A Legal Theory for the Age of Regulation

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THE REALIST–INTERNALIST DIVIDE

- The usual understanding of the formalist–realist divide
  - Realism / contextualism focuses on how law works and what it does
  - Formalism / internalism focuses on what law is

A DEEPER DIVIDE: JURISTIC METHOD

- What is the juristic method *mainly* about?
- Llewellyn: Two dimensions
  - 'the ways of handling "legal" tools to law-job ends'
  - 'the on-going upkeep and improvement of both ways and tools'
- The latter has particular importance to realism:
  - leads to the critique of legal fossilisation
  - also leads to the importance assigned to context (as the primary means of understanding where upkeep and improvement are necessary)

THE RETREAT OF THE JURISTS

- Much of law is now regulatory
- Legal theory has little to say about the *content* of regulation
  - As distinct from how regulations should be made
- Legal theory also:
  - has ignored the creation of new regulatory jurisdictions and
  - has little to say about their interaction with the civil jurisdiction
- Implications:
  - Legal theory occupies a shrinking domain
  - Gap occupied by regulatory theorists and social scientists

TWO ROUTES TO FORMALIST FAILURE

- The formalist–internalist position is limited because:
  - It inevitably lapses into functionalism
  - It relies on unrepresentative exemplars
- Cumulative effect:
  - Legal theory can fail to depict the real issues with which the legal system struggles
  - It fails to give guidance on resolving the sort of issues with which the legal system is faced

INTERNALISM AND FUNCTIONALISM

- What is functionalism and why is it a problem?
- Question considered in more depth in social sciences than jurisprudence
- Three main characteristics:
  - Institutions defined by beneficial effects they can be interpreted as producing
  - Institution's existence *justified* by those beneficial effects
  - Whether or not those effects are ever consciously intended is irrelevant (or at best peripheral)
- (See eg Elster, *Explaining Technical Change* (Cambridge UP 1983))

INTERNALISM AND FUNCTIONALISM: AN EXAMPLE

- Example: 'Private law values its own coherence' (Weinrib)
- What does this mean?
  - Private law does not have a mind capable of forming autonomous preferences
  - or the cognitive capacity to select preferences.
- Reduces to one of two formulations:
  - That judges, lawyers, academics, and other jurists who operate and maintain private law value coherence.
  - That the institutional framework of private law is such that actors are led, without conscious realisation, to prioritise coherence over other possible objectives.
- Former meaning is explicitly rejected; latter meaning is canonically functionalist
- Similar issues re political constitutionalism's ability to protect the subject's interests

THE PROBLEM WITH FUNCTIONALISM

- Marginalisation of intentionality can lead to mischaracterising institutions
  - The fact that an institution has *occasionally* produced a beneficial effect does not mean it has a propensity to produce that beneficial effect in every instance
  - It will only do so if that propensity is hardwired into it
  - Whether such a propensity is hardwired cannot be established by a functionalist argument
- Exacerbated by:
  - Focus on selected moments which are taken to represent the ideal-typical functioning of the system
  - Role of normative justification in identifying an institution's function

INTERNALISM AND THE USE OF EXEMPLARS

- Functionalism leads to systematically misreading the past and present of the institution
- Unrepresentative exemplars leads to misreading the *context* in which the institution operates
  - ...and, hence, the impact its functioning actually has...
  - ...as well as the evaluative judgments it actually embeds.
- Exemplars: 'paradigmatic' instances of the application of a framework to a particular problem (Kuhn)
  - includes the solution produced by the application of a framework...
  - ...as well as an explanation of why that solution represents law at its best

THE PROBLEM WITH UNREPRESENTATIVE EXEMPLARS

- Exemplars entrench approaches by reinforcing
  - How law can be done
  - How law ought to be done
  - The power of the results we get when law is done as it ought to be done
- Unrepresentative exemplars do not represent law as it is *actually* done:
  - They draw attention away from problems that have not been solved
  - They treat as typical situations that are not in fact typical
- Examples:
  - Reference to 'citizens' in administrative law theory (and the consequences for how we think about MNCs)
  - Non-regulated symmetric interaction as the basis for discussions of duties in private law

INTERNALISM AND LEGAL FAILURE

- Combination of functionalism and unrepresentative exemplars leads to systematic failure to study and / or understand:
  - what a given legal institution actually does
  - what a given legal institution is capable of doing
  - whether a legal institution is doing what it is suited to doing
  - whether *some* legal institution is discharging every task that needs doing
- These are the precise gaps regulation fills.

THREE REALIST SHIFTS

- Realism alters the analytical frame through three shifts:
  - By looking at law as an instituted process
  - By bringing the civil legal system and the regulatory–administrative legal system into a single frame of reference
  - By putting the focus back on the functions actually discharged by legal institutions

LAW AS AN INSTITUTED PROCESS

- Formalist–internalist perspective suffers from two issues:
  - It inevitably lapses into functionalism
  - It relies on unrepresentative exemplars
- Remedying these issues requires treating law as an *instituted process*:
  - *Instituted*, in the sense that it is integrative and seeks to integrate individual determinations into a legal system
  - A *process*, in the sense that it is not a static set of rules, but an adaptive system which uses its doctrines and concepts as tools to respond in new ways to new types of stimuli

ANALYSING LAW INSTITUTIONALLY

- Viewing law as an instituted process helps put political, administrative, regulatory and civil institutions into a single frame of reference.
- A new juristic method focused on a schema of co-figuration:
  - Law's pluricentricity does not lend itself to a traditional hierarchy (what is the hierarchy between criminal law, competition law, and medical negligence?)
  - Different branches of law nevertheless exhibit a systematic interrelation in discourse, thought style, and imaginative world
  - Law is not a hierarchical autonomous system, but a collection of institutionally linked sub-systems which are at least partially embedded in a social order.
  - The unity of any institution within the political, administrative, regulatory, and civil legal systems cannot be figured out its except in relation to the unity of other systems with which it interacts

A NEW JURISTIC METHOD

- Institutional analysis as a juristic method:
  - Eschew high theory for a more practical focus on the distinctive institutional features of the judiciary or a doctrinal tool as compared to other categories
  - Treats the judiciary as part of the state and a participant in its broader activities
    - Not as an organisation standing outside and athwart the state
  - Uses these two bases to examine what role or functions the institutional characteristics of the judiciary or a doctrinal tool enable it to discharge which:
    - fit with the institutional structures and goals of a particular type of polity;
    - further institutional dialogue between different institutions; and
    - that institution or tool is better equipped to discharge than others given the reality of what *they* are equipped to do.

INSTITUTIONALIST ANALYSIS AND LEGAL REALISM

- Institutional basis leads legal realism to study:
  - Not just law's propensity to require moral *responsibility*
  - ...but also its propensity to enable moral *distancing*
  - The circumstances in which the law requires interests to be respected...
  - ...as well as those in which it permits parties to act in ruthless disregard of the interests of others
  - The social expectations (and not just interests) the law does and does not protect
- Every one of these is capable of being applied to regulation as well as law

REALISM, FUNCTIONALISM, AND INTENTIONALITY

- Institutionalising and processualising theory also helps overcome the problem of intentionality in functionalism
- The 'self-reinforcing' functionalist cycle:
  - Outcome Y is an effect of rule or institution X
  - Y is beneficial for Group Z
  - Outcome Y is not intended by those who operate and maintain X
  - The relationship between X and Y (or the phenomenon of Y itself) is not recognised by members of Group Z
  - Y reinforces X by a feedback loop ('thought style') incorporating Z
- Explains (and helps overcome) doctrinal fossilisation as well as regulatory blind spots

IMPLICATIONS OF THE SHIFT

- Viewing the law in this light puts the focus on studying law as representing:
  - *degrees* of coherence and consistency,
  - *degrees* of responsiveness to stimuli, and
  - *degrees* of reductionism in turning those stimuli into stylized representations intelligible to the world of law
- And, in terms of the tasks for normative legal scholarship, it points to the importance of analysing
  - what degree of each is appropriate to a particular type of social phenomenon or interactional structure;
  - the institutional forms that lend themselves to a propensity to operate in alignment with those degrees

CONCLUSIONS: "THIS SUBLIMATED PERVERSION OF REASON"?

"The Common Law is the perfection of Human Reason—just as alcohol is the perfection of sugar. The subtle spirit of the Common Law, is Reason double distilled, till what was wholesome and nutritive, becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason bewilders, and perplexes, and plunges its victims into mazes of error."

Robert Rantoul, *Scituate Oration* (Boston 1836) 38