

## Lecture Notes with some handy links for Philosophy students – 19 October 2018

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By reflecting upon the basic issues in philosophy we can see that claims to have objective knowledge as a part of human experience cannot be sustained. Maybe this was what Descartes was striving towards when he sought that one thing which could be known for certain – to be used as a fulcrum upon which he could move the universe. He arrived at the *cogito ergo sum* – “I think therefore I am”.

I would say that human knowledge is variable, contingent and essentially purposive. I get there through the following considerations. [‘Epistemology: The Common Ground](#)

It was David Hume the Scottish philosopher who first spoke about sensory impressions as the basis for knowledge.

It was Immanuel Kant who observed that they presupposed the necessity for the categories of space and time, which of course are not sensory entities.

It is not that the human mind receives ‘knowledge’ from the world but in fact imposes meaning upon it. We cannot see the world ‘as it is’ – we can only see certain wave-lengths of light and hear certain wave-lengths of sound. The true ontology of existence must ever remain a mystery to us (ontology – the nature of being – the world ‘as it is’ – the Kantian ‘phenomena’).

Aquinas *Summa Theologiae* - To know as such and essentially is to be the thing that is known.

Bohm – *Wholeness and the Implicate Order* - cannot maintain the distinction between observer and observed – both part of one whole and indivisible reality.

It means therefore that our epistemology is inherently subjective (epistemology – how we know the world – a theory of ‘knowledge’ rather than ‘being’ – the Kantian ‘noumena’).

Even in the philosophy of science it is accepted that knowledge cannot be ‘objective’

Karl Popper says that observation must be selective – we can’t look at ‘everything’ at once – a hungry dog will see the world in terms things which can be eaten and those which can’t. A frightened person will see place of threat and safety.

Michael Polanyi titled his book *Personal Knowledge* – he says if we were to be objective about the universe, we would spend a great many years studying interstellar dust, and human activity relatively speaking would be very low down on the list.

As I explained in Epistemology (above) we must have:

A frame of reference or criterion of demarcation

We must have abstraction or generalisation – what exists in the mind is not a mirror of reality – if everything had a name, names would have no meaning. We don't have laws for individual cases but for *classes* or categories of cases.

Human thinking is a 'purposive' activity – why do we look at the world in *this* way?

RG Collingwood used to say that all statements are answers to questions – statements cannot be contradictory unless they are answers to the same question.

As Aquinas said, “for part of the knower is unexpressed in knowledge and part of the known remains opaque.”

“Knowing and loving are not twin things or acting causes but a doubled expression of one and the same thing”.

John Searle in his book [\*Constructing Reality\*](#) engages in a delightful exposition of these issues – how can we have such things as “money” “marriage” and “law” which are not real things – they depend upon a “collective intentionality”

Bohm - theories (explanatory frameworks) are insights – neither true nor false

The ideas of objectivity – detachment and impartial is but a myth – in law as elsewhere

Judges therefore cannot be faithful 'appliers of the rules' without more – they are architects, not just technicians.

There is no logical relationship between the rule and the material from which it is derived.

So, the rules are not reflections of an underlying reality but a transforming of it – as we will see the judges will make sense of their experiences by reconstructing their experiences in different ways – not so much right or wrong – just different.

However, we are free to make different *moral* and *political* judgments about them and also about the degree of coherence with other statements made by judges or courts.

We can see that it would be wrong to say that judges are *controlled* by rules – there are no authoritative rules in our legal system – some are more 'well settled' than others.

The moral, legal and political are not different actions but different ways of viewing actions.

Could one act in one dimension and ignore the others? If judgment is required in applying rules is an informed judgment better than one which is ill-informed?

HLA Hart, former professor of Jurisprudence at Oxford, and Professor Neil MacCormick, Regius Professor of Public Law and of the law of nature and nations at Edinburgh University (and former supervisor of my Phd) were agreed that:

rules have a core of certainty, a penumbra of doubt or 'fringe' of open texture – that rules are generally applied 'without further judgment' from case to case. The social commentators I referred to in D and R said that judges must give effect to the law irrespective of whether the consequences are unjust or immoral in order to avoid them using their subjectivity. They can only change the law 'at the margins'- they must apply a literal approach to the interpretation of legal rules.

See also [\*The Decline and Fall of Dworkin's Empire\*](#)

Sydall Castings, 3 year old girl deprived of benefit of life insurance scheme - illegitimate *Matrimonial Violence Act* non-molestation and exclusion order –

*B v B*: had to leave the home and the children behind – Judge granted the order - overturned on appeal. Only a procedural change (injunction normally requires a substantive action) not substantive. Cannot interfere with property rights,

*Cantliff v Jenkins*: *B v B* correct but now the principle of precedent applies also

*Davis v Johnson*: radically reinterpret the MVA – it would hardly apply to anyone in the category of abuser - and the judges also managed to get around the principle of precedent.

*Vestey v Inland Revenue Commissioners* 1979 – used discretion to tax people sensibly – not allowed – like an atom bomb to blow away the earlier case of *Congreve* which had stood for over 30 years.

*Ramsay v Inland Revenue Commissioners* 1981 – radical approach to tax avoidance schemes.

*Schorsch Meir* – payments of damages in foreign currencies

*Anton Pillar* orders and *Mareva* injunctions

## **In Australia**

Judges coming up with remarkable reinterpretations of the facts and issues of legal responsibility. Are they treating some people (solicitors and law students) more favourably than others? Is this consistent with the 'rule of law' principles?

See [Gendered Stereotypes and the Facts \*Diprose v Louth\*](#)

[The case of Anu Singh](#) in the Australian Capital Territory

[The case of Gordon Wood](#) in NSW

## **Miscarriages of Justice in South Australia**

[See report on Miscarriages of Justice](#)

The judges have consistently acted as stringent gatekeepers to the legal system by conservatively interpreting (or misinterpreting) the law. At the same time, they have interpreted (or misinterpreted) the law dealing with expert witnesses to get them into court to help the prosecutors secure convictions.

[Submission to Parliament of South Australia](#)

Link to over [120 television and radio programs](#) on miscarriages of justice.