

**THE RELATIONSHIP BETWEEN LAW AND LITERATURE –  
IN SEARCH OF JUSTICE AND JUSTIFICATION**

**by**

**KIMON CELICOURT MACRIS DE RIDDER**

**Submitted in accordance with the requirements**

**for the degree of**

**DOCTOR OF LAWS**

**at the**

**UNIVERSITY OF SOUTH AFRICA**

**Promoter: Prof. AE van Blerk**

**SEPTEMBER 1999**

**The Relationship between Law and Literature –  
In Search of Justice and Justification**

**By: K.C.M. de Ridder**

**Degree: Doctor of Laws**

**Promotor: Professor A.E. van Blerk**

## SUMMARY

The law-literature debate appears to be, at best, marginalised and often overlooked by legal scholars in the light of other inter-disciplinary jurisprudential pursuits such as the study of the relationships between law and politics, economics and sociology.

This thesis seeks to reassert the importance of law-literature scholarship by examining the valuable contribution, with regard to an understanding of justice, which literature can bring to the law. I examine the differing interpretations of justice which law and literature possess and the manner in which the adoption of certain literary devices enable legal discourse more effectively to attain and maintain its objectives. In this regard, I view both disciplines (i.e. law and literature) as sharing a 'core of meaning' which finds expression through the notion of justice. Moreover, I submit that this shared endeavour is born of an attempt to re-order reality and instil some certainty into the chaos of human existence. Counter-balancing the drive towards 'justice', however, is the notion of 'justification' which is embedded within legal and literary discourses. This notion illustrates the fact that both discourses thrive on an element of uncertainty (the 'human factor') which provides them with a rationale of sorts for their continued existence and authority.

In the light of these two potent and often vying forces ('justice' and 'justification'), I go on to explore new ways of interpreting and understanding the arena of legal discourse- as viewed with a post-modernist bias- by examining the capabilities and constraints of the law which are identified through the medium of certain literary texts.

Ultimately, my objective is neither to malign the law unnecessarily, nor to promote the complete integration of legal and literary identities. Rather, I seek to emphasise the importance of inter-disciplinary research and the manner in which it can be utilised to provide challenging insights into various issues of human concern.

**Key terms:**

Law-literature debate; justice; justification; postmodernism; deconstructionism; law of literature; law in literature; law and literature; law as literature; legal discourse; literary discourse; inter-disciplinary research; legal understanding; literary understanding.

340.1 DERI



0001764754

I declare that **The Relationship between Law and Literature – In Search of Justice and Justification** is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

A handwritten signature in black ink, appearing to read 'K. de Ridder', with a long horizontal line extending to the right.

**Kimon de Ridder**

## ACKNOWLEDGEMENTS

I am indebted to the following for their assistance and guidance throughout the preparation of this thesis: Joanne Fedler and Iain Currie for introducing me to the field of law-literature study and encouraging me to develop my understanding of it; Rosemary Morris for undertaking to decipher my handwriting and type up the thesis; Christa Cromhout for printing off the thesis and maintaining regular e-mail contact with me while I have been based in London; Professor Joan Church for providing me with the opportunity of putting myself forward as a candidate for doctoral studies and for taking a keen interest in my progress; Professor Adrienne van Blerk for her valuable insights and constructive suggestions as well as her constant encouragement and support throughout my research; my parents for their love and example.

**For my parents, Sophia and Jac**  
**(with love)**

## TABLE OF CONTENTS

Chapter		Page
	<b>PREFACE.....</b>	<b>1</b>
<b>1</b>	<b>THE ARENAS OF LAW-LITERATURE INTERACTION.....</b>	<b>4</b>
	<b>Introduction.....</b>	<b>4</b>
	<b>1.1 Law of Literature.....</b>	<b>7</b>
	<b>(a) Copyright.....</b>	<b>7</b>
	<b>(b) Defamation.....</b>	<b>12</b>
	<b>(c) Obscenity.....</b>	<b>14</b>
	<b>Conclusion.....</b>	<b>17</b>
	<b>1.2 Law in Literature.....</b>	<b>17</b>
	<b>Conclusion.....</b>	<b>24</b>
	<b>1.3 Law and Literature.....</b>	<b>25</b>
	<b>(a) The Educative Desire of “Law and Literature”.....</b>	<b>26</b>
	<b>(b) The Economic Dimension of “Law and Literature”.....</b>	<b>28</b>
	<b>(c) The Social Realities of “Law and Literature”.....</b>	<b>36</b>
	<b>(d) The Political Context of “Law and Literature”.....</b>	<b>38</b>
	<b>(e) The Spectre of Duelling Discourses.....</b>	<b>40</b>
	<b>Conclusion.....</b>	<b>45</b>
	<b>1.4 Law as Literature.....</b>	<b>47</b>
	<b>(a) An Act of Hope along the Journey of Experience.....</b>	<b>47</b>
	<b>(b) A Poethical Perspective.....</b>	<b>56</b>
	<b>(c) Interactive Communities of Understanding.....</b>	<b>62</b>
	<b>(d) Redefining our Reality.....</b>	<b>69</b>

<b>Chapter</b>		<b>Page</b>
	Conclusion.....	76
2	<b>JUSTICE.....</b>	<b>78</b>
	Introduction.....	78
	2.1 Legal Understanding of Justice.....	80
	2.2 Literary Understanding of Justice.....	100
	(a) Romanticism.....	102
	(b) Modernism.....	108
	(c) Postmodernism.....	110
	2.3 Fusion of Understandings.....	117
3	<b>JUSTIFICATION.....</b>	<b>131</b>
	Introduction.....	131
	3.1 Legal Justifications.....	132
	3.2 Literary Justifications.....	154
	3.3 Fusion of Justifications.....	161
	Conclusion.....	175
4	<b>A FLY'S PASSAGE INTO THE HEART OF DARKNESS.....</b>	<b>177</b>
	Introduction.....	177
	A Passage to India.....	177
	Lord of the Flies.....	184
	Heart of Darkness.....	190
	<b>CONCLUSION.....</b>	<b>197</b>
	<b>BIBLIOGRAPHY.....</b>	<b>200</b>

## PREFACE

In the race for efficiency, clarity and certainty which has arisen in recent years as a result of the legal profession being viewed as a 'service industry' governed by client demands, the role of jurisprudence has mistakenly come to be seen as an indulgent and non-essential academic activity. Legal practitioners feel uncomfortable in having to relate their daily professional responsibilities back to something as abstract as jurisprudence. Yet, the truth of the matter is that jurisprudence provides one with a wider understanding of the law and the concepts which underpin the legal process as well as encouraging one to question and critically develop one's own role in this process.

Within the field of jurisprudence there are, of course, many avenues one can choose to explore, and I have taken as my focus the relationship between law and literature. The reason for this is threefold. First, the belief in the autonomy of legal discourse can no longer be upheld. This is due to the fact that since the 1960s, the spectrum of political opinion in law schools (particularly in America) has blossomed as a result of the end of the Cold War. Moreover, as a result of the decline in political consensus there has arisen a concurrent growth in disciplines complimentary to law (most especially, philosophy and economics). Furthermore, the increasing reliance by the legal system on the statutes and constitutions (in place of the common law) as sources of law has led to ambiguity and difficulty of interpretation which has given rise to the realisation that some interdisciplinary perspective might assist the agents of the law in their interpretative duties. Secondly, both law and literature are products of the same tool – language – which is designed to communicate fundamental ideas and important beliefs between individuals. An interdisciplinary perspective, therefore, provides one with the means of assessing the ability and effectiveness of a particular discipline to reflect and convey its message through the medium of language while also encouraging one to explore new ways of understanding and interpretation. Thirdly, (as the content of my thesis will indicate), I examine the important connection between law and literature as evidenced through their respective search for justice and their particular conceptions of it.

I begin my analysis of the relationship between law and literature by examining, in Chapter 1, three different arenas in which they interact and the ways in which the two discourses have

historically impacted on each other through these arenas (i.e. 'Law of Literature'; 'Law in Literature'; 'Law and Literature'). Having discussed these arenas, I then go on to analyse an important facet of law-literature interaction, namely, 'Law as Literature'. This serves to develop certain elements of their relationship which are rooted (but remain largely unfulfilled) in the first three arenas of interaction under discussion. The analysis of this fourth dimension of their relationship also acts as an effective point of connection between the historic backdrop of law-literature study and the task ahead which is geared towards an exploration of their shared focus on justice. This leads into Chapter 2 which analyses the different conceptions of 'justice' which law and literature harbour based on their respective social obligations. I then reflect on the benefits of a fusion of legal and literary understandings of 'justice' as viewed in the context of the postmodern predicament in which we are all embroiled. This serves to emphasise the unspoken connectedness of law and literature while also seeking to de-mystify the deconstructive process and to show that it has an order and logic of its own out of which sense can be made and through which man's surroundings can be understood. However, while postmodern analysis does not stultify the human urge for certainty, it does problematise the desire in as much as it reawakens man's intellect to the justificational foundations of all human discourses which are themselves rooted in the uncertainty of human existence. Chapter 3 then develops this argument by examining the conceptual tension which filters between the identities of 'justice' and their pluralistic 'justifications'. Finally, in Chapter 4, I analyse legal discourse through the medium of literary narrative. In so doing, I unite all the previously mentioned elements which constitute the mechanics of my argument and synthesise them into practical examples of the very principles and tensions under discussion.

After all has been said, however, regarding the relationship between law and literature, it is just as well to return to some words of advice handed down in the mid-1950s by the American judge, Felix Frankfurter. A young teenage boy wrote to Mr. Justice Frankfurter expressing an interest in a career as a lawyer and requested advice on how he should prepare himself while still at school. The response he received was as follows:

*My dear Paul,*

*No one can be a truly competent lawyer unless he is a cultivated man. If I were you, I would forget all about any technical preparation for the law. The best way to prepare for the law is to come to the study of the law as a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give. No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, in the original or in easily available reproductions, and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe, and forget all about your future career.*

*With good wishes,*

*Sincerely yours,*

*[Signed] Felix Frankfurter*

## CHAPTER 1

### THE ARENAS OF LAW-LITERATURE INTERACTION

#### Introduction

Analysts of the law-literature association have to date generally confined themselves to evaluating the impact of the endeavour in the light of an accepted dichotomy between 'Law in Literature' and 'Law as Literature'. The former broadly referring to themes of a legal nature within literary contexts; and the latter concerning itself with superimposing a literary critique onto legal texts.

However, I submit that this schism, on its own, fails to account for much of the work surrounding the points of connection between law and literature. Thus, I have chosen to analyse the law-literature relationship in terms of four sub-sections, namely, the 'Law of Literature', 'Law in Literature', 'Law and Literature', and 'Law as Literature'.

I begin with the 'Law of Literature' since this is the field in which the mechanisms of law are seen at their most assertive from a legal perspective.<sup>1</sup> Moreover, it is through the mediums of copyright, obscenity and defamation that most legal scholars and professionals are initially 'baptised' in literary waters. However, the disturbing reality is that for many legal analysts the extent of their appreciation of law-literature is confined to this narrow, technical element of the broader debate. In effect, there is no relationship between law and literature within the context of this particular perspective, since the law is simply imposed upon an alien entity called 'literature'.<sup>2</sup> To this extent there is no unity of law-literature per se, since they retain a distinct (literary) cause and (legal) effect between each other. I refer to this exclusiveness of vision as 'disturbing' because, on its own, it denies the possibility of anything greater and more fulfilling in law-literature studies than a list of rules providing protections and prohibitions.

The next area of discussion is 'Law in Literature'. This context is arguably the least complex of all the categories inasmuch as it encompasses all forms of literature which share a common

---

<sup>1</sup> A 'legal perspective' in this sense embodies the desire to analyse the law's effects on human actions by means of legal sanctions in the form of statutes and legal reasoning – such as the law of copyright, defamation and obscenity.

<sup>2</sup> In the same way that law is imposed upon other entities which we refer to as 'property', 'delict', 'crime' and so on.

identity through their depiction of some 'everyday' aspect of the law.<sup>3</sup> However, this element of the law-literature endeavour has greater implications for the discipline as a whole, since it is at this juncture that the initial ideas of certain influential jurisprudential scholars (such as James Boyd White, Richard Posner, Robin West and Richard Weisberg) begin to filter into the reader's realm of understanding. It is here that one develops a burgeoning awareness (however fragile) of the broader potential of the task ahead.<sup>4</sup>

Such a discussion (i.e. of 'Law in Literature') which introduces the reader to certain law-literature proponents,<sup>5</sup> their views, and the broader relationship of the two disciplines then leads into the arena of 'Law and Literature'. I regard this to be the broadest of all four categories under discussion, since it is in this context that the views of certain law-literature scholars are expounded, analysed and criticised in greater detail than the 'Law in Literature' section permitted. In 'Law and Literature', I do not confine myself to analysing the reasoning of any one particular school of thought,<sup>6</sup> but rather aim to discuss a broad range of academic perspectives relating to the law-literature relationship. The one factor that all these different perspectives have in common, however, is their acknowledgement of an essential dichotomy between 'law', on the one hand, and 'literature' on the other.

In essence, the degree to which law-literature scholars acknowledge or denounce the existence of an inherent dichotomy between 'law' and 'literature' has determined (in my estimation) whether I class them under 'Law and Literature' or 'Law as Literature'.<sup>7</sup>

---

<sup>3</sup> e.g. Detective novels, literature revolving around criminal trials etc.

<sup>4</sup> The task being the search for justice and justification.

<sup>5</sup> I specifically avoid using the phrase 'the law literature movement' as far as possible due to the myriad (and oft-times conflicting) stated desires of individuals law-literature scholars. Although I will not elaborate on these conflicts of opinion at present, they will become increasingly apparent from reading the sections 'Law in Literature', 'Law and Literature' and 'Law as Literature'.

<sup>6</sup> Such as feminist critics (Caroline Resnik, Judith Heilbrun) or economics-biased scholars (Richard Posner).

<sup>7</sup> I am the first to concede that there is more 'art' than 'science' to the creation of this distinction, in as much as the position of certain theorists, such as Ronald Dworkin (with his concept of the 'chain novel'), appears to straddle the 'Law and Literature' and 'Law as Literature' divide. Far from creating spurious classifications, however, I hope that in dividing theorists (particularly those who are capable of 'theoretical mutation' such as Dworkin) into essentially 'Law and Literature' vs 'Law as Literature' camps, my decisions will be seen to be justified on the basis of my co-existing rationales for them. Such rationales will be enunciated in these respective sections which follow.

Finally, with regard to the 'Law as Literature' category of my analysis - I regard this area as comprising the philosophical apex of the entire law-literature endeavour. It is within this context that the two disciplines are analysed in a manner which pierces their respective veneers and seeks out their underlying mutual commonality through the medium within which they operate (language) and the desire towards which they both strive (justice). In essence, in my conception of 'Law as Literature', I establish the means with which to initiate a focused (although complex) exploration into the concepts of 'justice' and 'justification'.

I must reiterate that I am fully aware of the inherent danger of categorising the law-literature debate into distinct 'compartments', however I have found the task necessary for two reasons. First, so that I can effectively order my own thoughts and convey them in an accessible (yet not pedantic) manner; and secondly, so that the reader can relate to my 'voyage of discovery' in the broad and conceptually treacherous seas ahead<sup>8</sup> with at least a 'compass' with which to navigate. The intention of this initial four-pronged approach to law-literature, therefore, in no way presupposes a belief in the virginal autonomy of each category under discussion. On the contrary, I would assert that to effectively, and more importantly, in a worthwhile fashion go about one's duties as a legal analyst (whether as a scholar, academic or practitioner) in the 'Law of Literature' field,<sup>9</sup> one must have some conception and appreciation of the fields of 'Law in Literature', 'Law and Literature' and 'Law as Literature'. Moreover, the same applies to the remaining three individual elements through which law-literature is analysed. In essence, therefore, I envisage an organic unity into which the four elements under discussion ultimately merge. However, the paradox of journeying towards such a unified understanding appears to be that it requires of the human mind an act of constraint and categorisation.<sup>10</sup> Only once equipped with such units of perception is it possible to appreciate their context and unite them in a coherent vision of what the law-literature endeavour ultimately represents - the search for justice and justification. It is this search towards which my analysis and reconstitution of the elements of the law-literature relationship hopes to

---

<sup>8</sup> "Broad and... treacherous" because of the interdisciplinary nature of the task at hand, and the very real possibility of getting drowned in linguistic and philosophical discourses.

<sup>9</sup> i.e. The field with which legal analysts are obliged to interact by virtue of their professional standing and 'job description'.

<sup>10</sup> In as much as the entire thought process is broken down into distinctive and identifiable constituent parts, thereby preventing the abstract notion (in its entirety) from assaulting us with its grand dimensions, and effectively remaining beyond our comprehension.

guide the reader. Whether this search will culminate in a 'discovery' will only be explored in the chapters on 'Justice' and 'Justification'. However, at this stage it should not be presumed that I am being utterly indulgent and embarking on a convoluted 'phantom search', rather, I intend to ensure that the 'search' itself becomes a journey of discovery.

## 1.1 Law of Literature

As previously mentioned, this area of discussion is the one which legal analysts<sup>11</sup> tend to regard as presenting the total extent of law-literature interaction. Taken on its own, however, I maintain that the 'Law of Literature' as embodied in the law relating to copyright, defamation and obscenity provides nothing more than a hollow 'legalistic' glimpse into the complexities of the greater law-literature endeavour.<sup>12</sup>

Nonetheless, it provides an accessible point of entry into the law-literature debate, and will moreover prove to be of great value when regarded as one of the four component elements defining law-literature interaction.

I shall look at the South African laws relating to copyright, defamation and obscenity, in turn, and discuss their impact in the light of a narrow 'legal' perspective, followed by a broader 'literary' understanding of the task ahead.

### (a) Copyright

The concept of copyright laws has arisen from man's growing appreciation of the existence and value of intellectual property and the need to regulate it through legally enforceable mechanisms. Moreover, such regulatory laws are rooted in the peculiarly Western notion of 'private ownership', since early Eastern and African cultures regarded intellectual works as

---

<sup>11</sup> I use the term 'legal analyst' as a generic title to refer to legal scholars, academics, theorists and practitioners (including lawyers and judges).

<sup>12</sup> Paradoxically, it is worth noting at this point that J Hillis Miller inverts the 'Law of Literature' relationship by examining the ways in which literature instigates the establishment of legal measures and sanctions. However, she notes that the process is by no means straightforward or predictable since the avenue through which it operates is the individual reader's sense of 'justice'. Nonetheless, the result of such an exercise (as seen in Miller's analysis of Heinrich von Kleist's *Michael Kohlhaas* (1956)) is the attainment of a socio-historically effective, albeit unforeseen, legal structure upon which the inroads of literature can only be assessed ex post facto: See Miller *Topographies* (1995) at 80-104.

belonging to the community or society (rather than to the individual creator), and hence not in need of protection from infringement between individuals.<sup>13</sup>

In essence, therefore, the notion of 'intellectual property' (and more specifically the laws relating to copyright) are borne of Western cultural and economic dynamics, with the specific intention of "organising and controlling the flow of information in society".<sup>14</sup>

### **South Africa**

Copyright legislation in South Africa has, to date, undergone a three phase development beginning with the Designs and Copyright Act 9 of 1916, followed by the Copyright Act 63 of 1965, and culminating in the Copyright Act 98 of 1978. Unlike the first two Acts, however, which relied heavily on British copyright legislation,<sup>15</sup> the present Copyright Act 98 of 1978 (which superseded them), although containing many similarities, is largely reliant upon the Berne Convention for the Protection of Literary and Artistic Works (as ratified in Paris on 24 July 1971). Moreover, since the present Copyright Act (1978) effectively repeals all previous copyright legislation,<sup>16</sup> all reference hereafter to copyright legislation in South Africa (unless otherwise specified) shall refer to the present Act.

The present Copyright Act has brought South African copyright regulations in line with the provisions of the Berne Convention, and consequently allowed South Africa to become a signatory of the Convention.<sup>17</sup>

---

<sup>13</sup> Regarding the specific time frame in which the notion of copyright emerged in Western culture is, however, a matter of great contention amongst theorists – some root copyright in the Greek culture of the sixth century BC, during which time authorial rights in works were acknowledged; other theorists locate copyright at a particular date in Western history – 1436, with the invention of the Gutenberg Press (since there could clearly be no right to the reproduction of a work without the initial ability to reproduce it); and still other theorists maintain that copyright only emerged in Europe in the eighteenth century when it became regulated by law: See EW Plowman and LC Hamilton *Copyright – Intellectual Property in the Information Age* (1980) at 4-21.

<sup>14</sup> *Idem* at 5.

<sup>15</sup> Particularly the Copyright Act 63 of 1965, which is based on the British Copyright Act of 1965.

<sup>16</sup> Nonetheless, providing in s46 that "any proclamation, regulation or rule having effect under any provision so repealed and in force immediately prior to the commencement of this Act, shall continue in force after such commencement and may be repealed, amended or altered as if it had been made under this Act".

<sup>17</sup> The fundamental benefit of signatory status is the reciprocity (i.e. equal rights and protections) granted to authors from signatory states. Moreover, the Berne

Regarding the nature of copyright as understood by our judiciary, the Appellate Division in *Parktown North Video (Pty) Ltd v Paramount Pictures Corporation*<sup>18</sup> has acknowledged that a copyright is a form of intellectual property with rights separate from normal ownership. Thus, a copyright is a right given to the owner of a copyright in a work, entitling him to perform certain acts in respect of the work reserved exclusively for the "owner" as defined in the Copyright Act.<sup>19</sup>

In s2(1) of the Act various works (including literary works - s2(1)(a)) are then listed as being eligible for copyright protection. However in assessing the requirements for the subsistence of a copyright in such works, it is first necessary to distinguish between the requirements in terms of the common law, and the requirements in terms of the Copyright Act.

Regarding the common law, two requirements are necessary before copyright protection will be granted. First, the work in question must not be contrary to public policy or good morals; and secondly, the work must be original. Therefore, the consequence is that works regarded as contrary to good morals and public policy may be indiscriminately reproduced since no one can copyright them.<sup>20</sup> Moreover, regarding the standard of 'originality' in order for a work to gain common law protection, this standard is set very low inasmuch as the only requirement is that the work in question must not have been copied from another work. In effect, therefore, authors in different countries, who by chance happen to produce similar works, will all enjoy copyright protection provided they can show that they did not 'copy' the particular work.<sup>21</sup>

---

Convention requires no formalities (such as registration) for copyright protection, since compliance with certain requirements ensures the automatic application of such protections.

<sup>18</sup> 1986 (2) SA 623 (A).

<sup>19</sup> The author of a particular work is prima facie entitled to the benefit of first ownership of copyright (except in regard to government controlled works) in terms of the Act.

<sup>20</sup> Into this category would fall material which is regarded as obscene. As the argument stands at present, it would seem to imply that obscene material can be freely reproduced and disseminated. However, this is clearly not the case, since such obscene material is regulated by other statutes preventing its reproduction and dissemination.

<sup>21</sup> Therefore, common law copyright protection is much weaker than patent protection, in as much as the common law does not protect the theme or idea underlying a work (in contrast to patent protection which does so), but merely protects the external expression of the work.

In contrast to the common law, the statutory requirements for the subsistence of a copyright are more developed, (although ideas are still not protected). Therefore, in terms of s2(2)(b) of the Act a work is only protected once "written down, recorded or otherwise reduced to material form".<sup>22</sup> Moreover, the author of the work must be a "qualified person";<sup>23</sup> and when he is regarded as such, it is not necessary for the work in question to be published in order to enjoy copyright protection.<sup>24</sup>

The duration of the copyright depends upon the nature of the work in question, and in respect of literary, musical, or artistic works this is deemed to extend over the author's lifetime and continue for a further 50 years from the end of the year in which the author died.<sup>25</sup> Moreover, there may be more than one copyright in the same work, such as is the case in literary works in which the author (usually) retains a copyright in the text and content of the work, while the publisher possesses a copyright in the layout of the work. There are, however, certain exceptions to this general rule (as elucidated in s21 of the Act) which deem the author of the work to be the first owner of the copyright in the work.<sup>26</sup> Irrespective of such exceptions, however, the law's concern at all times revolves around the rights of the owner of the

---

<sup>22</sup> By implication, therefore, taping (which is a form of recording) is sufficient to reduce a work to a "material form".

<sup>23</sup> i.e. Someone who is a South African citizen, resident or at least domiciled here, or a juristic person registered in South Africa. Furthermore, this has been extended to all members of the Berne Convention. Therefore someone with citizenship, residence or domiciled in a member state enjoys the status of a "qualified person".

<sup>24</sup> Only in the case of a 'non-qualified person' (i.e. someone not fitting the description of a 'qualified person') is it necessary for the work to be published in South Africa or a signatory country to the Berne Convention, in order for it to enjoy copyright protection in terms of the Berne Convention.

<sup>25</sup> In contrast, copyrights in published editions subsist for 50 years from the end of the year in which the edition was first published; while copyrights in computer programmes subsist for 50 years from the end of the year in which the work was first made available to the public with the consent of the copyright owner.

<sup>26</sup> For example, where a literary work is made by an author in the course and scope of his employment by a newspaper, magazine or similar periodical, and intended for publication in such periodical, then the owner of the copyright in the work is the owner of the publication concerned. However, the owner of the periodical owns the copyright only for the purposes of publication in such periodical. Therefore, for all other purposes, the author of the work owns the copyright in the work. So, too, a person who commissions a work retains the copyright in such work made in pursuance to this commission. However, this exception only relates to works specifically mentioned in s21(1) of the Act. Finally, work made in the course of an author's employment under a contract of service or apprenticeship, is copyrighted to the employer of such author.

copyright. For it is only the owner who is entitled to perform certain acts in respect of the work, such as reproducing the work (in any manner or form), publishing it, and adapting it (including translating the work).

Therefore, s23(1) of the Act deems the copyright in a work to have been directly infringed if someone (without the permission of the copyright owner) performs an act reserved for such copyright owner. However, it must be proved that the copyrighted work was actually copied.<sup>27</sup> Moreover, to prove such 'copying', the Appellate Division in *Galago Publishers (Pty) Ltd v Erasmus*<sup>28</sup> maintained that the works in dispute should be compared through the eyes of a 'reasonable person' reading or analysing them. However, this is not the end of the matter in the law's eyes, since s12 of the Act provides a defence to claims based on direct infringement. This defence is termed "fair dealing" and includes the use of the copyrighted material for purposes of research, private study, criticism or review, and reporting on current events in the news media. In order to constitute a valid defence, however, copying made for one of the above purposes is not, per se, sufficient, and must in addition be regarded as 'fair dealing', otherwise strict liability is imposed on the offending party. Regarding the term 'fair dealing', however, our courts provide no guidance as to its potential meaning, leaving one with the impression that some sense of justice and equity is envisaged, without fully elaborating on the manner in which it is to be attained.

Direct infringement is not the only form of infringement, however, since s23(2) of the Act also specifies that a copyright is infringed when a person performs certain acts without the permission of the copyright owner. Such violations may be termed 'indirect infringements', and include situations in which a person imports work into South Africa for purposes other than domestic use; or where such person sells or leases out the infringing article in South Africa; or where such person distributes such article in South Africa for purposes of trade, to such an extent that the owner of the copyright is prejudicially effected. At all times, however, in order to constitute an 'indirect infringement' the person accused of such violation must be aware that his acts constitute an illegal action.

Notwithstanding the different factors to be noted in respect of direct and indirect infringement, two remedies always remain available by virtue of the very act of copyright

---

<sup>27</sup> Because of this requirement, the protection of a copyright owner is weaker than that given to the holder of a patent, who need not prove copying occurred.

<sup>28</sup> 1989 (1) SA 276 (A).

violation, namely interdicts and damages. Moreover, such remedies favour the position of the copyright owner inasmuch as no fault (on the part of the infringing party) need be proved when claiming an interdict; and when claiming damages, provision is made<sup>29</sup> for awarding additional damages based upon the flagrancy of the violation<sup>30</sup> in situations in which the plaintiff is unable to estimate the extent of his loss.

When one distances oneself from the technical confines of the language of the Act, however, one becomes aware of an ironical anomaly, namely that an Act which seeks to regulate works of a literary nature (amongst others) defines such works without any recourse or reference to 'literary merit'. Thus, telephone directories and bus timetables are accorded the same reverence as the works of EM Foster or the poetry of TS Eliot. In my view, such linguistic callousness in the guise of legal impartiality is not to be lauded or admired for it only bolsters the law's delusional supremacy over other discourses of perception.<sup>31</sup> Nevertheless, it is not my intention to deride legal reasoning per se, since I believe it to be founded upon principles of perceived 'fairness' and 'equity'; rather, what I will explore in the course of this thesis are the ways in which an infusion of literary ideals and expressions into legal understanding and discourse can aid the manifestation of the law's noble objectives, and facilitate its search for justice.<sup>32</sup>

### (b) Defamation

The law of defamation relates to civil actions in which the plaintiff seeks compensation for the unlawful, intentional publication of defamatory material referring to him, which causes his reputation to be impaired.

---

<sup>29</sup> In terms of s24 of the Copyright Act 98 of 1978.

<sup>30</sup> This is a moral judgement not related to actual loss suffered but to the blameworthy nature of the infringement.

<sup>31</sup> One such discourse is literary discourse which readily admits to its own subjectivity (particularly modernist and post-modernist genres) and arrives at a more sensitive and poignant expression of the human condition.

<sup>32</sup> In this sense, what I propose is in conflict with Richard Posner's analysis of the effects of copyright legislation: See Posner *Law and Literature – A Misunderstood Relation* (1988) at 348-361, hereafter referred to as *A Misunderstood Relation*. For Posner asserts the inevitability of tension between copyright and creativity, and argues for a reduction in the scope of copyright regulation of literary material. In contrast, I maintain that this copyright/creativity dichotomy is not a necessary state of affairs. In fact, it is my assertion that if one infuses the legal discourse of copyright legislation with an appreciation of literary merit, then the resulting framework is likely to compliment and assist the creative process rather than detract from or stifle it.

## South Africa

It has always been accepted that natural persons are entitled to recover compensation for defamatory statements made against them, however it has only been in recent years that South African courts have extended this principle to juristic persons.<sup>33</sup>

In order to be actionable, however, such defamatory statement or matter must be published (i.e. made known - either orally or in writing), and the person to whom it was communicated must have understood its meaning.<sup>34</sup> As previously stated, the effect of such defamatory matter must be to impair the plaintiff's reputation in some way. And this, in turn, is determined by asking whether the communication complained of would lower the plaintiff's reputation in the estimation of reasonable and ordinary people generally.

However, when words are per se innocent, the plaintiff may still allege defamation on the basis of 'innuendo' given the particular context and manner in which such words have been used. Moreover, the defamatory matter need not necessarily refer to the plaintiff by name, and may identify him in another manner.<sup>35</sup> Once publication has occurred in this manner, two presumptions automatically arise - first, that the statement was made intentionally (*animus injuriandi*); and secondly, that the publication was unlawful. The onus then shifts to the defendant who must either accept responsibility for his actions, or attempt to establish a defence negating the element of unlawfulness or that of fault.<sup>36</sup>

Literature clearly provides a fertile foundation for the launching of defamatory allegations and claims, whether in the form of newspaper articles, biographies or fictional novels. In this

---

<sup>33</sup> See: *Mutiplan Insurance Brokers (Pty) Ltd v Van Blerk* 1985 (3) SA 164 (D) at 168A-B; *A Neumann CC v Beauty Without Cruelty International* 1986 (4) SA 675 (C) at 688C; *Dhlomo NO v Natal Newspapers Ltd.* 1989 (1) SA 945 (A); *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 560-61; *Argus Printing and Publishing Co. Ltd. v Inkatha Freedom Party* 1992 (3) SA 579 (A).

<sup>34</sup> Therefore publication is not deemed to have occurred if the words are published in a foreign language or secret code which the readers/hearers cannot comprehend. However, if such individuals (at a later stage) discover the meaning of the words used, then publication is deemed to have occurred.

<sup>35</sup> Such as by an official title, a known *nom-de-plume*, a prominent physical feature or a known characteristic.

<sup>36</sup> Defences excluding unlawfulness include truth for the public benefit; fair comment; and privileged occasion. While defences negating intention include mistake; intoxication; provocation; jest; and insanity.

regard, Richard Posner<sup>37</sup> alleges that a balance needs to be maintained between the competing interests of authorial integrity on the one hand, and the right of individuals not to be defamed on the other. However, this becomes particularly difficult in the context of fictional literature since real people are often subsumed into the world of the text in a manner which still makes them identifiable in the guise of fictional characters, who are themselves not subject to legal jurisdiction.<sup>38</sup> The weakness of Posner's argument, in my opinion, is that he readily concedes the complexity (if not impossibility) of the task of regulating defamation within fiction, while maintaining that it is nonetheless necessary,<sup>39</sup> yet he fails to suggest an effective method to facilitate the task ahead.<sup>40</sup> My submission is that we should approach the dilemma from a different perspective by acknowledging the frailty of legal discourse to comprehend (let alone control) the human condition, while simultaneously exploring the value of literary discourse in this same task.<sup>41</sup> Moreover, by bridging the chasm between these two discourses of perception, I believe that the possibility exists for the law to at least venture towards (if not attain) the justice which it seeks.

### (c) Obscenity

The label 'obscenity' is the law's most direct and effective means with which to censor literature, from on high. Yet, despite the law's vigorous disapproval of lewd materials<sup>42</sup> courts in general have found it difficult to describe what exactly it is they regard as

---

<sup>37</sup> *A Misunderstood Relation* at 320-328.

<sup>38</sup> Fictional characters are only subject to the whims and designs of their author(s), and need not feel any inherent sense of duty or obligation to any legal system outside the confines established by the literary work itself.

<sup>39</sup> Essentially, Posner analyses four arguments which object to the abolition of liability for defamation within fiction, they are: (a) that such abolition of liability would benefit fictional literature (above 'factual' literature) in an unfair manner; (b) the fiction/non-fiction dichotomy is in and of itself arbitrary; (c) such abolition would simply result in authors mala fide coating their work with a fictional veneer so as to avoid liability; (d) the Utopian ideal that in the event the legal system attained a state of perfection justice would prevail and all deserving persons would receive damages. Therefore, the argument for abolition would be undermined, since any deserving person is entitled to remuneration for defamation, irrespective of whether such communication originated from within fictional or non-fictional contexts.

<sup>40</sup> All Posner suggests is that it is the law's duty to "internalise costs and benefits" so that society does not receive external costs (or benefits) to the detriment of the individual (and vice versa): See Posner *A Misunderstood Relation* at 320.

<sup>41</sup> Literature, in my opinion, is more capable than law of comprehending the human condition.

<sup>42</sup> Inevitably, obscenity and sexually lewd depictions or descriptions are regarded as synonymous.

"obscene". Such uncertainty is not, however, in itself surprising since the labelling of certain actions or statements as 'obscene' is a value judgement. Not only are such judgements peculiar to particular individuals or social contexts (rather than being universal and objectively understood), but they also inevitably undergo a transformation over time. This is due to the fact that social mores adapt to effectively respond to and represent changing conditions and developments in society. In turn, the law's use of the 'obscenity' label is aimed at legally entrenching societal mores existing at a particular time in that society's development.<sup>43</sup>

As previously stated<sup>44</sup>, the terms 'obscenity' and 'pornography' are often imploded into each other and viewed as a single entity. However, Catherine MacKinnon<sup>45</sup> incisively distinguishes between these two entities, creating a Janus-like vision of their respective concerns. According to MacKinnon, pornography represents a socio-political actuality indicative of the realities of female subjugation and marginalisation within a patriarchal society; while obscenity embodies a moral abstraction created by the judicial system in order to regulate ethical human behaviour. Notwithstanding this difference in focus, MacKinnon maintains that both concepts retain a fundamental unity inasmuch as they are constructed from within a masculine frame of being without any reference to female perception. Moreover, she accounts for the law's inability to provide an effective definition and understanding of obscenity as being based on the fact that to appreciate prurient interests "someone has to admit sexual arousal by the materials, but male sexual arousal signals the importance of protection".<sup>46</sup> Therefore, any attempts to define 'obscenity' (according to MacKinnon) will only be successful once they "address its fundamental issue - gender inequality".<sup>47</sup>

As justified as such feminist critique may be, however, I do not wish to analyse and discuss the properties of this discourse here.<sup>48</sup>

---

<sup>43</sup> The ensuing interaction between the law and society around the issue of obscenity most often revolves around literary material which is deemed in some way to undermine or tarnish the social fabric.

<sup>44</sup> See n42.

<sup>45</sup> C MacKinnon *Philosophical Problems in the Law* (1996) DM Adams (ed) at 290-306.

<sup>46</sup> Idem at 294.

<sup>47</sup> Idem at 295.

<sup>48</sup> First, because the feminist critique of the pornography/obscenity debate contains sufficient material and merit (on its own) to constitute the subject of a substantial

## South Africa

Even given South Africa's morally calvinistic heritage, our courts have not been granted many occasions on which to adjudicate the question of 'obscenity' in relation to the language of literary texts. Instead, the question of 'obscenity' has often revolved around pictorial material and graphic depictions contained in literary works. However, an example drawn from within this latter context is still able to provide one with an insight into our courts' obtuse understanding of 'obscenity'.

The case of *Anchor Publishing Co. (Pty) Ltd. and Another v Publications Appeal Board*<sup>49</sup> provides just such an insight. The applicants were publishers of a glamorous photographic magazine which was declared to be 'undesirable' (and subsequently censored) by the Publication Appeal Board, due to its lewd pictorial content. However, the applicants maintained that the decision was unreasonable since the Board "had failed to apply its mind to the issues it had to determine, and had misdirected itself by condemning outright photographs of breast nudity in conflict with judicial and other authority to the effect that nudity per se was not indecent or undesirable".<sup>50</sup> Notwithstanding this argument, however, the court held that the Board had been correct in its decision,<sup>51</sup> although (ironically) even the court admitted that "it was not easy to discover from the Board's reasons the factor which made the photographs obscene, and it was not enlightening for the Board to say that nudity per se was not undesirable and some aggravating factor was required".<sup>52</sup> Such reasoning clearly begs the very question it set out to answer, and our courts have (to date) proven unable to rectify this situation. A possible solution would be to tackle the 'obscenity' definition from a different angle by analysing what it is not, although even such an option, in order to be effective and accurate, requires the definition reached to acknowledge the vagaries of the social context from whence it emerges.<sup>53</sup>

---

work; and secondly, because I shall look at the feminist perspective on the law-literature debate in greater detail.

<sup>49</sup> 1987 (4) SA 708 (N).

<sup>50</sup> *Idem* at 708 G.

<sup>51</sup> Although the court did set aside the Board's decision to ban all subsequent editions of the magazine.

<sup>52</sup> 1987(4) SA 708(N), 708 H-I.

<sup>53</sup> In other words, such definition must not presume 'obscenity' to be a constant and objectively defined class, and should rather concede that it varies from society to

Whatever the preferred definition of 'obscenity',<sup>54</sup> the fact remains that an appreciation of literary texts as well as an understanding of social contexts can only illuminate one's conception of the term 'obscenity'. This is due to the fact that 'obscenity' is a legal label imposing a moral judgement on society, and in order to better appreciate its content one must, of necessity, understand its context. In this regard, literature can be of great benefit in framing one's understanding of 'obscenity' for two reasons - first, it forms a major component of the body of work against which obscenity laws react; and secondly, literature is able to reflect the vagaries of society and humanity in a manner which eludes the law.<sup>55</sup>

## **Conclusion**

The effects of the 'Law of Literature' are clearly of vital concern to legal analysts by virtue of their legal immediacy. However, (as I hope I have begun to convey) taken on its own this area of law-literature interaction fails, through its technicality, to convey the rich complexities of the greater law-literature endeavour. For this reason, one would be committing a grave injustice were one to regard the 'Law of Literature' as anything more than a component of (and suitable point of entry into) the law-literature debate. Notwithstanding this, the 'Law of Literature' remains a vital element within the broader framework of law-literature since it allows all the philosophical arguments and nebulous conceptions within the debate to find a point of connection in the day-to-day life of the law.

### **1.2 Law in Literature**

The arena of 'Law in Literature' is generally understood as encompassing legal narratives within literary contexts, and literary reflections on legal institutions and concepts. Into the former category fall literary works which might be termed 'populist' for their broad readership and their stereotypical depiction of the legal process.<sup>56</sup> While the latter category

---

society and even person to person, while noting that the law's allegiance is owed to the society at large.

<sup>54</sup> I do not go into further detail in this regard owing to the broad nature of the task; however, two books which do focus exclusively on this enquiry are: T Klein (ed) *Obscenity and Pornography: An Interdepartmental seminar, University of Munster* (1984); and N St. John-Stevas *Obscenity and the Law* (1956).

<sup>55</sup> In turn, it is these societal vagaries which 'obscenity' seeks to reflect.

<sup>56</sup> In this regard, I am specifically thinking of detective novels and novels revolving around 'trial scenes' as depicted in works by authors such as Agatha Christie, John Mortimer, and John Grisham.

consists of works which, while often containing 'populist' devices (such as criminal trials), are primarily concerned with sublime issues involving ethics, morality and justice.<sup>57</sup>

This area (i.e. 'Law in Literature') of the law-literature institution represents the decisive transition from the pedestrian (i.e. 'Law of Literature') into the philosophical (i.e. 'Law and/as Literature'), for it is here that legal and literary discourses become interlinked within the body of the literary text.<sup>58</sup> 'Law in Literature' may therefore be regarded as the foundational progenitor of interdisciplinary research into the fields of law and literature. As such its genesis is generally regarded, by American theorists, as being situated "in the first three decades [of America's] national history, [when] many cultural critics and men of letters were lawyers or received legal training as part of their education".<sup>59</sup> This period of classical unity has, however, faded in the light of an evolutionary estrangement between law and literature, as a result of the development of Romanticism.<sup>60</sup> In turn, the Romantic urge has dwindled and been superseded by a more complex appreciation of the fundamental similarities between law and literature as evidenced by "the power of language and the practice of interpretation".<sup>61</sup> This transition should not, however, be seen as an exclusively American occurrence, since it has taken place at different times in various societies.<sup>62</sup>

What is noteworthy, however, is the manner in which this law-literature animosity and interaction is mirrored in the progression from 'Law in Literature' through 'Law and Literature'. In other words, each phase of the law-literature endeavour can be seen to represent (in general terms) a particular point in societal development – 'Law in Literature' representing the genesis of the philosophical interdisciplinary endeavour; 'Law and

---

<sup>57</sup> Into this category, I place works such as Harper Lee's *To Kill a Mockingbird* (1987), EM Foster's *A Passage to India* (1989), Joseph Conrad's *Heart of Darkness* (1989), and Frank Kafka's *The Metamorphosis, In the Penal Colony and Other Short Stories* (1995).

<sup>58</sup> This is due to the fact that the law's concerns are given effect to through the medium of literature.

<sup>59</sup> Judith S Koffler 'Reflections on Détente: Law and Literature' (1984) 62 *Texas Law Review* 1152 at 1158.

<sup>60</sup> This is due to the fact that the Romantic movement "elevated the artist to the position of 'profit of humanities highest possibilities', while the lawyer and the legal system became the artist's enemy": See Koffler *idem* at 1163.

<sup>61</sup> *Idem* at 1167.

<sup>62</sup> One could, for example, go as far back as the ancient Greek philosophers and playwrights (such as Sophocles, Plato and Aristotle) to search for the seeds of 'Law in Literature' through their reflections on it in *Antigone, Gorgias* and *Ethics*

Literature' providing the Romantic progression, and hence necessitating the entrenchment of the law/literature dichotomy; and 'Law as Literature' culminating in the complete unification of 'Literature and Law'. As I have already alluded, the true value of such progression can only be appreciated if one envisages it as circular (rather than linear) in structure. Therefore, the philosophical core of the law-literature relationship should not be seen as emerging (at its most basic) in 'Law in Literature' and culminating (at its most supreme) in 'Law as Literature'. Rather all the elements should lead back into one another so that a circular flow is created amongst them through which a more illuminating vision may be constructed. The most correct manner in which to conceptualise this configuration, therefore, is by seeing the three philosophical components (i.e. 'Law in/and/as Literature') as manifestations of each other.<sup>63</sup> With this framework in mind, it is therefore appropriate (at this point) to introduce the arguments of certain law-literature scholars with regard to 'Law in Literature'.<sup>64</sup>

J Neville Turner<sup>65</sup> maintains that literature undeniably impacts upon the law through the countless legal references within literary texts,<sup>66</sup> which, in turn, often lead to an awareness of the ethical dimensions of "the moral issues involved in legal theory".<sup>67</sup> Similarly, William

---

respectively. Likewise, while America was going through its cultural 'renaissance' of 'lawyer-poets', western Europe was already steeped in an era of Romanticism.

<sup>63</sup> Which is, after all, what they are since I conceded to regarding them as separate entities only for the purposes of more effective explanation initially. Moreover, my exclusion of the 'Law of Literature' in the above passage is neither an oversight nor a denial of its importance in relation to the other three elements of law-literature. The reason I have failed to mention the 'Law of Literature' is simply because I regard it as the factual component of the law-literature relationship (i.e. indicating what the law actually does) in contrast to the other three elements which represent the philosophical dimension of the relationship (and which I am at present analysing).

<sup>64</sup> Since these scholars, strictly speaking, fall into the 'Law and Literature' and 'Law as Literature' categories, their views will be discussed in greater detail in these later sections.

<sup>65</sup> JN Turner 'Teaching Law through Literature' (1985-86) 14 *University of Queensland Law Journal* 61 at 84.

<sup>66</sup> He highlights works such as CP Snow's *Strangers and Brothers* (which concerns various ethical dilemmas within the law) and *In their Wisdom* (revolving around testamentary issues, including the doctrine of undue influence), as well as Edward Albee's *Who's Afraid of Virginia Woolf?* (concerning family law, and the disintegration of a marriage).

<sup>67</sup> In this regard, Turner is referring to the 'moral issues' illuminated in Greek dramas and Shakespearean tragedies, as well as in more modern contexts such as Harper Lee's *To Kill a Mockingbird*: See Turner loc cit at 65.

Domnarski<sup>68</sup> asserts that reading legal fiction is important for the education of the legal scholar inasmuch as it allows him "to experience the human drama and to see the law from a participatory perspective".<sup>69</sup> Therefore, in order to qualify for analysis, Domnarski requires of such legal fiction that it provide the reader with "something [which] political, sociological, or historical studies cannot", namely, an appreciation of "the particular response of the individual to the law".<sup>70</sup>

Other theorists, such as Brook Thomas,<sup>71</sup> have gone into immense detail of 'Law in Literature'. Thomas analyses various literary texts in the light of their historical context<sup>72</sup> in an attempt to entrench the value of literary criticism for an understanding of legal history. As William H Page notes, Thomas creates this historical context by drawing on three primary sources: first, the 'personal relationships' between the four authors he discusses and certain prominent judges of the time; secondly, by describing various 'celebrated legal cases' which are likely to have impacted on the authors' 'conceptions of social conflicts'; and thirdly, by relying on a Critical Legal Studies movement interpretation of legal history, i.e. an interpretation based upon the belief in "a dynamic relationship between the legal system and the economic and political order". In this sense through his analysis of 'Law in Literature' he advocates a policy of 'Law as Literature' in which legal decisions are viewed as literary works, containing narrative subtexts. It is these subtexts which Thomas analyses, and in so doing tacitly undermines the rational and impenetrable discourse of the law in an attempt to arrive at a clearer conception of justice. As burdensome as such a task may be, Thomas finds it necessary due to the fact that he believes 'Law in Literature' illustrates "the limitations of posing questions of justice the way we do".<sup>73</sup>

In a similar vein (but with a different rationale), Carolyn Heilbrun, Judith Resnik and Robyn West<sup>74</sup> all maintain that legal discourse per se, as well as much of literacy discourse<sup>75</sup> is

---

<sup>68</sup> W Domnarski 'Law-Literature Criticism: Charting a Desirable Course with Billy Budd' (1984) 34 *Journal of Legal Education* 702.

<sup>69</sup> Idem 703.

<sup>70</sup> Ibid.

<sup>71</sup> B Thomas *Cross Examination of Law and Literature* (1987).

<sup>72</sup> B Thomas 'The Ideology of Law and Literature' (1988) 68 *Boston University Law Review* 805 at 808.

<sup>73</sup> B Thomas unpublished manuscript, as quoted by Gary Leeds 'Cross-examining the Narratives of law and literature' (1990) 40 *Journal of Legal Education* 195 at 200.

<sup>74</sup> C Heilbrun and J Resnik 'Convergences: Law, Literature and Feminism' (1990) 40 *Yale Law Journal* 1913; R. West 'Communities, Texts and Law: Reflections on the

unable to effectively convey a morally just message owing to the fact that both discourses are focused on a male centre of consciousness which ignores the female experience. Therefore, although Resnik conceives of 'Law in Literature' as either a means of analysing "how lawyers are perceived by the larger culture" or as a means for "the educated lawyer to become a certain kind of well-read humanist",<sup>76</sup> the underlying irony for her (as well as for other feminist scholars) is that since this very discourse is perceived in male terms, its stated task is rendered impotent.<sup>77</sup> Moreover, at the core of feminist literary theory is the realisation of the need for women to develop their own language and narrative discourse so as to more effectively express themselves free from the constraints of a patriarchal society.<sup>78</sup>

In turn, Ian Ward<sup>79</sup> reflects generally on the great potential of literature to enlighten the study of law, while cautioning that such possibilities should not be sacrificed by converting the endeavour into an academic and inhibitive exercise accessible only to theoreticians. For this reason, Ward maintains that 'Law in Literature' presents an ideal vehicle for conveying and reflecting upon legal issues in an engaging manner. However, Ward reflects on the spectrum of opinion which exists amongst contemporary critics regarding narrative and metaphoric usage within legal discourse,<sup>80</sup> while also pointing to the distinction between the use of metaphor and narrative drawn by many theoreticians in respect of 'Law in Literature'. Richard Posner, for example, acknowledges that the use of metaphor provides a means of enhancing judicial style, while he marginalises the importance of legal narrative. In contrast,

---

Law and Literature Movement' (1988-89) 1 *Yale Journal of Law and the Humanities* 129.

<sup>75</sup> This includes literary discourse in which legal matters are expounded i.e. 'Law in Literature'.

<sup>76</sup> Heilbrun and Resnik loc cit at 1936.

<sup>77</sup> Feminist scholars maintain that the 'female voice' (unlike the 'male voice') is inclusive, and hence more adept at being able to perceive the larger culture and create well-read humanists.

<sup>78</sup> It is difficult for a woman to define her feelings in language which is chiefly made by men to express theirs": See Thomas Hardy *Far from the Madding Crowd* (1974). As an aside it is worth noting how ironical this quotation actually is in the present context, since it is after all a man (Thomas Hardy) who provides a female character with her 'voice', and he does so by means of a male discourse.

<sup>79</sup> I Ward *Law and Literature – Possibilities and Perspectives* (1995), hereafter referred to as *Possibilities and Perspectives*.

<sup>80</sup> Ranging from Richard Posner who maintains a cautious demeanour towards the application of literary devices in legal analysis through to James Boyd White who advocates the creation of 'community' by means of literary interpretative techniques of legal subjects.

Paul Ricoeur<sup>81</sup> alleges that metaphor and narrative are essentially different aspects of the same process – ‘storytelling’.<sup>82</sup> It is this latter opinion (i.e. Ricoeur’s) with which Ward aligns himself since he acknowledges that parables (or narrative fiction) together with metaphors have been used since Aristotelian times to interpret legal matters because they provide an effective and concise analytical tool.<sup>83</sup>

In contrast to Ward, however, Richard Posner<sup>84</sup> cautions against presuming that law and literature contain a shared core of understanding to which the legally trained reader is exclusively privileged simply because issues of a legal nature are frequently the topic of literary texts.<sup>85</sup> Posner asserts (in accordance with the view espoused by George Orwell) that “survival [over a period of time] is the operational test of greatness in literature”.<sup>86</sup> For this reason literature must concern itself with issues of fundamental importance to the human experience in order to survive - one such issue being law. Therefore, he agrees with John Ellis<sup>87</sup> that the term ‘literature’ is the “label we give to texts, of whatever character or provenance, that are taken to have a meaning that is independent of the specific context in which they were created”.<sup>88</sup> Consequently, references to law in literary texts tend to be general (rather than technical) and metaphorical, making their impact minimal in regard to legal studies per se. However, Posner makes an important distinction by conceding that ‘Law in Literature’, while being of little value to the mechanics of the law, does provide a basis for exploring the question of justice. Even texts which appear to be “pervasively and accurately about law”<sup>89</sup> such as Mark Twain’s *Pudd’nhead Wilson* or William Shakespeare’s *The*

---

<sup>81</sup> P Ricoeur *Oneself as Another* (1994).

<sup>82</sup> However, according to Ricoeur, the infusion of ‘scientific’ discourse into contemporary jurisprudential thinking has resulted in the general confinement of metaphoric usage and narrative discourse to minor areas of jurisprudential endeavour: Idem at 96.

<sup>83</sup> Ward *Possibilities and Perspectives* at 6.

<sup>84</sup> Posner *A Misunderstood Relationship* at 13.

<sup>85</sup> Posner maintains that the effects of this frequency should not be overstated because the occurrence of legal topics within literary texts “is partly a statistical artifact”, and moreover the “law figures in literature more often as a metaphor than as an object of interest in itself”: Idem at 71.

<sup>86</sup> Idem at 74.

<sup>87</sup> JM Ellis *The Theory of Literary Criticism: A Logical Analysis* (1974).

<sup>88</sup> R Posner *A Misunderstood Relationship* at 75. By applying this definition of ‘literature’, Posner specifically excludes a great many ‘populist’ literary works from his analysis (even though they may contain insights into law) on the basis of their apparent transience: Ibid.

<sup>89</sup> Idem at 79.

*Merchant of Venice* become (in Posner's estimation) works lacking sufficient accuracy and realism to depict the mechanisms of law, and are merely metaphorical interpretations of man's struggle with the concept of justice.<sup>90</sup>

Further along the law-literature continuum are Richard Weisberg and James Boyd White who represent the quintessence of the 'Law as Literature' formulation. Both theorists propagate the deconstruction of the law-literature dichotomy so as to create a unified sphere of law-literature co-existence.<sup>91</sup> The complexity of their individual positions, however, lies in their joint refusal to polarise the ideals of law and literature into reason and passion respectively.<sup>92</sup> Therefore, in respect of 'Law in Literature' Weisberg notes the potential for the distortion of natural forces (such as love, community and power) through the medium of language.<sup>93</sup> In essence, therefore, he acknowledges the similarity between legal and literary discourses,<sup>94</sup> while appreciating that their necessary unity is potentially destructive.<sup>95</sup>

In turn, James Boyd White applies an equally nimble approach to the law-literature axis by assigning to it the ambition of attaining "a more complex and integrated organisation of language and experience"<sup>96</sup> by reconstituting them in our minds so that we arrive at a clearer understanding of the ethical system in which they operate. White contends that legal analysts are sensitive to the benefits of interdisciplinary studies, however he believes that their

---

<sup>90</sup> In this regard, Posner is particularly critical of Robin West's reading of works by Franz Kafka which he slates as being too literal, and consequential resulting in the untenable juxtapositioning of law and literature.

<sup>91</sup> Although sharing this ideal, Weisberg and White are by no means in agreement as to its implementation (as will be seen in the section, 'Law as Literature').

<sup>92</sup> In other words, they refuse to regard the law-literature axis as embodying the marriage of sense and sensibility respectively.

<sup>93</sup> Thus, Richard Weisberg does not regard the law as the cause of the suppression of passionate arts. Rather he conceives of legal thinking as an example of the intellectual stagnation which language can impose on life. Literary texts embodying legal themes are, therefore, merely an illustration of this tension: See *The Failure of the Word* (1984).

<sup>94</sup> In this regard, Weisberg primarily focuses on the linguistic and formalistic narcissism (he uses the term 'ressentiment') of modernist literature and law.

<sup>95</sup> This fearsome potential of law-literature unity arises owing to the repressive capabilities of ethical power (i.e. law) when combined with aesthetic authority (i.e. literature), and the tendency this has to substitute "wit for judgement, elegance for substance, words for values": See Richard Weisberg *The Failure of the Word* (1984) at 178. As Robert Weisberg (1988) *1 Yale Journal of Law and the Humanities* 1 at 34 notes of his namesake "Richard Weisberg's work has demonstrated how a legal theme can exert specific gravity in fiction".

<sup>96</sup> JB White *Words Beyond Theory* (1985) at 881.

endeavours are confined to either ascertaining the 'findings' (or assertions) which such disciplines maintain in respect of the world, or to establishing the 'methods' (or analytical means) of such disciplines, and in both cases transposing these conclusions onto the field of law.<sup>97</sup> Moreover, White maintains that these analytical methods are of "little value in forming the hopes and expectations that we should bring to imaginative literature"<sup>98</sup> by virtue of the fact that legal analysts do not turn to literature to provide the legal process with assertions or analytical techniques. This is not, however, to say that literary studies do not inform one about the world, or that literary analysis is a meaningless operation, but simply that (in White's estimation) literature approaches one's self-awareness from a more acute angle than that of the law.<sup>99</sup> Therefore, White asserts that an inherent necessity of literature is to "question the nature of the language in which [it] is written",<sup>100</sup> and by so doing bring to light the inadequacies of our basic tenets of communication. The result is the inevitable transformation of the Self through the reconstitution of language<sup>101</sup> and the act of engaging with the literary text.

In contrast to this 'literary metamorphosis' of self, legal texts merely provide us with information that, while it may aid in changing our mental perceptions of external concepts, will never require of us a fundamental re-assessment of self. For this reason, 'Law in Literature' provides an important avenue by which to erode the law's doctrinal dependence and encourage it towards a re-appraisal of its own means and ends through the creation of a textual community.

## Conclusion

The 'Law in Literature' arena, at its most basic level, depicts legal characters and themes within literary texts. However, on its own, such a banal interpretation does not enrich law-literature co-existence. Therefore, one must look beyond the pedestrian facade of 'Law in Literature' to appreciate its valuable contribution to the greater law-literature endeavour.

---

<sup>97</sup> JB White 'Law and Literature – No Manifesto' (1988) 39 *Mercer Law Review* 739 at 740.

<sup>98</sup> *Ibid.*

<sup>99</sup> In White's words "[literature] complicates one's sense of oneself and the world, it humiliates the instrumentally calculating forms of reason so dominant in our culture": *Words Beyond Theory* at 741.

<sup>100</sup> *Ibid.*

<sup>101</sup> This is of great significance since we use language to define everything we know of the universe, including ourselves.

Moreover, based on one's analysis of 'Law in Literature' one tacitly establishes one's own frame of reference for larger law-literature issues. By this I mean that depending on the extent to which one conflates law and literature into a single community of understanding or entity (within the context of 'Law in Literature') determines, in my estimation, one's position against either 'Law and Literature' scholars or 'Law as Literature' theorists. This is because, as I later hope to show, the former category focus on distinguishing law from literature by creating (simplistically put) a rational law vs. passionate literature dichotomy. Therefore, for such scholars 'Law in Literature' provides a forum in which the extremes of both disciplines can be mitigated with reference to each other, while ensuring that their fundamental differences of identity are entrenched. In contrast, 'Law as Literature' theorists approach 'Law in Literature' as a framework in which the essential 'sameness' of both disciplines is reflected in spite of their different perspectives and purposes. Having thus taken the first step into the philosophical dimension of law-literature study, it is now appropriate to expand on this initial understanding by investigating the area that is 'Law and Literature'.

### 1.3 Law and Literature

What follows is an analysis of a broad range of theoretical perspectives relating to law-literature which, not surprisingly, far from being complementary often challenge and contradict one another's perceptions of the endeavour. Although I make no apologies for what at first glance may strike one as a morass of theoretical and philosophical claims and counter-claims, I hasten to add that such seeming complexity is supported by sound (if somewhat unorthodox) method.<sup>102</sup> The source of cohesion with which I have chosen to unite conflicting theorists under the banner of 'Law and Literature' rests in my belief that they all share a fundamentally united vision of the law-literature relationship. This form of classification is unusual in that it is theorist-specific rather than theory-specific. By this I mean that I am more concerned about placing theorists into 'Law and Literature' and 'Law as Literature' categories on the basis of their own ideological perspective rather than on the basis of their allegiance to feminist, modernist or post-modern theories. For this reason it will be noted that theorists traditionally aligned to particular theoretical genres will not be grouped together on the basis of such allegiance alone. For example, I divide feminist scholars into 'Law and Literature' proponents, such as, Teree E Foster, Carolyn Heilbrun, Judith Resnik and Jane Baron; and 'Law as Literature' adherents, such as, Robin West. I

---

<sup>102</sup> 'Unorthodox' not in the sense of frivolous, but rather (as I modestly submit) in the hope that it may provide a novel and worthwhile dimension to law-literature studies.

believe that by constituting the theoretical framework in this manner the philosophical undertaking which follows<sup>103</sup> will prove to be more focused.

In respect of my immediate task, I have chosen to divide 'Law and Literature' into five areas of enquiry which, I believe, effectively account for the different theoretical standpoints present within this particular category of law-literature endeavour.

(a) **The Educative Desire of 'Law and Literature'**

Ian Ward<sup>104</sup> notes that in contrast to most theoretical approaches to the law, the primary motivation of law-literature is educative. In this regard he finds support amongst other theoreticians, such as CRB Dunlop<sup>105</sup>, Nancy Cook<sup>106</sup> and Jules Getman<sup>107</sup>. The foundation for this common belief is constructed from their individual encounters with the unique potential of the law-literature endeavour. Such potential arises from what has been described as the 'user-friendly'<sup>108</sup> nature of law-literature studies which enables its proponents to grapple with legal problems in an engaging environment.<sup>109</sup> Most importantly, the educative scope of such legal-literary union extends well beyond traditional assumptions of legal domain, and encompasses a desire to inform human beings and not simply legal automatons. Therefore, the importance of this inter-disciplinary unity is not merely based on the scope of its domain, but also on the manner in which it effectively conveys its concerns.

Moreover, scholars adhering to such an 'educational doctrine' maintain that socio-political and economic ambitions associated with law-literature are all subject to its primary educative concern. Thus, it is a matter of first conveying understanding to (i.e. educating) legal scholars (through the medium of law-literature), and then enabling them to make use of such knowledge to formulate socio-political or economic assertions. The reason advanced for the need for such an educative understanding in the first place is the common manipulative

---

<sup>103</sup> i.e. The search for justice and justification.

<sup>104</sup> I Ward 'The Educative Ambition of Law and Literature' (1993) 13(1) *Oxford Journal of Legal Studies* 323; and 'From Literature to Ethics' (1994) 14(3) *Oxford Journal of Legal Studies* 390.

<sup>105</sup> C Dunlop 'Literature Studies in Law Schools' (1991) 3.1 *Cardozo Studies in Law and Literature* 63.

<sup>106</sup> N Cook 'Shakespeare Comes to the Classroom' (1998) 68.3 *Denver University Law Review* 387.

<sup>107</sup> J Getman 'Voices' (1988) 66 *Texas Law Review* 577.

<sup>108</sup> I Ward 'The Educative Ambition of Law and Literature' (1993) 13(1) *Oxford Journal of Legal Studies* 323 at 324.

tendency of lawyers and writers in respect of language, coupled with their pre-existing interaction in the field of 'Law in Literature'. Thus, the 'educative proponents' maintain that the knowledge lawyers glean from law-literature "will enable them to respond maturely to the genuine, and thus enhance the perception of law and justice in the community they serve; if they fail to do so, society may accept literature's perception of law and justice rather than the lawyers".<sup>110</sup> In effect, therefore, contrary to their alleged desire to see legal analysts become well-rounded individuals through the study of literary texts, a number of 'educative proponents' retain a hidden agenda. They simply wish lawyers to learn to manipulate language with a similar subtlety to the author's art, and in so doing retain their discursive monopoly over the governance of society and the concept of justice.

Although there are certain 'educative proponents' who genuinely desire the development of well-read legal humanists by means of law-literature studies, it is unfortunate that their good intentions have been partly scuttled from within their ranks. Not that their worthy ambitions are completely lost, however, for there remain those amongst them who, like Ian Ward, are loyal to the notion that "literature is ethical, because language is ethical".<sup>111</sup> Unfortunately, in the light of both modernist and post-modernist literary evaluation, this particular ethical perspective of language is difficult to defend, and is easily swept aside as a remnant of Romanticism. Therefore, in order to revitalise the worthy ideals of 'educative proponents', I propose a fundamental reappraisal of their method of analysis.<sup>112</sup> This can be achieved by acknowledging that language does not in itself present a higher and constant truth, but that it is rather a flawed means of presenting man's ideals and aspirations. With this as a backdrop, it becomes apparent that law-literature must acknowledge its existence within an imperfect world as well as its own blemished facility of expression (i.e. language). Working with these realisations its educative potential is not lost or fruitless, but, in fact, enhanced, for while the discourses of law and literature may individually prove incapable of providing a sufficiently incisive vision of reality, combined they can create an illuminating spectacle which is able to account for the vagaries of human existence in a more just manner. This is due to the fact

---

<sup>109</sup> Rather than having to deal with legal issues within the impersonal confines of a purely legal discourse.

<sup>110</sup> JG Mowatt 'Teaching Law through Literature' (1992) 1 *De Jure* 416 at 417.

<sup>111</sup> I Ward 'From Literature to Ethics: Strategies and Ambitions of Law and Literature' (1994) 14(3) *Oxford Journal of Legal Studies* 389 at 395.

that both disciplines approach the human condition from different angles and thereby interpret it with a differing emphasis, which when combined, creates a depth of understanding not present in either individual discipline. I submit that the disciplines of law and literature share a 'core of meaning' represented by the concept of justice. Both disciplines are vessels into which an amorphous mass of reality is poured, and out of which man tries to come to a clearer understanding or better control of some particular element of human existence. In this regard, law leans more towards a better control, and literature towards a better understanding. However, when combined, I maintain that these two disciplines allow one to glimpse a grander reality in which justice resides.

Therefore, while instituting a re-assessment of law-literature's educative focus, I in no way wish to detract from its foundation (i.e. the education of legal analysts), but simply wish to magnify its potential. For I believe that the law-literature endeavour must go beyond educating lawyers simply for the sake of creating well-versed cultural connoisseurs, and that it should, in fact, take them on a far more fruitful journey - in search of justice and justification.

#### (b) The Economic Dimension of 'Law and Literature'

Richard Posner,<sup>113</sup> (who in recent years has been a regular contributor to issues of a law-literature nature as well as other interdisciplinary legal studies) is the most vocal supporter of the need for viewing both law and literature in the light of market-based economic principles.

The essence of Posner's particular perspective regarding the law-literature relationship (or more aptly, given his views, the law-literature dichotomy) is partly found in his statement that unlike law, "literature is not concerned with establishing the truth of propositions".<sup>114</sup> On this basis it could, therefore, be argued that literature is relegated to a low rung on the tacitly constructed 'Posnerian ladder' of noble and worthy disciplines, at the apex of which resides economics and economic interpretation of all other disciplines (including law). However, it could also be presumed that Posner's statement refers to a belief that literature is content

---

<sup>112</sup> In this sense, I do not wish to re-assert the Romantic ideals of linguistic transparency, but simply to illuminate the manner in which the educative potential of law-literature can be pragmatically re-awakened.

<sup>113</sup> Posner *A Misunderstood Relationship*.

<sup>114</sup> *Idem* at 270.

merely to pose questions in its search for 'truth', while law is obliged to provide one with definitive answers. Even if one accepts this latter interpretation, however, there is a fundamental flaw in the entire assertion since there is no logical basis for presuming that law should come any closer to attaining 'truth' (let alone representing it) than literature does, given that they are both human creations which are imperfectly communicated through the medium of language. Ironically, Posner later asserts that "the reason why rhetoric or style is important in law is that many legal questions cannot be resolved by logical or empirical demonstration".<sup>115</sup> This statement surely undermines any attempts by Posner to infuse the law with moral authority over and above that possessed by literature. Furthermore, I maintain that this acknowledgement (by Posner) of law's reliance on an element of human intuition beyond mere reason indicates the essential 'sameness' of law and literature. This is because both disciplines are borne of man's uncertain and intuitive steps to define and control his existence; they both suffer from the same shortcomings of language in attempting to find expression to their desires; and they both merely represent two avenues of human endeavour whose ultimate focus is the search for truth and justice.<sup>116</sup>

Posner is critical of White's assertion that the languages of law and literature share fundamental similarities which enable a scholar of the one discipline to provide unique conceptual insights into the study of the other discipline. According to Posner, the narrow focus of legal training precludes legal scholars from formulating any profound insights into non-technical issues of law within literary contexts; however, he is prepared to concede that the concept of 'revenge' does create a point of connection between the two disciplines. He asserts that 'revenge' may be viewed as both a legal prototype and a literary genre. With regard to law, Posner indicates that the origins of modern legal systems can be traced back to a system of revenge whose purpose was to achieve justice in earlier societies; while in the field of literature, 'revenge' provides a recurrent and universal theme.<sup>117</sup> Furthermore, Posner

---

<sup>115</sup> Idem at 284.

<sup>116</sup> All three of these fundamental similarities lack any logical *raison d'être*, and are created and maintained on a level which transcends logic and reason, and embraces instinct, intuition and spirituality.

<sup>117</sup> Vengeance, however, has proved to be an ineffective means of maintaining order (according to Posner) since it produces an underspecialised workforce because it requires all members of the community to dabble in the culture of revenge, rather than concentrating on specialised occupations and leaving law-enforcement to others; it also hampers large-scale co-operation, since people tend to look after their own interests or the interests of small, intensely loyal groups; moreover, because of the savagery and frequency of revenge, the subsequent feuds tend to be more destructive

is willing to acknowledge the existence of similarities in the structural frameworks of law and literature which result in parallel tensions, the most notable being "the theme of rule versus discretion".<sup>118</sup> In the legal context this is evidenced by the rules of precedent relating to judicial decisions which are balanced against judicial discretion; while within a literary framework, a writer is subject to grammatical rules and scholastic conventions (such as meter, pronunciation and genre), while retaining some measure of independence as to the construction of his work. Given such superficial similarities between the two disciplines, coupled with Posner's insistence that legal analysts cannot benefit in a fundamental manner from law-literature studies, it is surprising that his assertion leading on from this should be that law-literature studies are an avenue for bringing broader issues of legality and justice within the range and understanding of legal scholars. Surely if this is so then legal scholars benefit in a most crucial manner from law-literature studies, for what can be more vital to the study of law than an appreciation of the concept of justice.

In essence, while seeking to distinguish law from literature on the basis of their mutually exclusive desires, Posner simultaneously analyses both disciplines in the light of an economic cost/benefit paradigm based on market forces (i.e. the law must internalise its costs so as to ensure that neither the individual plaintiff or the larger society/market unduly benefit from the law's actions; while, the true test of literary greatness is survival over time in the sea of changing market forces). While I agree that "the ability to make distinctions is as important to knowledge as the ability to make connections,"<sup>119</sup> and while I am prepared to accept Posner's assertion that the effect of an economic vocabulary "is not to conceal unpleasant realities but to achieve analytical precision",<sup>120</sup> what is apparent is that (aims aside) the effect of such analytical precision inevitably results in the vagaries and uncertainties of reality being suppressed by the veil of 'theoretical economic certainty' (i.e. for every human action there is a rational explanation which can be accounted for in terms of economic discourse). It is this element of Posner's argument which I find disturbing since, in my view, it denies the primacy of the very 'human condition' upon which it is based - the element of uncertainty.

---

than the initial "offence"; furthermore, seeking justice through revenge can result in lax punishment since revenge is dependant upon anger which rapidly fades away; and finally, justice based on revenge is morally crude.

<sup>118</sup> Posner *A Misunderstood Relationship* at 113.

<sup>119</sup> Posner *A Misunderstood Relation* at 353.

<sup>120</sup> *Idem* at 310.

Considering his 'economics' perspective, it is not surprising that Posner is sceptical of the claims made by deconstructionists and the Critical Legal Studies movement with regard to the inherent ambiguity of literary works and legal texts. However, it is Posner's assertion that there are far too many differences between literary and legal texts (i.e. that no tangible benefits can be gained from a cross-application of interpretative techniques) that leads him to assume an unusual interpretative stance. Due to this latter assertion, Posner does not regard himself as being inconsistent when he approaches legal interpretation from an 'intentionalist' perspective, while seeking to understand literary texts from within the context of a 'New Critic' approach. In essence, therefore, Posner the 'legal intentionalist', maintains that one must analyse the words, structure and background of a statute (or other legal text) so as to establish how the framers would have approached a particular problem had it occurred to them. In contrast, Posner the 'literary New Critic', regards a literary work as a coherent whole in and of itself, thus precluding any need for establishing the authorial intent so as to better comprehend the work.

In the 'intentionalist' framework, the author assumes a pivotal role towards which all the readers' concerns are centred. Not only is it acknowledged that the author has a reason for including all the details he does, but it is also assumed that to understand the work a reader is required to appreciate the author's reasons. The corollary to intentionalism lies in what Posner describes as "an extreme form of 'reader response' criticism"<sup>121</sup> through which the meaning of the literary text is regarded as the creation of the individual reader. The 'via media' of these two approaches is evidenced in 'New Criticism' which rejects the notion of both authorial-centred (i.e. intentionalism) or reader-centred (i.e. reader-response) literary interpretation, and assigns primacy to the work itself.

Moreover, Posner criticises 'intentionalist' theories applied to literature because he believes they drain a work of its potential to relate to people and situations across time and space by confining the work to the author's perspective. In stating this, Posner concedes that "a work of literature is a deliberate human creation, and in that sense intentional",<sup>122</sup> however, he maintains that issues of literary interpretation are by no means most effectively approached by analysing authorial intentions, since "the creation of works of literature is not a fully self-conscious activity",<sup>123</sup> coupled with the fact that "an author may lack an adequate

---

<sup>121</sup> *Idem* at 219.

<sup>122</sup> *Idem* at 228.

<sup>123</sup> *Idem* at 229.

perspective for understanding his work".<sup>124</sup> Ultimately, Posner believes that the 'aesthetic enjoyment' embodied in a literary work is diminished (rather than enhanced) if the work is engulfed by issues of intention which are "remote from the textual surface, and usually, banal".<sup>125</sup> Furthermore, since the rationale for excluding authorial intent from literary texts is premised on aesthetic criteria, Posner concludes that issues of intention within literary and legal contexts are far removed from each other, since he maintains aesthetics are of no concern in legal texts.<sup>126</sup>

With regard to legal texts, therefore, Posner maintains that an 'intentionalist' approach to interpretation is appropriate. This is due to the fact that, unlike literary texts which are often multi-faceted and contain various layers of meaning, legal texts are one dimensional and solely focused on conveying to the reader the legislature's or judiciary's commands and conclusions. Furthermore, the importance of constraining legal interpretations to authorial intent rests on the need to create certainty within the law and thereby instil confidence in the authority of the legal system.<sup>127</sup>

The only junctures at which Posner foresees legal and literary interpretation connecting are in situations in which it is the legislature's intention to delegate its lawmaking function to the courts, and cases in which the intention of the legislature is not capable of being clarified. The former situation refers to "legitimately judge-made law",<sup>128</sup> and thus coincides with an analysis of authorial intent within literature; while the latter case coincides with situations in which one simply cannot arrive at the original intentions of the legislative framers. In this latter situation, however, Posner cautions against applying Dworkinian reasoning which views the court's interpretative task as the creation of the best rule of law possible. The reason for Posner's concern stems from the fact that he contends such an approach belies a naive understanding of the legislative process, as well as the fact that the comparison between

---

<sup>124</sup> Idem at 230.

<sup>125</sup> Ibid.

<sup>126</sup> Moreover, Posner asserts that much of the literary appeal in respect of intention rests on the "romantic fascination with the personality of the artist": See Posner idem at 238. In turn, (so the argument goes) this results in an academic exercise which subjugates all meaning to authorial intent rather than creating a liberating experience through which the text is able to transcend the time and space of its own creation.

<sup>127</sup> While Posner concedes that in certain situations there is a need to interpret the wording of legal texts in the light of the framers' intentions, he asserts that this is not to denounce his fundamental premise that one of the prerequisites for legal legitimacy is that the interpreter of the text must subordinate himself to the author in all respects.

<sup>128</sup> Posner idem at 246.

a judge interpreting the legislative provision so as “to make it the best possible statement of political principle or social policy”,<sup>129</sup> and a literary critic doing the same to a literary text is deceptive. Moreover, Posner seeks to elaborate on this erroneous similarity by distinguishing the roles of the legal interpreter (judge) and the literary interpreter (critic) on a number of grounds all of which rest on the same fundamental assertion, namely that acts of judges are politically and socially “far-reaching” and on this basis in need of conformity; whereas the interpretation of literature, no matter how absurd it may be, is ultimately a ‘harmless’ act.<sup>130</sup> In so doing, Posner denounces any theories attempting to show the fundamental ‘sameness’ of legal and literary interpretation based on the fact that (according to Posner) both disciplines have essentially divergent focuses.<sup>131</sup>

Posner acknowledges the fact that certain scholars believe literature has the potential to infuse the law with moral meaning and universal values due to its focus as a “surer source of knowledge about human nature, social interactions and other background information important to judges”.<sup>132</sup> However, he rejects the notion that literature is in any way a moral prism reflecting reality in a morally righteous and timeless manner. On the contrary, Posner maintains that just as notions of morality change over time, so the notions of morality depicted in literature merely reflect a particular age's beliefs. Thus, “a fair amount of literature is immoral by current standards”.<sup>133</sup> On this basis, he asserts that far from being a moral force, great literature (which in Posner's definition is literature which has withstood market pressures over time) has the ability to induce the reader “to suspend moral judgements”,<sup>134</sup> and in so doing it becomes universal. Moreover, Posner believes that the didactic school of thought whose literary critiques assign moral and political values to literature is in danger of creating such a strong politico-literary link that literature may potentially find itself subject to some form of public regulation.

Furthermore, Posner is dubious of the assertion that a literary background provides people with a broader sense of the human condition, thereby making judges, for example, more knowledgeable and able to more effectively arrive at just decisions. The reason for his

---

<sup>129</sup> Idem at 247.

<sup>130</sup> Ibid.

<sup>131</sup> Likewise, as previously indicated, Posner also rejects claims made by deconstructionists and the CLS movement regarding the inherently problematic nature of legal and literary interpretation given the essential ambiguity of language.

<sup>132</sup> Posner idem at 301.

<sup>133</sup> Idem at 298.

scepticism lies in Posner's belief that too great an immersion in literature may result in people reformulating their expectations and perceptions within the fictional environment of a literary framework, and hence distancing themselves from reality and the human condition. This line of argument appears cogent, yet it once again emerges as a result of one of Posner's fundamentally inaccurate premises, namely, that literature lacks the capacity to reflect the human condition with the same efficiency and insight as economics due to the former's reticence to provide finality on issues. In literature's defence, however, I assert that its reluctance to commit itself with any finality on issues regarding the human condition is merely an indication of its incisive appreciation of human existence which itself defies comprehension in terms of unwavering definitional characteristics. Moreover, given this 'literary appreciation' of existence, one must surely acknowledge that Posner's economics-based reading of law with its emphasis on certainty and finality is more removed from reality than is literature, and in this sense may be said to be not unlike the Romantic ideal of which it accuses literature.

Due to Posner's conservative conceptual framework<sup>135</sup> he envisages a narrow connection between law and literature based upon the 'aesthetic integrity' of literature as evidenced from

---

<sup>134</sup> Idem at 298.

<sup>135</sup> The use of 'conservative' and 'conceptual' (in the sense of being visionary) to describe Posner's views may appear contrary and contradictory, yet I believe the words are truthfully ironical. Posner is clearly an erudite and well-read individual, moreover he is acutely aware of the benefits of inter-disciplinary approaches to legal understanding (to which his numerous books and articles bear testimony), and in this light I would label him 'conceptual'. Yet, Posner's approach to all inter-disciplinary endeavours is fraught by a conservative spectre (in the form of economics) which he carries everywhere with him. It is this insistence on erasing the uncertainties and vagaries of human existence and replacing them with structured economic principles that justifies, in my opinion, Posner's being labelled 'conservative'. This is not to say that 'liberal' scholars are more able to account for the 'uncertainties and vagaries' thereby making their approach to law correct. Rather, such 'liberal' scholars concede the vagaries of human existence and structure their arguments around this factor – unlike Posner's economic approach which first erases all traces of uncertainty by denying their existence, and then claims to have arrived at a true and incisive reflection of existence. Therefore, I disagree with Posner's approach not because of any lack of structured and clearly reasoned arguments on his part, but rather in spite of such arguments. I cannot accept his approach because of the foundations upon which it is based and the economics-biased vision which he seeks to propagate.

its 'impartiality',<sup>136</sup> 'scrupulousness' and 'concreteness'.<sup>137</sup> Moreover, it is in this light that he confesses "a preference for literature that expresses a realistic awareness of the tensions and ironies of the human condition",<sup>138</sup> while acknowledging that one should not completely disregard "the Romantic impulse - the sense of infinite human potential".<sup>139</sup> These two statements can be seen as the joint keystones around which Posner's arch of perception is constructed, and they provide the basis for much of his reasoning. For in my opinion, the fact that he regards a 'realistic awareness' and a 'Romantic impulse' as separate and largely self-sufficient entities goes a long way to explaining his sole reliance on an 'economics-based' approach (as his vision of reality) towards both law and literature, to the almost total exclusion of any other influences. This indicates that Posner fails to sense the fundamental tension and irony inherent in human existence, namely, that realism and Romanticism are simply two sides of the same concept – i.e. man's vision of reality;<sup>140</sup> and I assert that it is the interaction between the sense of reality and the desire for Romanticism within man that make his vision of the world so complex.<sup>141</sup> One cannot, therefore, accept Posner's economics-vision of reality if one wishes to remain true to the belief that an unaccountable tension underlies all human endeavour.<sup>142</sup> Consequently, the realism-Romanticism friction indicates the need for a more empathic (and consequently anti-economics) vision of law.

Furthermore, in contrast to Posner, I maintain that not only is the study of law and literature an illustration of 'realism-Romanticism' interdependence (and hence vital to an appreciation of the vagaries of human existence); but also that in terms of this relationship, law sides more with the 'Romantic' ideal, and literature more with the 'realistic' perspective. This may seem a startling assertion to make given the fact that law prides itself on its ability to control the actions of people in the 'real world', while literature appears to be little more than an intellectual indulgence in 'Never-Never land'. Yet, in spite of such beliefs, I assert the

---

<sup>136</sup> Posner defines it as its "detachment, empathy, balance, perspective, a complex awareness of the possibility of other perspectives than the writer's own: See Posner idem at 301.

<sup>137</sup> Ibid.

<sup>138</sup> Idem at 304.

<sup>139</sup> Idem at 305.

<sup>140</sup> As opposed to being two separate and unrelated concepts.

<sup>141</sup> As TS Eliot stated in *Four Quartets* "humankind cannot bear too much reality": See *TS Eliot: A Collection* (1987).

<sup>142</sup> This tension results from the attempt to formulate untarnished ideals from the imperfect materials of human existence.

'realistic' supremacy of literature above that of law given the fact that literature embodies the intellectual, emotive and intuitive capabilities of man to strive for some understanding of his reality, while the law represents little more than the framework of man's desires and romantic ideals. In making these assertions, however, I am in no way implying that literature is pragmatic and law is idealistic. For in adhering to such a dichotomy, I would merely be creating a fallacy similar to that of which I accuse Posner. Rather, all I intend by this reasoning is that while acknowledging that law and literature are both wrought with realist-Romantic tensions, I believe the law to be more influenced by the 'Romantic', and literature by the 'realistic' strands of human existence. I concede that this is not likely to be a popular sentiment, but I feel it needs to be made since it is my view that it is only as a result of the dominance of legal discourse (and without any logical foundation) that literature and literary discourse have come to be seen, at best, as pleasant diversions from the 'real world'.

Finally, it is only in undermining the Posnerian dichotomies of law/literature and economic realism/literary romanticism that will, I believe, enable the search for justice to be effectively undertaken.

### (c) The Social Realities of 'Law and Literature'

Carolyn Heilbrun and Judith Resnik<sup>143</sup> approach law-literature interaction from a feminist focus, and in so doing criticise many of its analysts (such as Ian Ward and Richard Posner) who, they claim have failed to give due regard to the 'female voice'. They maintain that this disregard of the female perspective is not in itself surprising given the social realities of patriarchal society, which in turn impact upon legal and literary disciplines to form a male-biased canon of perception. However, in analysing the sexist assumptions underlying both law and literature, Heilbrun and Resnik hope not only to enlighten an audience burdened by this sense of false consciousness, but also to provide a viable (feminist) vision to replace the present social order.<sup>144</sup>

This feminist perspective (in terms of description, analysis and theory) is based upon the real experiences of women, which in turn aid the process of acknowledging the importance of the

---

<sup>143</sup> Loc cit.

<sup>144</sup> What adds to the interest of Heilbrun and Resnik's analysis of law-literature is that they postulate a feminist standpoint from different disciplines – Heilbrun from a literary perspective and Resnik from a legal point of view.

'female voice', as well as re-evaluating the legitimacy of a purely male-centred discourse. Moreover, at the core of this feminist perception of self lies the belief that the proximity between the theoretical plane and real experience which it advocates provides feminism with a unique and invaluable insight into both law and literature. In this regard, Heilbrun laments the fact that no male analysis on law and literature<sup>145</sup> has to date acknowledged the virtues of feminist interpretive critique.<sup>146</sup> These feminist benefits are further expounded by Teree Foster<sup>147</sup> who asserts that "one must question the relationship between the status of women in American Society and the role of the legal system in perpetuating this status".<sup>148</sup> Only by so doing can one achieve a "sensitive understanding of the human experience"<sup>149</sup> - more specifically, the female experience.

The primary concern of these three feminist analysts is, therefore, to use the field of 'Law and Literature' to explore "the conditions of women and [create an] understanding of the ways in which patriarchy assaults women's rights and choices".<sup>150</sup> They thus view literature in a very focused light - i.e. as a means of concretising the marginalised voice of female experience into the life of the law; and consequently as a way in which to legitimize and humanise legal discourse. This is clearly a worthy task based upon justifiable concerns. However, in my view, none of the critics mentioned analyses the law-literature relationship in terms beyond its 'social realities'. In other words, they confine themselves to the task of reconstituting the female-self in law and literature, and do not venture to explore the underlying congruence between law-literature per se (i.e. they do not embark upon an analysis of 'Law as Literature'). This is not unexpected since the scope of their task is, in itself, monumental, however it is unfortunate that they do not extend law-literature along its natural hermeneutic

---

<sup>145</sup> With one exception, namely, Stanley Fish *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989) (hereafter referred to as *Doing What Comes Naturally*).

<sup>146</sup> Heilbrun refers to Ibsen's play *A Doll's House* to illustrate the legal bias in favour of men which continues through to the present - "There are two kinds of moral laws, two kinds of conscience, one for men and one, quite different, for women. They don't understand each other; but in practical life, woman is judged by masculine laws, as though she weren't a woman but a man": See *Ibsen: A Biography* (1971) at 466.

<sup>147</sup> TE Foster 'But is it Law? Using Literature to Penetrate Societal Representations of Women' (1993) 43(1) *Journal of Legal Education* 133.

<sup>148</sup> Idem at 135. Of course, the enquiry ought not to be confined to American society alone, and is applicable to all patriarchal communities.

<sup>149</sup> Idem at 136.

<sup>150</sup> Heilbrun and Resnik: Loc cit at 1927.

progression – i.e. the formulation of ‘Law as Literature’ - which in turn creates the possibility for a more sublime conclusion in which justice is of paramount importance.<sup>151</sup>

#### (d) The Political Context of ‘Law and Literature’

The ‘social realities’ of law-literature as brought to light by feminist scholars naturally extend into an analysis of its political context. This is due to the fact that issues of socio-political concern of necessity enjoy a symbiotic relationship with each other since both arenas (i.e. social and political) provide structural manifestations of a community's anatomy. Thus, for example, the social reality which dictates that female experience is to be marginalised is situated within the political context of patriarchal domination. Therefore, as Jane Baron<sup>152</sup> indicates, law not only recognises an exclusive type of story (i.e. based upon a male perspective) but it also places constraints on the ways in which the story is to be told. In so doing, "the extent [to which] stories and storytelling technique govern what and how things are said in legal fora, they are vital to understanding the way in which power is exercised".<sup>153</sup> Moreover, Baron perceptively notes that the manner in which stories exercise power can be used to subvert present power-relations (including the political context in which power operates) and replace them with a different strategical framework in which to operate.

Similarly, Judith Koffler<sup>154</sup> regards the ‘law-literature movement’<sup>155</sup> as “an alliance that aims at generating political friction, intentionally going against the grain ... and an effective agitation of the organs of power”.<sup>156</sup> In this regard, she brings to light an interesting

---

<sup>151</sup> I do not develop upon the ‘social dimension’ which is presented by these feminist scholars, at this juncture. However, I do continue my exploration into it when I come to discuss Robin West in the section ‘Law as Literature’.

<sup>152</sup> JB Baron ‘Resistance to Stories’ (1994) 67 *Southern California Law Review* 255 at 260.

<sup>153</sup> Idem at 265. Thus, over time and through repetition the dominant stories attain a truth of their own and become accepted as the way things are.

<sup>154</sup> JS Koffler ‘Forged Alliance: Law and Literature’ (Book Review) (1989) 89 *Columbia Law Review* 1374.

<sup>155</sup> Koffler refers to the ‘American chapter’ of law-literature interaction in disparaging terms. She deems it to have been constituted by a series of theorists with differing perspectives, whose only point of connection was their desperate desire to infuse the law with a humanistic perspective. In so doing, these theorists have (according to Koffler) unwittingly stumbled onto a common focus in the form of a law-literature association, and consequently had the term ‘movement’ imposed on their individual endeavours.

<sup>156</sup> Koffler idem at 1375.

dichotomy by distinguishing between the law-literature 'movement' and the law-literature 'industry' - the former consisting of subversive (and chiefly political) scholastic attacks on the staid legal establishment; while the latter embodies the legal establishment's (primarily political) attempt to mould law and literature into an industry of authority and respectability under its conservative auspices. Consequently, Koffler finds herself in total disagreement with Richard Posner's perspective of law-literature due to his tacit belief that literary interpretation cannot be regarded as interpretation "if it draws support from an ethical or political position from a text".<sup>157</sup> Koffler, therefore, concludes that, in essence, Posner finds no room in his objective and 'reasonable' universe of male-centred law for female voices or literature about women. In contrast, Koffler regards Benjamin Cardozo's<sup>158</sup> interpretation (with which she does not agree) of the law-literature relationship as forwarding the notion that inescapable truths and justice can be reached by means of these dual disciplines, due to the fact that (she contends) Cardozo regards law as being a form of literature. Moreover, it is interesting to note that Koffler's vision of the law-literature symbiosis is in certain respects similar to that of Thurman Arnold,<sup>159</sup> who regards law as merely being a gigantic folktale without any particular focus on truth and justice, whose sole purpose is the protection of private property interests.

Once again, it is unfortunate that while these proponents of law-literature's political bias provide astute arguments in support of their cause, they fail to extend their reasoning beyond the immediate political context of patriarchal domination. By so doing, they tacitly denounce the possibility of a greater political reality in the context of which a sense of justice might prevail.<sup>160</sup>

---

<sup>157</sup> Idem at 1382.

<sup>158</sup> B Cardozo *Law and Literature and Other Essays* (1931) at 116.

<sup>159</sup> T Arnold *The Folklore of Capitalism* (1937) at 77.

<sup>160</sup> Admittedly, feminist theory per se alleges that justice can only exist once female discourse is entrenched within the legal and literary canon. However, I believe that this argument, as it stands, does not go far enough towards its desired ambition. In my estimation, in order to attain a state of justice (at least in a theoretical, if not a pragmatic sense) one must go beyond the mere inclusion of minority discourses into the accepted canon, and one should delve into the underlying tensions and similarities of law and literature. It is this further enquiry which is required, and which can only be attained through a conception of law-literature in terms of 'Law as Literature'.

### (e) The Spectre of Duelling Discourses

Ronald Dworkin<sup>161</sup> maintains that law per se is an interpretative undertaking which is unavoidably political. Moreover, he asserts that legal propositions are interpretative of legal history without requiring an appreciation or analysis of authorial intent since in many cases "the author has no intention either way and ... on others his intention cannot be discovered".<sup>162</sup> In this regard he, therefore, proposes a policy of 'law as integrity' which aims to ensure that all legal interpretation conforms with doctrinal history while simultaneously striving towards social goals and principles of justice.<sup>163</sup> To illustrate his vision, Dworkin makes use of the 'chain-novel' which would appear to suggest his allegiance to 'Law as Literature' theorists. However as I intend to show, Dworkin's conceptual framework lacks certain fundamental characteristics of 'Law as Literature' discourse.

In essence, the 'chain novel' represents the continuum of subsequent judicial decisions along which legal reasoning on a particular point of law has developed.<sup>164</sup> Rather than being arbitrary or inconsistent, however, this progression of judicial analysis is bound together by a common desire to jointly "create, so far as they can, a single unified novel that is the best it can be".<sup>165</sup> This, in turn, ensures that all 'novelists' give due regard to the judicial precedent preceding their contribution, and strive to maintain conformity by means of the dimensions of 'fit' and 'interpretation'.<sup>166</sup>

However, despite apparent allusions to an interpretative connectedness between legal and literary texts, I believe that Dworkin's focus lies elsewhere. He makes use of the 'chain novel' not because of a belief in the intrinsic worth of literary interpretation when applied to

---

<sup>161</sup> R Dworkin 'Law as Interpretation' (1982) 60 *Texas Law Review* 527.

<sup>162</sup> *Idem* at 529.

<sup>163</sup> *Idem* at 545.

<sup>164</sup> Dworkin regards the judges as novelists in the enterprise, whose individual decisions contribute to the creation of a single 'chapter' in the greater endeavour.

<sup>165</sup> R Dworkin *Law's Empire* (1986) at 229.

<sup>166</sup> Dworkin asserts that all legal interpretations must be tested in terms of these two dimensions so as to maintain conformity and achieve just results. First, the 'dimension of fit' must be satisfied, by which he means that in adopting a particular interpretation an individual author must ensure that it conforms to the general pattern laid down by judicial precedents. (This is not however, to say that the judicial interpretation in question must 'fit' all aspects of the precedent). Secondly, in situations in which several possible interpretations 'fit' the text in question, then the 'dimension of interpretation' or value (i.e. that which is most morally appealing) must be relied upon to ensure that the interpretation chosen is that which best advances the text towards its just ends.

legal analysis, but simply because he maintains that legal and literary interpretation happen to share a common desire, namely, the ambition of creating the best legal or literary 'novel' possible. While I regard all attempts to understand legal reasoning in terms of literary discourse as valuable avenues of exploration, I find that Dworkin has, in many respects, forged a false and superficial alliance between the two disciplines. This stems from the fact that Dworkin applies a Posnerian analysis of literary texts by tacitly assuming that the text represents a coherent whole from within whose sphere no details are accidental as they all contribute to the work's meaning.<sup>167</sup> However, when such an analytical technique is transposed onto legal interpretation (i.e. when every included detail is deemed to be significant) then the very structure of the text disintegrates and frivolous assumptions arise as to its meaning. This is because (to continue Dworkin's analogy) while a small percentage of literary texts may have successive authors thereby creating a "chain novel", all legal texts are, by their very nature, constituted by both multiple and successive authors. This is due to the fact that legislative bodies comprising tens, if not hundreds, of individuals impact upon the form of certain legal texts (i.e. Acts of Parliament) which are, in turn, often referred to and interpreted by single or full judicial benches in their own legal texts (i.e. judgements). The result being the creation of a modernist or even post-modernist novelistic structure in the case of legal texts, rather than the Romantic and highly stylised form suggested by the 'chain novel'. This should not, however, detract from the fact that Dworkin appreciates an essential concern of law and literature, namely, the question of interpretation of texts. Nonetheless, while critics remain divided as to the benefits of his 'chain novel' vision what remains self-evident (at least as far as I am concerned) is that Dworkin's thesis at no point delves beneath his self-imposed novelistic framework to question the underlying hermeneutic tensions common to both law and literature. By this I mean that he fails to fully explore the concept of law through the lens of literary perception, while also not engaging with the mutual desire of both disciplines to strive for something beyond themselves. It is this failure which entrenches a law-literature dichotomy and prevents Dworkin from entering the philosophical plane of 'Law as Literature'.

---

<sup>167</sup> In contrast, Hershel Parker argues in *Flawed Texts and Verbal Icons: Literary Authority in American Literature* (1984), that this presumption ought to be rebuttable owing to the many 'radically imperfect works of literature': See Posner *A Misunderstood Relationship* at 245 n61.

Stanley Fish<sup>168</sup> also concerns himself with issues regarding the nature of interpretation similar to those espoused by Dworkin. Notwithstanding this, however, while Dworkin asserts the existence of a distinction between the first 'author' in the chain who merely creates, and subsequent 'authors' who both create and interpret;<sup>169</sup> Fish, in contrast, argues that no distinction exists between the initial 'author' and subsequent 'authors' along the chain. The reason for this (according to Fish) lies in the fact that the initial 'author' can begin any type of 'novel' he wishes, but his choice must conform to the requirements of 'novel writing' per se.<sup>170</sup> Therefore, for Fish, the central point of authority remains authorial interpretation of the text no matter how far along the authorial 'chain' one travels.<sup>171</sup> Moreover, in this regard, while Dworkin's notion of the chain enterprise provides him with a foundation upon which to explain the consistency inherent in the judicial and literary process, Fish maintains that any extreme judicial decision does not constitute a judge "striking out in a new direction",<sup>172</sup> but is merely a continuation (albeit a bizarre one) of the initial enterprise along non-judicial lines. Furthermore, Fish asserts that if a judge can provide a reasoned explanation for arriving at a different decision to that of his predecessors, then such a decision is not new since "it will have been implicit in the enterprise as a direction one could conceive of and argue for".<sup>173</sup>

In essence, therefore, while Dworkin believes in the judicial integrity of prior decisions (in accordance with which present judgements must conform or risk illegitimacy), Fish maintains that to conceive of present judgements in the context of past decisions is, in effect, to "reconceive that chain by finding it in an applicability that has not always been apparent".<sup>174</sup> In so doing, Fish asserts that in order for judicial decisions to retain the integrity of the

---

<sup>168</sup> Fish op cit.

<sup>169</sup> Thus as the 'chain novel' progresses so the constraints on each subsequent author become greater.

<sup>170</sup> As Fish puts it, the initial author is "neither free nor constrained (if these words are understood as referring to absolute states), but free and constrained": Op cit at 89.

<sup>171</sup> However, this is not to be interpreted as a carte blanche for whimsical or obscure readings of earlier texts by 'authors', since they are all merely free agents within the constraints of the textual enterprise itself.

<sup>172</sup> Op cit at 93.

<sup>173</sup> Ibid. Furthermore, although this does not preclude such a decision from being criticised, any criticism will be based upon the judicial direction of the decision rather than its inherent 'newness'.

<sup>174</sup> Op cit at 94.

reasoning from whence they sprung they must continually revise and reinterpret that past so that the lessons it has to teach may be of value to the present.<sup>175</sup>

Most importantly, Fish agrees with Posner's fundamental assertion that literary and legal interpretation are distinct enterprises. However, he disagrees with Posner's justification for the dichotomy based upon the notion of 'intention'. Posner conceives of the interpretative process as either a means by which to discern the authorial intention (in the case of legal texts) or a means by which to assign some satisfactory and coherent meaning to a text independent of authorial intent (in the case of literary texts). Each interpretative method is distinct and text-specific in the context of its Posnerian application and is used as a mechanism for constraint and consistency. In other words, Posner insists on the importance of relying on the authorial intent in the context of legal texts so as to constrain analysts from imputing terms into such texts which result in inconsistent results, while he maintains a *laissez-faire* approach to literary texts by encouraging interpreters to seek an interpretation with which they simply feel comfortable.<sup>176</sup> However, Fish maintains that this Posnerian dichotomy regarding intention is fundamentally flawed since he (Fish) asserts that intention is the sole avenue for interpretation in the first place. Thus, Fish alleges that interpreting all texts in terms of 'intention' is a necessary requirement for understanding, and not simply an optional endeavour to be embarked upon when one requires a measure of constraint in respect of certain texts. This is based on Fish's assertion that "words are intelligible only within the assumption of some context of intentional production, some already-in-place predecision as

---

<sup>175</sup> In this sense, Fish asserts that all histories are not merely discovered, but to some limited extent, actually 'invented'. And it is this crucial understanding of history and judicial precedent which Fish alleges that Dworkin fails to appreciate, since he (Dworkin) is guilty of raising earlier decisions in the judicial chain to the level of universal truths, while regarding arbitrary decisions in the light of such truths as being institutionally impossible. Therefore, in Fish's mind, Dworkin ironically adheres to the extremes of legal realism and positivism which he seeks to avoid. Moreover, with regard to 'intention', while Dworkin conceives of it as alien to the notion of 'understanding' (in as much as he refutes the suggestion that one must accede to authorial intent so as to interpret a text effectively); Fish maintains that within the 'chain novel' context (which Dworkin himself has created) to read a text, of necessity, requires one to engage in "the act of specifying the same intention": Op cit at 99.

<sup>176</sup> This is not so much because Posner believes in the need for freedom of literary interpretation in order for artistic integrity to be maintained, but is rather based on the assumption that the artistic process is itself inconsequential in the greater scheme of things. Therefore, according to Posner, what people choose to infer from such literary texts may as well be based on personal preferences without being hindered by having to refer back to some foundational authorial intention.

to what kind of person, with what kind of purposes, in relation to what specific goals in a particular situation, is speaking or writing".<sup>177</sup> Consequently, one cannot assign, as Posner suggests, a coherent meaning (independent of intention) to a text, because all possible meanings are, in fact, in Fish's opinion subject to "an intentional structure already assumed".<sup>178</sup> Moreover, Fish accounts for situations in which meaning appears to emanate from the words themselves without any reference to authorial intent by means of the fact that "the intentional structure -the conditions of intelligibility that limit the meanings words can have before they are produced - is so deeply in place that we are not aware of it and seem to experience its effects directly, without mediation".<sup>179</sup> However, as Fish concedes, the necessary entwining of interpretation with intention creates a symbiotic relationship which works both ways. In other words, not only must one take cognisance of intention in the act of interpretation, but one must also be aware of the fact that the act of defining the intention from which a text proceeds is itself subject to the possibilities of interpretation.<sup>180</sup> Therefore, Fish's universe of understanding revolves within the sphere of intention and interpretation which share a cause-and-effect relationship to each other, unlike the understanding of Posner which regards intention and interpretation as distinct spheres of endeavour which only intersect each other when the requirement of constraint prevails.

So it is that Fish criticises Posner's fundamental assertion that unlike persuasive language which relies on rhetoric for its effectiveness, scientific language is founded upon some purer and more precise formulation, namely, logic which creates such certainty in and of itself that it does not require rhetorical persuasive techniques. Fish's criticism stems from his assertion that, in fact, all modes of discourse are rhetorical inasmuch as they are steeped in assumptions, distinctions, and perspectives which are always vulnerable to criticism.<sup>181</sup>

---

<sup>177</sup> Op cit at 295.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid.

<sup>180</sup> This is to say that one still uses one's faculty of interpretation in respect of the authorial intention behind a work. Therefore, Fish acknowledges the fact that a group of people may hold distinctly individual appreciations of the authorial intention behind a work based on the fact that they each interpret such intention in the light of their unique concerns.

<sup>181</sup> Furthermore, Fish indicates that both scientific and legal discourses are themselves formulated on the basis of distinctions such as "rest and motion" or civil and criminal, which have come about as a result of protracted rhetorical arguments. Thus, their apparent serenity ought not to deceive one since it is merely the result of a particular rhetorical argument finally gaining acceptance over other similar arguments, and winning for itself the right to act as an accepted premiss and go largely unchallenged

similarities between law and literature rather than an intrinsically philosophical relatedness. Thus, the result is that Dworkin's conceptual framework is insufficiently particular (in terms of the creation of some symbiotic understanding between law and literature) in order for him to be comfortably numbered amongst the ranks of 'Law as Literature' scholars.

However, while Dworkin makes an attempt to include literary theory in his analysis of textual interpretation and understanding, other theorists such as Jessica Lane<sup>186</sup> exhibit a blatantly hard-line approach by maintaining that law and literature "speak to vastly different human impulses and needs",<sup>187</sup> therefore resulting in the requirement of a conceptually individual method of interpretation so as to best serve their particular ends. Moreover, Lane elaborates on the inherent distinction between law and literature by framing their practices and communities in terms of the different interests which they serve. Thus, for example, she conceives of law and the legal community as based upon a clearly defined hierarchy (comprising courts and individuals) whose duties are to ensure the survival of principles of certainty and continuity by "regularising social structures" and focusing on "social integration".<sup>188</sup> In contrast, literary criticism is viewed by Lane in terms of a "critical fascination with upheaval and novelty" intent on elaborating on the "intricate possibilities hidden in the dialectic of writing and reading". Furthermore, in highlighting the distinctiveness of law and literature, Lane points to the two characters whom she believes epitomise the traits towards which the respective disciplines strive – Hamlet (depicting the intense complexity and emotional enormity possible through literature) and Hercules J (the supremely just and omnipresent figure who seeks to guide the legal process). Ironically, however, at no point does Lane concede the fact that both figures referred to are (in terms of her own dichotomy) ultimately founded upon intensely literary characteristics in as much as they are both creations of man's "critical fascination with upheaval and novelty".<sup>189</sup> Nonetheless, this analysis of Lane is not in itself contentious or particularly novel (no pun intended) since it forms the main (albeit tacit) thrust of most critical evaluations of the relationship between law and literature. It is, therefore, generally taken as a 'given' amongst

---

<sup>185</sup> i.e. Legal vs literary discourse.

<sup>186</sup> D Lane 'The Poetics of Legal Interpretation' (Book Review) (1987) 87 *Columbia Law Review* 197. Although not previously mentioned, I do regard Lane as a 'Law and Literature' exponent.

<sup>187</sup> *Idem* at 215.

<sup>188</sup> *Idem* at 216.

<sup>189</sup> *Ibid.*

law-literature scholars (even those espousing a 'Law as Literature' viewpoint) that differences do exist between the two disciplines. The only area of division, accordingly, is between those who focus on the disciplinary dichotomy (i.e. 'Law and Literature') to the exclusion of a valuable interdisciplinary symbiosis, and those who acknowledge the autonomy of the respective disciplines but choose to analyse them in a joint community of understanding (i.e. 'Law as Literature').

I now move on to examine 'Law as Literature' theorists and the way in which they seek to interpret the law-literature enterprise.

#### 1.4 Law as Literature

In its application to date, the term 'Law as Literature' has been used to describe the inherent tensions arising from an exploration of legal discourse which seeks to acknowledge the 'ordinariness' of language on the one hand, while emphasising the philosophical potential of such discourse on the other. While sharing this common interpretative paradox, however, 'Law as Literature' theorists (as I choose to define them) have by no means formulated a standardised approach to the dilemma. For this reason I have divided the present section into what I regard to be the four primary methods by which such scholars seek to resolve their concerns.

##### (a) An Act of Hope along the Journey of Experience

James Boyd White<sup>190</sup> asserts that learning from literature is both an intensely personal, as well as complex experience. Not only must the individual interpreter "accept responsibility"<sup>191</sup> for what he gleans from the literary text and for the manner in which it impacts upon him, but this relation between interpreter and text is not something judged in terms of 'findings' or 'methods' but rather experience and exposure. This of necessity results in a broad interpretative network making the law-literature endeavour an abundance of claims and counter-claims.<sup>192</sup> Therefore, White maintains that what "literature has most to teach, then, is a way of reading ... not only 'literature', but all kinds of texts and expressions : a way of

---

<sup>190</sup> JB White 'Law and Literature : No Manifesto' (1988) 39 *Mercer Law Review* 739.

<sup>191</sup> *Idem* at 742.

<sup>192</sup> For this reason, White asserts that the phrase 'Law and Literature' is inaccurate on three grounds. First, it presupposes the existence of a coherent body of work 'operating on common premises'. Secondly, the use of the word 'and' fails to convey the deep-rooted connection between law 'and' literature. And thirdly, 'literature' is

focusing our attention on the languages we use, on the relations we establish with them, and on the definition of self and other that is enacted in every expression".<sup>193</sup>

Moreover, White is concerned that discussions of 'Law and Literature' are often pedestrian in nature, revolving around questions of 'aesthetic(s)' rather than 'political and ethical meanings' which "we must be prepared to understand and to judge". Thus, White encourages the reader to immerse himself in the literary experience and engage with the "multiplicity of voices" therein so as to arrive at some appreciation of the "unstated or opposing truths" they contain.<sup>194</sup> It is precisely for this reason that he scoffs at suggestions that a "literary view of law fails to see that the law is about power", since White maintains that reading texts in the manner he advocates is to "expose the root of power, which is linguistic or ideological in nature. [After all] whoever controls our languages has the greatest power of all".<sup>195</sup> This point is of particular significance when one notes (as White argues) that while people may perceive reality by means of languages of common understanding such as "social science or common sense – or even literature", the fact remains that this reality is both language – created and language-bound, and we as individuals must, therefore, be aware of our accountability for what we perceive and how we express our perceptions. Therefore, White asserts that it is only through such individual and collective efforts than an effective "ground of judgement" can be created whereby we learn to pose the correct questions, and to perceive the just answers. Thus, for this reason, White asserts that the 'heart of justice' does not reside on a theoretical 'nonlinguistic' plane, but that it is 'ethical and relational' embedded in our approach to the interpretation of texts and their reflection of experience.<sup>196</sup> In this regard, White prefers to formulate his arguments in the context of 'law and the humanities' rather than 'Law and Literature' (which he believes to be too narrow a category containing certain erroneous implications). According to White the 'literature' categorisation is narrow because it does not fully account for the wide range of works and discourses which can aid the understanding of law, and which are outside of the canon of high literature. Moreover, White maintains that the thrust of the law-literature endeavour is not towards literature per se, but

---

itself too narrow a category confining itself by implication to 'high literature': Ibid at 745 footnote 14.

<sup>193</sup> Idem at 745.

<sup>194</sup> Idem at 746.

<sup>195</sup> Idem at 747.

<sup>196</sup> Idem at 751.

consists of a wider movement away from social science discourse and towards the language of the humanities. In this regard, he insists on the diversity and individuality present in law-literature studies, which, in turn, makes it unwise to assume that all of its proponents operate from within the same contextual premises. Therefore, White does not regard law-literature interaction as the foundation of a 'movement', but rather "a return to a sense of law as a humanistic discipline that has its modern roots at least as early as the Renaissance".<sup>197</sup>

Based upon his perspective, White, therefore, asserts that rather than contribute to the study of law and literature in a broad humanistic sense, the work and ideas of Richard Posner marginalise literature in an attempt to "reaffirm the primacy of another kind of speech and thought over law and literature alike".<sup>198</sup> Whereas Posner's conception of language stems from a particular understanding of natural science (based upon 'economic' foundations) through which he reflects his understanding of the world (including literature); White, in contrast maintains that literature exists within a different conceptual and discursive framework to that in which Posner seeks to place it. As White states – "a literary text is not a string of propositions, but a structural experience of the imagination, and it should be talked about in a way that reflects its character".<sup>199</sup> It is Posner's denial of the special qualities of literary discourse, therefore, which form the main thrust of White's critique of his view, since White cannot accept his (i.e. Posner's) tacit premise that science establishes universal criteria of meaning and validity, and hence a universal model of thought and expression.<sup>200</sup> In spite of this, such a 'scientific' means of analysis remains deeply embedded in the human psyche, and White readily admits to its advantages in circumstances other than literary analysis. White accounts for the natural tendency towards a 'scientific' analysis of literature in terms of the inherent tendency in man to support the view that the core meanings of any text is propositional in character, and that rational thought must contain some linear coherence

---

<sup>197</sup> JB White 'What Can A Lawyer Learn from Literature?' (1989) 102 *Harvard Review* 2014 at 2015 footnote 3.

<sup>198</sup> Idem at 2016. Posner's conception of language and his particular discourse is widespread (according to White) which, in turn, accounts for its potential appeal and its inherent dangers.

<sup>199</sup> Ibid.

<sup>200</sup> Moreover, White is not alone in his belief, for the image of science as the supreme medium of understanding has been tarnished in recent years by numerous other academics such as William Booth *Critical Understanding – The Powers and Limits of Pluralism* (1979) and Stanley Fish *Doing What Comes Naturally* (1989) (in literary studies); Roger Rorty *Philosophy and the Mirror of Nature* (1981) (in philosophy);

linking its propositions. There is great comfort to be gained from supporting such a vision of language as fundamentally certain. At least within such a framework one has a solid foundation from which to make assumptions, without having to question the very premises on which one's argument is based. Yet to do so within the context of literary texts is to commit a grave injustice by failing to appreciate that such texts operate on the basis of a different conceptual discourse. Rather than being 'propositional', literary texts are, in fact, experiential and performative, inextricably tied to language and not reducible to any logical outline. Most importantly, such texts are cultural entities seeking to integrate the author's experience with the reader's interpretation and perspective.<sup>201</sup>

Moreover, White maintains that to effectively appreciate a literary text one must engage with it so that a dialogue of sorts forms between the reader and the writer on the one hand, and the writer and the original experience (i.e. that experience which he is relating) on the other. Such a system of understanding naturally presupposes the existence of interstices between the chaos of reality and its textual (or oral) depiction, and between the experience of 'the Self' and the perceptions of 'the other'; however, it is in bridging these fissures of perception by means of the connective tissue of understanding that 'the Self' is transformed and the text reveals its meaning. Such a manner of interpretation is a naturally complex and intensely emotional encounter fraught by the possibility of failure. Yet, White contends that its complexity provides no valid justification for its dismissal in favour of a more 'scientific' and straightforward approach. In actual fact, were one to adopt such 'Posnerian' lines of reasoning, White contends that one denounces the humanistic dimensions present in literature and literary analysis.

White then institutes a separate enquiry to analyse whether one should regard the law in purely 'scientific' terms or whether it contains a moral dimension (similar to that of literature) which can consequently be aided by a literary approach. He concedes the fact that (once again) the prevailing norm in past decades has been to regard the law as a science, and that various schools of legal thought (such as the Legal Realists) have developed with the aim

---

Carol Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1993) (in psychology); and by postmodernist scholars in general.

201

While it is invaluable to share such 'experiences' through the medium of language (whether in a textual or oral form) one must always be aware that all of one's efforts invariably constitute a reduction in the intensity of the original experience (something which Posner appears unwilling to acknowledge).

of piercing the ambiguities of legal language so as to “reach the real world’ upon which the law acted”.<sup>202</sup> Moreover, White does not underestimate the potentially invaluable insights which ‘science’<sup>203</sup> can provide as a gateway into law. However, he maintains that the image of law as a science is a misconception because it overlooks the central concern of all legal activity, which is to analyse issues in the light of “authoritative texts and other documents which define the terms of thought” of the analyst.<sup>204</sup> Within this context all that any science can do is to provide the legal analyst with data which he must then analyse, interpret and translate into a text of his own. The reason for such a reconstitution of ideas and re-alignment of data is due to the fact that social science “speaks to an audience that is, in principle, omnipotent, able to implement the policy it recommends without constraint from the will of others”.<sup>205</sup> In contrast, the legal analyst is never in an omnipotent position but “always speaks to circumstances defined and regulated by a set of authoritative texts which it is his task to identify and interpret”.<sup>206</sup> Thus, the texts constrain the freedom of choice of both the legal analyst and her audience (something which social science cannot achieve, because if it were to interpret legal constraints it would, in effect, be ‘doing’ law).

Furthermore, White contends that the manner in which legal analysts translate such ‘scientific’ principles and arguments into a legal discourse is itself not a science but a literary art. It is thus around this ‘art’ that all legal scholarship is centred (according to White), whether they care to acknowledge it or not. In this respect, in interpreting the authoritative texts which provide the legal analyst with his conceptual framework his duty is to ‘translate’ such texts in a manner which precludes them from being read and reduced to a “simple re-statement of their original meaning”.<sup>207</sup> This is because in translating words across different contexts one necessarily changes their significance. However, this is not to say that legal analysts have a ‘carte blanche’ to interpret authoritative texts according to their own whims. In actual fact, legal analysts are constrained in all they do “by an obligation of fidelity to the original text”.<sup>208</sup> Thus, the legal analyst is “a kind of translator, a writer who

---

<sup>202</sup> JB White (1989) 102 *Harvard Law Review* 2020 at 2024.

<sup>203</sup> Whether they be the social sciences- sociology, psychology or anthropology; or the natural sciences – economics.

<sup>204</sup> JB White (1989) 102 *Harvard Law Review* 2020 at 2021.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Idem at 2022.

<sup>208</sup> Ibid.

necessarily remakes an original text, but always under the obligation to do justice".<sup>209</sup> In fact, if one were to encapsulate the work of a legal analyst in one sentence, it is best summarised by White as the art of "invention and imagination, constrained, as art always is, by her [the legal analyst's] responsibilities to her material and her world".<sup>210</sup>

It is this spirit of artistic creation at the foundation of the legal process which is enhanced by an understanding of law coupled with an appreciation of literature, which allows us to better comprehend our universe through a greater awareness of the capacities of language and the potential of our minds to formulate our existence. Moreover, the act of reading texts composed by other minds (with different perspectives) allows us to engage in avenues of thought we would not otherwise have encountered. Thus, in reading literary texts we are vulnerable inasmuch as we allow our perceptions and beliefs to be developed, adapted and even undermined by those of the writer, through the process of understanding. And ultimately, understanding engenders an intellectual humility borne of the knowledge that our individual perceptions are imperfect, and allowing us to perceive 'truths' that rest beneath the veneer of certainty created by the social and political frameworks in which we exist. It is to this spirit of questioning and adapting which literature re-awakens our minds, and in turn, allows us to reformulate our perceptions of the law as not something certain and omnipotent, but rather as a process of discovery (just like any other human institution) in search of the key to the most noble human ambition - the attainment of justice.

Unlike White, however, Posner confines the extent to which literature aids law to situations in which the reading of literature can teach the legal analyst certain 'craft values' (such as meticulousness, impartiality and concreteness) and certain 'rhetorical tricks' (which can make an argument more persuasive than its merits warrant). This absence of any greater and more fundamental connection between the two disciplines may be accounted for by considering Posner's conservative-economics perspective which prevents him from entering a discussion or forwarding an opinion lacking any formal economic foundations. And since any comparison of law and literature in terms of the fundamentals of language and our understanding of the world is based on a 'humanistic' rather than an 'economics' appreciation of existence, Posner must of necessity excuse himself from the discussion. By implication, Posner's view of reality appears to be one in which a clear causal sequence runs

---

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

through all human actions, allowing analysts in all disciplines to account for such actions in concrete (economics-based) terminology, while any actions not reducible to such terms are best left unaccounted for. In this sense, Posner (and other 'Law and Literature' theorists) could be criticised for distancing themselves from the mire of uncertainty through which 'Law as Literature' scholars are prepared to trudge in search of answers. Rather than join the fray, Posner maintains a conviction in the untarnished 'sense' present in his line of argument. However, what he overlooks is that the human condition (by its very nature) tarnishes the appeal of 'sense' through its inherent 'sensibility'. It is this latter element which is missing as a vital thread throughout Posner's argument. Nonetheless, Posner's perspective of the law-literature relationship provides a suitable point of entry into the discussion of the topic, if only for his logical reasoning, his conversational tone and his interesting insights (even if one does not agree with them). Moreover, his views provide the perfect foundation for an analysis of more complex and controversial approaches to law-literature interaction.

Furthermore, White asserts that rather than seeking to integrate law and literature, Posner's primary premise is to 'show up' their differences and incompatibility. By so doing, however, Posner is obliged to analyse them as if they are self-contained fields of thought offering us different findings based upon their different objectives. Yet, White maintains that this is not the correct way in which to approach the debate, since literature does not offer us findings ("as though it were a kind of social or natural science"),<sup>211</sup> rather it engages and transforms the mind in certain ways. Thus, White criticises Posner's framing of his fundamental enquiry, namely - what the field of literature has to teach the law - as being a trivialisation of the complexities of the symbiotic relationship in existence. The enquiry to be embarked upon should, according to White, rather be - what meaning and value can a literary education have on a legal scholar? The answers to such an enquiry being neither logical nor 'scientific', but based upon the individual's willingness to engage with texts and increase his understanding by re-evaluating his perspective. Not only is this a far more interesting concern for the purposes of academic debate, but it also adds a deeper dimension to the intellectual kudos around law-literature philosophy<sup>212</sup> positioning it as a discipline of great impact and potential

---

<sup>211</sup> Idem at 2028.

<sup>212</sup> The use of 'philosophy' is explicit in this context and is used to connote a way of thinking embodied in my understanding of law and literature as mirrors of human thought. Whereas, the terms law-literature 'movement' or 'debate' are umbrella terms relating to the divergent philosophies and understandings of scholars relating to the union of the two disciplines.

in relation to the study of law, while simultaneously refocusing our understanding of law by encouraging us to reconsider our preconceived notions of the purpose and aims of law.

Peter Teachout<sup>213</sup> is highly complementary of White's approach to law and literature, and both men are equally critical of what they regard as "the disintegrative tendencies underlying the effort by some economic theorists to transform the language of legal discourse into the terms of utilitarian cost-benefit calculus".<sup>214</sup> In this regard Teachout asserts that Posner's jurisprudential approach towards legal reasoning and interpretation corrodes the complexities and integrity of the whole legal process, not least because it "leaves out entirely the central fact of individual human suffering".<sup>215</sup> Consequently, Posner's vision "is one in which the rhetoric of expediency and self-interest would become the exclusive rhetoric for explanation and justification of the decisions we make".<sup>216</sup>

In contrast to Posner's market-based legal vision lies the opposite extreme of communitarianism whose central theme represents an attack on what it perceives to be the reductionist tendencies of such market-orientated approach together with a naive vision of a reconstituted existence in which 'the Self' and community are joined in a coherent oneness. This approach, therefore, focuses on the establishment of an existence "in which the bond of shared values would be so great that the need for law itself would simply fall away".<sup>217</sup> Moreover, Teachout points out that the central concerns of communitarianism<sup>218</sup> are effectively the very same ones which concern White; however, in Teachout's opinion while the communitarian vision fails, White's succeeds, and he thus endeavours to establish the reason for this ironical discrepancy by analysing the arguments of a great communitarian theoretician, Roberto Unger.

According to Teachout, Unger appreciates the fact that a liberally-biased society will not perse result in a coherent vision of reality. Thus, Unger seeks to attain a theoretical fusion of

---

<sup>213</sup> PR Teachout 'Words Beyond Theory' (Book Review) (1985) 83 *Michigan Law Review* 849.

<sup>214</sup> *Idem* at 851.

<sup>215</sup> *Idem* at 882.

<sup>216</sup> *Ibid.* However, it is important to note that Teachout does not disapprove of Posner's reliance upon economic theory per se (since Teachout approves of White's stance which maintains that a certain level of efficiency and narcissism have a role to play in life), but rather that he merely disagrees with the extremes to which Posner employs it.

<sup>217</sup> *Idem* at 884.

<sup>218</sup> i.e. "the establishment of a truly integrated ethic for self and culture": *Ibid.*

acknowledging these elements and working through them, it is White's assertion that some 'unity' will be found and justice achieved.

However, in attempting to connect the fictional with the factual in some 'unity' of existence, it could be argued that White is embarking upon exactly the same impossibility of task of which he accuses Unger. This is because the two concepts (i.e. literature and law) are perceivably distinct in their perspectives of reality and hence require different vocabularies for their expression. However, in response to this, while the distinctiveness of the two discourses is undeniable, this should not, however, preclude the persuasive potency of their unity owing to the fact that both disciplines are structured around a common goal (the attainment of justice) and communicated through a mutual medium (language). In fact, I would submit that the unity of their divergent perspectives through interdisciplinary study provides one with a more richly textured appreciation of the construction of language and the potential for justice. In essence, what such 'unity of existence' symbolises is an act of hope along our journey of human experience.

#### (b) A Poethical Perspective

Richard Weisberg<sup>224</sup> maintains that the merger of "form and substance, sound and sense"<sup>225</sup> within the legal system inevitably results in the attainment of a just system of law. This is because there is (according to Weisberg) a unity of meaning between the use of words in a particular context and the substance imparted by those words. In this regard, therefore, "words do not translate the thought of justice, words are justice, and words can be the absence of justice".<sup>226</sup> Within this context, therefore, Weisberg contemplates a dimension of

---

<sup>224</sup> Richard Weisberg *Poethics and other Strategies of Law and Literature* (1992), hereafter referred to as *Poethics*.

<sup>225</sup> *Idem* at 5.

<sup>226</sup> *Idem* at 6. In a similar vein, Paul Henle *Language, Thought and Culture* (1958), as reprinted in *Law, Language and Ethics* (1996) WR Bishin, CD Stone (eds) at 159 argues that language is generally regarded as a "transparent medium for the transmission of thought" because people tend to regard it as a facilitator for the efficient expression of our desires, thoughts and beliefs. However, Henle agrees with Edward Sapir's analysis of the relationship between language and experience, namely, that language actually defines such experience "by reason of its formal completeness and because of our unconscious projection of its implicit expectations into the field of experience". Thus, Henle maintains that language (more specifically one's use of a particular discursive vocabulary) influences one's perceptions, and therefore helps to define one's understanding of the world and of oneself. In Henle's opinion these perceptions are created from the fusion of environmental factors together with one's

'fit' (unrelated to that espoused by Dworkin) between the use of words within a legal pronouncement and the desire for justice towards which they strive.

This unification of form and substance to which Richard Weisberg adheres was initially posited by Justice Benjamin Cardozo,<sup>227</sup> and appears to stand in stark contrast to the notion that the outcome of a particular case must take precedence over the linguistic components which produce it, since a decision may be 'well crafted' but might lead to unjust results. However, Weisberg alleges that this concern over the possible incompatible desires of form and substance is groundless. The reasons for this are threefold. First, that a judicial decision cannot be alienated from the language in which it is expressed, without some modification of meaning. Secondly, that no judicial opinion which harbours an erroneous outcome has ever been 'well crafted'. And thirdly, that even highly esteemed judicial statements will lose potency over time should they fail to correlate 'sound and sense' into their conclusions.<sup>228</sup> In essence, "the years have not changed the reality of law : for better or worse, it is utterly dependant on language; better, it is, utterly, language".<sup>229</sup>

These factors constitute the poetic message with which Weisberg deems legal texts and oratory to be infused, by virtue of their dependence on language. Moreover, the extent to which such method encourages the harmonious synergy of form and substance dictates the artistic mastery of the legal text (or judgement) and its subsequent intellectual value. Yet, in order to attain the ends of justice, a further enquiry into the poetic substance of the legal text is required. This journey into 'poethics' is initially embarked upon through the medium of literary works 'about' law,<sup>230</sup> but extends to encompass "any well-crafted story - whatever its subject matter - [which] uncovers for the lawyer the inevitable primacy of the poetic method to law";<sup>231</sup> and ultimately, it is within this broader arena of literary works that Weisberg believes the law (and more specifically, its legal agents) can arrive at a better sense of justice having peered through a literary "lens" to discover how legal agents communicate, how they relate to marginalised elements/discourses in society, how they reason, and how they 'feel'.<sup>232</sup>

---

"mental set" (i.e. the way in which we have been conditioned to experience reality by means of cultural and societal pressures).

<sup>227</sup> B Cardozo *Selected Writings* (1924).

<sup>228</sup> Richard Weisberg at 7.

<sup>229</sup> Idem at 10.

<sup>230</sup> i.e. What I refer to as 'Law in Literature'.

<sup>231</sup> Richard Weisberg at 34.

<sup>232</sup> Idem at 35.

In this regard, Weisberg is adamant that the canon of “great [literary] books”<sup>233</sup> be retained, despite the insistence of many feminists that such canon should be overturned and replaced with one which is more partial to minority discourses and perceptions. The reason for this rests in Weisberg's belief that all attacks levelled against the literary canonical structure emanate from those who feel unduly threatened by it when, in fact, such a canon of ‘great books’ also “renders comprehensible an often relativistic postmodern program. So, in addition to providing what might be called remedial training to people not responsible for having read so little, law and literature expands their sensitivity to more contemporary fads”.<sup>234</sup> Weisberg goes on to emphasise his point by stating that “Shakespeare says more in one play than all the rest of English speakers combined ... [therefore] ... I do not think the case has been made for law and literature's abandoning the canon just because some feminists insist we do so”.<sup>235</sup> Yet, sweeping statements such as this cannot alone detract attention from Weisberg's inability to effectively counter feminist allegations. For the fact still remains that the ‘great books’ to which Weisberg refers are founded in a male centre of consciousness which denies all other marginalised experience value and voice. And the fact remains that without the inclusion of marginalised discourses into his canon of ‘great books’, Weisberg remains unable to pragmatically achieve the just ideals which his poethical theory seeks. This is due to the fact that in order to attain justice the poethical tradition requires ‘unity’ (in effect, some sort of community of law-literature understanding), yet Weisberg confines it (i.e. the ‘unity’) to an exclusively male discourse. Taken to its logical conclusion, therefore, the result can be seen as the attainment of an exclusively ‘male justice’, nothing more.

While Weisberg lauds White's many efforts to ennoble the legal process through a steady erosion of its bureaucratic and ‘scientific’ foundations, he (Weisberg) is sceptical of the supremacy of rhetoric with which White seeks to replace them. This sense of dread which Weisberg feels relates back to White's foundational premiss of the ambiguity of rhetoric. Thus, while White claims that such rhetorical fluidity positively engages (rather than negatively illustrates) the ‘radical uncertainties’ of human existence,<sup>236</sup> Weisberg adopts a more sceptical stance regarding the integrity of rhetoric. This is based upon Weisberg's assertion that human history (particularly that of the twentieth century) has witnessed the vulgar abuse and destructive manipulation of human aspirations through the medium of

---

<sup>233</sup> Idem at 117.

<sup>234</sup> Idem at 121.

<sup>235</sup> Idem at 122.

rhetoric. In essence, a schism between ethics and rhetoric, which Weisberg believes only his system of 'poethics' can effectively re-establish. Therefore, for this reason Weisberg cannot abide by White's (arguably inconsistent) conception which "at one and the same time asserts the musicality of justice and also its ethics" through the medium of rhetoric.<sup>237</sup> Furthermore, the chief area of concern for Weisberg lies in the fact that this evolutionary metamorphosis as envisaged by White, does not appear to be grounded in principles of justice or some innate sense of social order, and is rather based upon "the already established discourse of the matter at hand".<sup>238</sup> Weisberg thus perceives White's frame of reference to be one in which "the good judge manages to hear all of the sides of that talk and then to create a new text. The text differs from the earlier discourse, just as a translation differs from its 'original', yet it is always responsive to it".<sup>239</sup> Weisberg thus finds himself unable to project any ethical dimension onto White's rhetorical system. Moreover, he finds great discomfort in White's tacit condonation of the ability of some rhetoricians to incisively posit a particular view without necessarily retaining an allegiance to the text. Therefore, in Weisberg's view "always of more importance to White than an honest act of communication is any act, for it is the absence of words, and that alone, that his system cannot abide".<sup>240</sup> Related to this concern is Weisberg's assertion that "White also disregards the probability that the ensconced 'translator' (the authoritative lawyer or judge) simply has no interest whatsoever in inviting disempowered outsiders into the discursive arena".<sup>241</sup> However, as already mentioned, Weisberg's own male-dominated 'poethical' framework can also be seen to deny such marginalised groups access to the "discursive arena".

The formation of 'poethics' thus represents Weisberg's attempt to structure law-literature co-existence along ethical lines which, in turn, creates a superstructure in which justice prevails. Moreover, in this context, 'poethics' can be seen to contain four main component parts.<sup>242</sup> First, the primary desire to infuse the law and legal thinking with an ethical bias by

---

<sup>236</sup> JB White *Heracles' Bow* (1985) at 40.

<sup>237</sup> Richard Weisberg loc cit at 246.

<sup>238</sup> Idem at 225.

<sup>239</sup> Idem at 225.

<sup>240</sup> Idem at 226

<sup>241</sup> Idem at 226.

<sup>242</sup> As enumerated by Ian Ward 'From Literature to Ethics : The Strategies and Ambitions of Law and Literature' (1994) 14 *Oxford Journal of Legal Studies* 389, hereafter referred to as *From Literature to Ethics*.

means of a literary perspective, coupled with the revitalisation of political ethics.<sup>243</sup> Secondly, the observance of literary formalistic techniques (in spite of present deconstructionist trends) through an appreciation of the harmony between form and substance.<sup>244</sup> Thirdly, an analysis of the sameness between "the power and politics of literary texts, and the corresponding power and politics of legal texts".<sup>245</sup> And finally, the educative ambition of law-literature which bolsters its ethical dimension. However, relating back to the important ethical dimension at the core of Weisberg's framework, Ian Ward makes certain interesting observations which are worth quoting at length:-

"Literature is ethical because language is ethical. I have no wish to doubt this assertion. If literature did not demand of a student the appreciation of ethical issues, and thus the creative understanding of them, there would be little point in suggesting that they should be read, at least not as a means of supplementing a legal education. The problem lies in trying to identify the point where ethics finishes and where politics begins, and of course, whether this point is ever totally distinguishable ... What Weisberg's book [Poethics] does, more than anything perhaps, is reveal an essential paradox common to all jurisprudential writings; the near impossibility of writing about law theoretically without introducing politics in the guise of ethics."<sup>246</sup>

Therefore, while Weisberg maintains the autonomy of ethical endeavours from the influence of political opinions, Ward incisively pierces Weisberg's own argument to reveal his political biases by reference to three areas of discussion. The first area relates to the Holocaust which Weisberg discusses on the grounds of the ethical concerns which it raises. However, as Ward notes, while the lapse of time might lull one into the belief that the spectre of genocide over 50 years ago has transcended political confines, one should bear in mind that such a process bears unfortunate similarities to the extermination of ethnic groups in the ex-Yugoslavia within the last five years. The second area of debate revolves around misogyny which Weisberg labels as ethically immoral and intolerable. However, Ward, once again, maintains that Weisberg's allegations are based upon the tacit premises that misogyny is also politically unacceptable from a liberal Western perspective, since in Kantian terms it undermines "the

---

<sup>243</sup> In this regard, Richard Weisberg looks to the arena of 'Law in Literature'.

<sup>244</sup> As Ward notes in *From Literature to Ethics* at 393 "literary formalism [according to Richard Weisberg], demands a return to the text and not the reader as the centrepiece of the literary enterprise ... Only literary formalism can foster the return of a literary ethics, and then, in turn, a postmodern legal ethics".

<sup>245</sup> Ibid. In this regard, Ward notes that it is "[Richard Weisberg's] explicit assertion that interpretation is constrained by its own normative integrity".

<sup>246</sup> Idem at 395.

equality of human dignity”.<sup>247</sup> And lastly, Weisberg's critique of “Christian theology, whose philosophy and culture he [Weisberg] concludes could only rise to prominence at the expense of the Aristotelian concept of justice”,<sup>248</sup> which Ward regards as also providing a clear (albeit tacit) indication of Weisberg's own political perspective.

While Weisberg's ‘poethical’ vision might best be accounted for in terms of a ‘polethical’ (i.e. political-ethical) discourse, there nonetheless remains an ambivalence between Weisberg's references to justice and the competence of any discourse to attain it. In this regard Weisberg himself notes that “[Richard] Poirier says it might make more sense to view literature as a model of postmodernist confusion [rather] than as a cure for it”.<sup>249</sup> So, too, in the opinion of William Gaddis,<sup>250</sup> as people turn to literature or law in a vain attempt to rid themselves of their corrupt societal influences, they are simply met by contorted grammatical structures which serve to confuse and confound rather than redeem.<sup>251</sup> In spite of the linguistic and conceptual chaos, however, Weisberg holds fast to his belief that sense can be made of it and justice achieved by means of his ‘poethical’ foundations, (which are themselves steeped in the Romantic notion that words themselves create knowledge).

It is in relation to this ‘poethical’ concept of justice that John Fisher<sup>252</sup> finds himself at odds with Weisberg. For while Weisberg asserts that the term ‘justice’ symbolises the connection of subjective perspectives into a mutual vocabulary; Fisher, in contrast, maintains that Weisberg's assertion that “beautiful language is intimately connected to ethics and empathy”<sup>253</sup> is problematic since in associating beautify speech with justice, one must of necessity then question what makes speech beautiful in the first place? In this regard, Fisher notes that Weisberg's essence of ‘beauty’ is determined by reference to the ‘great writers’; however (as I have already intimated) this proves unsatisfactory since one is of necessity confining one's understanding to ‘male justice’ within such a restrictive cannon. Fisher, therefore, posits a more culturally inclusive appreciating of the literary process which steers

---

<sup>247</sup> Idem at 396. While in certain Eastern and African cultures misogyny proves to be an acceptable (if not foundational) practice of the society.

<sup>248</sup> Idem at 397.

<sup>249</sup> Robert Weisberg ‘Taking Law Seriously’ (Book Review) (1995) 7 *Yale Journal of Law and the Humanities* 445 at 453.

<sup>250</sup> W Gaddis *A Frolic of His Own* (1994).

<sup>251</sup> These issues (amongst others) will be analysed in greater depth in the chapters of ‘Justice’ and ‘Justification’.

<sup>252</sup> J Fisher ‘Reading Literature/Reading Law : Is there a Literary Jurisprudence’ (1993) 72(1) *Texas Law Review* 135.

clear of problematic notions such as 'beauty', and strives rather to engage a broader spectrum of culturally diverse perspectives in a community of understanding, which he maintains will enable a "true vision of justice to emerge".<sup>254</sup> This stems from Fisher's assertion that the claims of 'poethics' are "more appropriate for the complex, self-referential nature of poetic language than for the more functional language called for in judicial opinions".<sup>255</sup>

Nonetheless, despite Weisberg's Nietzschean bias (by virtue of his insistence that "textual meanings are indeterminate"),<sup>256</sup> he asserts that this in no way denies the possibility of justice. According to Weisberg, therefore, it is only as a result of the "resentful inversion of the notions of punishment and, more generally, justice"<sup>257</sup> that a spirit of 'ressentiment' has been allowed to prevail during the nineteenth century, which, in turn, has perverted the notion of justice,<sup>258</sup> and created a conceptual mire which only 'poethics' can pierce and reformulate into a just ideal.

### (c) Interactive Communities of Understandings

Robin West<sup>259</sup> approves of JB White's literary bias in the formulation and transformation of communities of understanding by means of the centrality of texts.<sup>260</sup> Therefore, West readily acknowledges that this essential textual focus impacts upon the "form and substance of a community's moral and social life" which, of necessity, then demands a fundamental reassessment of the purpose of legal texts, inasmuch as "we ought to think and read legal

---

<sup>253</sup> Idem at 146.

<sup>254</sup> Fisher loc cit at 139.

<sup>255</sup> Fisher loc cit at 160.

<sup>256</sup> Richard Weisberg 'On the Use and Abuse of Nietzsche for Modern Constitutional Theory' (1988) *Interpreting Law and Literature* at 181.

<sup>257</sup> Idem at 183.

<sup>258</sup> Nietzsche situates the concept of justice in the active emotions of aggression, strength, boldness and nobility (as opposed to the reactive emotions), since "to be just is a positive attitude": Idem at 183.

<sup>259</sup> R West 'Communities, Texts and Law : Reflections on the Law and Literature Movement' (1988) 1 *Yale Journal of Law and the Humanities* 129, hereafter referred to as *Reflections on the Law*.

<sup>260</sup> As White himself states "Every text is written in a language, and the language always entails commitments to views of the world - of one's reader, and of others - with which the writer must somehow come to terms ... Every text thus creates a community, and it is responsible for the community it creates. This means that every

texts, not as political or positive commands, but as texts which both constitute and constrain the community's moral commitments".<sup>261</sup> In so doing, White and West maintain that one arrives at an ethical understanding of justice which is rooted in the interpretative capacities of the reader to draw together the textual community, thereby ensuring that the interpreter bears a measure of responsibility for the manner in which the ideals of justice are reflected. However, it is also in regard to this factor, that West criticizes White's interpretative competency, based upon two elements. First, that in West's estimation, White's 'textual analyst' is excessively bound by the very texts he wishes to analyse, therefore, resulting in a "social criticism which is constrained and stunted by the texts it criticizes".<sup>262</sup> And secondly, that White's textual canon which seeks to define and constitute a community does so only in the interests of the existing discursive participants.<sup>263</sup> Therefore, in defining one's community in this restricted 'Whitean' sense, one of necessity arrives at an incomplete and inconsequent interpretation of justice, marked more by its exclusion, objectification and violation of societal discourses than for its creation of an inclusive vision of justice. It is, thus, on this point that West seeks to distance herself from White and develop a more effective method of approaching interpretative communities.

Rather than expose the manner in which communities are formed or the means of creating better ones in terms of a 'Whitean' textual framework, therefore, West seeks to approach the issue from within her understanding of the interactive catalyst around which one's sense of community is centred and develops. In other words, West appreciates that our individual sense of community is forged from our interaction with those around us, and the extent to which we impose, subordinate or compromise our views in respect of theirs. It is, thus, the extremes to which we choose to go in respect of our own discursive desires which determine the extent of our community's interactive nature and hence integrity. As West notes, "the moral worth of these communities depends entirely on the quality of this affective

---

text is at once an ethical and a cultural performance": See JB White 'Law and literature : No Manifesto' (1988) 39 *Mercer Law Review* 739 at 745.

<sup>261</sup> West *Reflections on the Law* at 131.

<sup>262</sup> *Idem* at 138.

<sup>263</sup> On this point West is particularly harsh (and justifiably so) of White's treatment of the 'outsiders', asserting that "because they do not participate as subjects in the processes of critique and self transformation, they become literally objectified ... because they do not speak, they are objects; because they are objects they do not speak, and as non-speakers they are outside the community": *Idem* at 140.

interaction".<sup>264</sup> This conception of community is, therefore, far greater in its extent than mere textual communities for primarily two reasons. First, based upon the fact that interactive communities "include those we violate as well as those with whom we textually communicate".<sup>265</sup> Secondly, such communities (in addition to acknowledging our textual interconnectedness) also embody our non-textual and non-verbal attachment to others.<sup>266</sup> Therefore, the manner in which such interactive communities evolve and improve is not necessarily confined to the channels which seek to create a deeper awareness of our cultural texts. While, West concedes that such a method is of prime importance for the understanding of textual communities, we must go beyond the transformation of the text and seek to transform ourselves if we wish to better comprehend the interactive community. As West remarks – "we need to transform our communities of violence, terrorism, and oppression into communities of compassion and respect. The way to do so is by improving the quality of our affective interaction with others".<sup>267</sup>

Therefore, West develops White's notion of community beyond a sense of moral textualism and onto a broader interactive sphere in which even the textually marginalised are included. In this regard, law and literature are seen as embodying more than textual communities which "reflect and constitute as well as convey our moral and cultural traditions",<sup>268</sup> and are also regarded as interactive communities conveying a sense of "violence, violation, compassion, nurturance and respect"<sup>269</sup> amongst individuals. Moreover, West alleges that our understanding of a specific law or legal decision may vary according to whether we perceive it from the perspective of a textual community or an interactive one. This is because while a statute or judicial decision may textually represent a noble cultural ideal for its constituents (i.e. the textual community) it may simultaneously operate as an oppressive force in respect of members of the interactive community who are textually excluded. For this reason, West

---

<sup>264</sup> Idem at 146.

<sup>265</sup> Idem at 147.

<sup>266</sup> This results in a far greater potential in respect of the interpretative process since (as West indicates) often factors beyond textual cohesion bind particular communities. In the case of oppressive communities, for example, violence predominates as a cohesive influence while "words themselves - not the texts they form - actively deprive or speciously grant the slaves [or any oppressed groups] their humanity - whether or not they express their deprivation textually": Idem at 149. Likewise, moral communities of respect are chiefly bound by non-textual methods of understanding, such as, intimacy, passion, trust and even sadness.

<sup>267</sup> Idem at 147.

<sup>268</sup> Idem at 154.

maintains that law-literature study contains the invaluable potential for improving our appreciation of the textual community (through the act of reading) which, in turn, acts as the foundation upon which the interactive community is constructed (though the act of understanding the narratives of the textually excluded). The ultimate ambition of such a vision therefore appears to be the hope that through a willingness to engage with the narratives of the interactive community, the textual community will expand and the importance of literature will become entrenched in the life of the law.<sup>270</sup>

Melissa Harrison<sup>271</sup> notes, however, that the general notion of 'community' is not something which is readily associated with either literary or legal studies. She bases this on Robin West's thesis that the defining experience in both disciplines is that of the male perception which is by its very nature rooted in alienation and separation.<sup>272</sup> The effect of this is that the joint goal of literature and law (specifically jurisprudence) is seen as the promotion of individual autonomy at practically all costs. Yet, as Harrison indicates, such a perspective fails to account for "the subjective reality and the contradictions of women's lives".<sup>273</sup> This female perspective consists of a sense of connection<sup>274</sup> which goes unacknowledged in terms of the male norm; and it is for this reason that Harrison has sought to take practical steps in the law school environment to reverse what she regards as an unnatural state of affairs.<sup>275</sup>

---

269 Ibid.

270 As things stand at present, however, West points out that the fields of 'Law and Economics' and 'Law and Literature' (in the general sense) achieve the same result from different perspectives. The economics perspective focuses on "preference and choice", while the literary concern revolves around "promulgation of texts and interpretations" as well as "a commitment to canonical culture". The result of both disciplines nonetheless being the production of "an intensely conservative commitment to the values and mainstays of the status quo": Extract from the *Fate of Law* (1990) at 34-45, as quoted by West (1990) 99 *Yale Law Journal* 1936.

271 M Harrison 'A Time of Passionate Learning : Using Feminism, Law, and Literature to Create a learning Community' (1993) 60 *Tennessee Law Review* 393.

272 West refers to this phenomenon as the 'separation thesis': See R West 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1 at 2.

273 Harrison loc cit at 397.

274 Connection both "materially (through pregnancy, intercourse, and breast-feeding) and existentially (through moral and practical life)": Ibid.

275 Harrison who is attached to the faculty of law at the University of Montana established a course on feminist theory and the law in 1992. The focus of the course was structured on a study of feminism, law, and literature, and sought to reduce the alienation experienced by many female law students by creating a "connection between the law and the rest of their lives": Idem at 400.

To this end Harrison has chosen to incorporate a literary focus together with a feminist vision of law so as to redefine reality in terms of an integration of experience. In this regard, she maintains that the use of literature is justified on two grounds. First, in line with West, Harrison asserts that literature and literary narratives, when used in legal studies, have the ability to instil a sense of empathic understanding in one, through an acknowledgement of 'the other'. In turn, this bolsters feminist legal theory (which posits an inclusive vision of existence in which theory and practice merge) by including marginalised discourses in the reader's scope of experience. Secondly, with particular reference to female marginalisation in the legal canon, feminist literature ensures that women have the opportunity of satisfying their inherent need to be a part of a 'connected' community of other women. In so doing, it is argued that they can foster a 'bilingualism'<sup>276</sup> or exchange between the language of their experience and the dominant language which defines all norms and standards,<sup>277</sup> and arrive at a sense of completeness. Most importantly, this symbiosis allows marginalised stories to acquire a fundamental legitimacy tantamount to that which is wielded by entrenched canonical theories, thereby enabling such stories to, at times, take precedence over the theoretical canon if justice will be best served in this manner.

While I would rather critique law-literature scholars in terms of their individual contribution towards a greater understanding in the field, the concept of communities of understanding inevitably leads into an analysis of feminist legal theory in general. This is because the majority of scholars who promote the concept of communities of understanding (whether they be textual or interactive) happen to be feminist proponents. For this reason I am obliged to collapse my own 'Law and Literature' and 'Law as Literature' dichotomy to illustrate certain underlying notions inherent in feminist jurisprudence generally.

Regarding the notion of justice, Anne Scales<sup>278</sup> maintains that the sense of 'objective reality' as posited by formalism is simply untrue since abstract universality is unsuited to the law whose goals are, after all, social and not merely theoretical. However, Scales is adamant that feminist theory must not respond to formalism by constructing a solipsistic system of its own

---

<sup>276</sup> This term was first coined by Shauna Van Praagh 'Stories in Law School : An Essay on Language, Participation, and the Power of Legal Education' (1992) 2 *Columbia Journal of Gender and Law* 111 at 141.

<sup>277</sup> i.e. The language of authority in the legal and literary canon, which in modern Western society is invariably defined in terms of the perceptions of the middle to upper-class white male.

to replace it. Rather the solution lies outside the bounds of an objective-subjective divide, and within the realm of principled adjudication and orderly co-existence. Thus, feminist legal theory should refocus the law on its principle task, namely to reinterpret differences and provide morally just decisions in the light of real human conflicts.<sup>279</sup> Consequently, the feminist goal of discerning domination requires the law to recognise the psychological substructures of gender which, in turn, requires us to disregard the formalistic notion that the success of a legal system must be ascribed to a principle of detachment.

However, having rejected the notion that for a legal system to be effective it requires a completely objective perspective, Scales concedes that there are certain qualities inherent in the notion of a just legal system. For such a legal system to exist there must of necessity be discernible elements of reason and fairness present. Notwithstanding this, neither element depends on objectivity per se, and instead relies on the redefinition of terms and the inevitability of gender differentiation to arrive at the moral crux of human conflict. In essence, therefore, the formalist tendency of equating humankind's most noble aspirations with objectivity<sup>280</sup> and neutrality must be discarded in favour of a principled standard of equality.<sup>281</sup>

It is plain that feminist jurisprudence entails a radical shift away from law reform, inasmuch as it provides a different perspective of equality based outside the male-dominated legal culture, while law reform seeks to work within the existing legal framework. Furthermore, feminism provides one with a very incisive critique of formalism's weaknesses by uncovering what is at best its stubborn male-centredness, and, at worst, its misogynistic hypocrisy. However, having critiqued formalism, feminist jurisprudence appears to be divided as to its

---

<sup>278</sup> A Scales 'The Emergence of Feminist Jurisprudence : An Essay' (1986) 95 *Yale Law Journal* 1373.

<sup>279</sup> Scales refers to this feminist perspective as 'concrete universality' in contrast to the 'abstract universality' (which disguises differences beneath a veil of apparent objectivity) put forward by formalism: *Idem* at 1388.

<sup>280</sup> This is inherent in the male sense of individual alienation, in contrast to the female capacity of individual connectedness. However, this in no way suggests that male experience is fundamentally a vision of benign objectivity.

<sup>281</sup> To this end, Carol Smart suggests that only women should be entitled to use the argument of equality in an attempt to reach such a principled standard, while men should be estopped from raising such arguments in the light of the male bias inherent in the legal system: See Smart *Feminism and the Power of Law* (1990) Chapter 4. However, I find such a solution unsatisfactory since it brings us no nearer to an

goals,<sup>282</sup> and often vague as to the means of attaining its objectives. I would venture to suggest that the reason for this has a lot to do with the very label – ‘feminism’, which creates an immediate polarisation between the genders and thereby results in an even wider schism between male and female perceptions, causing unnecessary antagonism by forcing people to adopt either extreme of the debate (i.e. formalism or feminism) purely on the basis of gender. In effect, one, therefore, arrives at a situation in which people with different desires and ambitions (in law-literature study, or any other jurisprudential endeavour) are grouped together on the basis of gender, as if this were the sole criterion for perception.

While a name change alone is unlikely to change much, some satisfactory solution may, however, be reached if one looks to the essence of feminist jurisprudence, rather than its outward manifestations and varied interpretations. Essentially, feminism seeks to accord legitimacy to a more subjective and less formalistic approach towards legal interpretation by the judiciary, as well as creating an awareness of the inherent male-bias within present legal systems, and the need to acknowledge and reform gendered perspectives. On this basis, it appears to me that feminist jurisprudence should make itself the rallying point for a large range of minority and marginalised groups whose voices go unheard in the presence of the dominant legal discourse.<sup>283</sup> In turn, two alterations would be required of feminist jurisprudence, in my mind, first that it go beyond a mere reforming of gendered perspectives, and include racial, religious, cultural, and sexual perspectives, as well; and secondly, that it achieve such results through a more socially neutral title, such as ‘minoritarianism’, which will have the effect of making the feminist ideology more accessible to a wider range of interest groups.<sup>284</sup>

---

understanding of what constitutes a principled standard of equality, and, in fact, proves to be contradictory since it argues for equality in certain lights but not others.

<sup>282</sup> Hence my division of particular feminist scholars between ‘Law and Literature’ and ‘Law as Literature’ proponents based upon their individual contributions to law-literature study, rather than the common theory which they all espouse.

<sup>283</sup> Such minority groups might include people of colour, people of different religious and cultural persuasions, and people of different sexual orientations. All these groups will benefit from a more subjective approach to legal interpretation as argued for by feminism, since their individuality will be accorded status and due respect.

<sup>284</sup> It should be noted that two feminist scholars support such a redefined notion of feminist ideology : namely, Anne Dailey ‘Feminism’s Return to Liberalism’ (1993) 102 *Yale Law Review* 1265, and Joan Williams ‘Feminism and Post-Structuralism’ (1990) 88 *Michigan Law Review* 1776.

Therefore, while Robin West may have coined the phrase 'interactive communities', I believe that in order for it to have the universal appeal which it deserves, it must of necessity be distanced from 'feminism' (technically understood), and hence applied in a less theory-specific manner. Only in this way will one be able to attain the levels of understanding alluded to by West and consequently arrive at a truly 'interactive community' in whose presence the possibility of justice is a reality.

**(d) Redefining our Reality**

Gretchen Craft<sup>285</sup> asserts that law and literature are bound together by a fundamental fear of the unknown and the desire to control future events in some way. Moreover, Craft astutely notes that this sense of 'dread' is shared by all human endeavours (be they medical, religious, scientific, et cetera) based upon the unpredictability of the human condition (all that we know for certain is the sequence of three events, namely our birth, our life, and our death - what occurs before, during, and after them, however, remains a profound mystery). Therefore, all disciplines are, in Craft's opinion, focused on providing "a system for making sense of what might happen and for establishing rules to shape or predict possible outcomes".<sup>286</sup> It is, accordingly, this anxiety for what the future holds that law and literature each seek to allay through their own perceptions of reality (and the human condition therein), and their individual channels of communication. In this regard, Craft maintains that literature "captures and suspends fear, allowing readers to contemplate the perils of arbitrary fate", while the law features as "an antidote to fate" by interposing its judgement and explanation on events *ex post facto*.<sup>287</sup> Moreover, since the law cannot make any overt allusions to its own insecurity,<sup>288</sup> the arena of law-literature interaction provides an effective means of revealing the true state of affairs beneath the guise of benign certainty which legal discourse projects. Nonetheless, Craft's understanding cannot be reduced to a dichotomy between 'deceitful' law and 'sublime' literature, for, in effect, both disciplines necessarily provide some intellectual solace to humanity by eliminating the inessential and filtering the chaos of

---

<sup>285</sup> GA Craft 'The Persistence of Dread in Law and Literature' (1992) 102 *Yale Law Journal* 521.

<sup>286</sup> *Idem* at 522.

<sup>287</sup> *Ibid.*

<sup>288</sup> This is based upon the fact that the law of necessity advocates certainty and predictability so as to instil in its subjects (i.e. humankind) an unquestioning reverence for its capacity to govern human affairs.

existence into a 'coherent reality'.<sup>289</sup> In essence, therefore, they do so by placing geometrical constraints onto the organic curves of existence. As Craft states – “Literature and law winnow out unimportant, distracting details through a process of elimination that reduces human experience, and shapes it, to achieve an account endowed with certainty and meaning”.<sup>290</sup> However, whether such ‘meaning’ is ever of value depends on whether one believes that the uncertainty of existence is ever knowable, in part or whole. For without the certainty of such knowledge, meaning itself becomes an illusion. It is because of the risk of sliding into such a mire of indeterminate ‘nothingness’ that people are generally prepared to concede the existence of certain ‘givens’ as baselines on which to construct their understanding of reality. And it is on this need for meaning which law (particularly), and literature, thrive by individually asserting that they should be perceived as just such a ‘baseline’ of understanding.

This process of reductive filtration is, according to Craft, “driven by a demand for order and connections, for composition”,<sup>291</sup> and for this reason there is no denying the fact that it impacts upon the emotional poignancy of any given text. In this regard Craft maintains that, in literature, every detail which is included is significant based purely upon its incorporation in the text, thereby allowing one to explore the tacit emotional variables which underlie the text with great accuracy. In contrast, Craft views the law's exclusion of certain facts from legal texts as the basis for a fundamental distortion of the truth, since she regards the law as only having an interest in truths which provide a ‘coherent’ and ‘controlled’ outcome.<sup>292</sup> Nonetheless, while the law might muffle an event's original poignancy it still retains a certain impact.<sup>293</sup> Craft asserts that the reason for this rests on the fact that legal discourse's use of restraint actually bestows upon an event a sense of immediacy and dignity. Consequently, in

---

<sup>289</sup> Loc cit at 522.

<sup>290</sup> Idem at 525.

<sup>291</sup> Idem at 526.

<sup>292</sup> Idem at 527.

<sup>293</sup> This creation of distance between legal discourse and emotional immediacy has been the subject of much debate in itself. Karl Llewellyn *The Bramble Bush* (1991), for example, maintains that the law has a duty to prevent people (in a legal arena) being consumed by what they witness, and the most effective manner in which to achieve this is through the use of dispassionate language. So, too, Adam Smith *The Theory of Moral Sentiments* (1978) promotes the desire of legal discourse to distance itself from the horror of the events with which it deals. In contrast, Martha Minnow ‘Words and the Door to the Land of Change’ (1990) 43 *Vanderbilt Law Review* 1665 and Julius Getman ‘Voices’ (1988) 66 *Texas Law Review* 577 express concern at the law's highly structured discursive framework and its lack of regard for empathic understanding.

this manner the law is able to effectively (according to Craft) preserve people's stories and act as a record of their suffering.

Most importantly, however, in Craft's view, is the shared focus of literature and law, embodied in the desire to order the chaos of existence. In this regard, she views them as "two parts of a continuum"<sup>294</sup> approaching the dilemma from two separate points of reference - law, by analysing the ordinary and revealing the inherent dangers which lurk beneath it; and literature, by focusing on the arbitrary and suspenseful, and examining the sense of dread "as it unfolds".<sup>295</sup> By so doing, the two disciplines, combined, afford us the opportunity of controlling the arbitrary and unknown,<sup>296</sup> while also examining and possibly rationalising our fears. By imposing artificial constraints on reality, Craft believes that law and literature seek to order it in some way. Literature achieves its ambition by creating stories in a linear format (i.e. a beginning, middle, and end), while law goes about its task by means of an allegiance to principles of certainty (i.e. by promising finality on issues). However, I find that Craft's explanation regarding the linearity of literary structures is unsatisfactory, especially when one takes note of modernist and post-modernist genres which adopt techniques such as a stream of consciousness writing. Thus, in spite of such promises and motivating forces, it is difficult, in my mind, to argue with any conviction that a sense of calm can prevail through legal or literary discourses, and overcome humankind's inherent sense of uncertainty and dread.<sup>297</sup>

---

<sup>294</sup> Craft loc cit at 538.

<sup>295</sup> Idem at 539.

<sup>296</sup> At least so the law would like us to think. However, since Craft maintains that the law should not lead to arbitrary dangers being created, it consequently has no duty to punish the unavoidable or inevitable.

<sup>297</sup> As Craft herself concludes "We are exposed to fortune. Don't go into the woods at night. Don't set out from home on an icy winter's morning. Stay away from the water's edge. Don't let the children stand near the stove. Something is going to happen": See Craft loc cit at 546. Prakash Mehta, however, views the existence of doubt as having a worthy role to play in the legal process, since "texts that acknowledge the human experience of doubt in decision making can be 'beautiful'" by virtue of their honest appraisal of our very humanness: See Mehta 'An Essay on Hamlet : Emblems of Truth in Law and Literature' (1994) 83 *The Georgetown Law Journal* 165 at 167.

While Craft is absorbed by a sense of dread, John Cole<sup>298</sup> is intent on redefining the law's role in our lives by examining its function in relation to art and science, and in so doing he hopes to arrive at some understanding of law-literature interaction.

Cole begins by seeking to 'frame' (i.e. view from an external perspective) legal facts and literary fictions only to conclude, however, that while the latter is capable of being deconstructed into receding frames of reference,<sup>299</sup> the former cannot be reframed in a larger perspective since it is exceedingly difficult to project ourselves beyond its bounds.<sup>300</sup> Therefore, we are required to perceive truth (as opposed to fiction) from within a frame of reference "in which there is a Given, and language either relates to that Given in a straightforward way (and is true) or it does not (and is false)".<sup>301</sup> Prior to this notion of 'framing' (which, in essence, acknowledges the primacy of the subjective experience), Cole notes that western ideology was bolstered by three fundamental beliefs. First, that for every honest question there is only one true answer; second, that the methodology behind a 'correct solution' is 'rational in character'; and third, that such solutions are 'true universally, eternally and immutably'.<sup>302</sup> Cole refers to all forms of understanding which operate with these premises as perceiving existence through the 'Door of Or' in which meaningful statements are either true OR false, and in which the participants have no choices or responsibilities beyond declaring an assertion to be true or false. Moreover, there are no costs attached in ascertaining the truth, and consequently "no responsibility for the choices we make",<sup>303</sup> since we are reassured in the knowledge of the existence of answers to all our dilemmas. However, as Cole notes, once we acknowledge the possibility of receding frames of reference, then the search for universal truths depends on the possibility of arriving at the founding frame from whence such eternal truths emanate. Yet, the human condition has, to date, been unable to present any experiential proof of such final frame. On this basis, therefore, Cole asserts that it becomes troublesome to perceive reality through the 'Door of

---

<sup>298</sup> JO Cole 'Thoughts from the Land of And' (1988) 39 *Mercer Law Review* 907.

<sup>299</sup> i.e. Literature is always capable of being reframed in a 'larger perspective' or a "different perspective" thereby making it a controllable rather than controlling entity: See Cole *idem* at 910.

<sup>300</sup> Cole asserts that the only way in which we could achieve a framing of reality would be by means of "radical metaphysical assumptions, on which we lack agreement": *Ibid.*

<sup>301</sup> *Ibid.*

<sup>302</sup> *Idem* at 911.

<sup>303</sup> *Idem* at 912.

Or' owing to the fact that an assertion may be true from one referential focus, but false from another. It is in this state of suspended potential that all assertions are thus true AND false simultaneously.

In the 'Land of And' (as Cole chooses to refer to this state of contradictory potential) we are at once capable of 'negative capability',<sup>304</sup> as well as the obligation of making 'tragic choices'<sup>305</sup> affecting our vision of reality. In essence, the world we choose to create at times varies between an existence of "or" and the potential for "and" depending upon our particular circumstances, while "prior to that contextual creation we exist in a space where both are possible".<sup>306</sup> While frames of reference are capable of infinitely receding in the 'Land of And', Cole, however, is adamant that this should not be regarded as an indication of 'systematic uncertainty'<sup>307</sup> in which a sense of nothingness prevails. Rather, if we conceive of the process by which we restructure (i.e. frame) our world as being a circular progression in which we simultaneously define and interpret our reality, then we create "a world that makes sense to us (and only us) and makes sense in terms of the specific purposes we have in mind".<sup>308</sup> Moreover, the spectacle of receding frames in no way prohibits the formulation of distinct concepts of truth and falsehood, owing to the fact that they are merely redefined (and hence retain their dichotomous relationship) in the context of a particular frame and in relation to specific circumstances. This also invariably impacts upon language per se which is seen by Cole as "neither unproblematic nor neutral",<sup>309</sup> but as an active participant in our formulation of that which we take to be 'Given'. Therefore, language achieves the status of determinate meaning exclusively within the bounds of a particular frame of reference, and as the creation of a particular individual. In this sense, Cole propagates a deconstructionist ideology of language. For while all disciplines rely on their appearance of certainty and self-sufficiency for their legitimacy, deconstructionism erodes such claims, most notably by

---

<sup>304</sup> i.e. the phrase coined by John Keats to refer to "the state of being, in which we are capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason": Idem at 914.

<sup>305</sup> Idem at 915. 'Tragic' inasmuch as we have to choose between various possible assertions with which we wish to frame our understanding of the world, even though no single assertion has power on its own to attract our allegiance. In effect, therefore, we are obliged to conform with an inherent characteristic of the human condition, namely, the duty to make choices. However, in this situation, unlike the 'Door of Or', our choices have intensely personal consequences.

<sup>306</sup> Idem at 917.

<sup>307</sup> Ibid.

<sup>308</sup> Idem at 919.

showing that the apparent autonomy of individual disciplines is illusory, since they all retain a common reliance on language. This is perhaps the most valuable contribution of deconstructionist theory in as much as it encourages one to ask questions which reformulate the way in which we view individual disciplines and the ways in which they interact with one another. One such area of interdisciplinary endeavour has been the analysis of law-literature interaction. Consequently, deconstructionism should not be viewed as a theory which subjectivises all meaning into a morass of indeterminacy. Rather, it acknowledges the existence of an interpretative context from within whose sphere a work ought to be interpreted. What remains at issue, however, is the manner in which one should approach such contextual reading, which is, in turn, determined by the questions one poses.

Since answers are not simply available for the taking, the obligation to create them is a precondition of our existence. Regarding legal decisions, moreover, Cole believes that they epitomise the strictures of the decision-making process whose focus is governed by this “need for creating answers, and the conditions of uncertainty relatively unobscured by myths of the Given”.<sup>310</sup> In this regard, Cole defines the decision-making process within the ‘Land of And’ as a two stage development, beginning with the appointment of a particular decision-maker, who is simultaneously declared to be the ultimate arbiter and retainer of solutions, and followed by the assignment of ‘burdens’ which assist him in his duties. To this end, Cole believes that the requirement of a declaration is the principal indication of existence in the ‘Land of And’, for it signifies the acceptance of responsibility for our actions.<sup>311</sup> Moreover, the declaration of a particular decision-maker is itself contextually orientated and not permanently entrenched,<sup>312</sup> since the human condition is marked by a continual fluidity of understanding which is best served by situation-specific declarations. Cole concedes the fact that human experience is motivated by a desire to arrive at some omnipresent and ethereal declaration which governs existence. However, he notes that the search for such guiding principle through the ‘Door of Or’ creates harmful consequences by leading one on a Utopian crusade removed from the essence of existence by demanding right OR wrong, yes OR no answers. Therefore, perceptions in the ‘Land of And’ seek to echo the gentle curves of our human understanding by incorporating visions of reality so as to create

---

<sup>309</sup> Idem at 921.

<sup>310</sup> Idem at 933.

<sup>311</sup> A factor which is lacking in actions embarked upon through the ‘Door of Or’.

“the composition of a small masterpiece”,<sup>313</sup> unrelated to any ‘Given’, and chosen simply because of its ability to restore “harmony to our vision of the world”.<sup>314</sup> For this reason, Cole's appreciation of law-literature interaction is not one which conceives of ‘Law and Literature’ (since this is tantamount to pursuing understanding through the ‘Door of Or’), but is rather founded upon a sense of ‘Law as Literature’ (i.e. providing a glimpse into the ‘Land of And’), since he asserts that “There is no Science! There is no Art! There is no Law! There is only Science, Art and Law, simultaneously defining themselves and each other”.<sup>315</sup>

Led by a similar motivation to redefine our reality, James Murray<sup>316</sup> seeks to unravel the metaphoric potential of legal discourse and its impact upon the human experience. The importance of such an exploration being that the medium of metaphor is rooted in the human imagination through which it facilitates the point of connection between language per se and understanding so as to project the participant beyond the everyday and into “the poetic, the imaginative, the analogical, the emotive, the whimsical, the affective”.<sup>317</sup> In this regard, just as human beings reflect ideals which extend above mere rationality and logicity, so, too, the legal process (which is, after all, a human institution) embodies humanity's noble aspirations through metaphoric constructs. Murray notes that even “the ‘facts’ of a case are metaphorical constructs and more goes into their creation than meets the eye. The facts are not set in concrete ... The facts are created, fabricated in the classical sense”.<sup>318</sup> In a similar vein, Lawrence Douglas<sup>319</sup> asserts that literature (both fictional and factual) can act as a responsible vessel of communication, and do justice to the memory of the Holocaust. For this reason, Murray not only perceives the fluid interchange of what might crudely be termed ‘fact’ and ‘fantasy’, but he also, in effect, condenses reality to a series of metaphoric catalysts which (when engaged) allow us to glimpse essential truths which go by unseen through rational perceptions. Therefore, Murray maintains that metaphorical thought is inextricably linked to all human endeavours (and, in fact, represents their foundation), thereby making its continued

---

<sup>312</sup> Unlike the situation relating to the ‘Door of Or’, in which declarations and decision-makers take on a universal and constant dimension.

<sup>313</sup> Cole loc cit at 934.

<sup>314</sup> Idem at 935.

<sup>315</sup> Ibid.

<sup>316</sup> JE Murray ‘Understanding Law as Metaphor’ (1984) *34 Journal of Legal Education* 714.

<sup>317</sup> Idem at 718.

<sup>318</sup> Ibid.

union with the law and legal thought an absolute necessity if we wish to do justice to our human potential.

### Conclusion

The arena of 'Law as Literature' is simultaneously challenging and discomfoting. It encourages us to re-evaluate our hermeneutical understanding of the legal process and the role of law in society, while also unsettling any comfortable notions we have regarding law's inviolability and legal discourse's supremacy in relation to other discourses. Most significantly, it demands of one the recognition that the concept of 'Law and Literature' contains an inherent problem in its formulation;<sup>320</sup> and it is in this regard that it (i.e. 'Law as Literature') strives to entrench a vision in which literature and literary criticism "structure discussions on fundamental legal issues".<sup>321</sup> Moreover, 'Law as Literature' theorists tacitly support a conception of the individual as a morally autonomous being who functions within the chaos of existence,<sup>322</sup> inasmuch as mortals are seen to be 'free agents' within the divine framework. This emphasis on the individual, in turn, requires us to define people in terms of their community and context so as to make an effort towards some sense of 'connection' between 'the Self' and 'the other', which subsequently guides one's judgement in the search for greater aspirations.<sup>323</sup> However, the disturbing realisation emerges that this subtlety of individual characterisation (which has also been referred to as the 'human condition') inevitably brings to light the law's inability to cope with (let alone control) human nature, due to the relative inflexibility of the legal process in relation to the vagaries of humanity.

While 'Law as Literature' scholars try to infuse the law with literary dimensions, or (more correctly speaking) aim to rediscover the essential 'sameness' between law and literature, so that a sense of justice might be captured, and reflected in the human condition one has to question whether human experience has ever attained these levels of justice alluded to, and,

---

<sup>319</sup> Lawrence Douglas 'Wartime Lies : Securing the Holocaust in Law and Literature' (1995) 7 *Yale Journal of Law and the Humanities* 367.

<sup>320</sup> This is because the notion of 'Law and Literature' is misleading and imprecise in its assertion of the existence of two independent and largely unrelated disciplines.

<sup>321</sup> (part of a quote by Richard Weisberg) reproduced in the article by John Ayer 'The Very Idea of Law and Literature' (1987) 85 *Michigan Law Review* 895 at 896.

<sup>322</sup> In effect, no human actions are predetermined by a divine, omniscient power. This is not, however, to argue within an atheistic framework necessarily; rather, it is the result of an appreciation of divine authority as non-intrusive rather than authoritarian.

<sup>323</sup> The most sought after and noble of which is the search for justice.

in fact, whether it ever can or will arrive at this ideal. In their own ways, those scholars mentioned all claim to have the answer to the creation of a just vision of human experience. However, in the next two chapters, I propose to show how this search for 'justice' is always counterbalanced by a corresponding search for 'justification' which, in effect, ensures that the human experience is spent in a state of 'suspended animation', as it were, thereby preventing either extreme from being fully embraced.

## CHAPTER 2

### JUSTICE

#### Introduction

The arenas of law-literature interaction (as I have chosen to formulate them) while concerning themselves with highly focused enquiries into the law-literature endeavour, nonetheless all maintain a unity of purpose centred around the search for justice, and the concomitant search for justification.<sup>1</sup> However, given the broad scope and multiple understandings of 'justice' which various situations impose upon different people,<sup>2</sup> it should not be presumed that a single conception of justice is viable, or, in fact, desirable in all situations. In other words, while the desire for justice is a common one shared by all people, the exact means of its attainment is in no way commonly agreed or understood.

However, despite such multiplicity of understandings relating to justice (which I have chosen to broadly categorise into legal understandings), and literary understandings, the element of prime and unifying importance is that the search for this illusive concept pervades all human endeavour by virtue of man's need to create some just order and certainty in the midst of the vagaries of existence. Moreover, the desire for such predictability is bound (one might say inextricably) to the loftier aspiration of the attainment of justice, since there is little point in desiring a system of knowable regulations and order which simply entrenches base desires without seeking to empower the human intellect and spirit in the search for justice. For it is only in entertaining the notion of justice as a possibility in all human equations, that one can appease the moral and ethical dilemmas which confront human existence. Without such a possibility we are no more than amoral mutations in a ghastly experiment. In this regard, the law-literature endeavour provides a particularly insightful angle on man's preoccupation with justice by exploring the concept from within the framework of two seemingly unrelated disciplines, and thereby exposing their essential commonality while also underlining the extreme complexity of their mutual ambition. Moreover, it is within the context of 'Law as Literature' that the search for justice can be seen to attain a measure of extreme poignancy inasmuch as the disciplines of law and literature are conflated into each other. On this basis, I hope that the reader is able to infer that my intention in analysing 'justice' goes beyond a

---

<sup>1</sup> This latter element will be expanded upon in the following chapter on 'Justification'.

<sup>2</sup> And, in turn, which different people choose to imply in particular contexts.

superficial examination of its properties in the context of legal, and literary understandings, respectively. Rather, it is my desire to show that law-literature study, as a whole, provides a manifestation of humankind's timeless search for justice.

Once again, however, in order to embark upon the complex task of defining the broad expanse of law-literature study in terms of a single, focused search, it has proved both convenient and necessary to divide my exploration into legal, and literary compartments first, prior to fusing them into a single understanding.

While I wish the reader to become engrossed in my search for justice within the field of law-literature interaction, I feel that it is only fair at this stage to provide you with a tentative guideline of where this will all lead :

It is my contention that language (and hence the disciplines of law, and literature which are merely different vessels of perception constructed by language) is one of the primary constructs through which man is able to convey his conceptualisation of 'justice' to others.<sup>3</sup> However, while I believe that this search for justice is an inevitable condition in a postlapsarian existence, I do not foresee the possibility of its attainment precisely because of the vagaries of such existence. More fully analysed, I believe that there are three principle factors which preclude a state of 'justice' from being attained. First, due to the fact that we cannot fully express such worthwhile notions as 'justice' through the imperfections of language. Thus, at best we can only hope to achieve 'relative justice' rather than attaining a state of 'absolute justice'.<sup>4</sup> Secondly, law, and literature, are tainted endeavours inasmuch as they aim to find some certainty to existence and attain 'justice', yet they are unable to divest themselves of the uncertainty of existence from whence they have their being. The reason for this is twofold. Pragmatically, such a divestiture is impossible, because human existence, by its very nature, is unpredictable in a philosophical sense;<sup>5</sup> and theoretically, as soon as one removes the human element from the equation, all actions become predetermined or 'known',

---

<sup>3</sup> Another manner in which to tacitly convey such understanding would be through actions, unaccompanied by words.

<sup>4</sup> In this sense, the law is (by definition) itself steeped in injustice since the language upon which it relies is flawed and imprecise, and can never fully convey the true extent of legal aspirations.

<sup>5</sup> i.e. Although certain actions may be predicted or inferred from those actions which have gone before, human nature and actions per se remain spontaneous, and hence 'unknown'.

since no element of spontaneity remains. In other words, law and literature gain power and authority from their self-declared crusade in search of 'justice' from within the midst of human chaos, yet it is this same chaos of existence off which they both feed to bolster their legitimacy. Thirdly, law and literature can never attain a state of 'justice', since human beings have a limited perception (i.e. we only know so much at any one time), thereby precluding us from arriving at a state of just harmony and equilibrium given our present circumstances. To argue otherwise is to denounce our fundamental humanity and distance ourselves even more from those around us - something we cannot do because of our fundamental need for 'connection' (within ourselves and with others).

In essence, while people strive for 'connection' between one another so as to create some harmony of belief in which justice might prevail, the problem of the enquiry has to do with relativity, and the fact that you and I are, by definition, separate entities who do not perceive reality in exactly the same manner. Therefore, until such time as you is I, only then will our perceptions coincide and language effectively reflect our internal state, thereby allowing justice to prevail. To a limited extent, communities of people with shared values and perceptions manage to form a cohesive internal identity and reflect this in a common externalisation and understanding of justice through a common language usage. However, this only occurs on a limited scale and is never completely effective because of the flaws of language itself, together with the fact that while a common identity may be formed by the community, I am still not You (and never will be until such time as all our identities are subsumed into the force of a single entity).

Having thus outlined, in general terms, my understanding of what the search for justice entails, I shall begin by analysing in greater detail different conceptions of justice.

## **2.1 Legal Understanding of Justice**

There is no denying the fact that, on a superficial level at least, the law claims to be preoccupied with the notion of justice, its attainment, and its maintenance. Yet, it is also necessary to be aware of the magnitude of this concept; the different conceptions of 'justice' which abound; and the complex task of arriving at some understanding of justice.

Edgar Bodenheimer<sup>6</sup> asserts that "a reaction or judgement in a matter concerning justice or injustice is something which takes place in the realm of values, that is, in a mental empire distinct from the domain of physical occurrences",<sup>7</sup> which is similar to Hans Kelsen's<sup>8</sup> belief that the concept of justice has no rational foundation, and is merely rooted in the emotional reactions of individuals or groups to the demands of positive law - consequently making it a subject unfit for philosophical analysis. Within the legal context, the concept of legality is often closely associated with the notion of justice. 'Legality' requires administrative acts to conform with general laws, and thereby be legitimised - without which a sense of justice will not permeate the society. However, this in no way presupposes the absolute conformity of the two concepts (i.e. legality, and justice). Plato, for example, argued that a just social order is not reliant upon government by law, but is rather based upon the belief that government by liberated individuals which is focused upon the desire to resolve real issues within specific contexts is both necessary and possible (provided, of course, that one selects individuals who prove worthy of the challenge). Moreover, notions of equity and morality also filter into the generally perceived understanding of justice, thereby framing it as the representation of all legal ambitions, and the state in which the law ought to be.<sup>9</sup>

In this regard William Galston<sup>10</sup> notes that justice has been associated with the 'common good' since the earliest times of Greek philosophy. However, he acknowledges that this notion is in itself ambiguous since, while justice may lead to the greater common good, the journey towards such a state invariably requires certain individuals to make greater sacrifices than others; while at times when a sense of cohesion and co-operation guides a society towards justice (by means of the route of 'the common good'), there is no indication as to how the benefits gained are to be subsequently divided amongst the society.<sup>11</sup> Therefore,

---

<sup>6</sup> E Bodenheimer *Treatise on Justice* (1967).

<sup>7</sup> Idem at 2.

<sup>8</sup> H Kelsen *General Theory of Law and State* (1961) at 56.

<sup>9</sup> In itself such an understanding need not constitute a purely utopian ideal, since many areas of legal endeavour often coincide with a particular society's understanding of justice.

<sup>10</sup> WA Galston *Justice and the Human Good* (1980) at 34.

<sup>11</sup> The answer to this issue has generally depended upon allegiance to one of two extreme points of view *Hyperorganicism* (which posits the cohesion of the community above individual subjectivity), and *Hyperindividualism* (which maintains the primacy of individual desires over any communal considerations). Support of the former position requires a standard division of benefits amongst all individuals; while support of the latter notion requires division of benefits according to merit and

Galston chooses to conceive of justice in terms of a bundle of possessive relations to which an individual is rightfully entitled. In this respect, therefore, he envisages a system of 'proportional justice' based upon allocable goods,<sup>12</sup> and distributive principles within specific social contexts. The benefit of such a notion is that it is not subject to the extremes of ideology associated with 'absolute justice' which seeks to provide a uniform framework for all human experience.<sup>13</sup> However, as Galston concedes, the effect then of such 'proportional justice', which demands more than mere voluntary agreement as to the distribution of benefits, is "less than perfect community".<sup>14</sup> Thus, there is no 'science of justice' in his opinion, merely "an ability to surmise what is possible or probable within a given situation"<sup>15</sup> based upon a thorough knowledge of the facts of a particular scenario, and a sense for human ethics and morality.

In turn, Terry Threadgold<sup>16</sup> roots this sense of relativity of experience in the communicative constraints of human discourse (and I would consequently extend this reasoning to the proportionality of justice). He asserts that discourse constitutes a means for creating the world from within a particular point of reference thereby making it a specific rather than a

---

demand alone.

<sup>12</sup> Galston divides such goods into three principle categories, namely, 'economic goods' (such as property, income and developmental opportunities); 'political goods' (which include authority and citizenship); and 'recognition goods' (comprising status and prestige).

<sup>13</sup> In this regard, Aristotle is noted to have said "All law is universal, but about some things it is not possible to make a universal statement which shall be correct. In those cases then in which it is necessary to speak universally but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is nonetheless correct; for the error is not in the law, nor in the legislator, but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission - to say what the legislator himself would have put into his law; if he had known. Hence the equitable is just, and better than one kind of justice - not better than absolute justice, but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of the law where it is defective owing to its universality" (extract from Aristotle's *Nicomachean Ethics*, Bk 5, Ch 10 as reprinted in JB White *The Legal Imagination* (1985) at 647.

<sup>14</sup> Galston op cit at 282.

<sup>15</sup> Idem at 283.

<sup>16</sup> T Threadgold 'Legal Practice in the Courts : Discourse, Gender and Ethics' (1991) 7 *Australian Journal of Law and Society* 39.

universal truth. In effect, therefore, it becomes possible to reconstitute experience by reconstructing the narratives which are told; however, the arrival at a single unified community of understanding (and hence the attainment of 'absolute justice') is no longer an option, given the relativity of experience as embodied in language. The best one can hope for, then, (in Threadgold's opinion) is to work within the present linguistic framework so as to provide 'radical alternatives'<sup>17</sup> to the entrenched canon of discourse. However, achieving this is itself not an easy task since it requires the unmasking of existing discourses, and their expression in a manner which provides the reader with effective alternatives to the dominant discourse. This requires a delicate and precise procedure, for it leaves the theorist in a vulnerable state, uncertain that his new discourse will be able to effectively communicate his ideas to the reader.

A good foundation, therefore, from which to explore the modern relativistic understanding of justice within the legal context is by examining recent assaults upon legal-formalistic pretensions.<sup>18</sup>

Jack Balkin<sup>19</sup> advocates a theory which calls for a shift in the jurisprudential focus away from the legal system per se, and onto the nature of the legal subject who analyses and interprets the law. Thus, legal understanding should be seen as something which the legal subject brings to the legal object itself, rather than an amorphous concept which pre-dates the legal subject and represents a universal truth embodied in the legal object. The effect of such an assertion consequently leads to the dismissal of notions of rigid certainty and the undermining of the objective foundations upon which formalist jurisprudence is based. This is not, however, to say that Balkin rejects ideals of certainty in favour of some sort of 'anarchic bliss'.<sup>20</sup> Even within the new subjective framework certainty is maintained by means of 'shared subjectivity'. Thus, the subjectivity of the legal subject operates within a

---

<sup>17</sup> *Idem* at 41.

<sup>18</sup> Essentially, formalism maintains that the law is interpretively self-sufficient, and hence indifferent to the social context in which it operates.

<sup>19</sup> J Balkin 'Understanding Legal Understanding : The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105 at 107.

<sup>20</sup> Such a sense of subjectivity would itself of necessity lead to a complete immersion of Self in an existence of 'nothingness' and a world of 'meaninglessness'. Moreover, this state of being is inconceivable for humankind, since we need some foundation (however tenuous) for our beliefs. In this regard even deconstructionists give primacy to a particular object (namely, the text) and by so doing establish a foundation upon which to make assertions.

specific framework of cultural norms and values which form the core of the individual's understanding. It is, therefore, merely within this framework that subjectivity is able to contribute to, rather than create, the individual's understanding of the legal object. Moreover, the importance of such a 'cultural perspective', according to Balkin, lies in the fact that legal understanding is very much an active process centred on 'the knower' rather than 'the known'. Therefore, judgements of legal coherence of necessity rest upon the nature of the Self which, in turn, ensures that legal understanding comes to be seen as a means of self-evaluation and reflection.

Balkin's theory provides an interesting alternative to formalist-based jurisprudential interpretation. In turn, however, Christof Heyns<sup>21</sup> confronts the one factor which Balkin overlooked in the formulation of his theory, namely, the role which irrational factors, such as values, play in the construction of our cultural framework, and consequently our vision of reality. Therefore, Heyns (in a sense) develops Balkin's argument by centring his enquiry on which legal subject's value system to apply when deciding the issue of reasonableness in a divided society. Thus, in a similar vein to Balkin, Heyns asserts that the 'reasonableness enquiry' cannot be made on a purely objective and clinical basis since there is a need for the infusion of humanness into legal decision-making. However, in contrast to Balkin, Heyns argues that the incorporation of the legal subject's perception into the 'reasonableness enquiry' cannot be regarded as a rational factor per se, since it (in turn) is based upon irrational elements, such as beliefs and values. For Heyns, the basis for adjudicating competing values is effectively resolved in terms of a 'scale of relative acceptability'<sup>22</sup> whose primary enquiry revolves around which particular value and its associated conduct will best serve, or at least minimally disrupt, the focus of a particular society.

What is most apparent from a study of Balkin and Heyns is that the formalistic notion of objectivity (which extends into an appreciation of justice as objective, as well) is merely an illusion, since law is created by people for the governance of human interaction. Thus, at both ends of the legal equation - the creators, and the subjects - subjective factors have a paramount influence on the course of the legal process. However, formalist proponents have themselves now instigated a backlash against what they perceive to be the tide of anarchy

---

<sup>21</sup> C Heyns 'Reasonableness in a Divided Society' (1990)2 *South African Law Journal* 279 at 281.

<sup>22</sup> Idem at 301.

inherent in subjective interpretations of the law. So it is that Herbert Wechsler<sup>23</sup> maintains that the main prerequisite of the judicial process is that it must be 'genuinely principled'<sup>24</sup> inasmuch as the grounds for the decision must be adequately neutral, and thereby transcend the immediate result. Consequently, it is alleged by Wechsler that only an approach rooted in formalist theory can provide the required level of neutrality, and hence arrive at a principled decision. So, too, John Rawls<sup>25</sup> avers that the less one knows about a particular situation, and even the less one knows about oneself, the more likely one is to reach a just decision. Thus, the more one immerses one's 'flawed' subjectivity in the omniscient waters of formalist thought, the more likely one is to reach a just conclusion. However, as communitarian theorists effectively reason - Rawls' theory proves impractical since individual persons are not autonomous entities capable of ideological isolation from those around them, let alone from themselves. Thus, the communitarian paradigm of justice requires (as one of the factors for its attainment) a knowledge and sensitive understanding of 'the Self', coupled with an appreciation of the connective relationship between 'the Self' and its societal framework.

Although one may agree with the approach adopted by Balkin and Heyns, and on this basis rationalise that formalistic objectivity is merely an illusion which appears theoretically 'complete' but which is practically flawed. Nonetheless, such an approach overlooks the very allure of formalism inherent in its illusory perfection. Formalism appears to provide us with a glimpse of that towards which we all strive, namely, certainty, comfort and a conclusion - all of which we somehow equate with justice. The fundamental basis of formalism is that it does not have to justify its existence or belief to anyone. It takes on a heroic stance in challenging individuals to look beyond their own interests to a system of legal interpretation which strives for perfection and justice by means of objectivity. The fact that the process must inevitably end in despair given the solipsistic nature of man renders the formalist journey meaningless for many, yet for some the challenge of setting aside the chaos of selfhood for the promise of objective certainty makes formalism an alluring concept to adhere to, and defend.

---

<sup>23</sup> H Wechsler 'Towards Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1.

<sup>24</sup> *Idem* at 3.

<sup>25</sup> J Rawls *A Theory of Justice* (1971) at 76.

Gretchen Craft<sup>26</sup> astutely notes that literature tries to account for the irrationality of reality within the confined and ordered world of the specific literary work, while law attempts to provide some coherence to human existence within the formalistic confines of statutes, custom, and judicial precedent<sup>27</sup>. Therefore, just as a literary work is self-referential (inasmuch as the "real world" is filtered, and condensed onto the pages of a particular literary work according to the whim or design of the author), and self-contained (since a work represents an entity of sorts with some cerebral progression - as opposed to being a 'vacuous nothing'), so, too, the law harbours similar principles, according to Craft. However, Craft would want us to believe that by applying the law in this formalistic manner, the most equitable and efficient legal results can be attained, and the chaos of human experience controlled. It is thus, at this point that Craft's comparison of law and literature begins to go awry and her conclusions askew.

Admittedly, within a literary context the very act of confining emotions, motives, and desires onto paper constitutes an inevitable reduction in the complexity and intensity of such human characteristics. So, too, the act of legal explanation deconstructs the enormity of an event to a level at which it can be grasped more easily, and analysed with greater speed. However, Craft advocates that, within a legal context it is imperative not only to filter out emotion but also to confront and control human behaviour purely by means of rules. Such ideals are, however, distinctly problematic since they claim to provide just results while denouncing the existence of variable characteristics such as emotion, motivation, and desire which are inherent in the human condition. Since the rationale for law is the control of human behaviour, it appears strikingly incongruous to attempt to achieve such a lofty desire without acknowledging the components within the human psyche which may effect its outcome. It is thus, in my opinion, a fallacious argument to rationalise that by discarding all the variables and uncertainties within human existence - in essence 'fate' - from legal reasoning, that such legal system will provide an effective antidote to fate, while also assuring just results.

In contrast to Craft's assertions, Kristin Bumiller<sup>28</sup> maintains that formalism, which stresses its ability to provide some certainty in the wake of humankind's chaos of being, is unable to

---

<sup>26</sup> G Craft 'The Persistence of Dread in Law and Literature' (1992) 102 *Yale Law Journal* 521.

<sup>27</sup> See Ch 1 for an introductory discussion on Craft.

<sup>28</sup> K Bumiller *The Civil Rights Society* (1990) Ch 2.

do so. Despite (or arguably because of) formalism's strict focus upon legal rules, Bumiller contends that discrimination simply works through such rules with the result that the law comes no nearer to providing clarity on humankind's tumult. For Bumiller, rules merely provide an illusion of certainty, and do not effectively confront the fears and anxieties present in reality. In fact, rules serve to create dread and fear in the very victims who seek refuge in the law from the injustices of human existence. According to Bumiller, this dread stems from the fact that in seeking assistance through legal channels, 'victims' are required to assume their victimhood and accept their inability to assist themselves, thereby legitimising their own defeat. Rather than confronting their position, therefore, in the light of the clinically impartial law, victims tend to internalise and rationalise their pain and hurt. Thus, the objective system of rules to which Craft refers is the same body of law which Bumiller perceives to be born of division and manipulative inequality. In effect, Bumiller indicates that Craft's theory of law is merely an academic exercise which fails effectively to account for or encourage people's interaction with the legal process. This is due to the fact that the theory itself bears no relation to the reality of human tensions, conflict, and inequality in which it is situated. Furthermore, the concept of law itself is actually grounded in such human turmoil, and feeds off it, rather than simply regulating it.

John Noonan<sup>29</sup> also criticises Craft's defence of the effectiveness of law as a means for creating certainty. Noonan emphasises the legal system's reliance on the human element in its midst - ranging from those who create the law, through to those who apply it, and those against whom it has an effect. This very humanness which pervades the entire legal process means that at best the law is feigning objectivity, and at worst is tacitly consorting in the conflicts brought to it for adjudication, since it is upon the maintenance of such tensions that the legal system relies for its survival. Furthermore, the surfeit of human egos, desires, and machinations at all stages of the legal process make the thought of an objective body of law seem impractical. Thus, for Noonan, the law's assumption of an impersonal and objective persona is simply a donned mask of impartiality, used as a means for creating a secure (albeit fictitious) premiss on which people can rely based upon our tacit association of objectivity with justice. Nonetheless, it may be argued that far from achieving its goal of certainty, formalism, in fact, creates a greater sense of unease through its utter disregard for the 'human

---

<sup>29</sup> J Noonan *Persons and Masks of the Law* (1991) Ch 2.

element' both surrounding it, and within it.<sup>30</sup> Moreover, in this regard, Martha Minow<sup>31</sup> implicates the legal process in condoning the very social violence it claims to govern by means of a tacit violence inherent in the law itself. This 'legal violence' may, in turn, be analysed in terms of an 'active' and 'passive' violence. Regarding the former, Robert Cover<sup>32</sup> asserts that legal interpretation, and the violence it occasions can only be understood with reference to each other. On the one hand, legal interpretation signifies the imposition of rational constraints upon the irrational tumult which social violence occasions; while on the other hand, through interpretation the law responds to pain by imposing sanctioned violence of its own in the interests of 'justice'. As to the 'passive violence' in the legal system, Minow relates the tragic details of two child abuse cases<sup>33</sup> in which judicial inaction resulted in the agonising deaths of two young children. She regards such inaction on the part of the law as tacit condonation of the very atrocities it was established to control, and consequently as reprehensible as any positive actions which participants acting on behalf of the legal system may take to hinder, delay, or prevent such access to justice.

Cover and Minow appear, however, to conflict in their assessment of the measures required to deal with such 'legal violence'. In essence, Cover maintains that the violence perpetuated through legal interpretation is indicative of a vain attempt by the law to impose some

---

<sup>30</sup> In spite of this, formalism seems able to comfort itself in the illusion that the theoretical attempt at certainty by means of objectivity, rather than the attainment of such certainty through experience, is important. As theoretically satisfying as such an argument may be, however, there is a need to find some practical solutions to law's aim to provide individuals with some respite from the uncertainties of life. The first means of tackling the problem would seem to be an acknowledgement of the various subjective voices vying for supremacy within the law. Once such conflicting perspectives have been identified, the law has to embark on the task of providing some certainty for its subjects by simply balancing these different rights and values against one another. The rights and values (and consequently the sense of 'justice') to be adopted will, therefore, be those which a particular society can best afford from a moral and practical point of view. Such a system cannot, however, be dependent upon the whims of those in effective control of the legal system (i.e. the legislature and judiciary). Therefore, if the legal system is to instil confidence in its subjects and provide them with a beacon of certainty in a sea of apprehension, it must be seen, by the 'victims' who seek its assistance, as being benignly omniscient.

<sup>31</sup> M Minow 'Words and the Door to the Land of Change : Law, Language and Family Violence' (1990) 43 *Vanderbilt Law Review* 1665 at 1666.

<sup>32</sup> R Cover 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601 at 1604.

<sup>33</sup> The cases in question are *De Shaney v Winnebago County Department of Social Services* [109 S Ct 998 (1989)] (Minow op cit at 1667); and that of Lisa Steinberg (Minnow op cit at 1678).

effective domination and control over reality. While this may result in a superficial sense of security, in effect it nonetheless merely serves to accentuate the existing problems. Cover is understandably unable to provide any absolute remedy to the above dilemmas since he acknowledges that legal interpretation is not a utopian ideal imposed upon the suffering of the world, but that it is, in fact, a creature borne by this suffering, and one which merely attempts to maintain a tenuous equilibrium between conflicting interests by means of a violence of its own. Therefore, rather than provide conclusions, Cover attempts instead to create an awareness of the ironies and hypocrisies present in any legal system as evidenced through legal interpretation. Moreover, Cover appears resigned to the violence present in legal interpretation based on humankind's inherent desire to manipulate the "social organisations of violence"<sup>34</sup> through the use of violence in another guise. Thus, owing to the law's unfortunate response to violence, Cover's ideal of common meaning is a pragmatic impossibility. In this regard, Cover maintains that the best that can be achieved, given the chaotic nature of humankind's perceptions of reality, is some form of 'shared subjectivity' (as opposed to 'universality of understanding') coupled with recognition, rather than mere denial, of the violence which operates from within a legal context. In turn, Minow approaches the issue of legal violence from the perspective of the language used by courts, which result in judicial inaction based upon often spurious distinctions. As with Cover, Minow acknowledges that the law is a social construct born of the very societal turmoil it seeks to regulate. However, whereas Cover acknowledges the inevitability of violence within the law, Minow asserts that through its use of words the law is able to re-create itself, change its emphasis, and strive for justice. Minow maintains that while the law often acknowledges the human element present in all given situations<sup>35</sup>, somehow in implementing the law the judiciary seeks to avoid the emotions and passions embedded in the conflict in favour of a clinical and antiseptic resolution of the situation. There is, thus, an ill-conceived presumption that 'justice' is best served when references to the vagaries of human nature are kept to a minimum in matters of law. Moreover, Minow astutely criticises the irony of such a presumption, since law is by reason of its very purpose<sup>36</sup> grounded in human conflict. Thus, to simply denounce the relevance of human attributes when deciding the law does not do away with their existence.

---

<sup>34</sup> See Minow op cit n40 at 1625.

<sup>35</sup> This acknowledgement can be seen in the legal constructs of mens rea, the test of the 'reasonable person', and the various legal obligations to act in particular circumstances amongst others.

<sup>36</sup> i.e. The constraining and controlling of human society.

According to Minow not only do such human attributes have a right to be considered in a court of law, but they are of vital necessity if justice is to be regarded as more than an idle and idealistic phrase. In this regard, Minow places great stress on the role of narratives in legal reasoning. In this regard, she states that law is, essentially, a morass of subjective realities vying with one another for power, inasmuch as parties come before the court with different interpretations of events from which the judge is expected to extract commonalities and contradictions, and come to a resolution based on his own perception of events. Such a task is exceptionally onerous (if not altogether impossible), and Minow, therefore, advocates legal narratives as a means for all parties to effectively express themselves and infuse the legal process with compassion and greater justice. The narrative process will thus serve a dual function in that it will provide the legal system with an opportunity to analyse accounts of reality which diverge from, and even undermine dominant understandings, as well as (hopefully) creating some 'connection' between these different perceptions, thereby eliciting empathic understanding. The appeal of Minow's argument lies in the fact that differing legal narratives alert judicial decision-makers to the vagaries of the human condition, and provide them with often overlooked perspectives of the law. Thus, the legal process is brought to the realisation that in all situations paraded before it, no matter how constant or certain the law appears to be, sight should never be lost of the one 'uncertainty' which is always present, namely, the spectre of violence present in humanity. With such a perspective at hand, it can only be hoped that the law will incorporate an element of flexibility (and consequently, pragmatism) into its dealings with its mortal and imperfect subjects, thereby emancipating the notion of 'justice' from the shackles of theoretical objectivity.

In essence, therefore, both Cover and Minow criticise the legal process' regular formalistic adherence to rules, and its disregard for the realities of the participants. However, while Cover appears resigned to the need for violence within the law to supplement its regulation of society, Minow, in contrast, regards the law in a less severe light, as simply in need of greater exposure to different "realities" in the legal narrative process in order to arrive at just decisions<sup>37</sup>. Nonetheless, I contend that one thing remains undeniable, namely, that the power

---

<sup>37</sup> Whether, in fact, there is necessarily any fundamental distinction between Cover's and Minow's approaches, or whether they merely provide a different perspective on the same issue, is debatable. However, I would tend to support the latter assertion, since both authors provide valuable insights into the association between violence and law, and its consequent effect on the possibility of 'justice'. Thus, it seems wasteful, in my

of words should never be looked upon with disdain or disbelief. As Michael Barkun<sup>38</sup> states “perceptions help us understand the law in important ways, since the primary ‘vessel’ for perception is language, and language has the ability to confine and define events”.<sup>39</sup> Therefore, just as the language of law has the ability to condone violence, so, too, it has the power to control it, and in the process strive towards an understanding of ‘justice’. Admittedly, such an appreciation of legal discourse in terms of its nebulous nature, poised as it is between violence and rationality, is not conducive to the attainment of a comfortable and straightforward understanding of ‘justice’. Yet it is imperative to embark upon such a journey in order to penetrate the polished veneer of the law so as to ascertain whether ‘justice’ has a point of connection in human existence and the rule of law.

In this regard, Randy Barnett<sup>40</sup> asserts that the concepts of ‘justice’ and the ‘rule of law’ “presuppose a social context”<sup>41</sup> onto which they then proffer their services as a means of managing the “fundamental social problems that are unavoidable features of human social life”.<sup>42</sup> To this end, however, Barnett insists that justice is not simply a tacit and intangible desire, but one which must, in fact, be effectively communicated (ex ante) in order to have the desired results implicit in its formulation, successfully achieved. Moreover, he alleges that the channel of communication most suited to this task is the rule of law, since it is founded upon the principle of standardised ex ante communication. As Barnett himself notes: “Without the formal characteristics of the rule of law, justice will be unknowable in advance of personal decisions to act and, consequently, avoidable injustices will unavoidably occur”.<sup>43</sup> In essence, therefore, Barnett conceives of justice and the rule of law as operating in two dimensions - first, as a means of addressing “the problem of knowledge”;<sup>44</sup> and

---

mind, to attempt to weaken each argument's valuable contribution by pitting them against one another.

<sup>38</sup> M Barkun *Law Without Sanction* (1968).

<sup>39</sup> *Idem* at 39.

<sup>40</sup> RE Barnett ‘Forward : Can Justice and the Rule of Law be Reconciled’ (1988) 11 *Harvard Journal of Law and Public Policy* 597.

<sup>41</sup> *Idem* at 599. Since he maintains that both concepts require some form of human interaction in order to justify their existence.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Idem* at 616. i.e. Justice through the channels of the rule of law disseminates information to people, thereby providing them with ex ante knowledge of events and their consequences.

secondly, as a means of confronting “the problem of interest”.<sup>45</sup> However, he readily concedes that the latter issue of ‘interest’ poses difficulties, since the law is required to impose force (in the form of legal sanctions and retributive measures) so as to facilitate the attainment of just results; yet the imposition of such force may reach a point at which it becomes self-defeating. Moreover, the fact that the authority to impose sanctions on others is confined to a small group of individuals leads to the potential for (rather than a respite from) injustice. Nonetheless, through the association of the rule of law to justice in the light of a moral dimension, Barnett believes that the potential of sliding towards an abyss of injustice can be averted, and the social ills of knowledge, interest, and power, effectively controlled.<sup>46</sup> Therefore, Barnett's universe is rooted in moral justification which permits it to effectively attain the ideals demanded of it by justice. Such an understanding, thus, requires an appreciation of the need for the concept of justice to be conjoined with its channel of communication – i.e. the rule of law - in order for there to be an effective transmission of such noble ambitions (with the consequent possibility of their attainment). Barnett, however, is not unaware of the reality that both the rule of law, and justice are imperfectly evolving concepts (inasmuch as they develop and mutate at differing rates, and at different times to each other); yet, he maintains that it is only by means of a unified vision in which justice and the rule of law are seen as co-dependent upon each other that one can achieve an informed appreciation of their social functions, and thereby “better understand and reform both ideas”.

Richard Posner,<sup>47</sup> in contrast, approaches the notion of morality from a more radical standpoint in terms of which legal authority per se is celebrated in the light of a “morality of obedience”.<sup>48</sup> This essentially conservative perspective<sup>49</sup> (rooted in unsentimental premises) seeks to articulate the moral virtue of legal authority as distinct from justice.<sup>50</sup> In essence,

---

<sup>45</sup> Ibid. i.e. The rule of law accords high status to certain relationships (eg ownership and marriage), and sets about first, defining, and secondly, defending them in a uniform manner (within a particular societal context) so that just results might prevail.

<sup>46</sup> Idem at 623.

<sup>47</sup> Posner *A Misunderstood Relationship* at 250.

<sup>48</sup> Idem at 252.

<sup>49</sup> I realise that in referring to Posner as both ‘radical’ and ‘conservative’, I open myself to the accusation of being inconsistent. However, the juxtapositioning of such adjectives is emblematic of the underlying tensions in Posnerian reasoning - ie he seeks to entrench an essentially conservative rationale by means of radical formulations.

<sup>50</sup> Posner contends that the object of law is the creation of order, rather than justice. Therefore, there is no correlation between law and justice (or any other virtue for that

therefore, legal authority (together with other forms of authority) which has been distilled in the filter of human history serves to clarify and structure the unknowable content of human motivations in an irrational universe, thereby providing some focus and, more importantly, order - without the need to elucidate upon and seek comfort within the ideal of 'justice'. In this regard, Posner's commitment to the importance of authority is somewhat 'Darwinian' in nature inasmuch as he maintains that the hierarchical and institutionally entrenched authority which prevails in the present is to be supported and valued by virtue of its temporal survival. It is, thus, not the prerogative of mankind to question the *raison d'etre* or suitability of such authority, but merely his obligation to adhere to it, (if he wishes to retain a semblance of sanity), since it objectively rationalises the chaotic universe and thereby orders it in accordance with humankind's craving for rationality and certainty. In contrast to this understanding, Posner intimates that existence within the chaotic flux of the 'natural world' (i.e. a framework devoid of hierarchical and institutional authority) requires of one the sole belief in the possibility of attaining 'justice' (which itself requires an ordering of sorts) without the assistance of any pre-existing foundational framework - something which (Posner alleges) is altogether futile, and fit only for philosophical consumption rather than practical implementation.

Taking Posner's reasoning to its logical conclusion, one might assume that due to the advances in the law, and the long history of judicial precedent, the law today possesses a greater degree of certainty than ever before (inasmuch as new cases can be decided merely by reference to past decisions). However, such a presumption would be misguided since legal decisions are "just particular propositions which only report ... certain historical events"; therefore, "in order to obtain a general or functional rule or principle we must have a universal proposition".<sup>51</sup> In essence, therefore, there can never be a presumption that a previous decision can be followed 'in toto' in later cases, since the variables in a given situation are never completely replicated in other contexts. This is not, however, to assume that judges are free-agents whose decisions merely represent their whimsical dictates in a particular situation. On the contrary, (and in contrast to Posner's principal allegation) the

---

matter); and the sole factor dictating the inherent good in law is its authoritative nature. In this same vein, great literature (for Posner) is generally concerned with the virtue of authority.

<sup>51</sup> Stoljar 'The Logical Status of a Legal Principle' (1953) 20 *University of Chicago Law Review* 181 at 182.

thread linking past, present, and future decisions is the fundamental presumption in favour of justice. While I concede the fact that human history is littered with instances of injustices and excesses, nonetheless, I maintain that but for some basic tenet of justice around which the human psyche is moulded, and towards which successive societies have striven (in various manners), all existence is rendered amoral - and worse still, meaningless. As John Dickson notes regarding the modern manifestations of justice which have developed in the past two centuries:

"In the eighteenth century the emphasis shifted, though less in England than elsewhere, from history to reason, from precedent to fundamental justice. That was the golden century of human "reason", when the miraculous was expected of it. In it was found what the Middle Ages had found in religious faith, and what the nineteenth century was to find in science - a key to unlock doors, a panacea for all the ills of the world, a mechanical toy that kept man agape for what wonders it was going to work next. And for the type of reason, mathematical reason was chosen - a reason working out with inexorable logic the single correct solution for every problem. Such an idea at work in politics produced the Abbé Sieyès, and in law the era of codes. It was believed that the one and only legal rule for every possible situation could be written off in advance by a proper combination of axiomatic first principles with the same accuracy as the answers to all the problems in Euclidean geometry. Law ceased to be an instrument working towards certainty - it became certainty itself ... [However] we have come to realise that logic is but the tool of premisses, and that the premisses of social intercourse fluctuate ... logic will not yield us certainty; in fact nothing will".<sup>52</sup>

An important point of distinction, however, remains - namely, that while modern existence may be characterised by acute uncertainty, it nonetheless retains meaning by virtue of the human preoccupation with justice.

Modern liberal thought has sought to cope with such uncertainty by creating fundamental distinctions in all spheres of human understanding. Thus, for example, the liberal theory of Self distinguishes between objective reason and subjective desire; liberal epistemology entrenches the separation of theory and fact; and the liberal theory of legal reasoning divides

---

<sup>52</sup> Extract from *Administrative Justice and the Supremacy of Law*, as reprinted in *Law, Language and Ethics* (1996) Bishin WR, Stone CD (eds) at 468.

all legal endeavour between impersonal rules and individual values. Far from providing a suitable, or indeed practicable, solution to the quandary of uncertainty, however, Roberto Unger<sup>53</sup> maintains that such liberal theory forces one to make a choice based upon extremes and lacking in any essential validity, as a consequence of which one's argument becomes steeped in contradiction and destined for failure. Unger acknowledges that the relationship between particulars and universals remains the central problematic in modern existence. However, whereas modern liberal thought looks to the establishment of dichotomies for comfort, Unger seeks to replace the very foundation of classical teaching from which liberal thought has evolved. Unger's underlying concern with modern liberal thought is that after having entrenched the notion of dichotomies as a natural phenomenon of human reasoning, it then seeks to marginalise the significance of theoretical universals in the equation and to establish the primacy of the particular and the individual as defined in terms of a 'universal' category. The problem with this, however, Unger notes, is that by denying the significance of essences, universals are reduced to the level of nominal quantities. In other words, terminology and defining characteristics are merely abstracted from a series of chosen instances. Moreover, such categorisation is flawed by its very randomness since the manner in which we seek to define such notions is principally governed by our particular purposes in a defined instant. Conversely, if one wishes to define a universal without reference to particulars, then one enters the sphere of formalistic pretentious lacking in any practical application. Either way, one will meet with disappointment. Unger is, therefore, at odds with both the classical foundations of liberal thought as well as the modern interpretation which such liberal thought seeks to extract from its classical origins.

Unlike classical ideology which denies the existence of tension between the particular and the universal simply by subordinating the will of the individual to the destiny of the universal; and unlike modern liberal thought which attempts to redress this imbalance by asserting the perpetual separation of the individual from the universal and defining them independently of each other, Unger charts a different course which he labels 'concrete universality'. In terms of Unger's theory, the universal is only able to exist through the individual and the individual is given the ability to influence the universal. In essence, they are contingent upon each other for their identity and meaning. Only when the one is understood can the other be known. In terms of this paradigm, therefore, the separation of particular from universal and Self from

---

<sup>53</sup> R Unger *Law in Modern Society: Towards a Criticism of Social Theory* (1976) at 116.

Other is not a hinderance to understanding, but rather, a vital component in the formulation of meaning since they are all co-dependent identities.

It is undeniable that in recent years there has been a shift (in the legal context) away from an objective and universal understanding of justice towards a more relativistic approach<sup>54</sup> closely associated with a more pragmatic appreciation of the attainment of human ideals. There is, therefore, no fear of resorting (through relativism) to a nihilistic vision of existence based upon conflicting personal experiences; rather, the journey requires of one a more complex understanding of the dense interrelationship of such personal experiences through an acknowledgement of their 'sameness' and their 'difference', and ultimately their individual contribution to the larger canvas of human endeavour.<sup>55</sup> However, it is apparent that one will encounter problems whether one abides by an absolute or relativistic notion of justice. The reason for this lies in the fact that allegiance to the former notion demands of one a belief (some would call it a naive faith) in the ability and desire of people to look beyond their own circumstances, and comprehend a uniform totality of vision upon which all individuals can focus with equal conviction; while acceptance of the latter notion often exposes one to the accusation of being solipsistic and failing to 'do justice' to humankind's nobility of spirit and visionary potential.<sup>56</sup>

---

<sup>54</sup> In the context of justice, relativism entails an understanding of moral values in less than absolute term, i.e. it connotes a willingness to accord status to socio-historical, political, economic, and cultural variables in the creation of a particular justice paradigm. In contrast, the naturalist school of legal philosophy is categorised by its adherence to a conception of justice as uniform and universal and, most importantly, not a human creation but a divine concept.

<sup>55</sup> As Hans Kelsen stated "I cannot say what justice is, the absolute justice for which mankind is longing. I must acquiesce in a relative justice and I can only say what justice is to me ... justice, to me, is that social order under whose protection the search for truth can prosper. 'My' justice, then, is the justice of freedom, the justice of peace, the justice of democracy - the justice of tolerance": See H Kelsen *What is Justice?* (1957) at 23-24.

<sup>56</sup> In this context, Julius Stone asserts that while relativist theories are often structured so as to account for fluctuations (be they social, political, economic et cetera) in the human environment, this in no way presupposes the efficiency and influence of such theories upon general human endeavour. The reason for this, according to Stone, has to do with the fact that the very complexity of such relativist theories often stifles their effectiveness as tools of general applicability and influence: See J Stone *Human Law and Human Justice* (1965) at 299. In short, "the ideals which relativism usually offers have not the glamour which surrounds principles which present themselves as absolute": Ibid.

Essentially, the legal conception of justice appears to contain an inherent paradox in its formulation inasmuch as its formulaic construction (governed by the principles of reasonableness, equity, fairness, and due process) seeks to administer the variables of a particular situation, while retaining sufficient elasticity so as to be applicable to a wider range of differing social contexts. The result, according to Stone<sup>57</sup> is, therefore, that the outcome of such an enquiry cannot direct judgement in the way of a single validated conclusion in a particular case since the opposing tensions of particularity and generality serve to diffuse the focus of the 'justice' enquiry.<sup>58</sup> Ultimately, this is due to the fact that legal notions of justice expressed in terms such as 'doing justice between the parties' and 'basing one's decision on the merits of the case' are at once both general and particular in nature. Nonetheless, it is this very plurality of visions<sup>59</sup> which enables one to resolve matters of extreme complexity "without undermining faith in justice by open confession of our inadequacy",<sup>60</sup> while also encouraging a sense of constancy during times of vacillating values by focusing on an omnipresent ideal.<sup>61</sup>

This paradoxical position extends into the notion of 'morality' which is often embedded in legal understandings of justice. Within this context it is apparent that a distinction is generally made between 'natural law' and 'positive law'.<sup>62</sup> The former notion relating to a

---

<sup>57</sup> Ibid.

<sup>58</sup> Moreover, on the basis of a particularist view the search for justice in the context of a specific factual matrix would defy application in any other context since the material factors of any given situation are unique.

<sup>59</sup> One might refer to it as an indeterminacy of sorts.

<sup>60</sup> Op cit at 301.

<sup>61</sup> Stone alleges that an understanding of the notions of 'justice' and 'law' as synonymous indicators of a single concept is both unhelpful and incorrect given the broad nature of 'justice' and its association with almost every facet of human life. (For an in-depth analysis of the impact of 'justice' in human relations generally: See CK Allen *Aspects of Justice* (1958). However, this is not to assert that 'justice' and 'law' are easily distinguishable in practice. What it does, nonetheless, indicate is that while legal discourse would have one believe that it is the most effective (if not the sole) means by which to attain justice, there are, in fact, other discourses which are equally capable of providing one with a unique, and possibly clearer, conceptualisation of justice. Such discourses include political, scientific, philosophical, and literary discourses. However, given the broad nature of such a multidisciplinary analysis in the context of the present thesis, I have felt it appropriate to confine myself to an enquiry into literary discourse alone.

<sup>62</sup> 'Natural law' embodies an ideal of justice which guides a society, and is based upon a communal allegiance to a moral ('internal') facet of legal justification; while 'positive law' seeks to account for legal justification in terms of 'external' socio-political

legal ideal, and the latter notion representing a legal reality. Joseph C Cascarelli<sup>63</sup> argues that the distinction between the two notions is to be found in their different interpretations of how they perceive justice to be connected to human origins. Cascarelli notes that while natural law must maintain a presumption of innocence as to the origin of mankind, since it is only from such innocence that 'Justice' (in the sense of an immutable concept) can be born, the understanding of positive law is embedded in man's imperfect beginnings and amoral nature as a consequence of which only 'justice' is attainable.

In my view, however, this reasoning seeks to create unnecessary distinctions, not in terms of the nature of the concept and conceptions of justice but in as much as while they are separate notions, they yet remain reliant on each other for their individual meaning. In order to appreciate the ideal of 'Justice', one must account for the reality of 'justice'. Conversely, in acknowledging the existence of 'justice', one is still accepting the relevance and primacy of 'Justice' (one is simply now saying that while it cannot be attained, its significance can still be appreciated). I therefore, find no difficulty in premissing my reasoning on the situation of man in a postlapsarian world in which 'Justice' cannot be fully comprehended yet it is conceptually acknowledged in order to facilitate the interpretation and meaning of 'justice'. Moreover, given modern day levels of sophistication (be they technological, scientific, or artistic) which have permeated all aspects of human existence, and which, in turn, have necessitated the birth of a 'conceptual scepticism', it becomes evident that inevitable tensions must exist between factual experiences and abstract thought. In other words, the existence of justice (in a generic sense) in a modern age can only be appreciated through an understanding of the justification on which it is grounded. Nonetheless, while absolute standards have had to be eroded in favour of mortal desires and capabilities, an awareness of the phenomenal extent of human potential is simultaneously developing (hence 'Justice'/'justice' and justice/justification tensions). In spite of such advances in human understanding, however, the legal system per se remains deluded by its own formalistic pretensions and seeks to portray itself as the embodiment of human aspirations regarding justice without questioning

---

decrees enforced by sanctions (and unrelated to any moral sphere). In other words, 'natural law' is premised upon humankind's innate desire to strive for justice in the light of a benign framework, while 'positive law' has its roots in humankind's fears and uncertainties.

<sup>63</sup> JC Cascarelli 'Presumption of Innocence and Natural Law: Machiavelli and Aquinas' (1996) 41 *American Journal of Jurisprudence* 229 at 231.

its own legitimacy as a harbinger of such ideals. In itself, this is not surprising since any discourse is eager to establish its primacy as the ideal means by which to capture the essence of the human condition, and is loath to question its own abilities in this regard. While it is, therefore, important to question the law's integrity with regard to justice, it is also necessary to be aware of what questions to pose and what solutions they may proffer. For it is often in asking the 'right' question of the law, rather than simply demanding any answers of it that one gains a more incisive (not to mention complex) appreciation of its functions and effectiveness as a mechanism for the regulation of human existence and the attainment of human ideals. In this regard, I shall now list the three principal concerns to which I have tacitly alluded in the context of 'Legal Understanding of Justice' : Is legal discourse entitled to enjoy greater reverence than that which is accorded to other discourses? Is legal discourse more capable of responding to human uncertainties than other discourses? Is legal discourse (on its own) the most effective mechanism for the regulation of human society and the attainment of justice? My answers to these questions shall become apparent in the context of the next section ('Literary Understandings of Justice'). However, at this juncture it is worth noting how MR Cohen<sup>64</sup> incisively penetrates a weakness in the legal understanding of justice in a manner worthy of citing in full within this context:

“[U]niversality and individuality, justice and the law, the ideal and the actual, are inseparable, yet never completely identifiable. Like being and becoming, unity and plurality, rest and motion, they are polar categories. Deny one and the other becomes meaningless. Yet the two must always remain opposed. You may even insist that there is little difference, if any, between a positivism like Gray's which allows for moral judgements upon the law, and an idealism that admits the inherent limitation of any ideal of justice that can be applied to human affairs. There is a sense in which the same system of legal rights and duties might be expressed in positivistic or idealistic language. But not only is language itself a most important factor in human affairs - since all sorts of emotional differences arise from differences of expression - but so long as our knowledge remains incomplete it makes a difference from which end we view the legal system. The positivistic and the idealistic perspective cannot be identical on the level of human knowledge. Positivists fail in trying to separate law from all ideals, and Hegelians fail in trying to identify the ideal with some form of the

---

<sup>64</sup> MR Cohen *Reason and Nature* (1931) Bk III ch 4 at 426.

actual, whether the Prussian or any other state. The deeper and more ancient wisdom is to recognise that divine perfection is denied to human beings in legal as in other practical affairs. It is romantic foolishness to expect that man can by his own puny efforts make a heaven of earth. But to wear out our lives in the pursuit of worthy though imperfectly attainable ideals is the essence of human dignity.”

Such an appreciation of justice in terms of its paradoxical totality cannot, however, be effectively accounted for in terms of legal discourse alone. Within the legal arena all jurisprudential ‘sorties’ into justice somehow always centre on the issue of morality, giving rise to the old chestnut scenario embodied in the Hart-Devlin debate. Moreover, at no point in the dilemma does legal discourse suggest the possibility of an integrated vision which is able to assimilate the conflicting belief systems into a unified understanding of sorts. As far as the law is concerned, everything is an ‘either ... or’ situation, never an ‘and’ prospect. What is, therefore, required for the advancement of ‘legal justice’<sup>65</sup> in a beneficial direction is, I would venture to suggest, an analysis of the more complex understanding of justice presented by literature.

## 2.2 Literary Understanding of Justice

As has been seen, the primary motivation of the law is to create an illusion of absolute and omnipresent authority from within the context of its words by attempting to deny the existence of a specific author. This is partly achieved by means of the temporal distance between the framers of a particular text (i.e. legislative bodies and committees) and the interpreters of such texts (i.e. judges and lawyers), as well as the complex division of tasks and duties amongst these various groups with regard to the text. By so doing, the law hopes to create an omniscient aura in the belief that a cloak of objective values and benign authority best serves the ends of justice. In contrast, literature retains a poignant immediacy of purpose through the tacit intimacy between author and reader (who in the act of interpreting becomes an unwitting subject of the author). Ironically, I intend to indicate, that it is this very intimacy which makes the quest for justice within literature a distinctly noble and more achievable goal. This is because the attainment of justice requires a merging of the subjective inner existence of the individual with those of other individuals.<sup>66</sup> The task is, moreover, eminently worthwhile (and problematic)

---

<sup>65</sup> i.e. The legal understanding of justice.

<sup>66</sup> ‘Justice’ requires an element of empathic reasoning in its formulation which enables the

since it requires the interpreter to be willing to admit to his own vulnerability by coming to terms with the potential weaknesses of his perspective and recognising, through the process of understanding, that a myriad of other valid views exist. However, in spite of the difficult nature of the task, it is not altogether unrealistic because, unlike law which requires one to denounce subjectivity in favour of an objective perspective (in order to best serve the ends of justice), literature does not require a renunciation of one's subjectivity so much as an acknowledgement of it.

It is, therefore, important to note that a 'literary bias' often focuses on a different conception of 'justice' than that which is presented by means of pure legal understanding. The task of literature is at one and the same time, first, to do justice to the vagaries of the human condition, and secondly, to remain loyal to humankind's desire of a greater certainty beyond 'the Self' (i.e. an innate sense of 'justice').<sup>67</sup> The result is, therefore, a far more immediate and intense appreciation of the potential for justice than that which a purely legal understanding accords one. In this regard, however, the literary understanding of justice has not remained static, and in order to appreciate the nature of 'literary justice'<sup>68</sup> one must analyse its temporal progression so as to ascertain its broad connection with, and benefits for, legal discourse as a whole. To this end I have chosen to examine three literary genres of particular relevance in recent times - Romanticism, Modernism, and Postmodernism.

---

individual to somehow look beyond the Self and transpose the situation of another into his own frame of reference.

<sup>67</sup> In contrast to my contention, however, and far from seeing literature's primary motivation as the search for justice, Georges Bataille (*Literature and Evil* (1973)) regards literature as nothing more than a form of communication reliant for its cohesion and effectiveness upon an allegiance to Evil. This is not, however, to suggest that it is immoral, but rather that it requires a sense of 'hypermorality' i.e. an awareness of literature's potency as an arbiter of fate. In this sense, therefore, Bataille appears to acknowledge the capabilities of literature in structuring existence, however he regards the process itself to be tainted by prejudices and steeped in Evil. Moreover, such a perception can be closely aligned with that found in Edward Blake's *Songs of Experience*: See E Blake *Songs of Innocence and Experience* (1976) in which the adult can only recapture the immediacy of his childhood by acknowledging the evil in experience where once he found only good. However, while Bataille focuses solely on the 'Evil' into which literature is immersed, Blake appears to accept the necessity of evil as an indicator of a complex and fulfilling appreciation of the possibility of justice.

<sup>68</sup> i.e. A literary understanding of justice.

### (a) Romanticism

The Romantic movement, whose origins can be traced back to the latter part of the eighteenth century, arose as a result of a fundamental ideological reappraisal of the relationship between 'the Self' and 'the other'. In essence, the notion of an objectively defined, and immanently knowable world from which humankind draws knowledge about itself began to waiver in view of an increased awareness of the complex relativity of nature and the metaphysical isolation of the individual. Where once objectivity and justice were synonymously intertwined with each other in an incestuously banal paradigm of existence, there now emerged a complex self-reflection of the human condition based upon social isolation and metaphysical uncertainty. Moreover, such complex tensions, in turn, accounted for the tangible revision, by Romantics, of what they perceived to be man's social role and his societal obligations.<sup>69</sup> Society became viewed as the artificial construct bridging the chasm between internal identity and external circumstances; and, the Romantics' prime desire was to analyse the interrelations between role and self, 'the Self' and 'the other' in an attempt to better understand man's interaction with the world. To this end, they devised an 'anti-role'<sup>70</sup> designed to account for and penetrate the inevitable (some might say, necessary) masks behind which human participants conduct activities amongst one another, and thereby find some basis for meaning, value, order and identity.<sup>71</sup> The 'anti-role' construct did not, however, represent a static vision of Romantic ideology; rather, it evolved successive personas in its quest to account for and relay man's societal insecurities. In this regard, George Braziller<sup>72</sup> analyses the development of the 'anti-role' tradition from its negative foundations in the 'Byronic hero', followed by the positive visions embodied in the 'Poet-Visionary', the 'Bohemian', the 'Virtuoso', the 'Dandy' and

---

<sup>69</sup> Note that while I make use of the term 'man', I intend it to stand as a general reference to both sexes.

<sup>70</sup> i.e. "a role that was different from all other roles in that it could not be integrated into the social structure of interlocking roles": See Braziller *Romanticism- The Culture of the Nineteenth Century* (1965) at 17.

<sup>71</sup> The foundational premise of Romantic ideology was that human existence was structured around the desire for order, value, and meaning, and that such attributes lay at the core of the notion of 'self'. Thus, the focus of attention shifted onto 'the Self' as the receptacle for human potential and the catalyst for change.

<sup>72</sup> Op cit.

culminating in the 'Historian', and it is worthwhile to follow this same illustrative progression as an aid in comprehending Romantic concerns.

Upon the putrefaction of Enlightenment ideology, resulting from a questioning of moral order and meaning, there emerged a symbol - the 'Byronic hero' - who took on the role of the social outcast and misfit within the context of a society alienated from itself. Gradually, however, the despair of the 'Byronic hero' gave way to the potential embodied in the 'Poet-Visionary' who perceived the world with an innate sense of the justice to be found in the natural universe, even while acknowledging that effective comprehension and communication of such notions were beyond human capabilities. Within this context, the beauty and importance of art, therefore, lay in its ability to subsume all divisions and categories into a poignant revelation of untainted human experience - the process being, at one and the same time, both redemptive and reassuring. This process was redemptive inasmuch as it allowed one to progress beyond the confines established by society in general, and the social masks of individuals in particular; while also, by virtue of its task, necessitating a reappraisal of such social constructs and providing assurances of greater (and ironically, unknowable) possibilities from within this new framework of understanding. Similarly, the 'Bohemian hero' sought to distort his perceptions (aided by the use of alcohol and drugs) and thereby attain a clearer conception of reality unhindered by social norms and constructs; at the core of which often lay a strong reliance on art as a catalyst of thought and an "excuse for his deliberate offensiveness".<sup>73</sup> Soon the notions of 'Virtuoso' and 'Dandy' emerged to increase the complement of anti-heroic figures to tackle societal role-playing. The 'Virtuoso' was characterised by his ability to portray 'the Self' as the origin of potential perfection amidst societal ineffectuality. Moreover, what marked him out was his use of such genius in activities and pursuits which had no apparent impact on, or were of no immediate benefit to, the structure of social hierarchies. The 'Dandy', in turn, revealed the essential meaninglessness of such hierarchies by assuming a guise of utmost importance - that of the aristocrat - and playing it with ironic mastery. In so doing, the grave significance of social constructs was denied, and the possibility of greater individual potential unleashed.

---

<sup>73</sup> Idem at 21.

understanding and communicating our experiences which will lead to a unification of individual experience, and the creation of an "integrated view of the world".<sup>219</sup> However, while White adopts Romanticist literature as a means of collapsing the dualist dichotomy, Unger does not fully explore, what Teachout regards as, "the important window of opportunity"<sup>220</sup> of White's revelations. Thus, Teachout regards all of Unger's subsequent attempts to create some cohesion of understanding as theoretically tortured and incapable of achieving the type of integrated experiential vision he seeks. The reason for this failure (according to Teachout) lies in the fact that Unger isolates himself in abstract theory and is, therefore, incapable of reconciling himself with the vagaries of existence. Consequently, Teachout refers to Unger's visions as "though-tormented literature"<sup>221</sup> which valiantly attempts to express concepts which by its very nature it cannot hope to achieve.

It is this Ungerian sense of 'unity' in the abstract which Teachout disapproves of, and provides the basis for his point of distinction between communitarian failure and White's success. For unlike the communitarian vision, White's Romanticist vision positions the potential of 'unity' within a symbiosis of actual experience and visionary desire. In other words, Teachout maintains that White's emphasis on Romanticist literature enables him to ground his understanding of 'community' in the realities of existence, while confidently peering into more abstract conceptions (as embodied in the world of the literary work) and consequently uniting the two. Moreover, White's sense of 'community' stems from his understanding of 'friendship' which he sees as resulting from the bonds between the individual and those around him. It is these links (such as those between writer and reader) from whence a 'community' arises, and which, in turn, "form a durable cultural community linking us backward and forward through time to generations that have come before and those yet unborn".<sup>222</sup> In essence, therefore, Teachout believes that "White's work allows him to achieve the expression of a deeply integrated view of experience - one in which there is a genuine reconciliation of the abstract with the concrete",<sup>223</sup> and, moreover, one in which the reconstitution of the world towards a just future is the main concern. This is not, however, to deny the fact that injustice and suffering are integral parts of human existence. Rather, by

---

219

Ibid.

220

Ibid at 885.

221

Idem at 886.

222

Idem at 892.

223

Idem at 888.

The tripartite structure ('Mosque', 'Caves', 'Temples') of *A Passage to India* serves to unveil the evolving complexity of the interaction between the characters in the novel. In the first section the title – 'Mosque' – refers to the initial meetings between Aziz and Mrs. Moore in surroundings which present the promise of future cordial communication. Yet such communication is implicitly based upon an acknowledged difference and distance between English and Indian societies. There is a sense that there is something quaintly foreign about the Indian way of comprehension and that while this should not necessarily hinder cross-cultural communication the English characters do not contemplate the need for 'connection' because they remain firmly entrenched in the justification of their own vision.

In 'Caves', however, this vision is gradually eroded and the language upon which it is based is undermined. Out of the supposed certainty and clarity embodied by Western thought and interpretation there emerges a fundamental mystery which cannot be explained in language, namely, how does one structure meaning? This results in a crisis of understanding for the Western characters some of whom experience psychological breakdowns (Adela Quested and Mrs. Moore) brought on by the intensity of this non-verbal experience and the ineffectiveness of their culture (as embodied by the legal process) to account for it. While this represents a point of confusion for the characters concerned it also signifies a catharsis for them in as much as they are encouraged to acknowledge their inhibitions while not necessarily being freed of them.

The final section – 'Temples' – attempts to reconstruct the broken down relationships between the characters on the basis of the failings in understanding which they have come to accept as an inherent component of human interaction. While no ultimate resolution is presented to the tragic inability of characters to connect with one another, the reasons for the failure of such connection are acknowledged and the hope of some future connection expressed. It is the expression of this possibility which is important since its actual attainment is, in any event, denied by the psychological division between 'the Self' and the Other in their present state.

As has been noted, an appreciation of the distinction between the story and the plot of *A Passage to India* is crucial for a proper understanding of the text. While the story relates the impact of British rule in India to the reader through the medium of the relationship between various characters, the plot is concerned with analysing the way in which different discourses structure meaning in particular ways in an attempt to advance human understanding. In this regard, the socio-political tensions between British 'ruler' and Indian 'subject' presented in

is that we should randomly raise questions lacking in any particular value in the hope of somehow stumbling across some worthwhile insights. The fact that the final destination of this journey can never be truly realised while we remain subject to the limitations of the human condition is no reason in itself for abandoning the pool of shared wisdom from which we nevertheless still benefit. The little that we do know still forms a sufficiently stable foundation from which to launch cogent enquiries. Bearing this in mind, the mark of an incisive question is, therefore, the ability to appreciate the current status of human knowledge while retaining a desire to challenge the limitations of human understanding.

Through the lens of postmodernism, I have sought to show that while narrative tools constitute our only means for interpreting our universe, no single narrative discourse suffices. We have to open our minds to the plurality and interaction of discourses if we are to understand the significance of living in a postmodern age and the role of justice in such an age. This is primarily because the postmodern condition gives rise to a crisis of understanding which is rooted in a fundamental re-evaluation of three traditional concepts: language, reality and 'the Self'. Whereas, prior to the advent of postmodernism, these concepts were clearly delineated and 'objectively' understood, postmodernism causes one to reflect on the subjective and incongruous characteristics embedded in such terms.

Postmodernism destroys the traditionally constructed dichotomies of subject/object, good/bad, truth/falsehood, justice/oppression and merges them into the fabric of language which embodies all extremes and through which we interact with the world. Language is the central focus of postmodern sensibility and rather than describing what is known, in fact, becomes the only factor accessible to human knowledge. For this reason, postmodernism challenges our perceptions in important ways and forces us to acknowledge that just as narrative provides us with the means for comprehending that which is 'just' both within and beyond ourselves, so too, it must contain the seeds of its own justification since there is no longer a universally accepted meta-narrative on which to rely. That which we create is merely the embodiment of that which is known to us. In other words, all discourses represent mediums of intelligibility through which we make sense of our individual and collective experiences and gain some understanding of that towards which we aspire. In a sense, we are all pre-destined to embark on the same journey of interpreting and coming to terms with our identity in a postmodern age, yet our discoveries and the effectiveness of our quest are distinctive to the individual and are by no means generic to humankind. For this reason, my focus has not been (and cannot be) linked to a particular conclusion or journey-end as my

Finally, and most importantly, the notion of the 'Historian' came to be associated with the Romantic culture since he governed the discipline which came to guide the process of reality. In an era in which a sense of alienation between 'the Self' and 'the other' first came to be acknowledged, and the existence of reality beyond interpretation denied, all that remained was for 'the Self' and 'the other' to define each other in terms of experience. And such experience was channelled through the avenues of history.

In essence, the foundation underlying the development of Romantic 'anti-roles' was based upon the need to recalibrate perceptions around a new centre of value, order and meaning, namely, 'the Self'. However, the rationale for such value, order and meaning in the first place necessitated some form of explanation which, according to George Braziller developed in four distinct phases. The first of these developmental progressions Braziller termed 'Analogism' which was composed of sentimental and sublime motivations in an attempt to release 'the Self' from its mundane constraints and thereby arrive at "the divine noumenon (or ultimate reality)"<sup>74</sup> situated beyond nature. However, such an experience was valueless and amoral on its own, since it merely provided a basis for value without the necessity for action. And, as Braziller indicates – "without action, reality could not be encountered and the Self could not be realised"<sup>75</sup> Moreover, it denied the possible resolution of the subject-object relationship by ignoring the complexities inherent in the formulation of 'the object' in favour of a complete absorption in the life of 'the subject', and a consequent disregard for all elements beyond 'the Self'. The second phase, termed 'Transcendentalism', then sought to develop certain elements engineered by Analogism. It retained the sense of a world devoid of function and purpose which Analogism had initially devised, while simultaneously asserting that the rationale behind 'the Self's' committed desire for order, value, meaning, and identity lay in a divine authority. In essence, "the Transcendental hero was to redeem the Self in the act of redeeming the world"<sup>76</sup>. However, in situating such value within the human will and simultaneously providing an incentive for action, Transcendentalism in effect, condoned the real threat posed by the imposition of a stronger will (i.e. as embodied in the 'Transcendental hero') upon weaker ones.

---

<sup>74</sup> Idem at 25.

<sup>75</sup> Idem at 26.

<sup>76</sup> Idem at 27.

Thus the foundation of Romantic morality, in the form of empathy, was prejudiced if not completely undermined since empathy requires one to acknowledge and appreciate existence beyond 'the Self' in order to assert the existence of 'the Self' in the first place. Furthermore, by asserting the primacy of any one particular will above a host of others, the latter's humanity was alienated and an absolute value structure (be it good or evil) constructed for all to abide by. The difficulty of such conception being that the notion of morality is itself rendered meaningless thereby, since (as already alluded) the imposed value structure which binds all human actors may itself be steeped in injustice and corruption. Moreover, such heroic world redemption is seen in an inevitable and absolute light through Transcendentalism, whereas the Romantic preoccupation is with journeying towards a sense of order and value (as opposed to necessarily arriving at a particular value construct) from within the context of an organic morality born of the world; and the progress of the journey is often tinged with fear and self-doubt as to the potential outcome. The third phase of Romantic rationalisation therefore sought to extinguish any sense of heroic suprahuman determination of value by asserting in its place a purely mortal consciousness which is driven by the conviction that all beliefs are merely creatures of their own creation, all perceptions simply illusions. Strictly speaking, of course, the notion of perception cannot control the mass of reality on its own; to create some orderly coherence of perception one must have an awareness of definitional concepts which can then be used to encompass a large and unwieldy group of objects or conceptions. This is common to language generally, whether it be legal or literary in nature, and can be illustrated by reference to two concepts – 'ownership' and 'character'. In the legal sense, the concept of 'ownership' is used to describe such varying conceptions as physical possession (in the form of holding an object or controlling access to it); enjoyment of the fruits of the object (*ius fruendi*); mental intention to own such object; right to abuse the object (*ius abutendi*); right to dispose of the object; right to grant third parties access to the object and, possibly, rights in it as well. Similarly, in the literary sense, the concept of 'character' is conceived of through an understanding of its relation to the sum of its parts – i.e. the conceptions which it encompasses. Thus, the use of the word 'character' encompasses an appreciation of honour, valour, jealousy, greed, hatred, indifference, and other qualities indicating temperament and psyche. While such vision of necessity deems the world to be unredeemable, its apparent tragedy is, in fact, the ultimate triumph since it provides one with a vision of one's naked and alienated self without the comfort of idealistic perceptions for support. By so doing one is therefore obliged to acknowledge "the unredeemable character of

experience"<sup>77</sup> and accept that all value germinates in, and feeds off, this extended sense of alienation which lies at the heart of 'the Self'. However, Objectivism's failing was that (as with Analogism) it provided the individual with no real "imperative to action",<sup>78</sup> as well as no means of expressing the enormity of the experience from whence value was distilled. As Braziller states "...there was no defence against the hell of existence. It required a tough-mindedness which even the tough-minded could not endure, for it provided no mode of existence, of getting from day to day".<sup>79</sup> So it was that the final stage in the Romantic process, 'Stylism' (conventionally referred to as 'Aestheticism'), evolved so as to alleviate some of the angst left in the wake of Objectivism. It achieved this by surrounding the individual with a "culturally transmitted pattern of action"<sup>80</sup> to supplement the vagaries of individual circumstances, while allowing the individual to simultaneously formulate his own unique approach (i.e. 'style') to general scenarios, thereby retaining a sense of selfhood and a defence against the brutality and unpredictability of existence. In essence, therefore, while style symbolised the essential and constant identity of selfhood as it journeyed from predicament to predicament, it also shielded "the Self" from the malevolence of circumstances by means of an intricate social pattern of predictable responses. However, as Braziller indicates such predictability was not without dangers, as it too often lapsed into the comfortable rut of mannerisms devoid of substance beyond the facade of the roles they created.

Ultimately the Romantic desire for the re-evaluation of 'the Self' was closely aligned to a distinctive understanding of the soul rooted in humanist philosophy. Within this conception, the soul became the medium for all achievement and the signifier of all potential. This was based upon the tacit presumption that the soul contained an inherent core of integrity which could be relied upon to facilitate the attainment of human ideals. However, the difficulty (and some might say the inevitable consequence) of such an analysis was the metaphysical constriction of the soul by diminishing its potential through the act of intellectual contemplation. Nonetheless, the splendour of our selfhood, as embodied in the soul, was that both elements (i.e. selfhood, and

---

77     Idem at 29.  
78     Ibid.  
79     Ibid.  
80     Idem at 30.

soul) were self-propounding notions, thereby making individuals the culmination of their own imagination. In so doing, the essence of 'Being' was accounted for, and the existence of 'Becoming' was hinted at. (The ultimate irony, of course, being that the act of discovery, in both cases, only served to propound the view that beyond all questions lay an even greater uncertainty which defied any comprehension.)<sup>81</sup> And it was within this void of uncertainty that Romantics fell back on the notion of 'justice' to comfort themselves from the implications of a universe free-falling into a meaningless abyss of despair. It must be noted, however, that at no time were references to 'justice' overtly manifest in such Romanticist writings; nonetheless, all their concerns were tacitly underpinned by this notion, inasmuch as the belief in 'justice'<sup>82</sup> was their only guarantee against the anarchic dissolution of human hopes, and possibly even the human soul.<sup>83</sup>

Ultimately, however, Romanticism proved incapable of attaining its ideal of comprehending existence by destroying the schism between the isolation of 'the Self' and the existence of 'the other' without the need to sacrifice one or the other. Nonetheless, while it may have failed in this regard, it remains a valuable primary gateway into the sense of empathic comprehension around which literary understandings of justice invariably revolve. Moreover, as noted in *At the Limits of Romanticism*,<sup>84</sup> romanticist ideology continues to filter into contemporary methodology

---

<sup>81</sup> Possibly, the most poignant description of this essential uncertainty is to be found in William Wordsworth's *Ode: Intimations of Immortality*

"But for those obstinate questionings  
Of sense and outward things,  
Fallings from us, vanishings;  
Blank misgivings of a Creature  
Moving about in worlds not realized..."

Moreover, in this regard, LJ Swingle *The Obstinate Questionings of English Romanticism* (1987) analyses in detail the conception of Romanticism as an ideology versus the notion of it as a purely questioning entity.

<sup>82</sup> In the sense of a notion embodying certainty, continuity, and benign immanence.

<sup>83</sup> In contrast, some scholars might choose to label such ends 'love', 'faith' or 'destiny'; however, I merely regard these as possible avenues along which to progress in search for 'justice' rather than being ends in themselves. In this sense, therefore, central to the attainment of 'justice' within a Romanticist paradigm is the complex acknowledgement of existence both within and beyond 'the Self'. Nonetheless, such acknowledgement is solely justified in terms of the end towards which it leads.

<sup>84</sup> MA Favret, NJ Watson (eds) *At the Limits of Romanticism* (1994) at 6, hereafter referred to as *Limits of Romanticism*.

from New Criticism through to deconstructionism to form what Alan Liu refers to as 'new formalism', which in many ways represents the bedrock for all subsequent literary constructs, whether they choose to acknowledge it as such or not.<sup>85</sup>

### (b) Modernism

The Modernist tradition evolved out of man's continuing post-Romantic quest to attain a greater understanding of the relationship between 'the Self' and 'the other' within a changing socio-political context, and cultural environment. To this end, therefore, I contend that it would be unwise to maintain that modernism represents a fundamental diversion from Romantic perceptions; rather the beauty (and complexity) of the process lies in its continuity and the essential integrity of the notion of 'justice' which it bears with it in its journey towards a greater understanding of the human condition. Unlike Romantic comprehension, however, modernist visions of justice are rooted in an ironic understanding of existence. This stems from the modernist appreciation of man's own limitations in coming to terms with the complex ambivalence of the world, which requires philosophical inklings to be tempered by pragmatic limitations.<sup>86</sup> The most significant of which is the acknowledgement that "the only destiny man can aspire to is conditioned of necessity by his finitude";<sup>87</sup> yet, the very existence of such a definable and brief framework is no reason for one to denounce the possibility of a greater potential within its confines.<sup>88</sup> Such tension-laden complexities are necessarily discomfoting, and prove problematical. Nonetheless, in working within the various possibilities which modernist thought presents one implicitly affirms the integrity of existence by denying the assertion that life is devoid of purpose and that communication is nothing more than solipsistic rantings. In essence, one concedes that there is a core ambition which is shared by humanity (by virtue of our nebulous existence), namely, the hankering after justice.<sup>89</sup>

---

<sup>85</sup> *Limits of Romanticism* at 1-19.

<sup>86</sup> Within the modernist tradition there is always the sense that the magnitude of the search is too great a burden to be borne by the enquiring party. This intensity is, therefore, defracted by means of ironic conventions.

<sup>87</sup> CI Glicksberg *The Ironic Vision of Modern Literature* (1969) at 7.

<sup>88</sup> This 'greater potential' is synonymous with justice. However, as already noted, unlike literature, legal discourse seeks to account for it beyond subjective boundaries in the realm of objective value judgements.

<sup>89</sup> Some may assert that this journey is no more than a quest based upon an illusion. However, illusory or not, it proves to hold sufficient magnetism to draw humanity on.

Modernism's search for answers in a relativistically constructed universe carries with it a tacit vulnerability inasmuch as it requires man to strive towards a perfection within himself which he has no guarantee of attaining (by virtue of the constant reminder of his own relativity of experience). Nonetheless, it is a journey which must be undertaken since it represents a defining feature of humanity in relation to other existence on earth. (i.e. the desire for justice coupled with the uncertainty of its attainment is a quandary solely reserved for human contemplation.) Moreover, the potential of its attainment (no matter how slight) and the subsequent dawn of self-fulfilment which it is likely to herald is sufficient, in itself, to warrant the continuation of the search. In essence, therefore, the question of whether justice should be sought within or beyond man is subject to the acknowledgement that man himself wields the ultimate sanction of interpretation. Not only are the consequences his to bear, but the choices his to make. Moreover, if one acknowledges that the world of meaning and understanding is determined by imperfect mortals who, in turn, are also governed by such concepts, then the question arises to what extent it can be said with any certainty that sense can be made of existence. The answer to this depends on one's own fundamental framework of perception. Either one believes in the essential integrity of existence (this is not to deny the chaos and vagaries of humanity, but merely to maintain that despite such uncertainty, the framework within which existence operates is structured and directional), or one adheres to the notion that not only is existence formless, but it also lacks a continuum along which to develop. In my estimation, there are two possible worlds in which the application of a continuum of understanding would serve little purpose. The first is a world of absolute flux in which no progression (in the sense of movement in a particular direction) exists; and the second, is a world which has reached its point of termination, and hence leaves nothing further to be understood. I submit that one cannot convincingly account for human existence in either of these paradigms.

It is interesting to note that Modernism has attempted to distance itself from the stultifying Romantic paradigm by creating its own traditions and heritage, yet in doing so it adopted mythical devices (not unlike those used by the Romantics) with which to chart its progress.<sup>90</sup>

---

<sup>90</sup> TS Eliot, for example, believed that art represented the only infallible construct capable of ordering existence effectively.

Through the aesthetics of art, for example, modernist proponents sought to organically unify human desires and experience into a heightened awareness of perfection and order. Nonetheless, the modernist ethos has found itself uncomfortably confronted by the desire to transcend its soci-historical context on the one hand, while being a creation of it (and consequently subject to it) on the other. In essence, therefore, I would characterise modernism as both a reaction to human suffering, and a cause of it. For in its desire to 'do justice' to the human condition, modernism invariably heightens the crisis of the subject by refusing to alleviate his essential uncertainties.<sup>91</sup> Nonetheless, the wisdom of 'modernism' lies in its acceptance of the fundamental 'dynamic energies'<sup>92</sup> present behind the veil of everyday rationality<sup>93</sup> coupled with a sense of the infinite justice which resides beyond mental comprehension (but within human experience).<sup>94</sup>

### (c) Postmodernism

If modernism proves to be problematical in terms of its complex understanding of existence, then postmodernism may be said to cast an even wider net of unease upon humankind's cosmological deliberations. The reason for this is often attributed to postmodernism's acute awareness of the fragmentation of sentience, culminating in a fundamental indeterminacy with regard to all human interpretations. It is important to note, however, that such consequences are not necessarily devised so as to thrust humankind into a chaotic abyss of non-meaning for its own sake. Rather, the rationale behind the postmodernist approach is intricately tied to its desire to decanonize cultural discourses and thereby deconstruct the inhibitive social hierarchies through which humankind has, until recently, been obliged to comprehend existence. For this reason, I suggest that the fundamental ambition underlying the postmodernist quest is man's desire to attain an effective conception of 'justice' in the hope of better representing the human

---

<sup>91</sup> Moreover, this is not so much through any failing of modernism as an incisive indicator of human experience, but, in fact, precisely because it manages to pierce human frailties so effectively that it leaves one somewhat aghast at the enormous implications of one's task.

<sup>92</sup> Bernard McGuirk *Theorising Modernism - Essays in Critical Theory* (1993) S Giles (ed) at 17.

<sup>93</sup> Unfortunately, however, as a consequence of this realisation many prominent figures in the modernist tradition have been led to despair and untimely death, e.g. Vincent van Gogh, Virginia Woolf.

<sup>94</sup> Referred to as 'binary perception' by Bernard McGuirk in Giles op cit at 53.

condition.<sup>95</sup> The complexity of this approach, however, resides in its insistence on subverting pre-existing paradigmatic structures to the extent that the dichotomy between 'the Self' and 'the other' is partially erased. This is due to the fact that the former notion is denied any primacy as a measure of judgement or understanding. This ultimate rejection of 'the Self' as a quantum of value is vital, in my view, if an effective image of 'justice' is to be attained since 'justice' requires the ability to empathise with others, and in so doing deny oneself. However, within present human discourse (whether it be legal, literary, or scientific) constrained by language which is based upon identity, the element of 'justification' always imposes its will on the equation. As a result, therefore, 'the Self' and 'the other' can never be fully integrated with each other, and consequently 'justice' can only be viewed in terms of conceptions without the concept itself ever being fully comprehended or attained. Nonetheless, despite the intricacy of post-modern pursuits, a sense of teleological purposefulness is retained through its inevitable historical connection with the past and its organic progression towards an immanent awareness (though partial comprehension) of 'justice'. It is, of course, ironical that post-modern ideology should unwittingly retain a sense of historicism when it is, after all, seeking to weld human understanding into a unified comprehension of existence and meaning beyond historical constraints. Yet such a situation is inevitable since the human mind has difficulty in interpreting language and extracting meaning from it outside of an historical context. Therefore, postmodernism's attempt to deconstruct historicism is in itself based upon an internalised causal timeframe. As Mihai Spariosu<sup>96</sup> notes "postmodernist literature attempts to deal with a world in which all discourses have become allegorical".<sup>97</sup>

In this regard, moreover, there is no unitary or unified voice which may be distinguished as 'the' postmodernist discourse since the spectrum of ambition within post-modern purview range from the revisionary to the anarchic.<sup>98</sup> Yet, in spite of such divergent opinions amongst its adherents, the essence of the post-modern dilemma remains the desire to justly reflect existence. Within the postmodernist paradigm this represents a dilemma because it strives to emulate the

---

<sup>95</sup> In this regard, the postmodernist paradigm is merely the present-day culmination of man's continuing desire, through the medium of literary discourse, to arrive at an understanding of 'justice'.

<sup>96</sup> M Spariosu *Exploring Postmodernism* (1987).

<sup>97</sup> Idem at 61 (own italics).

<sup>98</sup> One needs only to look at the writings of Umberto Eco *The Role of the Reader- Explorations in the Semiotics of Texts* (1979), Friedrich Nietzsche *Beyond Good and Evil* (1990), and Jacques Derrida *Acts of Literature* (1994) to verify this statement.

immediacy of existence through, what it regards as, the constraining and inhibitory functioning of language in an irrational universe. Furthermore, it hopes to attain its objective by acknowledging a multiplicity of centres of consciousness. And it is this quintessential search for justice which dictates the construction of any particular post-modern perspective.

Nietzsche,<sup>99</sup> for example, while maintaining that the world lacks order, value and meaning<sup>100</sup> at no time denied the desire for, or existence of, justice as part of the human psyche. Instead, he simply located it within the ego, and saw the potential for joy arising from the realisation that we create and renew our being from a nothingness which both underpins and presides over all creation. Moreover, the primacy of the ego may be tempered by an acknowledgement of another ego's equality in so much as they share a similar will to power and standard of value.<sup>101</sup> In effect, therefore, the noble soul is identified by its egoism and uncompromising demand of self-sacrifice and subordination on the part of less distinguished egos, and it is this essential expectation that embodies justice in Nietzschean ideology. Beyond this solitary truth float the changing compositions of metaphysics which deny assumptions of certainty or intelligibility. In turn, Derrida<sup>102</sup> focuses his deconstructive task upon the linguistic indeterminacy with which human aspirations are formulated, and the vain attempts of man to somehow renounce the necessity for language in his understanding of the world. It is this Derridan belief in the pervasive primacy of linguistic (particularly textual) hermeneutics that has led Christopher Norris<sup>103</sup> to comment that "Derrida's writings seem more akin to literary criticism than philosophy. They rest on the assumption that modes of rhetorical analysis, hitherto applied mainly to literary texts, are in fact indispensable for reading any kind of discourse, philosophy included" thus, literature comes to embody the principal concern of philosophical discourses, as well as being emblematic of the vision towards which they strive, namely, a sense of truth through justice.<sup>104</sup> However, the paradox underlying the journey towards justice is that "[t]here

---

<sup>99</sup> A Nehamas *Nietzsche—Life as Literature* (1985) at 48.

<sup>100</sup> This is based upon his belief that value and identity are illusions, and that no finality can ever be attained.

<sup>101</sup> This limited acknowledgement of fellow psyches is permitted so as to prevent the atrophy and dissolution of both social and natural structures (such as class and power) which Nietzsche sees as vital for the co-ordered and effective attainment - or exploitation - of a just balance within human existence.

<sup>102</sup> J Derrida *Writing and Difference* (1990) at 156.

<sup>103</sup> C Norris *Deconstruction : Theory and Practise* (1983) at 19.

<sup>104</sup> In this regard, therefore, it seems appropriate to conclude that "literary texts are less deluded than the discourse of philosophy, precisely because they implicitly acknowledge

is no language so vigilant or self aware that it can effectively escape the conditions placed upon thought by its own prehistory and ruling metaphysic".<sup>105</sup> In effect, therefore, it would appear that at best, justice represents a compromise, and at worst, an illusion. Central to this particular understanding lies the appreciation that the task of deconstructionism is itself rooted in the very object which it seeks to amend.<sup>106</sup> Thus, it follows that what Derrida refers to as "a primordial intuition of the other's lived experience", which is the only effective means by which language can "fulfil the condition of self present meaning",<sup>107</sup> cannot be attained given our present temporal and spatial limitations. Finally, Eco<sup>108</sup> confronts the creation of texts through the organic interaction between the author and the text, and the reader and the text. For him, the text represents the essence from which meaning is drawn which, in turn, is interpreted or decoded by means of channels of communicative understanding which pierce the core of textuality and unite both reader and author in a common body of co-operative integrity. Therefore, by inviting the reader to partake in the production of a text through the act of reading, Eco in no way establishes a dangerous precedent or creates the potential for a complete breakdown of textual objectives. Rather, his belief appears to rest on the premise that it is only through the involvement of the reader, in the first place, that the true value of a particular text can be appreciated. This collaborative task is facilitated, to a large extent, by what Eco regards as humankind's deep-rooted sense of the shared mythology of Adam's fall from grace, and our present existence in a postlapsarian environment. For it is from within this acceptance of the loss of our innocence that the knowledge of language's multivalent nature arises; and it is the realisation of language's awesome power which encourages man to harness its potential and to reformulate its context by reinterpreting its meanings. In effect, therefore, for Eco, Adam's action in eating the apple and humankind's subsequent banishment from the Garden of Eden are the two most exquisite accomplishments to ever have occurred. For it is as a result of them that justice came to be seen

---

and exploit their own rhetorical status": Idem at 21.

<sup>105</sup> Idem at 22.

<sup>106</sup> i.e. "[Deconstructionism] seeks to undo both a given order of priorities *and* the very system of conceptual opposition that makes that order possible." Therefore, it becomes "an activity of reading which remains closely tied to the texts which it interrogates, and which can never set up independently as a self-enclosed system of operative concepts" Idem at .31.

<sup>107</sup> Idem at 46.

<sup>108</sup> U Eco *The Role of the Reader— Explorations in the Semiotics of Text* (1979) at 96.

as created of language, understandable in terms of language, and attainable only by means of language.<sup>109</sup>

Admittedly, part of the increased complexity of post-modern analysis has to do with the aversion of its adherents to being seen as genre specific in their approach to the tasks which they undertake, coupled with the denial of causality entrenched in post-modern thought. This invariably results in the text being infused with the multiplicity of discourses vying for supremacy in a body of indeterminate meaning. Nevertheless, as has already been shown, the compass guiding post-modern ideology is itself based upon the notion of justice (however this may be understood or interpreted), and it is this aspiration which seeks to compose human understanding into a cohesive vision of the future. As Fredric Jameson<sup>110</sup> notes, "in a fallen or class society, science, the Utopian, and indeed everything else of value, must ... always function as an ideology. There can be no escape from this ideology, that is to say from our rationalisation of the blood guilty of our own positioning and class situation in this society".<sup>111</sup> Therefore, while postmodernism might wish to deny such philosophical tenets, the fact remains that it works within their framework to try and achieve its ends, since this is the only means by which postlapsarian man can make sense of existence.<sup>112</sup> In this regard, moreover, the post-modern concern may ultimately be seen as the crystallisation of an attempt to 'write the future' and record destiny in the context of a 'future imperfect'.<sup>113</sup> While this may appear illogical when

---

<sup>109</sup> Nietzsche, Derrida and Eco are thus, not primarily concerned to replace one system of discourse in lieu of another. Rather their conduct is broadly centred on the motivation to rediscover the plurality of Discourse itself. As Christopher Norris notes, "[d]econstruction begins with the same gesture of turning reason against itself to bring out its tacit dependence on another, repressed or unrecognised, level of meaning": See C Norris *op cit* at 64.

<sup>110</sup> F Jameson *The Seeds of Time* (1994).

<sup>111</sup> *Idem* at 77.

<sup>112</sup> While more radical post-modern scholars would argue that there is no point in trying to make sense of anything since everything is a meaningless illusion, the fact remains that the post-modern quest to subvert previously accepted canonical and ideological structures is based upon the tacit desire to restructure the human understanding of existence so as to better reflect reality. And it is by doing justice to the human condition that one can then amass the knowledge and wisdom required to better comprehend the concept of justice itself. In essence, the philosophy of justice is an inevitable concern of post-modern discourse.

<sup>113</sup> As Geoffrey Bennington contends, postmodernism represents a means "of writing the future as the destiny of indeterminate or disfigured destination" which "has consistently been marked by a negative pathos, at best by a sort of stoical resignation.": See D Wood (ed) *Writing the Future* (1990) at 28.

viewed along a linear continuum leading from past, through present and into future, post-modern philosophy turns the temporal sequence back into itself so that a hermeneutic circle is formed leading from past into present, and future into past thereby simultaneously embodying “a model of some sort of perfection of thought”, as well as “a description of thought's own self-deception and imperfection”.<sup>114</sup> However, given the limitations of man's existence,<sup>115</sup> emphasis must lie with the latter notion, which conceives of the philosophical process as “a way of expressing the real presence and foreknowledge of what is not, or cannot, ultimately be anticipated or known”.<sup>116</sup> Moreover, the eminence of the future rests in the rich potentialities and awesome possibilities which it hints at, as well as its embodiment of a “legacy that far surpasses what can and does get actualised”.<sup>117</sup> Therefore, the primacy of the present is tacitly denounced, and its role as the sole arbiter of reality decried in favour of a resolve based on future experience.<sup>118</sup>

Linda Hutcheon astutely comments that “[it] is not that the modernist world was a world in need of mending and the post-modern one beyond repair”.<sup>119</sup> Rather she maintains that, “[p]ost-modernism works to show that all repairs are human constructs, but that from that very fact they derive their value as well as their limitations. All repairs are both comforting and illusory. Postmodernist interrogations of humanist certainties live within this kind of contraction”.<sup>120</sup> And it is within the psychedelic perspective, created by postmodernist awareness, that the formalistic and conventional borders (both temporal and conceptual) of traditional understanding begin to dissolve, and a greater appreciation arises.<sup>121</sup> In essence, a deeper self-awareness burgeons from the intensity self-conscious demands placed upon the post-

---

<sup>114</sup> Dennis J Schmidt *Writing the Future* at 67.

<sup>115</sup> i.e. While man may be able to conceptualise the syntactic integration of the different tenses, he remains, as yet, unable to give effect to this potential.

<sup>116</sup> Idem at 72.

<sup>117</sup> Idem at 73.

<sup>118</sup> This should not, however, be viewed as a necessarily vain goal for human contemplation since the intense and varied futures symbolise an acknowledgement of the hope yet to come which, by its very nature, remains unfulfilled in the present.

<sup>119</sup> L Hutcheon ‘Beginning to Theorise Postmodernism’ *A Postmodern Reader* (1993) J Natoli, L Hutcheon (eds) at 248.

<sup>120</sup> Moreover, Hutcheon is of the opinion that the value of such speculation and reflection lies in the fact that “the knowledge derived from such enquiry may be the only possible condition of change”: Ibid.

<sup>121</sup> The mechanism facilitating such new awareness, according to Hutcheon, lies in the post-modern preoccupation with parody which “paradoxically both incorporates and challenges that which it parodies” by revealing the “ironic discontinuity ... at the heart of continuity, difference at the heart of similarity”: Idem at 251.

modern discipline. By so doing, accepted traditions simply become provisional discourses lacking in any immutable principles of legitimacy, and postmodernism presents itself as merely another interpretative discourse providing alternatives to (rather than thrusting its vision upon) the canonical narrative. Clearly, this denies the possibility of a comfortable resolution to questions of ideological primacy, discursive hierarchies and human understanding, yet this uneasy *détente* should not be dismissed off-hand as intellectually tortuous and pragmatically worthless since it quite possibly provides one of the most effective channels for viewing humankind's omniscient potential. The reason for this lies in the ability of postmodernism to release man from the conceptual constraints that previous methods of understanding have wrought upon him. Ultimately, the post-modern vision is forged on the anvil of deconstructionism which seeks to redefine and re-evaluate accepted hierarchical norms by seeking to forsake the duality of 'either/or' affirmations in favour of a multipolar modality of comprehension. Old assumptions are discarded, and previously held expectations debunked. Yet, though this intellectual morass which is left in its wake, the mark of post-modern enquiry rests in its refusal to provide a particular and tangible path forwards. This is not, however, to suggest that any text has limitless readings or that any discourse lacks essential credibility. Rather, it merely denotes the fact that all claims to perceptive integrity on the part of discourses are grounded in their own fallibility.<sup>122</sup> Therefore, from within the plurality of discourses lies an acknowledgement of their individual vulnerability and frailty. However, even adherents of deconstructionism appreciate that beyond this mire of meaning and misunderstanding resides a sense of integrity which is, at the very least, born of the pragmatic realisation that without some shared basis of communication and understanding any potential for change is destroyed.<sup>123</sup> Put

---

<sup>122</sup> As Barbara Johnson appositely contends, in regard to the 'deconstructive impulse', ... "[i]t is only by forgetting what we know how to do, by setting aside the thoughts that have most changed us, that those thoughts and that knowledge can go on making accessible to us the surprise of an otherness we can only encounter in the moment of suddenly discovering we are ignorant of it": See B Johnson *A World of Difference* (1991) at 16.

<sup>123</sup> In effect, therefore, without this mutuality the very changes which postmodernism seeks to institute would be impossible to implement since the canonical regime of understanding would be eliminated and no replacement framework of comprehension proffered by way of a reconstitution of human apprehension. As Wayne C Booth observes "even if no one can ever embrace more than one mode (however complex), even if no critical position is finally invulnerable, there are still strong reasons for acting *as if* one might offer a full embrace, not just to one but to many, because to do so will reduce the amount of meaningless critical conflict in the world and help to preserve the exemplars": See WC Booth *Critical Understanding* (1979) at 217.

differently, it is only through a conscious reliance upon, and progression towards, a moment of justice that one can successfully collate the discursive plurality emblematic of postmodernism.<sup>124</sup>

### 2.3 Fusion of Understandings

Having analysed the legal and literary formulations of 'justice' it is now appropriate to consider what benefits a fusion of these understandings might have on human endeavour in general and legal practise in particular. In doing so, however, it is necessary to briefly recount the conceptual framework within which legal hermeneutics has evolved from a historico-political perspective.

One of the motivational forces behind the emergence of the 'interpretative legal paradigm' has been the growing awareness among legal scholars that the pre-existing formalist legal structures were themselves subject to imperfect agents with subjective concerns. Moreover, this arose out of a general multidisciplinary desire to overtly recapture the cultural and historical context of human interpretative undertakings so as to provide them with an organic justification.<sup>125</sup> Acknowledgement of the human condition, therefore, in aspects relating to the interaction between 'the Self' and 'the other' attained a paramountcy previously denied it; and the only acceptable standpoint from which to confront such a capricious state of affairs was from within its midst.<sup>126</sup> Clearly, this proved troublesome and the notion of 'culture' thus became a means for assisting in the creation of certainty in a world which denied the existence of 'absolutes'. Legal theorists have, however, been slow to divest themselves of the belief that meanings somehow reside 'in' language. Rather than merely regarding words as motiveless indicators or accepted symbols which through the context of language, serve to construct the world and the bounds of 'the Self' and 'the other', legal scholarship, for the most part, has steadfastly

---

<sup>124</sup> In this context, I specifically refer to a 'moment', rather than a 'state', of justice because I regard the former as a pragmatic (and not necessarily static) possibility, whereas the latter notion has connotations of theoretical idealism removed from any obligatory connection with that which is morally attainable.

<sup>125</sup> In the legal context, rather than regarding an analysis of culture to be 'an experimental science in search of law' it became 'an interpretative one in search of meaning': C Geertz 'Thick Description : Towards an Interpretative Theory of Culture' *The Interpretation of Cultures : Selected Essays* (1993) J Block (ed) at 3.

<sup>126</sup> On this basis Geertz (op cit), reflects on the German philosopher Hans-George Gadamer who maintains that if an individual's access to reality is reliant upon specific cultural prejudices or historical preconceptions, then it would appear that claims by any intellectual discipline to a greater or more intense knowledge of the human experience

maintained that language simply reflects reality. For this reason, interdisciplinary studies (and specifically law-literature studies) have opened an important avenue through which various discourses can impact upon one another, and from which the law, in particular, may begin to take its first to query the conceptual foundations of formalism. The 'realists' embarked on an interpretative reassessment of meaning which naturally progressed from an analysis of word meanings based upon authorial intent towards a greater understanding of the socio-political climate in which such meaning was founded. Bearing this in mind, the question faced by judicial authorities is no longer 'which litigious party is telling the truth?', but rather 'which litigious party's version of the truth am I to accept?'<sup>127</sup>

This conceptual progression has resulted in the unfortunate polarisation of positivism and subjectivism as the only two jurisprudential choices, with regard to the legal discipline, which are available to an individual. Owen Fiss,<sup>128</sup> however, seeks to resolve this dilemma by constraining the determination of meaning by means of "disciplinary rules" which interpose themselves between the reader and the text and function as a body of norms which transcend the act of individual interpretation. Moreover, such rules are bolstered by an "interpretative community" which acknowledges their authority. In so doing, Fiss seeks to divert the focus of the enquiry away from the positivist-subjectivist dichotomy (into which it had lapsed) and onto a path of integrated understanding.<sup>129</sup> Similarly, Walter Gibson<sup>130</sup> has sought to show how certain literary terms and conceptions can be of use to "writers of legal compositions".<sup>131</sup> Moreover, in

---

are unfounded.

<sup>127</sup> Unfortunately however, while this may represent the extent of jurisprudential advancement, the mechanics of the legal process remain restrictive and formalistic in content. (One of the law's prime arguments for the retention of a positivist paradigm has been that without it human existence would lapse into nihilistic subjectivity).

<sup>128</sup> O Fiss 'Objectivity and Interpretation' (1982) 34 *Stanford Law Review* 739 at 744.

<sup>129</sup> However, as previously mentioned, the legitimacy of such an "interpretative community" is itself open to speculation when one considers that it is often a predominantly white, male, middle-class enclave of opinion. In this regard, WC Dimock notes in regard to literature that 'novelistic justice' is merely a manifestation of 'gendered justice': See WC Dimock *Residues of Justice* (1996) at 23-56.

<sup>130</sup> W Gibson 'Literary Minds and Judicial Style' (1961) 36 *New York University Law Review* 915.

<sup>131</sup> *Ibid.* Gibson provides interesting insights into the question of judicial style and language through an analysis of the impact which a literary understanding and focus has on legal scholarship. Moreover, his discussion is refreshing inasmuch as he approaches the topic as an English scholar and academic who lacks formal legal training.

doing so he analyses an interesting predicament (already alluded to) at the core of judicial decision making, namely, the duty of a judge to, effectively, provide a 'yes' or 'no' decision which simultaneously conforms to judicial precedent as well as his own (i.e. the judge's) understanding of justice. Gibson thus states that it is of vital importance that legal scholars should be made aware of the schism existing between their crude, abstract, and analytical interpretations of human experience, and the reality of "the vast flood of unorganised sensations, flowing, more or less haphazardly into the infinitely receptive consciousness of human beings".<sup>132</sup> And the only available means by which humankind can effectively confront its desire of understanding is through language. As M Seagle asserts:<sup>133</sup>

"How better to give form and shape to amorphous custom, to give law the appearance of definiteness and certainty, than to write it down in books."

By so doing, a measure of logical progression and inevitability is infused into the chaos of existence.

Possibly the most succinct analysis of the situation is provided by L Whitehead<sup>134</sup> when he states:

"The most obvious aspect of this field of actual experience is in its disorderly character. It is for each person a continuum, fragmentary, and with elements not clearly differentiated ... To grasp this fundamental truth is the first step in wisdom ... This fact is concealed by the influence of language ... which foists on us [apparently] exact concepts as though they represent the immediate deliverance of experience."

The literary author is, however, at an advantage in being able to more effectively reflect this 'continuum' and retain some of the immediacy of existence in his work by focusing on human nature (rather than 'legal fact') and thereby avoiding the pressure of reaching conclusions merely so as to create (false) certainty. It is from this example, therefore, that legal scholars can glimpse valuable insights into the relationship between their use of language and the incomplete human

---

<sup>132</sup> Idem at 916-17.

<sup>133</sup> M Seagle *The Quest for Law* (1941) at 151.

<sup>134</sup> L Whitehead *The Aims of Education* (1929) at 157-58.

existence which it both presupposes and constructs. In this regard, Michael Kaufman<sup>135</sup> proposes a strategy for reconstructing the value of friendship within the law in the light of deconstructionist critiques.<sup>136</sup> And with regard to law in particular, he notes that 'friendship' has been eroded owing to a 'fear of sentimentality'<sup>137</sup> together with the increasing influence of the deconstructionist movement whose philosophies have served in widening the schism between the conception of 'the Self' and the nature of the community. Most significantly, he furthermore cautions that one should not simply ignore the decline of 'friendship' in legal discourse for, to do so "would be to ignore the role which the law does [sic] play in shaping and reflecting our values"<sup>138</sup> (or at least in reinforcing them). However, given the complex nature of 'friendship', mere legislative enactments will prove hopelessly inadequate in addressing the current imbalance. Therefore, the strategy to be implemented, according to Kaufman, must encompass law, literature, and philosophy.<sup>139</sup>

---

<sup>135</sup> M Kaufman 'The Value of Friendship in Law and Literature' (1994) 60 *Fordham Law Review* 4 at 7.

<sup>136</sup> He, however, appears to impose a narrow understanding of 'friendship' onto the law-literature field by defining it as a relationship which exists "among the authors of literature, philosophy and law" and which is focused "through the medium of the texts which they write": Idem. Thus, it would appear that the reader who engages with a text is precluded from partaking in the 'friendship' it offers.

<sup>137</sup> Kaufman takes this phrase from Ronald Sharp who stated that the absence of the value of friendship from all disciplines "has much to do with the fear of sentimentality" which in turn, stems from an inherent dread amongst modern theorists of locating their perspectives within false centres of consciousness: See R Sharp 'Friendship' (1980) 2 *Kenyon Review* 1 at 1.

<sup>138</sup> Kaufman op cit at 659.

<sup>139</sup> Within the literary context, a strategy for the resurrection of 'friendship' is advanced by Wayne Booth: See WC Booth 'The Way I Loved George Eliot : Friendship With Books as a Neglected Critical Metaphor' (1980) 2 *Kenyon Review* 4 at 4. Booth maintains that the author and reader should be united in 'friendship' through their common love of virtue as reflected in the text. Moreover, the strength of this 'friendship' should be evaluated in terms of an Aristotelian moral hierarchy with 'useful books' at the base and 'good books' at the apex. However, Kaufman criticises Booth's approach as a nostalgic hankering for a 'centred universe' by means of Aristotelian logic which merely reveals "Booth's false hope in the ability of man to find a unique word, a mastername, or an ultimate concern": See Kaufman op cit at 661. Furthermore, as Jacques Derrida asserts "[t]here will be no unique name, not even the name of Being. It must be conceived without nostalgia; that is, it must be conceived outside the myth of the purely material or paternal language belonging to the lost fatherland of thought": See J Derrida *Speech and Phenomena and Other Essays on Husserl's Theory of Signs* (1973) at 159.

It is with such ambitions in mind that James Boyd White<sup>140</sup> maintains that the act of reading contains an integrity of its own which goes beyond the acquisition of knowledge and encompasses an ethical catharsis which forms one's character. Thus, White looks upon reading as a process of self-revelation and understanding with regard to the community and the individual's interaction with it. However, in analysing various texts the essential predicament which he faces is the mercurial nature of 'the Self' in its social context. As White asserts, "[w]hen we speak or write we define ourselves and another and a relation between us, and we do so in words that are necessarily made by others and modified by our use of them".<sup>141</sup> Thus, not only is language central to the formulation of individual character and human interaction, but it is also partly inherited and partly dependant on our use of it. It is important to note, however, that the ambiguity of language does not, in White's estimation, imply that meaning be made through an organic process of 'reconstitution of language and community'.<sup>142</sup> Moreover, such a process only emerges by means of complex literary processes at the core of which rests a reverence for the written word coupled with a proactive reading of the text. By applying this technique, therefore, a course of cultural re-alignment occurs which aids in the establishment of a community<sup>143</sup> between author and reader through the channels of the text.<sup>144</sup> Once this has been attained, White then proceeds to establish a connection between the personal 'friendships' embodied in texts and larger political relationships, thereby adopting an Aristotelian belief that justice and friendship are concerned with fundamentally the same ideals.<sup>145</sup>

However, given humankind's present day concerns, reflected in the literature of 'alienation', Richard Weisberg asserts that White's concept of 'friendship' is naive since even scholars are

---

<sup>140</sup> JB White *When Words Lose Their Meaning* (1984).

<sup>141</sup> Idem at 276.

<sup>142</sup> Idem at 278.

<sup>143</sup> As with Kaufman, White perceives this textual community to be a form of friendship.

<sup>144</sup> See William H Page 'The Place of Law and Literature' (1986) 39 *Vanderbilt Law Review* 391 at 413 - 414.

<sup>145</sup> White illustrates this point by analysing the culture of argument depicted in Thucydides' *History*, which collapses because of the society's absorption in the ideal of self-interest to the exclusion of a notion of justice which would provide 'the Self' with meaning: See JB White *When Words Lose Their Meaning* (1984) at 91. Moreover, according to White, the nearest any legal system has come to attaining these aims has been the American constitution "whose function is not to create power but to establish a language and a set of roles and occasions for speaking, which, with the participation of the people, create a government": Idem at 253.

susceptible to resentment.<sup>146</sup> In any event, one should not simply disregard White's insights offhand since he in no way suggests the need to accept an author's ethical views in an uncritical fashion; rather, he merely elaborates on the possible ways in which character may be moulded through the act of reading.<sup>147</sup> In this regard, moreover, White engages with the past by not only insisting on the correlation between text and context, but also through his transformation of the past by means of an act of hope, culminating in a vision of the future.<sup>148</sup>

Underlying White's approach to law, therefore, resides the unwavering belief in law's sense of connection with the past as well as its rhetorical potential to reshape the future. All conceptions of an objectified and inviolable system of reasoning are denounced, and replaced by a pragmatic and socio-historically rooted paradigm. Yet, despite what some scholars might regard as bordering on 'historicism', White maintains the immediacy and vitality of legal discourse by virtue of its existence as a rhetorical expression. At the most basic level, the connection between law and rhetoric (or more correctly, the existence of legal rhetoric) manifests itself in three ways. First, by virtue of the fact that the lawyer is obliged to communicate with his audience in a mode of language which they regard as legitimate and comprehensible given their particular frame of reference. Secondly, given the sequential nature of the legal process, a creative element is necessitated so as to guide and enrich the law. And finally, the act of communicating through legal discourse constitutes the creation of a 'rhetorical community' which embodies the cultural identity and moral character of a people.<sup>149</sup> This sense of creation and constitution is thus an integral aspect of legal discourse which, when acknowledged as such, enables the law to be seen as a continually evolving and adapting process of comprehension, rather than as an omnipotent

---

<sup>146</sup> This is in contrast to White's belief in the ethical integrity of the text.

<sup>147</sup> If one had to draw a crude distinction between the approaches of Weisberg and White, it would probably be as follows. Whereas Weisberg tackles (what he perceives to be) dilemmas inherent in the relationship of language to justice, White maintains that no such dichotomy exists. This is due to the fact that, in White's view, when reading, writing, or speaking, an individual's entire consciousness is absorbed in the act. Therefore, "in a sense we literally are the language we speak", and on this basis language is justice: See JB White *When Words Lose Their Meaning* at 20.

<sup>148</sup> In *Acts of Hope : Creating Authority in Literature, Law and Politics* (1994), White analyses speeches, made by Nelson Mandela and Abraham Lincoln, as examples of the ability to reconstitute a community through 'acts of hope' embodied in the rhetoric of moral integrity and justice. In this context, the reference to Mandela is particularly apposite as it traces his use of a canonical discourse imposed upon him, and his transformation of this past into a redeemed future by means of rhetorical constructs.

<sup>149</sup> JB White 'Law as Rhetoric, Rhetoric as Law : The Arts of Cultural and Communal Life'

force to which one should simply acquiesce.<sup>150</sup> In essence, therefore, “[t]he law should take as its most central question what kind of community we should be, with what values, motives and aims. It is a process by which we make ourselves by our language”.<sup>151</sup> On this basis, the important realisation emerges that language is not merely a series of hollow measurements of communication but a means by which identity is forged and perceptions focused; and there is no human reality which predates such linguistic interaction.

White strongly distances himself from attempts to compartmentalise existence into intellectual/emotional, physical/psychological dichotomies. Instead, through the linguistic creation of self and community, he seeks to encourage an ‘integration’ of the various layers of perception and presence.<sup>152</sup> In this regard, therefore, the techniques he employs in relation to the study of law and literature are designed to reinterpret their essential functions in the world. Whereas law is often regarded as a tightly structured discourse, and literature an expansive one, White endeavours to indicate the intense morality and awesome potential of each when transposed on the other. Reading literature is seen to bear a resemblance (albeit a general one) to the appreciation of a legal text based upon the shared belief in a value system from whence all further enquiry emanates. Moreover, both discourses, through their common linguistic foundations, engage the human consciousness in an act of understanding which is made all the more meaningful when the discrete intercourses are undertaken simultaneously.<sup>153</sup> The task is plainly not a simple one, but one which can nevertheless be realized through a process of

---

(1985) 52 *University of Chicago Law Review* 684.

<sup>150</sup> It is in this light that White comments “To look at the law in this way is to direct one’s attention to places that are normally passed over : to the way in which our literature can be regarded as a literature of value and motive and sentiment; to the way in which our enterprise is a radically ethical one, by which self and community are perpetually reconstituted; and to the limits that our nature and our culture, our circumstances and our imagination, place on our powers to remake our language and communities in new forms”: *Idem* at 696.

<sup>151</sup> *Idem* at 698.

<sup>152</sup> This is the case not only within a particular discourse, but extends across individual discourses. Moreover, it should be noted that Whitean ‘integration’ does not signify the creation of, or arrival at, a single and supreme language, but rather the accommodation of numerous discourses into a conciliatory vision of the world- a task which is complex, yet rewarding, for in its attainment rests our own transformation.

<sup>153</sup> Clearly, a similar or greater benefit would accrue to humankind were other discourses likewise to be ‘integrated’ with each other or with those already mentioned. However, given the scope of the present thesis, I must abstain from entering such rich and vast

'translation' which seeks to interpret the transposed discourses in a spirit of esteem for both, culminating in the "creating of new compositions that will establish mutually respectful relations between them".<sup>154</sup>

The sense of language which White, thus, evokes is one of fluidity requiring the continual reconstitution of understanding so as to effectively reflect 'the Self', the community, and their interrelationship in contemporary existence. As a consequence of this, White views the legal process generally, and legal discourse in particular, as a microcosm of the larger human endeavour to reformulate ourselves by re-evaluating our respective experiences or stories. To this end, the essence of the legal process, namely, the 'legal hearing' is, for White, an arena in which competing constructions of discourse (and hence reality) interact with one another to create a sharper awareness of who we are and how we are constituted. And, in so doing, the potential arises for a "simultaneous affirmation of self and recognition of other" at the point at which the discourses connect.<sup>155</sup> The whole process thereby becomes one in which the sequence of causation no longer follows a linear progression,<sup>156</sup> and instead adopts a circularity of purpose whereby the creators of language are also deemed to be its subjects as well.<sup>157</sup> On this basis, the nature of 'concepts' creates, by its very formulation, a distinctly untenable situation for White inasmuch as it suggests the existence of assumptions and ideas bearing no correlation to language.<sup>158</sup> Equally, it requires one to allege the existence of a distinctly non-lingual portion of oneself, (a declaration for which White displays an acute sense of alarm).<sup>159</sup> In essence, one can

---

154 areas of scholarship and confine myself solely to the discourses of law and literature. JB White *Justice as Translation* (1990) at 20. The novelty of such an 'analysis' is that it defies its own linguistic constraints by not only deconstructing both discourses to their essential 'core', but then reformulating this core into a just perspective of our own actions and motivations.

155 Idem at 24.

156 i.e. One in which the direction of events is dictated by an individual through the medium of language and has its effects upon inanimate objects and the 'outside world'.

157 Language, rather than human agency, therefore, becomes the motivational force behind existence, and nothing pre-dates it or exists beyond its sphere.

158 By this it is not implied that language cannot successfully define such notions, but that these concepts exist apart from and irrespective of any verbal identification in the first place.

159 It should be noted, however, that White's unease does not stem from the possibility of such personal silence (per se) beyond language, but from the worrying realisation that such solipsistic tendencies may gain credibility and be seen as reason enough for not seeking to bridge the chasm between 'the Self' and 'the other'. In other words, White

reduce all these concerns into White's central thesis, namely, that by communicating in terms of 'concepts' one stands the risk of assuming that they embody a unitary certainty which can be homogeneously determined by means of a host of heterogeneous discourses. The ultimate effect of which would be the unfortunate conclusion that disparate languages are a hindrance to comprehension and should be replaced by one metalanguage "in which all propositions can be uttered, all truths stated".<sup>160</sup> It is the simultaneity of contrasting identities and meanings, characteristic of language, which White, thus, seeks to re-awaken, and thereby indicate that there resides within each individual a core meaning which is uniquely his and which bears the seeds of truth.<sup>161</sup> Through the avenues of literary - rather than conceptual analysis of language, therefore, White alleges that the natural tensions present in communication can be effectively confronted and contained resulting in a measure of integration rather than alienation. In itself this process has extreme ethical implications for it requires one to entertain thoughts about one's own uncertainties and lack of knowledge which, through the ebb and flow of experience, come to form the basis of an organic (as opposed to a complete) appreciation of human dilemmas. Chief amongst these is the search for justice within a world defined by mortal constraints.<sup>162</sup>

The process of 'translation' is, therefore, an essential element in the scheme of human understanding, as far as White is concerned, for it brings one to the brink of individual

---

seems to be suggesting (somewhat strangely) that by not attempting to talk about the most intimate and difficult to relate aspects of personal identity, we may be able to communicate better with one another.

<sup>160</sup> JB White *Justice as Translation* (1990) at 31. This belief is rooted in the Whitean ideology that understanding is created by virtue of the interaction of discourses, rather than through the erosion of 'inessential' voices from the scheme of interpretation.

<sup>161</sup> In this context, the idea of 'concepts' again proves intellectually troublesome and inaccurate for White since it suggests a means by which all elements of personality and perception can be understood in terms of a universal dimension (i.e. everything is ultimately knowable). When, in fact, White contends that certain elements of our identity (which in effect means our discourse) remain comprehensible to ourselves only and no one else. This is not to say, however, that these components cannot be verbalised or expressed in terms of language, but that even when they are we cannot expect others to fully relate to their value.

<sup>162</sup> For White, 'translation' is seen as a discourse which provides ways of understanding human associations with both languages and other people. The reasons for this are that it is only through the process of translation that one can attempt to bridge the divide between what is said and what is understood. In so doing, one also comes to formulate an awareness of the individuals behind the other discourses, and the relational context to that of one's own identity. Through this relationship of integrity to what is spoken

discourses and provides for “the composition of one text in response to another, as a way of establishing relations by reciprocal gestures”.<sup>163</sup> Moreover, it indicates the constraints of our own discursive perspective and challenges us to integrate more fully into an existence of mutual respect and communal harmony.<sup>164</sup> Applied to the law, therefore, the act of ‘translation’ presents an opportunity for legal discourse to be refocused upon its primary motivation as a tool of interpretation through the creation of a channel of integrity between opposing discourses. In other words, the law is denied its formalistic armour of supreme authority and cloaked in the humble garb of an interpretative functionary. By so doing, the integration of understandings becomes possible, and justice foreseeable. Yet, in White's post-modern paradigm it should always be noted that the only truth of lasting value remains the realisation that “we all inhabit different languages, which cannot be reproduced to the language of another”.<sup>165</sup> This is not, however, to imply that the legal process is invariably ineffective in its role as an arbiter of human discourses. Rather, what White's argument indicates is that our assessment of the legal process must itself be re-evaluated so that we come to understand it as simply one of many methods of ‘translation’, and a discourse in its own right, which may itself be the subject of ‘translation’.<sup>166</sup> Invariably, therefore, human understanding and coexistence comes to be seen as more art than logic and more creation than predetermination. The tools of ‘translation’ are ours to utilise, and if managed effectively, will provide us with a means of moving towards a sense of justice both within and amongst ourselves.<sup>167</sup>

---

amongst discourses ‘Whitean justice’ is born.

<sup>163</sup> JB White *Justice as Translation* (1990) at 255-256.

<sup>164</sup> This is surely nothing less than justice in action.

<sup>165</sup> JB White *Justice as Translation* (1990) at 263.

<sup>166</sup> While this may be a disconcerting thought since it implies an infinite regress of translation upon translation, it should be remembered that White's emphasis rests on the process of ‘translation’ per se. Thus, a single act of ‘translation’ (no matter where it lies on the scale of regression) is sufficient, in itself, to bring back the world from the precipice of anarchic misunderstanding, provided, of course, that it is instituted in a spirit of ethical integrity.

<sup>167</sup> In contrast to all that White has to say, one of course finds other scholars insisting upon the inadequacy of this paradigm altogether. CH Perelman, for example, maintains “the diversity of laws is proof of our ignorance of true justice ... Disagreement is a sign of imperfection, of a lack of rationality. If two interpretations of the same text are reasonably possible, it is because the law is ambiguous, therefore imperfect”: See CH Perelman *Justice, Law and Argument* (1980) at 164. Having stated this, moreover, Perelman notes that the only solution is the imposition of rationally biased (and hence formalistically based) strictures to guide legal enquiries towards the ends of objective justice. In turn, WC Dimock asserts that justice in a human context is, by its very nature,

At this juncture it appears apposite to reintroduce certain tenets espoused by Jacques Derrida as a means of governing the process of 'translation'. Derrida and deconstructionism are often regarded as synonymous in light of the principle of 'différence', and it is to this inversion of hierarchies which I consequently turn as an initial gateway into an effective synthesis of legal and literary understandings. Derrida observes that the process of deconstruction is applicable to any classification of ideas<sup>168</sup> and serves as a means for re-evaluating the most essential notions we have of both the world and ourselves. The importance of the deconstructive task is to re-awaken our senses to forgotten truths. In the legal context this means we must develop an awareness that any given legal system is the embodiment of a community's aspirations to attain a sense of 'justice',<sup>169</sup> which presupposes the existence of some moral strictures or, at the very least, a sense of the polarity and opposition of certain notions (such as good/bad, right/wrong). Having established this, one has consequently (and in all likelihood unconsciously) privileged certain assumptions above others. It is in this regard that the deconstructive process guides us towards the understanding that the legal framework is itself a method of privileging texts, and a metaphor in its own right. All that we achieve through the law is simply a means of

---

an incomplete action and that any attempt to universalise or objectify it is fraught with unrealistic intentions: See WC Dimock *Residues of Justice* (1996) at 57-95. It is this very point, moreover, that is picked up on by Rosemary J Coombe when she states that "we can engage in critique without claiming any transcendental observation point because the form of life in which we are embedded is not a singular, hermeneutically sealed system, but a constellation of shifting conjectures of multiple discourses which itself provides resources that make criticism both possible and meaningful": See RJ Coombe 'Legal Interpretation' (1989) 34 *McGill Law Journal* 642.

<sup>168</sup> One of Derrida's most interesting applications of the deconstructive task is centred on the bias within Western civilisation, towards oral discourse above written discourse. By regarding speech as a manifestation of the written word (rather than vice versa), one inverts the hierarchy and creates a temporary privileging of new sources. The guiding philosophy is that, at any given point, the nature of deconstruction is such as to provide only temporary insights into the creation of meaning which are themselves then open to a further cycle of reduction, ad infinitum. The essential concern, of course, does not rest in a bizarre desire to attain a nihilistic utopia, but rather to question our own perceptions at any point in the cycle and thereby progressively reform our vision. Such a process is clearly in motion throughout our lives, and the potential for its resolution would appear to lie either before or beyond our present existence, yet, interestingly enough, Derrida indicates that it is within our existence as well since, for him, there is nothing outside of the text.

<sup>169</sup> Whether the 'justice' so desired is, in fact, morally defensible is not at issue here, what is important is the belief that the ends to which the action leads are just ones.

interpretation, and the legitimacy of such interpretation rests on the tacit assumption or justification that this particular system is the most effective one to channel human actions towards our reflected desires. In deconstructing legal texts, therefore, the intention is not one of denial (i.e. denial of certainty), but rather affirmation of human potentialities. Furthermore, when one encourages the synergy between legal and literary understandings and into this one distills the energy of deconstructionism, the result is a far richer blend of human competency capable of ascertaining the complex essence of 'justice' to a greater extent than otherwise possible.

When the tensions between legal and literary discourses are lessened, and ambitions refocused upon mutual understanding, the task not only becomes more complex, but the benefits, more rewarding.<sup>170</sup> On the one hand, the intellectual solace found in the creation of individual and distinct discourses is eroded, while on the other, the possibility for the comprehension and attainment of 'justice' is increased. In all these efforts, however, it should always be borne in mind that the intention of creating a fusion of understandings is neither to formulate a single narrative structure nor to impose a unitary vision of 'justice', but merely to create a deeper awareness of our own identities, how they are formed by various discourses, and how we seek to channel them towards an understanding and potential realisation of 'justice'.

### **Conclusion**

Theories of justice are diverse in scope, and often complex in content. This fact, I neither dispute nor seek to trivialise. On the contrary, while I acknowledge the existence of these factors my focus lies elsewhere. It has been my intention to show that the search for justice is of fundamental concern to human existence and that this concern manifests itself in the various discursive representations which justice assumes in different disciplines.<sup>171</sup> At the most basic level, the fusion of legal and literary understandings of justice highlights the need for law and

---

<sup>170</sup> While it is acknowledged that the likelihood of a complete resolution to such tensions appears unlikely until such time as human comprehension enters another dimension of validity, nevertheless, our duty as human agents is to strive for such greater comprehension through the fusion of understandings. In so doing we do justice to our communities and ourselves by redefining both so as to serve the future with integrity and judgement.

<sup>171</sup> Clearly, for present purposes, I have exclusively focused upon legal and literary discourses and venture to suggest that they be taken as representative of inherent human concerns regarding justice.

society to coexist in a harmony of ideals and values if unnecessary friction is to be avoided. Moreover, it has been my contention that literary discourse provides the law with an effective illustration of the benefits of applying empathic reasoning to come to a better understanding of the human condition upon which society is based. Without such an understanding and appreciation for the vagaries of human existence not only will the law become an empty shell of rules allocating meaningless rights and duties to individuals, but it will also increasingly conflict with people's senses and act as an affront to their sensibilities. The very fact that the human condition is founded upon a range of interrelated and contradictory desires and emotions is reason enough for the law to take note of, rather than simply discard, these factors when arriving at conclusions which affect people's lives.

In many ways such an approach makes the task of the courts harder since they are obliged to acknowledge their formalistic allusions and face the brutality of a particular factual matrix head on. However, it must be remembered that the primary responsibility of the law is to provide just, rather than convenient, results; and in so doing if this means that courts must embark on a tortuous journey in which they experience the pain of empathy, then the agony of such self-discovery is outweighed by their arrival at a just decision.<sup>172</sup> More than this, however, and whether we like to admit it or not, both legal and literary discourses entertain philosophical allusions inasmuch as they are mediums desirous of providing us with an appreciation of justice. With this in mind, therefore, the fusion of understandings of justice serves to create an environment in which we can better comprehend the totality of the ideal. However, (as shall be more fully explored in the next chapter) this search for 'justice' relies on the existence of a

---

<sup>172</sup> Gretchen Craft, in contrast, would retort that the law cannot allow people to be consumed by what they watch and that it is necessary to shield them by means of dispassionate language. The rationale for such an argument is (as TS Eliot succinctly stated) that "humankind cannot bear too much reality": See *TS Eliot: A Collection* (1987) *Four Quartets* at 35. Undoubtedly, there is truth in such an assertion and it is partly for this reason that the law constrains the evidence brought before it by means of evidentiary rules and the like. However, this is not to say that empathy and emotion should per se also be disregarded from legal enquiries, since they have what Joseph Conrad referred to as the essential ability to present "all the truths of life" in a "moment of vision": See L Feder (ed) *Heart of Darkness: An Authoritative Text, Background and Sources* (1982) at 51. It is this truth and vision which the law must strive to attain by means of empathic understanding and connection with the lives of its subjects. For it is such connection that is required if the law is to be regarded as an honest reflection and

perpetual tension between knowledge and ignorance, the given and the unattainable. Whether we can effectively attain a sense of justice (and if so, most importantly, what kind of justice it will be) given human circumstances is therefore something which requires further analysis.

---

legitimate embodiment of a people's desires and morality.

## CHAPTER 3

### JUSTIFICATION

#### Introduction

Having traversed the illusive portals of justice in the last chapter, an important stage in the body of this text now presents itself with the more thorough introduction and analysis of the concept of 'justification'.

I use the term 'justification' to denote the moral, political, social and economic rationales underpinning both legal and literary disciplines. However, all these enquiries are undertaken with the view that any justification is per se based upon the chaos of human existence, and consequently prevents the attainment of 'justice'. In this regard, moreover, I will seek to prove my contention by referring to four indices, which represent the cornerstones of my understanding. First, in terms of the deconstructionist framework (from within whole realm I argue) 'justice' is of necessity defined in terms of the existence of, and its relationship to, 'injustice'.<sup>1</sup> Therefore, at the moment at which 'justice' is attained, law and literature lose their justificational foundation.<sup>2</sup> Secondly, one cannot faithfully express such noble intentions as those which 'justice' embodies through the imperfections of language.<sup>3</sup> Thirdly, law and literature share conflicting desires inasmuch as they seek certainty and justice yet cannot divest themselves of the uncertainty of existence from whence they were born. Finally, law and literature can never attain a state of justice because human beings have limited perceptions to begin with.<sup>4</sup>

---

<sup>1</sup> i.e. The chaos of human existence born of uncertainty and limited knowledge.

<sup>2</sup> In essence, therefore, neither extreme (i.e. a complete state of 'justice' or 'justification') can be fully embraced and a tentative state of suspended animation between both extremes must be accepted. The reason for this is that one cannot divorce 'justice' from 'injustice' just as one cannot separate 'justice' from 'justification'.

<sup>3</sup> Consequently, one can only attain relative justice rather than absolute justice since the law is inherently unjust due to the fact that the language on which it relies is flawed and imprecise.

<sup>4</sup> i.e. We can only ever know so much and no more; and by implication, therefore, we can never attain the absolute knowledge required for a state of justice to be assumed.

Undoubtedly, the justificational paradigm which I impose upon the field of legal and literary endeavour is somewhat heterodox, particularly given my focus upon the human need to strive towards justice. However, in my view, the marriage of the concepts of justice and justification in the body of this work does not represent a flaw of reasoning or an inconsistency of logic. Rather, the progression towards justification epitomises the natural tension and organic complexity of the journey upon which I have embarked. In denouncing the formalistic contentions of those who would have us believe that strict compliance with the letter of the law is the only measure of justice, I have entered an interpretative realm where there are no longer any easy resolutions, only enigmatic possibilities. Drawing from the work of James Boyd White and expanding upon his reasoning, I therefore structure the justification of legal and literary discourses around a culture of argument and integration. In itself this requires an acknowledgement of the tensions inherent in the search for 'justice' and, by implication, leads to the need for a reassessment of previously asserted legal and literary justifications. I will use the present chapter to show that the inflexibility of past assumptions has become an inadequate tool with which to tackle our present awareness of future uncertainties.

### 3.1 Legal Justifications

The formalistic nature of legal discourse is such that it would have one presume it to be the only effective means of comprehending and attaining justice. In this regard, justifications of the law often incorporate ethical and moral dimensions in an attempt to construct their own validity.

By its very nature, legal discourse represents a paradigm of human understanding and is, by implication, therefore, simply one of a myriad potential gateways that can assist one in coming to terms with the morality inherent in the nature of justice. However, the consequence of framing the relationship between law and justice in these terms is that while it serves to indicate the existence of an association between the two institutions, it tacitly acknowledges that the law is by no means necessarily the sole or most effective vessel in which principles of justice may be said to reside. Bearing this in mind, it becomes apparent that attempts to completely unite law and justice in a shared moral enterprise incorrectly evaluate the nature of their association. Inevitably there is a degree of interaction between law and morality inasmuch as they are both creations of their societal context,<sup>5</sup> yet they retain an individual integrity which must be

---

<sup>5</sup> i.e. They are both formulations based upon a particular community or society's value structure and its understanding of concepts such as good/evil, right/wrong.

acknowledged.<sup>6</sup> To the extent, therefore, that a particular law, legal structure or legal system is said to present an objective vision of reality (according to a sector of society) has nothing to do with its inherent objectivity per se and everything to do with the shared morality of the community so viewing it. Consequently, I have no difficulty in acknowledging the moral dimension embedded in the legal process, but I do have the gravest of objections to the monopolisation of morality by the law. In spite of this, however, morality remains one of the primary justifications of the law, and manifests itself in an assured manner which belies its own frailty and uncertainty. With this in mind, it appears fitting to briefly contrast the moral visions of the law which certain legal scholars harbour, with a view to showing that academic understanding of this dimension of legal justification is itself a cacophony of interpretations.

At the one extreme of the spectrum resides Jeremy Bentham,<sup>7</sup> who embodies the legal positivist traditions of judicial analysis. In general terms, Bentham advocates the separation of law from morality and consequently has criticised natural law's philosophy of intuition with regard to the existence of divine guiding principles and the ability of reason (when applied to specific situations) to provide universal truths. In its place, Bentham chose to construct a system of hedonistic utilitarianism whose primary concern was centred on individual happiness, and the overriding desire was to facilitate such freedom by curbing existing legal restraints. In this regard, the individual was deemed to be driven by pleasure-seeking desires (good) above pain (evil), and consequently the sense of primary good (justice) arrived at was no more than "the aggregate of individual surpluses of pleasure over pain".<sup>8</sup> As clinical as this reasoning may appear it nonetheless bears the markings of morality inasmuch as it is a construction of human

---

<sup>6</sup> Taking this argument to its extreme conclusion, Jeremy Bentham and John Austin together with other legal positivists seek to clearly delineate 'law as it is' from 'law as it ought to be' in an attempt to completely divorce moral issues from the life of the law. However, in itself this extreme response indicates a flawed understanding of the very nature of law in that a sense of morality (out of which our understanding of justice flows) underlies all our actions and all our discourses. Whether that particular sense of morality comes within other peoples' interpretive framework or not is beside the point. The very fact of its existence is what is important: See J Bentham *An Introduction to the Principles of Morals and Legislation* (1988), J Austin *The Province of Jurisprudence Determined* (1988).

<sup>7</sup> J Bentham op cit.

<sup>8</sup> J Stone op cit at 122.

contemplation designed to provide all human actions with a motivational force beyond their immediate context.<sup>9</sup>

While the ultimate aim of Bentham's jurisprudential paradigm was to provide a systematic justification for the need to adhere to legal precepts, one must also see his work as a desperate search for certainty within an age of acute despair and social turmoil.<sup>10</sup> This contextual appreciation of the fragmented state of the English legal process (in particular) provided Bentham with the foundation for his philosophical formulations and directed his work towards a system of classifications designed to shatter the fictitious illusions behind the wheels of justice. In this regard, legal discourse had to be reformulated around new structures and different understandings by means of a renewed awareness of the relationship between language and metaphysics. In essence, Bentham encouraged the realisation that we have to contend with a discursive structure which is inherently ambiguous, and words must, therefore, always be deciphered in context as well as being seen to embody ideas beyond their linguistic or oral representation. The reform of the law was ultimately the medium through which Bentham sought to recalibrate a decaying social structure and thereby guide people towards the attainment of happiness by means of the principle of 'utility'.<sup>11</sup> In order to facilitate this, however, Bentham insisted upon drawing a distinction between 'fictional entities' and 'fabulous entities' within the realm of jurisprudence. The latter encompassed natural rights and had to be purged from the legal vocabulary altogether, while the former consisted of legal rights and had to be merely re-assessed so as to resume an effective role in the political structure of society. By so doing, Bentham maintained that one could give effect to reforms and bring an end to much political conflict. The difficulty is, however, that rather than elaborate upon the reasons for such a conclusion, Bentham took them for granted as the only legitimate outcome given the factual

---

<sup>9</sup> In itself this is somewhat ironical inasmuch as Bentham's implicit intention was to create a system of legal governance based upon a concept (i.e. 'the principle of utility') which lacked any ethical content and was consequently immersed in objective rationality.

<sup>10</sup> At the time at which Bentham English society was plagued by a high rate of unemployment, compounded by entrenched social stratification, which created a climate in which delinquency and crime flourished. Moreover, the loose structure of the common law in terms of its content and implementation proved to be an ineffective sanction in such troubled times.

<sup>11</sup> The principle, in effect, shifted the burden of proof onto the individuals who wished to curtail particular pleasure-seeking activities by requiring them to prove that the pleasure gained by a particular person or sector of society was outweighed by identifiable and causally related pains to specific individuals or groups.

matrix. Little explanation was given for this reasoning, but then he presumed little was needed. Despite this personal conviction in his own beliefs, however, Bentham readily conceded the uncertainty within human knowledge and the likelihood of most ideological aspirations remaining within the realm of the hypothetical. In consequence, he was under no illusions that the primary motivation of the legislator in placing restraints on individuals so as to ensure the greatest happiness for the greatest number required a shift in personal ideology from egoism to utilitarianism, and that this in turn was something which not necessarily all people were prepared to abide by. This dilemma was particularly acute for those in positions of legislative authority, for they possessed control over judicial sanctions and were in one sense above the law, yet had to subject themselves to the same constraints as all subjects before the law if the system was to retain its integrity. While not providing a detailed account of how this could pragmatically be achieved, I suggest that one must assume that Bentham's tacit presumption underlying all his work is that human beings are guided in their actions by a moral core,<sup>12</sup> and that the aim of a utilitarian paradigm is to ensure that the dictates of the law coincide with this moral pith so as to ensure that the conditions for justice are established. Once a utilitarian paradigm is adopted, therefore, the resulting system creates its own justification and in a sense wills itself into being based upon its own moral dimension. On this basis, while Bentham would appear to reject the notion of any moral justification of the law, his utilitarian principles of pleasure and pain are (of necessity) determined in relation to a moral foundation and within the framework of a moral understanding. Expanding upon this line of interpretation, one could consequently conclude that in distinguishing between 'law as it is' and 'law as it ought to be', Bentham is not denying the legal process an element of morality but merely cautioning against the assumption that simply because the law ought to be associated with moral ideals it necessarily follows that it is. The only ideological paradigm in which this expectation can be taken for granted and effectively fulfilled is a utilitarian one.

In effect, Bentham's tacit credence of the notion that the legal structure is the chief mechanism for the regulation of social interaction implies that he concedes there is no inherent correlation between basic human ambitions and the strictures of public obligations. This is not, of course, to suggest that the two do not often correspond (for how else could one account for the relative

---

<sup>12</sup> The inevitable concession has to be made, of course, that some individuals are guided to a greater extent than others by this sense of entrenched morality.

ease with which harmonious social intercourse appears to predominate), but merely that they should not be viewed as mutually inclusive terms.

In a similar vein, while it is generally acknowledged that the concepts of pleasure and pain lie at the heart of the principle of utility, what is not so clearly delineated is the nature and extent of their mutual relationship to the structured moral concepts embodied in 'good' and 'ought'. Certain fairly recent interpretations of Bentham's work by scholars such as B Parekh<sup>13</sup> and JP Plamenatz<sup>14</sup> favour the idea of inferring absolute mutuality to the notions of pleasure and of good. However, as PJ Kelly<sup>15</sup> alleges, to create such an incestuous connection between pleasure and good is to collapse the identity and meaningfulness of morality (as understood through the prism of utility) into the "tautologous claim that *Pleasure is pleasurable*".<sup>16</sup> Therefore, Kelly maintains that Bentham's primary concern lies beyond a supposed desire to unite good and pleasure within the moral canvas of utility so as to provide a justification for the legal process.<sup>17</sup> Rather, the focus of Bentham's analysis of good and pleasure (according to Kelly) is aimed at providing a deontological rationale for such morally-laden concepts. Therefore, he notes, "[t]he principle of utility is used by Bentham as a metaethical principle which provides the criterion of meaningfulness for moral judgements, and for the terms of moral discourse. The criterion he adopts for the meaningfulness of such terms are derived from reflection on the point of moral discourse".<sup>18</sup> In this regard, there are, of course, real difficulties in installing the principle of utility as the seat of moral obligation inasmuch as such a utilitarian paradigm is suspended by the vying forces of individual ambitions and communal desires. This is not to presume that individual human actors are incapable of distinguishing between pleasure and pain, but rather that morality is essentially a collective enterprise focused upon the conditions of social interaction over which the individual has no command. As a consequence, the individual cannot ensure either the attainment or the maintenance of suitable conditions in which his actions can

---

<sup>13</sup> B Parekh (ed) 'Bentham's justification of the Principle of Utility' *Jeremy Bentham : Ten Critical Essays* (1974).

<sup>14</sup> JP Plamenatz *Man and Society* (1963).

<sup>15</sup> PJ Kelly *Utilitarianism and Distribute Justice* (1990) at 44-70.

<sup>16</sup> *Idem* at 46.

<sup>17</sup> Kelly supports his allegations by reference to the fact that in *An Introduction to the Principles of Morals and Legislation* and *Deontology together with A Table of the Springs of Action and Article on Utilitarianism*, Bentham at no point overtly insists upon a synonymous connection between good and pleasure or pleasure and right, other than to show how they mutually function as independent entities within the realm of utility.

<sup>18</sup> Kelly *op cit* at 47-48.

be co-ordinated with those of others. And without such interaction (upon which social well-being depends) the conditions for the existence of rules and norms are eroded and the emergence of expectations and expectation utilities destroyed. The rationale for this complex interaction and ensuing tension lies in the fact that by obliging the individual to act in a manner which enhances societal interests he would, of necessity, have to determine whether to abide by such externally imposed constraints which, in turn, would inhibit the expansion of personal expectations. Moreover, if one contends that an individual ought only to submit to a right justified in terms of utility, then such right cannot be regarded as a condition for expectations since it remains arguable as to whether it provides a satisfactory justification for action in the first place. This is because a utilitarian paradigm on the one hand requires individual actions to abide by societal regulations so as to develop a consistent pattern of behaviour, while on the other hand allowing legislators to bypass their own laws in circumstances where the dictates of social well-being so demand. In essence, therefore, “[u]nless legal norms and rights function as authoritative reasons they cannot function as a source of expectation”.<sup>19</sup> The consequence of this is that in order for the principle of utility to be regarded as a pragmatic framework influencing the actions of a society it must be seen as going beyond the balancing of pleasure against pain, and must encompass the task of advancing individual actions towards the principal ambition of social well-being (which itself is a necessary element in the concept of justice). In so doing, Bentham's system of legal justification seeks to consolidate the abstract moral vision embodied in the notions of pleasure and pain together with the realities of rules, rights and obligations found in the letter of the law. The outcome of this integration is that the latter becomes rooted in the former, and the conditions for harmonious social interaction and advancement are established. Thus, it is interesting to note that the moral focus as evoked by the conditions of social interaction provides the basis for legal obligations owing to the crucial utilities derived from them. Notwithstanding this, however, it is not the fact of greater utility per se which dictates the necessity to act upon such obligations, but rather the force of sanctions imposed upon actions of non-compliance. “Therefore, while the greater utility derived from these practices accounts for their utilitarian justification, their effectiveness as conclusive reasons for action does not depend on a utility calculation, but on the threat of sanctions”.<sup>20</sup> In effect, Bentham's moral justification of the legal process indicates his complex appreciation of the

---

<sup>19</sup> Idem at 64.

<sup>20</sup> Idem at 68.

interaction of morality with the threat of sanctions in providing an insight into the rationale and functioning of the law.

While Bentham placed great store in the discourse of the law and the political establishment as the foundation for all utilities dependant upon expectation, he extended the veil of justification to include both legitimate and illegitimate expectations. Consequently, the position of a thief and his act of stealing is of relevance only insofar as the notion of property exists as protected by the law and provided the thief harbours the expectation of depriving some utility from the object in question.<sup>21</sup> Conversely, in an ideal state of being in which no motivational tensions or conflicting desires exist the need for regulation is superfluous and a system of law, in effect, becomes redundant inasmuch as theft does not occur, property is not violated and personal interests do not clash. Given the realities of the human condition, however, the concept of justice together with conceptions such as property, rights and duties are required within any political society so as to provide its members with some security against the barrage of feuding identities. Thus, the necessity for, and existence of, a legal system is seen as an understandable attempt to marginalise the potential for contingency within human society and provide one of the primary rationales for political commitment. For this reason, Bentham was averse to any form of tyrannical government or arbitrary rule as this simply magnified human uncertainties and injected them into the very heart of socio-political life. In this context, therefore, the law became viewed as the primary vessel from which societal expectations flowed and social interaction was moulded, and following on from this came the network of communal and individual moralities which sought to bolster and refine these broad ideals. Prior to the establishment of the law no formal political structure could operate and hence no expectations could be formulated as to the future. Therefore, Bentham distanced himself from any suggestions that peaceable interaction was possible without a source of authority and the threat of strictures. Moreover, the natural conclusion to be drawn from this is that 'individual identity' as we understand it is as much a political creation as it is a social phenomenon. Social interaction as established by the legal process and evidenced in the moral identity of a society also has a strong connection to economic activity. This is due to the fact that economic functions are a form of advanced social activity dependant upon stable and predictable conventions of social interaction giving rise to particular expectations. Therefore, the existence

---

<sup>21</sup> e.g. Either direct enjoyment of the object through use or from the proceeds accumulated through its subsequent sale to a third party.

of legal accountability presupposes some form of economic system (however crude) upon which to base presumptions regarding the relationship between persons and objects and subsequently the connection between different individuals in relation to objects. In this manner economic activity becomes a defining characteristic of individual identity insofar as it provides a rationale for the legal process. Accordingly, the economic arena plays a pivotal role in defining and supporting a particular societal regime and, by implication, is a fundamental tool of justification for the law.

Bentham appears to harbour paradoxical attitudes towards the morality of humankind. On the one hand, he acknowledges the essential selfishness and egoism of the individual, yet he also readily concedes the existence of human attributes such as philanthropy and self-sacrifice.<sup>22</sup> In effect, Bentham advocates the principle of 'free will' inasmuch as man can be drawn to the pursuit of selfishness as much as selflessness.<sup>23</sup> Moreover, by adopting the notions inherent in the principle of utility, Bentham seeks to espouse freedom of individual choice within a morally contained spectrum based on the greatest happiness to the greatest number. And it is within this framework that the justification of the law also divorces itself from the purely moral and becomes enmeshed in political and economic intrigue. Industrialisation, for example, is viewed by Bentham as a facilitator of altruistic desires inasmuch as its defining feature is the coexistence of a great many people in a relatively confined area. Given this matrix he maintains that the need arises for the individual to develop an acute awareness of self within the context of other individuals. In turn, this results in a mellowing of the ego and the desire to co-operate and compromise for the sake of the greater good of the extended community.<sup>24</sup> It is at this critical juncture, too, that the practical functioning of the law can assist in the maintenance of societal cohesion. Inhuman and cruel practices, for example, ought to be prohibited or at least strictly

---

<sup>22</sup> In itself the integration of such conflicting motivations should come as no surprise given the sophistication of the human mind and the complexity of human ambitions.

<sup>23</sup> In this regard, it is arguable that there is a general bias towards the latter as evidenced through the tendency towards social cohesion rather than disunity in human affairs.

<sup>24</sup> Given the benefits of hindsight it could, however, be argued that industrialisation with its associated urban pressures has (paradoxically) served to alienate individuals' awareness of their communal context and societal obligations. Moreover, it would seem reasonable to suggest that as a result of the foundations laid by industrialization a culture of uncertainty and alienation has entrenched itself (as manifest through the avenues of modernism and post-modernism) in human thought.

regulated, and anti-social behaviour, in whatever form, should be strongly curtailed.<sup>25</sup> Having said this, however, Bentham maintained that punishment and retribution ought to have the greatest apparent effect while producing the smallest actual expense. In other words, the physical retribution inflicted on the criminal must be minimal since this involves an expense for society, and yet the deterrent effect which such an action creates within the community must be harnessed to the fullest to ensure the greatest profit for all. In essence, the law must be utilised as a force for communal well-being and moral benevolence. In this regard, however, it is interesting to note that Bentham appears to have tacitly conceded that the legal process is justified in seeking to attain such ends through the medium of fear - fear of legislative retribution, fear of communal sanctions and fear of future uncertainties. Moreover, the task of unlocking and utilising the innate potential of legal reasoning was delegated by Bentham to the middle-classes, for in his eyes they had the most to fear and the most to lose from an unchecked legal system. As the greatest stakeholders in the stable survival of the law, therefore, the middle-class came to represent (for Bentham) the only social grouping with direction and with a future.

Bentham's moral justification of the legal process is at times decidedly complex (not to mention confusing), particularly when one considers his apparent support for some form of legalised prostitution and short-term marital commitments which can lapse after a stated period. Nonetheless, his belief that such institutions deserve the protection of the law can be seen as an incidence of pragmatic resolve rather than moral turpitude. Therefore, while the principle of utility is based upon universal well-being it is still rooted in social reality. Consequently, the task of the law is to facilitate the attainment of moral aspirations while acknowledging the existence of (and attempting to regulate) those regrettable areas of the social fabric which for one or other reason have become engrained in the mindset of a community. For the law to attempt otherwise by making sweeping statements condemning the continuation of such actions based on moral precepts alone would, after all, be unrealistic and unwise. This may thus be viewed as yet another instance where socio-political and economic influences modify any moral justification of the law and require a change in its emphasis. In this context, moreover, Bentham's use of the principle of utility appears to be based on relative criteria inasmuch as a

---

<sup>25</sup> In this regard it is interesting to note that Bentham viewed religion as a primary cause of misunderstanding and confrontation inasmuch as religions vie with one another for

private citizen could not possibly be expected to take into account the same broad ambit of pleasures and pains as a government agent acting in his official capacity, for example. On this basis, therefore, the justification of the legal process can be refined as a system of governance striving towards justice within a particular paradigmatic framework. This essentially means that not only does one apply idiosyncratic criteria in an analysis of legal justifications but one also, of necessity, infuses the concept of justice with relative bearings. In spite of all this, however, it becomes apparent from Bentham's application of the principle of utility that the only justification for theoretical activities is to be found in practical consequences. In this regard, therefore, the law's ambition to mould society as it ought to be from human materials as they are finds a pragmatic resolution in the form of judicial legislation. For it is at this nexus of understanding that personal interest and public duty can best be collated and controlled. Moreover, it is with this understanding in mind that Bentham believed all institutions of societal governance would benefit from an infusion of similar analytical foundations. Only if this were achieved could it be said that the government had succeeded in its duty to provide its subjects with rights and consequently benefits. In essence, the obligation of any effective legal system is to artificially adjust the course of human interaction wherever necessary so that societal integration and individual autonomy maintain an element of fluid equanimity. The fact that such adjustment will result in an element of discomfort (i.e. 'pain') is unfortunately inevitable, yet at the same time, acceptable in Bentham's paradigm given that the sole justification of the legal process is, above all, to facilitate the greatest happiness for the greatest number. Any sacrifice that has to be made, any punishment which must be meted out, and any evil which must be endured are consequently seen as integral components within the framework of utility. They are not in themselves justifiable entities but they do feed off a greater justification to the extent that they can be accounted for by means of a dedicated allegiance to the tenets of utility.<sup>26</sup>

---

divine supremacy and in so doing also distract man from his present concerns due to their celestial promises: Op cit at 30.

26

It should be mentioned at this point, however, that while the present object of inquiry has been the justificational foundations of the legal process per se, Bentham also explored the practical motivations of legislators in implementing particular laws. In this regard the genesis of an individual law rests in the legislators hands, and the rationale for its implementation is formulated in terms of an expression of will by the sovereign. The importance of this motivational reality lies in the fact that it serves as an important reminder of the sociological setting of the legal process. Consequently, one is encouraged to make a single assumption, namely, that the field of legal endeavour comprises an amalgam of expressions of intent, and that it is only through a utilitarian analysis of such 'competing wills' that sense can be gleaned, progress made and ultimately justice attained.

The analysis so far clearly indicates that, for Bentham, the law is primarily a structure for effecting social control inasmuch as it is designed to facilitate communal interaction and encourage individual restraint. In itself, however, this framework is incapable of effecting its own ambitions without the infusion of a rational legal and moral basis in the guise of the principle of utility. The law, therefore, is justified in Bentham's eyes to the extent that it conforms to his utilitarian precepts and encourages a community to be happier than they would otherwise be without it. In this regard, moreover, the chief attributes of the legal process are the ability to bolster religious and moral countenances and to entrench a sense of security and certainty within a community's fabric.<sup>27</sup> Inasmuch as the tenets of utility constitute Bentham's vision of morality, legal sanctions consequently remain justifiable only to the extent to which their implementation is shown to assist in the attainment of pleasure above pain. In essence, the morality of the law is qualified and the justificational scope of the legal process curtailed. In contrast to this confined legal framework, however, AJ Milne<sup>28</sup> maintains that Bentham's insistence of the primacy of the individual (which is born from his allegiance to 'psychological hedonism') as well as his belief in the fictitious nature of the community does not constitute a viable basis for moral justifications of the law. The reason for this is that Milne asserts that an individual can only be defined in terms of his communal context, and that it is only once this context has been identified or established that it can be said that a moral framework has been created. Only once this course has been concluded does the legal process itself become infused with a moral justification because morality is an indication of societal integrity, and the law becomes an expression of this communal vision. In essence, the acknowledgement of a communal identity is, in Milne's view, a prerequisite for the moral justification of the law. Moreover, whereas Bentham maintains that the moral justification of the law rests in its ability to make people happier than they would otherwise have been, Milne asserts that such a view is

---

<sup>27</sup> With regard to the former element, the law is seen to verify and succour the benevolent ambitions of religion and morality by means of its political sanctions which provide a motivational impetus for the avoidance (or at least control) of individual animosities; so far as the latter element is concerned, legal conceptions such as private ownership and the identification of property rights are (according to Bentham) essential for the fulfilment of the individual and hence the community - this is so because the possession of such rights constitutes an integral component of individual autonomy (i.e. the ability to acquire and dispose of goods as one wishes) resulting in greater individual fulfilment and collective satisfaction.

<sup>28</sup> AJ Milne (ed) 'Bentham's Principle of Utility and Legal Philosophy' *Jeremy Bentham - Critical Assessment* (1993) at 53-79.

too narrow since a legal system is in no way an integral component of a community's identity whereas morality is.<sup>29</sup> Consequently, morality pre-dates law and whenever the latter element is formally entrenched in a community it simply attempts to reflect the moral understructure rather than being the source of it. The rationale for this is that the fundamental compulsion to abide by the law is moral in nature and does not arise merely from the structure of the legal process itself.

In many ways, given the intricate rituals of human interaction and the diverse nature of societies, Bentham viewed the legal process as a universal means whereby individual differences could be resolved and communal integrity promoted. In this way apparently solitary instances of diverging opinions could be evaluated in a broader context and seen as indicative of deeper social tensions.<sup>30</sup> In this regard, moreover, as a theorist of the components of state identity, Bentham regarded part of the justificational rationale of the law to be political in nature. It was the law's function, in his opinion, to facilitate institutional reforms which would enable the attainment of individual sovereignty and the prevention of arbitrary and inconsistent governmental directives within the framework of a democratic state. In fact, it has been argued by LJ Hume<sup>31</sup> that the primary focus of Bentham's scholarly writings rests on the notion of power and how it is and ought to be distributed, exercised and controlled within the political state. Consequently, the morality of the law is only justified to the extent that it complies with, and is legitimised by, an appropriate political framework. However, having stated this, it is interesting to note that Hume maintains that Bentham's political theory and his moral ideology did not strictly correspond with each other. The reason for this incongruity lay in the fact that Bentham's moral universe sought to reduce all variables to a pleasure-pain dichotomy (with pleasure as the sole ambition) while his political framework expanded beyond individual hedonism and introduced rival moral structures and factors into his theoretical understanding.

---

<sup>29</sup> In this regard, Milne points to tribal communities and dictatorial social structures as instances of social interaction which maintain particular conceptions of morality but which lack formal legal institutions and autonomous legislature assemblies.

<sup>30</sup> It is worth noting, however, that while no mention is made of a specific legal regime, Bentham clearly constructed his arguments as a jurist versed in English law. While this may seem self-evident and not worthy of comment the importance of this distinction lies in the realisation that while certain elements of Benthamite jurisprudence are global in application, other elements are born from and biased towards an English law foundation. Consequently, at times, what purport to be general comments on the nature of law per se amount to reasoning peculiar to the English law context.

<sup>31</sup> LJ Hume 'Bentham as a Social and Political Theorist' *Jeremy Bentham - Critical Assessment* (1993) AJ Milne (ed) at 482-500.

Moreover, not only did the resulting tension reverberate within Bentham's moral structure, it ultimately impacted upon his political principles and left both sadly depleted.<sup>32</sup>

In many ways (criticism of Bentham's legal justifications aside) his ambitions for the law were admirable and the means for their attainment intricately crafted.<sup>33</sup> However, if one could reduce the bulk of his writings to a single statement of intent, I submit that it would be composed in a similar vein to the following - *The pursuit of certainty motivated by the desire for happiness*. It is from this core intentionality that much of Bentham's ideology stems and from which his justification of the law emerges. The law was, after all, seen by Bentham as a social mechanism in need of reform so as to pursue the ends of utility effectively and thereby arrive at a state of certainty characterised by the motivational force of pleasure.

Moving on from Bentham, John Rawls defines 'justice' as fairness, in terms of two criteria. Fairness, first, in the sense of equal individual entitlement to fundamental human freedoms to the extent that they do not infringe upon the equivalent freedoms of others; and secondly, fairness in terms of the arrangements of economic and social inequalities in such a manner that they are reasonably presumed to be to the advantage of all individuals and are, moreover, strictly attached to posts which are open to all. On this basis, Rawls can be seen to espouse Kantian undertones as evidenced in his 'social contract theory' and the concept of justice as embodied in the 'ideal observer'. Rawls, moreover, asserts that the justification for civil disobedience within a "reasonably just (though of course not perfectly just) democratic regime"<sup>34</sup> should be interpreted as a political phenomenon representing the majority's conception of justice in the face of injustice.

---

<sup>32</sup> In contrast, HF Pitkin investigates Bentham's theoretical premises in a somewhat complimentary light: See 'Slippery Bentham ...' *Jeremy Bentham - Critical Assessment* (1993) AJ Milne (ed) at 534-560. He notes that Bentham's writings contain tacit ambiguities which have enabled him to be "on both sides of the fence at once - on both sides of every major intellectual fence he encounters - without ever admitting that the fence is there": *Idem* at 537.

<sup>33</sup> It is for this reason that I chose to begin an examination of legal justifications with a fairly detailed analysis of certain aspects of Benthamite reasoning. Such an inquiry, in my view, not only provides a suitable point of entry into justificational issues but it also assists in constructing a sufficiently broad foundation from which moral, political and socio-economic justificational issues can be identified and expanded upon.

<sup>34</sup> Rawls *A Theory of Justice* (1971) at 125.

In essence, social institutions possess credibility based upon efficiency and justice, and Rawls maintains that given these factors individuals contribute to the continuance of such amicable interaction through a natural predisposition coupled with a moral obligation for doing so. In the context of a constitutional democracy, therefore, Rawls notes that the 'social contract theory' provides a suitable political foundation for the maintenance of this human balance. His theory is premised upon the belief that social arrangements in general and justice in particular must be judged against and conform to the paradigmatic principles to which "free and rational men would agree to in an original position of equal liberty".<sup>35</sup> Consequently, "social arrangements are just or unjust according to whether they accord with the principles for assigning and securing fundamental rights and liberties which would be chosen in the [hypothetical] original position".<sup>36</sup> It should be noted, however, that while the parties in the original position are taken to have equal powers and rights they are denied absolute knowledge. More particularly, they are deemed to be unaware of the institutional structures around them as well as their individual positions in the hierarchy of natural talents and competencies, and most importantly, they have not rationalised their understanding of morality. As a result of these circumstances an equilibrium is maintained in which the individuals concerned make the critical assumption that justice prevails inasmuch as nature is not so divine as to make social co-operation unnecessary nor so dissonant as to make it impractical.<sup>37</sup> On this basis, therefore, the social contract doctrine provides a viable rationale for the human need to comply with just social structures. However, one must also examine the basis for acquiescence with unjust laws since this is a factor of everyday existence. In this regard, Rawls expands upon the evolution of the 'social contract' from its origin in the original position (at which point the principles of justice are established), through to the development of a constitutional framework to facilitate the attainment of the chosen principles, and culminating in the enactment of laws by a legislative body which is influenced by the tenets of justice and regulated by a just constitution. At all stages in the development process "the contracting parties have the knowledge required to make their agreement rational from the appropriate point of view, but not so much as to make them prejudiced".<sup>38</sup> Therefore, they are precluded from

---

<sup>35</sup> Idem at 126.

<sup>36</sup> Idem at 127.

<sup>37</sup> It should also be noted that within this system of existence represented by the 'original position' each individual acts with his own interests in mind in an effort to promote his paradigm of comprehension in whichever direction it develops and for whatever purposes its existence becomes apparent.

<sup>38</sup> Rawls op cit at 129.

manipulating the system in light of their hierarchical position since they remain unaware of this position to begin with. Within this paradigm the consequence of adherence to the different stages in the process inevitably results in the attainment of just laws. And for these purposes Rawls advocates the formation of constitutional democracies so as to facilitate the results envisaged by the principles of justice. Yet, the drawback in reality is that the process cannot be tailored so as to permit the enactment of only just and effective legislation to the exclusion of all else. Inevitably, injustice inhabits the system by virtue of the imperfect nature of the procedural safeguards in it.<sup>39</sup> In accepting the benefits of a constitutional democracy one necessarily subordinates one's will to that of the majority in times when unanimity of opinion does not exist. Justice, thus, represents the foundational force which requires our allegiance to the just constitution as well as the unjust laws enacted in its name by the majority. However, as Rawls notes, "while we often have both an obligation and a duty to comply with what the majority legislates (as long as it does not exceed certain limits), there is, of course, no corresponding obligation or duty to regard what the majority enacts as itself just". All we as individuals are required to do is to "submit our conduct to democratic authority to the extent necessary to share the burden of working a constitutional regime, distorted as it must inevitably be by men's lack of wisdom and the defects of their sense of justice".<sup>40</sup>

Within this paradigmatic context 'justice' in general and the notion of 'civil disobedience' in particular are viewed as political conceptions by virtue of the fact that they frame a vision of social interaction and societal interests grounded in morality. On this basis, a democracy retains its united structure by means of a shared vision of justice which guides its population in their administration of the mechanics of government and their application of the constitution. In times of civil disobedience, moreover, the protestors' actions are justified in terms of notions of political parity as evidenced among the many principles of justice. Thus, it seeks to reform injustices through the avenue of political expression and thereby make a tangible contribution towards social reintegration and institutional adaptation. Consequently, civil disobedience and the principles of justice are by no means mutually exclusive entities within the context of a democratic nation, provided certain guidelines are observed. In the first instance, Rawls notes

---

<sup>39</sup> This is principally due to the human agents in the process who constitute the membership of the various institutions coordinating the different levels of human interaction, and who may, intentionally or otherwise, permit a breach of such safeguards to occur.

<sup>40</sup> Op cit at 130-131.

that civil disobedience retains an allegiance to the rule of law owing to its 'public' and 'non-violent' nature. Admittedly, it may border on volatility given the social disquiet which has given birth to it, however, it should never overstep this mark and degenerate into an unstructured reactionary backlash against government policies. Given the severe implications and possibilities arising out of actions of civil disobedience they should, therefore, be viewed as last ditch attempts to rectify the political process and not as convenient deterrents to be wielded at the drop of a hat. Secondly, by its nature, civil disobedience seeks to modify conceptions of justice by means of legally sanctioned (although extreme) measures and for this reason it should be restricted to blatant transgressions of justice as well as requiring those who dissent in this way to acknowledge the rights of others to likewise protest. Having regard to these considerations as the general conditions precedent for the exercise of civil disobedience a final and most important tactical issue arises, namely, whether one should exercise one's right in this regard in the first place and whether it will further one's desired ambitions.<sup>41</sup> This is an issue which must be resolved by each individual having regard to his personal morality together with the principles of justice which fashion the process of legal interpretation. And ultimately, one must be prepared to account for the decisions that one has taken.

In light of Rawls's comments on the role of the legal structure within the framework of the political process (and specifically the constitutional democracy) it becomes apparent that he seeks to justify the law in terms of political motivations leading towards a moral standpoint. Yet the politicisation of the process is not viewed with disdain or scepticism but is seen simply as the natural interaction of different human functions. Politics is, therefore, regarded as a necessary component in the effective functioning of social intercourse since it creates a judicial climate conducive to the adoption of particular legal processes and mechanisms. Without it human society would lack the ability to implement moral judgements since there would be no structured legal system to ensure compliance with social norms and enforce the morality of the community upon recalcitrant individuals. Consequently, to the extent that the law is a social process entrenched in political discourse it becomes apparent that its justification is the maintenance of

---

<sup>41</sup> Rawls notes that a test of reasonableness complemented with rational considerations should be used as the foundation for the enquiry.

an open avenue of communication between those managing the political process and those subject to it.<sup>42</sup>

Out of the socio-political identity of the law there also emerges a strong economic justification for its existence. This is essentially a twofold enquiry indicating the manner in which the law impacts upon economic behaviour and the way in which particular economic interaction gives rise to a need for legal intervention. Within this framework the law is seen as a facilitator of resource allocation, and the method of such resource allocation is, in turn, viewed as the single most important factor which determines the environment in which all social interaction takes place. All actions are adjudged in terms of their respective costs and an effective legal system is deemed to be that which ensures their most cost-effective apportionment in the circumstances. Viewing the legal system in this manner, Richard Posner<sup>43</sup> notes that economics embodies a supremely rational and compelling justification to all facets of human endeavour but particularly legal discourse. This is because the law represents one of the most potent mediums for adjusting and regulating human behaviour in a world of limited resources and knowledge. By applying economic justifications to the law, therefore, one focuses on that which is known and can be predicted thereby maximising human choices and knowledge of restricted resources. Any other measure of analysis based upon non-economic criteria is subsequently regarded as a misuse of analytical skills resulting in a misapplication of legal resources. Posner maintains that the beauty of economic reasoning in a legal context is that it is an essentially amoral exercise which does not seek to dictate appropriate conduct based on meritorious sensations and criteria, rather it endeavours to channel human conduct along natural lines of efficiency and in so doing create a

---

<sup>42</sup> In contrast to this point of view, however, Duncan Kennedy asserts that often the law represents a rigid composite of human aspirations and lacks the means to unleash its own potential due to the fact that legal education manages to stultify innovation: See D Kennedy 'Legal Education as Training for Hierarchy' *The Politics of Law - A Progressive Critique* (1982) R Somner (ed) at 40-61. According to Kennedy the primary reason for this is due to the fact that legal education seeks to entrench an unnecessary hierarchical structure upon its participants which only serves in preventing reasoned discussion and hindering future development. Far from providing an arena for reasoned discussion and pragmatic variations the law too often becomes a self-perpetuating mechanism through which 'the establishment' seeks to promote its own ends by means of convenient and self-indulgent justifications.

<sup>43</sup> Posner *Economic Analysis of Law* (1986) at 112-130, hereafter referred to as *Economic Analysis*.

suitable structure for individual and societal governance.<sup>44</sup> In this respect, its infusion into the legal process and its utilisation as a justification for the law can only reinforce the law's worthy ambitions and promote social cohesion. The reason for this is that in applying economic justifications to the law one is bestowing upon it a pro-active focus which enables legal discourse to adjust to, and cope with, changes in society's underlying timbre far more swiftly and efficiently than it would have otherwise been able to do.<sup>45</sup> In contrast, any morally-laden rationale would, it is argued, distort the enquiry and deaden the potential impact of the law owing to the difficulty in establishing a mutually acknowledged frame of reference. Essentially, the 'economics' argument goes as follows - by focusing on non-essential<sup>46</sup> factors such as morality to justify the law one loses sight of the fact that the legal system, and, in fact, all socially constructed institutions, take their directional cues from economic circumstances and policies. This is the bedrock upon which decisions are made and actions accounted for, the rest is mere diversion.

In Posner's view the beneficial consequences of instilling economic reasoning into legal theory are fourfold in nature - first, the individuals subject to the legal process behave in a manner which seeks to rationally maximise their satisfactions; secondly, the internal workings of the legal system become imbued with the goal of promoting economic efficiency; thirdly, economic analysis encourages the development of legal reforms; and finally, the methodology of economic analysis enhances our understanding of the legal system. In essence, all four factors embrace the basic thesis of the 'Chicago School', namely, that the law's primary objective is the attainment of efficiency and that all legal reasoning is geared towards its realisation. Moreover, given these circumstances, the effectiveness of the law is judged in terms of its ability to promote the 'wealth maximisation principle' which is deemed to be the supreme indicator of efficiency.<sup>47</sup> In this regard, the principle itself presupposes that individuals possess a range of

---

<sup>44</sup> In this light, for example, the economist's duty is not to disparage criminal activity or delictual actions per se but rather to show how they result in an inefficient allocation of resources which needs to be curtailed if society is to remain effectively run.

<sup>45</sup> This is largely due to the fact that economic criteria can easily be analysed in terms of a series of rational units of comprehension and accounted for as predictable circumstances or outcomes given a particular factual matrix.

<sup>46</sup> i.e. Fluid and irrational.

<sup>47</sup> The 'wealth maximization principle' lies at the heart of Posner's economic focus on the law. It asserts that the sum total of everything within society can be reduced to and accounted for, in terms of the concept of 'wealth'. In this regard, it is calculated by establishing the value at which individuals are prepared to exchange particular goods.

inalienable rights which can be assigned and reassigned from one to the other through the medium of free market forces. Throughout this process the legal system is designed to encourage the recalibration of market forces when the costs of market transactions become prohibitive, as well as providing for a body of legal remedies when rights have been infringed.<sup>48</sup> However, while the assumed efficiency of Posner's economic justifications are tantalising, the inherent bias of the value structure on which they are based ought to be remembered. After all, the 'wealth maximisation principle' reduces values to units of preference dependent upon willingness and ability to pay. Moreover, it is only market forces which have the ability and authority to determine which particular value from a range of competing values ought to be implemented based upon economic and efficiency criteria. Consequently, the possibility arises that certain legitimate and already marginalized values will be completely overlooked in the effort to promote the greatest efficiency for the majority. Such a situation is clearly of great concern since it can, at best, result in the perpetuation of insipid value structures and, at worst, in the entrenchment of insidious belief systems within a society. In turn, such a state of affairs would appear to undermine the facilitation of cohesion within society which is a *sine qua non* for any discussions on 'justice'.<sup>49</sup> Moreover, in its attempt to define the legal process along structurally distinct lines, economic analysis appears to overlook the socio-political context of

---

Once these figures have been arrived at the efficiency of the law is then determined in terms of its ability to foster the continuation of the system in its present form: See Posner *Economic Analysis* at 126.

<sup>48</sup> It is interesting to note that while Posner asserts that the entire system which he constructs must be grounded in a medium of personal morality (so as to further reduce the cost of market transactions) he seeks to distance himself from the utilitarian tenet which unites morality with the existence of pleasure above pain. In this context, Posner maintains that the utilitarian ideal contains three fundamentally problematic propositions. First, it provides little guidance as to which classes of human beings are to be assessed in determining the pleasure/pain calculation (i.e. should the class only be confined to humans known to us; or, all existing human beings; or, all current and potential future generations?). Secondly, while utilitarianism requires a pleasure/pain calculation to be made it provides no concise formula for the arrival at such a resolution. Finally, utilitarianism does not take into account the fact that certain individuals are capable of deriving greater pleasure from permissible acts than others. In effect, this leads to a distortion in the pleasure/pain ratio and results in an inaccurate representation of the actual state of affairs: See Posner *Economic Analysis* at 128.

<sup>49</sup> As an aside and in addition to the concerns already expressed, the 'wealth maximization principle' rejects the concept of economic redistribution since such redistribution constitutes a re-assignment of wealth rather than an increase in its fundamental volume. However, given that one of the legal process' motivational forces ought to be the desire for 'equity', one can but wonder how the harsh judgements emanating from Posnerian reasoning would be accepted within society in general, and how they could be reconciled with the law's ambition for justice?

legal discourse together with its moral functioning. Nonetheless, Posner's retort to such a claim would be that while economic theory reduces the complexity of the law into a series of specific propositions this is a necessary precondition for purposes of analysis and does not detract from the basic truth of the economic message itself whose assumptions remain valid.

As has been seen, legal justifications are essentially framed in terms of two camps of thought - formalism and realism. Legal formalism denotes a rational order of pre-existing rights and rules which can be relied upon in making judicial decisions, while legal realism embodies the belief that the law is constructed from a myriad of conflicting points of consciousness, which cannot be reconciled with one another. Consequently, formalism presupposes that legal discourse represents a means of comprehension untainted by social uncertainty or political necessity and that the law contains an innate morality within its own identity. In contrast, realism asserts that formalism represents an impractical framework given the limits of human knowledge and the ambiguities of language. In this context all expressions of human contemplation are regarded as no more than incomplete rationalisations of inexplicable occurrences, and the law is seen to be a system which evolves in a complex and unpredictable manner in the light of antecedent social factors. The Critical Legal Studies movement whose defining feature is a belief in the radical indeterminacy of law is born of such realism. Through the channels of Critical Legal Studies understanding orthodox analyses of law are seen to mystify legal objectives and to legitimate legal decisions so as to bolster the political status quo. In so doing they deny the existence of a fundamental contradiction inherent in legal and political thought, namely, that conflict inhabits the core of human experience. Such conflict presents itself through our sense of self definition and individual identity which is at one and the same time a formulation of intensely personal expectations as well as a construction defined in terms of and connected to the existence of others. It is this contradiction within the nature of individuality and its attachment to other identities that Critical Legal Studies alleges is ignored by mainstream legal thought. Moreover, it is as a result of such inherent tension that the law can be manipulated and its justifications reinterpreted in numerous ways. Mainstream legal thought fails to acknowledge such possibilities and tries to privilege one form of interpretation above another thereby stifling the range of legal justifications and the potential of legal discourse.

Clearly, Critical Legal Studies can be accused of allowing itself to become so absorbed in issues concerning the contradictory nature of legal justifications that it ultimately regresses into a nihilistic void in which nothing can be accounted for, and in terms of which nothing can be

predicted with any sort of accuracy. This is a very real problem since it undermines Critical Legal Studies's attempt at constructing an alternative vision to orthodox legal reasoning. The notion that the law is indeterminate at its core as well as in its application is consequently a troublesome proposition which Critical Legal Studies adherents are obliged to confront in order to avoid accusations of nihilism. Some Critical Legal Studies scholars choose to approach this dilemma by asserting that the fact that the law does not need a rational justification does not automatically gear it towards an inevitable journey in the direction of nihilism. The reason for this is that nihilism requires an antecedent belief in the inability of actions to be foundationally justified in any way and it exhibits a real concern about such a state of affairs. In contrast, Critical Legal Studies refrains from regressing to the level of complete disillusionment (as embodied in nihilism) and acknowledges that there is a compelling human need to accept a range of beliefs and to assert an array of intuitions which underlie all human interaction even though they cannot be rationally explained. In this regard, the Critical Legal Studies movement stands in contradistinction to 'law and economics' reasoning and assumes an objectivist critique of such theories not for the sake of indicating its own pre-eminent analytical objectivity but as an indicator against which to hold such theories accountable in terms of their own aspirations. Despite such argumentation, however, Critical Legal Studies analysis remains open to criticism from quarters who believe that it requires a more advanced vocabulary and analytical approach in order to overcome formalistic dualities and to avoid the potential of a nihilistic paradox. To this end, Roberto Unger<sup>50</sup> appears to provide certain valuable insights from within Critical Legal Studies itself so as to advance its ambitions and promote its understanding of the role and extent of legal justifications.

Unger notes that human identity is forever understood in terms of social and cultural contextual settings which define the extent of possibilities on the one hand, and experiences and thoughts which transcend such context and cannot be effectively accounted for by means of language, on the other. This conflict translates itself into our 'existential dilemma',<sup>51</sup> and it is with this in mind that the justifications of social institutions need to be understood. Unger maintains that human personality once cleansed of the restraining forces of imposed beliefs is capable of

---

<sup>50</sup> R Unger *Law in Modern Society* (1976) at 26.

<sup>51</sup> The manifestation of the dilemma is the longing of the individual psyche to be subsumed into a collective identity and its simultaneous revulsion at the possibility of losing its individual identity.

infinite potential. To interpret the law in terms of formalistic intentions is to stifle such potential, but to view it as a mechanism for the release of human personality is to facilitate the understanding of an important and universal aspiration. The inherent plasticity of human nature is regarded by Unger as the central and only predictable feature about our existence and the ability to harness such adaptability beyond particular contextual, circumstances is a supreme triumph.<sup>52</sup> The possibility of arriving at the template of understanding is, consequently, not at issue since the progression towards more flexible interpretive structures is the factor of sole concern. The complexity of such reasoning, however, lies in the fact that it requires one to view the law as an ideology which is entrenched as a tool of political legitimation and which feeds off a sense of pervasive indeterminacy. It is only in understanding the law in this light that one can appreciate the complexity of legal impulses and seek to assimilate the multitude of legal justifications in a coherent manner.<sup>53</sup> In so doing the legal system is enabled to promote human discovery rather than perpetuate self-ignorance. Moreover, it is this sense of textuality and contextuality which will be re-emphasised when the fusion of legal and literary justifications is examined later.

Critical Legal Studies is a movement primarily concerned with the development of political understanding. To this end it asserts that no single medium of political integration has perpetual or conclusive authority and that the most effective means of ensuring political advancement is through the continual re-assessment of political ideas and institutional mechanisms. In this regard, therefore, the ultimate justification of the law is to facilitate this quest through a constant re-appraisal of both its objectives and the means for their attainment. Furthermore, given that Critical Legal Studies theorists such as Unger abstain from promoting turbulent social revolution as the catalyst for political change, the onus falls even more heavily on the law to ensure a smooth transition in social identity and political belief.<sup>54</sup> The balance of power at any given time

---

<sup>52</sup> Unger acknowledges that for every context that is superseded another one is created with the result that we are never entirely free agents. However, contextual fluidity allows one to progress towards surroundings which are less structured and encourage questioning of their own pretences. It is this progression which unlocks human potential rather than necessarily arriving at an ultimate context-free state of being: *Idem* at 121.

<sup>53</sup> This may seem ironical given the fact that coherence is somehow taken to emerge from an array of vying points of reference, yet it is important to remember that Critical Legal Studies continually makes the point that the only meaningful vision of reality which we possess is one based upon our appreciation of the difference of things.

<sup>54</sup> With this in mind, it becomes apparent why Critical Legal Studies frowns upon formalism since the latter form of critique seeks to establish a particular and immutable

in history is subsequently never viewed by Critical Legal Studies scholars as an irrefutable state of affairs but is seen as an arena of vying political motivations which must be effectively assimilated through the channels of the law to ensure the maintenance of social progress and communal stability.

### 3.2 Literary Justifications

While the reasons for composing a literary work<sup>55</sup> are as diverse as the myriad motivational forces influencing any one author, the underlying 'constant' within literature is that it embodies an attempt by man to identify some measure of justice in the sea of human chaos as well as representing a medium in which interpretative justice can be 'done' to the human condition. By this I mean that literature constitutes an endeavour to reformulate time and space within the confines of the written page so as to guide the reader towards a particular conclusion or realisation while, at the same time, rendering the interpretation of reality sufficiently meaningful to him despite the exclusion of a range of facts and stimuli which would have been present in the actual event. Consequently, while I will present numerous justifications of literature in this section, it should be borne in mind that the bedrock upon which they are all based is the desire to comprehend the human condition which, in itself, constitutes a conception of justice.<sup>56</sup>

Perhaps the most powerful attribute of literature is its ability to defy the linear constraints of time together with the specific constraints of place and in so doing, encourage man to reformulate his understanding of the world. Through the channels of literature one can regress in time,

---

means of legal analysis which fails to heed socio-political developments and consequently restricts the law from fully utilising its justificational foundation as the arbiter of ordered societal evolution.

<sup>55</sup> In this context, I use the word 'literature' in a broad sense to denote written adaptations and interpretations of human experience, both fictitious and factual. Admittedly, many societies have a strong oral literary tradition which could also be classed as a genuine representation of the 'literature' to which I refer. In many respects, I believe this assumption to be correct, however, for present purposes I have chosen to confine myself largely to the written word whose inherent characteristics may be taken as emblematical of the 'literacy' endeavour in its even broader sense.

<sup>56</sup> This is not to say that all human actions are necessarily 'just' for such an impression is both naive and imprecise. However, what it does imply is that through the act of analyzing and attempting to grasp the ramifications of the human condition one inevitably encounters and develops an awareness of the notion of justice and the manner in which a facet of it is reflected in the very act of being.

encounter different cultural identities, stimulate one's imagination of unseen or fictitious worlds, or even expand one's knowledge of the known universe. It is this unique ability to transcend the acknowledged present which constitutes literature's greatest asset. In this regard, especially considering the stunted integration of South Africa's heterogeneous society, literature has often been used as a means of social commentary and has been rooted in political justifications.

In the South African context, two literary traditions arose out of these specific circumstances, one which sought to justify the status quo and another which defied the authority of the law and the imposed morality of the state. This latter group has gained renewed prominence and legitimacy in the years following the collapse of apartheid doctrines and has embarked upon a systematic reappraisal of its ambitions while retaining an allegiance to its original justificatory precepts rooted in political struggle. It is interesting to note, too, that this transition from a marginalised discourse to a mainstream one has been fraught with difficulties due to the new responsibilities, challenges and expectations of a steadily integrating society. For example, the new-found freedoms of expression of black authors together with their accounts of past injustices, are gradually being translated (where necessary) into other languages (particularly English) so that a dialogue can be established between different communities within South Africa as well as abroad. In this regard, moreover, it is vital to acknowledge the tacit connection between reality and fiction and the valuable role that the latter medium has in reflecting elements, particularly painful instances, of the former condition. It is my belief that as 'marginalised literature' in South Africa develops so as to fill the vacuum left by discredited ideologies the message to be conveyed will have to be less militant and more conciliatory in tone. This is not to deny the pain which has taken place or the indignities which have occurred nor is it to denounce the political justifications which underlay this literature in the first place. The fact remains, however, that if one wishes social interaction to progress there is a need to convey one's experiences and beliefs - particularly if they are now regarded as legitimate - in a manner which ensures the greatest effect and the least affront. Only in this way are you likely to win people over to your point of view and consequently bolster the position of your political justifications.<sup>57</sup> Furthermore, regarding this process of transition in South African 'protest'

---

<sup>57</sup> As an aside in this regard, it is worth noting that the *Truth and Reconciliation Commission (TRC)* was established as a forum for the expression of marginalised discourses. The ultimate aim of the process being a societal catharsis in which those previously denied a voice would be entitled to relate their experiences and confront their tormentors in the hope that the truth would emerge and justice would prevail. Yet, given

literature, the time has come to distance itself from an exclusive preoccupation with the past and develop an awareness of future possibilities. For it is in this arena that one of literature's greatest potentials lies (i.e. the ability to look beyond both the past and the present) and through which it can influence the course of law. The reason for this is that by its very nature the legal process is an institution with a retrospective focus always battling to meet or shape the expectations of the present generation based upon the criteria established by, often, bygone social structures. Law does not contain within itself the ability to formulate an accurate and detailed projection of future social scenarios. Consequently, literature can provide the keystone which enables the law to connect past and present experience to a potential future context.

Undoubtedly, a great deal of literature has a didactic and moralising function, particularly in newly-evolving societies and communities which are in a state of flux. In these contexts, the primary justification of the literary process is seen to be the imparting of a particular message or the conveying of basic moral tenets. Consequently, the manner in which the ideas are conveyed is designed to ensure the greatest effectiveness with the minimum of sophistication. In this sense literature can be seen to harbour definite socialising ambitions inasmuch as it seeks to dictate to a community the specific lines along which interaction ought to take place and the manner in which communal integrity should be viewed.

Clearly, as societies advance, however, the overt didactic stress of literature recedes and is replaced by more subtle undertones while the task of regulating the behaviour of society falls more on the shoulders of carefully composed and instructed legal institutions. In this manner, literature develops a certain refinement and becomes elevated to the status of an imaginative

---

the *TRC's* noble ambitions to utilize the literary process (in both its oral and written media) to facilitate understanding and promote cultural integration it would appear that its task has been somewhat sullied by the insertion of a pecuniary value and form of compensation in its analysis and assessment of individuals appearing before it. Arguably such fiscal recompense undermines the process on two grounds - first, it constitutes an unwarranted encroachment into the duties and jurisdictions of the legal process, and secondly, it fuels the dangerous perception that justice must be equated with financial compensation, in essence, 'blood money'. Given the undeniable potential for the constructive reconstitution of society presented by the *TRC*, it is, therefore, unfortunate (to say the least) that it should hamper its own effectiveness because of poorly evaluated channels for the attainment of its goals. Any attempt to reduce a vehicle of literary understanding to a quasi-legal institution is indicative of a fundamentally flawed appreciation of the distinction between the two institutions as well as the margin of practical effectiveness which literature holds in its own right.

experience whose justification becomes the interpretation of reality rather than simply the prescription by a community to the individuals therein of particular moral and social expectations. Moreover, it is within this context that modernisation seeks to entrench the primacy of experience above the theory about experience - in essence, resulting in the perpetuation of a tension within human consciousness inasmuch as man is seen to embody the truth but is denied full knowledge thereof. Such an acknowledgement consequently serves to alert the human intellect to the power relations behind one's understanding and the entrenched framework from within whose sphere one makes assumptions.<sup>58</sup> However, the very modernist construction of existence would seem to deny the possibility of any denouement or ultimate frame of reference (i.e. the absolute form of narrative experience) given its complex appreciation of the relativity of reality in the first place. In spite of such a state of affairs, however, modernism itself simply expounds a system (albeit a system of disbelief) onto the 'formalistic' beliefs of legal discourse. The myth of literary clarification and control over the vagaries of existence is consequently perpetuated across the literary spectrum and is not reliant upon particular genres but is tied to the constant literary ideal - the search for justice. Be this as it may there is, nonetheless, a continued desire to come to terms with the complexity of experience, and a tacit resolve to effectively establish channels of communication through which justice might be attained. These ambitions are adopted by postmodernism as well by virtue of its allegiance to the literary ideal although it seeks to distance itself from the moral and humanistic justifications of literature which have been previously accepted. Through postmodern eyes literature is seen to represent nothing more than an illusory channel of perception indicating the meaninglessness of existence. Yet even this apparent sense of futility contains direction and is filled with meaning. It is aimed at discerning the true nature of human consciousness, rationality and reason and trying to formulate an interpretative template against which particular actions can be accounted for. In this respect, therefore, while postmodernism questions the traditional pretensions of literary scholarship by focusing upon the fragmentation of human knowledge and understanding this quest is nonetheless rooted in the natural human craving for justification and resolution. The reason for this is that by acknowledging the complexity and formlessness of existence, postmodernism does so from the tacit vantage point of systematic and rational interpretation. In other words, the very act of identifying the presence of a confused mass of

---

<sup>58</sup> In essence, modernism seeks to acknowledge the inherent tensions within human existence, thereby reflecting 'reality' more accurately and doing justice to the human condition.

being implies the ability to withdraw beyond it and impose some meaning upon it. For this reason even postmodern analyses of reality should be seen as containing a definite structure and fulfilling an essential function - the former denotes its justification (which is the search for meaning), and the latter embodies its desired resolution (which is the attainment of justice). The important element in this context, however, is that unlike legal rationality and to a greater degree than other measures of literary discourse (e.g. Romanticism), postmodernism is acutely aware of the irresolvable tension which exists between its implicit destiny (i.e. the search for justice) and its inevitable justification (i.e. the complexity of meaning and the unavoidability of misunderstanding).<sup>59</sup>

In all that has been said it becomes apparent that literature represents an arena in which human motivations are questioned and man's myth-making capacity analysed. Through literary symbols the greater symbolism of ordinary activities is revealed and human potential explored. Moreover, it is at the point at which literature engages with such ideas that it comes to constitute a powerful philosophical entity in its own right. This is not, however, to say that literature provides answers to all dilemmas in human understanding for such a claim would be immodest and untrue. Rather, literature poses questions and conducts enquiries which other disciplines overlook, and it is this factor which constitutes the core of its sublime insight. Furthermore, it is literature's unique ability to evolve in a remarkably fluid manner so as to reflect contemporary paradigms of understanding that gives it an analytical edge over more contemplatively inflexible discourses such as law. The mythical justification of literature represents a valuable field of exploration at a number of levels. First, the creation of myths serves to bridge gaps in human understanding through the formulation of circumstances which constitute definable points of reference against an enigmatic backdrop of uncertainty. Secondly, myths provide the contextual framework from which literature gains its historical perspective and its analytical stimuli. This

---

<sup>59</sup> Taken to its extreme, postmodernism defies the need for any justification in both literature and life. The point being that the insistence on some form of justificational criteria is indicative of a failure to realize that things simply 'are' and motivelessness reigns. However, this extreme point of view appears to me to fall short of the sophisticated potential of the postmodern argument because it unquestioningly accepts the 'chaotic' status quo whereas the postmodern quest has long been concerned as to why things are in such a state of flux in the first place. After all, when one deconstructs the disorder of existence one is left with units of meaning and shared understanding which provide clues as to the justificational intent of literature and act as a basis from which to evaluate the descent into the disorder of reality.

is due to the fact that myths construct a past heritage of shared human endeavour around which literature evolves, while simultaneously providing a contemporary setting from which literature can fuel its efforts to define itself. Consequently, myth is both a justification and ambition of literature inasmuch as it is born of mythical projections, on the one hand, and it seeks to define reality in mythical terms, on the other. Thirdly, the power of myth stimulates the development of literary creation and it also provides an effective point of entry and means of interpretation of literary texts. Finally, myth is the element within literature which possesses the power to influence peoples' perceptions, alter their judgements and release their inhibitions. This is because through the mythical projection of 'the Self', individuals become more attuned to confirming their presence in the world and seeking to establish a particular mark of their existence in a profoundly 'Delphic' universe.

The rationalisation of myth has undergone an interesting change in emphasis over time, reflecting the growing sophistication in literary comprehension. The initial purpose of myths was seen to be the communication of moral truths in an allegorical setting. With the rise of the 'church state', however, political undertones began to filter into myth analysis and myths were legitimised to the extent that they did not undermine church policies. As the Enlightenment dawned, rationalistic philosophers then began to subvert classical mythology as a medium for the perpetuation of superstitious beliefs and wilful untruths. Ultimately, each philosophical generation has sought to adapt what has gone before it and to reinvent itself in the language of its own mythical understanding. In engaging with the mythical identities of preceding ages scholars have inevitably laid the foundations for their own frame of reference and the criteria by which they will be judged. So it is that myth should be understood as a manifestation of human consciousness closely associated with man's vision of his place in the world, rather than simply being a freely invented and value-neutral commodity. Bearing this in mind, myth comes to represent an integral component in the composition of cultural identity and the formulation of individual psychology. Moreover, in constituting a channel for the interpretation of reality, myth discloses a profound appreciation of the inter-relationship between the real and the ideal, the actual and the imagined. Neither sphere would appear to predominate and both are interchangeable with each other resulting in the confluence of human imaginings.<sup>60</sup> In primitive societies it is interesting to observe the manner in which myth penetrates all aspects of language

---

<sup>60</sup> At a basic level this can be seen from the regular metamorphosis within mythology of divine gods into human characters and human characters into mythical entities.

and is, in turn, reflected in various forms of art. As communities advance, however, such interaction becomes increasingly restricted as the various modes of interpretation evolve into distinct entities vying with one another for legitimacy. In its present state of advancement Western society has already experienced this schism and the only remnant of mythical potential available to us is to be found through literary channels. For this reason and in order to re-affirm the mythical content of legal discourse we must first renew our acquaintance with the mythical justification of literature. Only in so doing can we fully appreciate and account for the perpetual tension present within legal discourse as between its stated desire for justice and its justifications born of the imperfections in human understanding and limitations in human knowledge. The reason for this is that in subsequently transposing the existence of myth into a legal justificatory setting we come to see that the apparent intentions of the law do not always coincide with its underlying justificational influences. In this regard, the law has undeniably and ironically constructed a mythical presumption of its own inasmuch as it would have one assume that no tensions or conflicting motivations exist within its own discursive framework. Yet, somewhat paradoxically, by applying mythical assumptions and constructs to legal discourse one is able to unravel an otherwise overlooked portion of law's construction, namely, that it operates to a large extent within a mythical sphere of dual realities. By this I mean that the law overtly seeks to establish itself as an effective medium for the attainment of just ends, yet it also needs to be acknowledged that it is formulated through the existence of violence, discord and uncertainty in human affairs. The former state of being consequently represents one mode of reality which would be labelled 'the divine' in a mythological context, while the latter embodies the second manifestation of reality characterised as 'the mortal' sphere of existence within the myth. While the perpetual tension between these two modes of reality precludes the complete exclusion of either interpretation (and consequently the absolute attainment of only one) the mythical framework facilitates their interaction within the purview of its own creation. In so doing, man is not necessarily drawn to any conclusions, but his understanding of the human condition, in general, and legal discourse's interpretation thereof, in particular, is greatly enhanced. In this regard, the predominant sense to be drawn from such increased understanding is that legal discourse analysed solely on its own terms and interpreted exclusively through its own channels is both ineffective and distorted. What is required for a more thorough understanding of matters is the application of literary justifications to the legal process, culminating in a synthesis of

interpretations.<sup>61</sup>

The very existence of myth is an indication of the rich imagination of the human mind and its attempts to account for the unknown and to justify the tacitly perceived potential of man. In this regard, it remains as cogent a force in contemporary society as it was in bygone eras. However, the only point of distinction between these two ages in time is that the significance of myth has been largely forgotten in the modern world. It is this fact which is particularly unfortunate since through the marginalisation of myth we are denying ourselves the benefit of a notable narrative discourse and medium of interpretative understanding. In this regard, moreover, it should not be presumed that myth is somehow incompatible with the scientific advances of the modern age. Such a supposition is spurious because, in spite of the tangible consequences of modernisation and the scientific revolution, humankind remains subject to inherent deficiencies in knowledge. We are only able to comprehend so much of reality, the rest is a matter of our own creation, presumptions and intuition. At this level myth constitutes an effective forum for interpretation and expression of both human frailties and capabilities, and consequently provides a means by which they can be better understood. So it is that myth is essentially a philosophical quest framed in a narrative form. To this end, however, it should not be supposed that myth and literature are inter-changeable entities. Such a statement would be to confuse their individual identities since one cannot have literature without myth, but myth is able to exist without the need for an established literary framework.<sup>62</sup> In this regard, therefore, myth constitutes a justification of literary interpretation, and an appreciation of myth is necessary if one wishes to embark upon an effective analysis of literary ideals.

### 3.3 Fusion of Justifications

Law and literature symbolise different means through which man tries to comprehend the reality surrounding him and to define himself in terms of this understanding. In many respects not only do these two disciplines constitute divergent mechanisms of comprehension but they also serve different practical functions. Yet, while one must clearly acknowledge such dissimilar activities it is also necessary to analyse those instances where parallels can be drawn and where inter-

---

<sup>61</sup> This element of the argument will, however, be discussed at greater length in the next section 'Fusion of Justifications'.

<sup>62</sup> Moreover, while literature is identified by the synthesized structure of its basic elements (i.e. words), myth embodies a far more indeterminate arrangement which is able to retain its essential integrity across a range of media (i.e. words, art, drama or dance).

disciplinary cross-pollination can prove fruitful. This is what I hope to highlight in this section. However, it should be remembered that given the emphasis of my argument up until now, I shall be concentrating on the beneficial influence which literary justifications can have within a legal context rather than vice versa.

Within the framework of legal justifications the central issue regarding the nature of language is the extent to which it is able to effectively communicate man's perceptions and understanding of reality so that socio-political communities and economic systems can function successfully. Consequently legal rules are not only directional in application (i.e. they do not simply lay down guidelines as to how one should act), but are also justificatory in the sense that people are called upon to justify their conduct in terms of such regulations which are themselves rooted in a greater justification of their own. Thus, while the law and literature strive for 'justice', people are constantly obliged to justify their own actions within the framework of this greater ideal, and this ideal is itself counterpoised and limited by its own justificatory identity. In other words, referring to what has already been noted, it should be remembered that while law and literature are directed towards an interpretation of 'justice' they are denied the possibility of attaining it by virtue of their respective justifications which are to a great degree reliant upon the uncertainty of existence and the limited nature of human knowledge. Moreover, from a purely hypothetical point of view, if one were to divest law and literature of the justificatory functioning provided by uncertainty and limited human knowledge then it is reasonable to assume that they would lose both their authority and rationales as forces for the attainment of justice. The reason for this is that in such a scenario 'justice' would presumably be an existing state of being since certainty and absolute knowledge would be entrenched in every human mind, consequently the need for a discursive channel presenting a vision of 'justice' becomes superfluous. Therefore, when I note the beneficial implications of providing a 'fusion of justifications' I do so not in the belief that literary justifications applied in a legal context will necessarily assist in the attainment of 'justice',<sup>63</sup> but that such an integration of ideals will result in a more thorough evaluation of the potential of the legal process and of the relationship between the search for justice and the need for justification.

---

<sup>63</sup> The reason for this is that this argument contains two fundamental flaws - first, it fails to acknowledge the essential distinctions between law and literature and the fact that they cannot be reduced to a single entity with a uniform identity; and secondly, such an argument mistakenly assumes that the attainment of 'justice' in a legal context can be achieved simply through the importation of literary justifications.

In many respects literature assists in redefining law in terms of its own mythical projection. By this I mean that literature alerts one to the mythical content of legal identity, the way in which it operates and the consequence of its presence. For example, while legal discourse is preoccupied with projecting an air of focused certainty and fairness, literature assists in dispelling such presumptions by elaborating on the manner in which the law can be seen to provide occasions for the creation and perpetuation of conflict rather than for its resolution. This is evidenced through the condonation of varying degrees of violence within the legal process itself together with the fact that much of the law's legitimacy is drawn from the tumult of its surroundings rather than the integrity and effectiveness of its proposed resolutions to such circumstances. Consequently, the legal process is rooted in the disorder of existence yet its ideals strive towards greater ambitions beyond social reality (but within human contemplation) and the factor which permits such contrasting circumstances to coexist is 'myth'. This is not to denigrate the ideals of the law since myth per se is an amoral concept, but merely to indicate that the law exists as much - if not more so - through myth as it does through reality. Moreover, the fact that myth is embedded in the identity of the law enables the legal process to account for the dual nature of its existence (i.e. simultaneously within and beyond society) as well as to acknowledge the unattainability of its desires given the continuation of the present factual matrix. In this context, 'myth' embodies two separate concepts - the first is 'myth as illusion' and the second is 'myth as creation'. Regarding the former concept, the acknowledgement of myth within the law indicates the inherent and paradoxical tension present in the legal process as between the search for justice and the necessity for justification, while the latter concept denotes the potential for the greater understanding of legal discourse as a mythical creation much more complex and inconstant than its assumed certainty would suppose. In essence, myth provides a point of connection between the understood and the inexplicable, yet its potential for revelation within legal discourse has gone unharnessed owing to the illusion of rational certainty surrounding the legal process. It consequently proves to be beneficial to utilise the avenue of literature to deconstruct the formalistic pretensions of the law and thereby relocate the justification of the law in human aspirations and capabilities, many of which are inextricably tied in with the notion of myth.

In this regard the process of deconstruction is beneficial inasmuch as it serves to alert one to the fact that justice can only be attained if it has the ability to be implemented. In other words,

enforcability is a necessary prerequisite for an understanding of justice. This infuses the identity of justice with two important notions, namely, that violence<sup>64</sup> is an inherent component in the creation of the 'just ideal', as well as the fact that such ideals are a compound of human identity and divine belief. Consequently, just as the law is born of the tensions of human uncertainty so, too, is its ambition - the attainment of justice - plagued by the pressures of brutality and turbulence in human existence. Of all the forms of experience the ideals of justice remain obsessively guarded by societies yet are little understood by them. This is not to say that no conclusions can be drawn as to the function or nature of justice, but merely that the ways in which it is accounted for are in need of re-evaluation. It is no longer a satisfactory exercise to presume that justice is undeniably attainable or entirely within human ken. Such presumptions detract from the complex universe which the concept of justice inhabits, yet it is these very notions (ironically) which legal discourse instils in human minds.<sup>65</sup> For this reason it is vital to extend one's search beyond the bounds of purely legal reasoning while simultaneously deconstructing the monopoly of misunderstanding and misinformation which the law seeks to impose upon individuals. Admittedly, the ultimate consequence of such an enquiry is to highlight the complex inter-relationship between justice and justification and to render the viability of justice conceivable while declaring its attainment to be impractical. However, what at first sight might be labelled an irrational statement takes on a critical truth when it is seen to reflect the fundamental contradiction of existence, namely, that man has the intellectual ability to bring his being into question yet he lacks the knowledge to advocate a specific resolution (in this case - justice) to consume all of his uncertainties. There will always be a sector of reality which subsequently remains unknown and there will forever remain a portion of the unknown which continues to be unattainable. Deconstruction teaches man that his purpose is not to deny or retaliate against this state of affairs but rather to abide by it and formulate his being in accordance with it.

Whereas the law imposes upon individuals a single discourse of interpretation regarding the concept of justice, literature intimates that justice can be more readily attained if one communicates in a language of mutual understanding (i.e. in the language of the other). Such an

---

<sup>64</sup> If one wishes one could use the term 'force' in lieu of 'violence', however the outcome is the same.

<sup>65</sup> Not only does the law seek to define justice in terms of tangible criteria but it also aims to be the sole regulator of all human actions in the light of its definition of justice.

observation clearly serves to humanise the dictates of the law, however it does not necessarily bring one to a just resolution in itself. The reason for this lies in the fact that the language of the other can only be spoken to the extent to which it is assumed by the party concerned, and in order to do this it must be appropriated and redefined in terms of a foreign frame of reference in the first place. The potential for justice is, therefore, always subject to an act of violence and embodies an instant of isolation in the very act of connection. Moreover, within the particularity of the circumstances in which justice is sought man desires to extract principles of universal application for all time. However, an unsullied allegiance cannot be shared between 'the Self' and the other, the specific and the universal, with the consequence that each attempt at justice must harbour the seeds of injustice. In essence, what is not said or done, the silence between words, and the individual isolation in the midst of community identity are all factors which have as strong a bearing on human understanding as all spoken words and actions. It is, after all, in this silence that the justifications of justice reside. Given this state of affairs the very foundations of justice remain, to some extent, shrouded from human comprehension, however, the onus is still on man to decipher and interpret to the best of his abilities the symbols at his disposal.<sup>66</sup> This is clearly not the ideal situation since the essence of justice is irreducible, yet it is all we have to go on. In these circumstances, furthermore, human understanding and interpretation are acts of continual deconstruction inasmuch as intangibles are defined and intricacies unwound so as to embody an attainable level of human contemplation. In itself this presents no intellectual dilemma and, in fact, constitutes an avenue of greater understanding since we are thereby enabled to confront otherwise illusive notions and identities. However, the problem arises if we deem such reduced reflections to be untainted manifestations of the original. And it is with regard to this aspect of understanding that the law's potential often capitulates to its own formalistic pretensions. For this reason, more than any other, it is vital that legal discourse not be isolated from literature's sphere of influence, for where the law presumes, literature dares to question.

---

<sup>66</sup> In this sense the most cogent manner in which to 'do justice' to the notion of justice is by attempting to understand the situations out of which it arises and the resolutions which it seeks to impose in different circumstances. Nothing more than such finite solutions can or should be expected of man.

While the notion of justice retains a supremely abstract identity which resides beyond the present<sup>67</sup> the course of human conduct requires that decisions be implemented with dispatch and without the consolidation of infinite knowledge as a justificatory stay. In this regard, the moment of decision always retains the mark of uncertainty by virtue of its own finitude and it is this element which humankind seeks to alleviate through the utilisation of legal discourse which provides one with a conceptual crutch inasmuch as it proffers resolutions to current human conflict which are allegedly steeped in certainty and equity. In effect, the law seeks to emulate the infinite wisdom of justice in a manner which provides for some temporary respite for societies from the onslaught of present dilemmas. Such an ambition is admirable inasmuch as it assists in the continued maintenance of social cohesion and order in a dignified context. However, the problem arises when 'law' is equated with 'justice' and legal contemplation is elevated to the status of the supreme medium of enlightenment, while the identity of justice, in its entirety, is reduced to a number of basic legal tenets.<sup>68</sup> Such incongruous correlations are indicative of a profound misunderstanding of the role of law and a misinterpretation of the identity and content of justice. In order to rectify these erroneous presumptions, however, a relatively straightforward procedure is required whereby one comes to recognise the failings and inconsistencies present in certain legal justifications and in so doing one facilitates a paradigmatic shift in emphasis and understanding. First, the claim to objectivity by the law ought to be viewed in a decidedly circumspect light. Not only is the law a socio-political institution but its implementation relies upon the motivations of human actors. Consequently, it should not be presumed that legal discourse can somehow detach itself from the foundations of its own subjectivity in order to render dispassionate outcomes for all occasions. Secondly, the law should be seen not so much as a forum centred around the notion of justice, but rather as a medium for the monopolisation of violence. While it has already been stated that implicit within an understanding of the just ideal there resides an appreciation of the role of violence one should not confuse the justifications of the law with its ambitions. In other words, while the law appears to be concerned with just accomplishments its authority is gleaned from its ability to harness and monopolise the violence in humanity which surrounds all channels of social

---

<sup>67</sup> The actions of justice can only be perceived with hindsight or hoped for in the future, but they can never be fully apprehended in the present.

<sup>68</sup> In many respects general legal scholarship may be seen to espouse such frivolous assumptions.

interaction.<sup>69</sup> Thirdly, as with all human institutions, legal discourse is constructed around the certainty of the unknown, and its function is to placate the uncertainty which society feels in the wake of such an inevitable state of affairs. However, as with any interpretative discourse the law's vantage point remains clouded by human ignorance. Any legal justifications must consequently be seen merely as attempts to infuse social functioning with foundational constraints so as to prevent society from disintegrating altogether. In this regard, therefore, the realisation emerges that legal justifications do not necessarily meet the ambitions inherent in the notion of justice. This having been said, however, one should not presume that all is lost and that humanity is destined to a pedestrian existence in which any sense of justice is deemed to be illusory. For while a state of justice may be denied to us the search for it remains very real and the potential for better comprehending it becomes all the more possible with the assistance of a literary perspective.

The law necessarily creates expectations which regulate the practices of individuals and provides a broad regulatory framework in which they can, within reason, pursue their own conceptions of well-being. However, as has been shown, the legal process occupies a chamber of conflicting potentialities inasmuch as the law characterises actions in terms of their social value by means of entitlements, while simultaneously creating the conditions in which confrontations over titles take place. Ironically, moreover, the law maintains a stubborn allegiance to the notion that the appearance of certainty is a necessary precondition for the exercise of effective authority. As a consequence thereof any affirmations regarding the existence of doubt are marginalised in legal settings, and where they are entertained they are seen to debase the ambitions of the law. In addition to representing an incomplete image of the tensions present within the legal process such legal reasoning lies in stark contrast to the legal visions of human disquiet presented and questioned in literature. Furthermore, while it might be argued that the legal system is obliged to sacrifice a measure of its own complexity in order to arrive at conclusive results in an expeditious manner this still begs the very issue whether results so obtained can, in fact, be said to be 'conclusive'? In relation to the factual matrix before the court they may well be, but in the

---

<sup>69</sup> In this sense, the only forms of violence which pose a threat to the authority of legal institutions are those which can formulate their justifications from beyond the bounds of contemporary legal orthodoxy. In other words, any action or event whose justification for the use of violence does not rely on purely legal authority constitutes an unwelcome challenge to legal supremacy. It is for this reason that the law seeks to regulate as much

larger and more salient context of the desire for human truths which facilitate the search for justice I would maintain that legal reasoning so devised only serves to entrench the authority of the law and to perpetuate the misguided illusions surrounding it. There would, of course, be no dilemma were legal discourse not to claim a mark of credibility by aligning itself with the notion of justice. However, such a connection lies at the heart of the law's legitimacy while its justifications provide the basis for its continued manipulation of human interaction. While there may be little hope of extricating legal expectations from this quandary there remains the distinct possibility of reformulating the situation with the aid of external stimuli so as to better understand the notion of justice, the bases of justifications and the levels of interaction between the two. This is what I have been attempting to achieve thus far with the aid of literary devices. Where I have deconstructed legal pretensions or injected an element of doubt into legal rationality I have done so in the belief that it is more important to openly acknowledge human frailties in our search for justice than it is to assert comfortable misconceptions in the light of our own ignorance. Bearing this in mind, my standpoint is at once nihilistic inasmuch as it is grounded in the eternal indeterminacy and unattainability of a state of justice while simultaneously conveying the markings of hope through the greater awareness of the human conditions which literary perceptions are able to reveal in legal contexts. It is this acute and perpetual contradiction which constitutes the basis for my theoretical journey.

The lack of any ultimate frame of reference, or rather the inability on the part of human beings to arrive at such an infinite understanding does not necessarily represent a discouraging state of affairs however. The reason for this is that if one applies an active nihilism (as opposed to a negative or regressive nihilism)<sup>70</sup> one still affirms the potential for a greater knowledge and reality beyond the context of present perceptions. The fact that our finite capacity impedes the attainment of such event is consequently irrelevant inasmuch as it is the act of visualization rather than the process of its fulfilment which is of consequence. In this regard, moreover, the

---

societal activity as possible so as to entrench its prerogative and to stave off vying centres of authority.

<sup>70</sup> An interpretation of the critical distinction between active - and negative nihilism is provided by CI Glicksberg: See CI Glicksberg *The Ironic Vision in Modern Literature* (1969) at 60. In essence, Glicksberg maintains that the latter notion denotes an air of resignation regarding the fruitlessness of existence, while the former concept goes beyond this initial sense of sufference to actively promote the destruction of human meaning in an effort to expedite 'the coming of the Lord'. While I agree with Glicksberg's general observations regarding active nihilism, I seek to show that negative

application of regressive nihilism to the process of justice-creation does not per se constitute the establishment of an impractical scenario. On the contrary, what such a perspective achieves is to unleash human potential from the chains of human finitude. In other words, the belief that no meta-narrative exists is indicative of the boundlessness in which human intellect reigns. While truth may be illusory and in this sense seen to be a mercurial construction of the individual mind, its protean nature is symptomatic of the fact that reality (of which truth and justice are two of the clearest manifestations) is itself an entity which requires the presence of a creative forethought for its existence. As a consequence, there is nothing which precedes the being of the mind, all things are tied into a process of perpetual becoming and eternal development with the mind as their only foundation. Far from plunging existence into a morose decline such an interpretation can be seen as a liberating influence in the midst of a life of uncertainty, for when human thought prevails a multitude of discourses abound each of which carries the seeds of greater understanding within itself. What such paradoxical flirtations within the boundlessness of nihilism ultimately indicate is not that one should denounce legal justifications as hypocritical mutterings devoid of justice, but rather than one ought to re-evaluate their function in the light of a different perspective. This, in turn, requires a return to 'The Land of And'<sup>71</sup> where inflexible dichotomies can be abandoned and greater understanding achieved.

Within this context, the infusion of Nietzschean ideology also has an important role to play in that it encourages one to focus 'beyond good and evil'.<sup>72</sup> In this sense, even morality is seen as merely another manifestation of the 'will to power' and presents an interpretation of events which remains open to question.<sup>73</sup> This is not to say that all motivations are indefinable, but rather that we should not seek to define them in terms of resolute and alienable identities. In other words, it is not sufficient simply to regard the framework of legal justifications as

---

nihilism need not culminate in mere frustration and that it, too, may harbour an element of possibility and hope.

<sup>71</sup> JO Cole 'Thought from the Land of And' (1988) 39 *Mercer Law Review* 907.

<sup>72</sup> A Nehamas *Nietzsche- Life as literature* (1985) at 200-234.

<sup>73</sup> Orthodox ideologies, in contrast, assume that the spectre of morality always precedes the implementation of actions which may then be judged in either a 'moral' or an 'immoral' light. Consequently, all actions stem from and refer back to this definable foundation. Nietzsche, however, maintained that even this apparently constant and incontestable core bore flaws inasmuch as it sought to classify events along problematic lines which failed to take account of the fluidity of motivations. Of paramount concern for Nietzsche was the fact that he regarded morality as nothing more than the crystalization of majority will. In such a context, therefore, morality bore the markings of a sullied and irrational system of belief.

formalistic utterances. We must try to reinterpret their motivations in the context of the search for justice and in the light of the complex inter-relationship between the desire for justice and the necessity for justification. Moreover, because of the difficulty in assessing such interaction with a measure of sensitive detachment from within the realm of the law itself, I maintain that it is prudent to utilise the channels of literary discourse as a means for their better comprehension. Apart from being an important socio-political interpretative source beyond the confines of the law, literature also bears the distinction of having set a salient precedent with regard to the manner in which we comprehend ourselves and the 'realities' surrounding us. I am, of course, referring to the critical effect which the post-modern tool of 'deconstruction' has had on our perceptions. By imposing new demands on the human psyche, post-modernism has obliged us to re-evaluate accepted notions and to dispute previously affirmed beliefs. In the context of the law this is not, however, to imply that an allegiance to deconstruction requires one to refute the validity of legal discourse per se. In itself such an assumption is naive and antithetical inasmuch as it seeks bombastically to denounce the cogency of one discourse in favour of another and in so doing to propagate the belief in the primacy of a universal system based on easily distinguishable dichotomies. The application of a deconstructivist paradigm to legal discourse, therefore, should merely be viewed as a means for enriching our understanding of it, and not as an opportunity for denouncing its legitimacy. In this sense, the 'fusion of justifications' embodies a creative process grounded in reciprocity rather than the supremacy of an individual discourse. This brings about an important realization, moreover, in that it also alludes to the fact that legal-literacy interaction within a postmodern context should not be seen as a means for resolving the disparate motivations underlying human discourses on the one hand, and the desire for justice on the other. This is, after all, not the objective of postmodernism whose purpose remains simply to alter perceptions and to encourage questioning of accepted norms. Consequently, what we should aim to achieve through such channels is improved comprehension rather than comprehensive finality.

Whereas traditional legal scholarship seeks to define justice in terms of attainable ambitions which are rationalised and executed through the medium of legal justifications, postmodernism regards such justifications as merely hollow legitimations for the imposition of constraints and the maintenance of violence. The same applies, to a certain extent, to the relationship between the justifications of the orthodox literary canon and its quest for justice, except that in this context the postmodern concern has more to do with the presence of self-deception than of violence. As a whole, however, the literary enterprise is far more capable of questioning its own

pretensions than is legal discourse by virtue of the latter's insistence on its own indisputable authority. It is my belief that it is for this reason that postmodern thought has been able to flourish in the environment provided by literary discourse. It is important, however, that it should now be applied to the mechanisms and stated intentions of the law in an attempt to re-assess legal justifications in the light of their own alleged motivations. In so doing, the notion of justice is not per se denounced but merely reinterpreted in the light of its complex association with the justifications of literary and legal discourses. The complexity of the situation has to do with the fact that humans only exists in the present, while the past is steeped in a fictional identity and the future remains an uncertain potentiality. This is because the act of reflecting upon what has gone before constitutes a 'fictionalisation' (however extreme or minute) which subsumes the present reality of the circumstances beneath a cloak of imaginative re-creation, while the future, in turn, remains a sphere of doubt in relation to which only assumptions can be proffered. Viewed in terms of such a chronological continuum, justifications represent the present embodiment of past fictions designed to regulate future eventualities. In contrast, justice demands that this continuum be turned on itself so as to formulate a hermeneutic circle of understanding in which past, present and future meet in a moment of extreme comprehension. The fact that such imaginings will never materialise in our present state of awareness does not detract from their essential validity, but merely goes to indicate another unavoidable irony of human existence, namely, that we can conceive of and conceptualise realities beyond the present and yet we ourselves only exist to the extent to which we can be defined in the present.

The chronology in terms of which man defines himself also takes an interesting turn when viewed from a different context. It is intriguing to note that from a cosmological point of view human perspective (i.e. the means by which we define ourselves) in all likelihood is rooted in the past but exists in the future. By this seemingly paradoxical statement, I mean that the only point of reference we have within our cosmic framework is a matrix consisting of planets, stars and galaxies which have been visually filtered to us over time and through space at the speed of light. Given the constraining features of such distance and speed (i.e. they are not instantaneous reactions because they are linked to the notion of time) the vision which reaches us in the present is nothing more than an illusion inasmuch as it is simply the representation of activity within the cosmos as it appeared millions, if not billions, of light years ago.<sup>74</sup> Consequently, our only

---

<sup>74</sup> Although the time-frame may vary in extremity (e.g. the sun's rays are estimated to reach the earth's surface in only a matter of minutes) the principle remains the same.

present point of reference in astronomical terms is based upon past events. However, by implication, if what we are experiencing is a historical event then in practical terms at the very point at which we are subject to such stimuli a future event (millions of light years into the future) is actually occurring to those very same elements of matter which we are, at present, viewing. In effect, we are actually living in the future without the knowledge or ability to experience it.<sup>75</sup> When viewed in such a universal dimension justice, yet again, resides at a point in space and time at which the past, present and future coincide in a single moment of primary shared experience which can be assimilated and enjoyed by human beings. Nonetheless, given what has already been said, it would appear that the attainment of such a moment (in present circumstances) will remain an unfulfilled desire and that the potential for justice will persist while never prevailing. However, in itself, such a state of affairs need not by any means represent an undesirable situation. The reason for this is that continued uncertainty regarding the future may be seen to encourage man to ceaselessly strive for such a time which may already have been determined, but of which he (as yet) remains unaware. The implication of such a postmodern argument is that in the event that the future was known by man he would either lose the desire to project himself towards it (the reason being that he already possesses the knowledge which the future contains and, therefore, he can simply content himself in the present) or the knowledge thereof would undermine the very essence of his humanity, in the first place, and destroy him. By following this dimension of time it becomes apparent that not even deconstructionism can hope to eclipse the schisms wrought among the three tenses of existence. Then again, from what has been said above it should not be presumed that it would wish to do so, anyway. Two of the primary impulses of postmodernism remain its continual struggle to try and redeem man's misapprehensions regarding the notion of justice, and to reformulate history as a human construct which is accessible only through the medium of the text rather than embodying a free-standing entity comprehensible in its own terms.<sup>76</sup> As a result, it is to be inferred that postmodern ideology is all too aware of the implicit nihilistic dangers it faces by

---

<sup>75</sup> One must, of course, not allow oneself to be sucked into the bizarre void which is created by taking such a perspective to its extreme conclusion – i.e. the universe may already be dead and we might simply be surviving based upon past recollections. Moreover, if such finality has been attained prior to our existence, we have, in effect, died before we were born and subsequently have never existed!

<sup>76</sup> As Linda Hutcheon notes “In the past, history has often been used in criticism of the novel as a kind of model of the realistic pole of representation. Postmodern fiction problematizes this model to query the relation of both history to reality and reality to language”: See J Natoli, L Hutcheon (eds) *A Postmodern Reader* (1993) at 256.

completely deconstructing the notion of justice while destroying all connections between the past and the present. And it is because of this realisation that it deepens our awareness of the relationship between justice and justification without attempting to extricate itself entirely from human constraints.<sup>77</sup>

Consequently, it should not be supposed that any instances whatsoever of justice cannot be entertained in human society. On the contrary, individuals regularly deliberate the merits of actions and events in view of their conceptions of justice. There is, however, a distinction between the ability to conceptualise and the power to institute. The former represents an inherent trait of the human condition while the latter is an action that is primarily left to the discretion of the judicial structures of society. Yet at both levels (i.e. conceptualisation and institution) there remains an unbridgeable interstice of interpretation. Regarding the process of conceptualising, man's efforts remain frustrated by the fact that he is required to project the past, present and future into one moment of understanding in order to achieve the fundamentals of justice, yet he is required to go about all of this with a limited vision of existence beyond the present. The subsequent limitation in his knowledge then impairs the implementation of a structure which can candidly reflect the essences of justice to their original extent. As a result, all justifications relating to human discourses possess a cardinal flaw which distinguishes and severs them from the ultimate object of discursive enquiry, namely, the search for justice. Admittedly, in this regard, different discourses are bolstered by disparate justifications some of which are not as ill-conceived as others. For this reason the value of embarking upon studies of an inter-disciplinary nature should not be underestimated or regarded as a futile academic indulgence. It is from the pronouncements of such inquiries that greater human comprehension arises whether it be with regard to our own potential or the impediments which hinder our advancement.

---

<sup>77</sup> In this sense, the postmodern condition is all the more painful to bear in that it must continually restrain its potential so as to avoid destroying the defining features of humanity from whence it stems. Moreover, given what has been said, it is interesting to note the close parallels between postmodernism and Christianity as to the tension between justice and justification. In the Christian context the notion of the fall destroys all possibility for the attainment of an inviolate world vision since the cardinal prelapsarian notion of justice has been disobeyed. Hence (as with postmodern theory), Christian ideology relates to the justice-justification connection as a relationship

Albert Camus incisively depicted the human dilemma in the following words – “The world is not reasonable, that is all that can be said. But what is absurd is the confrontation of the irrational and the wild longing for clarity whose call echoes in the human heart”.<sup>78</sup> This irresolvable contradiction provides the indelible thread which has spurred man into a perpetual search for the signifying features of justice while ensuring that he will always fall short of perfection in his attempts to terminate his predicament. However, human actions are rooted in a morality of faith. Not necessarily a religious faith, but a faith which provides our actions with meaning and creates an incentive for our continued progression forwards into the realm of the unknown. The framework against which such actions are judged is the notion of justice, and the medium through which this concept is interpreted is the various discourses of human understanding (of which, law and literature are but two examples). When modernism and postmodernism centre justice within the vagaries of existence rather than positioning it beyond this uncertainty in an objective realm, the purpose is not to indicate the attainability of justice, but rather to point to its very ambiguity and inaccessibility from within such a human perspective. Postmodernism, in particular, seeks to undermine formalistic pretensions while tacitly counselling empathic reasoning in the interests of human integrity, yet it readily concedes that the ambitions of justice cannot be met given our present factual matrix. While the justifications for justice naturally abound in view of the fact that it remains the essential human ambition, it should also be remembered that it has captured our imagination due to the fact that it is not (or at least that it is no longer) a natural state of affairs. In other words, an understanding of justice requires one to embark on a conceptual progression out of comfortable surroundings and into challenging frontiers. This is what we strive for and yet if we are to retain our allegiance to the foundations of our humanity we must be prepared to acknowledge that all justifications are, by virtue of their very nature, tied in with our own imperfections. Consequently, the act of justifying marks the beginning of a journey whose horizon (i.e. the attainment of a state of justice) is visible but forever beyond the reach of those travelling along its path. In this regard, therefore, the focus lies not in quixotic attempts at verifying the permanence of justice in the here and now or in claims of its finite identity. Rather, the measure of one's actions is taken to be the manner in which one chooses to journey towards a greater comprehension of justice. In essence, therefore, the fusion of justifications represents the

---

perpetually grounded in tension, and it deems this to have existed from the time when the original vision for humanity was shattered in the Garden of Eden.

<sup>78</sup> A Camus *The Myth of Sisyphus* trans J O'Brien (1955) at 16, and as reproduced by D Granfield *The Inner Experience of Law* (1988) at 9.

foundation of my journey and the conclusions which can be drawn from it constitute my contribution.

### Conclusion

In examining the concepts of legal and literary justifications, I have been at pains to avoid any suggestion that their individual identities should be dispensed with in the interests of creating some monolithic amalgam of interpretation. The reason for this, quite simply, is that law and literature satisfy different human requirements while serving a primary human desire. This alludes to the fact that while they are both immersed in the perennial search for justice, they do not undertake similar obligations as to either its composition or its attainability. In essence, their justifications are different. Given this situation, it appears prudent, therefore, to retain their individual integrity while seeking to establish their common fundamentals. Consequently, such an interdisciplinary and inter-contextual account is designed to intimate that legal justifications on their own are inadequate tools with which to structure a comprehensive vision of human aspirations. Literary discourse helps to frame legal interpretation in terms of both its socio-political and economic motivations as well as releasing some of its dormant capacities through the disclosure of the law's mythical potential. Moreover, where legal discourse endeavours to impose certainty and finality on issues within its realm, literature emphasises the importance of acknowledging the existence of doubt and impulsive tensions within legal philosophy. In this regard, perhaps the ultimate insight which can be gleaned from literature is to be found in the fact that while human discourses seek to redeem our understanding of the world and of ourselves we must acknowledge the actuality that no such discourse can claim to embody the notion of justice in its totality by virtue of the fact that their own justifications are steeped in the imperfections of the world. As a result, at the very moment when literature elaborates on its interpretation of justice it tacitly concedes that it does so while dragging the fallibilities of the world along with it. It is this realisation which all discourses - particularly legal discourse - need to develop.

One's appreciation of the unattainability of justice would appear to be proportional to one's comprehension of the magnitude of the notion itself as well as the manner in which justice and justification counterpoise each other on the scales of human interpretation. However, this situation need not be regarded as utterly intolerable for as Thom Gunn<sup>79</sup> states -

---

<sup>79</sup> T Gunn *The Cost of Consciousness* B Taylor, R Bain (eds) at 14.

“At most, one is in motion; and at best,  
Reaching no absolute, in which to rest,  
One is always nearer by not keeping still”

A great deal of wisdom is, therefore, to be gained in acknowledging that our ignorance grows exponentially in relation to each insight into justice which we are granted. Such an acknowledgement serves to emphasise that while we are constrained by basic human limitations, the defining characteristic of our humanity is the desire to project ourselves beyond the trivial and the mundane and into an arena in which we can glimpse our true potential, even though we may not currently be in a position to sustain it. The mere fact that the justifications underpinning certain discourses appear to misdirect or frustrate us in our ambitions should not be seen as cause enough to abandon our journey altogether. It is up to us to continue the search, to accept the frustrations and to attempt to facilitate the process through new modes of understanding and interpretation.

## CHAPTER 4

### A FLY'S PASSAGE INTO THE HEART OF DARKNESS

#### Introduction

Now that the mechanics of my argument have been analysed and my frame of reference explained, I propose to elaborate on what has already been said by discussing my views in the context of three literary texts, namely EM Foster's *A Passage to India* (1989), William Golding's *Lord of the Flies* (1996) and Joseph Conrad's *Heart of Darkness* (1989). It is my belief that all three works contain interesting and challenging views regarding the notion of justice as well as providing a range of settings in which to situate the tensions between justice and justification. Consequently, not only does this chapter constitute the continuation of the journey begun in earlier chapters, but it also represents a new turning in as much as we are now engaged in an area in which legal discourse finds expression through a literary format. In one sense we have, therefore, arrived at the best resolution possible, but in another sense the journey has just begun.

It is plain that all three texts to which I refer constitute a vast body of material providing insights into a host of matters of human concern. However, by virtue of my present focus, I am obliged to exclude many elements from my discussion of these texts. While this narrows down my analytical ambit it should not, however, be seen as indicative of an erroneous interpretation of the texts. For while such analysis is undeniably incomplete it is not necessarily likewise inaccurate.

When viewed as a socio-political chronicle, *A Passage to India* represents an interpretation of the effect which British rule had in India. In itself this is a perfectly sound frame of reference, however, its shortcoming is that it does not necessarily question the legitimacy of the vision which it embodies. To achieve this it is necessary to venture beyond the veil of the text and acquire a feel for the novel as an emblem of meanings rather than simply as an historical observation. In so doing, the reader's principal objective moves away from the passive enjoyment of the story and encompasses a critical interpretation of the values presented in the text. In essence, to understand the text, the reader must maximise his unique position both within and beyond the textual framework. Taking this as a starting point, therefore, when examining the issue of power (for example) in the novel one must do so at a

number of levels. The most obvious point at which to begin is by examining the political tensions presented in the relationship and interaction between English 'rulers' and their Indian 'subjects'. This is evidenced most notably at the trial of Dr. Aziz in which an Indian court based upon English legal principles has to determine whether he is guilty of having attempted to rape Ms. Adela Quested or not. Having structured the question in this light, moreover, it is important to note that I have sought to indicate a close association between the concept of socio-political power and the mechanics of the legal system. To a very large extent, the law seeks to regulate vying political and social identities (legal justification) under the banner of justice—creation. However, as has previously been noted, the ability of the law to retain its impartiality in the light of such partisan notions as political judgement and social opinion is open to question. Moreover, the enquiry should not stop here. In one sense the court case presents a resolution of sorts to the tensions which have flowed through the text, yet in another more fundamental way the court case is merely an explicit 'marker' which hints at (but never explains) the deeper layers of distrust and misunderstanding which pervade the text. Consequently, it is insufficient simply to rely on the legal discourse as embodied in the context of the trial as presenting some tangible resolution to the fragile understanding between the characters. One needs to appreciate that the trial simply highlights the difficulties which the characters have in connecting with one another in the first place. While Adela's statements at the trial result in Aziz's acquittal, they in no way serve to forge a greater understanding across an ever increasing cultural and socio-political divide.

By appreciating the failings of legal discourse to account for or resolve human injustice one comes to realise that underpinning the perceived unity of human understanding lies the ultimate failure of connection – the failure, at times, of the individual to connect with his own sense of Self. For not only is Adela distanced from Aziz after the trial but she is also alienated from herself since she has betrayed her integrity through her own actions. In this way the identities of the characters are inextricably intertwined with one another both through a linear progression over time, but more importantly, through a sense of shared experience beyond time. It is this innate sense of remembering beyond the past and projecting across the future that characterises human consciousness. But for this fact, Adela, Mrs. Moore and Fielding would not have realised the potential for connection and in so doing come to appreciate a sense of loss born of their inability to obtain it. Against such a backdrop the resolutions presented by the Trial are, in fact, affronts to human sensibilities in as much as

they marginalise the potential for any understanding to exist without temporal constraints. For legal discourse to obtain its ends (i.e. the attainment of justice through a process of justification) it must reduce a complex web of contemporaneous stimuli to an artificial and less complex casual sequence. There is no room for sensing a complex and combined mood of shared moments of experience. What the law demands is a clinical assessment of the impact of particular actions on one another at specific moments in time. Moreover, in its analysis of such temporal causality, the legal process also seeks to utilise the mechanism of time to distance itself from the brutal immediacy of the vision before it. Consequently, the law enters into a discourse of disassociation whereby it seeks to bolster its own legitimacy by emphasising its concern with justice while choosing to ignore the tensions inherent in the justice–justification paradigm off which it feeds. This is the mark of legal discourse – at once idealistic in its vision, yet pragmatic in its application.

At a different level, and in subtle ways, *A Passage to India* seeks to question accepted Western social preconceptions relating to politics, cultural heritage, social identity and philosophical beliefs. By hinting at the existence of gaps in Western understanding, EM Foster draws our attention to the negative spaces which constitute an integral component of our identity and in so doing seeks not so much to destroy completely our understanding of concepts such as value, justice and self, but rather, to reformulate them in terms of an identity which is not unquestioningly subjugated to the will of a single authority such as the law. The inevitable consequence of this process is to problematise accepted norms and highlight the indeterminacy of social constructs.

In all situations, language is based within a cultural and political framework which provides it with a template for interpretation. An environment of understanding is constructed by virtue of this socio-political heritage and a sense of ‘the norm’ gradually evolves and entrenches itself in people’s reasoning. The integrity of literature is that, unlike legal discourse, it owes no fidelity to the dominant norms governing a society. Literature is at liberty to question and criticise inherited social values and encourage the evolution of new thought patterns within a society. Clearly, not all literary works share the same success (or even the same level of commitment) in the task of expanding cultural and individual horizons. Some are designed to propagate the orthodox viewpoints of a governing class while others are content to avoid any suggestion of socio-political commentary whatsoever. Such literature, however, chooses to frustrate its own potential by denying its instinct for critical analysis.

the story are of relevance to the plot only insofar as they provide a familiar setting from within which to develop an intellectual arena in which meaning is both constructed and questioned.<sup>1</sup> Ironically, however, at the heart of this analysis into meaning lay Foster's fundamental presumption that a great deal of human experience remains intrinsically non-verbal. Consequently, Foster's dilemma as a novelist was born of the fact that the non-verbal essence of meaning lost its potency to the extent that persuasive language could be employed to validate its existence. It is this paradox between what might be termed 'the expression of meaning' on the one hand and 'the experience of meaning' on the other which constitutes one of the fundamental tensions running throughout the body of the text. Moreover, it is a sign of Foster's literary astuteness that he does not make the fatal flaw of seeking to reconcile these two elements of meaning in an attempt to negate their differences. Rather, he acknowledges the limitations of language as a mechanism for the translation of meaning by virtue of the fact that we all seek to communicate and connect with others from within the unyielding shackles of 'the Self'. Yet, in spite of such inhibiting characteristics, Foster manages to utilise the medium of language (with all its intellectual constraints and entrenched hierarchies of value) to allow the reader to glimpse the inherent meaning of human existence which transcends hierarchical constraints and which is rooted in the unidentifiable and whose realm is silence.

Consequently, it is important to note that any linguistic expression of a concept rooted in non-verbal origins represents an incomplete reflection of that original experience. The fact that we continue to utilise the avenue of language as an expression of understanding should not, therefore, be based on a perception of its inherent validity rather than the realisation that language serves to provide us with an 'echo' into a truth behind words which, in turn, reflects upon a universal silence beyond individual meaning. Seen in this light, Foster's characters undertake individual journeys of self-expression which call upon them to query the meaning which language attributes to essential features of human interaction such as, loyalty, honour, dignity and justice. Interestingly, the answers to these questions are not to be found in the words or tricks of verbal expression used by the characters but in their ability to assimilate

---

<sup>1</sup> In this context, I use the term 'familiar setting' to denote a set of circumstances with which the reader can identify. Clearly, such circumstances would be more immediate and meaningful to a readership constituted of people from Foster's generation who had experienced the impact of the Raj. Nevertheless, because the story merely constitutes an entrance into the body of the text and the plot, the socio-political

and come to terms with the present silence underlying this framework. K. Natwar-Singh<sup>2</sup> effectively expresses this important insight by stating "Expectancy has been celebrated. This heralds the crucial understanding that the moment itself (rather than the structures of potential realisation and futurity built upon it), when prolonged, absorbs eternity. Significance resides in waiting. That is the condition on which insight and understanding become available".<sup>3</sup>

Of all the characters, Professor Godbole is most able to assimilate both the eternity of the moment and the silence beyond expression which eludes the other characters. However, the attainment of Godbole's vision rests on the detachment of the individual from his surroundings, from his fellow men and, most significantly, from his personal aspirations. Clearly, these are criteria which cannot be attained (not to mention, consistently sustained) in reality by an individual without sacrificing his identity. Godbole manages to maintain his persona only because he is ultimately the creation of another's imagination and to that extent remains bound by the human characteristics in terms of which the author chooses to define him. In relation to his motives, however, "no eye could see what lay at the bottom of the Brahman's mind, and yet he had a mind and heart too, and all his friends trusted him without knowing why".<sup>4</sup> It is this latter observation which is important as it indicates the great extent to which Godbole cannot be defined or understood in human terms. His presence is merely to be accepted while it is his ideas and philosophy which are to be analysed. In this regard, while Godbole presents a momentary vision of reconciliation he does so not on human terms, but merely within the ambit of human understanding. His vision can be comprehended but it cannot be implemented since it is based on the need to denounce the essential characteristics which constitute human personality (and which are bound by temporal constraints) namely, the ego, motive and desire. Consequently the supreme act of connecting with an infinite universe is played out in the actions of Godbole and the paradoxical cost of such connection is the alienation of Godbole the man from the ideas which he propounds as well as the other individuals whom he attempts to enlighten. The reason for this rests on the fact that the philosophy which Godbole expounds aims to facilitate the connection of different centres of consciousness at a level beyond the individual and the particular. Thus, at the very point at

---

climate in which the novel is set is not as important as the philosophical issues and dilemmas which are confronted in the plot and which are universal in character.

<sup>2</sup> K Natwar-Singh *Modern Critical Interpretation : A Passage to India* (1987).

<sup>3</sup> Idem at 70.

<sup>4</sup> EM Forster *A Passage to India* (1989) O. Stallybrass (ed) at 184

which the effects of such connection are witnessed, the primacy and vitality of the individual are subsumed beneath a haze of interconnectedness. The character of the individual is replaced by a sense of unpartisan virtue, and a cautionary note is sounded, namely, that the process of connection entails an element of disassociation from the constituent parts of one's own Self.

Few are able to attain such detachment, and the irony remains that those who do are invariably regarded by others as indifferent and ineffectual when judged against the standards of rationality imposed by social institutions such as the legal process. Yet, as has been noted, the legal process (as depicted by Foster) lacks the ability to confront, let alone account for, the dilemmas which beset the minds of the characters. The law is centred on apportioning blame in the light of physical 'markers' (e.g. Question: Was Aziz in fact with Adela in the caves? Answer: No) backed up with rational explanations (e.g. Reason: Adela was flustered by the heat outside the caves and the silence within them, causing her to imagine things), rather than looking beyond both these variables and deducing the poignancy of the situation in terms of an ingrained desire on the part of 'the Self' for a connection beyond itself. In essence, Adela's breakdown in the Marabar Caves was the culmination of the vain attempts of her Self to come to terms with the need for its connection at the cost of its identity. In a sense, Adela emerges from this trauma a wiser but defeated person. Wiser because she dared to look into the silence, but defeated because she was overcome by the enormity of it.

While Adela has failed in her attempt to relate to this greater dimension in which a different understanding of justice reigns, her efforts have at least helped in creating a context in which Godbole's thoughts can be better appreciated. For while Adela's reaction centres on the 'nothingness' of the caves, Godbole's wisdom perceives their infinite significance. There is little more that can be said so as to define Godbole's perceptions and insights. To specify and particularise his vision too much would be to undermine the powerful mysticism upon which it is based and reduce it to a rationally answerable assertion, which it is not. All that should be noted is that Godbole makes no assertions as to the attainability of his vision; all he does is to present his philosophy as an alternative medium through which a particular construction of justice may be glimpsed. This would suggest, moreover, that the significance of such a vision lies in its very existence rather than its actual attainment.

It is important to note that the novel at no point discounts off-hand the possibility of some future reconciliation between 'the Self' and 'the other', nor does it deny the ability of 'the Self' to reformulate itself in this greater image. The potential for such a metamorphosis

remains a real possibility beyond the novel since it does not conclude its vision with a 'Never' but with a 'not yet'.

-----

*Lord of the Flies* presents interesting insights into the nature of justice by means of contextualising it within what JS Whitley refers to as a 'fable'.<sup>5</sup> There are essentially two inter-related reasons for referring to the novel as a fable. First, the island setting in which the story unfolds constitutes a pristine sphere free from external distraction or influence. Consequently, the reader's attention becomes acutely focused on not merely the characters' interaction but also (and more importantly) on the moral implications of their decisions. Secondly, the story is able to present a powerful pattern of didactic symbols to the reader because the author's task is governed by a particular premise and the rhythm of what is written always refers back to this initial presumption. In *Lord of the Flies*, Golding's premise is that man inhabits a post-lapsarian world in which he must come to terms with his fallen state and develop an awareness of the fact that the potential for both justice and evil reside within him. The task of making this discovery ironically falls on the relatively inexperienced shoulders of a group of pre-pubescent schoolboys. However, this seemingly incongruous combination of youthful naivety and philosophical sophistication on one level serves to parody the presumptions of staid rationality and refinement upon which the adult world is based while also drawing attention to the fact that the secrets of such wisdom are open to anyone (no matter how young) who is either willing or forced through various circumstances to view the truth residing within himself. In the context of the novel, the very fact that the boys are stranded on the island away from the secure environment of the 'grown up' world requires them involuntarily to initiate the process of reflecting upon their motivations, their aspirations and their failings. Their initial reaction is to externalise this discomfort and anxiety brought on by their own insecurity and to objectify it in the form of a 'beast' which inhabits the island and which they must hunt down and kill. As the novel unfolds, however, certain of the characters gradually become aware of the fact that the existence of the 'beast' is merely a tangible construct in their own minds of their fears and of the awful potential of their motivations and desires. It is important to note, however, that this realisation does not, in itself, verify the existence of an irredeemable situation since the process of acknowledgement serves as a liberating influence which, at least temporarily, allows us to

---

<sup>5</sup> JS Whitley *Golding: Lord of the Flies* (1970) at 7.

view our own shortcomings and reassess our potential for overcoming them. Where the danger lies is in not effectively identifying where our motivations are open to such solipsistic abuse and self-delusion.

Of all the boys, the four whose characters are most clearly defined are Piggy, Jack, Ralph and Simon. Piggy embodies the rational precision of the adult world as he vainly attempts to retain his distance from the chaos and irrationality which envelopes the other boys. Jack comes to represent a focused and corporeal outlet for the latent evil present among all the boys. Ralph counterbalances the malign nature of Jack by means of a steady and well-intentioned desire to impose a semblance of order and dignity on the community. And Simon does not adhere to any logical or systematic form of comprehension but rather apprehends his surrounding circumstances by means of intuitive perceptions and reacts in accordance with such perceptions. Each one of them is crucially flawed by their inability to understand one another and yet all of them are, ironically, merely trying to resolve a common predicament (namely, the desire for justice) by means of differing interpretation. Piggy believes that by seeking to rationalise the actions and fears of the boys and to reason with them, the extreme burden of their predicament might be lessened and their senses shaken back into an orderly perspective of right and wrong, good and bad, justice and injustice. However, what Piggy fails to appreciate is that his perception of these notions is guided by a sense of time and place far removed from the present circumstances of the boys. There is little to be gained in seeking to impose the norms, values and beliefs of a different society (the 'adult world') on the interaction taking place among the boys on the island. Not only does this rationality as expressed by Piggy fail to account for the general anxiety felt by all the boys, it also inevitably seeks to perpetuate an inadequate template of understanding because it unquestioningly relies on the inherent authority of the law without seeking to clarify or question the underlying justification of the legal system which it advocates.

Jack takes the notion of justice to an extreme based upon crude power relationships meted out by means of violence. He employs a simple equation in his dealings with the other boys, namely, those with strength deserve respect and those who follow must submit to their authority. Anyone who seeks to undermine this crude equation is victimised since there is no flexibility for accommodating disparate views. Justice simply becomes the rationale for maintaining the status quo as defined by those in authority. Moreover, there is no underlying moral template or reasoning behind such a system since justice is always given effect to through violence and it is neither conciliatory nor is it necessarily morally justified. There is

also no objective formula for its implementation which results in its principles being somewhat random and altogether unsatisfactory.

In turn, Ralph relies on the existence and effective implementation of a legal system to provide a tangible indication of the orderly progress being made by the boys in their search for what is fair, reasonable and just, and moreover to ensure that they do not lose sight of it. His faith in the integrity of the law is absolute and he fails to appreciate that any system of rules and laws is open to abuse through the act of interpretation. For this reason, Ralph remains naively unconscious of the fact that Jack is not seeking to undermine the legal process through his actions but that he is simply interpreting the law in a different light based upon different presumptions. Ralph's mistake is that he incorrectly assumes that the legal process naturally channels all actions in a direction leading towards just resolutions. He does not view the law as a discourse open to interpretation, manipulation and abuse.

Unlike Ralph who places such great store in the integrity of the legal process, Simon remains detached from any of the systems, structures and discourses with which the boys seek to surround themselves. He embodies the absolute outsider from within, someone who leads a peripheral existence and whose actions and ideas constitute a counter-current to the flow of societal norms and identity. To the extent to which his tangential status provides Simon with the means to view the search for justice in an unpartisan light free from social stigmas and misconceptions, the very fact of his alienation from the dynamics of power within the community renders him conscious impotent. It is Simon who first acknowledges that the beast may in fact be nothing more than an expression of the psychological malaise besetting the boys in their misguided search for justice. Yet his inability to articulate these sentiments in such a manner so as to brand them with authenticity and conviction renders them impotent and exposes Simon to deepening prejudice from the other boys ultimately resulting in his own destruction.

It would clearly be erroneous to presume from what has been said above that Golding is somehow distinguishing reason from passion in a crude dichotomy of good versus evil. What is occurring in the novel is something far more elaborately intertwined. It revolves around the inability of any of the boys to connect with one another across the divide of ideas and beliefs in a community of mutual respect. More poignantly, however, Golding weaves his story in such a manner as to indicate that the inability to connect stems from Piggy's, Jack's, Ralph's and Simon's fundamental failure to comprehend their own motions which would have

created a definable context of shared vulnerabilities and strengths. Instead they choose to remain isolated from one another through a barrier of misconstrued impressions and mistaken expectations which gradually destroys each one of them and permanently hinders any attempts at a later reconciliation which might facilitate some revelation as to the nature of justice. Each of the boys is implicated in his own downfall as well as that of the community as a whole thereby providing an echo to the philosophy of Professor Godbole in *A Passage to India*, namely, that when evil is committed all are implicated just as when good occurs all are responsible. It is unfortunate therefore that in view of this premiss which Golding espouses, the boys remain determined to distance themselves from the consequences of their own actions by conjuring up the image of a beast separate from themselves and onto which they can transpose their anger and sense of betrayal at being misunderstood. Moreover, it is even more misguided that in hunting for the beast they should choose to paint their faces so as to provide themselves with a disguise. All they are, in fact, doing is denouncing their accountability and deluding themselves in the belief that deeds can be committed without the burden of repercussions. The irony of this, of course, is that while it provides certain of the boys with the 'freedom' to commit acts which they might otherwise have felt restrained from performing this is not to say that they are any less accountable for the decisions which they take and the actions which occur as a result thereof. For this reason it is misleading to presume that the boys have retreated into a state of primal savagery since this suggests that their actions are now governed by a different morality and must be adjudged in the light of different criteria. The truth is that the actions to which they have resorted always presented a natural undercurrent to their interaction but were simply kept in check by the constraints of the legal process as interpreted in the context of a 'civilised' social hierarchy. Consequently, while the element of morality has remained constant throughout the boys' transition from the adult world through to their experiences on the island and culminating in their rescue, the image of the legal process presented in the novel has developed from being viewed as a pre-ordained and static system of social and moral governance to a more fluid channel of interaction which is open to interpretation and which is not necessarily a tangible and unambiguous icon of justice. The very fact that the boys do not lose their morality is what makes their decisions and actions, at best, poignant and, at worst, tragic. The human conscience survives the individual decline and social degeneration which takes place in the novel and provides an indelible reminder to the reader of the magnitude of the boys' 'discovery' namely that there is no mystique to the savagery and cruelty which they unleash

on one another, it is merely another facet of 'the Self'-same legal process which they initially considered to be above reproach.<sup>6</sup>

It should be remembered that the island environment did not change the boys or expose them to some extrinsic savagery, it only provided a setting in which the veneer of polite, civilised western society could be stripped away and its underlying core exposed. The powerful and extreme dynamics which the boys experience among themselves are, therefore, not rooted in their adoption of primitive rituals but rather are based on the fact that they create a setting without restraint. Everything is taken to extremes because there is nothing in terms of which to define justice with the consequence that the understanding of justice which develops among the boys is one of unrestrained power and uncompromising excess. Moreover, no solace is to be found in the fact that things might have been different but for the naivety, immaturity and inexperience of the boys. This fact is powerfully brought home by the discovery of the dead airman's body on the island which stand out as a symbol and a reminder of the brutality of humankind generally. The reader is, therefore, denied the comfort of supposing that but for the boys' age and their circumstances things might have been different.

Golding's objective is to show that human nature remains constant whatever one's experiences and surroundings in terms of time or place. When understood in this context, the boys' rescue from the island and their inevitable return to the adult world is not to be viewed with unadulterated relief, for such a journey (no matter how geographically far it may be) can never provide the boys with the means to escape from themselves which is after all the single factor which constantly haunted them on the island. The return to the adult world is, therefore, a comfort only to the extent that it represents a familiar setting. However, such familiarity should not be interpreted as necessarily more moral or just. It is simply an inanimate surrounding in which pre-existing prejudices, desires and potentials interact with one another resulting in different means of expression and forms of self-deception. If anything, it would seem that the reader is cautioned against the temptation to unquestioningly accept the virtues of a particular socio-political matrix simply because it is familiar and to acknowledge that the gravest danger presented by such a setting is that of complacency. This is emphasised, moreover, by the poignant irony of the boys' situation at the moment of their rescue, for while their time on the island has brought them into contact with events of

---

<sup>6</sup> The unfortunate fact, however, is that the boys who most astutely appreciated the implications of such a 'discovery' have either been destroyed by the community (Piggy and Simon) or have been victimised to the point of destruction (Ralph).

immense gravity and exposed them to the depths of their own nature, the rescuing officer only sees a group of boisterous and dirty boys before him who have been lost a long way from home and who have begun to weep through a mixture of homesickness and relief at having been found. In truth, however, the boys' weeping is indicative of a shameful realisation of their actions on the island, the repercussions of which they are bound to carry with them even after they have departed from the island. Ralph, in particular, weeps because he finally understands a little bit more about what it is to be human, and this catharsis of experience brings with it the realisation that all actions are contextualised by their post-lapsarian surroundings. He comes to understand that no matter where or in what circumstances people interact they do so in the knowledge of a shared loss, and that those who are unaware of this loss are not innocent but merely ignorant.

It is important to note, however, that the moment Ralph comes to appreciate this sense of shared loss it also represents a catharsis in his vision of justice. He realises that for all the serenity and orderliness which the adult world presents it suffers from the same tensions and disquiet which the boys have experienced. The only difference being that the former society (ironically through its own sophistication) diverts its gaze from its brutality by indulging in fancy word games and false appearances in the hope that such concealment might come to represent a new reality. To the extent to which legal discourse serves to perpetuate this illusion it cannot be regarded as serving the ends of justice in the way in which literature does. The fundamental reason for this is that legal discourse seeks to externalise conflict and violence and to regard them as unnatural and inanimate objects in an otherwise peaceful setting. It chooses to avoid seeing 'the Self' as the source of such conflict and consequently it neglects to develop the perception required to appreciate that a sense of justice is born from an acknowledgement of human frailties combined with a questioning of 'the Self'. The simple truth is that 'meaning' (which contextualises and defines justice) is to be found in the boys and not in their surroundings. It is the boys, after all, who confer meaning onto their surroundings by virtue of their motives as expressed through their actions. However, the problem which arises (and which has already been noted) is that the boys are operating without an appreciation of the fact that they constitute the principal source of justice.<sup>7</sup> Thus, it is literature which redirects our attention to the fact that justice is as much a concerted

---

<sup>7</sup> While Ralph, admittedly, comes to appreciate that this is where the source of justice resides, his knowledge exposes him to victimisation by the other boys and comes too late to save either Piggy or Simon.

effort and a frame of mind as it is an ideal, and it is literature which emphasises that the creation of a just society is a perpetual human responsibility and obligation. The law, on the other hand, merely seeks to dictate and to enforce the boundaries of cultural conformity without necessarily appreciating the social context in which it operates or the human cost of its realisation. Legal discourse requires a conscience in order to operate effectively and justly and literature provides just such an impetus allowing the law to be interpreted and rationalised in a different light. Above all, it should be borne in mind that the fact of Ralph's survival is a symbol of some future hope namely that, in spite of the fact he is re-entering the adult world, he does so with an altered vision and deepened perceptions as to that which has been and that which is to come. The ideal of justice is, therefore, maintained as a central feature of the novel right to the end and its potential fulfilment remains hinted at beyond the cries of the plot.

---

Joseph Conrad's *Heart of Darkness* has been effectively described by Lillian Feder as containing three levels of meaning "on one level it is the story of a man's adventures; on another, of his discovery of certain political and social injustices; and on a third, it is a study of his initiation into the mysteries of his own mind".<sup>8</sup> Marlow's literal journey into the heart of darkness provides a setting for a psychological journey of greater proportions and with substantial implications, not only for himself but also for the reader who accompanies him and who must decipher the nature and extent of the meaning being revealed to him. The narrative of Marlow serves to frame these concurrent journeys and to provide the reader with an accessible and identifiable point of reference as the horrors of the story unfold and it becomes increasingly apparent that any meaning which is extracted from the tale told is not simply to be found in the words used but in the manner in which they are spoken and in the shadows of those things which are left unspoken.

An ironic tension exists between the control which Marlow wields over the reader's interaction with the events of the story and the nature of the events themselves which are beyond the powers of manipulation or comprehension by any single character from within the body of the text (even if he is the narrator). Marlow might guide the reader by constructing an image for him of the arena in which the story takes place and the sequence of events

---

<sup>8</sup> Lillian Feder (ed) *Heart of Darkness: An Authoritative Text, Backgrounds and Sources* at 186-7.

leading towards the text's central revelation but even Marlow cannot dictate the pace of events themselves, or indeed, what those events are to be. He may choose to mention certain events and overlook others in the course of his narrative but even Marlow's motives are subject to interpretation by the reader and his actions are judged with the benefit of hindsight which only the reader possesses. In essence, Marlow's narrative guides the reader through the terrain of the text but falls short of the point at which meaning is extracted from all that has gone before. That task is the sole responsibility of each reader.

The illusiveness of meaning is embodied in the character of Mr. Kurtz. Not only is Marlow unable to visualise what he might look like when he first hears of him but as Marlow's journey unfolds and more of Kurtz's history becomes apparent Kurtz evolves into a character of extreme contradictions and unresolvable cross-purposes. He is a creation of his age and culture and from all the reports of him which filter through to Marlow he is depicted as erudite, sophisticated, an effective ivory hunter, pragmatic and with an edge of arrogance born of his own success. Yet the closer Marlow comes to finding Kurtz, the more he becomes aware of the irrationality, barbarism, vulnerability and incoherence which has engulfed him. The man Marlow seeks is not the one who he finds and it is the fact of this discovery together with Marlow's gradual realisation of the wider implications of it which raise the novel above the level of a location specific, historical travelogue or a tale of one man's downfall. Kurtz's story is emblematic of more than just the rise of the industrial revolution and its consequences, it is principally a human journey in search of meaning. The journey is conceived out of a change in socio-economic and political circumstances brought about as a result of the advances of industrialisation, yet its focus is not solely (or primarily) concerned with such changes. In journeying towards Kurtz, Marlow perceives how he too is implicated in all that Kurtz has stood for and done, but more importantly by acknowledging this Marlow is required to re-evaluate all that he has taken for granted and accepted. Morality becomes tempered with uncertainty, integrity is tainted by injustice and virtue is undermined by greed. Within this haze, meaning is seen to reside in a constant flux without any comfort to be found in a discernible conclusion. The reader is not provided with a didactic framework to govern his interpretation of the text but is simply given the foundations upon which to embark on an independent journey in search of an interpretative framework which is not presented as a conclusion but as a beginning. The fact that it is to be found in the heart of darkness is, therefore, not so much a threat as a challenge and an opportunity. The figure of Kurtz serves as a reminder of the dangers which are inexorably associated with

such a journey and his role should not be seen as either a warning against undertaking the journey in the first place or, more importantly, as a symbol of the inevitable conclusion of such journey. The journey is one which the reader must make of his own volition and interpret through the prism of his own experience. Nothing is predetermined, and that which seems to be is not. It is this very misconception which Kurtz laboured under and which hastened his self-destruction. In essence, Kurtz dared to take things to the point of no return and paid heavily for his impetuous actions and the fact that he came to understand too late the implications of the journey on which he had embarked.

It is out of this image of Kurtz ('the man') with all his attendant human frailties that Kurtz as a symbol of some greater meaning is born. As Marlow gradually begins to associate Kurtz's torment with his own discovery of Self, so too, the meaning of things which Kurtz symbolically comes to hint at becomes reflected in Marlow's own actions. Yet the supreme irony remains that as Marlow's journey progresses in pursuit of such meaning he comes to understand it not in terms of a point of finality but rather as a perpetual progression without any definable points of interpretation beyond 'the Self'. The social safety net and any cultural comfort which it may provide to the individual is marginalised by virtue of Marlow's alien environment and this has the effect of focusing his thoughts beyond the reality which he has taken for granted and onto a search for some greater scheme of meaning underpinning it. It is this set of circumstances which leads Marlow to view the law for the first time as a socio-politically motivated system which harbours within it the subjective seeds of its own welfare. The powers inherent within the legal system are utilised in the novel to impose a governing regime on a foreign culture and to ensure that such system remains entrenched so that the economic and political benefits arising from it are harnessed for the benefit of the culture seeking to impose its ideals as well as to bolster the legitimacy of the legal system in question. Consequently, the law comes to be seen as a discourse in need of constant scrutiny (in much the same way as any other discourse would be scrutinised) so as to retain its allegiance to the ideals which it espouses and to ensure that it will be interpreted with a greater awareness of the predicaments facing it. Chief among the challenges facing the law is clearly the fact that, as with any human discourse, it is, on the one hand, an amoral system in search of a moral matrix and it is bound by the frailties of human experience in seeking to attain this and, on the other hand, it is guided by a primeval desire to use language as a means of expressing ideas which may not represent human reality but embody human aspirations.

Marlow's progress into the heart of darkness is as much a search for meaning as it is a battle with language. The only access which Marlow has into the motivations of Kurtz, the meaning of his journey and the lesson of his life is through language. Moreover, the story of Kurtz and the journey of Marlow are related to the reader through the narrative of the text. Yet the meaning which language is able to extract from the events so described fails to communicate the immediacy of the present (by virtue of the fact that the written word constitutes a historic account) as well as the fact that the true significance of the experiences conveyed to the reader inhabit a realm which language cannot penetrate. In this regard, the scream uttered by Kurtz – "The horror! The horror!"<sup>9</sup> can be seen to relate to the underlying turmoil seething beneath the surface of the text. Significantly, however, even these words, which seek to embody the essence of that which is unspoken and which lies at the heart of all discourse, are unable to convey the entirety of the event. This is not, however, to imply that language is per se a meaningless exercise since at worst it conveys a stream of data and instructions between people, and at best, it serves as a channel for the communication, expression and translation of personalised experiences into instances of shared comprehension. It is in this latter arena that the potential of language is truly realised, yet it is also in this very context that language, ironically, comes to be seen as a fiction. By this I mean that once one interprets and utilises language for a purpose beyond the mere transmission of data and converts it into an expression of more sophisticated desires and beliefs, at that point one begins to sense that there are matters which even language cannot penetrate. Language then comes to be understood as a fiction designed to reflect matters which lie beyond its immediate grasp and to act as a verbal and visual connection between the meaning embedded in the human mind and the expression of such meaning which is within the ambit of human interpretation. This is not, however, to suggest that language is an elaborate hoax which serves to delude us into imagining the unreal and anticipating the impossible. If anything, language plays an essential part in structuring our interaction with one another and in ordering the tumult of thoughts, instincts, beliefs and desires within our own minds into some sort of comprehensible identity. Without language there would be no purposive outlet for the uncertainties and angst embedded within us. In interpreting language, however, the key is to view it as a surface along which we journey so as to discover the existence of a reality which remains suspended beneath this surface. This is the ultimate experience which any meaningful interpretation of language seeks to apprehend. Moreover,

---

<sup>9</sup> J Conrad *Heart of Darkness* (1989) at 117.

the very nature of the journey so described means that to immerse oneself entirely below the surface of language one must unreservedly plunge into an alinguistic universe from which there is no return. It is into this universe which Kurtz has utterly receded and into which Marlow gazes from the relative safety of the discourse to which he clings as he peers over the edge into a world beyond the bounds of language and logic. To the extent that Kurtz's journey can be related, through the medium of Marlow, to the reader their fates are inextricably linked, for without someone to verbalise this non-linguistic rite of passage, Kurtz's journey would remain misinterpreted. Moreover, but for the extreme nature of this journey, Marlow would never have had the opportunity or the need to acknowledge the existence of a level of human interaction beyond words.

The nature of Kurtz's journey can never be fully understood or reasoned because it constitutes an intensely personal voyage into the heart of the uncharted psyche. Nothing is clearly delineated and it remains for the reader to try and piece together Kurtz's story through the mirror of Marlow's narrative. In spite of Kurtz's self-destruction and Marlow's uncomfortable proximity to such disintegration, the reader is given access to the turmoil experienced in the text without ever having to abandon his faith in language itself. Instead of being overcome by the despair which has engulfed Kurtz or the uncertainty which plagues Marlow, the reader is left with an awareness of the malleability of language and the potent forces which lie beyond language. It is the reader's vision of the tension which he witnesses through the text which survives and raises the narrative to a level where the imagination can explore possibilities unavailable to the characters who are embedded in the text. Consequently, meaning is not to be found in the disintegration of Kurtz per se, but in the reader's response to, and interpretation of, the actions taking place in the context of the novel. Similarly, the law is not inevitably to be viewed as a malign process, but simply as a discourse labouring under its own frailties (namely, the 'justification' previously discussed in Chapter 3) and as a consequence of which it is open to misinterpretation and misapplication.

Having traversed through the landscape of *A Passage to India* and *Lord of the Flies* the 'heart of darkness' into which the journey has descended is not to be viewed as a melancholic conclusion. It is, instead, emblematic of the inevitable uncertainty surrounding meaning and the efforts of man to attain some comfort and finality on this point. Far from presenting a defeated vision, the darkness serves to acknowledge the frailty of human discourses in expressing concepts which are rooted in an understanding which itself lies beyond words. In turn, this state of affairs allows for greater fluidity of thought because one is no longer

compromised by the constraints of a particular discourse. In effect, one is now at liberty to utilise a range of discourses simultaneously to the extent that their combined effort may assist in releasing thoughts and perceptions which remain impregnable to a single discourse. The heart of darkness is, therefore, not a defeated vision nor does it embody finality. It is simply a method of understanding and interpretation designed to unlock meaning. Moreover, the effectiveness of it as a tool is inextricably linked to the role of the reader and his willingness to interact with the text in an intelligent and constructive manner. At no point in the novel is the reader presented with a pre-existing conclusion towards which he is unwittingly drawn by means of a didactic narrative. The effect of this is to heighten the reader's stature as an agent for interpretation while simultaneously preventing any general and superficial conclusions being drawn from the narrative itself. The object of the exercise is to create an arena of interaction in which the reader's ability to understand and intelligently respond to the circumstances related to him through the text allows him to gain an insight as much into the workings of his own mind as into the dilemmas, motivations and aspirations of the characters in the novel. Given this framework it becomes apparent that the author's ambition and the reader's focus are grounded in the development of a community of understanding predicated on integrity. In turn, such integrity requires the existence of a conceptual system able effectively to convey the potential meanings embedded in the text to the reader as well as allowing the reader to interpret and understand such meanings in the knowledge that the act of interpretation in itself constitutes a judgement call. The concept which embodies this vital point of connection between the reader and the author is justice. Without it there are no repercussions for decisions taken and choices made. In essence, there is everything to lose and nothing to gain.

All discourses, of necessity, adhere to some conception of justice, for without it the very words which give rise to actions and processes are meaningless. However, the process of understanding requires one critically to interpret the conception of justice which is portrayed in a particular discourse rather than unquestioningly accepting the existence of an overriding and omnipotent concept. It is this form of analytical engagement with the text which all good literature demands of the reader.

While my narrative journey through the three texts brings in itself no solace in the form of finality or ultimate certainty for the reader on the question of justice, it was never intended to do so. Rather, my ambition has been to dissolve the mystique of the law and highlight the problematical interaction within legal discourse between justice and justification. In doing

so, I have harnessed the literary imagination as a means of accessing legal reasoning and unleashing some of the latent potential within the law. The process can never be truly concluded, however, for to do so would require the identity of the one discourse to be completely subordinated to that of the other (and as previously argued this serves no useful purpose). The natural (and only) compromise, therefore, is to embark on a process of interaction (interaction between the reader and the author; interaction across different discourses; and interaction with ones own intellect) in which the journey is forever beginning, with no end in sight.

## CONCLUSION

I may be accused by some of having failed to provide more decisive conclusions as to the exact nature of justice, however, my retort is twofold. First, the desire to frame justice has been one of humankind's most enduring searches dating back to the time when man first began to reflect on his actions and consciously appreciate his being in the context of his surroundings and his society. The catalyst for such conscious reflection was the development of language as a means of expressing more than basic needs in the imperative tense. In other words, at the moment that man began to look both beyond 'the Self' and into 'the Self' he became aware of his psychological profile and his philosophical motivations. In this way, man hesitantly began to engage with his universe through the channels of language and to search for meaning through the spoken (and later the written) word. This philosophical genesis was premised on a notion which bore many facets of expression but all facets of which were united under the title of 'justice'. While the source of this notion has shifted over time from an ambition which is external to man to a motivation centred within man, and from something which is unitary and universal in its application to something which is relative and plural, man's awareness of himself remains inextricably linked to his acknowledgement of the notion of justice. However, just as human consciousness is not a static concept, so too, our sense and understanding of justice evolves with the advancement of the ages. Secondly, given what has just been said, it is for this reason that I have chosen to predicate my analysis on the search for justice rather than situating my research within the context of a particular understanding of it. To have adopted the latter approach would have been to compromise my very argument because I would necessarily be confining my point of reference to a single conception or dialogue of justice. This is antithetical to the whole purpose of my interdisciplinary focus. In shifting the enquiry away from a single notion of justice and onto the search for the plural identities of justice, my aim has been to encourage a re-evaluation of our relationship with the law. This has required the reader to enter into a cerebral dialogue with me through the medium of the text. As each person engages with the text, so a different matrix of issues arises, at once peculiar to the individual and common to the human condition. The task, therefore, becomes one of knowing what questions to pose rather than what the ultimate conclusion may be. It is often a difficult mental exercise to divorce a quest from a result (particularly when the quest is intangible). What I am not suggesting, however,

destination will only be attained when my narrative struggle has resolved itself which, in turn, will be reflected in the fact that both you and I will have discarded our identities and share a common and single ambition. As this cannot happen until such time as our self-awareness ascends to a different level, my focus must remain on the process itself and how we can seek to make sense of, and extract meaning from, that which we interpret.

Postmodernism re-awakens our consciousness to the mechanics of legal discourse in an innovative manner and allows us to assimilate a body of theory into a world of experience and through such integration extract meaning. The attainment of such meaning (however incomplete it may be) is justice in itself.

## **BIBLIOGRAPHY**

- Aarnio A                                    *The Rational as Reasonable: A Treatise on Legal Justification*  
(D Reidel 1987)
- Abrahams G                                *Morality and the Law*  
(Calder & Boyars 1971)
- Abrams MH                                *The Mirror and the Lamp*  
(Oxford University Press 1953)
- Adams DM (ed)                           *Philosophical Problems in the Law*  
(Wandsworth 1996)
- Allen CK                                    *Law in the Making*  
(Clarendon Press 1964)
- Allen CK                                    *Aspects of Justice*  
(Clarendon Press 1958)
- Allott A                                     *The Limits of Law*  
(Butterworths 1980)
- Altman A                                    *Critical Legal Studies – A Liberal Critique*  
(Princeton University Press 1990)
- Amerasinghe ARB                        *Defamation in the Law of South Africa and Ceylon*  
(Cave & Co 1969)
- Arnold E (ed)                              *Law and Society: The Crisis in Legal Ideals*  
(St Martin's Press 1978)
- Arnold T                                     *The Folklore of Capitalism*  
(Finch & Co. 1937)
- Atiyah PS                                   *Promises, Morals and Law*  
(Clarendon Press 1981)
- Austin J                                      *The Province of Jurisprudence Determined*  
(Hackett Publishing Company 1998)
- Bacon AW                                   *Literature as Experience*  
(McGraw-Hill 1959)
- Baird RM, Rosenbaum  
SE (eds)                                   *Morality and the Law*  
(Prometheus Books 1988)

- Barak A *Judicial Discretion*  
(Yale University Press 1989)
- Barker F *The Culture of Violence: Essays on Tragedy and History*  
(Manchester University Press 1993)
- Barkun M *Law Without Sanctions*  
(Yale University Press 1968)
- Bataille G *Literature and Evil*  
(Calder & Boyars 1973)
- Bayefsky A (ed) *Legal Theory Meets Legal Practice*  
(Academic Printing and Publishing 1988)
- Bayles MD *Hart's Legal Philosophy – An Examination*  
(Kluwer Academic Publishers 1992)
- Belliotti RA *Justifying Law*  
(Temple University Press 1992)
- Benditt TM *Law as Rule and Principle – Problems of Legal Philosophy*  
(Harvester Press 1978)
- Benjamins J (ed) *Exploring Postmodernism*  
(Philadelphia 1987)
- Bennett T *Outside Literature*  
(Routledge 1990)
- Bentham J *An Introduction to the Principles of Morals and Legislation*  
(Prometheus 1988)
- Bishin WR, Stone CD (eds) *Law, Language and Ethics*  
(University Casebook Series 1996)
- Blake E *Songs of Innocence and of Experience*  
(Penguin 1976)
- Block J (ed) *The Interpretation of Cultures: Selected Essays*  
(Fontana 1993)
- Bloom C (ed) *Literature and Culture in Modern Britain*  
(London Longman 1993)

- Bloom H *Deconstruction and Criticism*  
(Continuum Publishing Company 1994)
- Bloom H (ed) *Modern Critical Interpretations – E M Forster's A Passage to India*  
(Chelsea House Publishing 1987)
- Bloom H (ed) *Modern Critical Reviews – Joseph Conrad*  
(Chelsea House Publishing 1986)
- Bodenheimer E *Philosophy of Responsibility*  
(Fred B Rothman & Co 1980)
- Bodenheimer E *Jurisprudence – The Philosophy and Method of the Law*  
(Harvard University Press 1962)
- Bodenheimer E *Treatise on Justice*  
(Harvard University Press 1967)
- Booth WC *Critical Understanding – The Powers and Limits of Pluralism*  
(University of Chicago Press 1979)
- Boyd SJ *The Novels of William Golding*  
(The Harvester Press 1988)
- Braziller G *Romanticism – The Culture of the Nineteenth Century*  
(Stevens & Son 1965)
- Britton K *John Stuart Mill*  
(Penguin Books 1953)
- Brooker P (ed) *Modernism/Postmodernism*  
(Longman 1992)
- Bumiller K *The Civil Rights Society*  
(Cornell University Press 1990)
- Burchell J *The Law of Defamation in South Africa*  
(Juta 1985)
- Burger P *Literature and Philosophy*  
(Pennsylvania University Press 1992)
- Burks MD (ed) *Rhetoric, Philosophy and Literature*  
(West Lafayette University Press 1986)
- Calinescu M, Fokkema D (eds) *Exploring Postmodernism*  
(John Benjamins Publishing Company 1987)

- Campbell C, Wiles P      *Law and Society*  
(Martin Robertson 1979)
- Cardozo B      *The Paradoxes of Legal Science*  
(Columbia University Press 1928)
- Cardozo B      *Law and Literature and Other Essays*  
(Harcourt, Brace & Co 1931)
- Cardozo B      *Selected Writings*  
(Columbia University Press 1924)
- Carlson D      *Deconstruction and the Possibility of Justice*  
(Routledge 1992)
- Carter-Ruck PF, Skone  
James EP      *Copyright – Modern Law and Practice*  
(Faber & Faber 1965)
- Chapman R      *Literature and Society*  
(Weidenfeld & Nicolson 1983)
- Cohen MR      *Reason and Nature: An Essay on the Meaning of Scientific  
Method*  
(Free Press of Glencoe 1959)
- Cohen MR, Cohen FS  
(eds)      *Readings in Jurisprudence and Legal Philosophy*  
(Prentice-Hall Inc 1951)
- Cohen R      *Literature and History*  
(Clark Memorial Library 1974)
- Cohn G      *Existentialism and Legal Science*  
(Oceana 1984)
- Conrad J      *Heart of Darkness*  
(Penguin 1989)
- Cooper DE      *Existentialism: A Reconstruction*  
(Blackwell 1990)
- Copeling AJC      *Copyright and the Act of 1978*  
(Butterworths 1978)
- Copeling AJC      *Copyright Law in South Africa*  
(Butterworths 1969)

- Cornell D, Rosenfeld M, Carlson DG (eds) *Deconstruction and the Possibility of Justice* (Routledge 1992)
- Cotterrell R *The Sociology of Law: An Introduction* (Butterworths 1984)
- Couzens T, White L (eds) *Literature and Society in South Africa* (Maskew Miller Longman 1984)
- Cox CB (ed) *Heart of Darkness, Nostromo, Under Western Eyes – A Casebook* (Macmillan Press 1981)
- Craige B (ed) *Literature, Language and Politics* (University of Georgia Press 1988)
- D'Amato A *Jurisprudence – A Descriptive and Normative Analysis of Law* (Martinus Nijhoff Publishers 1984)
- Daiches D, Thorlby A *Literature and Western Civilisation* (Aldus 1972)
- Davis RL, Schleifer R (eds) *Contemporary Literary Criticism* (Longman 1986, third edition)
- Davison D *Literature in Perspective* (Evans 1968)
- DeGrazia E *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on the Genius* (Random House 1991)
- Delgado R *Must we Defend Nazis: Hate Speech, Pornography, and the First Amendment* (New York University Press 1996)
- Denning A *The Road to Justice* (Stevens & Sons Limited 1955)
- Derrida J *Speech and Phenomena and Other Essays on Husserl's Theory of Signs* (Northwestern University Press 1973)
- Derrida J *Acts of Literature* (Routledge 1994)
- Derrida J *Writing and Difference* (Routledge 1990)

- Dimock WC *Residues of Justice – Literature, Law, Philosophy*  
(University of California Press 1996)
- Drewny G *Law, Justice and Politics*  
(Longman 1975)
- Duncan HD *Language and Literature in Society*  
(The Bedminster Press 1961)
- Dworkin R *Law's Empire*  
(Oxford University Press 1986)
- Eckhoff T *Justice – Its Determinants in Social Interaction*  
(Rotterdam University Press 1974)
- Eco U *The Role of the Reader – Explorations in the Semiotics of Texts*  
(Hutchinson Publishers 1979)
- Eden K *Poetic and Legal Fiction in the Aristotelian Tradition*  
(Princeton University Press 1986)
- Ellis JM *The Theory of Literary Criticism: A Logical Analysis*  
(University of California Press 1974)
- Ellmann R (ed) *The Modern Tradition – Background of Modern Literature*  
(Oxford University Press 1965)
- Engel M (ed) *Uses of Literature*  
(Harvard University Press 1973)
- Eysteinnsson A *The Concept of Modernism*  
(Cornell University Press 1990)
- Ezer N *Literature and Ideology*  
(Tel Aviv Papyrus 1992)
- Favret MA, Watson NJ (eds) *At the Limits of Romanticism*  
(Indiana University Press 1994)
- Feder L (ed) *Heart of Darkness: An Authoritative Text, Background and Sources*  
(University of California Press 1982)
- Feibleman JK *Justice, Law and Culture*  
(Martinus Nijhoff 1985)
- Fish S *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*  
(Oxford University Press 1989)

- Fitzpatrick P *The Mythology of Modern Law*  
(Routledge 1992)
- Fleming BE *Modernism and its Discontents*  
(Peter Lang Publishers 1995)
- Forster EM *A Passage to India*  
(Penguin 1989)
- Fowler R *Literature as Social Discourse*  
(Bloomington Indiana University Press 1982)
- Freeman MDA *Lloyd's Introduction to Jurisprudence*  
(Sweet & Maxwell 1994)
- Friedland ML (ed) *Rough Justice – Essays on Crime in Literature*  
(University of Toronto Press 1991)
- Gadamer H-G *Philosophical Hermeneutics*  
(University of Chicago Press 1977)
- Gaddis W *A Frolic of His Own*  
(Poseidon 1994)
- Galston W A *Justice and the Human Good*  
(University of Chicago Press 1980)
- Gamache LB, MacNiven IS (eds) *The Modernists: Studies in Literary Phenomenon*  
(Associated University Presses 1987)
- Ganguly AP *India: Mystic, Complex and Real*  
(Motilal Banarsidass Publishers 1990)
- Giles S (ed) *Theorising Modernism – Essays in Critical Theory*  
(Routledge 1993)
- Gillie C *A Preface to Forster*  
(Longman 1983)
- Gilligan C *In a Different Voice – Psychological Theory and Women's Development*  
(Harvard University Press 1993)
- Glicksberg CI *The Ironic Vision in Modern Literature*  
(Martinus Nijhoff Publishing 1969)
- Golding W *Lord of the Flies*  
(Faber & Faber 1996)

- Graff G *Literature against Itself: Literary Ideas in Modern Society*  
(University of Chicago Press 1979)
- Granfield D *The Inner Experience of Law – A Jurisprudence of Subjectivity*  
(The Catholic University of America Press 1988)
- Griffith JAG *The Politics of the Judiciary*  
(Fontana 1997)
- Hardy T *Far from the Madding Crowd*  
(New Wessex 1974)
- Harrison R *Bentham*  
(Routledge & Kegan Paul 1983)
- Harvey D *Justice, Nature and the Geography of Differences*  
(Blackwell 1996)
- Hayman RL (jr), Levit N *Jurisprudence – Contemporary Readings, Problems and Narratives*  
(West Publishing Company 1995)
- Henry S *Private Justice*  
(Routledge & Kegan Paul 1983)
- Hernadi P (ed) *What is Literature?*  
(Bloomington University Press 1978)
- Hodin JP (ed) *The Dilemma of Being Modern – Essays on Art and Literature*  
(Noonday Press 1984)
- Hutcheon L *Beginning to Theorise Postmodernism*  
(Routledge 1993)
- Hutchinson AC *Dwelling on the Threshold – Critical Essays on Modern Legal Thought*  
(Sweet and Maxwell 1988)
- Jameson F *The Seeds of Time*  
(Columbia University Press 1994)
- Johnson B *A World of Difference*  
(The John Hopkins University Press 1991)
- Kafka F *The Metamorphosis, In the Penal Colony, and Other Short Stories*  
(Scribner Book Co. 1995)
- Kaplan EA (ed) *Postmodernism and its Discontents*  
(Verso Publishing 1988)

- Kelly PJ *Utilitarianism and Distribution Justice*  
(Claredon Press 1990)
- Kelsen H *General Theory of Law and State*  
(Russel 1961)
- Kelsen H *What is Justice, Law and Politics in the Mirror of Science*  
(California University Press 1957)
- Kennedy D *The Politics of Law*  
(Harvard University Press 1982)
- Kettle A (ed) *Literature and Liberation – Selected Essays*  
(Manchester University Press 1988)
- Kinkead-Weekes M,  
Gregor I *William Golding – A Critical Study*  
(Faber & Faber 1984)
- Klein T (ed) *Obscenity and Pornography: An Interdepartmental Seminar*  
(University of Munster Press 1984)
- Kostelanetz R (ed) *On Contemporary Literature*  
(New York Avon 1969)
- Kristeva J *Desire in Language – A Semiotic Approach to Literature and Art*  
(Columbia University Press 1980)
- Lee H *To Kill a Mockingbird*  
(Penguin 1987)
- Lerner L (ed) *Reconstructing Literature*  
(Oxford Blackwell 1983)
- Letwin SR *The Pursuit of Certainty*  
(Cambridge University Press 1965)
- Levi J N, Walker A G *Language in the Judicial Process*  
(Plenum Press 1990)
- Levinson S ed *Interpreting Law and Literature: A Hermeneutic Reader*  
(Northwestern University Press 1988)
- Lewis FF *Literature, Obscenity and Law*  
(Southern Illinois University Press 1976)
- Leyh G *Legal Hermeneutics: History, Theory and Practice*  
(University of California Press 1991)

- Llewellyn K *The Bramble Bush*  
(The Harvester Press 1991)
- Locke J *An Essay Concerning Human Understanding*  
Yotton J W (ed)  
(Everyman's Library 1978)
- Lockridge LS *The Ethics of Romanticism*  
(Cambridge University Press 1989)
- Long DG *Bentham on Liberty: Jeremy Bentham's Idea of Liberty in Relation to his Utilitarianism*  
(University of Toronto Press 1977)
- Lucas J *Literature of Change*  
(Harvester 1977)
- Lyotard J-F *The Postmodern Condition: A Report on Knowledge*  
(Manchester University Press 1984)
- Magnus B, Stewart S, Mileur J-P *Nietzsche's Case – Philosophy as/and Literature*  
(Routledge 1993)
- Manlove NC *Literature and Reality*  
(Macmillan 1978)
- McCarthy T *Ideals and Illusions – On Reconstruction and Deconstruction in Contemporary Critical Theory*  
(The MIT Press 1995)
- McHale B *Constructing Postmodernism*  
(Routledge 1992)
- Meyer M *Ibsen: A Biography*  
(Penguin 1971)
- Miles A (ed) *TS Eliot: A Collection*  
(Faber & Faber 1987)
- Miller JH *Topographies*  
(Stanford University Press 1995)
- Milne AJ (ed) *Jeremy Bentham: Critical Assessment*  
(Routledge 1993)
- Milner A, Thomson P, Worth C (eds) *Postmodern Conditions*  
(Berg Publishers 1990)
- Mitchell WJT (ed) *The Politics of Interpretation*  
(University of Chicago Press 1983)

- Morelli EA, Morelli MD (eds) *Understanding and Being – An Introduction and Companion to Insight*  
(The Edwin Mellon Press 1980)
- Morrisson W *Jurisprudence: From the Greeks to Postmodernism*  
(Cavendish Publishing Limited 1997)
- Murphy CF (jr) *Modern Legal Philosophy – The tension between Experiential and Abstract Thought*  
(Duquesne University Press 1978)
- Natoli J, Hutcheon L (eds) *A Postmodern Reader*  
(State University of New York Press 1993)
- Nazareth P *Literature and Society in Modern Africa*  
(Northwestern University Press 1981)
- Ndebele NS (ed) *Writers from Africa*  
(Tri-Quarterly Books 1989)
- Nehamas A *Nietzsche – Life as Literature*  
(Harvard University Press 1985)
- Nerhot P *Law, Writing and Meaning: An Essay in Legal Hermeneutics*  
(Edinburgh University Press 1992)
- Nerhot P *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics*  
(Kluwer Academic Publishers 1991)
- Ngara E (ed) *Literature, Language and the Nation*  
(Baobab 1989)
- Nietzsche F *Beyond Good and Evil*  
(Penguin 1990)
- Noonan J *Persons and Masks of the Law*  
(Philadelphia 1990)
- Norris C *Deconstruction – Theory and Practice*  
(Methuen 1983)
- Oliver JM *Law and Economics – An Introduction*  
(George Allen & Unwin 1979)
- Palmer F *Literature and Moral Understanding*  
(Claredon Press 1992)
- Parekh B (ed) *Jeremy Bentham – Ten Critical Essays*  
(Frank Lass London 1974)

- Parekh B (ed) *Jeremy Bentham – Critical Assessments (Vol. III)*  
(Routledge 1993)
- Parker H *Flawed Texts and Verbal Icons: Literary Authority in American Literature*  
(Columbia University Press 1984)
- Pennock J R, Chapman J W (eds) *Authority Revisited*  
(New York University Press 1987)
- Perelman C H (ed) *Justice, Law and Argument*  
(D Reidel Publishing Co. 1980)
- Perloff M (ed) *Postmodern Genres*  
(University of Oklahoma Press 1988)
- Plamenatz JP *Man and Society: A Critical Examination of some Important Social and Political Theories from Machiavelli to Marx*  
(Longman 1963)
- Plowman E W, Hamilton LC *Copyright – Intellectual Property in the Information Age*  
(Routledge & Kegan Paul 1980)
- Posner RA *Economic Analysis of Law*  
(Little, Brown and Company 1986)
- Posner RA *Law and Literature: A Misunderstood Relationship*  
(Harvard University Press 1988)
- Postema GJ *Bentham and the Common Law Tradition*  
(Oxford University Press 1986)
- Rawls J *A Theory of Justice*  
(Columbia University Press 1971)
- Reichert J *Making Sense of Literature*  
(Chicago University Press 1977)
- Rickword E *Literature in Society*  
(Manchester Carcanet 1978)
- Ricoeur P *Oneself as Another*  
(University of Chicago Press 1994)
- Robertson M, Aubert V *In Search of Law: Sociological Approaches to Law*  
(Oxford 1983)
- Rogers P *Literature and Popular Culture in Eighteenth Century England*  
(Brighton Harvester Press 1983)

- Rorty R *Philosophy and the Mirror of Nature*  
(Blackwell 1981)
- Rosenblatt LM *Literature as Exploration*  
(Heinemann 1968)
- Sandel MJ *Liberalism and the Limits of Justice*  
(Cambridge University Press 1998)
- Seagle M *The Quest for Law*  
(Knopf 1941)
- Selby-Bigge LA (ed) *Treatise of Human Nature*  
(Prometheus Books 1992)
- Sen A, Williams B (eds) *Utilitarianism and Beyond*  
(Cambridge University Press 1984)
- Shepherd V *Literature and Language*  
(Routledge 1994)
- Showalter E *A Literature of Their Own: British Women Novelists from Bronte to Lessing*  
(Princeton University Press 1977)
- Smart C *Feminism and the Power of Law*  
(Princeton University Press 1990)
- Smith A *The Theory of Moral Sentiments*  
(Routledge 1987)
- Spariosu M (ed) *Exploring Postmodernism*  
(State University of New York)
- Spindler M *American Literature and Social Change*  
(Macmillan 1983)
- St John-Stevas N *Obscenity and the Law*  
(Secker & Warburg 1956)
- Stalley R F *An Introduction to Plato's Laws*  
(Basil Blackwell Publishing 1983)
- Stallknecht NP, Frenz H (eds) *Comparative Literature – Method and Perspective*  
(Southern Illinois University Press 1971)
- Steintrager J *Bentham*  
(George Allen & Unwin Limited 1977)

- Stone J *Human Law and Human Justice*  
(Stevens & Son Limited Press 1965)
- Stone W *The Cave and the Mountain – A Study of E M Forster*  
(Stanford University Press 1966)
- Surette L *The Birth of Modernism*  
(McGill-Queen's University Press 1993)
- Swingle LJ *The Obstinate Questionings of English Romanticism*  
(Louisiana State University Press 1987)
- Taylor B, Bain R (eds) *The Cost of Consciousness*  
(Greenwood Press 1987)
- Taylor R *Literature and Society in Germany 1918 – 1945*  
(Brighton Harvester 1980)
- Taylor R *Understanding the Elements of Literature*  
(London Macmillan 1981)
- Thomas B *Cross-examination of Law and Literature: Coopers, Hawthorne, Stowe and Melville*  
(Cambridge University Press 1987)
- Thorslev PL (jr) *Romantic Contraries: Freedom versus Destiny*  
(Yale University Press 1984)
- Todorov T *Genres in Discourse*  
(Cambridge University Press 1990)
- Todorov T *Literature and its Theorists: A Personal View of Twentieth Century Criticism*  
(Cornell University Press 1987)
- Treibner G *Autopoietic Law: A New Approach*  
(de Gruyter 1987)
- Unger R *Law in Modern Society: Towards a Criticism of Social Theory*  
(Free Press 1976)
- Unger R *What Should Legal Analysis Become?*  
(Verso 1996)
- Vickery JB *Myth and Literature – Contemporary Theory and Practice*  
(University of Nebraska Press 1966)
- Von Kleist H *Michael Kohlkaas*  
(Kopf 1956)

- Ward I *Law and Literature: Possibilities and Perspectives*  
(Cambridge University Press 1995)
- Ward I *An Introduction to Critical Legal Theory*  
(Cavendish 1998)
- Wauthier C *Literature and the Thought of Modern Africa*  
(London Pall Mall 1966)
- Weisberg Richard H *Poethics and Other Strategies of Law and Literature*  
(Columbia University Press 1992)
- Welch DD (ed) *Law and Morality*  
(Fortress Press 1987)
- Wellek R *The Attack on Literature*  
(North Carolina University Press 1982)
- White JB *Justice as Translation*  
(University of Chicago Press 1990)
- White JB *Acts of Hope: Creating Authority in Literature, Law and Politics*  
(Chicago University Press 1994)
- White JB *The Legal Imagination*  
(University of Chicago Press 1985)
- White JB *Heracles' Bow*  
(University of Wisconsin Press 1985)
- White JB *When Word Lose Their Meaning*  
(University of Chicago Press 1984)
- Whitehead L *The Aims of Education*  
(Friers & Co. 1929)
- Whitley JS *Golding – Lord of the Flies*  
(Edward Arnold Publishing Limited 1970)
- Wilson C *The Strength to Dream: Literature and the Imagination*  
(Victor Gollancz Limited 1962)
- Wolff RP *Understanding Rawls*  
(Princeton University Press 1977)
- Wollaeger M A *Joseph Conrad and the Fictions of Scepticism*  
(Stanford University Press 1990)
- Wood D (ed) *Writing the Future*  
(Routledge 1990)



- Cover R 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601
- Craft GA 'The Persistence of Dread in Law and Literature' (1992) 102 *Yale Law Journal* 521
- Cunningham C 'Learning from Law Students – A Socratic Approach to Law and Literature' (1994) 63 *University of Cincinnati Law Review* 195
- Daily A 'Feminism's Return to Liberalism' (1993) 102 *Yale Law Review* 1265
- Domnarski W 'Law-Literature Criticism: Charting a Desirable Course with Billy Budd' (1984) 34 *Journal of Legal Education* 702
- Donaldson M 'Some Reservations about Law and Postmodernism' (1996) 40 *American Journal of Jurisprudence* 335
- Douglas L 'Wartime Lies – Securing the Holocaust in Law and Literature' (1995) 7 *Yale Journal of Law and Humanities* 367
- Dunlop C 'Literature Studies in Law Schools' (1991) 3.1 *Cardozo Studies in Law and Literature* 63
- Dworkin R 'Law as Interpretation' (1982) 60 *Texas Law Review* 527
- Fish S 'Not of an Age – Canons and Postmodernism' (March 1993) 43 *Journal of Legal Education* 11
- Fish S 'Working on the Chain-Gang' (1982) 60 *Texas Law Review* 551
- Fish S 'Interpretation and the Pluralist Vision' (1982) 60 *Texas Law Review* 495
- Fisher J 'Reading Literature/Reading Law: Is there a Literary Jurisprudence?' (1993) 72(1) *Texas Law Review* 135
- Fiss O 'Objectivity and Interpretation' (1982) 34 *Stanford Law Review* 739
- Foster TE 'But is it Law? Using Literature to Penetrate Social Representations of Women' (March 1993) 43(1) *Journal of Legal Education* 133
- Gemmette D 'Law and Literature – An Unnecessary Suspect Class in the Liberal Arts Component of Law School Curricula' (1989) 23 *Valparese University Law Review* 267
- George RP and Wolfe C 'Natural Law and Liberal Public Reason' (1998) 42 *American Journal of Jurisprudence* 31

- Getman J 'Voices' (1988) 66 *Texas Law Review* 577
- Gibson W 'Literary Minds and Judicial Style' (1961) 36 *New York University Law Review* 915
- Goldsworthy J 'Fact and Value in the New Natural Law Theory' (1997) 41 *American Journal of Jurisprudence* 21
- Grossfeld B 'Language and the Law' (1987) 20(2) *De Jure* 217
- Harrison M 'A Time of Passionate Learning: Using Feminism, Law and Literature to Create a Learning Community' (1993) 60 *Tennessee Law Review* 393
- Hartigan E 'Poethics and Justice as Translation' (December 1992) 67 *Tulane Law Review* 455
- Hartigan E 'Power of Language beyond Words' (1991) 26 *Harvard Civil Rights and Liberties Law Review* 67
- Heilbrun C and Resnik J 'Convergences: Law, Literature and Feminism' (1990) 40 *Yale Law Journal* 1913
- Heyns C 'Reasonableness in a Divided Society' (1990) 4 *South African Law Journal* 279
- Kaufman M 'The Value of Friendship in Law and Literature' (1994) 60 *Fordham Law Review* 4
- Koffler J 'Forged alliance: Law and Literature' (Book Review) (1989) 89 *Columbia Law Review* 1374
- Koffler J 'Capital in Hell: Dante's Lessons on Usury' (1979) 32 *Rutgers Law Review* 608
- Koffler J 'Terror sand Mutilation in the Golden Age' (1983) 5 *Human Rights Quarterly* 116
- Koffler J 'Reflections on the Law-Literature Movement' (1988) 1 *Yale Journal of Law and the Humanities* 129
- Koffler J 'Reflections on Détente: Law and Literature' (Book Review) (1984) 62 *Texas Law Review* 1157
- Lane D 'The Poetics of Legal Interpretation' (1987) 87 *Columbia Law Review* 197
- Lee S 'Law and Literature' (1990) 10 *Oxford Journal of Legal Studies* 252

- Levinson S 'Law as Literature' (1982) 60 *Texas Law Review* 373
- Lippucci A 'Surprised by Fish' (1992) 63 *University of Colorado Law Review* 1
- Machan TR 'Posner's Roryite (Pragmatic) Jurisprudence' (1996) 40 *American Journal of Jurisprudence* 361
- Minow M 'Words and the Door to the Land of Change: Law, Language and Family Violence' (1990) 43 *Vanderbilt Law Review* 1665
- Moore J 'Covenant and Feminist Reconstructions of Subjectivity within Theories of Justice' (Summer 1992) 55 *Law and Contemporary Problems* 159
- Morawetz T 'Ethics and Style – Lessons of Literature for Law' (January 1993) 45 *Stanford Law Review* 497
- Mowatt JG 'Teaching Law through Literature' (1992) 25(2) *De Jure* 416
- Murray JE 'Understanding Law as Metaphor' (1984) 34 *Journal of Legal Education* 714
- Nussbaum M 'Poets as Judges' (1995) 62 *University of Chicago Law Review* 1477
- Page W 'The Ideology of Law and Literature' (1988) 68 *Boston University Law Review* 805
- Page W 'The Place of Law-Literature' (Review Essay) (1986) 39 *Vanderbilt Law Review* 391
- Pantazakos M 'A Personal Reflection on the History and Purpose of the Law/Literature Movement' (Spring/Summer 1995) 7 *Cardozo Studies in Law and Literature* 31
- Prakesh M 'Essays on Hamlet – emblems and truth in law and literature' (1994) 83 *Georgetown Law Journal* 165
- Riga PJ 'The Nature of Truth and Dissent' (1996) 40 *American Journal of Jurisprudence* 71
- Roos J 'Unger and Aquinas on Universals and Particulars' (1994) 38 *American Journal of Jurisprudence* 63
- Royal R 'Justifying Ethics: Human Rights and Human Nature' (1998) 42 *American Journal of Jurisprudence* 337
- Scales A 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale Law Journal* 1373