

## **The Judicialisation of Values**

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- 1 The idea that values have only recently come to the law should be challenged at the outset.
- 2 Equity is built on conscience and the protection of the vulnerable and of given trust.
- 3 The common law too has values at its heart. Examples abound.
- 4 Procedural fairness is based on fairness; fairness is based on dignity and equality.
- 5 The criminal law is constructed at its most important parts by the concern for the individual, equality and human dignity. The High Court jurisprudence on sentencing since the turn of the century has been dominated by the incommensurable balance of the individual with society, eschewing rules and lines and emphasising the human circumstance.
- 6 The norms and conceptions inhering in the exercise of judicial power incorporate from their roots in the common law the norms that now characterize international human rights – a rejection of inequality, arbitrariness, discrimination, unfairness, injustice and cruelty. That the common law and legal punishment in earlier eras exhibited a severity that might shock today does not mean that by the values and political and legal structures at the time any severity could not be justified. Nor does it mean that contemporary conceptions of punishment need embrace any such severity. Indeed, these considerations reveal the effect of changing circumstances on the content of law and its informing norms.
- 7 But it is commerce and values that I wish to say something about tonight.
- 8 Commercial law is riddled with values in its principles and rules. Without values commercial law would not be certain; rather it would be the arbitrariness and tyranny of the written word, but the written word not as the vehicle for expressing human relationships, but for the expression of power. Certainty is not gained by the written word alone. It is derived and felt from an understanding of a stable and known position, often a space. That comes as much from a known demand for, and expectation of, a requisite degree of trust, honesty and lack of sharp

practice, as from any clarity of expression. That is why in most civilized legal systems there is a concept of good faith, not as a specific implied term, but as a pervading norm or assumption that helps supply blood and oxygen to honest common sense in the processes of implication and construction of contracts.

9 But it is fair to say that Parliament in recent times has expressed values in statutes more frequently than in years gone by. Importantly, good faith and unconscionability (decoupled from, but still closely related to, their common law and equitable anchors) have been introduced into Commonwealth statutes governing business behaviour.

10 The task of the profession and of the courts is to conceptualize and interpret Parliament's will faithfully in a way which vindicates both the command of Parliament and the techniques and values of the common law and equity.

11 Let me give historical examples of broad values in statute leading to a stable and known position or space. In 1980, the New South Wales Parliament passed the *Contracts Review Act*. The Attorney-General of the day (Frank Walker) was viewed by many in the legal profession as little better than a communist. The Act, however, followed a thoughtful inquiry by Professor John Peden, whose short but scholarly rich report still repays careful reading. Nevertheless, notwithstanding that unthreatening background, the sky was sure to fall in.

12 Section 7 of the Act said that a contract which was unjust in the circumstances could be varied or set aside. Section 9 had various inclusive criteria to help in this assessment of injustice. Section 6 denied relief if the contract was entered into by the person in the course of or for the purposes of a trade, business or profession carried on or proposed to be carried on by that person. It was a short, readable Act that encapsulated the elements of potential transactional injustice.

13 Without a single intervention by the High Court, the New South Wales Court of Appeal, the Equity Division and the Common Law Division of the Supreme Court of New South Wales carefully, through practical and clear expression, established a stable and faithful application of the Act. The novelty of expressed human values in such wide open-textured language was made familiar and stable, and so made certain, through legal technique and case by case analysis using inductive reasoning and guidance from similar facts. No-one tried to define "unjust" – it is indefinable. The values that attend the assessment came from the common law,

equity and the statute itself. The space became familiar and comfortable by legal technique and case examples.

14 The sky did not fall in.

15 I venture to suggest that if the *Contracts Review Act* had become uniform legislation in its simple form in the early 1980s many of the deconstructed particularised pages of legislation that we now have about consumer contracts would not have been necessary.

16 Meanwhile the norm of s 52 made its way into the bones and marrow not only of lawyers but of business people. Importantly, however, s 52 carried within its text a reference and framework for analysis. “Misleading” or “deceptive” carry their own points of reference.

17 But one must say something of a modern cast of mind. It is the tendency, almost a mania, to deconstruct, to particularise, to define to the point of exhaustion and sometimes incoherence. Often, if not always, this is in the name of certainty and completeness; but it is false certainty. Attempts to define whole concepts concerning human experiential relationships are generally doomed. Such attempts change the concept itself and only bring artificial certainty, by that change. It can be like trying to define the beauty of Mona Lisa’s smile or the entrancing proof of God of Maria Callas’ voice. Not only is the task impossible, but the attempt makes the sublime and emotional prosaic. Deconstruction and particularism plague our statutes, especially Commonwealth drafting. Corporations legislation, competition legislation and taxation legislation are living examples.

18 Deconstruction and particularism also plague how we think about regulation and behaviour. An example most readily apparent in the travails of those participating in the Royal Commission is the deconstruction of whole ideas of human relationships such as trust and fiduciary duty into rules, and protocols and checklists, that are to be ticked off and placed in boxes. So much of the conduct that is being exposed is just unthinkable if one simply understood and enforced, with rigour, fiduciary duty and holistically applied it to the whole facts.

19 Much of the debate in the Royal Commission can be seen to be about an inability of some in positions of trust and power to step back and see the whole circumstances of what their enterprise is doing and evaluate it from the perspective of honesty, good faith and a sense of decency, rather than the particularised abstraction of the elements in each of the boxes. So

much is broken up and distributed to persons in the organization, without an analysis of the whole.

20 Perhaps that is explicable for banks when they cease to be viewed as utilities and become growth stocks, driven not by credit analysis, but by commission-taking and marketing.

21 What about unconscionability? It is less precise than misleading or deceptive. Decoupled from a doctrine to set aside a transaction it becomes a body of conduct directed to a norm of right behaviour. It is not to be defined because it is indefinable.

22 Vital to the evaluation of whether conduct in business is unconscionable, and to understanding unconscionability itself, is the proper approach to the task. The court or the practitioner must approach the task as a court of equity would approach a problem. This is not to encourage arcane process. It is to recognize that there is no formula, or cause of action to be pleaded. There are no defined constituent parts to be isolated. That is because the evaluative conclusion is not definable. That is why traditional *Judicature Act* pleading of material facts is not very helpful given that there is no real division between pleaded facts and particulars. One needs to understand what Dixon CJ, McTiernan J and Kitto J were meaning in *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113 at 119 when they quoted Lord Stowell from the *The Juliana* (1822) 2 Dods 504 at 522; 165 ER 1560 at 1567:

A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case.

23 An appreciation of the legal technique to approach the evaluation helps one understand the nature and character of the norm being investigated and assessed. The practical undertaking of the task helps illuminate the norm. Because the illumination of the norm comes from explaining and discussing the human engagement about which the norm speaks. Essential to the proper evaluation is the task of consideration and articulation.

24 I will give an example from another field. How do you explain why a sentence for a crime, say two or three years given for the sexual assault of a young stepdaughter, was manifestly inadequate? No logic or rule is involved. Nor does one just say yes or no. One must work out, through explanation and description as best one can, the instinctive response of the person as an embodiment of state power. There is no definition; human values and human response, mediated through the court as an expression of state power, are worked through by articulation.

25 The process of considering whether conduct was unconscionable, according to *Jenyms*, is first to look to all connected circumstances that ought to influence the decision – all the facts. But what facts, you say? By reference to what? The collection of the facts is by reference to the values that will inform the relevant evaluative task. In a statute, they are the values and norms recognized by the text, structure and context of the legislation. The *Competition and Consumer Act* and the *Australian Securities and Investments Commission Act* take their place embedded in the fundamental values of law and equity. The statute is both general and specific about this. The general norms were discussed in cases such as *Paciocco v ANZ Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199 at 274-276 [296]-[306] and *Commonwealth Bank of Australia v Kojic* [2016] FCAFC 186; 249 FCR 421 at 435 [57], where it was said:

... The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.

26 The statute also descends to specificity in provisions such as s 22 of the *Australian Consumer Law*, looking at factors such as strength of bargaining position, pressure, unreasonable non-disclosure and the intelligibility of documents. From these one does not pick and choose. All the circumstances must be examined and evaluated. These factors are not a closed, nor an exclusive, universe. But notice that they all deal in some way with the exercise of economic and private power. (See also s 12CC of the *ASIC Act*).

27 The role of the profession and the courts is to organize and develop these public norms into a coherent stable body of expression, applying the values contained within the statute to bring about the familiarity of outcome by reference to varied circumstances brought to the courts. This will provide the certainty of a space. That there is a degree of contestability about a particular conclusion is only to say that the judgment does not fall on logical deductions, but must include a decision as to what justice requires in the instant case.

28 It is essential, however, whilst holding fast to the recognition that it is the text, structure and context of the statute that provides the norms and values, not to deconstruct or abstract the

judgment or assessment, not to seek to reduce it to a false certainty by seeking out some defining element. It is human behaviour that is to be evaluated and characterized, for penal purposes. But it is human behaviour to do with conscience. To behave unconscionably should be seen, as part of its essential conception, as serious, often involving dishonesty, predation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism. None of these is definitional. They are all the kinds of behaviour that, viewed in all the circumstances, may lead to an articulated evaluation (and criticism) of unconscionability.

29 That an evaluative technique is being used does not mean that this is an easy conclusion to draw. It is a serious conclusion to be drawn about the conduct of a business person or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience.

30 The High Court has taken up *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18 and will examine this question. An important aspect of this High Court consideration will be the correct standard of review and whether deference should be accorded to the view of the primary judge.

31 My view is that the correct legal techniques and attendance to the statute and its values will bring about a stable body of precedent and a familiarity in the business community. The Royal Commission will play its part through causing concern and an awareness of the values that inform unconscionability. But it would be unfortunate if the answer was thought to be found in more deconstructed, particularized legislation.

Sydney

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