idea that all subjects of the law could and should understand and be able to teach the law. The law itself was

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<sup>34</sup> For a detailed consideration of *ma'aseh* see Elon (1994, 945-986).

based not in an interpretation of mystic signs but in closely defined sources accessible to all. Elon argues that there are six primary legal sources in the talmudic system: tradition, interpretation, legislation, custom, *ma'aseh* and legal reasoning. Tradition refers to the rules which are transmitted from generation to generation and are believed to have been given at Sinai and is linked to the system of traditional relationships. Interpretation relates to textual interpretation and is seen in the rules dealt with below. Legislation and custom are self-explanatory.<sup>35</sup> *Ma'aseh* is case law. All of these systems root the reasons within the system and the community. Individuals thus are prevented from bringing in reasoning extraneous to the structure. The rules around the use of *Ma'aseh* shows that these sources were also understood in a complex manner.

*Ma'aseh* were the individual judgements of the courts. Though these judgements were made by authorised persons, they were not regarded as binding for future decisions. For a *ma'aseh* to become binding it needed to contain a legal norm, a *halakhah*, that could be used in future decision-making. *Halakhah* was the legal reasoning or instruction within the decision.

'Instruction' (*hora'ah*) is the legal source for those laws that the Supreme Court established as the result of its own legal scholarship or interpretation (*midrash*) as a precedent or instruction (i.e. either as a result of a case or on the basis of teaching promulgated by the court not in the context of a particular case.) (Segal 1996, 112)<sup>36</sup>

Instruction can be seen as classical legal reasoning - the judges are using legal skills as the basis for *halakhah*. Therefore for a decision to become binding it was not enough that it was made by a court, it needed to provide reasons and reasons that would be regarded as legally meaningful. It is the construction of

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<sup>35</sup> Custom is linked to community consent and cannot overrule laws but was used to allow for local variations in interpretations reflecting that the community often lived in very different circumstances.

<sup>36</sup> Instruction and legal reasoning are often used as virtual synonyms. The difference appears to be that legal reasoning passed down in a decision is instruction but in formulating that legal reasoning is used.

these reasons through the use of memory and rules of interpretation that will be considered next.

### 3.2 Memory

Memory operates in two ways in the *Talmud*. A memory is added to the *Mishnah* by the way it is linked to other texts and to reasoning and it seeks to affect the memory of those who seek to add to its reasons. In this way it lays the foundations for the system of reasoning.

The *Mishnah*, as a book of *halakhah*, would logically consist of rules based on the sources identified above. It does not though make this clear. Its standard form is generally a simple, almost code-like statement of law:

He who leaves a jug in the public domain, and someone else came along and stumbled on it and broke it - [the one who broke it] is exempt. And if [the one who broke it] was injured it, the owner of the jug is liable [to pay damages for] his injury. (*Baba Kamma* 3:1)

The statements are almost all of practical examples, some are very specific and there is little attempt to generalise into principles. Note the absence of any reference to authority or case law. Authorities, in the sense of recognised scholars, do appear but only where areas appear to have been a matter of some controversy:

Two [terraced] gardens, one above the other - and vegetables between them - R. Meir says, "[They belong to the garden] on top." R. Judah says "[They belong to the garden] below." Said R. Meir, "If the one on top wants to take away his dirt, there will not be any vegetables there." Said R. Judah, "If the one on bottom wants to fill up his garden with dirt there will not be any vegetables there." Said R. Meir, "Since each party can stop the other, they consider from when the vegetables derive substance [which is from the dirt]." Said R. Simeon, "Any [vegetables] which the one on top can reach out and pick - lo, they are his. And the rest belong to the one below. (*Baba Mesia* 10:6)

The *Mishnah* does use enactment and precedents but biblical *midrash* is strikingly absent. Although the Bible is rarely quoted in the *Mishnah*, Jacob Neusner argues that it underlies the statements therein which are often restatements of the Bible:

To state matters simply: all of scripture was authoritative. But only some of scripture was found to be relevant .... That is to say, they brought to scripture a program of questions and inquiries framed essentially among themselves. (1983, 27)

This restatement of earlier codes can be seen as part of a long tradition relating back to the deuteronomic restatement of the covenant code. Like the deuteronomic code the earlier code is not specifically mentioned. Indeed the relationship between the two is not made clear and this was to cause problems with the acceptance of the *Mishnah* as authoritative and was one of the reasons that the material contained in the commentary section of the *Talmud* was created. It seeks to show that within the codes of the *Mishnah* lies the memory of the debates and arguments and the sources of law that led to their creation. This links it to a tradition not only of relationships but of reasoning.

These two aspects are combined in the way in which the *Talmud* is written. The *Talmud* is in shorthand. A teacher is needed to explain the technical terms that are used and to decipher the structures that are revealed by the use of language. The nature of the *Talmud* means that to understand it you need to recreate the debate and this encourages you to take part and add to it, to comment on the commentary.<sup>37</sup> To join the conversation, the reader needs to reconstruct the reasoning. Only certain techniques are acceptable though these are not often made explicit and most of the techniques of interpretation used are deeply embedded in the structure of the *Talmud* itself. These would have been absorbed almost subliminally as the student was engaged in recreating the debate. This is further reinforced by the oral nature of the material. The laws in the *Mishnah* were originally transmitted orally and, even after it was written, it was expected that students would not just study

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<sup>37</sup> This after all is what it does to the *Mishnah*.

but memorise the statements. This meant that the reasoning would become automatic and ingrained.

Neusner (1989, 18) suggests that:

The technology of mnemonics (i.e., the technology of memory) therefore forms the surface of a deep texture of thought about communication, as well as thought about thinking, that is about conveying principles through details.

This can be seen in the *Mishnah* which uses techniques that are designed to make this memorisation of the material easier. Its patterns are generally simple and it does not use general principles but groups detailed examples together.

Consider, for example, the first line of the legal section: “[There are] four generative causes of damage (1) ox [Ex. 21:28], (2) pit [Ex. 21:33], (3) crop-destroying beast [Ex. 2:4], and (4) conflagration [Ex. 22:5].” (*Baba Kamma* 1.1) These four examples of injuries are the details through which the principle, that, if you are responsible for something which may cause injury then you are liable for any injury that it causes, is expressed. (This general point is made in the text but never supersedes the details, which still retain descriptive importance.)

The dominant structure is thematic, sayings are linked together by common theme. This occurs not just at the tractate level which divides the book into six thematic sections but within each tractate, sayings are linked by subthemes.<sup>38</sup> To make it easier for the student to identify a change of theme,

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<sup>38</sup> Neusner has identified three other structuring devices. These are limited in their use and Neusner suggests that they represent formats that were experimented with but later rejected. These list sayings according to the author; or pattern of linguistic use; or group topics that relate to one underlying principle. (Neusner 1989, 10-13) Elon (1994, 1055-1056) has also considered why on occasion the *Mishnah* does not follow its dominant thematic pattern. He believes that this may be because these rules had been passed down in this form and the compilers did not wish to disturb a traditional structure.

patterns of language are used.

For example *Baba Mesia* (6:15-6:16):

He who carried an ass to carry wheat on it and he carried barley on it.

He is liable.

[If he hired it to carry] wheat and carried straw on it.

He is liable,

since the [greater bulk] is hard to carry.

[If he hired it] to carry a letekh of wheat and it carried a letekh of barley, he is exempt.

But if he added to its burden, he is liable.

All craftsmen are in the status of paid bailees.

But any of them who said, "Take what is yours and pay me off [because the job is done]" [enters the status of] an unpaid bailee.

[If one person said to another] "You keep watch for me, and I'll keep watch for you," [both are] in the status of a paid bailee.

"Keep watch for me,"

and the other said to him, "leave it down before me,"

[the latter] is [in the status of] unpaid bailee.

It is clear that there is a major shift of language use and theme with the phrase "All craftsmen."

Neusner identifies only six patterns of sentence structure throughout the *Mishnah*. The first part of this extract is in the simplest form and is made up of declarative sentences. The second part of the extract is in the most complex form:

... we have a contrasting complex predicate, in which case we may have two sentences, independent of one another, yet clearly formulated so as to stand in acute balance with one another in the predicate, e.g., "He who does ... is unclean, and he who does not ... is clean.

Neusner argues that these patterns reveal the underlying logic of the work:

The Mishnah's logic of cogent discourse establishes propositions that

rest upon philosophical bases, e.g., the proposal of a thesis and the composition of a list of facts (such as a group of traits shared by certain categories of people) which prove the thesis. The *Mishnah* presents rules and treats stories (including history) as incidental. And of merely taxonomic interest. Its logic is prepositional, and its intellect does its work through a vast labor of classification, with comparison and contrast generating rules and generalizations. (Neusner 1989, 26)<sup>39</sup>

The six patterns that Neusner identifies all link facts by comparison and, therefore, the reasoning of the *Mishnah* is predominantly comparative.<sup>40</sup> It is concerned with finding not generalities but similarities between particular categories. This thematic and comparative structure is followed in the *Talmud* and though it has a much more complex structure it uses patterns at a number of levels which help to both guide the reader through it in a particular way.

At its meta-level the *Talmud* is in two/three languages; biblical Hebrew, Mishnaic Hebrew and Eastern Aramaic.<sup>41</sup> Each language indicates a different source. The two versions of Hebrew are used for quotes from the Bible and the *Mishnah*. Aramaic is used to show the debate that occurred in the study sessions of the *amoraim*. The language lets the reader know instantly at what level of debate s/he is looking at and whether it is a proof text, the starting point for the debate or the debate itself.

Language is also used to show how each debate progresses and the status of the person speaking. Special phrases are used to show how each statement relates to the following one. Louis Jacobs (1991) identifies a number of these formal terms that take the reader through the debate.<sup>42</sup> These are designed to trigger in the reader the memory of the previous time that this word was used

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<sup>39</sup> Neusner makes comparisons between mishnaic reasoning and Aristotle. This is dealt with in chapter 5.

<sup>40</sup> *T. Bava Bathra* 130b "Surely, in the entire [domain of] the Torah comparisons are made!"

<sup>41</sup> See Stemmerger (1996, 101-108) for a discussion of the languages of Rabbinic literature.

<sup>42</sup> Mielziner (1925, 191-260) lists dozens of such terms.

and provides a series of models of forms of reasoning. At no point does the *Talmud* itself identify rules of interpretation instead it simply sets out the process and encourages the reader to join the debate. Its reasoning is made visible but not completely visible and this suggests that there is something to be gained by hiding aspects of its reasoning. The *Talmud* also rejects the temptation to generalise or abstract its reasoning instead it stays close to the particular details of the text. This allows it to absorb the authority of the text and to appear like a natural progression rather than an imposition but it also reveals a deeper view of the relationship between the general and the particular.

### 3.3 The dominance of the particular

To the Rabbis who formulated the *Mishnah* and later the *Talmud* a principle is best expressed through the particular. A particular instance of a principle provides a potent visual image that can be more helpful at understanding the principle behind it than an abstract formulation. The general principle does not tell us more than the individual expression of it. Elon (1994) has described the *Mishnah* as predominantly a casuistic work:

The idea implicit in all the actual instances mentioned in the mishnah could have been expressed by stating it as an abstract legal norm without examples. The mishnah, however, expressed it in a series of illustrative everyday examples, some possibly based on decisions of actual cases, and others on hypothetical situations. (1994, 1074)

Handelman (1982) argues that the form of classification that is used in the Rabbinic texts, where the particular is never separated from the general and the general principle is expressed through the particular, arose because in Hebrew there is no split between the essence and the thing, or the word and the thing.

Like all Semitic peoples, the Jews regarded language as concrete. Words



could create what they described. The Hebrew for word implies deed.<sup>43</sup> Thus language, particularly spoken language, denotes creation, or action. A lie occurs when what is said is not done or does not occur. It has no effectiveness. Therefore, it is an illusion.

Study of the text would always involve reading aloud, not just because this would lead to creation but because of the nature of the language that it was written in - Hebrew.<sup>44</sup> When written, Hebrew is an incomplete language, lacking vowels. It needs to be vocalised for the meaning of the words to become clear.

As speech is a form of creation, the reader, by reading a text aloud, helps to create it. Thus, the reader takes an active part in creating the world of the *Talmud*, even when not actively fulfilling the laws within it. At the time of its compilation some laws could only be fulfilled by studying them, as the acts were not possible. (Laws relating to the temple, for example) This explains why the education stressed that all were responsible for learning and understanding how to interpret these laws.

This attitude towards language has a powerful effect on the formulations of categories. Abstraction, the distillation of the essence of something from its concrete form, is profoundly alien to this concept of language. To be able to make abstract concepts, language must be separable from its object. This prevented the *Talmud* moving away from the practical implications of the individual *halakhah* it contained. Equally the underlying narrative is about being particular, the particularity of the Israeli people and the need to define it to keep it separate.

As it was interested in the detail and in teaching reasoning by absorbing the

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<sup>43</sup> Boman (1960) contrasts this with the Greek *logos* which implies thought.

<sup>44</sup> It is contemporary Hebrew, not biblical Hebrew and thus shows traces of Aramaic influence. (Goldberg 1987)

reader in the text, the *Talmud* nowhere sets out rules of interpretation or seeks to be clear about its methodology. This would be absorbed by practice the student being encouraged to first memorise and then having learnt the tone of the *Talmud* to add to it. It is possible that making such an explicit statement on reasoning would have conflicted with the talmudic tendency to teach by example. Rules of interpretation were though set out in other texts and these do clarify the structure of reasoning used.

### 3.4. Rules of interpretation

These rules set out what is and is not acceptable as a technique. They are not set out in the *Talmud* and were probably first used as teaching aids. They are still important, these techniques do appear in the *Talmud* and the lists appear in the daily prayers in orthodox synagogues.<sup>45</sup> These are designed to be memorised. The lists of rules lay down the techniques of reasoning that can be legitimately used when interpreting holy texts.

In particular, the seven rules of Hillel which were expanded into the thirteen rules of Ishmael claim to lay down techniques that can be used in the interpretation of *halakhah*. These rules were clearly regarded highly, as the thirteen rules of Ishmael were incorporated into the daily prayers in the synagogue.<sup>46</sup>

These rules evolved to deal with biblical interpretation but were extended to halakhic interpretation and became standard forms of interpretation:

The reason is clear and quite understandable. From the moment that any halakhic collection, any enactment, or any other authoritative rule of

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<sup>45</sup> The texts that they are found in are regarded as central Rabbinical words. The seven rules of Hillel, first appear in the *Tosefta*, a collection of Halakhic material designed to supplement the *Mishnah*. The thirteen appear in *Sifra* an early *Midrash* on *Leviticus* (Stemberger 1996, 16-19).

<sup>46</sup> The other major collection of rules is the 32 rules of R. Eliezer ben Yose ha-Gelili. These are used in more general interpretation. Halakhic interpretation can lay down rulings that affect conduct and the rules are, therefore, restricted. (Stemberger 1996, 22-30)

Jewish law became an integral part of the Halakhah, it was itself automatically transformed into a subject of halakhic interpretation. It was only natural, and self-evident, that new legal rules being added to the corpus of the Halakhah themselves called for explication by means of all the available methods of interpretation. (Elon 1994, 401)

The thirteen rules of Ishmael are as follows.<sup>47</sup>

1. Inference a fortiori.
2. Inference from the similarity of words or phrases.
3. Application of a general principle derived from one or two biblical verses.
4. Inference from a generalisation followed by a specification.
5. Inference from a specification followed by a generalisation.
6. Inference from a generalisation followed by a specification that is in turn followed by a generalisation, in which case one must be guided by what the specification implies.
7. Inference from a generalisation that requires a specification or from a specification that requires a generalisation.
8. Whatever is included in a generalisation, and is also specifically mentioned to teach us something new, is stated not only for its own sake [lit. "to teach about itself"] but to teach something additional concerning all the matters included in the generalisation.
9. Whatever is included in a generalisation, and is also specifically mentioned to add another provision similar to the general law, is specified in order to alleviate and not to increase the severity of that particular provision.
10. Whatever is included in a generalisation, and is also specifically mentioned to add another provision that is not similar to the general law, is specified in order to alleviate in some respects and to increase in other respects the severity of that particular provision.

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<sup>47</sup> This translation follows Elon (1994, 318). Stemberger (1996, 15-30) discusses the source and status of all three of the major lists of interpretation.

11. Whatever is included in a generalisation, and is also specifically mentioned to deal with a new matter, can no longer have the terms of the general law apply to it unless Scripture expressly declares that they do apply.
12. An ambiguous word or passage is explained from its content or from a subsequent expression.
13. When two biblical passages contradict each other, they may be harmonised by a third passage.

This list is clearly a summary of the rules. Rules 1-5 need to be more specific before they can be applied and when used in practice they are (see below). Even when rules of reasoning are made explicit, there is still the need for either instruction by a teacher or close study of their use in the text before they can be fully understood.

Elon (1994) divides this list into two categories; explicative and analogical rules.<sup>48</sup> Rules 1-3 are analogical rules and rules 4-13 are explicative.

The rules reveal attitudes towards the texts that they are used to interpret. The explicative rules in particular are clearly designed to be used when interpreting a text where it is assumed that nothing in that text is there by accident, it is all by design. They operate like statutory forms of interpretation. They help to deal with problems caused within the text itself. The analogical rules allow development of the laws by allowing them to be used to similar situations or categories. The use of these rules is essential to the future of the system but as shall be seen they are strictly controlled.

The first three explicative rules, rules 4-6, all show when something in the text can be ignored. For example rule 5, in full, states that when a specification is followed by a generalisation, the generalisation broadens the specification, (i.e. the specification is merely an illustration), and does not

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<sup>48</sup> Elon calls them canons rather than rules. (1994, 315)

limit the rule. Handelman (1988, 225) and Mielziner (1925, 165-166) both use the same example for this rule. *Exodus* 22:11 states that “When a man gives to another an ass, an ox, a sheep, or any other animal to guard ...”. The Rabbis interpreted this to mean that any animal is covered by the law that follows, the specific mention of the ass and ox and sheep are merely illustrations and do not limit the law.<sup>49</sup>

The explicative rules also detail when the positions of words do have an effect. The following phrase:

In all charges of misappropriation – pertaining to an ox, an ass, a sheep, a garment, or any other loss, whereof one party alleges, “This is it” – the case of both parties shall come before God: he whom God declares guilty shall pay double to the other. (*Exodus* 22:8)

Is interpreted using rule 6 in *T. Baba Kamma* 62b:

As our Rabbis taught: “In all charges of misappropriation” is a generalization. “Pertaining to an ox, an ass, a sheep, a garment” is a specification. “Or any other loss” generalizes again. We thus have here a generalization preceding a specification which is in turn followed by a generalization, and in such cases we include only that which is similar to the specification. Just as the specification here mentions an object which is movable and which has an intrinsic value, there should therefore be included any object which is movable and which has an intrinsic value.<sup>50</sup>

The problem that the interpreters faced in interpreting the rule in *Exodus* was what should be included in the list of things for which double payment is required. They could have simply asked what is similar about the three things specified and used this to define “any other loss.” To an extent in deciding that the rule covers items that are moveable and of intrinsic value, they do so.

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<sup>49</sup> Given the prevailing attitude towards generalisation it is not surprising that these points should be made clear.

<sup>50</sup> The passage from the Talmud has been slightly altered. The biblical quotes used by Epstein have been replaced by the JPS (1985) translation to ensure consistency between the passages.

But this is not the reason that they give. The Rabbis instead explain that they are following a rule which is closely linked to the word order. The focus is on the details of the text and there is no attempt to find a deeper meaning or principle behind the decision.

A particular problem arises when these texts are treated thus because they do contain ambiguities and contradictions. One way around the contradictions has been seen above, they are simply accepted and allowed to generate a flexible concept of truth. The final explicative rules, rules 12 and 13 show how some of the contradictions can be reconciled.

Rule 12 reconciles ambiguities by looking at the context of the difficult phrase. *Deuteronomy* 19:6 states that:

Otherwise, when the distance is great, the blood-avenger, pursuing the manslayer in hot anger, may overtake him and kill him; yet he did not incur the death penalty, since he had never been the other's enemy.

In *Deuteronomy*, this is part of an exhortation to set up cities of refuge where blood vengeance can not happen, but in the *Talmud* the question the Rabbis try to answer is who in this law "does not incur the death penalty," the blood-avenger or the manslayer. This seems obvious from the context and, indeed, the Rabbis point to the final phrase in the law, since he had never been the other's enemy and deduce that it refers to the blood-avenger.<sup>51</sup>

It almost seems strange that a rule is needed for this, but this again arises because of the status of the text. Every phrase is deemed to be full of meaning and therefore, there needs to be a reason for going beyond the immediate words.<sup>52</sup> Rule 13 goes further and takes the Bible as a whole, so that where

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<sup>51</sup> There is a dissenting voice which points out that it could refer to the manslayer who has after all killed by accident and not out of enmity.

<sup>52</sup> See D.M.Walker (2001, 402-403) where he discusses three principles of interpretation that are used in statutory interpretation. The first *noscitur a sociis* is very similar to this rule and Walker describes it thus "a vague word takes a shade of meaning from the

two verses conflict a third can be found to explain it. This seems logical but it means that in such circumstances, interpreters cannot go behind the rules to an explanatory principle but must look else where in the text.

The explicative rules deal with problems that arise from the status of the text. The analogical rules allow the text to adapt and change. They start from the text and allow it to expand by using comparison. Analogy can be used without rules. The rules are used to show what sort of analogy is legitimate when it comes to interpreting laws. They act as a restriction to analogical interpretation. In addition to this, the rules themselves are further restricted.

The first analogical rule is the argument *a fortiori*. It literally translates as light is to heavy. (Stemberger 1996) To give a biblical example:

Well I know how defiant and stiffnecked you are: even now, while I am still alive in your midst, you have been defiant toward the Lord; how much more, then, when I am dead! (*Deut.* 31:27)

This rule hinges on the phrase 'how much more.' According to Handelman (1982, 54) this demonstrates a "perception of resemblance despite difference." (Handelman 1982, 54)<sup>53</sup> As this rule relates to *halakhah* its use is restricted. It cannot be used to increase the severity of the penalty applied<sup>54</sup> and it cannot be used to create a completely new *halakhah*.<sup>55</sup>

The restrictions on the use of rule 2 are even stricter. *Halakhah* can only be created using this rule, known as a *gezera shawah*, if the person putting forward the interpretation heard it originally from his/her teacher:

A man may infer a ruling *a minori ad majus* on his own but he may not

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accompanying words." The other two principles *expressio unius est exclusio alterius* and *ejusdem generis* are similar to some of the other explicatory principles which deal with the general and particular.

<sup>53</sup> Handelman (1982, 52-56) explains the difference between this rule and the syllogism. Syllogistic reasoning shows that the facts in the minor premise belongs to the class of the major premise. Instead here similarity is shown despite difference, one is not subsumed into the other.

<sup>54</sup> *Baba Kamma* 2:5

<sup>55</sup> *Nazir* 7:4

infer on his own one that is derived from a Gezera Shawah. (*T. Niddah*. 19b)<sup>56</sup>

A *gezera shawah* is used to link phrases together because they share the same word or phrase and it is this that distinguishes it from the first rule which concentrates on factual similarities. In the following extract from the *Talmud*, the word anger is used to link a saying from *Deuteronomy* concerning Moses with a phrase from *Proverbs*:

R. Eleazar said: A man who gives charity in secret is greater than Moses our Teacher, for of Moses it is written, For I was afraid because of the anger and the wrath, and of one who gives charity [secretly] it is written, A gift in secret subdues anger. (*T. Baba Bathra* 9b)

The third analogical rule seems to suggest that general principles can be created. Instead what it actually does is limit the making of such principles. This rule allows a specific rule to be used to cover other situations. It makes the rule more general but, as this example shows, there is no move beyond this to an abstract level of principle:

He who seizes millstones transgresses a negative commandment, and is liable on the count of taking two distinct utensils, since it is said, He shall not take the mill and the upper millstone alone did they speak, [Deut 24:6]. And not concerning a mill and the upper millstone alone did they speak, but concerning any utensil with which they prepare food, as it is said, for he seizes a man's life as a pledge. (*Baba Mesia* 9:13)

In allowing one rule to cover a new area, the *Talmud* allows the law to develop by using one part of the *Torah* to explain another. This is not used systematically and there remains a reluctance to go beyond the text and bring out general principles that could be seen in the laws.

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<sup>56</sup> Elon's discussion of this rule (1994, 351-355) concentrates on whether it should only be applied when the words are superfluous. This has been considered by some to be another restriction on its use.



Elon relates that traditionally the rules of analogy have been ranked in order of priority. This could be seen as a ranking of their persuasive power. Rule 2 is regarded as the most persuasive followed by rule 1 and this may explain why rule 2 is more restricted and why the restrictions on rule 1 are more than those on rule 3 which is limited in itself.<sup>57</sup>

Analogy seems to be regarded as potentially dangerous if left unrestricted, particularly analogy that is highly persuasive. Yet analogy as a form of comparison is the dominant form of reasoning in the *Talmud*. Even the explicative rules deal with comparison, with when general and specific facts can be used to compare and contrast with each other. Yet the preference for the particular remains. Indeed:

The Talmud also states that one may not base a legal decision on a halachic statement, unless that statement was applied to an actual incident. Hence a lesson derived from a story where the principle was applied has greater substantiality than a direct statement of the principle. That a lesson or law derived from a “story” in the Talmud has greater validity than a law directly stated in the Talmud firmly underscores the priority of the concrete embodiment of a thought over its abstract representation” (Handelman 1982, 66)

All of the rules of interpretation limit the creativity of those scholars who seek to interpret and apply the laws. Interpretations to be acceptable as law that would affect people lives and be regarded as divine needed to fit very high standards. The complex structure that surrounded the reasoning also lessens any sense of individual bias. The factors that bind the scholars are subtle and shared by the rest of the community and this clearly helps to make their pronouncements more authoritative. It is this complex and often subconscious structure that is the key to the *Talmud's* success.

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<sup>57</sup> Mielziner (1925, 150) argues that these restrictions were introduced because analogy was being abused by being extended too far and thereby falling into disrepute. Restrictions were brought in to rehabilitate analogy.

## Aristotle's rhetoric

## 1. Introduction

If the *Talmud* encourages all its readers to become judges, Aristotle<sup>58</sup> is seeking to understand how people can be persuasive in a structure where all are citizens and can say anything but laws have limited impact. In this the phenomenon he is seeking to understand is much closer to the world of the legal theorists in chapter 2 who have to deal with a space where everything is sayable. This does not mean that everything is persuasive and it is this that Aristotle seeks to understand. He also though seeks to improve upon the way in which rhetoric is used in Athens and there is a tension in his work between his desire to simply understand what is there and to change it. This will also be considered in this study which concentrates on his work on rhetoric, the *Ars rhetorica* or *Rhetoric*.<sup>59</sup>

This book is a collection of lectures given by Aristotle to his pupils when he was teaching in the Lyceum. At the time that Aristotle was teaching in the Lyceum, there would have been a number of people throughout Athens who would have been promising to teach young men to speak well. Plato, Aristotle's teacher, was dismissive of these teachers and regarded them as little better than flatterers. (Plato 1953, 551)<sup>60</sup> He did not teach rhetoric at the Academy.

Aristotle did teach rhetoric. He felt that speech was an inherent part of the nature of man and a fundamental aspect of life. In *Politics* he writes:

Now, that man is more of a political animal than bees or any other gregarious animal is evident. Nature, as we often say, makes nothing in

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<sup>58</sup> For an overview of his work see Barnes (1995). Evans (1987) describes why Aristotle's work is still influential as well as introducing basic concepts. Chroust (1973) critically evaluates the evidence about his life.

<sup>59</sup> References to Aristotle's work are from the Barnes' Complete Works (1984).

<sup>60</sup> See n 2, chapter 1 above

vain, and man is the only animal who has the gift of speech. And whereas mere voice is but an indication of pleasure or pain, and is therefore found in other animals ... the power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and the unjust. And it is characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state. (*Pol* 1253a6.)<sup>61</sup>

Speech and choice are placed at the core of the identity of people and as will be seen the relationship between speech and identity is central to Aristotle's understanding of the role of emotions and character in rhetoric. Speech is always seen in relationship and this is certainly true of rhetoric. Rhetoric is though only one of these forms of speech and Aristotle seeks to understand what it means in a very specific context - fourth century Athens.<sup>62</sup>

Aristotle taught rhetoric because it was an important part of life for an Athenian citizen.<sup>63</sup> Athens had a form of democracy which would impel participation and to an extent force citizens to approach each other on an equal footing. The Athenian democratic structure was based on speech. All citizens could participate in the assembly, the centre of government, by making speeches. At public events display speeches would be at the heart of the proceedings and in the courts representation was not allowed, any citizen who wished to pursue or was pursued through the courts would need to speak to both accuse and defend.

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<sup>61</sup> Interestingly, when Aristotle defines the three types of rhetoric, they correspond to this passage. They deal with just/unjust, expedient/inexpedient and praise/blame (good and evil). It may be that it was because he saw rhetoric as not purely artificial but as corresponding to something instinctive about man that Aristotle regarded it as a separate form of study.

<sup>62</sup> Trittle (1997) and Garner (1987) provide a good introduction to the fourth century in Athens. Aristotle's own constitution of Athens is a primary source for information on the political institutions.

<sup>63</sup> Rhetoric had been studied before - see Grimaldi (1996) and Poulakis (1996) for an examination of the relationship between Aristotle's work and the prior study of rhetoric.

Aristotle, though aware of the inevitability of the place of emotions in this structure, was also aware of their dangers particularly when the issue is not personal advancement but justice where he would prefer an impartial judge. He seems to feel that the open political space is somehow an inappropriate place to discuss such matters:

The arousing of prejudice, pity, anger and similar emotions has nothing to do with essential facts, but is merely a personal appeal to the man who is judging the case. (*Rhet* 1354a15)

Aristotle's dissatisfaction with some aspects of rhetoric in practice led to a conflict within his work. Aristotle did not simply want to pass on practical skills and attempts in the *Rhetoric* to give the first philosophical and detailed explanation for why this phenomena worked, why language used in a certain way could persuade an audience of an idea when expressed in another way the speaker would be less assured of success. This led to him giving two separate definitions of rhetoric. The first is theoretical and links rhetoric to logic and reasoning:

It is clear, then, that the technical study of rhetoric is concerned with the modes of persuasion. Now persuasion is a sort of demonstration (since we are most fully persuaded when we consider a thing to have been demonstrated); the orator's demonstration is an enthymeme, and this is, in general, the most effective of the modes of persuasion; the enthymeme is a sort of deduction (the consideration of deductions of all kinds, without distinction, is the business of dialectic, either of dialectic as a whole or of one of its branches). (*Rhet* 1355a5)

The second which is practical includes not only argument but also emotion and character:

Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker; the second on putting the audience into a certain frame of mind; the third of proof, or apparent proof, provided by the words of the speech itself. (*Rhet* 1357b3)

These two definitions are not fully reconcilable.<sup>64</sup> It could be argued that they are designed to fulfil separate functions. The first is a justificatory argument designed to dignify the study of rhetoric. The second is a practical description of how rhetoric works. Aristotle does not acknowledge this point but in his study having introduced the object he proceed to concentrate almost solely on the second description and the way in which an individual can learn these methods of persuasion:

These are, then, these three means of effecting persuasion. The man who is to be in command of them must, it is clear, be able to reason logically, to understand human characters and excellences, and to understand the emotions – that is, to know what they are, their nature, their causes and the way in which they are excited. It thus appears that rhetoric is an offshoot of dialectic and also of ethical studies. (*Rhet* 1358a22)

And although these methods which are particularly emotional may seem to be beneath logical analysis Aristotle takes these aspects seriously and seeks to understand them.

It is with this that this thesis is particularly concerned, the way Aristotle seeks not to dismiss but to understand the role of emotions and character and in in doing so generates a complex picture of the interaction between an individual's identity, the character portrayed and the way in which rhetoric not only reflects but helps to shape society. The next section of this chapter will look at this and why the context had such an influence on the role of speech, particularly in the courts. Aristotle did not though give up on his idea of rhetoric as logical and rational and the final section of this study considers how he tried to relate rhetoric to his wider work on dialectic reasoning and what this reveals about the limitations of logic but also its usefulness.

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<sup>64</sup> There is much debate amongst Aristotelian scholars on this point and any work on Aristotle's *Rhetoric* will consider this apparent conflict.

## 2. Ethics, emotions and character

This consideration of the role of ethics, emotions and character in rhetoric once again brings to light the way in which identity is created and understood by the wider society. This section looks first at the institutional context before considering Aristotle's explorations of ethics and character formation and how this relates not only to the ability of an individual to persuade but also to what a society will be prepared to consider persuasive.

### 2.1 Institutional context

Aristotle wrote the *Ars rhetorica* within a context where speech was central to political life. The political system was built upon the ability of every citizen<sup>65</sup> to present their views in the Assembly. This system not only provided benefits but by a system of lots made it, at least in theory, possible that every citizen would be called upon to administer the city-state.<sup>66</sup> An individual Athenian citizen, who would have felt responsible for the maintenance of the constitution, had access to both great power and authority but to achieve this had to persuade other citizens to support him. The central political problem then was how to persuade other citizens. This was of special relevance when it is considered that there were few limits to this persuasion, particularly in the courts as can be seen in Aristotle's description of the use of laws in this context:

First, then, let us take laws and see how they are to be used in persuasion and dissuasion, in accusation and defence. If the written law tells against our case, clearly we must appeal to the universal law and to equity as being more just. If however the written law supports our case, we must urge ... that not to use the laws is as bad as to have no laws at all. ... So far as the laws are concerned, the above discussion is probably

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<sup>65</sup> There were other groups within the city and Sealey (1987, 5-30) describes the relationships between the three main categories of citizen, slave and foreign resident.

<sup>66</sup> Yunis (1996, 6) and Sinclair (1988, 106-135) describe the sheer numbers that were needed to keep the system going.

sufficient. (*Rhet* 1375b25)<sup>67</sup>

From our point of view, what is interesting is what is missing from this discussion. In considering the role of law in persuasion, Aristotle does not consider how to find law, how to interpret it or how to apply it. We know more about the Athenian legal system than any other Greek system but the Athenians produced no textbooks and no works of jurisprudence comparable to those produced later by the Romans. If there was logic and a system to their law it remained “implicit and unconscious for them.”<sup>68</sup> As Todd puts it:

Law is one of the very few areas of social practice in which the ancient Greeks have had no significant influence on subsequent societies.  
(1993, 3)

Fourth century Athens did have a complex legal structure but this very complexity limited the development of jurisprudence. Athens created legal procedures and institutions but within this law was linked to individuals and politics.

This applied both to the creation and application of its laws. If a citizen sought to change a law or introduce a new law they would have to approach the Assembly who could make or change laws by a simple vote. They were then published by being inscribed on stone pillars. These were dotted around the city and despite an attempt to compile the laws in 403/2, it remained difficult to work out whether a law inscribed on a pillar was still valid. Every proposed change in the law did have to go through a committee who would scrutinise it and consider how it would affect the current law. They would

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<sup>67</sup> This technique is used in a surviving speech by Lysias. “It is the laws which urge the victims in cases such as this to exact this penalty. I urge you to show agreement with them. If not, you will provide so much security for seducers as to encourage thieves too to claim that they are seducers ... Everyone will know that the law on seducers can be ignored, that is your vote they need to fear for this is the supreme authority in the city. (Carey 1997, 32)

<sup>68</sup> For a good overall introduction to Athenian law see Garner (1987). MacDowell’s *The Law in Classical Athens* (1978) remains the standard text on this area. Todd (1993) is very thorough and possibly a better introduction for the lawyer. For speeches from actual trials placed in their legal context see Carey (1997).

instruct the assembly to repeal simultaneously any laws that it conflicted with. This, though, did not prevent conflicting laws standing. The committee was not made up of experts and relied on the individual who had proposed the law to find all the other laws that were affected. If a law proposed by an individual was later found to conflict with an existing law that individual could be brought to court. As it was difficult to know the state of the law, this could be a useful political ploy against a rival.<sup>69</sup> An individual citizen wishing to change law would have been involved not only in a need to persuade others of its use but in a complex calculation about the likelihood of a challenge.

Most of the “legal” decisions of the assembly, though, were not laws but decrees. This distinction was a fundamental one and was strengthened by reforms in 403/2 BCE. Decrees did not need to go through the same procedures as laws. They were not intended to be fundamental or unchanging and were designed to be temporary. They were passed by simple majority vote. They could not contradict laws.<sup>70</sup> Again, it was up to the proposer to ensure that decrees did not contradict with the laws and he could be tried if he failed to do so. The system thus made the individual responsible for not only persuading others that a change in the law was needed but for ensuring that “his” law did not conflict with others. Both laws and decrees were linked to individuals, most laws would have been presented in order to further individual or group interests and Athenians could contract out of almost all of the laws. As citizens they would have been neither able to contract in or out of the institutions. This was a status conferred at birth and which would have been at the core of the individual’s own sense of self. The community was generated by physical proximity and close relationships and reinforced by the need for these citizens to talk to each other.<sup>71</sup>

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<sup>69</sup> Todd (1993, 55-58) describes in some detail how difficult it was for the average Athenian to find laws.

<sup>70</sup> This does not mean that Athenians saw substantive law as part of a unified system. Laws could not conflict with each other and decrees with laws but this was a pragmatic matter. Sealey (1994, 25-58) is clear that laws were seen as individual and discrete.

<sup>71</sup> Strauss (1986) points to the importance of personal relations in Athens. Political groupings were not formal but based on looser connections of kin, trade and friendship. It was



Individual citizens were also responsible for the application of law in courts. A surviving speech by Demosthenes includes a line which refers to the oaths that jurors had to take and shows that they could not refuse to come to a decision: "Nay, more, in cases which are not covered by the laws, you have sworn that you will decide as in your judgement is most just." (1936, 477) Laws were subordinate to the views of the citizens. Todd suggests that statute law was evidential rather than binding:

The function of a modern judge, whether in civil- or in common-law jurisdictions, is to apply legal rules to a concrete case; an Athenian trial is instead a dispute an *agon* (Gernet) or *krisis* (Paoli), which it is the court's function to resolve: statute law in Athens does not supply the rules according to which the *dikastai* must proceed, but rather the limits within which they must resolve the dispute. (1993, 59)

Juries then were generally expected to make their decisions based on their individual views of what was or was not just in the circumstances. They were neither trained legal experts nor were they expected to justify their decisions. They were chosen by lot from a pool of men who had sworn an oath at the start of the year. Jurors were paid every time that they attended the courts. There were practical reasons for this, service was not compulsory on this group, members of which would simply turn up as they chose to and a large number were needed every day as Athenian juries were very large. The size of a jury would vary according to the case, 500 for public and 2-400 in private cases depending on the amount of money involved.

The procedures in court were relatively simple. The parties to the dispute would speak in turn before the jury and could present laws or witnesses to back up their case. The jury would make their decision by a simple majority vote, taken by ballot, at the end. This is also how they would decide on

punishment. They could not put forward suggestions or impose a punishment other than that which had been asked for by the parties.<sup>72</sup> There would have been little time to do so - trials were very short in Athens. The longest public cases would take a day. Where private cases were being tried, the court would deal with an average of four a day.<sup>73</sup> A magistrate would sit and be responsible for procedure but would have had no judicial role.

There was no scope in this system for Athenian courts to develop case law or systems of reasoning to fill the gap created by the uncertainty of statute law. Given the size of the jury it was not possible to be sure why a jury had come to the decision. Earlier cases might be used by orators as examples of public standards but these would be merely illustrative and the court would certainly not feel bound by them. In contrast to the talmudic structure the Athenian legal system had no legal memory, every decision was treated in isolation, laws were part of the context of that decision but had no greater influence than other factors.

This meant that law both in its creation and application remained linked to individuals and circumstances. There was no sense of a hierarchy of laws. Instead there were procedures by which a citizen could face fellow citizens and appeal to a sense of justice in the courts or political expediency in the Assembly.

This system was not without critics. Aristotle did not approve of the flexibility of Athenian law. He prefers the decision of the lawmaker to that of the judge/jury and advocates that laws should be written to leave as little as possible to judgement:

Now, it is of great moment that well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the

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<sup>72</sup> This is what would happen in straightforward cases. But there were other more complex procedures and, although the decision of the jury was supposed to be final and there was no formal appeal structure, cases could be reopened. (Todd 1993, 144-146)

<sup>73</sup> Several courts could sit on one day.

decision of the judges; and this for several reasons. First, to find one man, or a few men, who are sensible persons and capable of legislating and administering justice is easier than to find a large number. Next, laws are made after long consideration, whereas decisions in the courts are given at short notice, which makes it hard for those who try the case to satisfy the claims of justice and expediency. The weightiest reason of all is that the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it *their* duty to decide on definite cases brought before them. They will often have allowed themselves to be so much influenced by feelings of friendship or hatred or self-interest that they lose any clear pleasure or pain. In general, then, the judge should, we say, be allowed to decide as few things as possible. (*Rhet* 1354a31)

This can be linked in part to Aristotle's snobbery.<sup>74</sup> He had very little respect for the poorer citizens who formed the majority of the juries. In *Politics*, he argues that for democracies to be successful they should ensure that the rich as well as the poor undertake jury service. This, he feels, would ensure a better representation of the public. The balance between rich and poor that he envisages would be a mean, in his sense of the word, but not an average. Indeed, Athens probably got juries of average citizens as many more citizens were in the lower classes. Aristotle almost seems to be suggesting that there is a need for these groups to be represented as interest groups.<sup>75</sup>

Aristotle's unease is not simply linked to his snobbery. He does not see self-interest as equally problematic in all forms of rhetoric, he ranks deliberative

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<sup>74</sup> Bullen (1997) looks at this and similar criticisms that Aristotle makes in *Politics*. Overall, Aristotle believes that all citizens should be involved in some aspects of government but there are specific areas where specialist skills are needed that all citizens will not have. Waldron (1995) starts from the other end of this argument, and asks what Aristotle means when he talks about many being better at making decisions than one. He too concludes that Aristotle meant this only in a limited sense and that, often, Aristotle would prefer decisions to be made by one skilled individual.

<sup>75</sup> In *Politics*, he also states a preference for arbitration. The arbiter is more trustworthy because he is in the middle of the two parties.

or political rhetoric above legal because self-interest is clearer and not hidden:

The reason for this is that in political oratory there is less inducement to talk about non-essentials. Political oratory is less given to unscrupulous practices than forensic, but treats of wider issues. In a political debate the man who is forming a judgement is making a decision about his own vital interests. (*Rhet* 1354b26)

The audience for a political debate is involved in the decision and needs to take responsibility for it. This would equally apply to the other main use of deliberative rhetoric, in private counsel. The decision has implications for the person making the decision. The jury though has a distance they are bound only by their oath to be impartial. It is perhaps this distance, the fact that the jury will not have to incorporate their decision into their own lives that makes them more vulnerable to manipulation. This does not though mean that emotion and character should be excluded. Indeed as decision-making is involved they are inherent to the process:<sup>76</sup>

But since rhetoric exists to affect the giving of decisions – the hearers decide between one political speaker and another, and a legal verdict *is* a decision – the orator must not only try to make the argument of his speech demonstrative and worthy of belief; he must also make his own character look right and put his hearers who are to decide, into the right frame of mind. Particularly in deliberative oratory, but also in lawsuits, it adds much to an orator's influence that his own character should look right and that he should be thought to entertain the right feelings towards his hearers; and also that the hearers themselves should be in the right frame of mind. (*Rhet* 1377b20)

He summarises:

There are three things which inspire confidence in the orator's own character – the three, namely that induce us to believe a thing apart

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<sup>76</sup> Demos (1961) points out that Aristotle never fully separated the cognitive from the emotional in the way that later philosophers did. Smith (1997) feels that Aristotle limits reason by making it part of and a perfecter of natural instinct, it cannot, therefore, go beyond our natural capacity.

from any proof of it: good sense, excellence and good will. (*Rhet* 1378a5)

This is not simply about prejudice because ethics and character are closely linked.

## 2.2 The role of ethics

For Aristotle excellence is the goal of every individual. He does though describe it differently from the point of view of the one seeking to achieve excellence and the one seeking to portray it to an audience. In *Rhetoric*:

If excellence is a faculty of beneficence, the highest kinds of it must be those which are most useful to others, and for this reason men honour most the just and the courageous, since courage is useful to others in war, justice both in war and in peace. (*Rhet* 1366a4)

This contrast with *Ethics*, where he describes only one highest good or excellence, which is purely wanted for its own sake, *eudaimonia* or happiness. There are other goods, which are wanted at least partially for their own sake as well as for happiness.<sup>77</sup>

...honour, pleasure, reason, and every excellence we choose indeed for themselves (for if nothing resulted from them we should still choose each of them), but we choose them also for the sake of happiness. (*NE* 1097b1-3)

It appears that communicating the way that the behaviour of an individual affects others is more useful than trying to persuade them by abstract reasoning that it is the best way for them to behave. In *Rhetoric*, Aristotle is concerned not with the real nature of good and happiness but how to use the

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<sup>77</sup> The relationship between these partial ends and the highest end is a complex one. At first, Aristotle suggests that the highest end for man is the active life lived rationally, but later affirms that it is the contemplative life. The link between the active and contemplative life is never made clear and this makes the relationship of ends a matter of debate amongst Aristotelian scholars. See Ackrill (1980) and Nagel (1980), Cooper (1977), Kraut (1989) and Tuozy (1995), for a full overview of this debate.

commonly held opinions about them to influence the decision-making of a large audience.

But despite this there is also an aspirational aspect to his work on rhetoric. Though useful, Aristotle wants to raise the standard of rhetoric by ensuring that his pupils will approach their audience with the right facts and a full knowledge of the subject matter and of the reason that they use. Equally he tries to ensure that his pupils will be good decision-makers. This means not only that they need to reason well but perhaps even more fundamentally that they need the correct character and emotional responses before they can even begin to reason well. This is because of Aristotle's view of ethical knowledge cannot be understood without the context. Martha Nussbaum (1986) argues that Aristotle even feels that our ethical knowledge creates the context:

What he is saying is that our most basic beliefs and experiences concerning what is worthwhile constrain what we discover about the world and about ourselves.... certain things are so deep that either to question or to defend them requires us to suspend too much, leaves us no place to stand. (1986, 321)

This is why the audience needs to be put into the right frame of mind it is only if they are in the correct emotional state that they will be capable of understanding the situation and coming to the right decision. This may explain his preference for political decision-making where the decision-maker will automatically be emotionally committed to the result because it will impact directly on his life. It also helps to explain Aristotle's concern with his own audience.

### 2.2.1 Creation of individual ethics

In his work on ethics, Aristotle is very specific about to whom he is prepared to speak:

Hence any one who is to listen intelligently to lectures about what is noble and just and, generally, about the subjects of political science

must have been brought up in good habits. (*NE* 1095b3-6)

To understand ethics, the individual already needs to be living by the standards that Aristotle is describing. The process of becoming ethical or achieving an excellent character, they are the same for Aristotle, starts long before virtues are understood in childhood with education. As a child the individual is encouraged by praise and blame to follow the correct behaviour. This aims to teach the child not only how to act but also what are the right feelings and emotions to have in different situations. As the child acts, he starts to form his basic character. If he follows good acts and learns how to enjoy them then he will develop a good character.

It makes no small difference, then, whether we form habits of one kind or of another from our very youth; it makes a very great difference, or rather *all* the difference. (*NE* 1103b24-25)

The moral state of the adult is thus dependent on the child's and is logically prior to the intellectual state which is developed later.<sup>78</sup> The moral state forms the ability of the individual to understand behaviour:

For each state of character has its own ideas of the noble and the pleasant, and perhaps the good man differs from others most by seeing the truth in each class of things, being as it were the norm and measure of them. (*NE* 1113a31-35)

In adulthood the process becomes more complex. As the man gains more experience and as his ability to reason improves so will his ability to understand the ends that his childhood training and habits have provided him with. This, in turn, will affect the way he sees and understands those ends. At this stage, the interaction between the two aspects becomes increasingly blurred. Aristotle wants to give these men of good habits better reason, to give

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<sup>78</sup> Meyer (1993) has explored the issues that this raises for moral responsibility. She concludes that even when an individual can be regarded as not responsible for their character because that was founded at a time when they had limited power they can still be responsible for their actions because of Aristotle's descriptions of causality and voluntariness. Her study, though, does show that Aristotle's description of character formation does raise problems for individual responsibility.

them a better aim so that they may achieve excellence.<sup>79</sup> This consists of providing them with the reasoning to help them understand their already good habits. The profound circularity of the concept shows Aristotle's ethics are founded in a trust of the individual, the individual who has been brought up well and in the world he inhabits. This is why it is a good man that is Aristotle's model, not a rational principle.

This is relevant for rhetoric, where Aristotle seems to be at his most a-moral, particularly when it comes to the deliberate manipulation of emotional responses as it would give the man who had an excellent character a built-in advantage when it came to debate. The man of excellence would reveal his character through the language and structures he used in argument. He would also have an advantage when it came to assessing arguments. Excellence provides the ability to perceive the important aspects of a situation. It would provide the man who had this talent with great subtlety in his perception of the character of others. Thus, the excellence of his character and his skill in decision-making and perception would provide the ability to excel in rhetoric (in theory). Moral excellence would be reflected in persuasive talents. This in-built bias in favour of the virtuous acts as a riposte to those who argue that rhetoric is essentially neutral. Athens was a close-knit community, so people would be able to observe the behaviour and words of others, particularly those who sought political influence over a long period of time. Aristotle's linking of ethics to rhetoric is ultimately not designed to simply insist on the role of virtue but is a useful reminder of the oft-ignored impact of emotion and character on reasoning.

Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally

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<sup>79</sup> *NE* 1142a9. Aristotle also has a political objective. By showing how important the context is to the acquisition and the living of a good life he hopes to show the importance of both state education and legislation. (*NE* X:9) Collins (1997) has studied *Politics* and argues that it also has primarily an educative and political role. It seeks to encourage the student to adopt a positive attitude towards aristocratic government whilst showing them the best way to work within current political structures.



whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided. This kind of persuasion, like the others, should be achieved by what the speaker says, not by what people think of his character before he begins to speak. It is not true, as some writers assume in their treatises on rhetoric, that the personal goodness revealed by the speaker contributes nothing to his power of persuasion; on the contrary his character may almost be called the most effective means of persuasion he possesses. (*Rhet* 1356a5-13)

This is of course dependant on social circumstances - what has been praised or blamed - Aristotle does assume that there are moral absolutes but his work can also be understood as containing a complex view of the way in which society creates not only the ethical context but the ethics of the individual. This is because he argues that there is a close link between speech and social ethics.

### 2.2.2 Social ethics

The relationship between speech and social ethics is most obvious in display or epideictic rhetoric where the orator praises or blames individuals or actions and Aristotle suggests this performs a similar role to praise or blame aimed at a child:

To praise a man is in one respect akin to urging a course of action. ... Since we know what action or character is required, then, in order to express these facts as suggestions for action, we have to change and reverse our form of words. Thus the statement 'A man should be proud not of what he owes to himself', if put like this, amounts to a suggestion; to make it into a praise we must put it thus, 'Since he is proud not of what he owes to anyone, think what you would urge people to do; and when you want to urge' the doing of anything, think what you would praise a man for having done. (*Rhet* 1367b36)

Praise is the predominant form of epideictic rhetoric and it is this form of

rhetoric that Perelman argues helps to form the values of a society. Ryan (1984), in a study of *Rhetoric*, comes to a similar conclusion and argues that the language used to affect changes in convictions could affect the desires both of the person speaking and of the listener, and therefore, their characters. As Ryan puts it:

That Aristotle was concerned primarily with deliberative rhetoric, that he showed great care in distinguishing acceptable from unacceptable kinds of rhetorical argumentation, and that he regarded it as imperative that the speaker have in mind a coherent, and genuine, system of values - all these indicate, I believe that he saw rhetoric as a method, not primarily for persuasion leading to action, but for conviction leading to a new, changed, or reinforced attitude, which in turn would result in action. And it was this latter view of rhetoric, and of rhetorical argumentation, that could very well have led Aristotle to expend on it the efforts he did. He saw it, I believe, as a means of shaping the ethos of a society. Speakers, using the art of rhetoric, would over a period of time have a great impact on the ethos or character of society. In no way was it Aristotle's view that the ethos was completely determined by speakers, but rather that it was developed by an interplay between speakers and hearers, hearers on the one hand would be influenced by the speakers, and on the other hand themselves be such that they "are sufficiently disposed towards what is true, and most of the time they attain the truth." (1984, 190-191)

This is why Aristotle devoted time to rhetoric not only as a significant social structure but also and even more so as a way of affecting ethics. Therefore rhetoric is more than simply persuasion and is involved in the very shaping of society. This makes it very powerful and Aristotle is aware of the dangers:

And if it is objected that one who uses such power of speech unjustly might do great harm, *that* is a charge which may be made in common against all good things except excellence, and above all against the things that are most useful, as strength, health, wealth, generalship. A man can confer the greatest of benefits by a right use of these, and

inflict the greatest of injuries by using them wrongly. (*Rhet* 1355a20)

This is partly because of the field within which rhetoric is used. The example that Aristotle gives of a man who possesses excellence is of a man who is well known for his rhetoric: Pericles. This is because there is a close link between moral excellence or practical wisdom and skill in politics and legislation, though they are not identical:

Political wisdom and practical wisdom are the same state of mind, but to be them is not the same. Of the wisdom concerned with the city, the practical wisdom which plays a controlling part is legislative wisdom, while that which is related to this as particulars to their universal is known by the general name of 'political wisdom'; this has to do with action and deliberation, for a decree is a thing to be carried out in the form of an individual act. (*NE* 1141b24-28)

Pericles could use his rhetorical skill well but those who followed him did not:

So long as Pericles was leader of the people, things went tolerably well with the state; but when he was dead there was a great change for the worse. Then for the first time did the people choose a leader who was of no reputation among men of good standing, whereas up to this time such men had always been found as leaders of the democracy. .... After the death of Pericles, Nicias, who subsequently fell in Sicily, appeared as leader of the aristocracy, and Cleon son of Cleaenetus of the people. The latter seems, more than any one else, to have been the cause of the corruption of the democracy by his wild undertakings; and he was the first to use unseemly shouting and coarse abuse on the Bema, and to harangue the people with his cloak girt up short about him, whereas all his predecessors had spoken decently and in order. .... After Cleophon the popular leadership was occupied successively by the men who chose to talk the biggest and pander the most to the tastes in the majority, with their eyes fixed only on the interests of the moment. (*Const.* 27)

Leaders by their speech are capable of raising or lowering the ethics of society. Although he believes that the power of rhetoric is tempered by the general preference for the good and the true.

Rhetoric is useful because things that are true and things that are just have a natural tendency to prevail over their opposites, so that if the decisions of judges are not what they ought to be, the defeat must be due to the speakers themselves, and they must be blamed accordingly. (*Rhet* 1355a20)

He is though concerned about the quality of the Athenian audience who may not have been educated into the correct habits and, notably the critique of Pericles he records is of the way he impacted on the audience:

Pericles was the first to institute pay for service in the law-courts, as a bid for popular favour to counterbalance the wealth of Cimon. ... Some critics accuse him of thereby causing deterioration in the character of the juries, since it was always the common people who put themselves forward for selection as jurors, rather than the men of better position. (*Const.* 27)

This perhaps suggests that even men who have practical wisdom should use these highly flexible arguments of rhetoric with care.<sup>80</sup> Even those who possess excellent decision-making which cannot be used to harm, can be harmful when it comes to persuasion, or perhaps Aristotle is simply being inconsistent and recognising that Pericles could make wrong decisions. There is a certain amount of snobbery in this critique. Aristotle does seem to favour those leaders who had distinction of birth as well as talent and is critical of those who actively sought the approval of the majority. Clearly although society creates the ethical context this does not mean that individuals are always bound by its standards, it can be judged by what it choose to praise and blame.

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<sup>80</sup> "In the practical art of rhetoric, one senses that the aim is not to know what *phronesis* is, but rather to exercise this virtue in circumstances that challenge its optimal use." (Farrell 1995, 195) Garver (1994, 45) argues that in *Rhetoric* Aristotle is trying to encourage the use of rhetoric as a civic art.

### 3. Logic and persuasion

The last section dealt with the relationship between rhetoric, ethics and character. So far none of this has dealt with the actual words and structures of reasoning used. Aristotle's work deals with this in two ways. First he makes the theoretical statement that there is a close connection between logic and persuasion. Secondly, he shows his students how to generate speeches which will be persuasive. This reveals that there is a close link between the reasons shown and the character that is made visible.

#### 3.1 Rhetoric as the counterpart of dialectic.

At the beginning of *Rhetoric* Aristotle argues that there is a close link between his theories of reasoning and his theory of persuasion. This is significant because it is in the areas of logic and reasoning that Aristotle believed that he had made the most contribution.

Aristotle generally built on the work of others and was quite happy to admit to this.<sup>81</sup> When it came to logic, though, he believed that he had created a whole new field of study:

Of the present inquiry, on the other hand, it was not the case that part of the work had been thoroughly done before, while part had not. Nothing existed at all. (*SE*. 183b35)<sup>82</sup>

The field of study that he had created, he did not call it logic, was the systematic study of reasoning. He divided it into two spheres – demonstration and dialectic. Demonstration produces proofs and deals with scientific reasoning. Dialectic deals with areas where there are no proofs, where the issues are probable. Demonstration is ideally suited to theoretical knowledge

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<sup>81</sup> "Moreover on the subject of rhetoric there exists much that has been said long ago...." (*SE*. 185a10)

<sup>82</sup> This quote refers specifically to Aristotle's theory of deduction.

but dialectic is better used in the other two forms where our knowledge is less certain and more contextual. In *Rhetoric* Aristotle states “Rhetoric is the counterpart of dialectic” (*NE* 1354a1).<sup>83</sup>

He describes why this is so in some detail. He argues that rhetoric belongs to the same part of the mind (*Rhet* 1355a15).<sup>84</sup> It deals with similar subjects to dialectic, both dialectic and rhetoric deal with generalities, with such things as come, more or less, within the general ken of all men and belong to no definite science. “Accordingly all men make use, more or less, of both; for to a certain extent all men attempt to discuss statements and to maintain them, to defend themselves and to attack others.” (*NE* 1354a4 )<sup>85</sup>

Dialectic and rhetoric then are tools, skills which can be used in a variety of context, they are not separate objects of study in the sense that medicine is – they are forms of reasoning and in this area they are very similar because rhetoric follows the structures of reasoning used in dialectic:

With regard to the persuasion achieved by proof or apparent proof: just as is dialectic there is induction on the one hand and deduction or apparent deduction on the other, so it is in rhetoric. The example is an induction, the enthymeme is a deduction, and the apparent enthymeme is an apparent deduction: for I call rhetorical deduction an enthymeme and rhetorical induction an example. (*Rhet* 1356b1)

There are though significant differences between the two forms of reasoning and this is linked to the relationships within which the reasoning is taking place. Robin Smith (1995) believes that Aristotle's description of dialectic

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<sup>83</sup> Brunshwig (1996) deals with the implications of Aristotle's use of the word “counterpart” or *antistrophe*. He argues that there is a development in Aristotle's word and that he may originally have meant a historical counterpart but that this altered and became a theoretical one. He also suggests that *antistrophe* implies an analogical or comparative relationship.

<sup>84</sup> Aristotle does not specify which part but it is probably the calculative part. The parts of the mind are described in more detail in the section on epideictic rhetoric.

<sup>85</sup> In *Ethics* (*NE* 1094b11) Aristotle seems to imply that the subject dictates how it can be known. “Our discussion will be adequate if it has as much clearness as the subject matter admits of: for precision is not to be sought for alike in all discussions....”

reflects that its roots lie in a rule-based contest where there were very strict limitations on what could be debated and how. This had since broadened and Smith believes that by the time of Aristotle dialectic could be described as *argument directed at another person which proceeds by asking questions*. Aristotle seemed to want to limit dialectic to something closer to its original source. Dialectic, then, is argument within a restricted debate, indeed something almost like Plato's view of what rhetoric should be, for Aristotle though rhetoric is only like dialectic. The difference lies in the context within which rhetoric is used. Equally this idea of asking questions and debate would be unsuitable for rhetoric where a large audience was faced. This is at the core of the difference. Strict logic appears to be only suitable within a certain relationship where one individual can face another and where education and rules limit what is accepted as reasonable.

In the rhetorical context there is a very different relationship. Rhetorical debate is defined as those things which people debate about: "we deliberate upon without arts or systems to guide us, in the hearing of persons who cannot take in at a glance a complicated argument." (*Rhet* 1355a23) Aristotle feels that there is something about the audience in particular that makes full dialectic reasoning impossible:

It is possible to form deductions and draw conclusions from the results of previous deductions; or, on the other hand, from premises which have not been thus proved, and at the same time are not reputable and so call for proof. Reasonings of the former kind will necessarily be hard to follow owing to their length, for we assume an audience of untrained thinkers; those of the latter kind will fail to be persuasive, because they are based on premises that are not generally admitted of reputable. (*Rhet* 1357a8)

Rhetoric involves a larger, more political grouping and the orator must use whatever means are available. The orator cannot rely on rules or education to limit the attitudes of the audience, assumptions can be made about prejudices but not about their capacity to deal with complex arguments. The form of argument relates not to the conclusion that one wishes to reach but to the

person one is wishing to convince. This point is repeated more explicitly at the end of *Topics*:

You should display your training in inductive reasoning against a young man, in deductive against an expert. You should try, moreover, to secure from those skilled in deduction their premises, from an inductive reasoner their parallel cases; for this is the thing in which they are respectively trained. In general, too, from your exercises in argumentation you should try to carry away either a deduction on some subject or a solution or a proposition or an objection, or whether some one put his point which made it the one or the other. For that is what gives one ability, and the object of training is to acquire ability, especially in regard to propositions and objections. For it is the skilled propounder and objector who is, speaking generally, a dialectician.  
....

Do not argue with every one, nor practise upon the man in the street; for there are some people with whom any argument is bound to degenerate.  
(*Top.* 164a11)

This is a very pragmatic view of dialectic and one that emphasises the danger of being open to arguments. In dialectic though there is an option to choose to debate or not, in situations in which rhetoric is used, there is often no choice.<sup>86</sup>

### 3.2 The structures of rhetoric.

Aristotle does not simply describe the process of rhetoric but teaches by showing examples and structures. The *Rhetoric* is a manual that can be used for generating arguments. This again parallels the structure of dialectic reasoning.

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<sup>86</sup> Cohen (1995, 87) describes law in Athens as a tool of the traditional feud.



In books 2-8 of *Topics*, Aristotle gives his students the material necessary to put together good arguments. These are the *topoi* or locations from which the book gets its name. Aristotle provides lists of rules that show the student what type of premise or proposition would give the desired conclusion. Smith pictures the student using these in the following way:

Overall, the dialectical method of the *topics* requires the joint application of the “locations” and the inventories of opinion. To find my argument, I first look up a location appropriate to my desired conclusion and use it to discover premises that would be useful, then I consult the relevant inventory of opinions to see if those premises are found there. If they are, I have my argument: all that remains is to cast it into the form of questions and present them to my opponent. (1995, 61)

The amount of time that Aristotle gives to detailing the form of premises encourages the view that *Topics* is predominantly a training manual. As well as showing what premises to use, he also describes what form of argument would best support them:

Induction is more convincing and clear: it is more readily learnt by the use of the senses, and is applicable generally to the mass of men; but deduction is more forcible and more effective against contradictory people. (*Top.* 105a16.)

In *Rhetoric*, Aristotle also takes the student of rhetoric through the process that an orator should undergo to produce a complete speech.

For example, Aristotle defines the field of deliberative rhetoric by listing the things which men deliberate about most often. He then shows what an orator needs to know to have the right amount of information:

These, then, are the most important kinds of information that the deliberative speaker must possess. Let us now go back and state the premises from which he will have to argue in favour of adopting or rejecting measures regarding these and other matters. (*Rhet* 1360a36)

These lists are topics, or commonplaces, the basic material that the orator

needs to start formulating his speech.

Having established the premises, the orator needs to know how to put them together into persuasive arguments, how to use forms of argument practically. Like dialectic, rhetoric uses both deduction and induction. These two structures of reasoning shared by rhetoric and dialectic,<sup>87</sup> deal with how premises support the conclusion of an argument but do so in different ways:

Now a deduction is an argument in which, certain things being laid down, something other than these necessarily comes about through them. (*Top.* 100a25)

... induction is a passage from particulars to universals, e.g. the argument that supposing the skilled pilot is the most effective, and likewise the skilled charioteer, then in general the skilled man is the best at his particular task. (*Top.* 105a11)

Deduction is concerned with what inferences can be drawn from premises. Induction builds up an argument from related premises. Aristotle did not spend a great deal of time on induction and deduction is certainly the more important form. As it is concerned with inference and the rules that limit what deductions can be made it is, in contemporary terminology, the study of valid arguments. Aristotle describes the enthymeme, rhetorical deduction, as similar to dialectical deduction but simpler:

The enthymeme must consist of few propositions, fewer than those which make up a primary deduction. (*Rhet* 1357a16)

This seems to imply that the enthymeme is a lesser form of a dialectic deduction. This view can be supported by Aristotle's definition of the maxim, which is an even more compact form. The maxim consists almost totally of conclusions. The maxim is important not as a logical form of reasoning but because it is useful to the speaker:

One great advantage of maxims to a speaker is due to the want of

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<sup>87</sup> Also shared by demonstrative reasoning. (Aristotle 1984e, 39; *Prior An.* 24a10)

intelligence in his hearers, who love to hear him succeed in expressing as a universal truth the opinions which they hold themselves about particular cases. (*Rhet* 1395b1)

In the section on the practical use of the enthymeme and on the rhetorical proofs in general, Aristotle first lists material from which proofs can be constructed:

Another commonplace is got by considering some modification of the key-word, and arguing that what can or cannot be said of the one, can or cannot be said of the other.... Another is based on correlative ideas. ... Another is the *a fortiori*. (*Rhet* 1397a20)

He follows these with examples of how this material can be structured into arguments. In this section of *Rhetoric*, the enthymeme becomes the name for a list of persuasive techniques that are presented ready for use. These techniques are regarded as the most persuasive. This is why they are enthymemes but they have very different forms and it cannot be that they are logically the same. Aristotle even lists false enthymemes, methods of reasoning that appear to be enthymematic but are not. The “rules” of reason do underlie this, the enthymeme is still the most persuasive form because of its relationship to the dialectic deduction, but this section shows how flexible this relationship can be. Aristotle even goes as far as to use induction as an enthymeme:

Another line is based on induction. (*Rhet* 1398a31)

Ryan (1984) argues that *topoi* are patterns and that in *Rhetoric* and, by implication, in *Topics*, Aristotle is setting out a list of patterns that can be imitated. In his discussion of deduction and induction, Aristotle tries to bring some system to these patterns to work out why some are more persuasive than others are but his aim remains practical and this is why the topics and the logic do not always agree.

This means that logical validity cannot be the difference between the enthymeme and the dialectic deduction. Burnyeat (1994) believes that the

enthymeme is not a form of argument at all but refers to ideas and that Aristotle is arguing that it is the ideas that are conveyed that are the argument and not the form. The form, then, would simply be used to express the ideas in the most persuasive manner. The enthymeme then is simply the word used for ideas from which it is possible to deduce or create persuasive arguments.

It should be remembered that the material that Aristotle is working with already exists. Aristotle gives both forms of reasoning a theoretical base but, in both *Topics* and *Rhetoric*, there are inconsistencies between the theory and the practice. As with the enthymeme, the list of deductions in *Topics* is not logically consistent. Düring (1968) sees these lists as examples of actual use and in this area the question of logical validity is not a central issue.

Again, it seems that it is the context that is behind the difference. Dialectic is limited in both the premises that can be used, in what debates it can be used and with whom. This may be because it was originally used in the context of a rule-bound debate. *Rhetoric* is bound by its need to teach students to be successful in forms of public speaking that already existed. It seems that it may be the context of use and possibly the standard of the debate that lies behind the difference between rhetoric and dialectic.

Another difference between dialectic and rhetoric can be seen in the way in which the rhetorical equivalent of induction is a much more important form than its more reputable and logical equivalent. Example, is presented in two forms, narrated and invented. These also are distinguished not according to the logic of their form but the materials that they use for example. The narrated examples consist of facts that are true. The invented examples consist of facts that have been made up. Further there are two sorts of these invented examples, the illustrative parable and the fable. The difference between the two is predominantly practical and affects when they should be used:

Fables are suitable for addresses to popular assemblies and they have one advantage – they are comparatively easy to invent, whereas it is

hard to find parallels among actual past events. You will in fact frame them just as you frame illustrative parallels: all you require is the power of thinking out your analogy, a power developed by intellectual training. But while it is easier to supply parallels by inventing fables, it is more valuable for the political speaker to supply them by quoting what has actually happened, since in most respects the future will be like what the past has been like. (*Rhet* 1394a1)

In rhetoric the end, persuading a large audience, appears to dictate the means and this favours practical examples which work like induction and which are close to experience even more so than the enthymeme which starts from ideas and seeks to show that they apply. The dominance of the particular which has already been seen earlier appears again. Eugene Garver has argued strongly that the key to showing character is not logic but examples and that this explains the tendency to prefer these to logical structures:

The great appeal of narrative and examples is that they are obviously and immediately ethical, where enthymemes are not. Enthymemes can be the manifestation of a pure rationality that has nothing ethical about it. The goal of rhetorical arguments is to make discourse ethical, and so a purely logical argument can create suspicion, mistrust, and unsuccessful persuasion. Hence the appeal of narrative. One's choice of examples cannot help making discourse ethical by revealing character. Narratives are never ethically neutral. Examples cannot help but make their reasoning ethical and so examples are nearer to the goal of making discourse ethical than enthymemes. (Garver 1999, 120)

Garver makes it clear that Aristotle's goal is not to replace argument with narrative but to make reasoning ethical, logic on its own can "create suspicions that one is being merely clever, not practically wise". This seems to be at odds with Aristotle's practical focus but makes more sense when his view of the role of rhetoric in society and its link to ethics is understood. This does not mean that Aristotle rejects logic but simply that he accepts that logic is perhaps less robust and possibly needs a more rarified and protected atmosphere to survive. Examples are a shorthand linked to community mores.

## Persuasion

The aim of this chapter has been to generate a more complex understanding of the role of persuasion in judicial decision-making. This section highlights certain aspects of this and introduces some of the arguments that will be developed in the next chapter which deals with common law reasoning. It is in two parts, the first claims that in seeking to understand these different forms in their own terms, i.e. the way in which structures and systems led to a system in which an individual could and would seek to be persuasive, that what has been revealed is the way in which both the individual and the system become dependant on each other. The system could not survive without individuals but also gives the individual a sense of identity and access to authority. The second part suggests that the distance between the system and the person who wishes to participate in the system is one that needs to be carefully measured.

### 1. Identity and authority

In both systems a process was described whereby the individual's own sense of identity and the character that was revealed to a wider society was created through an interplay between their particularity and the communal structures which they sought to enter in order to be seen by others and by themselves. Relationships, indeed, were the key to both structures whether the traditional talmudic form which passed on not only knowledge but responsibility and authority through strictly regulated relationships or the political system of Athens which linked all citizens together by making them all individually responsible for pursuing their own interests but limited how they could do so by making them seek to persuade others in order to achieve this.

It is by entering into and accepting these relationships that a community within which an individual can seek to be persuasive is created. Before an individual can seek to persuade he needs to assert his identity as a member of the community with the right to be heard. This parallels the talmudic saying

that in order to understand the law one needs to do before one hears the reasons, in order to be persuasive one needs to be seen before one can be heard. In both studies individuals needed to be visible before they could persuade others that their arguments deserved either support or obedience. Their acceptance of certain standards allows them to be recognised and be seen as people who have authority to make decisions and legal interpretations, or the right to be heard. This making visible is closely linked to the way in which identity and even the character of the individual is formed and describes the ways in which an individual can become acceptable, a part of the community.

This visibility comes at a price for the individual, by showing that he is acceptable he needs to acquire a set of socially acceptable character traits and identity, to submit to the standards of judgment within the system.

Individuals do gain from this system, they gain status from their sense of identity, they gain a place in the world and become visible to themselves and they gain power.<sup>88</sup>

Authority, or *auctoritas*, has its origins in Roman political experience. It comes from the verb *augere*, meaning “to augment” or “to add to.” Politically it meant that those who had authority had it by virtue of the fact that they augmented or breathed fresh life into the original accomplishment of those who founded the city of Rome. Above all other considerable achievements of Rome was the unrepeatable enormity of the original acts that lay the foundations for the city’s body politic. These deeds gave authority to the living as long as these citizens safeguarded and renewed the spirit of that original foundation. The shining beauty of this beginning was passed down through tradition, and it was sacred or religious in the sense that it was with the city’s founding that that gods were given a home. It was the sacred and

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<sup>88</sup> Curtis further argues that our own individual experiences do not allow for self illumination which requires that they be seen in the light of a common sense.

stabilizing cornerstone of the body politic. (Curtis 1999, 105)

The goal of judgment is authority and specifically, the right to be seen as a judge.<sup>89</sup> The question of how much choice an individual whose sense of identity is related to this submission can have is not a simple one and is one that will be answered differently in different cultures and times. Indeed, it could be answered differently for the same individual participating in different systems within a wider culture. In describing the competing methodologies of dialectic and rhetoric Aristotle could be describing different roles or characters that an individual would use to express their identity at different times. The *Talmud* seeks to influence the identity of each individual in such detail because there are competing understandings open to the individual in the other communities within which he lives and precisely because its authority is limited. This would suggest that the more authoritative the system the less concerned it would have to be with influencing the nature of the individual. State sponsored systems could survive with fewer of its citizens identifying with the law and with a judiciary who would see their identity as judge as less all-encompassing than a religious duty. In the next chapter on the common law it will be seen that the individual who participates as a judge is very aware of their role in the system and one of the reasons they seek to be persuasive and to use arguments which support the foundations of the common law is to protect it as well as to formulate their own identity and to explore how that identity or sense of role should be formed. This awareness is both a support to and a danger to the system. It is the need to prevent individuals moving too far away from the system and therefore judging it with other standards rather than participating in the system that explains why a sense of the correct distance is all-important.

## 2. Distance and participation

In chapter 1 it was seen that Steiner has described two poles as the dominant

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<sup>89</sup> In terms of chapter 1 this could be seen as being dignified by being general.



approach to texts, critics or readers. In seeking to be persuasive neither a talmudic scholar nor an Athenian orator sits comfortably in either of these categories as they do not seek to distance themselves from the subject as a critic would, to do so would be to undermine its authority and use a form of judgment which comes from without rather than within. Instead, they seek to show that they participate in it, whether it be society or the text by persuasion. V S Naipaul has argued that the novel, a form which contains narrative and character, is only appropriate for certain societies where people have enough freedom to generate narratives and can only be written by an author who can see the detail of the society but has not seen enough of the world to understand the larger political and other factors which inform those and which by providing an understanding of the broader context undermine his ability to see the details.<sup>90</sup> This distance would undermine his/her emotional understanding and this is the key not only to good story telling but successful persuasion.

Some distance though is needed in order to judge. The danger of over identification is paralysis:

The problem with which Arendt wrestles is that we need compassion in order to have solidarity with the “oppressed and exploited,” and yet this compassion is politically pernicious if it becomes the foundation of politics - and takes the form of pity. Arendt says that compassion is politically irrelevant because it destroys the distance between persons. In the intensity of identification with another’s suffering, the compassionate person loses the capacity for argumentative speech, for talk about shared interests, for precisely those activities that arouse our urge to appear and that humanize the world. The compassionate cannot stand the suffering of others, and hence if they are moved to act, to go public, they eschew persuasion and negotiation in favour of darkness. (Curtis 1999, 90)

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<sup>90</sup> In a recent lecture given to the Edinburgh Book Festival (August 2001, unpublished)

A judge who is too distant introduces alternative forms of judgment and may fail to be persuasive<sup>91</sup> but one who is too close cannot judge. The next chapter considers the ways in which judges in the common law have tried to both respond to society and to ensure that law remains a separate criteria of judgment in order to support their role as judges.

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<sup>91</sup> This criticism could be made against the legal theorists in chapter 2 - indeed it is their distance and their emotional commitment to philosophy and to individual goals which make it hard for them to see these aspects of decision-making.

## Chapter 4

### Judicial decision-making in the common law

This chapter considers the role of persuasion in judicial decision-making in common law systems. The common law is an example of a system where individuals make judgments where they have limited authority and therefore have to provide persuasive reasons. This chapter specifically looks at six decisions of the highest court in the two jurisdictions considered, the House of Lords.

Although law lords have the highest authority of any judge in the system this is limited by a number of factors, their position as un-elected decision-makers in a democracy, the collegiate nature of the judiciary which requires judges to consider the views of others, the danger of being overruled or distinguished and positively the desire to create a precedent. Persuasive strategies are used by the judges in response to these limitations and both seek to reinforce and protect the individual decision and to legitimate the judicial role. The audience they are trying to persuade therefore is a multiple one consisting of their peers, future judges, the parties in the case and wider society. Following the analysis in the last chapter this chapter will look at the ways they ground authority and it does so through the law of negligence and, in particular, six cases which deal with the issues of pure economic loss.

Negligence is both central to and a border line issue for delict. It is easy to argue that an individual should be held liable when they commit an act with the intention that it cause harm. In this the relationship is clearly established by the actions. Indeed such an act will usually be criminal, although civil redress in the form of compensation may be sought. Negligence raises the question of how far we should be responsible for the unintended consequences of our actions. This raises issues of who we are responsible for and what relationships the law is prepared to recognise. This area of law thus deals very closely with the relationship between law and society and many of

the decisions considered refer to an underlying attitude towards the judicial role within society.

The chapter starts by showing how the doctrine of precedent both provides a foundation for judicial authority and a restriction by defining what judges need to take into account, the material they need to use to generate persuasive argument. Distinguishing techniques show the flexibility of this doctrine and, in showing what judges can choose not to take into account, demonstrates more precisely what sort of arguments are likely to be persuasive.

At the core of the chapter is the exploration of the law of negligence. This is in two sections. The first section looks at the development of the law of negligence in Scotland and in England. This shows how a sense of the relationship between law and society develops through the case law and leads to the creation of different persuasive strategies or methodologies.

The second section looks at two methodologies in some detail, principled and case-based reasoning. This study reveals that underlying these two strategies are conflicting attitudes towards the judicial role and that rather than undermining this conflict helps to create commitment. Throughout this exploration of negligence, a large field, six cases are used as the main object of study. The first *Donoghue v Stevenson*<sup>1</sup> is the modern foundation of the law in this area. The other five<sup>2</sup> all relate to pure economic loss an area which is at the boundaries of negligence and this is why methodological debate has been to the fore in these cases. In concentrating on these cases they are being used as examples of the implications of this debate and this thesis at no time sets out an analysis of the current state of the law of negligence.

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<sup>1</sup> 1932 SC (HL) 32, 1932 SLT 317.

<sup>2</sup> *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 429; *Caparo Industries plc v Dickman* [1990] 2 AC 605, [1990] 1 All ER 568; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575; *Junior Books Ltd v Veitchi Co Ltd* 1982 SC (HL) 24, 1982 SLT 492; and *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908.

## Precedent and distinguishing techniques

### 1. Precedent

The doctrine of precedent consists of inbuilt limitations in the system that dictate what judges take into account, the examples that they must use. The rules are strict. Judges are only bound by decisions of higher courts in their court structure and only by cases that are directly in point but in these circumstances they are completely bound.<sup>3</sup> Cases which are not completely binding are also influential, decisions made at the same level or even in other jurisdictions can also be highly persuasive and often need to be taken into account. Precedent gives judicial decisions authority by providing that they can use previous case law to show that they are coming to decisions not because of personal bias but because they are bound by external constraints. It also encourages the judges to generate decisions which in turn can become authoritative and binding on judges in the future. In doing so it ensures that judges are not only readers and appliers of decisions but authors and in using previous decisions they set out the way in which they wish their own reasoning to be dealt with. The doctrine itself impacts on this as it dictates not simply that previous case law must be taken into account but what in that case law should be considered.

According to the system of precedent, judges are not bound by all aspects of previous decisions. What is generally considered to be binding in any decision is the *ratio decidendi*. This is the “statement of law applied to the legal problems raised by the facts as found upon which the decision is based.” (Walker and Ward 1998, 61) It is distinguished from *obiter dicta*, other judicial pronouncements on principles of law which, although potentially

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<sup>3</sup> The Court of Appeal in England considers itself bound by its own decisions as well as by the decisions of the House of Lords. Until 1966, the highest court was also bound by its own prior decisions. In 1966 Lord Gardiner, then the Lord Chancellor, issued a practice statement which declared that judges in the House of Lords were no longer bound by prior decisions of the House. This power is used rarely as one of the aims of the system of precedent is to ensure consistency.

interesting and useful for later cases, are not *ratio* because they are not linked to the material facts and do not found the decision. The aspect of the decision which precedent defines as most persuasive is the part that relates law to the specific details of the problem placed before the judges. This encourages the judges to stay close to the details of the case.

There are though limitations to this as a decision which sticks too close to the individual facts is not persuasive and will not found a precedent. This can be seen in the case of *Qualcast (Wolverhampton) Ltd v Haynes*<sup>4</sup> the House of Lords found that a judge in the lower courts had misunderstood the concept. The judge had held that he was bound by the decisions of a higher court as to what was reasonable in specific circumstances. As the higher court had passed judgement on a case that was almost indistinguishable on the facts, he felt that he was bound by it and decided accordingly. The House of Lords held that he had failed to distinguish between judgements of law and judgements on the facts:

The question whether on the facts in that particular case there was or was not a failure to take reasonable care was a question for the jury.... The jury's decision did not become part of our law citable as a precedent.... Now that negligence cases are mostly tried without juries, the distinction between the functions of judge and jury is blurred. A judge naturally gives reasons for the conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as "law" and citable the precedent system will die from a surfeit of authorities.<sup>5</sup>

Although the distinction being made is that between facts and law the Lords are not referring to an external standard but to the different roles of judge and jury. The judge will give reasons for decisions which a jury would not but

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<sup>4</sup> [1959] AC (HL) 743, [1959] 2 All ER 38

<sup>5</sup> [1959] AC (HL) 743 at p 757-758

because he is doing so in his role as a “jury” then these reasons, in effect, can have no precedential value, the judge is not acting *qua* judge and is not persuasive. Indeed, these reasons, though the judge clearly feels the need to give some, are regarded as unimportant.

The definition of the judicial role in the sense of defining what is or is not persuasive does not belong to the individual judge making a decision. The *ratio decidendi* of a case, and the role and place of that case in the system, is decided not by the judges in that case but by later judges who decide to use that decision:

It is for the court which is later called on to consider the precedent to decide whether the precedent is “in point” or “distinguishable” and whether binding or persuasive, and what the *ratio decidendi* of the precedent is. (Marshall 1995, 117)

A judge therefore is seeking to persuade not the immediate audience but his/her current and future colleagues that his/her decision is persuasive and does so by using the authority of previous generations. S/he is persuasive when others agree that what has been produced is a workable *ratio* - a decision which has the character of law and that s/he is doing so in his/her role as judge. This clearly has echoes of discussion of understanding and judgment in chapter one and this will be considered in more detail in the following chapter. It should be noted that there is one further limitation on the judge making a decision, s/he is expected not to use the cases that s/he chooses but those that are presented before him/her during argument. Indeed, if a case is used that the judge disagrees with s/he must either reluctantly admit that s/he is bound or distinguish that case. This limits the personal involvement of the judge and is one of the limitations that stops him/her from pursuing a personal view of the law. Judicial decision-making takes place in the context of other decisions and of the presentation of reasons chosen by others. This does not mean that there is no space for a personal involvement, distinguishing techniques can allow judges to use previous cases flexibly.

## 2. Distinguishing techniques

Distinguishing techniques allow judges to avoid some of the rigours of precedent while at the same time reinforcing its role as a dominant legal practice by focusing the attention of the judges on certain aspects of the decision. There are no rules that limit what techniques can be used but judges need to persuade others that their decision to distinguish is correct, otherwise their decision will be vulnerable to appeal and, in using techniques which they feel will be persuasive and undermine the authority of the case they wish to avoid following, they reveal what it is in previous decisions that is authoritative and stay close to the central tenets of precedent.

In distinguishing a case they can avoid attacking the reasoning in the previous case and thus setting up their authority against that of another judge directly<sup>6</sup> by instead setting limits both on the case that is before them and on the previous cases they wish to avoid. They can concentrate on either the facts or the law of the previous case. On the use of facts to distinguish cases, consider Lord Keith's analysis of *Hedley Byrne* in *Junior Books*:

That case was concerned with a negligent statement made in response to an inquiry about the financial standing of a particular company, in reliance on the accuracy of which the plaintiffs had acted to their detriment. So the case is not in point here except in so far as it established that reasonable anticipation of physical injury to person or property is not a *sine qua non* for the existence of a duty of care.<sup>7</sup>

It should be noted that what is important is not the specific facts but the ways they are legally understood and the way they have been categorised and classified. In *Caparo*, Lord Bridge shows how this same technique can be used to distinguish several cases at once by generalising the factual

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<sup>6</sup> This is particularly true where they are seeking to distinguish a case where they would otherwise be bound.

<sup>7</sup> 1982 SC (HL) 244 at p 267.



circumstances and then excluding the instant case from the category that has just been defined:

The salient features of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. ... The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which the maker of the statement has no reason to anticipate.<sup>8</sup>

The most common technique though does not concentrate on facts but instead attacks the other element necessary for precedent, a *ratio* based on those facts. This technique uses the reasoning of the judges to undermine the authority of the case by looking at one decision in detail or, in cases where more than one decision has been issued, comparing decisions within one case. Where only one of the decisions is considered, it can be distinguished on the grounds that it has been disapproved later, that it misunderstood earlier authority or that it dealt with a narrow field of law and it does not apply.<sup>9</sup>

When more than one decision is given any differences can be used to undermine the authority of a case. A classic example of this is Lord Macmillan's analysis of the joint appeal of *Mullen v Barr & Co* and

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<sup>8</sup> [1990] AC 605 at p 620-621

<sup>9</sup> All of these techniques were used to demolish Lord Wilberforce's decision in *Anns* in the latter case of *Caparo*. This is a slightly unusual case in that this is one of the rare occasions when the judiciary directly take on the reasoning of a previous judge and it is notable that even here they used these distinguishing techniques. See the way Lord Keith of Kinkel deals with his use of American cases, [1991] 1 AC 399 at pp 469-470; and the way his decision is clearly defined into the field of pure economic loss and out of the field of physical loss (also Lord Keith at pp 464-468).

*McGowan v Barr & Co*<sup>10</sup> in *Donoghue*:

The Lord Justice-Clerk held that negligence had not been proved, and therefore did not pronounce upon the question of relevancy. Lord Ormidale held that there was no relevant case against the defenders but would have been prepared, if necessary, to hold that in any case negligence had not been established by the evidence. Lord Hunter held that the case was relevant and that negligence had been proved. Lord Anderson held that the pursuer had no case in law against the defenders, but that, if this view was erroneous, negligence had not been proved.<sup>11</sup>

By showing the differences between the judges, Lord Macmillan undermines the decision as a whole. If he had wished to follow the case he would simply have chosen the decision he agreed most with and only mentioned that one. Lord Buckmaster, who supported Lord Anderson's view, does exactly this in the same case:

In *Mullen v Barr & Co.*, a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgement, Lord Anderson says.... In agreeing, as I do with the judgement of Lord Anderson, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgement is clothed.<sup>12</sup>

A similar technique is used to show that the decisions in a case do not support the proposition for which they have been cited:

Leaving this on one side, however, it is not easy to cull from the speeches in the *Hedley Byrne* case any clear attempt to define or classify the circumstances which give rise to the relationship of proximity on which the action depends ...<sup>13</sup>

In this statement, which comes from Lord Oliver's decision in *Caparo*, the objection being made refers to an apparent lack of clarity. This is at the core of most of these techniques, the decision is either too clear and too narrow, or

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<sup>10</sup> 1929 SC 461, 1929 SLT 71. These are known as the "mouse cases".

<sup>11</sup> 1932 SC (HL) 31 at p 62

<sup>12</sup> *supra* at p 42

<sup>13</sup> [1990] 1 All ER 568 at p 588

too vague and unclear and therefore can not be used. In this these techniques reinforce the doctrine of precedent by ensuring that it is those who fulfil the requirements of this practice that will see their reasoning being reused. Indeed the practice of distinguishing, the way judges relate to previous legal material is where the content of the doctrine of precedent can really be seen. The next section deals with the way judges use legal material and justify their decision through two dominant methodologies, case-based and principled reasoning and their allied persuasive strategies. First the background to the development of these methodologies is set out in an historical study of the law of negligence.

Negligence.<sup>14</sup>

Negligence is a vast area and this chapter concentrates on only six cases. In all of them, though methodology was an explicit matter of debate in the judicial decisions and this is why they are of interest. This section sets out the background to these cases and places them in their broader legal context. The six cases considered come from not one but two jurisdictions, Scotland and England.<sup>15</sup> These systems originally developed separately and the Act of Union of 1707 had guaranteed the independence of the Scottish legal system which has remained a separate jurisdiction. In 1711, though it was firmly established that the House of Lords could overrule the Court of Session, previously Scotland's supreme court in civil matters.<sup>16</sup> This brought English and Scots law into direct contact and in *Donoghue v Stevenson* which is the first of the six the law was said to be the same in both jurisdictions. Since then the laws have developed together<sup>17</sup> and the other five cases dealing with pure economic loss come from both systems. Their separate evolution is though interesting as it shows the ways in which two different legal systems developed different strategies for dealing with the same perceived gap in the law. Pre-*Donoghue* the concern was whether or how to recognise certain relationships as legal and post-*Donoghue* the focus shifted to how to control the principle contained therein.

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<sup>14</sup> This section considers persuasion from the viewpoint of the judge. See Perelman's description of French law in chapter 2 for a parallel analysis of how attitudes towards the judiciary impacted on the way in which the role of the judge and the decision were regarded.

<sup>15</sup> Technically England and Wales.

<sup>16</sup> In the case of *Greenshields v Magistrates of Edinburgh*. (1710 - 11) Rob. 12

<sup>17</sup> There have been calls, particularly by academics, for Scots law to again be allowed to develop separately in this area. (eg Brodie 1997; Thomson 1996 and Cooper 1991).

## 1. Negligence pre-*Donoghue*<sup>18</sup>

### 1.1 Delict

#### 1.1.1 The role of reason

Viscount Stair's *Institutions*<sup>19</sup> is the foundation of the law of delict and is the first authoritative statement of the ways in which an action and its results can be legally recognised.<sup>20</sup> Stair's description of delict, one of the obediential obligations sees it as based on the need to repair for an injury lost and ultimately authorised by divine authority.<sup>21</sup>

Obediential obligations are either by the will of God immediately or by the mediation of some fact of ours; such are obligations of delinquence, whereby we become bound to reparation and satisfaction to the party injured, and are liable by punishment to God, which may be exacted by those who have his warrant for the effect. (Stair 1988, 100)

At the time, Stair made this statement, Scots law accepted a number of sources, including civil law.<sup>22</sup> Stair, though, saw not posited law but reason as

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<sup>18</sup> Although this chapter does not deal with the development of precedent. The development of this doctrine which was not fixed until the nineteenth century shows another way in which the judiciary can be seen creating an understanding of the nature of law and its role in society through the development of legal doctrine. (Maher and Smith, 1988).

<sup>19</sup> The *Institutions of the Law of Scotland*. (1981) Originally published in 1681, Stair's *Institutions* was revised in 1693 by Viscount Stair. This second edition was reissued in 1981, edited by D.M.Walker. It is this edition that is quoted in this essay.

<sup>20</sup> In Scots law, a small number of writers have been given 'institutional' status by the courts. This means that in the absence of other authority their statements carry the weight of law.

<sup>21</sup> In setting out the law of delict, Stair's primary source was the Roman *Lex Aquiliae*, but he chose to ignore it when it clashed with the dictates of reason: "Obligations by the Romans are distinguished in four kinds: in obligations ex contractu, vel quasi ex contractu, ex maleficio, vel quasi ex maleficio. Which distinction insinuates no reason of the cause or rise of these distinct obligations, as is requisite in a good distinct division; and therefore; they may be more appositely divided, according to the principle or original from whence they flow, as in obligations obediential, and by engagement, or natural and conventional." (1981, 100)

<sup>22</sup> Stair himself was a student of both civil law and philosophy. Stair had taken a general arts degree at Glasgow, he also taught and is believed to have been a teacher of philosophy with a particular interest in logic. He then followed a long Scottish tradition and studied civil law abroad in the Netherlands in Leiden during an enforced period of exile. Philosophy was at the heart of education in Scottish universities of the time and McIntyre

the ultimate foundation of law:

Law is the dictate of reason, determining every rational being to that which is congruous and convenient for the nature and condition thereof (1981, 73-73)

Stair's acceptance of the role of reason in law then is strongly linked to a sense that there is a natural law which can be accessed by reason and which can provide an alternative authoritative source to civil law (posited by secular authorities) or custom (practice and the roots of precedent).

In this specific area, obligations of delinquency are created by individuals who by their actions become bound to one another. This is a distinct method of entering relationships apart from citizenship, statute, or contract and is primarily what sets this part of the common law apart. In this area of law it is the judges who assess that there is a need for legal intervention. Stair argues that the obligations are the logical result of the injunction to love your neighbour as yourself but the role of the civil authorities in this area is a limited one which suggests that for Stair law had a specific and limited role which did not extend to imposing moral obligations. Specifically, only God can punish the wrongdoer. Civil authorities do though have the power to regulate the individual's responsibility to repair for evil done. This is a general obligation and is not limited to specific nominate delicts.<sup>23</sup> As an obligation, a restriction in behaviour, it is limited to the negative injunction to repair any evil done to a neighbour. This obligation rests on two distinct concepts who is a neighbour and what is evil, underlying any definition of both will be a set of assumptions about how and where law should intervene

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(1988, 209-259) considers the central place of philosophy in Scottish thinking and contrasts Stair who founded law on reason with Blackstone who saw past practice as the primary source of law.

<sup>23</sup> There were some specific medieval remedies, including assythment and spuilzie, which had survived and which Stair mentions. These remedies had links to criminal law and have since either been abolished or are considered obsolete. (Thomson 1999, 1-7; Norrie 1996a, 127; Smith 1962, 648-649)

to impose moral obligations which may have wider compass. Therefore in this area of law those making decisions about its application are required to not only a view about how law and society relate but how law should reflect the morality underlie Stair's description of what persuasive.

In the eighteenth and nineteenth centuries, institutional writers were more academic and less theological and the civilian Lex Aquiliae became more influential<sup>24</sup> (perhaps reflecting the difference between Reformation and Enlightenment Scotland). There is thus a shift in the sense of what sources are acceptable and though reason remains the method authority is sought not in religion which was being questioned but in easily verifiable authorities. The root of law though remains a wrong and this is not only a deliberate act but includes a negligent one as Erskine put it:

Wrong may arise not only from positive acts of trespass or injury, but from blameable omission or neglect of duty. (1989, 664)<sup>25</sup>

As wrong was the source, the judiciary who now take over from the institutional writers in developing this area of law now sought to develop the law by using culpa, a roman law principle, as a way of trying to set out the sorts of relationships the law was prepared to recognise on the actions of the individuals alone.<sup>26</sup>

### 1.1.2 *Culpa*

The development of negligence in the courts in the nineteenth century can be linked to specific societal changes, the industrial revolution and growing urbanisation. This brought people into closer proximity and in more dangerous circumstances. The attitudes and experience of the judiciary were

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<sup>24</sup> Bell, (1899, 250) follows the Lex Aquiliae's four-fold categorisation of obligations rather than Stair's schema.

<sup>25</sup> From his *Institute* first published in 1773. Bell makes a similar point in his work. (1899, 257)

<sup>26</sup> The importance of precedent was established by the nineteenth century and is the background to this discussion.

also important. In one of the earliest cases, *Innes v Magistrates of Edinburgh*,<sup>27</sup> it was held that a person who fell into a pit in the lanes of the city was entitled to damages even though considerable precautions had been taken to prevent such an accident. At the time, Edinburgh, home of the law courts, was full of man-made holes as a result of building work. This may have made the judges more prone to decide for the victim.

A major influence on the development of the law at this time was John Inglis. Inglis dominated the Court of Session in the later half of the nineteenth century, first as Lord Justice-Clerk and latterly as Lord President.<sup>28</sup> Elliot (1954) argues that he was central in authoritatively establishing culpa or wrong<sup>29</sup> as the key to liability. In *Campbell v Kennedy*,<sup>30</sup> when he was Lord Justice-Clerk, Inglis stated:

... I go further, and hold that no action for reparation of damage so caused can be relevant, unless negligence or *culpa* of some description is averred.<sup>31</sup>

Inglis was supported by the rest of the second division in this but there was some debate about its implications. The other judges were prepared to accept that culpa could be inferred from the facts. Inglis maintained that it was so central to the definition of delict that it needed to be specifically mentioned in the averments. This required those who sought legal redress not to specify facts which the judges could then decide amounted to a situation they could recognise but to state from the start the specific legal principle under which the pursuer sought reparation.

The difference of opinion in *Campbell* about the centrality of *culpa* supports

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<sup>27</sup> (1798) Mor 13967. This case was founded largely on *Lex Aquiliae* rather than negligence.

<sup>28</sup> John Inglis was Lord Justice-Clerk 1858-1867 and Lord President from 1867 till his death in 1891. He was much admired by his contemporaries. A laudatory biography was written shortly after his death by James Crabb Watt (1893).

<sup>29</sup> At its broadest *culpa* simply means wrong. It is also used to refer to unintentional wrongs alone and in this sense is often contrasted with *dolus*, intentional wrong. It is the narrower sense that came to the fore during the nineteenth century and led to the exploration of negligence by the courts.

<sup>30</sup> (1864) 3M 121

<sup>31</sup> (1864) 3M at p 126



MacCormick's (1974) assertion that there is a need to be careful when assessing the importance of *culpa* as a principle in the nineteenth century. He sees no signs of a fixed principle in the early cases. Instead, *Culpa* was used whenever there was a difficult case that dealt with unintended acts because of a preference for Roman legal terms and its meaning varied. The principle of *culpa*, the need for wrong to be established before there could be liability for injury, evolved alongside the use of the word.<sup>32</sup> As MacCormick puts it:

Not only do the courts in the process of setting the rule to be applied in these situations bring into relief the element of fault, expressed in terms of *culpa*, but these situations appear to have provided the medium for the creation of the principle. It was in areas where the basis of liability was doubtful that the pressure for the emergence and utilisation of a principle was strongest. (1974, 28-29)

This suggests that where the judiciary were unsure about whether they could provide a remedy that they sought support and authority for judgments. In effect, they were seeking to find legally persuasive reasons to justify their application of law in the absence of any pre-existing legally recognised relationship. This may explain Inglis' desire for the party who sought to establish a relationship to first make it clear what legal reason the court should apply. There was a sense that law should respond and that *culpa* used to justify and rationalise judicial attempts to make that response. It was therefore a useful category which allowed the judiciary to both develop the law while making that development seem part of a rational structure rather than a matter of policy. This reinforced the authority of their decisions by providing for a legal standard by which their decisions could be judged. It also allowed them to develop a sense of how this new society should be dealt with and provided the basis for a persuasive strategy that could be used to explore the relationship between individuals and the law.

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<sup>32</sup> The first reported case to deal with negligence was *Caddell v Black*. 1804 Mor. 13905, (1812) 5 Paton 567 (HL). This case cited both Stair and the Lex Aquiliae as sources of the law. There is an earlier unreported case of *Gardner v Ferguson* (1795) cited in *McKendrick v Sinclair* 1972 SC (HL) 25 at p 66., 1972 SLT 110 at p 120.

By the end of the nineteenth century negligence or unintentional wrong was well established as the core of delict. The source for delictual obligation was *culpa* an act, negligent or intentional, by which an individual became liable for wrongful damage which resulted. *Culpa* then is an act capable of setting up a relationship of responsibility between people. The problem facing Scots law was how to limit this very broad principle and thus what relationships the law was prepared to recognise. Two main routes were used, remoteness of damage and duty of care. The remoteness of damage route was used in *Allan v Barclay*<sup>33</sup> and is described by Lord Kinloch:<sup>34</sup>

The grand rule on the subject of damages, is that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore as may reasonably be supposed to have been in the view of the wrongdoer.<sup>35</sup>

In contrast, Lord Kinnear in *Black v Fife Coal Ltd*<sup>36</sup> felt the duty of care principle was more appropriate as it makes the issue one of law as opposed to one of fact:

... it involves a matter of law, because it means that no ground of liability in respect of negligence has been established against the respondents. But negligence is not a ground of liability, unless the person whose conduct is impeached is under a duty of taking care; and whether there is such a duty in particular circumstances and how far it goes are questions of law.<sup>37</sup>

The difference between these two approaches is significant, although there may be little difference in practice. The first, a consequentialist approach, encourages a concentration on the individual facts of each case by highlighting the physical results of the act. The second, is grounded not in the consequences but in a relationship governed by law and thus encourages a

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<sup>33</sup> (1864) 2M 873

<sup>34</sup> Lord Kinloch sat as Lord Ordinary in this case. This quote comes from a note to the judges sitting in the appeal

<sup>35</sup> (1864) 2M 873 at p 874

<sup>36</sup> 1912 SC (HL) 33

<sup>37</sup> 1912 SC (HL) 33 at p 40

concentration on how law creates and identifies relationships. This is a more general approach encouraging abstraction though it is still rooted in an ethical understanding of responsibility for others. The approach chosen would dictate what examples and analogies could be used to justify individual decisions, whether pragmatic examples of the likely physical results of actions or more general examples of responsibility and duty. These examples, following Aristotle, would reflect and create the judicial view of the character of law and therefore their view of the role of law in society.

*Donoghue v Stevenson* definitively answered this question by coming down in favour of duty of care and, in doing so, ended the formative period of delict. The impact of this case will be considered after the section on tort. This is because *Donoghue* did not only seek to answer questions for delict but also for tort. It could do so because Scots law had become heavily influenced by English law in this area and particularly by *Winterbottom v Wright*.<sup>38</sup> *Winterbottom* was decided on the English doctrine of privity of contract and the judges explicitly refused to create a general liability. Indeed, the House of Lords opposed the idea of general liability for injury caused by wrongful actions. They felt that liability should only be created by consent - by contract. This reflects English law which had a very different development based on a sense of law as part of the royal prerogative and which was reluctant to see any relationship recognised in law without the prior consent of the parties.

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<sup>38</sup> 1842 10 M&W 109. This decision was followed in the “mouse cases” *Mullen v Barr & Co.* and *McGowan v Barr & Co* (1929 SC 461, 1929 SLT 71). The facts in these cases were virtually identical to those in *Donoghue* but the judges all gave different reasons for their decisions showing that this was felt to be a difficult area. It is possible for all judges in a case to produce a written decision but this is rare and usually occurs in controversial cases, and indeed, in cases which are regarded as of some importance and likely to become sources of precedent. This allows later benches more flexibility in deciding how to use the case and which reasons will be acceptable.

## 1.2 Tort

### 1.2.1 Access to law

In England, the roots of tort lie in the middle ages when an action for trespass was introduced into the King's courts.<sup>39</sup> Trespass simply meant wrong and the action was designed to deal with breaches of the King's peace. Over time this 'criminal' action extended to cover areas of civil wrong.<sup>40</sup> An action of trespass, for example, would be used to recover damages from a workman who had negligently damaged an object in his care. (Milsom 1981, 290) This reflected what must have been a sense that the courts should intervene but these non-criminal cases were distorted by the need to bring them into the original formula, which stated there had been a crime against the monarch and that force had been used. In 1370 a new procedure was introduced. This made it possible to go to trial on the case, the facts simply stated, rather than having to claim a breach of the peace. The dominant focus of law was therefore access and how individuals could gain access to a space where the law seen as lying in the hands of the sovereign would be available to them.

There were now two actions, trespass and case. The creation of case did not lead to trespass losing all its civil aspects. Instead, it split the civil aspects into two, with people being free to choose whether to proceed by trespass or case to attract the court's attention either by alerting it to relevant facts or by bringing it under the King's jurisdiction by claiming his peace had been breached. The two actions followed separate procedures until 1504 when the procedures were made the same but even after this the writs remained distinct.

It is not possible to understand English law without appreciating the central

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<sup>39</sup> The sources for the history in this section are; Hepple (1984), Winfield (1926;1934) and Milsom (1981)

<sup>40</sup> Markesinis (1977) argues that tort and delict owe their similarities to the fact that, at an early stage, they both had mixed criminal and civil elements.

importance, until this century, of writs. A case could be brought before a court that on its facts was good in law but that failed because the wrong writ had been used. Separate writs could have different procedures and law even when pursued through the same court. In tort the existence of two writs, even though procedurally identical after 1504, caused considerable difficulty. Especially as over time trespass lost most of its criminal connotations. This meant that there was considerable overlap between the writs but, if the wrong writ was used - e.g. trespass where case was more appropriate - the action would fail.

By the seventeenth century the situation had become very confused and it was not clear why one situation should be tried as case and one as trespass. In *Scott v Shepherd*<sup>41</sup> the judiciary tried to establish a logical difference to help to resolve some of the confusion. It held that trespass covered direct injury and case covered indirect injury. This meant that wrongs were organised by injury rather than fault and led to tort being dominated by questions of fact rather than law. This reflects the way in which case had been created and contrasts with the Scottish development where Inglis sought to bring the facts under a recognisable legal principle and led English judges to create a series of nominate torts which detailed specific circumstances in which the higher courts had held that there was a relationship where there could be liability. These areas were limited and were generally restricted to people who had specific jobs, innkeepers for example, the nature of which meant that people relied on them to care for them or their property. (Winfield 1926, 185-186) The judiciary were only prepared to recognise pre-existing relationships.

Negligence was part of this structure but it had a limited place. It was not a nominate tort but a way of establishing wrong within the structure of nominate torts. Its role did become more important after it became clear that the difference between direct and indirect injury was not always an easy one to establish and there was another attempt to remedy the situation in *Williams*

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<sup>41</sup> (1773) 2 Bl R 892

*v Hollands*.<sup>42</sup> In that decision it was held that actions that, under the *Scott v Shepherd* rule, should proceed by way of a writ of trespass could proceed under case with no penalty. This did not abolish the difference but meant that it had no importance and this allowed legal focus from the distinction between trespass and case to the torts themselves.<sup>43</sup> Milsom (1981) argues that negligence evolved as the central question was no longer about the nature of the injury, focus turned to the wrong and in response to this lawyers used moral language, like negligence or deceit, as a way of legitimating their arguments. After a number of cases used negligence as a foundation for liability, it became a standard way for establishing wrong but only in cases where the law held that one of the parties had a special duty to the other. Relationships came first and acts second and relationships were still a matter of choice or clearly pre-existed by virtue of the social roles of the individuals.

### 1.2.2 Privity of contract

The doctrine of privity of contract prevented any development beyond this point. The main justification for this doctrine was the unlimited liability or floodgate argument which was expressed in its most pristine form in *Winterbottom v Wright*:

The only safe rule is to confine the right to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.<sup>44</sup>

The issue in *Winterbottom* was whether coach hirers could be held liable to a driver who was injured in an accident caused by latent defects in one of their coaches. The application of the floodgates argument can be seen in Lord Arbinger's decision where he justifies the dismissal of the case by arguing:

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road,

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<sup>42</sup> 2. LJCP (NS) 10 Bing 112

<sup>43</sup> See Pritchard's (1964) article for a fuller discussion of the reason for and an explanation of the importance of this rule.

<sup>44</sup> 1842 10 M&W 109 at p 115

who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences to which I can see no limit, would ensue.<sup>45</sup>

There is a strong feeling in this argument that law needs to be controlled. The legal sphere is one that is both powerful and dangerous and that could overwhelm other relationships so that it needs to be carefully fenced in.<sup>46</sup> In this view of law the role of the judge is to limit the potentially dangerous consequences. Another justification put forward for privity of contract was that the harm should be left where it falls. The classic exposition of this comes from Bramwell, B. in *Holmes and Wife v Mather*:<sup>47</sup>

For the convenience of mankind in carrying on the affairs of life, people, as they go along the roads must expect or put up with such mischief as reasonable care on the part of others cannot avoid.

Again this reflects a sense that people should be left alone to regulate their own affairs. There is a strong individualistic feel to such arguments that gives law a very pragmatic character. As society changed, though, there was a growing sense that in certain circumstances it was inequitable for the victim to be left to carry the harm. Forty years after *Winterbottom*, Lord Esher, then Brett, M.R., reveals how much when he made a concerted attempt to undermine the doctrine of privity of contract in *Heaven v Pender*.<sup>48</sup>

The facts in *Heaven* were not contested. A painter had been injured when staging put up by the owner of a dry dock gave way. The painter was employed not by the owner of the dry dock but by the owner of the boat he was painting. The issue was whether the owner of the dry dock could be liable if the staging had been put up negligently. Lord Esher felt that privity of contract should not stand in the way of the injured party receiving damages.

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<sup>45</sup> *supra* at p 125

<sup>46</sup> This is a reverse of the argument in the *Talmud* that a fence needs to be placed around the *Torah* in order to protect it but there is the same sense that law needs and requires limitations in order to be effective.

<sup>47</sup> (1875) LR 10 Ex 261 at p 267

<sup>48</sup> (1883) 11 QBD 503

He argued that there could be duty outside contract:

It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract.<sup>49</sup>

He even went so far as to suggest a general principle that could cover the area:

The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be no danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it as duty arises to use ordinary care and care as to the condition or matter of supplying such a thing. And for a neglect of such an ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence.<sup>50</sup>

Esher was attempting to introduce a new way to define relationships based on actions and close contact rather than by consent. This reveals a greater awareness of the complexities of social relationships than was seen in the earlier English cases. Lord Esher's proposals went too far for the other judges sitting on the case.<sup>51</sup> Although they supported his conclusion, they stated that they did not support his principle and it was this view that was followed in later cases.<sup>52</sup>

Esher had failed to persuade his fellow judges to adopt a principle that would allow the law to recognise certain relationships. This did though happen in

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<sup>49</sup> (1883) 11 QBD 503 at p 507

<sup>50</sup> *supra* at p 507

<sup>51</sup> Their timidity was criticised by Lord Johnston in the Scottish case of *Kemp & Dougall v Darnagavil Coal Co. Ltd.* 1909 SC 1314, 1909 2 SLT 181

<sup>52</sup> There was another small breach in the case of *Le Lievre v Gould* [1883] 1 QB 491: "If one man is near to another or is near to the property of another, a duty lies upon him not to do that which may cause a physical injury to the other, or may injure his property" p 497 per Lord Esher.



*Donoghue.*

## 2. *Donoghue v Stevenson*

*Donoghue v Stevenson* is one of the most persuasive of all legal decisions and has been adopted by numerous jurisdiction. The facts of the case were simple.

On the 26<sup>th</sup> of August 1928, Mrs May Donoghue entered a teashop in Paisley with a friend. Her friend bought Mrs Donoghue an ice cream and a fizzy drink.<sup>53</sup> It was later claimed that having drunk some of the fizzy drink, Mrs Donoghue discovered a decomposing snail in the bottle. It was alleged that, as a result, she suffered both shock and illness.<sup>54</sup> The bottle was opaque and there was no way that the retailer could have examined it before the sale. Mrs Donoghue decided to claim against the manufacturer and employed W.G. Leechman & Co. to take the case.<sup>55</sup>

Today, this would be a straightforward situation covered by consumer legislation but at the time it was not clear that the law could provide a remedy. Mrs Donoghue had no contract with either the retailer or the manufacturer and it was a moot point whether in such a circumstance there could be a claim under delict.

The House of Lords did decide in favour of Mrs Donoghue and, rather than go to proof, Stevenson settled out of court. The decision was not unanimous. The House was divided three to two, but despite the narrowness of the result the

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<sup>53</sup> There is some confusion as to what the drink was. The case reports that it was ginger beer, but “ginger” in the West Coast of Scotland is a term used to cover any bottled fizzy drink and it could have been misinterpreted. (Thomson 1999, 58)

<sup>54</sup> The facts were never proved

<sup>55</sup> There was a sense of the wider legal profession although this solicitor had been unsuccessful in two virtually identical cases here was extremely successful but there was strong feeling a change was due. Even Stevenson’s senior counsel felt the law was against them - “I personally thought that the H.L. would decide as they did in fact decide, but that we had a very strong case on the facts. If the case had gone to proof I think it would have been fought and possibly won on the issue whether there was a snail in the bottle and I may have told MacKinnon this.” (McBryde 1991, 51)

case has become incredibly influential and possible one of most persuasive.

The influence of *Donoghue* comes not from the bare facts of the decision but the methodology of the decision-making and the reasons given. It has become precedent and regarded as both useful and authoritative in Scotland. Indeed in both jurisdictions it has become the foundation of the law in this area. One of the reasons is not just its simple ratio but that judges have been able to adapt and use it in a number of different ways. The core decisions in the case are those of Lord Macmillan, a Scottish judge and Lord Aitken, an English judge. Their decisions reflect these different backgrounds and their views of the relationship between law and society. They also reflect the relationship between the two judges and the two jurisdictions.<sup>56</sup>

## 2.1 Judicial relationships.

Lord Macmillan had initially intended to decide the case using mainly Scottish cases and authority and only deal with English law because it had been cited before him. As he puts it, in an earlier draft of his decision:

The question accordingly for your Lordships' determination is whether by the law of Scotland the appellant has on her averments any right of action against the respondent. I say advisedly, by the law of Scotland, for close as may be the approximation in modern times between the Scots law of delict and the English law of torts, and instructive as English precedents may be of way of illustration in Scottish cases, the question before the House is one of Scots law. Historically there are distinctions, both in origin and in principle, in this branch of law between the two systems. These distinctions may not be material for the present purpose, but they should be borne in mind. Thus the law of Scotland has never recognised the English distinction between

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<sup>56</sup> It also brings to mind the point made in section on precedent that the first step to establishing a precedent is to show that the other judges who sat with you found your arguments persuasive.

misfeasance and non-feasance, which has had considerable influence on the development of the English law of negligence; nor again has the law of Scotland been hampered by procedural difficulties due to the rigidity of the English system of forms of action, which, though decently interred by the Judicature Act, in Maitland's words "still rule us from their graves." I hope, however, to show in the sequel that, notwithstanding these historical divergencies, the law of Scotland and the law of England, in their relation to practical problem of everyday life which this appeal presents, are not really at variance in principle. Both parties indeed at your Lordships' bar appeared to assume that this was so, but while the appellant maintained that her claim was not contrary to English doctrine or English decisions when rightly interpreted the respondent contended that according to English law the appellant's claim was inadmissible. It will therefore be necessary to consider hereafter whether the respondent's submission on the law of England is well-founded. But this is a Scottish case and I think it both appropriate and logical that to consider in the first case whether the appellant had stated a relevant case according to Scots law, for if she has not it is unnecessary to examine the English authorities. (Rodger 1992, 249)

Yet despite this robust defence of Scots law, Lord Macmillan's final decision minimised any difference and decided on English law:

At your Lordship's bar counsel for both parties to the present appeal, accepting, as I do also, the view that there is no distinction between the law of Scotland and the law of England in the legal principles applicable to the case, confined their arguments to the English authorities. The appellant endeavoured to establish that, according to the law of England, the pleadings disclose a good cause of action; the respondent endeavoured to show that, on the English decisions, the appellant had stated no admissible case. I propose therefore to address

myself at once to an examination of the relevant precedents.<sup>57</sup>

Lord Macmillan never explained why he changed his mind about what material was primarily persuasive in this case. The earlier version of the decision was only found recently amongst his papers. Rodger (1992), who published the earlier decision, suggests a number of reasons for this change. These include the fact that none of the Scots authorities that Lord Macmillan used in his earlier decision had been put before the court by the parties involved<sup>58</sup> but Rodger also feels that Lord Atkin may have had something to do with Lord Macmillan's change of mind.

It is certainly likely that Lord Atkin would have been discussing Lord Macmillan's decision in detail with him. He appears to have been preparing for such a case for some time and was very clear about what he wanted it to achieve. Lord Atkin was a reformer. He was unhappy with certain aspects of English law and sought to change them for the better. In two lectures to the Society of Public Teachers of Law, made prior to the *Donoghue* decision, he argued that English law needed to become more scientific, by this he meant more principled:

There is a general tendency to demand that law should consist of broad principles, that narrow distinctions should be eliminated. There are certainly still a number of such distinctions which it is difficult to justify or to apply. (Atkin 1925, 13)<sup>59</sup>

Lord Atkin was seeking to eliminate such narrow distinctions and to develop principles to replace them. He specifically criticised tort and singled it out as an area of law in need of reform. (1925, 13) Lord Atkin chose the *Donoghue* case to introduce a principled approach to this part of law:

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties

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<sup>57</sup> 1932 SC (HL) 31 at p 63

<sup>58</sup> This reflects a sense of the judge as a dispute solver and not primarily as the source of the law.

<sup>59</sup> In the same article, Atkin suggests that in areas of law where principles were settled they could only be reformed by legislation. (1925, 15)

that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstance. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation, or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman, or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.<sup>60</sup>

Clearly, Lord Atkin wanted to have an impact beyond the present case and one that would reflect his view of law as it should be - based on logic and principle. If there were some doubt as to whether the decision applied equally in England as in Scotland, this would have undermined that impact. This may have encouraged him to persuade Lord Macmillan to use only English law in his decision.

Whether Lord Macmillan was persuaded by Lord Atkin's reforming zeal, or was affected by other factors, can not be known for certain. It is certain that his use of English authorities did not affect the reasoning he employed in the decision:

Essentially what Lord Macmillan did when he prepared the May version was to take the generalised reasoning that he had originally used for Scots law and apply it to the law of both systems. In other words he used the same basic material but said that he was speaking of both systems rather than simply of Scots law. (Rodger 1992, 242)

Although Lords Macmillan and Atkin were both using what they described as

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<sup>60</sup> 1932 SC (HL) 31 at p 44

a principled approach, they had very different attitudes towards it and this revealed in reasons used to justify and legitimate their use of that approach.

## 2.2 Principled reasoning.

Lord Macmillan saw this as a traditional way of approaching such questions and found it unproblematic. Lord Atkin was seeking to have a radical effect on the way the law evolved. This difference can be seen in the way each judge introduced his use of principle-based reasoning. Lord Atkin, quoted earlier, starts by appealing to logic and reason. This appeals to a sense of law as an atemporal hierarchy which can always supply the answer. He then seeks a foundation in commonly accepted morality:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.<sup>61</sup>

It is notable that this is the same principle that Stair used when seeking to find a foundation for delict. It grounds this area of law in social morality and in the structures of society. Aristotle argues that the maxim or proverb has a particular power and it is likely this is because of its instant emotional comprehensibility rather than any inherent logic. Lord Macmillan does not

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<sup>61</sup> supra at p 44. This section is remarkably like one from one of the lectures to the Society of Public Teachers of Law: "It is quite true that law and morality do not cover identical fields. No doubt morality extends beyond the more limited range in which you can lay down the definite prohibitions of law; but apart from that, the British law has always necessarily ingrained in it moral teaching in this sense: that it lays down standards of honesty and plain dealing between man and man. .... He is not to injure his neighbour by acts of negligence; and that certainly covers a very large field of the law. I doubt whether the whole law of tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should do unto you." (1932, 30)

feel the same need to justify his use of principle though, he does point to its flexibility and the way it can be used to link law and societies' view of what is appropriate:

In the daily contacts of social and business life, human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgement must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and, on the other side, to a right to have care taken.<sup>62</sup>

In using a reasonable man as the standard Macmillan is asserting that a person should be the model rather than founding law in any more abstract principle. It also reflects the close link Macmillan feels should exist between the law as applied by the judiciary and the way in which society is evolving. The role of the judge is to assess whether society ready to be legally regulated or not and then to absorb that within legal system by applying legal categories to the relationships.

By coming down in favour of the duty of care, both judges are setting the scene for legal rather than pragmatic argument. That is argument about

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<sup>62</sup> 1932 SC (HL) 31 at p 70

principle and relationships rather than cause and effect. In doing so *Donoghue* solved the question of how to limit the *culpa* principle by coming down in favour of duty of care and relationships similar to the way England had. In tort, duty of care became the founding principle in negligence cases. This then became the principle around which new legitimate arguments could be explored. This has led to an explosion of cases, five of which, all dealing with pure economic loss are considered here.

### 3. Pure economic loss

Despite the shift to a relationship-based principle, negligence has tended to ground itself in physical links between people and to restrict loss to physical consequences:

The duty of care only extends to physical injuries to the pursuer or damage to the pursuer's property caused by the defective product. The damage must be done to property other than the defective product itself. For example, if a defective vacuum cleaner explodes and burns the pursuer or burns the pursuer's carpet, there is *Donoghue v Stevenson* liability. But if the defective vacuum simply does not work or it explodes and does not injure the pursuer or does not damage any other property of the pursuer there is no *Donoghue v Stevenson* liability. Why? In these circumstance, the pursuer has suffered only *pure* economic loss, ie the cost of repairing the vacuum cleaner or the difference in value between a defective or non-defective cleaner. The courts have consistently refused to allow the pursuer to recover compensation *in delict* for such losses. Instead, the pursuer must resort to the law of contract to obtain compensation.... (Thomson 1999, 95)

There has been a reluctance to go beyond the physical results of actions which could be easily absorbed into legal terms and the judiciary have required an extra justification to do so. As Thomson points out:

Although reasonable foreseeability of pure economic loss is not sufficient for the imposition of a duty of care, the courts have, in certain situations, been prepared to hold that a duty of care does exist.



However, there must be factors *in addition* to reasonable foreseeability of pure economic loss, which demonstrates that there is a sufficient degree of proximity between the parties for a duty of care to be inferred. (1999, 79)<sup>63</sup>

This is why pure economic loss is an interesting area. It is not enough that the reasonable foreseeable results of my actions might lead to such loss. In considering proximity judges have continually to consider what relationships deserve legal recognition.

One of the first significant cases was *Hedley Byrne v Heller*.<sup>64</sup> The question in *Hedley Byrne* was whether negligent misrepresentation could give rise to liability. In this case an agency had placed orders with a company for a third party. The agency was liable for the orders and asked their bankers to check the company. The bank wrongly and negligently gave good references and when the company failed the agency was liable to the principal. The agency sued their bankers for the loss which was described as purely economic.

One of the main authorities against the agency was the English case of *Derry v Peak*<sup>65</sup> which asserted that negligent statements could not give rise to liability but *Derry v Peak* had been limited by *Nocton v Ashburton*.<sup>66</sup> As Lord Reid in *Hedley Byrne* said:

It must now be taken that *Derry v Peak* did not establish any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action.... it was shown in this House in *Nocton v Lord Ashburton* that this is too much widely stated. We cannot, therefore, now accept as accurate the numerous statements to that effect in cases between 1859 and 1914, and we must now

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<sup>63</sup> Thomson (1999, 69-109) sees duty of care as a 'threshold device'. A way of allowing judges to limit liability by using policy considerations. This view, and others, of duty of care is discussed by K Norrie (1996b 157-169)

<sup>64</sup> [1964] AC 465, [1964] 2 All ER 575, HL.

<sup>65</sup> (1889) 14 App Cass 337.

<sup>66</sup> [1914] AC 932

determine the extent of the exceptions to that rule.<sup>67</sup>

The situation in *Hedley Byrne* was declared to be such an exception. The House held that there was a special relationship between the parties. This relationship was sufficient to find that they were in proximity and that, therefore, the agents were reasonable in relying on the bankers statement and that the bankers had a duty of care not to make those statements negligently.

In doing so the judges made use of *Donoghue*, Lord Devlin chose not to follow the facts of the decision but to use its methodology:

... for a general conception cannot be applied to pieces of paper in the same way as to manufacturers.... The real value of *Donoghue v Stevenson* to the argument in this case is that it shows how the law can be developed to solve particular problems.<sup>68</sup>

Lord Pearce's reasoning is similar but he prefers Lord Macmillan's contextual reasoning and is clearer about the need for judges to consider how law relates to society in deciding which relationships to recognise:

How wide the sphere of the duty of care in negligence is to be drawn depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property. It may be that the size and width of the range of possible claims has acted as a deterrent to the extension of economic protection.<sup>69</sup>

According to this view the role of the judge is to assess whether society would regard it as unfair if the law did not recognise certain relationships. It is not clear how the judge would assess the social view. *Anns* made this point more explicit.

In *Anns*, the local authority defending the case had approved the design for

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<sup>67</sup> [1964] AC 465 at p 484

<sup>68</sup> *supra* at p 525

<sup>69</sup> *supra* at pp 536-537

the foundations of a building. These later proved defective. The House of Lords decided that the local authority was liable to the owners of the house even though there had been no other damage to any other object or to a person. The most frequently cited and criticised passage from the decision focuses on the reasoning used. It was delivered by Lord Wilberforce:

Through the trilogy of cases in this House - *Donoghue v Stevenson* [1932] A. C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the questions has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of duty of it may arise.<sup>70</sup>

This was to prove a remarkably unpersuasive statement. In particular Lord Wilberforce was attacked for confusing the limiting principle which should have been proximity by restricting this to reasonable foreseeability and expanding the political role of the judiciary. Little that he actually said though could be criticised if compared for example to Lord Macmillan in *Donoghue*, where Macmillan links duty of care to reasonable foreseeability and refers to the need for law to be socially aware. This though was in cases of physical injury where proximity and reasonable foreseeability would logically have been very close. In cases of economic loss there was less obvious justification

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<sup>70</sup> [1978] AC 728 at p 752

for law to intervene and perhaps, therefore, an underlying need to be more cautious about proximity.<sup>71</sup> In *Hedley Byrne* the judge was to be responsible for assessing whether society was ready for this relationship to be classified as legal but *Anns* went further, the relationship was already recognised by the physical act and then the judge would consider whether it was fair to recognise it. This may seem a pedantic difference but it means that the legal classification becomes automatic and judges are left concentrating on policy and this they can no longer hide behind a discussion of legal classifications.<sup>72</sup> The discomfort this generated can be seen in *Murphy* which overruled this decision but before this there is one more case to consider *Junior Books*.

In *Junior Books*, the pursuer was a company which owned a new factory. The company was seeking reparation for a floor that had been laid badly. The floor had been laid by a nominated sub-contractor. Thus, although the pursuer knew who was laying the floor, there was no direct contract between the company and the defendants. There were no averments that the floor was dangerous. The loss was, therefore, economic. The cost to the company was the cost of repair or replacement. The court held that the sub-contractors were liable to the pursuer. On the facts, this appears uncontroversial. It was reasonably foreseeable that if the sub-contractor's laid the floor badly that the pursuers would be disadvantaged. In the absence of any damage to other property or immediate danger the special relationship test comes into play and the relationship can be easily established by the link of contracts.<sup>73</sup> Indeed it is clearly stated that proximity was accepted and not in issue. This meant that the judges were left to consider whether the damages were such as to be covered. This would seem to be fairly uncontroversial, this, though, was not how the decision was regarded. Instead, critics focused on the perceived

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<sup>71</sup> Peter Cane (2000) argues that negligence is not rooted in the intention of the actor (as in criminal *mens rea*) but rather judges have focused on the victim and this has led to the discussion of whether it would be inequitable to compensate and then how to justify.

<sup>72</sup> Howarth (1995) sees a similar problem in *The Wagon Mound No 1*. (*Overseas Tankships v Morts Dock and Engineering Co. Ltd.* [1961] AC 388, [1961] 1 All ER 404.) In that case, Howarth argues the remoteness and directness test was lost raising the spectre of infinite liability and that this was the source for the reaction against principled reasoning.

<sup>73</sup> This follows Thomson's (1999) analysis.

dangers of extending liability to goods which though badly manufactured do not present a danger to property or person. The dangers were that if no such boundary existed that there would be no way to logically stop legal liability spreading into more and more areas. The obvious fear behind this being that law itself would therefore be brought into disrepute.

Part of the problem came from Lord Wilberforce's two stage tests in *Anns*, which was explicitly referred to as persuasive in *Junior Books* and although *Junior Books* can be seen in a different light this led to it being viewed as infected with the same perceived fault. Reasonable foreseeability is easily passed in this case. As proximity and reasonably foreseeability had become combined, proximity was not considered.<sup>74</sup> Instead, the limiting factor was what the judiciary often define as policy - the view of the community.<sup>75</sup> Two of the judges saw no reason for restricting the duty of care. Lord Brandon did and in his decision lays the ground for the reaction against *Anns* and *Junior Books*. Lord Brandon follows Lord Wilberforce's two stage test closely but he does so in order to undermine it by showing that its methodology takes the law into dangerous areas. Notably, he was very clear about the policy considerations that informed his choice to dissent:

To that second question I would answer that there are two important considerations which ought to limit the scope of the duty of care which it is common ground was owed by the defenders to the pursuers on the assumed facts of the present case.

The first consideration is that, in *Donoghue v Stevenson* itself and in all the numerous cases in which the principle of that decision has been applied to different but analogous factual situations, it has always been either stated expressly, or taken for granted, that an essential ingredient in the cause of action relied on was the existence of danger, or the threat

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<sup>74</sup> This seems to be a reversal of the initial process and establishes duty through proximity. The limitation is reasonable foreseeability of the damage.

<sup>75</sup> Such reasoning will be discussed in more detail below.

of danger, of physical damage to persons or their property, excluding for this purpose the very piece of property from the defective condition of which such danger, or threat of danger, arises. To dispense with that essential ingredient in a cause of action of the kind concerned in the present case would, in my view, involve a radical departure from long-established authority.

The second consideration is that there is no sound policy reason for substituting the wider scope of the duty of care put forward for the pursuers for the more restricted scope of such duty put forward by the pursuers....<sup>76</sup>

The first consideration is not strictly a policy reason but rather a desire to restrict law and is based on a clear view of the role of the judge. There is a strong underlying desire to limit what could be perceived as judicial law making. In concentrating on authority rather than principle law will only evolve in steps rather than grand leaps and the policy consideration, although dealt with, is largely rejected. In concentrating on authority and analogy Lord Brandon is seeking to remind judges that their power is limited, that they need to justify their reasons and that the way judges should justify their reasons is by appeal to precedent. This restricts what an individual judge can do but embeds new decisions in a tradition. This has the advantage of hiding the way in which judges inevitably consider the relationship between law and society in such areas in questions of classification and categorisation. Although the result is similar this differs from early English attitudes to law as it is no longer a question of access to a space where judge's dispense a delegated authority but an awareness that the judiciary might not be the best place to openly define the legal meaning of relationships in the face of a political alternative. This contrasts sharply with Lord Atkin's desire to organise the law around scientific principles which sees the law as an area which creates meaning which should be clear and easy to see.

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<sup>76</sup> 1982 SC (HL) 244 at pp 281-282.

In the decade following *Junior Books*. Lord Brandon was to be at the head of the judicial shift which led to case-based reasoning becoming dominant. There are probably a number of social reasons for this shift. Internally, there was a lack of a clear justification of these relationships and the judiciary sought to justify any change in the law by embedding it in tradition rather than being seen to be involved in social engineering of any kind. From a broader view the market-centred 1980s favoured a caveat emptor approach rather than a protectionist one. The fear of American-style litigation may also have been a factor but the generational change in the judiciary may also have been significant.<sup>77</sup> New judges may well have instinctively sought a different path from their predecessors in order to stamp their own personalities on the law. Two cases show this new approach, *Caparo v Dickman*<sup>78</sup> and *Murphy v Brentwood District Council*.<sup>79</sup>

In *Caparo* the criticism of previous decisions was on two fronts. The first, put forward by Lords Bridge, Oliver and Jauncey, dealt with the identification of foreseeability with proximity. All three judges agreed that these should be kept separate:

The relationship of proximity ... is not one which is created solely by the foreseeability of harm resulting from carelessness in the statement, but is one in which some further ingredient importing proximity is present.<sup>80</sup>

Interestingly, the test in *Caparo* has been understood in two ways reflecting the difference between the two methodologies. Some commentators describing *Caparo* as introducing a three-stage test which expanded the first part of Lord Wilberforce's two-stage test so that foreseeability and proximity become separate tests that both needed to be passed before liability could be

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<sup>77</sup> There may also have been a reflection of changed attitudes towards reason and scientific principles since *Donoghue*.

<sup>78</sup> [1990] 2 AC 605, [1990] 1 All ER 568

<sup>79</sup> [1991] 1 AC 398, [1990] 2 All ER 908

<sup>80</sup> [1990] 2 AC 605 at p 655 per Lord Jauncey

established.<sup>81</sup> This reestablishes a principled form of reasoning. But the other criticism in the decision was of the principled approach itself and this is how most people have viewed *Caparo*. Lords Bridge, Roskill and Oliver all argued that there had been a move within recent cases back to such an approach and that this was a necessary corrective:

My noble and learned friends have traced the evolution of the decisions from *Anns v Merton London Borough* [1977] 2 All ER 492, [1978] AC 728 until and including the most recent decisions of your Lordships' House in *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514, [1989] 2 WLR 790. I agree with your Lordship that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or, in cases where such liability can be shown to exist, determine the extent of such liability. Phrases such as 'foreseeability', 'proximity', 'neighbourhood', 'just and reasonable', 'fairness', 'voluntary acceptance of risk' or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each cases before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge, suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty.<sup>82</sup>

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<sup>81</sup> This has been particularly true of the Scottish courts (See Brodie 1997 for a full analysis of this position).

<sup>82</sup> [1990] 2 AC 605 at p 628 per Lord Roskill.



The return to a desire to control law is clearly present in this passage and brings to mind the talmudic idea of the need for a fence around law to protect it. It could be arguable that the judges are aware that this works both ways, society needs to be protected from a law escaping its bounds and intruding in all relationships but equally if law and particularly judge made law is seen to be too radical it risks undermining the institution itself.

After *Caparo* it was clear that *Anns* was under a sustained attack and eight years after *Junior Books* and several cases in which *Anns* was debated, distinguished and criticised,<sup>83</sup> *Anns* was overruled in *Murphy v Brentwood District Council*.<sup>84</sup> If *Anns* was the highpoint of expansion, then *Murphy* was the highpoint of the reaction. The main criticism of *Anns* had been of its reasoning. It was felt that it had laid down too broad a principle and that it led to dangerous results. *Murphy* espoused a different approach:

As regards the ingredients necessary to establish such a duty in novel situations. I consider that an incremental approach on the lines indicated by Brennan J in the *Sutherland Shire Council* case is to be preferred to the two-stage test.<sup>85</sup>

Brennan's view of reasoning had been referred to positively in a number of cases in which *Anns* had been criticised and distinguished.<sup>86</sup> Its use in *Murphy* gave it even more support. Brennan did not set out his approach in detail. It is as much a critique of the use of policy in decision-making as a distinctive method:

It is preferable in my view, that the law should develop novel categories

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<sup>83</sup> See *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529, 1985 AC 210. *Leigh & Silavan Ltd. v Aliakmon Shipping Co Ltd* [1986] 2 All ER 145, [1986] AC 785. *Curran v Northern Ireland Co-ownership Housing Association (Stewart, third party)* [1987] 2 All ER 13, [1987] AC 718. *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705, [1988] AC 175. *Hill v Chief Constable of West Yorkshire*. [1988] 2 All ER 238, [1989] AC 53.

<sup>84</sup> [1991] 1 AC 398, [1990] 2 All ER 908

<sup>85</sup> [1991] 1 AC 398 at p 461

<sup>86</sup> See *Caparo Industries plc v Dickman* [1990] AC 605 at p 618 per Lord Bridge, *Curran v Northern Ireland Co-ownership Housing Association (Stewart, third party)* [1987] AC 718 at p 726 per Lord Bridge, *Yuen Kun-yeu v A-G of Hong Kong* [1988] AC 175 at p 191 per Lord Keith.

of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable “considerations which ought to be negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed”.<sup>87</sup>

Brennan is allying his views strongly to a core legal value, the need to provide certainty. It is this that allows people to use law in their daily affairs. He is arguing that principled reasoning does not provide for such certainty. In some ways he almost seeks a return to the pre-*Donoghue* law. Legal reasoning is based on examples with pre-established factual categories and certainly does not seek to understand the broader social relationships behind the categories but to restrict the speed with which law can respond. It portrays a more cautious role for the judiciary.

#### 4. Conclusion

In looking at negligence, the unintended consequences of actions, the judiciary have, over centuries, tried to adapt to changing attitudes towards law and changes within society generally. This task is not though unproblematic. Judges not only have to consider changing attitudes but how they can justify their recognition of those attitudes. In particular, in deciding how far pure economic loss should be recognised legally, the judiciary have been led to consider their own role and the way they should relationships in society. Two dominant methodologies have emerged, principled and case-based reasoning. These reflect historical differences in the two jurisdictions which interact in this area but also different views about where the limitations, the boundaries of law should be drawn. These reflect attitudes towards the judicial role and the next section shows how looking at these two methodologies and the persuasive strategies involved within them helps to reveal the emotional and personal commitment of the judiciary to the law.

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<sup>87</sup> *The Counsel of the Shire of Sutherland v Heyman & another*. (1985) 157 CLR 424 at p 481

## Principled and case-based reasoning

The last section showed how the law evolved and how in the five pure economic loss cases being considered these two methodologies were used to justify judicial reasoning. Although the phrase principled reasoning suggests that previous case law is ignored the doctrine of precedent ensures that the judiciary must take into account previous decisions and the distinction between the two is more subtle and relates to how previous decisions should be used. The choice made between these methodologies deals with how the judiciary relate to the material which they must take into account and the examples they use and, therefore, following Aristotle, the character they portray.

### 1. Judicial definitions.

In *Donoghue*, Lord Atkin describes how principled reasoning is based on a belief that there must be some logic to the law:

And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.<sup>88</sup>

The advantage of finding this logical element is that it can then be applied to future cases, as Lord Fraser puts it in *Junior Books*:

If and when such other cases arise they will have to be decided by appealing sound principles to their particular facts.<sup>89</sup>

Principled reasoners seek to find a principle in previous case law that can be reused. In *Hedley Byrne* Lord Morris of Borth-Y-Gest follows this procedure, first looking at previous authorities, then setting out a general principle and finally stating:

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<sup>88</sup> 1932 SC (HL) 31 at p 44

<sup>89</sup> 1982 SC (HL) 244 at p 265

I do not propose to examine the facts of particular situations or the facts of recently decided cases in the light of this analysis but I proceed to apply it to the facts of the case now under review.<sup>90</sup>

According to these statements, principled reasoning is dependant on finding a *ratio* that has been applied in a number of situations and therefore can found a general authoritative principle. Once this principle has been established future judges can use this rather than examining previous decisions. This can be seen in the case of *Donoghue* which is seen as founding a general principle and earlier cases are rarely considered. Lord Devlin describes this as almost an organic and natural process:

What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves. What *Donoghue v. Stevenson* did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when its cell divides.<sup>91</sup>

It should be noted that these categorisations are general rather than universal and do not stray far from the requirements of precedent. They provide a structure within which arguments can be placed and examined to see if they fit. In this view of legal development the role of the judge is to set out these logical categories and to decide when a new one has or should be created. The judge is responsible for developing a rational and logical structure.<sup>92</sup>

Case-based reasoning is often portrayed as being in direct conflict to principled reasoning and in many judicial pronouncements which have

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<sup>90</sup> [1964] AC 465 at p 503.

<sup>91</sup> [1964] AC 465 at pp 524-525.

<sup>92</sup> This supports MacCormick's view set out in chapter 2 that such structures support the rule of law and are therefore ethical.

supported this style of reasoning, approval has been given to the words of Brennan in *The Council of the Shire of Sutherland v Heyman & another*:

It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than a massive extension of a prima facie duty of care restrained only by indefinable “considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.”<sup>93</sup>

Brennan is describing a form of reasoning that, like principled reasoning, starts with previous cases and at first sight seems very similar. This can be explained by the dominance of the doctrine of precedent which ensures that categories and classifications remain at the core of what is persuasive.<sup>94</sup> The difference lies in the way that these categories and classifications are created. This can be seen in a section from Lord Bridge’s judgement in *Caparo*, where he describes how he will put the analogical method into practice:

Consistently with the traditional approach it is to these authorities and to subsequent decisions directly relevant to this relatively narrow corner of the field that we should look to determine the essential characteristics of a situation giving rise, independently of any contractual or fiduciary relationship, to a duty of care owed by one party to another to ensure that the accuracy of any statement which the one party makes and on which the other party may foreseeably rely to his economic detriment.<sup>95</sup>

From this it would appear that the main difference between the forms of reasoning is that judges perform the task of finding a generalisation in every case in case-based reasoning and do not need to do so in principled. Case-based reasoners use the cases cited before them to find examples that are used

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<sup>93</sup> (1985) 157 CLR 424 at p 481

<sup>94</sup> If a case is too narrow then it will be distinguished on its facts if too broad it will not found a precedent being seen as obiter and distinguished accordingly.

<sup>95</sup> [1990] 2 AC 605 at p 619

to find “characteristics” that are essential and apply these direct to the case. They do not seek to state this generalisation in such a way that it can found a new category. This structure is founded not on the sense of law of a structure but of law as authority. Previous cases show not some logical principle being developed but the application of authority. This is a form of commentary and reflects a sense of law as traditional rather than logical.

The implications of choosing between these two forms can be seen in *Donoghue* where there was a direct conflict between judges on this point, Lord Buckmaster preferred a case-based approach, although he admitted the limited presence of principle:

The law applicable is the common law, and, although its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit. Now, the common law must be sought in law books by writers of authority, and in judgements of the judges entrusted with its administration. The law books give no assistance, because the work of living authors, however deservedly eminent, cannot be used as authority, although the opinions they express may demand attention and the ancient books do not assist. I turn, therefore, to the decided cases to see if they can be construed so as to support the appellant's case.<sup>96</sup>

This is a more rigid version of case-based reasoning than would generally be accepted today but it does show the link between this and tradition and authority. In making this statement it is also clear that he has a very strong view of his own role which is to apply authority.

The following extracts all come from Lord Buckmaster's speech in *Donoghue* and show how he deals with earlier cases:

One of the earliest is the case of *Langbridge v. Levy*. It is a case often

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<sup>96</sup> 1932 SC (HL) 31 at p 35

quoted and variously explained. ... [Facts of case summarised.] .... How far it is from the present case can be seen from the judgement of Parke, B., who, in delivering the judgement of the Court, used these words (at p 531 of 2. M & W.): “ We should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into those hands they might happen to pass, and should be injured thereby.”

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The case of *Winterbottom v Wright* is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action wither in tort or arising out of contract. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the construction of a coach to lace it in a special category. It may be noted, also, that in this case Alderson, B., said (at p 115) : - “The only safe rule is to confine the right to recover to those who enter into the contract ; if we go one step beyond that, there is no reason why we should not go fifty.”<sup>97</sup>

In these extracts, Lord Buckmaster is following a standard pattern. The facts are described and distinguished and the reasoning backed up with a statement of the judge from the prior case which shows the possible consequences of the decision. It is not surprising that a judge who sees his role as following authority should take such a syllogistic approach which from the study of MacCormick reveals an ethical commitment to the rule of law.

Lord Macmillan’s decision is more complex. He starts by setting out the facts of the case before him and its procedural history. There then follows two very different sections. The first which he refers to as “preliminary observations”,

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<sup>97</sup> supra at p 35

could also be split into two subsidiary parts. The first deals with the “mouse cases” and uses passages from the individual judgments of the judges to undermine its authority, to make it appear a decision that is problematic. He also uses the reliance on English authority in those cases to justify his concentration on English rather than Scottish authorities. This section is clearly dealing with arguments that he feels could undermine the authority of his decisions and he is preparing a rebuttal. The second part consists of a general consideration of the relationship between privity of contract and negligence, few cases are quoted and it almost feels like a textbook or academic discussion in that it is “reasonable” - looking for general reasons for distinctions. This suggests that he believes such arguments are not only persuasive in a legal context but that it is important for a judge and a decision to appear to be reasonable in this sense. The second section of the decision is where the case law is contained. Lord Macmillan starts by setting out his approach:

... I turn to the series of English cases which is said to compose the consistent body of authority on which we are asked to nonsuit the appellant. It will be found that in most of them the facts were very different from the facts of the present case, and did not give rise to the special relationship, and consequent duty, which, in my opinion is the starting point here.”<sup>98</sup>

Lord Macmillan then considers a series of cases, these are approached chronologically and in most he follows Lord Buckmaster’s pattern of a description of facts and then principles. This shows the dominance not only of precedent but of a rule of law ethic that lies within the concept of precedent.<sup>99</sup> It is not surprising that in a system where precedent ensures that authority is grounded in previous cases that judges who also see reason as an important factor still use this syllogistic structure. Even here though there are differences, he concentrates more than Buckmaster on what the judges said in

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<sup>98</sup> *supra* at p 65

<sup>99</sup> As judges tend to use the form rather than the strict deductive logic of the syllogism this could be seen as the use of enthymemes (see chapter 3 above).



those decisions rather than the facts for example in considering *Heaven v Pender* concentrates on the dicta of Brett MR. Having established none of these apply, he returns to general principles which he sets out in some detail before applying them to the circumstances of the case.

It is in this latter section that one would expect to find the main distinctions between Lord Macmillan's and Lord Buckmaster's, yet in applying the principle he does use a practical example, not of a previous case but of a hypothetical situation of a baker to show the reasonableness of his decision:

Suppose that a baker, through carelessness, allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him?<sup>100</sup>

Indeed Lord Macmillan appeals to the reasonableness of the consequences of his decision and the irrationality of the alternative as a central justification.

I am happy to think that in their relation to the practical problem of every day life which this appeal presents, the legal systems of the two countries are in no way at variance, and that the principles of both alike are sufficiently consonant with justice and common sense to admit of the claim which the appellant seeks to establish.<sup>101</sup>

This parallels Lord Buckmaster's approval of the "floodgate doctrine", both judges are then looking at the facts of previous cases and seeking to apply and justify their decision making primarily in terms of consequences which are or are not reasonable. There are significant differences in some of their

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<sup>100</sup> 1932 SC (HL) 31 at p 71.

<sup>101</sup> *supra* at pp 71-72.

approach<sup>102</sup> but this does suggest that the source of what they find persuasive comes at least in part from how well it justifies the reasonable result.

If I were asked what is the most potent influence upon a court in formulating a statement of legal principle, I would answer that in the generality of instances it is the desired result in the particular case before the court. (Goff 1984, 183)

This could be seen to be a cynical statement where judges rationalise their opinions but as seen earlier<sup>103</sup> such rationalisations are a way in which individuals can understand values and socially are a way of encouraging others to act appropriately. It shall be argued that the values this rationalisation supports are linked to the sense of the judicial role held by each individual judge, whether they feel bound by authority or are seeking to apply justice - concepts which link well to these two forms of reasoning. The sections that follow look at these themes in more detail, the first looks at the consequences that concern the judiciary and which cluster around the floodgates argument. This relates strongly to a sense of the relationship between law and society and the character of law but in the way these arguments relate to judicial role also help to foster a sense of individual identity.

## 2. Law and society

A central issue in the cases explored here is the difference between economic and physical loss, the relationship between this and what judges find persuasive can be seen if the decision of Lord Keith in *Murphy* is contrasted with that of Lord Devlin in *Hedley Byrne*. Lord Keith strongly supported the view that these should be treated differently:

It being recognised that the nature of the loss held to be recoverable in *Anns* was pure economic loss, the next point for examination is whether the avoidance of loss of that nature fell within the scope of any duty of

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<sup>102</sup> Notably in Lord Macmillan's adoption of a more academic style.

<sup>103</sup> Chapter 3

care owed to the plaintiffs by the local authority. On the basis of the law as it stood at the time of the decision the answer to that question must be in the negative.<sup>104</sup>

because to allow such a right:

would open an exceedingly wide field of claims, involving the introduction of something in the nature of a transmissible warranty of quality.<sup>105</sup>

What is interesting in this passages, is what Lord Keith finds persuasive about the consequences that he identifies. He is persuaded by the danger of “an exceedingly wide field of claims.” It is this consequence that is most persuasive and suggests that he feels there is a need to protect society from the law.

Compare this rhetoric with Lord Devlin in *Hedley Byrne*, who feels the distinction is unjustifiable:

The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. ... I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense.. The line is not drawn on any intelligible principle.<sup>106</sup>

The arguments that persuade Lord Devlin centre around the use of logic and principle. He finds the distinction simply “a refusal to make sense.” The power of logic is enough for him to consider overruling earlier authority. But it is not simply logic alone that persuades Lord Devlin:

As well as being defective in the sense that it would leave a man without a remedy where he ought to have one, it would also be

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<sup>104</sup> [1991] 1 AC 398 at p468

<sup>105</sup> *supra* at p 469

<sup>106</sup> [1964] AC 465 at p 517

profoundly illogical.<sup>107</sup>

Logic linked to a sense of the unjustness of the decision that would result is what persuades Lord Devlin. The desire for law to be logical is thus linked to a sense in which this is the way to apply it to society. Lord Keith, on the other hand, feels the persuasive force of authority more than Lord Devlin and is also persuaded by arguments that stress the potential danger of unlimited liability. There is thus a real difference, expressed through their use of language, between what these two judges find persuasive. This difference is one that is not just related to the facts of the case but reveals more general attitudes about legal reasoning.

The differences between what judges found persuasive tended to cluster around the issue of unlimited liability or the floodgates argument. This argument dominates delict. It is present in all the cases in one form or another. It has not always been seen as positive. McManus feels that it has had a particularly negative effect on the way the courts have handled the issue of ‘nervous shock’:

As far as so-called “secondary” victims of nervous shock are concerned, the Atkinian foreseeability test has been refined in effect, almost beyond recognition, by judges superimposing arbitrary limits to the rule in order to whittle down the potential number of claimants. (McManus 1996, 159)

The classic statement on unlimited liability, quoted in the last chapter, comes from *Winterbottom v Wright*:

The only safe rule is to confine the right to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty.<sup>108</sup>

This fear, that reason would compel judges into making decisions that would expand the law to irrational levels if they take that one first step, is the core of

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<sup>107</sup> supra at p 516

<sup>108</sup> 1842 10 M&W 109 at p 115

the argument.<sup>109</sup> It is so persuasive that it distorted the development of tort and delict for decades following this decision. It was the main argument against introducing principle into delict and, even after *Donoghue* did introduce principle, it retained its persuasive force. Consider these two passages, which are separated in time by nearly sixty years. First Lord Buckmaster from 1932:

If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or anyone else, no action against the builder exists, according to the English law, although I believe such a right did exist according to the laws of Babylon.<sup>110</sup>

Now Lord Jauncey from 1990:

If it were to stand as good law there is no logical reason why it should not extend to defective chattels, thereby opening the door to a mass of product liability claims which the law has not previously entertained.<sup>111</sup>

There are stylistic differences between these two passages. Lord Buckmaster is much more assertive. This can be attributed to the passage of time. The underlying argument is, though, exactly the same.

The consistency with which the unlimited liability argument appears suggests that it is of great significance to delict. As Lord Fraser in *Junior Books* puts it:

.... the concern which has been repeatedly expressed by judges in the United Kingdom and elsewhere, that the effect of relaxing strict limitations upon the area of liability for delict (tort) would be, in the words of Cardozo J., to introduce “liability in an indeterminate amount for an indeterminate time to an indeterminate class.” This is the floodgates argument, if I may use the expression as a convenient

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<sup>109</sup> The fear of infinite regress and its importance in law is described in more detail in chapter 5 below.

<sup>110</sup> 1932 SC (HL) 31 at p 43

<sup>111</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398 at p 498.

description, and not in any dismissive or question-begging sense. The argument appears to me unattractive, especially if it leads, as I think it would be in this case, to drawing an arbitrary an illogical line just because a line has to be drawn somewhere. But it has to be considered, because it has had a significant influence ... <sup>112</sup>

Lord Fraser is not persuaded by the floodgates argument but he has to consider it.<sup>113</sup> This shows how powerful this argument can be and how the sense of law as something dangerous which led to the privity of contract rule still dominates this area of law. It does not, though, stand alone. There are other arguments that reoccur throughout the cases. Some of these tend to be used by those who support the unlimited liability argument and others by those who reject it. These create two distinct persuasive strategies.

In particular, those who are persuaded by the unlimited liability argument are very open about the use of policy in law and its limitations. Lord Keith in *Murphy* again:

So far as policy considerations are concerned, it is no doubt the case that extending the scope of the tort of negligence may tend to inhibit carelessness and improve standards of manufacture and construction. On the other hand overkill may present its own dangers. ... There is much to be said for the view that in what is essentially a consumer protection field, ... the precise extent and limits of the liabilities which in the public interest should be imposed on builders and local authorities are best left to the legislature.<sup>114</sup>

The presentation of the judicial role in this passage is repeated by a number of judges who are also persuaded by the unlimited liability argument. It is not surprising that those who hold this view also tend to support case-based reasoning. The incremental development that case-based reasoning claims is

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<sup>112</sup> 1982 SC (HL) 244 at p 264

<sup>113</sup> It is the nature of dominant arguments that even those who oppose them need to work within their structures. See the Neusner quote with which this thesis began p 1 above.

<sup>114</sup> [1991] 1 AC 398 at p 472.

attractive to the cautious nature of the decision-making of these judges. They are keenly aware of the importance of authority and in seeking to move one step at a time they are re-establishing the relationship between law and society in every decision.

If those who are persuaded by unlimited liability are persuaded by other related arguments, this is also true of those who are not persuaded by this argument.

In looking at Lord Devlin's decision in *Hedley Byrne*, two arguments were identified as persuasive. One was the "justice" argument. This rests on the need to provide remedies where there is felt to have been an injustice. Unlike the group of judges identified earlier, who feel the need for a strong argument before they will consider expanding the law, Lord Devlin wants a good reason for not providing a remedy. The other argument that Lord Devlin appeals to is the need for logic in the law. This positive attitude towards logic is in direct contrast with those who support the unlimited liability argument and are afraid of logic leading to illogical extremes. Principled reasoners make more assumptions about law and society. They assume that reason is good and that logic and justice can establish the relationship between law and society without the need to constantly refer to authority.

Thus, there is a clear distinction between the way judges approach arguments about consequences and policy and this links to the different methodologies adopted. The unlimited liability argument is linked to a distrust of principle. Those who support principled-reasoning are sceptical of line drawing and classification which is closer to case-based reasoning. Thus, there seems to be a link between the methodology explicitly chosen and what the judge finds persuasive. The principled group is persuaded by logic and reason, by arguments about justice. They admire the structure of principles. The case-based group is afraid of the generality of principles and seek refuge in classifications which they feel they can control. The choice made between these two methodologies relate to the examples that they feel are persuasive

but also to the language which they use and it is here that the most emotive language is used.<sup>115</sup> This suggests that it is to these arguments that the judiciary are most committed and these are linked to their views of judicial role.

It is notable that it is in reasons centred around this most emotive of arguments and the persuasive strategies that are related to it and that include more abstract issues of methodology that the real differences are seen between individuals. As shall be seen these emotive arguments remain individual and this may be because they reflect a very deep sense of the role of law in society that will be closely linked to the judge's view of their own judicial role and thus be closely linked to their own identity.

### 3. Judicial role

Arguments related to judicial role can not only be extracted from the decisions but are made explicitly. The link between these arguments and the relationship between law and society can be seen in *Murphy* where an attitude towards role was the main persuasive argument. Lord Mackay puts it this way:

For this House in its judicial capacity to create a large new area of responsibility on local authorities in respect of defective buildings would in my opinion not be a proper exercise of judicial power.<sup>116</sup>

Lord Bridge:

It is pre-eminently for the legislature to decide whether these policy reasons should be accepted as sufficient....<sup>117</sup>

Lord Oliver:

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<sup>115</sup> Language such as "just" 1982 SC (HL) 244 at p 271 per Lord Roskill; "absurd" [1964] AC 465 at p 516 per Lord Devlin; "capricious" [1991] AC 398 at p 457 per Lord Mackay and the use of such phrases as Lord Salmon's "the innocents who suffer from it [negligence]" [1978] AC 738 at p 767. Negligence itself is of course an emotive term with connotations of blame and wrongdoing.

<sup>116</sup> [1991] 1 AC 398 at p 457.

<sup>117</sup> *supra* at p 482.



... I do not, for my part, think that it is right for the courts not simply to expand existing principles but to create large new principles in order to fulfil a social need in an area of consumer protection which has already been perceived by the legislature, but for which, presumably advisedly, it has not thought it necessary to provide.<sup>118</sup>

Lord Jauncey:

Parliament is far better equipped than the courts to take policy decisions in the field of consumer protection.<sup>119</sup>

Though all make variations on the theme, these judges clearly have similar views about the judicial role and how that relates to the legislative role. There is no clear “opposing” view to this description of the judicial role.<sup>120</sup> Judges who do not find the unlimited liability argument persuasive do not talk about judicial role. It could be argued that in their preference for arguments involving logic and justice that a sense of judicial role could be extracted and Lord Devlin is perhaps the prime example of this:

This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense than this. ...[Devlin gives a practical example which he feels shows this absurdity] I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best system of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle.<sup>121</sup>

Lord Devlin clearly sees it as a core role of the judge the need to be logical and use common sense: “no system of law can be workable if it has not got

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<sup>118</sup> *supra* at p 492.

<sup>119</sup> *supra* at p 498.

<sup>120</sup> The attitude towards Parliament would be accepted generally by almost all judges.

<sup>121</sup> [1964] AC 465 at p 517.

logic at the root of it".<sup>122</sup> Law is a hierarchy and a structure. It is also just and it is this aspect of logic that principled reasoners often focus on. Amongst a number of case-based reasoners in *Murphy* Lord Mackay of Clashfern manages to find a principled approach to the decision:

the result of applying these qualifications to different factual circumstances is to require distinctions to be made which have no justification on any reasonable principle and can only be described as capricious. It cannot be right for this House to leave the law in that state.<sup>123</sup>

Judges do not though apply persuasive strategies and methodologies rigidly. They can be mixed and it is here that it is possible to see how the individual retains their commitment to a view of judicial role even when at first sight his choice of methodology appears at odds with this.

A good example of this is Lord Brandon's dissent in *Junior Books*.<sup>124</sup> He explicitly uses principled reasoning. So do the other judges in this case and it is clearly the dominant form. Yet, closer analysis of Lord Brandon's decision shows that he also finds persuasive arguments that would normally be associated with case-based reasoning - he is worried about unlimited liability and seeks to follow authority.

Lord Brandon starts by identifying the principle he will follow. He begins with *Donoghue* but settles on Lord Wilberforce and bases his decision on the two-stage principle in *Anns*:

My Lords, in support of their contentions the pursuers placed reliance on the broad statements relating to liability in negligence contained in the speech of Lord Wilberforce in *Anns v Merton London borough Council* (*supra*) at pp. 751-2. Lord Wilberforce there said: - "Through

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<sup>122</sup> *supra* at p 516.

<sup>123</sup> [1991] AC 398 at p 497.

<sup>124</sup> 1982 SC (HL) 244 at pp 278-283

the trilogy of cases in this House – *Donoghue v Stevenson* [1932] AC 562, *Hedley Byrne & Co. td. v Heller & Partners Ltd.* [1964] AC 465, and *Dorset Yacht Co. Ltd. V Home Office* [1970] AC 1004 – the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or to reduce or limit the scope of the duty or the class or person to whom it is owed or the damages to which a breach of it may give rise... ”<sup>125</sup>

Lord Brandon answers the first question positively:

That first question having been answered in the affirmative, however, it is necessary, according to the views expressed by Lord Wilberforce ... whether there are any considerations which ought, *inter alia*, to limit the scope of duty which exists.<sup>126</sup>

In answering the second question, though, he answers in the negative and it is this that he uses to justify his dissent. He starts thus:

To that second question I would answer that there are two important considerations which ought to limit the scope of the duty of care,<sup>127</sup>

These considerations are authority and the danger of unlimited liability. As he puts it:

The first consideration is that in *Donoghue v Stevenson* itself and in all

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<sup>125</sup> supra at p 281.

<sup>126</sup> supra at p 281.

<sup>127</sup> supra at p 281.

the numerous cases to which the principle of that decision has been applied ..., it has always been either stated expressly, ... that an essential ingredient in a the cause of action relied on was the existence of danger.... To dispense with that essential ingredient in a cause of action of the kind concerned in the present case would, in my view, involve a radical departure from long-established authority.

The second consideration is that there is no sound policy reason for substituting the wider scope of the duty of care put forward for the pursuers for the more restricted scope of such duty put forward by the defenders. ....

It is, I think, just worth while to consider the difficulties which would arise if the wider scope of the duty of care put forward by the pursuers were accepted. ....

This illustrates with especial force the inherent difficulty of seeking to impose what are really contractual obligations by unprecedented and, as I think, wholly undesirable extensions of the existing law of delict.<sup>128</sup>

In *Junior Books*, where he gives a dissenting decision, he refers to few cases and applies Lord Wilberforce two-stage test.<sup>129</sup> By contrast, in *Leigh and Sillavan Ltd v Aliakmon Shipping Co. Ltd*,<sup>130</sup> where he gives the leading decision, he places facts at the core of his decision and follows a form of reasoning much closer to Lord Buckmaster's style in *Donoghue*. From this, it could be argued that, in choice of methodology, Lord Brandon is more aware of the importance of the views of others and that the arguments that he finds consistently persuasive are the ones that reflect his own view of his role. Lord Mackay's decision in *Murphy* echoes this though it does so in a different way.

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<sup>128</sup> supra at p 283.

<sup>129</sup> supra at pp 278-283

<sup>130</sup> [1986] AC 785, [1986] 2 All ER 145,

In *Murphy* he argues for the narrow view of the judicial role which is the most common persuasive argument in that case and yet he does so because the law is not found in principle in this area, there is no principled justification.<sup>131</sup> Thus although he accepts the dominance of the legislature he sees the role of the judge to apply principles and this is at odds with his fellow judges who seek to limit the judge to the application of authority.

These Law Lords are not being inconsistent. They are responding to a basic requirement of legal reasoning, the need to persuade others. The biggest influence on the style of reasoning used and the choice of the dominant persuasive argument appears to be the attitudes of the other judges deciding on the same case.

At appeal level, judges do not decide alone. At the level of the House of Lords, the authority given to their decisions means that they are also deciding for future cases. They need to persuade others that their decision-making is rational and reasonable. The process of persuasion can be seen in the texts and is the result of a longer process that occurs behind the scenes.<sup>132</sup>

Between the hearing and the final decision, there is discussion between the judges. The details of this are not made public, but traces of it are left in the final decision. There is often consensus between judges as to what are the important points of the case. The similarity in matters of style, number of cases cited, the place of facts, and language used can be striking and notably in Lord Brandon's case, choice of methodology which is dependant not only on what the individual judge believes is appropriate but on what s/he believes will be accepted by the judges around him/her. Lord Diplock has suggested that:

... the way in which Courts in fact adapt themselves to the changing

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<sup>131</sup> See quote above p 226

<sup>132</sup> See the discussion above of the possible influence on Lord Macmillan's decision in *Donoghue* of discussions with Lord Atkin.

pattern of society is influenced less by conscious intention than by the training, practice and habits of thought of the legal profession as a whole. (Paterson 1982, 32)

This relates to the sense of character of law and yet when these judges are looked at in more detail their sense of the role of the law is consistent. This identity may sit better with one persuasive strategy than another but what really persuades these judges individually is their view of the relationship between law and society. In containing more than one view the legal system allows judges to ally themselves with alternative views of law and society. The way the judges relate to such arguments is linked to which form of reasoning they prefer. When we look at the unlimited liability argument, we can see that attitudes towards it and its persuasive force clearly split the decisions into two groups.

This model can be used to explain how judges come to the same decision but for different reasons. Compare these two passages from different decisions in *Junior Books*. Both were for the respondents, first Lord Roskill:

I think today that the proper control lies not in asking whether the proper remedy should lie in contract or instead in delict or tort, not in a somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not - it is sometimes overlooked that virtually all damage including physical damage is in one sense financial or economic for it is compensated by an award of damages - but in the first instance establishing the relevant principles and then in deciding whether the particular case falls within or without those principles.<sup>133</sup>

and Lord Keith:

Having thus reached a conclusion in favour of the respondents upon the

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<sup>133</sup> 1982 SC (HL) 244 at p 276

somewhat narrow ground which I have indicated, I do not consider this to be an appropriate case for seeking to advance the frontiers of the law of negligence upon the lines favoured by your Lordships. There are a number of reasons why such an extension would, in my view, be wrong in principle. ... So to hold would raise very difficult and delicate issues of principle having a wide potential application. ... To introduce a general liability covering such situations would be disruptive of commercial practice, .... The policy considerations which would be involved in introducing such a state of affairs appear to me to be such as a court of law cannot properly assess, and the question whether or not it would be in the interests of commerce and the public generally is, in my view, much better left to the legislature.<sup>134</sup>

Although Lord Keith and Lord Roskill come to the same conclusion, they are persuaded by very different arguments. Lord Roskill is influenced by principle and logic. He is wary of making illogical distinctions. Lord Keith is persuaded by the unlimited liability argument. He also refers to policy arguments. Thus, although Lords Roskill and Keith superficially appear to be on the same side, the arguments that they find persuasive puts them in different camps and leads them to prefer different methodologies which relate to the relationship between law and society.

This distinction can generate conflict but in doing so generates loyalty. They have a view to which they are committed and one of the reasons for this commitment may be that this is not a universal view but one that they have to argue for. In making them generate reasons the law encourages commitment by making the judges choose sides this commitment is deepened and linked to the way they see themselves as well as the law.

### 3.1 Judges outside the courtroom

Throughout this study, the focus has been on the decision as legal artefact.

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<sup>134</sup> *supra* at p 269

The attitude of the judges has predominantly been taken from the law reports. There are though other ways in which the attitudes of the judges could have been explored. Alan Paterson in his influential work the *Law Lords*, interviewed a number of senior judges. (Paterson 1982) Some senior Judges have written about their attitudes to judging.<sup>135</sup>

Detailed study of these sources are outside the scope of this thesis. However, it is worthwhile to note that a brief consideration of them reveals similar conclusions to those reached by this study of the decision itself.

Paterson has concentrated on the affects of judicial role perception and highlights the importance of the audience as perceived by the judge. His conclusions support the contention made here that judges are most influenced by those people they are immediately concerned with persuading, the other judges in the court. Paterson does also make the point that the individual personalities of the judges will affect how they respond in hard cases and this is strongly linked to their sense of role or identity:

The Law Lords' responses to role conflict, although along lines predicted from other fields of research, depend in part on their personalities. Thus when justice and certainty conflict, some Law Lords, for example Lords Diplock, Pearce, Salmon and Denning, consider that they have a tendency to favour flexibility and justice, others, for example Lords Cross, Guest, Pearson and Upjohn have admitted to a tendency in the opposite direction, while the bulk of the remainder endeavour to strike a balance between the two expectations. (1982, 199)

The law allows space for different personalities to exist and it is likely that these personalities and views of law are useful to legitimating the role. They encourage strong stances and seek to ensure that judges will not respond to

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<sup>135</sup> There is a growing literature in this area. Atkin (1925; 1932), Denning (1979), Goff (1984), Devlin (1976; 1978) McLuskey (1987) and Reid (1972) are only a few of the judges who have written about the judicial process from a variety of angles.



personal bias but to a strong sense of their role. In looking at the material produced by judges who have written or lectured on the judicial decision and role, it should be remembered that they are still aiming to persuade others that their views are correct. They are doing so, though, before a different audience and in these situations, their style is generally more personal, they do not need to justify their opinions with reference to earlier cases but much of their views remain the same. Lord Atkin is a good example of this. As has been shown, his earlier speeches to the Society of the Public Teachers of Law, (Atkin 1925; 1932) echo his decision in *Donoghue v Stevenson*. Lord Reid also gave a lecture to the Society of the Public Teachers of Law, in which he argued that in approaching a decision in the common law:

We should, I think, have regard to common sense, legal principle and public policy in that order. We are here to serve the public, the common ordinary reasonable man. He has no great faith in theories and he is quite right. What he wants and will appreciate is an explanation in simple terms which he can understand. (1972, 25)

Lord Reid is quite fond of the reasonable man.<sup>136</sup> He is mentioned twice in quick succession in *Hedley Byrne*.<sup>137</sup> Indeed, the decision that Lord Reid presents in *Hedley Byrne* fits with his description of how decisions ought to be made. He starts with the common sense argument and then considers the law:

A reasonable man, knowing that he was being trusted or that his skill and judgement were being relied on, would, I think, have three courses open to him ...

[Lord Reid describes three reasonable responses]

If that is right, then it must follow that *Candler v Crane, Christmas &*

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<sup>136</sup> The reasonable man has an interesting pedigree. As can be seen above, p 199, Lord Macmillan, like Lord Reid finds its use problematic but in a recent decision in the Inner House in Scotland it was this subject rather than the floodgates argument which generated the most emotional responses. Lord Morrison clearly feeling that Lord Prosser's use of this model was a way of introducing subjective moral views which would undermine the impartial position of law. (see *McLelland v Greater Glasgow Health Board* 2001 SLT 446 especially pp 453 and 458)

<sup>137</sup> [1964] AC (HL) at p 486-487.

*Co. was wrongly decided.*<sup>138</sup>

The decision being decided at this stage, there is no need to turn to the third part of policy.

The statements that judges make outside court either in interview or in public statements are consistent with the arguments that they make in court. This suggests that they regard at least some of the arguments that they use in court, usually the ones relating to the place of law in the world and choice of methodology, as persuasive outside the field of the decision. In particular what is most persuasive are those arguments which reflect their view of their own role, of their identity as a judge.

#### 4. Conclusion

This section has demonstrated the ways in which different methodologies and persuasive strategies reveal different attitudes towards the place of law in society. The link between these arguments and judicial role and a sense of individual identity explains why judges are committed to these values and seek to explore them through their decisions.

In the *Talmud* contradictory views were allowed the status of truth. This allowed those whose views were not accepted as having practical significance to feel that they had nevertheless become part of the tradition. It also allowed a greater pool of material for later generations to use. In the common law contradictory views are also allowed to stand and the judiciary have generated contradictory views of the legal process and the relationship between law and society. These views are both capable of describing the common law and could even be seen as complimentary. Law is both an historical, traditional structure and a logical structure and the choice that judges make between seeing law as the exercise of justice or authority in society relates to their own sense of self and how they feel about the role of law. In doing so, law does

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<sup>138</sup> *supra* at p 486-487.

not tear itself apart, both of these views of its place in society can be linked to underlying values of consistency and the rule of law to which all judges would subscribe but the existence of this conflict means that judges have to make a choice and therefore declare a commitment to law.

## Chapter 5

### Conclusion

The first chapter concluded with a quote from Kimberley Curtis describing Arendt's vision of judgment. This saw judgment as paradoxical, an emotional experience as a result of which the person was both convinced they were right and compelled to tell others but did so in a form which suggested a lack of belief - persuasion. This thesis set out to try and unravel the aspects of judicial decision-making which leads judges to feel convinced that they are right in their application of law but requires them to justify that assertion by arguments which legitimate and justify that decision. This chapter concludes this study by considering not only the relationship between judgment and persuasion but also that between persuasion and philosophy before concluding by arguing that using judgment as a paradigm for all understanding is highly problematic. In doing so it seeks not only to return to the main themes of the thesis but to understand more fully the ethical choice made in undertaking either philosophy or judgment.

The first section looks at persuasion as philosophy through Neusner's identification of the *Talmud* as philosophy. This defines philosophy as a pure form of persuasion where everything is questionable including the identity of the questioner.

The second section looks at judgment and shows why the role of authority means that despite some similarities to philosophy the two remain essentially different as the role of judgment is not to question but confirm.

The final section begins by arguing that this analysis explains more clearly why legal theorists have had difficulty expressing the role of the person in judgment. It, and this thesis concludes by arguing that, although it may seem a logical result of the position set out in this chapter, judgment should not be used as a model for understanding.

## Persuasion as philosophy

In chapter 2 it was argued that the three theorists presented had difficulty understanding the emotional commitment of a judge to his/her role. In part this was because they were seeking to produce philosophically acceptable arguments and were using the person of the judge to deal with gaps in their theoretical structures but it also related to a problem that philosophy in general had both with understanding the individual and with its own foundations. This problem made it difficult for them to understand judgment and, in particular, aspects of judgment such as authority and the role of character and identity. This section starts by looking at another attempt to understand judgment not only by philosophy but as philosophy. Jacob Neusner, whose interpretation of the *Talmud* was used in chapter 3, sees a strong link between the two. It will be argued here that this argument reveals less about judgment than it does about philosophy. His argument does though allow the form and structure of philosophy to be set out more clearly and therefore the problems that undertaking any philosophical analysis entails.

### 1. The goal of philosophy

Jacob Neusner has argued that there is considerable *congruity* between Classical Greek philosophy and the *Talmud*. (Neusner 1997) His argument is based on his identification of the *Talmud* as predominantly a work of philosophy and, in doing so, he expresses a view both about the goal of judgment and the nature of philosophy. In describing the *Talmud* he states:

This is a book about how in concrete detail great principles of Western philosophical thought were brought to concrete realisation, through applied reason and practical logic. (Neusner 1997, 1)

This sees the *Talmud* as a work about the application of principles. The *Talmud* does deal in detail with the application of laws and is a model teaching people how to judge and make persuasive judgments but Neusner is not concerned with the details of its debates but rather with the attitudes that underlie them. He says of the talmudic scholars:

Specifically, they took the static, systematic exchange of proposition and counter-proposition, argument and refutation, and turned it into a dynamic, sometimes meandering sequence of propositions, lacking the neatness of the received, neat exchange of positions and reasons for those positions. For what marks the Bavli's mode of dialectics is the power of an argument to change course, the possibility of re-framing a position altogether in direct response to a powerful counter-argument. (1997, 15)<sup>1</sup>

Philosophy is not being identified with a form of argument or even with the application of principles to fact per se. Instead it is an attitude that is Neusner's core concern and an attitude that is about accepting the power of argument and debate. This can be seen in what Neusner describes as the three key ways in which a philosophical argument can be identified:

- 1) Every allegation is tested by a counter-proposition.<sup>2</sup>
- 2) The range of possible moves from the original argument are explored.
- 3) It is set forth in such a way that the reader can understand the thought processes of the participants and reconstruct the argument.

These all place the argument rather than the answer to the argument at the heart of philosophy. They also define what sort of argument is acceptable and, by concentrating on the logical aspects of the argument, describe it as an argument which is not about the power of language but the power of ideas expressed through language. Indeed, if implemented, these three statements would limit the language that would be acceptable in a philosophical debate. They are founded on an aim to clarify and to make the steps in the argument clear. There is a desire for purity of form here that could be at odds with a desire to win the argument and Neusner accepts that despite the highly combative nature of the first statement the goal is not to win:

Specifically, the goal of all argument is to show in discrete detail, the

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<sup>1</sup> Bavli is a term used to denote the Babylonian *Talmud*.

<sup>2</sup> The implications of taking the opposite view will be discussed below.

ultimate unity, harmony, proportion and perfection of the law – not of the Mishnah as a document but of all the law of the same standing as that presented by the Mishnah.(1997, 140)

On this view of philosophy, an individual argues and seeks to do so in a rigorous fashion to establish the harmony, proportion and perfection of the object to which he is committed. This suggests that philosophy is interested in the aesthetics of argument and persuasive arguments are those which not only explain but do so in a specific form. This desire to uncover, to make clear and to explain may suggest a deep seated need in human beings to understand and to represent that understanding in an aesthetically pleasing manner.<sup>3</sup>

Whatever the source, this commitment to harmony and perfection is one that can be seen in legal theorists and supports the view that they are essentially producing philosophical arguments. The legal theorists in chapter 2 all showed a strong preference for presentations of law which were structural and unified. Even Jackson who criticises positivism for its unified structures seeks to replace it with his own. Dworkin's mythical Hercules is perhaps the best known theoretical embodiment of this desire and one which clearly sees this particularly as the goal of the judiciary. (Dworkin 1986) Dworkin accepts that this is unobtainable given the constraints on the judiciary but this does not mean this is insignificant. The goal is significant not because it is achievable but because of the process that it encourages.<sup>4</sup> Certainly any practical difficulties would not exclude such a philosophical goal from at least informing legal argument and it could be argued that those who supported principled reasoning certainly seems to have such a goal and to seek to see law displaying a character which is logical and rational. This would suggest

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<sup>3</sup> This is not an overriding goal and it could be argued humans also show a desire for chaos and irrationality.

<sup>4</sup> Madry and Richeimer have criticised Dworkin for having "mistakenly collapsed the two distinct practices, that of the philosopher describing judicial practice and that of the judge adjudicating a case". (1998, 228) The view of philosophy presented here supports this critique and indeed Hercules embodies the role of a legal theorist that MacCormick argues for in his ethical reinterpretation of his own work.

judges and philosophers have similar roles and goals.

Aristotle though felt that even when similar methodologies are used the context could be enough to generate two different forms of study and when one considers the persuasive strategies of philosophers it is possible to see in more detail the character of philosophy and how it relates to the identity of philosophers. This actually shows that though the power of a harmonious argument may be used by both philosophers and judges it is in their roles and context where the differences emerge.

## 2. Philosophy as question

In describing philosophy, Neusner describes a very general approach which can apply to any situation where an argument is used and requires an attitude rather than a professional practice but this approach can be seen in particular strategies used when presenting a philosophical theory. First philosophers have to demonstrate there are problems with past theories and with the structure of knowledge. This demonstrates that there is a space where they can enter. They then seek to generate solutions to show that they have the right to define that space, these solutions tend to be structural and involve categorisation and classification. The strength of the solution is shown by its ability to clarify and solve a whole range of problems. There is no false modesty in these goals - the space they define they define completely from the foundations up. Indeed there is not only a strong tendency but in their need to answer all possible refutations a need to make theories of everything.

The way in which they seek to answer all possible objections and the way they start the process by attacking previous theorists suggests that philosophers are not operating in a place where everything is sayable as suggested in chapter 1 - rather it is a space where everything is questionable.<sup>5</sup> Aristotle defined the question as the heart of dialectic and he was well aware

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<sup>5</sup> Gadamer describes the hermeneutic priority of the question (1994, 362).



of its combative nature. His caution may be seen as similar to Perelman's, entering this space means being open and allowing all of one's arguments to be questioned and this should only be done when the other(s) present are in a certain relationship of respect.

This relationship means that as well as being questioned the philosopher is aware that s/he will be heard. Other philosophers will listen and attempt to understand their solutions. They will be taken seriously. It is the promise not only of being able to understand all but of being capable of communicating that knowledge and therefore of convincing others that is the lure of philosophy. It suggests that a single individual could understand and explain everything. It places power in the hands of an individual. Indeed, the individual can even dictate the standards by which s/he will be judged. This can be seen in Perelman's description of the two audiences which are central to philosophy - the audience of all reasonable beings and self-evidence. There is a close link between these two, they are both created by the individual who seeks to persuade. The individual defines the standards by which s/he will be judged. As a result they will be the first aspect of any theory that will be questioned. In this way Jackson criticised MacCormick for failing to understand the ethical commitment in his description of the syllogism although MacCormick had claimed he wished to describe law without such ethical commitment.

Philosophy is founded on the understanding of individual philosophers. They generate the solutions and take part in the process of debate and questioning. It is they who are always seeking to find better solutions and which keeps it looking ever forward, tearing up its foundations as it goes. For all the goal of philosophy may be to explain all and to communicate that purely, its methodology of constant questioning and its corresponding goal to find the arguments which can withstand all questions has led it to become concerned with its foundations. In the last century this has led to a focus on a possible achilles heel - the inevitable limitations of the individual. In questioning the individual philosophy has come to its ultimate foundation and thus reveals

itself as pure persuasion - pure debate - but also as incapable of achieving its own goals.

### 3. Philosophy as persuasion

Today, the first question a philosopher must ask is “who am I?”, s/he needs to understand his/her point of view and the prejudices and limitations this imposes.<sup>6</sup> Jackson grounds truth in an individual and it is demonstrated by the individual defining where s/he stands and what sort of character s/he seeks to display by a rigorous application of self-reflection and self-awareness. Truth here is a process which is displayed not in the harmony and perfection of argument in truth but in the honesty of a person. The person who would have ultimate integrity would be completely free of the limitations of their point of view as they would understand them perfectly but such an individual is as mythical as Dworkin’s Hercules who could create the perfect structures to explain the law. This individual is important though because s/he would display the character of someone who has absorbed the central point of philosophy who debates with themselves and would express philosophy through their sense of identity. S/he would be the paradigm philosopher.<sup>7</sup>

Perelman saw the audience of oneself as similar to philosophy in that it was an area where one sought to convince but this argument takes this further and sees this conviction as the foundation of philosophy. Aristotle argued that debate was at its purest when the individual who had to decide would be affected by the result and Jackson’s academic of integrity would, if the

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<sup>6</sup> Gadamer puts it this way: “My real concern was and is philosophic: not what we do or what we ought to do, but what happens to us over and above our wanting and doing.” (1994 xxviii)

<sup>7</sup> If a mythical comparison is required this would be a Solomon rather than a Hercules. Hercules shows his strength of intellect in creating the perfect constructive interpretation. For this structure to be convincing in a world where the individual is now suspect it would to be completed by one who, like Solomon could absorb the viewpoint of others and found the structure ethically. Solomon is famed for his skill in judgment and philosophy has turned to judgment for a solution to this problem. The relationship between philosophy and judgment will be considered below. It should be noted that Dworkin also accepts that the role of the individual is problematic when he tries to refute suggestions that Hercules would be a tyrant (1986, 399)

process was taken to its limit, implicate his/her own identity in the process of questioning. Perhaps the best way to describe the nature of the pure form of persuasion that results can be seen with a parable of a similar problem in ethics. In Arthur Koestler's book 'Arrival and Departure' (1969), the main character, Peter, writes a short story, "The Last Judgement" (179 - 184)

Meanwhile the trial of the first defendant had begun. He stood facing the Court, a lean ascetic man with a stoop.

'How do you do?' asked the Judge in a terrible voice, which echoed throughout the dome.

'Humbly, my Lord,' said the defendant. But his voice was thin, it collapsed in the air without resounding and fell with broken wings on the marble slab before his feet.

'Bad echo,' roared the Judge. 'However, proceed.'

'He has sacrificed his fortune to help the poor,' said Counsel for the Defence. His face resembled the defendant's, but there was more fat on his body and more righteousness in his voice.

'On what did you dine tonight?' roared the Judge.

'On a glass of milk and a crust of bread, my Lord,' said the defendant.

The prosecutor rose. He too resembled the defendant, but he looked even more haggard and his voice was like a lash.

'A child starved in China while he guzzled his milk and bread,' he shouted.

'Condemned!' roared the Judge; and the audience echoed in awe-stricken voices:

'Condemned, condemned.'

....

The next defendant was a jovial, guileless man with a paunch. He advanced beaming all over his face, and as he advanced, the opposing Counsel changed in appearance; they again both resembled the accused, only the Defender looked even more guileless and had a bigger paunch.

'On what did you dine tonight?' roared the Judge.

'Well, my Lord,' said the defendant, 'we thought we might start on some fresh salmon, this being the season, and a bottle of hock, to keep

it swimming and cool.’

‘Enough,’ roared the Judge. ‘What has the defence to say?’

‘He has a blessed digestion,’ the Defender nodded earnestly, crossing his hands on his belly. ‘And what is the charge, anyway?’

The Judge turned towards the prosecution; but the Prosecutor’s seat was empty.

‘Acquitted in the absence of a charge,’ he roared; and the audience repeated joyously:

‘Acquitted, acquitted.’ (Koestler 1969, 180 - 181)

Koestler’s story was written as a direct response to relativism and sought to try and explain why some people could still feel bound when there was no longer a rational justification for submitting to ethics. It can though serve as a model for the problem philosophers face. If they accept that their role is to be open to questions and the rigour of others they cannot seek to impose their standards on those others. They are walking into an arena where like the “thin man” they are pre-judged. Philosophers though seek to present arguments of everything in this arena, they construct not only themselves but their audience, they are open to all questions and in their structures they even suggest what arguments can be used against them, by what standards they should be judged. Philosophy is a commitment less to a result than to a process. Debate and argument, the ability to rigorously question is placed above all else.

In the last century this has led them to focus on the individual with the result that they must also question themselves and, in doing so, risk destroying their own discipline or as Emmanuel Levinas has put it in:

the modern world; no one is identical to himself; nothing gets said for no word has its own meaning; all speech is a magical whisper; no one listens to what you say; everyone suspects behind your words a not-said, a conditioning, an ideology. (Levinas 1990, 152)

It is a paradox that if everything is questioned no one is listening. In this pure form of persuasion where first a philosopher needs to persuade him/herself that

his/her own identity can withstand questioning but the contextual limitations mean that this will be impossible, s/he will always be doomed to fail. S/he will not be able to communicate that conviction and all of the structures she wishes others to accept as convincing will be based on an unstable foundation. If this pure form of persuasion is always doomed to failure because it is rooted in the character of an individual who creates the standards by which that character is judged and these standards are always suspect it could be argued that philosophy is a futile enterprise. Yet unlike other attempts to provide theories of everything such as science or religion, philosophy does have an underlying ethical principle that is expressed in the way it places the individual human and a human in all his/her limitations at its core. Philosophy cannot explain everything because it only ever has one point of view but its desire to place this point of view in a public arena where it can be dignified as a possible explanation of everything and questioned as if it were of supreme importance is a supremely ethical one.<sup>8</sup>

There is also the abundant fact that philosophers do the impossible on a daily basis and like Steiner's translator the rigorous logic which declares its enterprise impossible does not stop the process occurring in fact. Steiner was though wrong to say that this impossibility has no empirical consequences. The goal of philosophy to provide the ultimate unquestionable structure that lies beneath its constant process of debate and questioning should not obscure the fact that philosophical tools and methodologies, the process of clarification, categorisation and classification have been useful not only in philosophies exploration of its own foundations but have been used in other spheres of knowledge. Further it is this commitment to pure persuasion, to the power of argument alone and above all else that give philosophy its character and that differentiates it most strongly from judgment which seeks not to question but to confirm.

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<sup>8</sup> Camus's reinterpretation of the myth of Sisyphus which sees in the King condemned to a task which is unachievable parallels this description of philosophy as a task aimed at the impossible. Camus concludes by stating: "The struggle itself towards the heights is enough to fill a man's heart. One must imagine Sisyphus happy." (2000, 111)

## Judgment and persuasion

### 1. The role of authority

In chapter two all three theorists recognised that authority was at the heart of judicial decision-making which is perhaps the paradigm of judgment. The role of authority in judgment can be contrasted with the role of authority in philosophy. Philosophy seeks not to found authority externally but to create the pure argument whose authority is held within itself and which can be easily communicated to the audience of all reasonable beings. By contrast, judgment seeks not only to use authority but can only exist when there is a certain amount of authority whether it be social, political or legal to enforce that judgment or at least to increase its persuasive power beyond that of the pure argument. This is because judgment is vulnerable to the power of argument, as although judges have authority they do not have absolute authority and this is seen by the way they express their judgments - in the giving of reasons:

... providing a reason invites evaluation of said reason and opens room for disagreement and dissent. In contrast, issuing a decree without reason means that the decree rests solely upon the authority of the issuer; if that authority is recognized, then those addressed by the decree have no opportunity (or reason) to question what has been demanded by then. (Kraemer 1996, 25).

To be effective, judgment must at some point stop the questioning. In doing so those who judge must seek to find ways to stop the endless circularity of questioning that occurs in pure persuasion. There are a number of possibly strategies, legal systems for example are almost always founded on the use of state power. The *Talmud* which did not have this option used a combination of education and social pressure to reinforce its standards and assumptions to embed them in the subconscious where they could be safe. Curtis, using Arendt's structures, describes a process where an appeal to commonsense is made. Like all attempts at persuasion this could become circular but unlike

self-evidence, or the audience of all reasonable beings commonsense is embedded in a real community and this is what stops the infinite regress. There are concrete others who can choose to accept or not and this stops the questioning. Much of philosophy in practice is a process of judgment with accepted social and intellectual practices exemplified by those who undertake philosophy as a profession.

In practice what this means is that judgment is not so much a form of persuasion but an attempt to use its power, the process of debate, while protecting its foundations from the ability of argument when pure process to undermine itself. A judge to be successful cannot question his role qua judge, s/he somewhere to stand a point of view that is acceptable not universally but at least generally. In recognising that dialectic and rhetoric could use the similar tools while being very different Aristotle was making a related point. He also pointed out that the rarified arguments in a process where one allows an other to question all of one's assumptions can only take place following a certain amount of training and an acceptance of a certain relationship. In a public arena such arguments would simply not be heard.<sup>9</sup>

There are numerous situations where certain matters are designated as not open to question and the first sign of judicial authority is their ability to decide what and whom to listen to. The common law contains a variety of practices which limit what the judge has to or can hear. S/he is limited to the arguments and authorities put forward by the parties to the case. S/he has to take into account previous case law. There is a hierarchy of courts that binds him or her. These limitations protect the foundations of the judge's authority by designating certain matters as beyond question. Just as philosophy's ultimate lack of limitations defines its sphere. Judgment is defined by its limitations.

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<sup>9</sup> This does not mean that they will have no impact. Relativism could be seen as having evolved first in philosophical sphere and gradually affecting public speech. It is only though when the language has entered this sphere and is part of common sense that such issues would be listened to in this context.

## 2. Authority and limitations

It may seem paradoxical that in seeking to avoid the dangers of persuasion, judgment uses argument and language as its primary tools. In the common law there is the ultimate power of the judge to use the state to enforce the decision and which always defines law as not a matter of choice.<sup>10</sup> This ultimate sanction is at its clearest in criminal law where society readily accepts the legitimacy of such power but is hidden in civil law where sanctions are generally financial and need to be pursued by individuals. It chooses to hide this power in order to appear above the mechanism which justifies the use of this power in a democracy - politics. Harlow, in a recent lecture reported in the *Independent* has argued that if the law were to be seen to be political that would undermine it:

The judicial process is valued for different qualities. It is formal, its conclusions are reached through a method of reasoned proof based on arguments submitted by the parties to an independent and impartial judge. Its objective being primarily the protection of legal interests, it is appropriate for access to be limited to those who can show such an interest. That is, of course, a stereotype. I suggest however, that, if we move too far away from the stereotype, we may end by stultifying it. If we allow the campaigning style of politics to invade the legal process, we may end up by undermining the very qualities of certainty, finality and independence for which the legal process is esteemed, thereby undercutting its legitimacy. (*Independent* 13 June 2001)

In democracies, law which is imposed by non-elected judges cannot use the methods of justification that are used to support the state and therefore the state use of power. The legal system is self-conscious in that it is based in public acceptance, particularly in a democracy, but seeks to hide this

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<sup>10</sup> Cover puts it this way: "On one level judge may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience but on another level they are engaging a violent mechanism through which a substantial part of their audience loses its capacity to think and act anonymously." (1986, 1615).



dependence to ensure that it retains a sense of power. Judges therefore need to use strategies to provide legitimacy in a different manner. One of the ways they do so is to make clear that they are not political. They portray law as impartial and consistent, and not subject to the vagaries of public opinion. Law is blind not just to protect those who come before the judiciary but to protect the judiciary from claims of bias. It is notable that feminist and critical theorists seek to undermine law by setting bare the foundations of the system in fallible human beings who do not live up to the impartial character it.<sup>11</sup> They use its own standards, set up to hide its dependence on public opinion, against it.<sup>12</sup>

The legal system uses a variety of techniques to establish its legitimacy. This thesis has focused on one set of limitations, those which are self-imposed by the judiciary in presenting acceptable arguments. This has led to a consideration of precedent and the judicial role.

## 2.1 Precedent and tradition

Precedent is purely a matter of practice and yet it is rigidly followed. This is understandable in lower courts where it is imposed by the state sponsored hierarchy of courts. Yet even in the House of Lords this is a supreme obligation. Previous cases may be overruled but the Lords are extremely reluctant to do so. This seems to place authority in these previous decisions and yet it is the judge making the decision who defines that power and its limits by defining the *ratio* and choosing whether or not to distinguish previous cases and even whether to distinguish on the grounds of fact or law. This process is expressed though not in the language of choice, instead judges use the language of compulsion, they are bound, they cannot see how this, the

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<sup>11</sup> Maley suggests that a growing interest in language in law often betrays a radical critique (1999, 50).

<sup>12</sup> Simpson has pointed out that the common law is essentially customary and based on acceptance. (1973, 85-86) He was focusing on those who participate but this is true also of its acceptance by the wider society and by the political establishment.

facts of the case simply do not apply. They seek the power of a tradition.

Traditions have power because they can hide the person who is making the decision in the instant case. Gadamer, who sees tradition as a paradigm of all understanding, has referred to the way in which no one can escape from their “historically determined consciousness”. Philosophy has seen this as problematic - the individual is always open to prejudices and yet judges seek this and seek to prejudge. This is not to use prejudicial in its more common sense but there is in the way that judges seek to portray, and clearly feel, themselves bound by previous cases an attempt to suggest that the case has been prejudged that they are applying a tradition that flows through them. In this their lack of individual response, the fact that they are determined by a tradition makes them less and not more suspect. The complex structure of tradition in the *Talmud* was strongly dedicated to smoothing out individual differences and creating structures of reasoning which would embed in the subconscious and predetermine certain responses to the material. Precedent is the structure through which the common law absorbs this traditional power. The practice of distinguishing is essential to this structure and provides for the mechanism of change that all traditions require.<sup>13</sup> It ensures that even when judges seek to avoid the power of a legal decision they do not seek to go beyond the decision. An advocate or barrister who approached the House arguing that precedent was simply a fiction and it was up to those individuals present to decide the case on the basis of their own sense of what would be a just outcome would be unsuccessful. Judges seek not only to make decisions but to legitimate and to justify them. They do not wish to persuade others simply that their decision is correct but that they had no choice but to come to that decision. They do not wish the decision to belong to them but to belong to the system as this is where it gains its authority.<sup>14</sup>

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<sup>13</sup> Krygier has described the way in which traditions build in change (Krygier 1986) and this is reflected in Gadamer’s statement that the past and present are constantly mediated - see chapter 1.

<sup>14</sup> Levenbrook argues that the examples used in precedent are socially rather than judicially set and that the judiciary are constrained by a wider sense of what is significant (Levenbrook

Precedent is not without content and this thesis as well as looking at precedent looked at the development of case law and judicial argument in the law of negligence in Scotland and England. This showed how the methods that judges used to develop acceptable arguments in this area of law changed and evolved over time. In Scotland the acceptance of reason and philosophy as an authoritative source encouraged the use of its tools of categorisation and principled reasoning.<sup>15</sup> In England where authority was based in sovereignty where this encouraged the development of systems where authoritative processes such as writs could become all powerful. The recognition of the limitations of this led judges to look at argument and reasoning and develop case law as an alternative source of authority. In Scotland case law came to replace a belief in a common morality<sup>16</sup> as a source of authority and thus from different directions the systems independently evolved a case-based system of precedent. Both systems also had to deal with what within that case law was authoritative. It would not have been possible for the system to simply be founded on the authority of individuals. Each decision made by a judge does not question but seeks to establish and re-establish their character and their role of identity - judges cannot ask "who am I?". Rather they have to support and nurture that character through their decisions. This thesis has argued that in looking at the way in which judges explore these arguments in their decisions and in what arguments are accepted it is possible to see the way in which these foundations of judgment are established and re-established and at the core of this is the complex which surrounds the way in which judges understand their role.

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2000).

<sup>15</sup> Blackshield (1987) has said of the influence of the Scottish traditions on the House of Lords: "This continuing influence is at its greatest precisely at the level of inarticulate background assumptions with which we are now concerned; and it is, of course, at this level too that Scots Law Lords (always among the most redoubtable in the House) are most likely to display the continuing influence of their original training." (1987, 115)

<sup>16</sup> It is interesting to note that Simpson links the development of precedent to a break down of custom. (1973, 98) Traditions occur in times when there are difficulties generating consensus in matters such as religion which seek the atemporal. This is another way in which judgment can be distinguished from philosophy which despite any difficulties still seeks this atemporal truth.

## 2.2 Judicial role

Negligence and pure economic loss are of particular interest in looking at judicial role because of the way they deal explicitly with the relationship between law and society which the judiciary see themselves as mediating. Negligence is an alternative way of recognising relationships in the absence of contract and can clearly only be based on a sense that law has a duty to enforce such relationships and to enforce some broader sense of the way relationships are formed. At times the judiciary are very clear about this, in *Donoghue* Lord Macmillan links the development of the law to social attitudes and Atkin goes further in espousing a principled approach on the foundations of commonly accepted morality.<sup>17</sup> They do so though in the context of physical relationships, the bottle passed physically from hand to hand. It is likely that any form of “common sense” would support a legal recognition of such relationships.<sup>18</sup> It is when there is no longer a clear physical link but a strong logical link that the arguments about limitations become most keen. In considering pure economic loss they cannot ground the decision in the real world.<sup>19</sup> This means that in this area judges are concerned that the foundations of their authority will be exposed as ultimately this is what the decision will be based on. These concerns will be expressed where it is that they feel law is vulnerable. It may seem a simple matter of fact to decide whether damages are reasonably foreseeable but as has been seen in the case of *Junior Books* this issue raises questions of foundational importance, implicitly raising questions such as how far is law prepared to go and how far will its foundations take it without them being open to question. It is in answering these questions that judges use their most emotional language and

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<sup>17</sup> Bankowski shows how the imaginative leap that this involved was later absorbed into the tradition where it lost its power to surprise (1991, 212)

<sup>18</sup> This has of course not always been true particularly in England. There is something anachronistic about the early English cases to modern ears which are based in a society with strongly defined roles. The new common sense probably evolved in response to the industrial revolution, which undermined this structure.

<sup>19</sup> There is a strong tendency to use the authority of the “real” world in judgment. Whether it be in the linking of the ratio to the facts of the case or the wariness about the power of pure ideas and logic.

show that it is when they feel that their role is in question that judges are most committed. The heat of the debate reflects the level of emotional commitment and undermines again MacCormick's argument that cognitive commitment and emotional or volitional commitment are separable. The emotional commitment here arising out of the cognitive commitment and indeed cannot be understood without it. Similarly the implications of the cognitive commitment are seen in the emotional response which in turn deepens the cognitive understanding of the process. The intensity of their debate does not lie around the emotional or ethical arguments as understood by the wider society but around the ways these should be absorbed so that the legal system retains its authority and is not undermined by being seen to be too political.

In providing these reasons the core commitment of judges remains to law and the distinction between the two methodologies discussed can be seen in terms of their response to issues which they feel undermine law's foundations. Often they are afraid of the same problems, politics and the power of argument. When it comes to being seen as political, the first group who espouse the principled approach is most concerned of the dangers of being seen to have founded a decision not on clear reasonable logic but on a narrow legalistic interpretation of facts which can appear to draw the line on a subjective whim and even worse on the whim of people with no links to the common people. Case-based reasoners are wary of being seen to be going too far and being ahead of public opinion, of losing the power of tradition to hide the impersonal. They are not afraid that logical arguments will show the absurdity of their narrow classifications rather they are afraid of the power of logic to tend to infinite regress. The key to both points of view is where they feel law is established and where the foundations remain secure their sense of authority and role is linked to their sense of limitations. This brings to mind a definition of a judge by Levinas:

The Judge is not just a legal expert of laws; he obeys the law he administers and he is trained in this obedience; the study of the law is itself the essential form of this obedience. (Levinas 1994, 107)

The obedience is not simply demonstrated in his/her ability to apply the rules and practices but in their emotional commitment to the foundations of their authority.

## Conclusion

It has been argued that no philosopher or theorist will ever be convincing and it has been pointed out that in practice philosophy is a form of judgment that often settles for lesser standards in order to resolve the problems of infinite regress. This conclusion considers first why theorists, and in particular the three studied in chapter 2, have failed to see the importance of emotional commitment in understanding judgment and then whether, given the limitations on philosophy, judgment should be seen as a model for all understanding.

### 1. Understanding judgment

In considering the success or failure of a legal theorist it is first necessary to consider the goals of their theory.<sup>20</sup> MacCormick seeks to support the rule of law with the tools of philosophy. He does so by defining people as essentially reasonable and seeing the syllogism as a choice not simply of logic but ethics. Perelman seeks to justify reasonable debate to provide it with a foundation. He is seeking to support theoretical debate with judicial authority. Jackson is the purest theorist, seeking to show how a structure can clarify practical problems. Most of the implications of these positions and the way it led the three theorists to misinterpret the role of the individual were raised at the end of chapter 2 and this section does not seek to revisit that argument but instead to deal with how their theories relates to the process of judgment as described in this thesis.

This analysis has actually revealed the importance of much of what was highlighted by the theorists in their own work and in particular this conclusion owes much to Perelman. Even Jackson who was seen as the least persuasive of the three can be seen, particularly in his discussion of closure rules, to be aware of the importance of limitations in defining a discourse.

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<sup>20</sup> This limits the constant questioning and allows them to be judged by their own standards.

Indeed, the works of Jackson and Perelman may well better highlight the ways in which the judge defines him/herself according to his audience as this thesis has focused more on the use of language. MacCormick's theory could also be used to explore the way in which the judiciary use philosophical tools to bolster their arguments. The core criticism made against them though remains and that is that they failed to deal with the rhetorical and the symbolic elements in the judicial decision. Instead, they have sought to see beyond these elements into philosophical structures. This does not mean that judgment cannot be understood in this way but that in stripping the decisions of the identity of the judge they failed to miss a key component of the judgment - the commitment of the judge.

It is in their commitment that the judge reveals the foundations of the system and why they too seek to hide certain personal elements and to be general but not universal. They absorb their role as a judge into their own personality and the system encourages them to do so by offering competing versions of the role which allow different personalities to absorb different versions. This makes their understanding the role a matter of choice and something which they can identify strongly with themselves. This is a trick known to the *Talmud*, a system which appears structural and impersonal but which allows individuals a degree of freedom.<sup>21</sup> In seeking to describe such a system in purely structural terms and not realising the way in which the individual relates to the system the theorists inevitably fail to see why the judge absorbs a sense of role and even more so why the system needs to keep open the possibilities of more than one sense of role or one answer in order to absorb different personalities. Indeed, their view of judicial role can be seen to express their own commitment and this is why only one view of the judge is presented and this the one that best fills the gaps and supports the foundations

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<sup>21</sup> Garver applies the talmudic structure to law in arguing that while there may be many legitimate arguments in a case, there will be only one just one in the sense of one compellable argument and that the gap between the two is an ethical one (1999, 122-123). Kramer (1991) following Derrida has argued that the paradoxes within law, its tendency to set up oppositions set up the sense of a background of objectivity to law and in this sense would be essential to its desire to justify its foundations.



of their own theory. In this light, McCormick's work is particularly notable as he, like the judiciary, wishes to support the legal system, and his description of judgment as essentially rational not only supports a rule of law ethic but gives strong support to a "Scottish" style of reasoning. Jackson's commitment to integrity is seen in his description of the academic which supports his role and explains his distance from a process which is essentially more bounded than that of the academic and which seeks to hide and not to reveal personal bias. Perelman's judge is the perfect example of a participant in argumentation who can respect all views and by using reason as well as rationality provide persuasive arguments without resorting to violence. These points have been made before but in the light of this understanding of judgment another possible reason behind their failures becomes clear - it may be that philosophy's desire to provide one single answer and therefore one model of the legal system makes it hard for philosophers to provide models which show why, within limitations, the system allows individual participants the opportunity to have divergent models.

## 2. Judgment as understanding

In chapter 1 it was suggested by Gadamer that judgment was the paradigm of all understanding. This was supported by a view of understanding as a process of mediation and application of past knowledge. It could be argued that the view of philosophy which is not a mediation but a questioning could also be seen as a practice akin to judgment in that this has its own limitations and certainly, as a profession, philosophers do submit to judgment. Yet philosophy does still retain within itself the pursuit of the unquestionable answer and is more dedicated to its process as pure persuasion than any particular paradigm. The goal it is wedded to may be impossible but does this mean that we should settle for a bounded view of understanding when it is at least possible to see an unbounded one.

The bounded nature of understanding and its limitations is what gives it authority and allows it to be communicated. A form of understanding that is

judgment sees knowledge as traditional and rooted in relationships between others and texts. The flexibility of such structures has been seen in this thesis which considered three different views of judgment in judicial contexts as well as different theoretical models which sought to understand them. The boundaries allows us to communicate to each other by setting out a series of practices and defining relationships but is this inevitable and should we hold on to the possibility of an unbounded world even though that raises questions of impossibility.

Yet there is an appeal in the goal of unbounded understanding. Critchley's reminder that betrayal is the result of all commentary and is inevitable whenever a choice or a decision is made<sup>22</sup> shows that the implications of a bounded understanding are not all positive and there is something attractive about the goal of the reader, a pure desire to completely absorb and reunderstand a text rather than imposing one's own situation on the text. There is an ethical argument in saving philosophy and not using a judgment as a model of all understanding but rather reestablishing its foundation in the impossible.

This is not to say that philosophy as questioning can not be equally problematic. Its structure of questioning and the goal of theory to explain everything can make it rigorously intellectual and as has been seen it has difficulty dealing with emotions, character and identity.<sup>23</sup> It is not being argued that philosophy is a purer or better goal than judgment but its unbounded nature means that restricting our understanding of understanding to judgment which is of essence bounded leads to a denial of the core element of what has been for millennia a respected form of intellectual practice. It may be that the way we understand texts, and each other is too complicated to be understood by one single theory and that we need different forms of

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<sup>22</sup> See chapter 1 above.

<sup>23</sup> It is possible that its current obsession with identity may lead to a form of study which can be more responsive to aspects of humanity that are not strictly intellectual.

understanding to reflect the different ways individuals and intellectual communities try and make sense of the world. This would see philosophy and judgment as related in their use of similar tools but as very different forms of understanding. Any similarity between them would lie in the fact that they were used by people as ways of explaining phenomena rather than in any relationship to some meta- or more foundational form of understanding. This means that there would be no overall theory of understanding that could explain the ways in which people choose to understand but instead the key to understanding would be in the decisions of individuals, influenced no doubt by their culture and education to adopt and use different forms and the ways in which each individual related them to each other. The advantage this would have over a meta-theory of understanding is that it would be at the service of individuals rather than, as so often appears to be the case in theoretical constructs of understanding, at the service of the theory. This would place ethics at the core of any such attempt at understanding and would inevitably lead to issues of relativism but this thesis has shown that it is possible to consider the complexities of the emotional commitment individuals have to their method(s) of understanding without having to share that commitment.<sup>24</sup> It has though to be admitted that the choice the philosopher or theorist makes in choosing a method of understanding to use themselves that they will inevitably have to make such an ethical commitment.

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<sup>24</sup> This does not mean that the theorists would not be and indeed they would probably have to be emotionally committed to the method of understanding that they themselves were using. There is an inevitable circularity in this structure. It is also likely that the best way to prove one understood a certain methodology of understanding would be as a practitioner rather than by using a different methodology. The latter though would have the advantage of introducing new perspectives.

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<sup>1</sup> References are organised by chapter. A number of the chapters deal with very different areas and as there is only limited overlap it was felt that this was the best way to present them.

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