

Dreamtime and the Common Law

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Abstract:

Teaching the law focuses on authoritative legal texts that create, modify, and end the rights of individuals or institutions. Authoritative texts include contracts, judgments, and statutes. The law structures and regulates the world through its textual power and the force of the state. Indigenous epistemologies are living systems that are sustained over generations, and often form part of its cultural or spiritual identity. In teaching law we both seek to disrupt the way in which extensive focus on text can obscure the ability to see the impact of the ongoing assertion of colonial power through the perpetuation of the common law. We illustrate how engaging with visual materials in the classroom enables a space to critically engage with the text of the law and law of the text.

Keywords: Common Law; Indigeneity; Pedagogy; Werner Herzog; *Where the Green Ants Dream*

Introduction

In this article we outline some aspects of the pedagogical approach that we take in response to the experience of teaching the law of the jurisdiction of England and Wales to undergraduate students at New York University in London (NYUL). Unlike similar modules taught within English university law degrees, we teach our courses to students who are majoring in legal studies as part of an undergraduate liberal arts degree program. Our students spend two semesters studying what are regarded as the foundational legal subjects of English law. Anybody who wishes to qualify as a lawyer working in the jurisdiction of England and Wales must have knowledge of these subjects, given that they underpin the professional qualification process. Unlike in the USA, in English universities the material is covered at the undergraduate level. This means it is not necessary for students to subsequently complete a postgraduate qualification in order to be able to sit professional qualification exams. As we are part of New York University's global network, our students come from a highly diverse range of countries, but the

majority are taking a degree program at the Abu Dhabi campus in the United Arab Emirates (UAE). The student interest in English common law is no doubt related to its use by businesses and nations around the globe, which to some extent reflects the former extent of the British Empire. However, apart from such historical reasons it is also widely regarded as innovative whilst at the same time being predictable enough to provide the certainty that is required for commercial dealings (Legal UK). The UAE has, for example, adopted English common law for its financial free zones: the Abu Dhabi Global Market and the Dubai International Financial Centre.

We teach the law as an academic discipline but our courses are impacted by the legal profession in a variety of ways, and not simply by the vocational aspirations of our students. The expectations and requirements of the profession frame perceptions of what is relevant in university modules but they also influence the material covered in text books and the coverage of legal journals and other academic publications. The effects are not limited to the creation of expectations that the pedagogical focus of courses will be on the relevant areas of doctrinal law, such as criminal law or land law. It is also understood that the processes of legal reasoning used by lawyers when analysing and advising on legal problems will be taught. This background context necessarily brings with it certain implications for our efforts to “de-center from Europe as the center of knowledge to include a polycentric approach to liberal arts curriculum” in our teaching of English law as part of the liberal arts paradigm.¹ Knowledge that is disregarded in the analysis and determination of legal disputes becomes marginalised, and this may be perpetuated by students given that they are required to use authoritative legal sources and decisions. In teaching the law in the context of a liberal arts degree we have a great deal of scope to unsettle what substantive knowledge is understood by students to be relevant to the doctrinal

¹ Liberal Studies Hold Global Symposium on a Polycentric Approach to Liberal Arts Curriculum, <https://as.nyu.edu/features/impact-makers/2023/ls-global-symposium.html>.

development of the law. However, in this article we focus on the colonialising effect of the process of legal reasoning, which is typically overlooked.

Our view is that it is insufficient to attempt to take a polycentric approach to teaching the law only by engaging with its doctrinal substance.² We seek to trouble students' assumptions about the law and the perception that studying it simply involves acquiring knowledge about its content. In this article we briefly discuss how we invite students to engage with the *process* of legal analysis. In order to do so it is necessary to mention that one prevalent method of both teaching and assessment of the law is by using problem questions or case studies. These are short narratives that require legal advice to be provided to one or more of the people affected by the events described in them. In solving such problem questions, enacted legislation and reported case law provide the primary source materials that students are expected to apply in the analysis and determination of the legal dispute that arises out of the described "facts." However, although a knowledge of the substance of the law is fundamental to answering these questions, equally important is the ability to demonstrate an ability to use that knowledge to analyse the problem in a way that is legally persuasive and appropriate. Central to doing so is the question of whether and why any given historical decision should be determinative of the outcome of (an)other subsequent legal issue or dispute. However, students commonly arrive in class without having given much, if any, thought to *how* the precedent value of previous decisions is used in the analysis of legal issues and disputes.

One fundamental question that faces the law is the matter of how "to balance stability and continuity against flexibility and change such that it results in a state of affairs that is neither only a case of stunted development nor a case of 'anything goes'" (Hutchinson 26-27). We

² To be clear, this is not intended to diminish in any way the importance and significance of approaches such as the Third World Approaches to International Law project, which focus on a particular area of the law, such as international law; see <https://twailr.com/>. Quite the reverse, as such engagements are clearly crucial in engaging with the way the so-called first world's policies and laws undermine the independence of the so-called third world. Our position is that given the spread of the common law it is *also* necessary to engage directly with the process of legal reasoning, given the way it carries with it colonial thinking and assumptions that are not sheltered only in particular subject areas of the law.

consider that engaging with the way in which the common law goes about resolving this conundrum is a crucial aspect of decolonising the law. Our efforts to do so include incorporating art and literature into our classes. An example is the film *Where the Green Ants Dream*, which will provide a useful focus for this paper. In class it serves to open an engagement with the way the colonising effect of the common law is perpetuated because its force is required to be used to analyse and determine the outcome of disputes. Our discussion of those matters first calls for some explanation of what exactly is involved in legal reasoning. As the legal scholar Alan C. Hutchinson has pointed out, it is generally thought that the “legal past must and should play a central role in the law’s present and future development” but that “resort to the legal past need not be restricted to particular decisions made or a mechanical application of them” (Hutchinson 26-7). The view is that whilst legal reasoning should involve an effort to be “a creative and disciplined practice” it must not be turned into an “open-ended ideological exercise” (Hutchinson 26-27).

Legal Method and Reasoning

In this article we can only seek to briefly touch on the techniques used by jurists in finding a balance between the competing demands of change and the stability that enables there to be an element of certainty in how legal issues will be determined. The common law adopts an incremental approach to the resolution of disputes, which is framed in two key ways that are at the core of a law student’s education. The first is the doctrine of precedent, which even these days is still referred to by its Latin name as the doctrine of *stare decisis*.³ This doctrine which is fundamental to the development of the law depends, in turn, on determining the *ratio decidendi*. This second element is that aspect of any given case that is binding on subsequent courts. Under *stare decisis* the decision of a more senior court will bind a lower court that is within the same jurisdiction. The decision of a court of another jurisdiction may only be treated as having

³ The phrase “stare decisis” is itself an abbreviation of the Latin phrase “stare decisis et non quieta movere” which translates as “to stand by decisions and not to disturb settled matters.”

persuasive authority. The Hon. Justice Paul M. Perell of the Ontario Superior Court of Justice, in a straightforward account of the law of precedent, refers to a book, *Learning the Law*, first written by Glanville Williams in 1945. In it the doctrine is clearly described by Williams as meaning that “cases must be decided the same way when their material facts are the same” (Perell). In this respect, the material facts of a dispute or crime are defined by the law, which may of course be determined from legislation or case law.

Justice Perell goes on to use Williams to explain that, in making their decisions, the courts are bound by the *ratio decidendi* of a case, which “can be defined as the material facts of the case plus the decision thereon” (Perell).⁴ In combination with *stare decisis* it means the stereotypical conservatism of the law may, at least to some extent, be explained in terms of the similarity of its process of reasoning with casuistry (Paulo 374). There isn’t the scope here to elaborate on this comparison in any great detail. However, when the term is not simply being used in a pejorative sense, casuistry involves a process of reasoning that derives or extends abstract rules from a particular case, and reapplies those rules to new situations in an effort to resolve moral problems. In a similar fashion, the authoritative decisions by certain courts in the common law become precedent cases, which have a “normatively binding status” (Paulo 377). As the theorist and philosopher Norbert Paulo has pointed out, casuistry has been criticised as being overly conservative on the basis it has no means to respond to change given that casuists have to “assume that everything morally relevant has already been incorporated into conventional paradigms,” which are used as benchmark cases to resolve subsequent matters that need to be determined (Paulo 377).

Paulo’s work is useful to us because in elaborating on their argument that casuistry *does* have the scope to develop and evolve, it engages with similarities between casuistry and common law reasoning (Paulo 377). They isolate the importance and significance of the use of analogy in the

⁴ Perell, “Stare Decisis,” section 9.2 quoting Williams, *Learning the Law* (9th ed., 1973).

process of legal reasoning. However, before turning to the significance of that matter, it must first be pointed out that when studying the law, students are very clear as to where they must look when seeking the doctrines and principles on which the determination of outcome of the problem questions they are asked to analyse will be based. As Paulo points out, by comparison with casuistry, “the advantage of common law is that one knows where to look for the normative source – the decisions are collected in reports and case books” (Paulo 377). In this way, cases that have determined legal doctrines in the resolution of disputes over time gain ever greater weight and strength as authorities. However, even when – or if – a student locates the relevant precedent cases that have binding force a number of potential difficulties remain (Paulo 380). Apart from the fact that *rationes decidendi* need to be interpreted, there is also the necessity to take into account that it is possible for previous decisions to be overruled and distinguished (Paulo 380). For the purposes of this article, as an example, we will focus on the process of distinguishing legal cases, which Paulo describes as a “means of expanding the normative system by filling a gap” (Paulo 380).

Distinguishing involves comparing two cases. In doing so it may be determined that a case, which otherwise might be regarded as authoritative, will not apply because the two different sets of facts are materially different. Paulo helpfully points out that given distinguishing and other such matters, “*stare decisis* is actually a disjunctive obligation” and this is “probably the main reason for the flexibility of the common law” (Paulo 380). In practical legal terms, the implications of deciding that a particular line of cases does not have precedential value may have very grave implications for at least one of the parties who are in dispute. More generally, it opens the possibility of the law starting to develop in new directions. In terms of distinguishing a case the key point is that any given *ratio decidendi* which binds a court will be open to interpretation. Crucially, students cannot avoid the need to deploy analogical reasoning in that process (Paulo 379). Yet, unfortunately, the question of what exactly is involved in such thinking itself is quite

often obscure (Paulo 382). Lloyd L. Weinreb has described how decisions as to which previous law cases are sufficiently similar to be regarded as authoritative are made on the basis of “the legal knowledge and experience that lawyers and judges bring to the facts of a case” (Paulo 383, quoting Weinreb). This vagueness is not only troubling from the perspective of the development of the law, it is also pedagogically problematic. Students engaged in the process of acquiring the necessary legal knowledge therefore rely on, but clearly have yet to have, the chance to gain the relevant experience.

In terms of the legal profession this lack of precision facilitates juristic complacency given the uncertainty as to precisely what knowledge and experience is regarded as relevant despite its centrality to the process. In an academic context it leaves a lot of scope for uncertainty and anxiety on the part of students. Paulo uses the work of Scott Brewer to elaborate on a clearer account of what is involved in analogical reasoning, which helps engage in the process without “hiding away the ample spaces in which casuists still have to rely on moral wisdom and the like” (Paulo 388).⁵ This goes some way to providing an account of how to go about identifying underlying assumptions that in a similar way underpin, in general terms, the development of the common law. This will be necessary if Anglo-European values and knowledge are to be decentred when engaging with the way the law frames and regulates societies. However, we seek to encourage students to identify *specific* cultural, moral, and epistemological assumptions that implicitly provide the foundations of the analogical development of the law. In doing so we deploy art and literature that has the scope to stage what the cultural theorist Derek Attridge has described as “an event which opens up new possibilities of meaning and feeling (understood as verbs), or, more accurately the event of such opening” (Attridge 58-9).⁶ Work is not approached in terms of a binary opposition between its form and content, understood in instrumental terms as

⁵ They deploy “Brewer’s model of analogical reasoning” set out in Scott Brewer, “Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument,” *Harvard Law Review*, Vol. 109, Issue 5, 1996, pp. 923-1028.

⁶ He acknowledges that in the main he gives examples from literature but he explicitly proposes that his argument refers equally to other forms of art.

communicating meaning. It is not simply seen as mediating content *about* the law or, more generally, the world. Instead we invite students to engage with work as “hold[ing] out the possibility of a repeated encounter with alterity” (Attridge 28). In short, art has the scope to open an engagement with what “the existing cultural order has to occlude in order to maintain its capacities and configurations, its value-systems and hierarchies of importance; that which it cannot afford to acknowledge if it is to continue without change” (Attridge 30).

Imagining the Law Differently

Art and literature has the capacity to provide an “understanding the world from within and as part of it” that invites those who encounter it to imagine how the world might be regulated differently by the law (Barad 88). Werner Herzog’s 1994 film *Where the Green Ants Dream* is a work we both draw on in our respective modules on commercial law and property in an effort to encourage students to engage with the law’s determination of conflict predicated on the assumption of self-evident truths. The film is based on a true story about indigenous land rights in Australia, partly based on the first indigenous land rights case *Milirrpum v Nabalco Pty Ltd* (1971). It opens a space to challenge the appearance of neutrality by the law and encourages awareness of the situated nature of concepts such as the rule of law, the right to property, human rights and justice. The case concerns the discovery of bauxite in Arnhem Land in the Northern Territory of Australia. The Yolngu people have lived in the region for thousands of years. In 1963, Prime Minister Robert Menzies announced plans to build a mine on the land. While the Yolngu people petitioned the Australian government against this decision they were ignored. In 1968, without any consultation with the Yolngu People, the Australian government granted Nabalco Pty Ltd total rights to mine the area. As a result, the Yolngu people brought an action against Nabalco and the government in the Supreme Court of the Northern Territory where it would be the first case in Australian history to consider the question of native title and indigenous rights to land. At the end of the case, following a judgement by Justice Richard

Blackburn, it was found that while the Yolngu people could be said to have observed a system of law and customs, their mode of conceptualising this was incompatible with the Australian legal system.

The Australian High Court decision meant that it was not possible to recognise any rights to land prior to English colonial settlement, and even if there were such rights these were extinguished. One reason given for that was that “less civilised” people could be displaced in favour of an “advanced” one. This remained the common law position until 1992. In this way, the outcome of the case exemplifies Jean-Francois Lyotard’s account of his use of the term “litigation,” which he understood as a dispute framed in terms of a single and determinant rule of judgement. In a sequence of *Where the Green Ants Dream* that we use in class, the director of the film, with the help of an early career anthropologist, informs a tribal elder of plans to mine the land with rights granted by the common law of Australia. He presents him with a long document of legal significance. The tribal elder is unbothered and calmly says “If you’re going to mine this land you’re going to destroy the land of green ants and green ants will come out and destroy the whole universe-world.” As has already been mentioned, despite the elders’ efforts to render intelligible the significance of “green ant dreaming,” he fails to convince the mining company the land must be preserved. The resolution of the dispute in Australian High Court simply involves the law placing its own intelligible and intelligibility demands on the Aboriginal people. The process of engaging with the common law’s inability to hear or understand different modes of conceptualising rules, customs, and legality as it is more broadly defined also opens a space in which to invite the students to engage with the fairness and neutrality of the law. Lyotard called the possibility of the appearance of neutrality into question through his concept of the *differend*. The *differend* is a dispute between at least two radically heterogenous or incommensurable language games. This is exemplified in *Where the Green Ants Dream* through the opportunity it provides to engage with the principle *audi alteram partem*, which means “let the other side be

heard as well.” This legal maxim is regarded as fundamental to justice. In the film there is a moment in the courtroom when one of the members of the Aboriginal tribe disrupts the usual court proceedings to get up to the witness stand only to say nothing. It is sought to compel this “mute” character to speak, but without any success until the judge asks the court for an interpreter of his own language to come forward. Silence follows this injunction, with no one stepping forward, until eventually an expert witness of Aboriginal culture and customs in Australia says simply that there is no one on this planet who can understand this man any longer. His language was extinguished with colonial exploitation and the erasure of his tribe. This is a powerful moment in the film where the history of the destruction of a world is brought into presence and where the consequences of the generalising force of law, and force of language, is made manifest.

Conclusion

The legal academics John A. Powell [sic] and Stephen Menendian have pointed out that the common law is predicated on the fundamental representationalist metaphysical assumption that “the world is composed of individual entities with separately determinate properties” (Powell and Menendian 1053).⁷ *Where the Green Ants Dream* provides an opening for students to engage with the possibilities of alternatives to the “epistemological and ontological principles of Enlightenment thought” taken for granted by the common law. This involves engaging with the extent to which the everyday world is brought into being by the performative force of the law in ways which are regarded as commonsensical in western cultures; in the course of which a greater scope to question the self-evidence of legal norms and values is opened for students. They are invited to engage with the importance of the *processes* by which legal determinations are arrived

⁷ John A. Powell and Stephen Menendian describe the relationship between “Anglo-American law, and American constitutional law in particular, to the Enlightenment” and make reference to work such as Karen Barad, *Meeting the Universe Halfway* which puts into question the metaphysics assumed by the law. In this regard, see Barad’s reference to a metaphysics that takes for granted the existence of individuals who each have their own “roster of nonrelational properties”: Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007), 55.

at and to recognise the ways in which the common law and its assumptions have become globally dominant. The sequences from *Where the Green Ants Dream* that we have discussed provide a space for students to engage with the way the universalizing claims of the law foreclose the possibility of other modes of social organisation that differ from those that perpetuate the capitalist mode of production. Individual property ownership and legal title are, for example, positioned otherwise than as the normal, or only means, by which one can have a relationship to land.

Herzog's film, and art more generally, has the scope to create contexts for students to encounter the various and multiple ways in which the contingencies and constraints of the law affect people's experience of the world and the relationships that are involved in the processes of bringing it into being. There is nothing that grants authority to law more than the idea of its recognisability amongst a community. In relation to the example of private property, the origins of how it can be individualised can first be recognised in language and by communal consensus. *Where the Green Ants Dream* opens the opportunity to engage with matters typically taken for granted by the common law. These include questions such as what happens when there are multiple communities who speak in different tongues concerning their mode of life? That is, how is the common law to engage with peoples who not only speak a different language but whose onto-epistemological understanding and experience of the world is radically different from each other? We seek to create spaces in our teaching for such engagements through works of art and literature that problematise the approach that "there are representations, on the one hand, and ontologically separate entities awaiting representation, on the other" (Barad 49). This opens up a wider scope to examine and question assumptions that legal reasoning is a universal and neutral process. It helps enable students to challenge a perpetuation of the view that "the West's religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of non-Western peoples" (Veitch 18).

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