
CODES, DOOMS, CONSTITUTIONS & STATUTES: THE EMERGENCE OF THE LEGISLATIVE FORM OF LEGAL WRITING

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If a man strike the daughter of a Freeman and cause her foetus to fall, he shall pay ten shekels of silver for her foetus. If that woman die, his daughter shall be slain.
Code of Hammurabi (Babylon 1750 BC)

If a man coming from afar, or a stranger, leaves the highway and then neither calls out nor blows a horn, he shall be considered a thief, to be slain or to be redeemed [by paying his wergeld].
Dooms of Wihtraed (England 695 AD)

If any negro or mulatto shall be found, upon due proof made to any county or corporation court of this state, to have given false testimony, every such offender shall, without further trial, be ordered by the said court, to have one ear nailed to the pillory, and there to stand for the space of one hour, and then the said ear to be cut off, and thereafter the other ear nailed in like manner, and cut off at the expiration of one other hour, and moreover to receive thirty-nine lashes on his or her back, well laid on, at the public whipping post, or such other punishment as the court shall think proper, not extending to life or limb.
Laws of Mississippi (USA 1840 AD)

1. Introduction

In this paper, I would like to look at the “emergence” of legislation in two different senses.

First, there is the historical emergence of legislation as a distinct form of legal writing. I have the impression that legislation is often seen as something modern when it is ancient with legislative texts predating just about all other legal and non-legal texts. To work out how ancient the legislative tradition is, we have to decide what we treat as legislation.

Second, there is the possibility of legislation emerging as a significant topic for law and literature studies. I have the impression that legislation is often seen as peripheral and ephemeral when it is now central and structural. I also have the impression that legislation is seen as a barren area for law and literature studies when there are some interesting questions to ask about how legislative texts work and how they fail.

I would be happy to be wrong in these impressions. It is encouraging to see a couple of sessions at this conference devoted to legislation.

The proper scope of law and literature studies

Law and literature studies are obviously in some way concerned with the interaction of law and literature. These 2 areas can interact in different ways.

In law and literature studies, we can, for example:

- * look at the way literature makes sense of and represents the law;
- * apply literary analysis and critique to legal texts;
- * see what insights literary studies can give us into the way the law “works”;
- * better appreciate how law and literature both operates as language in action: language doing work, changing attitudes and affecting behaviour.

Where does legislation fit into this picture? I suppose we could look at

how literature represents legislation. Material would, I suspect, be pretty scarce. Legislation hardly ever figures in literature. We are more likely to benefit from applying literary techniques to legislative texts. There are a number of things we could do to prepare the way for this kind of work. We could try to discover the distinctive features of legislation: the features that set it apart from other kinds of legal texts. We could try to identify the legislative tradition and its landmarks. We might then be in a better position to see what questions we can profitably ask about legislative texts.

What is "legislation"?

If you do not have a legal background, you may want to know what "legislation" is. Legislation is a text that has been agreed to, or indirectly authorised, by the political institutions that are accepted as having the constitutional power to make laws. In Australia, the power to make laws is given to parliaments.¹ Australian legislation comes in 2 forms:

- * Acts passed by the parliaments themselves
- * regulations, by-laws and so on that Acts authorise to be made by someone else (usually the government or one of its agencies).

The common law, by way of contrast, is the court-made or court-declared law. In our system, legislation overrides the common law. The courts have to decide when legislation applies to particular facts and the courts have to decide what the legislation means. Once they have decided that it applies and they know what it means, the courts have no choice but to apply it.

Is legislation important?

Consider first the practical effect of legislation. Legislation has done many significant things: some magnificent, some grand, some regrettable. At various times and in various places, legislation has:

- * abolished slavery
- * imposed the death penalty
- * abolished the death penalty
- * imposed conscription
- * abolished conscription
- * imposed taxes to equalise the spread of wealth and to fund social support schemes
- * embodied the aspiration to recognise human rights
- * fought against organised crime and against official corruption
- * denied women the right to vote
- * given women the right to vote
- * set society's sights against racial and sexual discrimination
- * tried to effectively outlaw trade unions
- * encouraged and supported trade unions
- * provided for the orderly settlement of industrial disputes

- * provided much of the structure for modern business: the formation of companies, the regulation of trade practices and the protection of intellectual property
- * created systems of registered land title
- * governed wills, intestacy and testators' family maintenance
- * regulated marriage, divorce and the custody of children
- * directed public finances to major infrastructure projects: dams, railways, airports and telecommunications
- * established a quarantine system to protect local plant and animal populations from disease
- * funded schools and tertiary education institutions
- * funded legal aid
- * regulated admission to the legal profession
- * established courts and defined their jurisdictions.

You might argue about whether these things are good or bad. There is no argument about whether they are significant. Legislation does affect our daily lives in important practical ways. Legislation and proposed legislation are often the centre around which political discussion and debate takes place. Parliaments are the central institutions for our form of democracy. One of a parliament's main functions is to consider and pass legislation. Much of a parliament's time is indeed taken up with debates on legislation.

What would we say were the 2 most important documents in Australia today if we were to judge importance of a document by its practical effect on our daily lives? The *Income Tax Assessment Act* and the *Social Security Act* would be excellent candidates. There was a time when one of the 2 would have been the King James' Bible.

Legislation's contribution to legal literature

If we turn to look at legislation's contribution to legal literature,² we see that legislation looms large. It is, unfortunately, voluminous. Australia has a federal system of government. There are 3 tiers of government and each level is eager to produce legislation. Legislation is growing at a fast rate: not only just in volume but also in the range of topics it addresses. It is a major source for other legal writings like law reports, legal advice, journals and textbooks. There is even a *genre* of legal material called the "legislative service" whose main function is to keep practitioners up to date with legislative changes.

Different forms of legal writing

There are different kinds of legal writing, not just one. Each kind of writing develops its own distinctive style, conventions and tradition. I would like to look first at the legislative form³ and then go on to look at 2 other kinds of legal writing: the judgment or judicial opinion and the learned treatise. The contrast with the other forms will give us a better feel for the true nature of

the legislative form.

2. The legislative form of legal writing

The main features of the legislative form

The main distinguishing features of the legislative form are easy to list. Legislation is basically:

***forward looking**: It tries to control or influence the future behaviour of people and tries to “organise future experience”.⁴

***general and abstract**: It lays down general rules for everybody to follow at all.

* **directive, normative and authoritative**: It tells you what to do and does not seek to persuade you or explain why you have to do it.⁵

* **systematic**: Even when it does not purport to provide a complete or exhaustive code on a particular topic, it tries to give an integrated system of rules on the topic.

* **innovative and responsive**: It usually involves change - if not to the substance of the law then at least to its expression.

* **politicised**: It comes out of political institutions and only happens if it can attract political support and political priority.

* **univocal and anonymous**: It speaks with one voice - the collective voice of the parliament that made it. This voice can, admittedly, become incoherent after numerous amendments at various hands. The collective voice of a parliament is impersonal.

* **atemporal**: It speaks not as at a particular time or on a particular occasion. It is often said that legislation speaks continuously. It usually speaks in the present tense and that present tense moves forward with the flow of time.

To this list Professor James Boyd White would add one further feature. In his view, legislative rules are “radically fictional expressions”.⁶ Here “fictional” is a polite way of saying “dishonest” or “misleading”. Legislation looks factual and logical and definitive when it is not in fact applied in this way. Matters of value judgment are dressed up as matters of description or fact. Matters of uncertain meaning are presented as clear, logical concepts. Matters of degree are turned into simple yes/no alternatives. Rules that will need to be applied with sensitivity, discretion and judgment if they are to work at all are presented as if they were easy to apply automatically, rigorously and consistently - almost mechanically.

Legislation is always a community text. It is accepted as canonical by the community that it governs. This acceptance is sometimes based on the text being endorsed by a democratic procedure; sometimes it is based on its endorsement by a traditional authority. The only other texts that receive this kind of acceptance are the religious texts of “established” religions. All other texts belong to their authors.

A few non-essential features

There are some things that legislation does not have to do. It does not have to:

- * be comprehensive: There are many statutes that deal with only part of a legal topic.
- * be completely self sufficient: Statutes often rely on existing common law concepts and on other ancillary and procedural rules
- * change the law: Consolidation and codifying statutes are legislation even if they do not change the law but simply put it into a more convenient and accessible form. The main political importance of many ancient codes was not so much that they changed the law but rather that they made the law accessible to the public and took it out of the hands of a social elite (such as an aristocracy or a priesthood).
- * try to anticipate future developments: Often a statute is doing well if it copes adequately with existing circumstances. Few legislators or drafters try to anticipate technological, social and economic changes.

Plain English

These days the form, style and appearance of Australian legislation are changing under the proddings of the plain English movement⁷ To me as a legislative drafter, this change seems fundamental, wide ranging and rapid. To someone pressing for the reform of legislative language, these changes may seem superficial, tentative, unadventurous and slow. However, if you compare current Australian legislation with current UK legislation, I am confident you will see the difference. The plain English movement there has so far not been nearly as effective as the Australian one and most Australian drafters have been much more responsive and flexible.

Accessibility

Often, when people want to find out what the law is on a particular matter, they just want to find out "what the rules are". They are not interested in the reasons for those rules. They are not interested in the arguments that could be put in favour of different rules. They can do without the detailed history of the parties to earlier disputes. They do want to find all the rules on that area - not just those rules that a particular dispute raised. They want the rules to be set out logically, coherently and as simply as possible. Case law (the collective body of reported judicial opinions) does not deliver such a product. Legislation often does. To see the truth of this, you only need compare the old "common law" on administrative review with the new Commonwealth legislative system based on the *Administrative Appeals Tribunal Act* and the *Administrative Decisions (Judicial Review) Act*.

Judges might usefully look at the techniques and patterns used in legislation to put across systems of rules when they articulate the rules of the common law. Textbook writers might do the same when they analyse and criti-

cise. Not all legislation is well put together or worth imitating but some of it is.

When writing a judicial opinion, a judge could extract, identify, bring together and highlight the rules that she or he thinks govern the case. If some of those rules consist of a basic rule and a number of exceptions or qualifications, they should be presented in a form that clearly shows that structure. If a judge makes use of a concept that is crucial in the judicial opinion, the judge may need to elucidate or define the concept. The words used by a judge in a judicial opinion do not have canonical value and are not to be interpreted as if they were the words of a statute. Readers do go to the judicial opinion, however, to discover what the legal rules are in a particular area. By clearly enunciating those rules, the writer can make the task of discovering them much easier.

Judges are less shy these days about admitting that they do from time to time make law and not merely find it or declare it. When a judge makes law, she or he should state the rules clearly. Judges are understandably cautious about making their rules too explicit. They do not want to be held to their literal words and do not want those words taken out of their context.⁸ They do not want their opinions interpreted like a statute. They would like to keep their options open for future cases. This caution does not, however, help to make the opinions easy to read and understand.

3. Two other forms of legal writing

3.1 Case law (the judicial opinion)

When a judge decides an important case, the judge will write up her or his reasons for deciding the way she or he did. This statement of reasons is called the judicial opinion. If a judicial opinion is important enough, it will be published in what is called a law report. These reports are collectively referred to as case law.

What is the function of a judicial opinion? In what context and circumstances is it produced? How does these affect its form and style?

The function of the judicial opinion: persuasion and justification

When a judge writes a judicial opinion, her or his immediate task is to justify her or his decision: in the first place to the parties who brought the case to court and then to the community at large. The judicial opinion is rhetorical and its aim is to persuade.

The particularity and specificity of the judicial opinion

The Australian legal tradition is a common law one.⁹ In this tradition, the legal effect of a judicial decision is limited by the issues that arose in the particular case before the court. The judge will, it is true, need to bear in mind the value that the decision will have as a precedent for later courts. The com-

mon law distinguishes between 2 kinds of statements in a judicial opinion. Some statements are part of the *ratio decidendi* (the reasons for the decision) and the others are *obiter dicta* (incidental words).

This distinction shows that the common law is basically suspicious of generalisation. We are not supposed to generalise or extend all the statements made in a judicial opinion. We are not to treat them all as general principles. Strictly speaking, the judicial opinion has legal authority only on the issues that the court had to decide in the particular case before it. If the judge helpfully and gratuitously makes some comments that stray beyond the issues, those comments may well be dismissed in later cases as *obiter dicta*.

Case law's fragmented treatment of legal topics

Case law tends, as a result, to produce a fragmented and piecemeal treatment of any given area of law. The whole of an area of law is rarely "at issue" in a single case. To find the law on a particular common law topic, you have to collect and reconcile many separate decisions. In a court case, only a few particular questions arise. The judge may, in her or his reasons for decision, describe for us the general legal environment in which the questions are to be resolved. The operative part of the decision will, however, be the part that deals with those particular questions. It is rare, then, to find in a judicial decision a thoroughgoing and comprehensive treatment of a significant legal topic. No single case deals with all of the law on the sale of goods or all of the law on wills. This is understandable because particular disputes do not involve whole areas of law. They always involve a selection of the elements within an area of law and usually a narrow selection at that. Even if the court does favour us with a general explanation of an area of law, it will only have "weight" as *obiter dicta* and not "legal force" as precedent.

You may think that I am not being fair to our judges. You may think that I am underestimating their ability to produce coherent legal conceptual systems. One judge at least seems to agree with the view I am putting. Justice Michael Kirby spoke at the recent launch of the Law Book Company's legal service *Laws of Australia*. He said that the greatest challenge that the common law system presents to its practitioners is that of seeing the immediate legal problem in its conceptual setting. He saw the publication of the *Laws of Australia* as a step towards combining the code system's power to systematise concepts and principles and the common law system's precedent basis. He acknowledged that the code system is superior to the common law system in its principled concepts. He suggested that the common law legal system should become more principled and less "a collection of isolated solutions to particular problems which might one day come together, as if by oversight, in a unified legal concept".

The retrospective viewpoint of the judicial opinion

A judicial opinion inevitably takes a retrospective or backward looking viewpoint. It deals with a set of facts that has occurred. Its subject matter is a finished (if perhaps disputed) past. It is to this extent historical rather than prescriptive. It applies norms to the past rather than creating them for the future. It is not essentially concerned with the future. It is not essentially concerned with other current fact situations. The parties have to establish the facts. Once they have done this, the judicial decision is concerned with a limited, definite and already realised set of facts.

The judicial decision focuses on the pathology of past events and not on generating general rules to apply to possible future events. In the common law tradition, the doctrine of precedent complicates matters but only a little. It is true that the judge knows that what is said in the judicial opinion will be applied by courts in later cases and this undoubtedly makes the judge take some pains to frame his or her reasoning carefully. The judge can take comfort, however, in the fact that the judicial opinion is only good authority on the precise questions it needed to address. If the opinion contains principles that are framed a little loosely or too generally, later courts will be able to use the technique called "distinguishing" to rein them in.

The conservatism of the judicial opinion

Judicial opinions are most persuasive when they appear to be continuing to apply well established and traditional rules. Judges are concerned to establish the continuity of their opinion with past decisions. Hence, the importance of precedents. Litigants find innovation from the bench unwelcome, unfair and unsettling. As a result, judicial opinions are slow to change. They make progress by usually small and cautious increments.

A bad judicial decision¹⁰ is, in our system, difficult to fix by further judicial decisions. This is especially so if the bad decision happens to be one given by one of the courts that are high in our legal hierarchy. To get around a bad decision, courts have to resort to the practice of "distinguishing" the bad decision - finding reasons for making it irrelevant to other cases. They tie it tighter and tighter to its own facts. They emasculate whatever general principle value the case might have had. The bad odour of the decision very slowly increases until it is so bad that a later court can feel justified in overruling it. The intellectual contortions involved in the distinguishing strategy are both admirable (for their ingenuity) and regrettable (for their lack of candour). Abandoning a bad precedent can be painfully slow.

The effect of function on style

The rhetorical, historical, particular and conservative nature of the judicial opinion leads to a discursive style. The judge feels obliged to:

- * state the facts¹¹
- * state, acknowledge and comment on the arguments that were put

by the lawyers on both sides

- * identify the earlier cases that the judge thought were relevant, recount their principles (and possibly their facts) and evaluate them
- * identify the applicable principles
- * justify the choice of principles and their application to the facts.

Multiple voices

If there are a number of judges involved in a particular case, they may disagree with one another. They may disagree on the outcome of the case. Even those who agree on the outcome may disagree on the reasons for the outcome. So we get majority judgments and minority (or “dissenting”) judgments. Sometimes it is impossible to find any analysis of the facts and the law that a majority of judges in the case agreed on. When there are a number of judges involved, the various judicial opinions naturally do not speak with one voice. Textbooks and legislation, by way of contrast, reflect only one point of view.

Attitude to the reader

The style of the judicial opinion is, unfortunately, often conservative and long winded and sometimes self-indulgent. Ask any law student who has had to learn the law by the casebook method. The student reads for many minutes with the pencil or highlighter poised, waiting for the 3 or 4 lines every 5 or 10 pages that deserve marking and remembering.

It is only in recent years that judges have started using headings in their judicial opinions. The use of headings is a simple courtesy to the reader of a long text. Many long judgments still have no headings at all. Textbooks and legislation have long used headings as elementary reader aids. Those judges who use headings are to be congratulated and encouraged to continue the practice. Judges who do use headings sometimes do not use them very effectively and the law report publishers sometimes undermine the usefulness of the headings by printing them in a way that does not stand out from the text.

For many a report of a judicial decision, the headnote is our salvation. Without the headnote, finding and consulting case would be inefficient if not unmanageable. Headnotes, however, are not composed by the judges but by the case note editors who work for the law report publishers. These editors digest judicial opinions for the rest of us. Without their help, we would have to read many pages before we could work out what subject a case was on, let alone what it had to say on the subject.

I understand that some judges are starting to use summaries and outlines in their judgments. This is very useful and should be encouraged. Plain English seems to be having only a very limited impact on judicial opinions. The impact on legislation is much greater.

3.2 The legal treatise (the textbook or learned commentary)

The treatise can take a progressively more thoughtful form. In its earliest form, it is a mere collection of court decisions, legislative provisions and respected opinions. Justinian's digest of Roman law is a good example of this. The next form goes on to systematise, reconcile and distil the collection - for example, Justinian's *Institutes*. The most advanced form of treatise does not just collect and organise the scattered fragments of the law. It also attempts a critique of the law and perhaps suggests a program for improvement or reform. Many modern textbooks are examples of this latest form of the treatise.

By beginning to organise the fragments, the treatise starts a conceptual treatment of the law. The treatise will often define an area of law as a discrete legal subject. It will often identify and explain the basic ideas that dominate that area of law. It will generally purport to be comprehensive: to tell you everything about that area of law.

Like the judicial decision, the treatise often adopts a descriptive or discursive style. It may recount the facts of the leading cases. It may cite passages from different cases to show the gradual evolution of the rules or to identify conflicts and discrepancies that need resolving. It rarely takes the form of a simple statement of the rules.

The significance of a treatise depends on the standing or authority of the author. Its pronouncements do not have the force of law. They may be useful or persuasive. The courts may give them respect and consideration. The author of the treatise is not, however, establishing rules for the future. Rather, the author is trying to help us make sense of the law of the present and the past.

General restatements of the law

Although most legal treatises are very different from legislation, there is one form of treatise that comes very close to legislation in its form and style. Halsbury's *Laws of England* and its Australian imitators consist of fairly bare statements of concepts and rules.¹² There is little by way of analysis, critique or argument. These works are intended to be used by practitioners who simply want to know what the rules are. These busy practitioners do not want a lot of fuss and bother about fundamental conceptual analysis. They do not want a blow by blow history of the development of the current rule.

The book of maxims

There is another kind of legal treatise that does attempt conceptual systematisation. The book of legal maxims is a very interesting development of the legal treatise. The best known is probably Broom's *Legal Maxims*. A "maxim" is a pithy general statement of principle, often based on a Latin phrase or sentence. It is a kind of legal aphorism in the vein of "Hear the other side",¹³ "A person must come to a court of equity with clean hands" and

“The law does not concern itself with trifles.”¹⁴ In the book of maxims, the author tries to discover fundamental legal propositions that work across the whole of the law. These propositions embody the law’s basic principles, values and approaches to problems. Often these fundamental proposals are not articulated in particular areas of law. They work silently and under the surface. The author of the book of maxims articulates the principles and illustrates their workings in particular areas of the law.

4. The legislative tradition

It is not easy to find a book that gives a convenient outline of the general history of legislation. Legal history books, to a surprising extent, pay little attention to legislation. Of the 37 chapters in Windeyer’s *Lectures on legal history*, for instance, only 2 (Chapters I and XI) devote significant space to legislation. In the index to this work, “statute law” refers to 16 pages of the 300 page book. Individual statutes are mentioned in the areas of law they impinge on but there is no general treatment of the history of legislation.

There is, however, a long and venerable legislative tradition (see Appendix A for an outline of the tradition and Appendix B for a sampler of some of the older legislative texts). Furthermore, legislation came quickly on the heels of writing itself. Legislation pre-dates most other forms of writing and certainly pre-dates the law report and the legal textbook.

The antiquity of the legislative tradition

It seems that the 3 main purposes to which writing was first put were:

- * to keep records (in particular, accounts and especially the accounts of temples)
- * to preserve the words of religious liturgies
- * to state the law.

Diamond says in *Primitive law past and present* that the oldest surviving literature of most peoples are their laws.¹⁵ He goes on to say that the bulk of the earliest legal literature was legislation and that most of the legislation that has survived is in the form of “codes”.¹⁶ As the codes were commonly at first the only literature, they tended to be used to teach reading and writing.¹⁷

Hammurabi’s code can be dated to about 1750 BC. Some Assyrian laws have been dated to about 2200 BC. The Old Babylonian version of *Gilgamesh* can be dated to around 1700 BC. The first written version of the *Illiad* of Homer probably appeared around 750 BC.

In the Anglo-Saxon/English tradition, we can compare the dates of the earliest legislation (the Dooms of Aethelberht - 600 AD) with the date of the earliest written poems (*Beowulf* some time between 650-850 AD). The reports of judicial decisions start with the Pipe Rolls. These were rudimentary official records of the arguments put to the courts and they were not published. They started about 1130. The first published reports were the Year

Books which started about 1270.

Were the early codes "legislation"?

What were these early codes? One view is that they were mere collections of judgments of the courts. Diamond rejects this view. He says:

[T]he origin of some legislation may have been a decision of a court on a topical question, and it may have been desired to reverse its effect or clarify the law. There was less distinction than now between a decision of a court and a decision of the ruler. [W]e are often told that a rule in a code represented change made by the king. [A]ll genuine codes are couched in the natural language of statutory legislation, namely conditional sentences in the third person, the protasis containing the facts supposed, and the apodosis the sanction.¹⁸

He goes on to point to the arrangement of topics in the codes and concludes that this arrangement is the natural arrangement of statutory legislation. The important thing to notice about these codes is that they are not in the form of a record of a judicial decision. They do not say: "X struck Y in self-defence and judge Q decided that X did not have to pay any damages". They say: "If one person strikes another in self-defence, the person striking does not have to pay damages". They are in the form of rules, not decisions or awards.

Maine, in *Ancient law*, suggested that there was a sequence in the development of legal systems. First came individual judgments. Then came custom, based on and emerging from the judgments. The custom was reduced to writing in a code. This analysis has the code emerging long after the judgment. Even if this analysis is correct, the phases of judgment and custom have no literature. The developments that took place in those phases are unknown to us because these phases left no written record. So far as literature is concerned, it is the judicial opinion and not legislation that is the new-comer.

Maine would also have said that real, modern legislation developed long after the ancient codes. The ancient codes were primarily custom reduced to writing and made public. As we have seen above, the legislative form easily supports a statement or a restatement of existing law. The ancient codes were normative and authoritative and looked to the future. Changing the law is not crucial to the form. Moreover, the codes were almost certainly more than mere statements of custom. The opportunity to clarify, correct and improve would have been too good to pass up.¹⁹

5. Why legislation seems unattractive as a subject for law and literature studies

We do not normally read judicial opinions because of their literary quality. We do not go to them for recreation or spiritual growth. But I take it to be

part of the rationale for law and literature studies that we can profit from seeing not only how literature treats the law but from seeing also how legal texts can be subjected to literary analysis.

Court decisions seem to be the main legal texts that get analysed. Why is there this concentration or emphasis on court decisions? I think there are several reasons for this.

Boring subject matter?

Many people would think that legislation is not inherently interesting. Legislation is not written in a way that makes it look like literature. Most legislation does not deal with interesting subjects. When legislation does deal with an interesting subject, it seldom deals with it in an immediately interesting way.

Most court decisions are dull and boring too, however. Often the only people interested in them are the parties to the case whose interests are at stake and lawyers looking for a precedent. From the vast field of recorded court decisions, we will find only a few that are sufficiently well written to be interesting as literature. This does not mean that judgments are not worth looking at.

We should make the same allowance for legislation. Admittedly not much of it is intrinsically interesting to the general public and not much of it will strike you as literary. It is, nonetheless, still worthwhile to apply literary analysis to it and some legislation is so important that it deserves close study, critique and appreciation. –

Bare rules without supporting argument

A second reason for judicial opinions being more immediately interesting for the nonlawyer is that they are rhetorical texts. They seek to justify, explain and persuade. Legislation does not enter into the arguments in favour of its rules. It just gives the rules. True, legislation sometimes includes purpose or objects clauses, but these are usually broad and vague. They are framed, not to persuade, but to inform.

This only means, however, that legislation and court decisions operate in different modes. If it is worthwhile asking whether a court decision works well in justifying the outcome, it is worthwhile asking whether a statute works well in laying down rules to govern or guide future conduct. If you approach legislation with the same rhetorical expectations with which you approach a court decision, you will, of course, be disappointed.

Alien - even to lawyers

A third reason is that even lawyers themselves generally do not feel comfortable and at home with legislation. Legislation is rarely taught as a discreet subject in law courses. The study of court decisions makes up most of

a law course in an Australian university. Statutes are only brought in incidentally and then, in a way, as an excuse for examining yet more court decisions.

A common attitude to statutes is to immediately run away from the statute text itself to look for the cases that tell you what it means. Few lawyers feel as comfortable with legislative texts as they do with reports of court decisions. There is a definite common law tradition of treating statutes not as forming an integral and useful part of our legal system but as unwelcome and often misconceived intrusions.

Lawyers would benefit from discussions about how to read and how to write statutes; how they work; how they fail; what you can expect of them and what you can't.

Unimportance

A fourth reason, which is undoubtedly related to the third is the feeling that court decisions are more important than legislation. Today this view is simply untenable. Legislation, for better or for worse, governs more and more of the legal landscape. Even for non-lawyers there can be few documents that are of greater practical importance than some pieces of Commonwealth legislation. For those in employment or in business, the tax legislation; for those in need, the social security legislation; for those in academia, the State Grants legislation that provides their funding; for those interested in protecting the environment, various pieces of environmental protection legislation; for those interested in the workings of our democratic system of government, the electoral legislation. It goes on and on. At the State level there is anti-corruption legislation, euthanasia legislation, local government legislation.

Even many important court cases such as the political broadcasting case are important because they define the reach and limits of legislative power. Few of us may ever read the legislation itself. But it is the legislation that governs how much tax we pay, whether we get income support or not and how much and so on.

Abstract and general

Legislation is general and abstract. In contrast, court decisions are particular and factual. There is something satisfying about the particularity of a case with the personalities of the parties and their private histories and circumstances. Legislation seldom comes down to the level of dealing with particular individuals. Legislation therefore seems comparatively bloodless and cold. That, of course, is only true when you stop short at the legislative text itself.

Once you go on to consider how the legislative text actually affects peoples' lives, interests and fortunes, the legislative text comes alive. The aboli-

tion of the death penalty, the imposition or the removal of conscription, the change to the basis of family law are not cold, indifferent or merely abstract things to the people whose lives they affect.

If we are going to study legislation, we have to accept the abstraction and generality that are inherent in the legislative form. We must not expect the colour and detail we get from the individual life stories of the parties in a court case. We will need to use our imagination (or research results) to go on to see what this abstract and general text does to people.

The common ground between legislation and judicial opinions

Judicial opinions and legislation have several things in common. The writing involved in both is done with a severely practical purpose. They are both very much writing in action - writing doing important practical work. Neither can afford to be tentative, critical, ironic, speculative or vague. They must work in practice - in the one case to record and justify the decision and in the other to establish the rules. Both have to do with rules, the one in discovering and applying rules, and the other in stating them. They are both written by lawyers²⁰ trained in the same legal tradition. In short, both involve practical writing about rules by people trained in the same legal tradition.

Statutes in one way are much more accessible than case reports. If you look at a law student's casebook, you will see from the student's underlining and colour coding how much effort goes into trying to identify the rules that the court endorsed and applied. Some statements that look like rules are summaries of the arguments of the parties. Often you don't know whether the court is going to endorse them, disagree with them or ignore them as beside the point. There are long recitations of the facts and the evidence, the procedural history of the case and the orders sought by the parties. Discussions of earlier cases have rules enunciated in them but, again, you will not be sure whether you need to underline or highlight them. You have to read on to see what the court is going to do with the earlier cases. Do they end up applying them as precedents, distinguishing them, overruling them, reinterpreting them or qualifying them? Getting rules out of case reports is very laborious. Getting to the rules in statutes is comparatively easy because, by and large, statutes are rules and nothing but rules.

6. What law and literature issues might be looked at in relation to legislation

Here are some suggestions for issues and questions about legislation that might be worth pursuing.²¹ General discussion of the issues would be useful but what would be really valuable would be some case studies. For example, someone could look, not at the general question of how the citizen finds out about legislation in general, but at the question of how the citizen finds out about drink driving legislation, or domestic violence legislation, or compulsory voting legislation.

In making these suggestions, I am accepting the very generous latitude that literary studies seem to assume. Gender issues - where do literary studies end and sociology and ethics begin? Semiotic analysis - where do literary studies end and linguistics begin? Critical studies of ideas and ideologies - where do literary studies end and philosophy begin? The nature of mind, the quality of experience and the formation of views of the world - where do literary studies end and psychology begin? The narrow traditional role of literary studies was to preserve and elaborate a tradition. That role now seems *passe*. Many literary studies now seem compelled to get under, or behind, or beyond the text. If you stop talking about the textual quality of the text, you have to start talking about ideas, the mind, experience, ideology, society, or something. Legislation is undoubtedly a text, but it is a text that can be related to the world in just as many ways as a literary text can be.

Legislation as discourse or conversation

Professor James Boyd White has made the interesting suggestion that legislation can be seen as the opening of a conversation - a conversation between those making the laws and those applying the laws.²² He suggests that legislation defines the issues that will be discussed and establishes the language in which they will be discussed. Legislation is not the conclusion of a composition exercise. It is, rather, the beginning of a discussion or conversation. This idea could lead on to some other questions:

Are there statutes whose main effect is to channel and focus community discussion about a particular issue?

To what extent is the drafter or legislator in control of the future and to what extent is the drafter or legislator at the mercy of the readers and applicers of the statute?

If there is a discussion, how does it become a 2-way discussion? How does the drafter or legislator "hear back"? Through the media? Through judicial opinions? What role can "exposure drafts" of legislation play?

How does the language in a statute limit and channel discussion of legal issues? How does articular language close off debate? How does particular language leave open debate? To what extent does the drafter "invent" a new legal language to discuss what was previously a political or a moral issue?

What is the correct attitude for the legislator to take to the citizen audience?

The traditional attitude that legislation takes to the people it addresses is the attitude of a sovereign giving commands to subjects. This goes back historically to the times when legislation was the King's or Queen's command issued with Parliament's mere consent. The view that law is essentially commands found its way into our jurisprudence. This view underlies the present style and tone of our statutes.

Would other attitudes be preferable? Would those other attitudes reflect a

more mature acceptance of the citizen's independence? Should legislation continue to treat the citizen like an incorrigibly naughty child? Is it realistic or practical to legislate on the basis that the citizen will willingly pay taxes if only the citizen knows what taxes you want paid? Is it realistic or practical to draft for the conscientious citizen and to ignore the crooks, the avoiders and the socially irresponsible?

Can we write legislation in the same frame of mind with which we would write a product manual? If we assume that the citizen accepts the system, can we express our laws as helpful information, directions and hints on how to operate the system?

Would legislation need to do less commanding if it did more explaining and more persuading?

What attitude can the legislator reasonably expect from the citizen audience?

Can we expect the citizen to be keen to obey the law? Or should we expect that the citizen will try to avoid the law? Are citizens as a body characterised by their cooperation with the law making bodies or by their reluctance, distrust and antagonism? Do we live in a society that is public-spirited or self-interested? Does the nature of our society limit what legislation can do? Is legislation doomed to threaten and punish rather than to guide and persuade?

Legislation as mass communication

Legislation, like advertising, tries to affect the future behaviour of large numbers of people. Somehow it must try to get its message across. How is the message spread in the community? Does the legislative text itself have much to do with the dissemination of the message? How do people hear about the law? Most of them certainly don't read the law. Yet somehow - through the media, through friends and colleagues, through pamphlets and general reading - people do find out that wearing seat belts is compulsory, that they have to vote, that a particular percentage is the legal alcohol limit for driving, that first offenders can get off with a warning and that there are limits on how many TV stations you can own.

How do legislative texts propagate? Is the version of the legislative text that is effective out in the community often an oral one? How do legislative rules get into what Umberto Eco would call our semiotic "encyclopedias"?

What influence (if any) does the form of the legislative text have on the impact of the message?

Are complicated laws doomed to fail in the same way as other complicated messages addressed to a mass audience? Do you have to keep it short and sweet if you want it understood and obeyed?

If legislators are trying to get a message to the public, how can they

ensure that the essential core of the message gets across? Should they aim mainly at avoiding innocent misreadings or should they aim mainly at anticipating deliberate misreadings?

How is legislation reported in the press? Where do journalists get their information about legislation? From press releases?

Legislation as a process of translating political policy into legal outcomes

There is an interesting process by which political policy is translated into law. Often a political policy is mainly a general affirmation of a value or the expression of a vague aspiration. Public service advisers translate the political policy into an administrative policy. They bring the values and the aspirations down to more tangible rules and objectives. This is necessary because you can't give effect to a feeling. You can only give effect to an objective. Drafters translate the administrative policy into a legislative scheme. You can constantly adjust and fine tune administration but people want the law to be fixed and enduring. They don't want their legal rights tomorrow to be different from their legal rights today because someone thinks the difference is better administrative policy. Administrators, lawyers and tribunal and court members translate the legislative scheme into actual legal outcomes.

This translation process, with all its links, can easily go wrong. The-outcomes at the end may betray or mock the political values at the beginning. How well does this translation process work in practice? If it goes wrong, where does it go wrong most often? How is what the various translators do analogous to what language translators do? Are there indeed different sub-languages spoken by, say, politicians, bureaucrats, drafters, judges and citizens? What skills make a good translator? How many debates about legislation are fruitless because the debaters are speaking in different sub-languages?

Who is the audience for legislation?

Who actually reads legislation? Is it only read by lawyers, administrators and court and tribunal members? What other people would read legislation if they could? Is the political agenda of the plain English movement a realistic one? What grass roots support does it have? Is the ordinary citizen really going to rush out and start reading legislation as soon as the plain English versions come out? Would it cost too much to buy copies of the legislation? Given the general complexity of our legal system, would it be wise for the citizen to act as his or her own legal adviser even if the legislation was itself more accessible? What about the Constitutional limitations, the laws of evidence, the rules of interpretation, the jurisdiction of courts and common law presumptions? How does the citizen get access to these? Without them, is the legislative text a sure guide to the citizen's legal situation?

Legislation and public opinion

This is an old topic but it is worth revisiting from time to time. The relationship between legislation and public opinion is complex and dynamic. Sometimes legislation can lead a change in public opinion. It would be interesting, for instance, to see what effects the Family Law Act, the Sex Discrimination Act and the Racial Discrimination Act have had on public opinion in the fields they regulate. Sometimes legislation that is out of step with public opinion becomes ineffective because the public does not accept, does not respect and does not obey the legislation. Gambling and prostitution legislation could be possible subjects for a study of public resistance to legislation.

Literature usually tries to change the individual reader's attitudes. Often it tries to change community attitudes. In this respect, literary studies that focus on the social critiques in literary works provide models for studies of how legislation tries to change social attitudes.

Legislation as gesture

Sometimes, does it matter what the legislation says or does? Sometimes, isn't the important thing for the government to be seen to be simply "doing something" about a problem? In these cases, the technical effect of the legislation may be unimportant. What is important is that the legislation act as a "tough" gesture or a "generous" gesture or a "concerned" gesture.

Grammar, syntax and deep structure for legislation

Various people have tried to develop ways of analysing legislation to find basic language patterns. Coode analysed the legislative sentence into 4 components: the legal subject, the legal action, the case and the condition. Driedger believed that the case and the condition were not distinguishable in principle.²³

This approach could be carried further. What are the different types of legal subject? What are the different types of legal action? Is it possible to identify types of case? The Coode/Driedger analysis is good for the main substantive rules in legislation but many provisions are not open to this analysis. There are provisions on meaning (such as definitions). There are provisions stating overall purpose. Increasingly there are provisions giving background information or directions on how best to read the legislation. A comprehensive analysis of legislation would have to address these ancillary provisions as well as the main substantive provisions. Perhaps there is a budding Chomsky out there who could carry out this thorough analysis and discover the deep structure underlying the apparent diversity of legislative forms.

The role of lawyers in shaping legislation

Are lawyers the main actual audience for legislation? Does the legal background of most drafters aid or interfere with the composition of effective

tive legislation? Should there be better consultative mechanisms so that the lawyers who will have to live with legislation get a say in how it is to be framed? Do lawyers make legislation better or worse by their involvement in its formulation?

7. Conclusion

Legislation has been around for a long time and it will be around for a long time to come. It already covers large and important areas of the law and its reach will continue to grow. It is socially and culturally, as well as legally, important. Legislation is, therefore, worth looking at. Within the admitted limitations of our system of representative democracy, legislation is the closest we come to a text owned and generated by the whole community: a text not only for the people but also of the people and by the people.

APPENDIX:

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NOTES:

¹ The parliaments for the Territories happen to be called "Legislative Assemblies". Technically the power to make laws is given to "the Queen in Parliament" so that, as well as being passed by Parliament, the text must receive the formal agreement ("assent") of the Queen's representative (the Governor-General in the case of the Commonwealth, the Governor in the case of a State and the Administrator in the case of a Territory).

² I am taking "legal literature" in a very broad sense as including the general body of legal texts of all kinds.

³ Constitutions may not strictly be legislation but I will treat them as legislation for the purposes of this paper.

⁴ James Boyd White, *The Legal Imagination*, p. 197.

⁵ Although the Bentham Austin "command" theory of law is out of fashion in jurisprudence, it is alive and well as the practical basis for the current form of legislation. Legislation imposes duties and legislation confers rights and powers. A right or a power can be seen as an indirect way of imposing the answering duty to respect the right or power. Everything else in legislation is ancillary to a duty, right or power. Every provision has its ultimate sanction somewhere.

⁶ *The Legal Imagination*, p. 228.

⁷ See the Victorian Law Reform Commission's report on *Plain English and the Law* (1987) and the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on *Clearer Commonwealth Law* (1993).

⁸ These are, of course, the occupational hazards of the legislative drafter. The drafter will be held to the drafter's words and those words will be applied in many contexts that are different from the context in which the words were produced.

⁹ A common law tradition is one in which there is a crucial role for the courts in elucidating and applying customary law that has no legislative basis. Another legal tradition is the code or civil law tradition in which legislation in the form a series of codes is the basis for all law.

¹⁰ A decision might be bad because it works injustice, is inequitable or is not in harmony with other principles in the system.

¹¹ Sometimes each of several judges will separately state the facts, each in his or her own individual style. They do this even when they are in complete agreement on what the facts are.

¹² The American "Restatements" of law are similar and in fact assume a quasi-legislative form.

¹³ *Audi alteram partem*.

¹⁴ *De minimis non curat lex*.

¹⁵ *Primitive law past and present*, p. 40.

¹⁶ *Ibid.*, p. 43

¹⁷ *Ibid.*, p. 44. Cicero claimed that when he was a boy, school children had to learn to recite the Twelve Tables.

¹⁸ *Primitive law past and present*, p.45.

¹⁹ See *Justinian's work*, the *T'ang Code* and *the Dooms*.

²⁰ This is usually, but not always the case, with legislation.

²¹ Tim Falkiner discusses the comparisons that can be drawn between computer programming and legislation in *Scientific Legislation*. This is a fascinating, profound and fruitful topic but belongs more perhaps to "Law and Computing" than to "Law and Literature".

²² *The Legal Imagination*, p. 215-216.

²³ See Bowers: *Linguistic aspects of legislative expression*, p. 241-2. Bowers himself does not so much develop a theory of legislation as apply existing linguistic theory to legislation.