Reasoning with Laws

(The Law Hath Yet Another Hold Over You)

by Craig Duncan for ALTA 2018, 5 July 2018

Today I am going to talk about how we might approach the topic of reasoning with laws and how to achieve the proper depth of reasoning, without too much breadth. The central thesis is that we need to be aware of a world view and context, to fix the logical premises of our reasoning, but we should not follow Portia's lead in how she does this in the Merchant of Venice, in the trial in Act 4, Scene 1. The reason is that she covers a broad range of matters, but too many. She dominates each one of those matters. She does not allow the parties an opportunity to focus on one area of the dispute for any length of time, and she does not permit Shylock or Antonio to argue or oppose her conclusions. She takes the trial out of their hands.

A related question we might pose is whether the breadth of reasoning that Portia engages in is a good thing? Did she have any alternative? Did she need to determine all these issues in a single sitting, because she was impersonating Balthazar?

I am going to provide a theoretical framework for examining these matters.

1. If we are to make sense of the structure of law, we must be able to discuss the purpose of law within the context of society's goals and human agendas, and not just law as a collection of rules. This involves two things:

1.1 The Law can be personified, and frequently attributed to the voice of someone speaking (even in the Interpretation Acts). It is even discussed as if it was the voice of some authority beyond society, like a God, which supplies not only a purpose, but overcomes the

apparent fragmentation of rules by the concept that there is a unified mind behind them. This attribution, or projection of mind, is not without significance in matters of interpretation. And it arises in the context of equity too. In the Earl of Oxford's case in 1615[1], there were references to God speaking, and thus founding the notion of a conscience that spoke in addition to the laws of the State. In *The Merchant of Venice*, Portia's speech about mercy (a response to Shylock's insistence on legal outcomes), cites God as the source of other authority, as if God is speaking and is thus a source of law, but also a personification of law.

1.2 The law is a conversation about the world in which we must note the projects that the State supports, and also introduce ideas in their proper order, if our reasoning is to make sense. The law of the colonising Europeans speaks favourably about the development of land, citing a Biblical influence, and so it speaks differently to laws where there is service not to a project of utilisation as Jeremy Bentham and John Loche advocated, but to a project of serving the land itself. Here, it is important to know that there are deep areas of law, like property law, on which much of commercial law, and even criminal law of property and goods is built.

1.3. Related to the idea that law is a personality, is the idea that there are privileged people who speak on behalf of the law. The idea that there are privileged social institutions in which legal discourse occurs should not be forgotten, especially at an early stage of legal education. I can single out de Montmorency (1927)[2] as an academic lawyer who noted, unlike many legal philosophers, that there could be cultures with laws in which there were people who were the custodian of tradition, rather than some sovereign or central authority.

2. We identify the forums in which discussions about what the law says, and what the facts are can be undertaken. This is not merely

1 Available at URL: http://www.oxford-shakespeare.com/MagdaleneCollege/Eng_Rep_21_Magdalene_1615.pdf (nb this site, by Nina Green, supports the hypothesis of Shakespeare, actor, as frontman for another writer).

2 de Montmorency, J.E.G (1927) The Custodian of Tradition. *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* (57) 235.

a matter of form. We must also examine if a real opportunity has been provided for examining how the law applies to the facts, where parties are heard and the processes are fair and transparent.

3. We ask whether the forum provides appropriate focus of attention so that a particular topic of law can be identified and spoken of within a particular frame of references. Some of these will reflect divisions in the law, but others will be suggested when the parties are involved in something of complexity.

3.1 - In our system, writs, pleadings and references to causes of action, and distinctions between civil and criminal law often achieve a narrowing of focus so that everyone understands the scope of the project. In contrast, in *The Merchant of Venice*, there is really no trial, but a series of 'trials' attempted in succession. Ironically, Shylock wants to hurry and be done with justice as soon as possible, but Portia extends the program.

4. The next task is to examine the adequacy of the reasoning within each of these separate 'trials' or forums.

As Waddams said[3]:

> "The selection of legally relevant facts is a matter not of empirical investigation but of judgment, and not wholly separable from the formulation of the applicable legal rule."

Waddams also said, in relation to traditional reasoning, that:

> "Legal decision-making requires the statement of relevant facts, the identification of a legal issue, and the formulation and application of a legal rule. These steps are interrelated, and each requires the use of judgment."[4]

3 Waddams, S. (2003). Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning. Cambridge University Press (2003). p14

4 Waddams, S. (2003). Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning. Cambridge University Press (2003). p18.

There are some things we want to see in legal reasoning, as a minimum.

4.1 A clear identification of world view, setting the concepts for discussion, and perhaps dictated by the rules that have been chosen. For example, in one forum at one time, a person may be regarded as an owner of property, in another as an employee.

As Umberto Eco once said:

> "Every text (even the most simple sentence) describes or presupposes a possible world."[5]

4.2 Secondly, proper attention to each element of a rule, or a concept used by the parties, that exists within the world view adopted for this particular logical reasoning.

4.3 Thirdly, it requires the opportunity for a concept to be explored in sufficient depth by reference to:

(a) how its legal character relates to other aspects of the world view (from 4.1);

(b) how evidence of specific events unfolding in time and space can be merged into the same world view that frames the dispute; and

(c) the opportunity of the parties to speak on these issues in their own words, with reference to their own timeframes.

4.4 Where necessary, we consider deeper matters of law that inform private law. For example, a commercial case can benefit from knowledge of the persistence of deep ideas like ownership of property, or the distinction between personhood and property, when dealing with

5 Eco, Umberto. Mouse or Rat? Translation as Negotiation. 2004 (Phoenix/Orion Books), London, at page 19.

its subject matter or legal policy. It is a foundational world view of society, and for that reason is one that no party can really ignore.

Conclusions

The thesis of this talk is that trial in *The Merchant of Venice* is a model of a forum in which the presiding judge is not only impartial, but covers a broad range of matters without permitting either party to do much more than assent or dissent. The parties themselves are not empowered by breadth of knowledge, though Antonio benefits from Portia's presence. Portia is not an advocate; she represents an inquisitorial presence, a person occupying a role under a false name, and with an intent to cover a broad range of matters in order to rest her decision in the arena of public law. We can examine her reasoning as one that touches on a number of issues that should either be dealt with in separate forums, or pursued more deeply with a bipartisan interest.

Overall, we see in the play a forum which is overburdened by what it attempts to achieve, and dominated by Portia's desire to move the trial into the public law space. In seeking to achieve her ends, she propels the trial to its conclusion with barely a thought for who might interrupt her lead, or the possibility that her predetermined outcome will not be met. The success of her planned series of trials is, in a true comedic sense, very fortunate indeed.

This is an example of what not to do if we want to avoid prejudicial, dominating discourse. The trial scene helps students and lawyers to reflect on how they might contextualise their own problems, consider multiple points of view, and giving those interested in the outcome a proper opportunity to speak. For without those things, something valuable to society and law has been lost.

The Nature of Law

The traditional education in legal philosophy in Anglo-Australian law, particularly in the 19th century and following, has centred on the question "What is law?", and the answer, reflecting the norm, has often been law is a set of rules administered by a dominant authority. We can summarise the long list of those that have pondered this question by naming the public intellectuals like Locke[6], Hume[7], Blackstone[8], Bentham (1781)[9], Austin[10] , Weber[11], de Montmorency (1927)[12], Hart, 1958[13], Dworkin[14], Kennedy and Unger[15] and Australian judges like Michael Kirby.[16] Locke was influentual in defining the goals of society as "Life, Liberty and Property". The U.S. Declaration of Independence (1776), US Bill of Rights (1789): borrowed from Locke's ideas,[17]as does United Nations Declaration of Human Rights (1948),[18] in which Article 17 refers to the right to property. Of these well known names, I can draw atttention to the lesser known de Montmorency (1927),[19] who has alluded to the fact that in non civilised cultures, there may well be a custodian of the tradition of law, rather than a central authority per se. We can also mention Dworkin, who sought to introduce the idea that

6 Locke, J. The Two Treatises of Civil Government. John Dent & Sons (orig edition 1690; London, 1943 reprint). Available from URL: https://archive.org/details/ofcivilgovernment00lock (Last accessed 13 June 2018).
7 Hume (1739).
8 Blackstone, ,W. (1765) (Commentaries)
9 Bentham, J. *An Introduction to the Principles of Morals and Legislation. A*vailable at URL: http://www.econlib.org/library/Bentham/bnthPML.html (Last accessed 13 June 2018). See also URL: https://www.utilitarianism.com/jeremy-bentham/index.html (Last accessed 19 June 2018).
10 Austin, J. (1832). The Province of Jurisprudence Determined. London: John Murray. Available from URL: https://archive.org/details/provincejurispr02austgoog (Last accessed 13 May 2018).
11 Three Types of Legitimate Rule. Originally published in the journal Preussische Jahrbücher 187, 1-2, 1922, an English translation, translated by Hans Gerth, was published in the journal Berkeley Publications in Society and Institutions 4(1): 1-11, 1958. See also Gephart, W. Law as Culture.
12 de Montmorency, J.E.G (1927) The Custodian of Tradition. *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* (57) 235.
13 See also H.L.A. Hart. (1994). The Concept of Law, Oxford : The Clarendon Press.
14 Dworkin, R. (1986) Law's Empire. See also Dworkin, R. (1977) Taking Rights Seriously. Cambridge: Massuchusetts Harvard University Press; cited by Bello, P (2012). The Controversy About The Essence of Law: A Dispute Between Hart and Dworkin. *Indonesia Law Review (Year 2, Vol 1)* 45 at 49-50.
15 Duncan Kennedy and Karl E. Klare, "A Bibliography of Critical Legal Studies," Yale Law Journal, Vol. 94 (1984): 461.
16 http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx. Ishay, M. The History Of Human Rights (2008). University of California Press is recommended. See Also Rhoda E. Howard-Hassmann (2013) Reconsidering the Right to Own Property, Journal of Human Rights, 12:2, 180-197, DOI:10.1080/14754835.2013.784667
17 http://www.globalization101.org/human-rights-vs-natural-rights/
18 http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx
19 de Montmorency, J.E.G (1927) The Custodian of Tradition. *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* (57) 235.

judges could find a way to decide the connections between laws by filling in gaps that would best fit the tradition of the law.

Some recent academic inquiries have investigated the extent to which concepts and facts reflect social reality, or relations, rather than merely objects. This includes Searle,[20] and Keenan who has spoken about property being a relation of belonging in a social and spatial context, rather than a historical incident of a privileged white, Anglo-Saxon male.[21] Some authors have suggested that law is ultimately a matter of social fact, and that even H.L.A Hart would have agreed to this proposition.[22]

The thesis of Hart, that there are secondary rules that help determine what law is, has aspirations for completeness, but this might not be possible. Results from science and mathematics that suggest systems might not be self-consistent, and may only represent intermediate paradigms of thought (see Godel[23], Kuhn[24]). Some authors have advanced this argument in relation to law, for example Carlson has stated : “In effect, we cannot say in advance what law is. The set of primary rules cannot be reduced to a determinate rule of recognition. We can only compile incomplete sets of individual laws.”[25]

Law as a voice for the dominant group

The enquiry into the nature of law can be assisted by transforming our question from “what is law” to “who is speaking

20 Searle, John R. (1964). "How to Derive 'Ought' From 'Is'". Philosophical Review. 73 (1): 43–58. JSTOR 2183201. Searle, John R. (1995). The construction of social reality. New York: Free Press. ISBN 0-02-928045-1. See also https://plato.stanford.edu/entries/chinese-room/

21 Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 423 at pp427-429.

22 Coleman, J. (1991) Rules and Social Facts. *Faculty Scholarship Series (Yale Law School).* Paper 4194. (14) 703 at 717. See also Coleman’s draft paper ‘Rethinking Legal Positivism’ about the Social Facts Thesis (available at URL: https://gould.usc.edu/centers/clp/papers/documents/Coleman.pdf)

23 As argued recently by Carlson, D. (2013). Legal Positivism and Russell’s Paradox. *Washington University Jurisprudence Review* (5) 257. Available from: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1048&context=law_jurisprudence

24 Kuhn, T. The Structure of Scientific Revolutions. INTERNATIONAL ENCYCLOPEDIA of UNIFIED SCIENCE. University of Chicago Press (2nd Ed, 1970).

25 Carlson, D. (2013). Legal Positivism and Russell’s Paradox. *Washington University Jurisprudence Review*. (5) 257 at page 259. Available from: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1048&context=law_jurisprudence

through the law?". The possibility of law having a personality, and a 'voice' is already contemplated by parliament, in Acts such as the Interpretation Act (WA) 1984, section 8 of which is as follows:

> **"**A written law shall be considered as always speaking and whenever a matter or thing is expressed in the present tense**,** it shall be applied to the circumstances as they arise**,** so that effect may be given to every part of the law according to its true spirit**,** intent**,** and meaning**."**

Another historical example, occurring only a few years after the Merchant of Venice play, and invoking Biblical texts and the notion of Equity 'speaking', was the Earl of Oxford case (1615).[26]

If we can comprehend that law is a voice, always speaking[27] (and putting aside problems with tense[28]), then we can also find a pragmatic answer to the question about the identity of law, and one which might assist with teaching it. The law may be, for example, the personification of the voice of the dominant group. It may be the official version of the national identity.

Importantly, law in its speaking form may be a voice that one must agree with, or inhabit, unless one wants to face exclusion from the group. This latter example is not so hard to imagine. There have been laws about sedition or treason which are effectively for dissent, for opposing the will of the ruler or country. The mere fact we record laws in writing for certainty and consistency does not mean we become disinterested in who speaks, or who it speaks for.

However, there is an important distinction between the freedom to speak at all, and the freedom to speak against the ideas of

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26 Available at URL: http://www.oxford-shakespeare.com/MagdaleneCollege/Eng_Rep_21_Magdalene_1615.pdf (nb this site, by Nina Green, supports the hypothesis of Shakespeare, actor, as frontman for another writer).

27 See the recent High Court decision of *Aubrey v The Queen* [2017] HCA 18, and academic comment: Dan Meagher, 'A Brief Word on the "Always Speaking" Approach to Statutory Interpretation: *Aubrey v The Queen*' on *Opinions on High* (4 July 2017) <http://blogs.unimelb.edu.au/opinionsonhigh/2016/07/04/meagher-aubrey/>. (Accessed 28 June 2018).

28 Goldfarb, Neal. "Always speaking"?: Interpreting the present tense in statutes." The Canadian Journal of Linguistics / La revue canadienne de linguistique, vol. 58 no. 1, 2013, pp. 63-83. Project MUSE, muse.jhu.edu/article/508733

the dominant group. Even though both these freedoms may exist, there may be pressures not to exercise them. In that case, the important function of speech to express the inner workings of the mind is diminished. If it is diminished to the point where the mind shuts off from the possibility of disagreering at all, then we have the oppressive, hegemonic state that Gramsci wrote about.

When we imagine law speaking, then it is relevant to also consider the notion of law having a human personality, and also that is speaks in public. The phenomenon of speech evidences priority, intent, focus of attention and a range of other human concerns. To respect the law is, in effect, to publically respect the personality behind the law. In seeking to find the meaning of rules, we can just as easily imagine the question to be – "what would [the person speaking the laws] say?". This is not unrelated to the approach taken by Dworkin, in suggesting that the problem of 'hard cases' is to find an answer that is the 'best fit', with reference to some unilateral objective that would seem to conform to a single mind.

This does not mean that we put aside logic and knowledge. Rather, the judicious search for relevant facts is undertaken as a search for meaning in a way that the human mind can recognise in another. This is a projection of our understanding of another consciousness (and has much in common with the "Theory of Mind" approach[29]).

That the law is both a personal and a social endeavour is reflected in the other disciplines that might be applied to it once it is not defined solely in terms of rules. A useful survey of inter-disciplinary insights that have had an influence on legal education was prepared in 1992 by Abdul Paliwala, who stated, inter alia:

29 see for example, Luhrmann, T. (2011). Toward an Anthopological Theory of Mind. Suomen Antropologi: Journal of the Finnish Anthropological Society 4/2011 page 7.

> "There have been new influences in legal education in this century. These have included the notion of law as a science, as well as insights derived from sociology, anthropology, economics, psychology and more recently linguistics".[30]

Legal reasoning

Reaching a judgment is one of the fundamental goals of legal reasoning and it draws together the various parts of selecting facts and the law. As Waddams said[31]:

> "The selection of legally relevant facts is a matter not of empirical investigation but of judgment, and not wholly separable from the formulation of the applicable legal rule."

Waddams also said, in relation to traditional reasoning, that:

> "Legal decision-making requires the statement of relevant facts, the identification of a legal issue, and the formulation and application of a legal rule. These steps are interrelated, and each requires the use of judgment."[32]

One definition of judgment in the Oxford English Dictionary, relevant to logic, is:

> The action of predicating or mentally apprehending the relation between two objects of thought; a proposition, as formed in the mind.

And another is:

> The formation of an opinion or notion concerning something by exercising the mind on it; an opinion, an estimate.

One way of understanding how a mind and speech can express a world view is through literature and semiotics, or the study of signs[33].

30 Paliwala, A (1992) Transforming Legal Learning. *Computers Educ*. 19(1/2) pp113-124.
31 Waddams, S. (2003). Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning. Cambridge University Press (2003). p14
32 Waddams, S. (2003). Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning. Cambridge University Press (2003). p18.
33 Eco, Umberto. *Mouse or Rat? Translation as Negotiation.* 2004 (Phoenix/Orion Books), London, at page 19.

As Umberto Eco once said:

> "Every text (even the most simple sentence) describes or presupposes a possible world."[34]

The practical assistance I derive from these ideas is that the logic of the law is always determined with reference to the world view in which its premises are stated. This is not merely relevant to the logical deduction that we undertake, but it also affects the imagination and freedom we have in selecting from one world view or another.

Changing a world view alters our state of perception of the world and can cause a reversal or significant change in our focus. Think of the suddent shift in perception that occurs when we suddenly find out that a person has been dishonest, or that an apparently successful sportsperson or business person has been guilty of cheating.

This correlation between a world view and the logical reasoning process has day to day relevance in the practice of the law. A person who is asked to meet a case with different assumptions or conceptual premises will no doubt need time to consider the effect of them, in order to apply the law to the facts. A request to modify the pleadings in a court case may be a consequence of a newly revealed fact or significant evidence which has led to a new conception of a case.

In a related way, there is also close connection between the ability to change the domain of legal reasoning and the need for natural justice and procedural fairness. A person that has control over the world view may also force logical reasoning to occur in a particular direction.

A new focus on the reasoning around laws

My reason for this diversion into the nature of law is to draw attention to the need to go beyond the predominant focus of law as

34 Eco, Umberto. Mouse or Rat? Translation as Negotiation. 2004 (Phoenix/Orion Books), London, at page 19.

rules, and to suggest that we reason with laws, but we also reason in the sense of selecting the forum and the context for rules. If we can think about those matters, then we can reason with them as well. In particular, there may be reasoning about opportunities to present one's case, or about the predicted or consequential effects of laws as mechanisms affecting the physical world, which are no less rational because they operate on a different plane of reasoning to the abstract symbols in legal logic.

Reasoning about the effects of laws

The rule-based definition of law diminishes the attention given in public discourse about how the rules tend to promote particular power structures or social outcomes. For example, it is rare in our country to describe a fundamental object or mechanism of law to promote the success of a particular social endeavour (like colonisation), or to facilitate the grant of large tracts of natural territory by the State to those who are best able to utilise it, for agriculture, mining, production and housing, with potential for future profit through subdivision of that land into smaller and smaller units. This cellular division is a combination of the deep embedding of private control of land, and the persistent encouragement of State-supported economics to pursue a new use of land that has economic value. It promotes the ideas of utility and use of property as promoted centuries ago by Bentham and Locke.[35] It is fair to say that the the dominant groups in society encourage those who speak with, rather than against those dominant ideals.

Reasoning about the efficacy of the legal forum

The other matter which is central to the idea of reasoning with laws is discussion about the opportunity to speak and have considered their thoughts within legal processes, and for the processes to be

35 See also the comments about Hegel, in Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 423 at pp427-429.

appropriately sized that their subject matter receives appropriate attention. This is partly regulated by procedures for natural justice and the separation of the civil and criminal procedures. We cannot divorce legal reasoning from the procedures that exist to permit reasoning to freely occur. However, we must also be attuned to the possibility that every ability to speak can be limited in duration, audience or response. There may be situations where people are permitted to speak, but no one is listening, and this may be evident by the sequence of opportunities to speak, and their subject matter.

Hegemony and oppressive legal conduct

Gramsci wrote about the passive oppression of a people by the domination of their minds; that they would unconsciously accept things that the State wished them to believe, without force, and even argue for them.[36]

Laws can be contributors to hegemony, but the exact mechanisms are often the subject of debate. Those inquiries have related to things like social institutions, but it may be that there is also a power over the legal forum, as we witness in *The Merchant of Venice*, which helps to coerce minds to think a partiular way. Through the domination of speech, the control of the timing and content of public speech by the dominant group, that a State may seek to erode the ability to speak or think privately in opposition to those dominant ideas, even without the direct use of force.

This oppressive denial of speech does not need to occur across society: we might even see these processes work in a single Court case. As Islam has said in relation to the Merchant of Venice:

36 see Litowitz, D. (2000) Gramsci, Hegemony and the Law. *BYU L. Rev* 515, 2000(2)

> "Second, the forced conversion of Shylock reveals the manipulation of the law by the dominant group to oppress the minority. Since Portia had been acting thus far to affect actions that were purely legal, one wonders why it is not consulted before such a decision is declared in Shylock's case."[37]

And later, he says:

> "In the context of the play, the tension between the dominant group and minorities is evident in Shylock's struggle for justice. For a lawyer, this reveals the complex nature of the law and how it is given to both bias and manipulation by different groups. The Merchant of Venice contradicts the age-old adage that the law is not blind and, as a literary work, the play highlights the dangers of classifying the law as such. In essence, if the law is projected as an abstract and objective concept, it fails to account for the struggles and stories of those who are oppressed by the dominant group by way of the law."[38]

The two mind reasoning model

To assist in examining the degree to which a legal discourse, and a legal forum or process, is determinative of the acceptance of a dominant group's thinking, it is useful to model the conversation as one between two minds:

(a) the relatively omniscient mind, which may be one that is speaking for the State, but it could also be one of the parties. This is the mind that, having the larger perception of the law and its concerns, wishes to communicate a particular world view as the premises for the logic, and to reason within that frame of reference; and

(b) the second, relatively ignorant mind, that must answer or respond to this. The second mind may be unable to see the

37 Islam, N. (2016), Shakespeare and the Law: A Critical Analysis. Trinity College Law Review Online. At page 13. URL: http://trinitycollegelawreview.org/wp-content/uploads/2016/04/Merchant-of-Venice-1.pdf (Accessed 2 July 2018).

38 Islam, N. (2016), Shakespeare and the Law: A Critical Analysis. Trinity College Law Review Online. URL: http://trinitycollegelawreview.org/wp-content/uploads/2016/04/Merchant-of-Venice-1.pdf . At page 17. (Accessed 2 July 2018).

problem in terms broader than the first mind has put to it, and is repeatedly reacting to the new information.

Without going into detail here, the choice of the 'world view' or the concepts and structure for each legal conclusion that is required, is an important element of legal reasoning, as it sets the agreed premise for the logical deductions that follow. This is a subject that can be dealt with as a matter of cognitive science, logic and semiotics. For present purposes, it is enough to say that there are some broad shifts that could occur, and which are relevant to both the substantive law and the procedure.

The tests for the domination of the dominant ideas include these factors:

(a) the extent to which the omniscient mind dictates the world view being discussed;

(b) the extent to which the elements of rules are discussed openly and transparently, without prejudice; and

(c) the extent to which specific facts are able to be discussed in the course of specific, time-based events and not merely as concepts in the persistent structures of the dominant world view.

It is a positive sign if a particular dispute can be located within a broader set of social or legal factors. However, it is a negative sign if the nature of the judicial forum changes arbitrarily and swiftly, according to the dictates of the Court and not by the request of the parties.

I have prepared a map which illustrates the extent to which a number of our contemporary legal tasks associated with legal reasoning are able to be located within a public-private domain, and also within a concept or time-specific domain. Time does not permit

attention to every aspect of this map in this talk, but even within one particular legal issue, it is a useful guide as to the deficiencies in the trial that is represented in *The Merchant of Venice*.

How does Portia dominate the discourse in the legal reasoning

An overlooked aspect of this play is the extent to which Portia controls time and pacing during the trial. Shylock was impatient and tried to maintain the focus of the argument and legal conclusions, but Portia asks him to wait, to "Tarry". The proceedings themselves evidence her ability to control the focus of attention.

1. The private law frame

It is Portia that says the agreement is binding; that it is validly concerned with the taking of flesh, and that Shylock cannot, it seems, take any blood when enforcing his agreement.

It is Shylock that said he wanted the pound of flesh due under the agreement, when it did not make these distinctions. But having made them, his statements about demanding his lawful entitlement should not be held against him. Antonio and Bassanio equally shared the same view. To punish one and not the other is a selective attention to the facts which favours only the person who has the sole power to determine the outcome.

The private agreement

Portia initially indulges Shylock by asking if he will proceed with the terms of the private agreement.

Shylock is then able to speak relatively freely: he demanded his due under the agreement.

Portia then took that agreement apart and attributes meaning to his words (flesh and blood) that neither party wanted. She speaks

for them, as the Court, without asking them at all. Whether or not the distinction makes any sense does not matter to her. She seems primarily interested in saying that Shylock cannot succeed in taking only ‘flesh’, in order to remove the benefit of the agreement from him.

In this way, Portia preferences the speech of the State to the parties; it is clearly an act asserting State power through control of the words of a private agreement.

Shylock has no power to speak, only to ask questions:

“Is that the law?” is all he can say.

2. The public law frame.

The shift to the public sphere is signalled to Shylock by the phrase “The Law Hath Yet Another Hold Over You.”[39]

On a first reading, it might seem that this is the humane thing to do: it moves attention away from a private agreement concerned with making a person’s body into property, and restores some worth and human dignity by trying to protect the life of a human being, namely that of Antonio. On first impression, it might seem to be protection that has some semblence to recognition of human rights.

However, when Portia invokes the criminal law, she has moved the rules back to the domain of the State, and the State’s power, in its present form. That is the same State that condones slavery, and it is not necessarily a more humane one at all.

The dominating ‘personality’ of the State is soon evident because of the flippant way that Portia raises new charges against Shylock.

39 *The Merchant of Venice*, The Oxford Shakespeare. 4.1.343, page 205.

The charges and the element of intent

The new charges change the character of the proceeding considerably. Shylock, who was claimant in a private law matter, was then made a defendant in a public law matter.

We draw on some experience with legal proceedings to frame the manner of the proceedings as one that requires a certain freedom in its undertaking. The subsidiary rules (as they seem to be described) that regulate trials are capable of being seen in that context, but they are also capable of being seen in the wider connection between speech and power. There is, after all, something of the sense of not only having an opportunity to speak (and to be heard), but to have someone listen. However, as Justice Robertson of the Federal Court noted in a speech in 2015[40], the history of the terms natural justice and procedural fairness have undergone some shifts in recent times, so that they are discussed in conjunction with detriment to rights, interests or privileges and not merely judicial forums.

Lack of natural justice and a fair trial

The central point of importance is that Portia did not allow the elements of the charges to be fully aired, preferring her conclusions to subvert the process of close reasoning. She did not permit time or speech to dwell upon the public law. Shylock was effectively sentenced without trial, because the first trial was on a matter of private law, and his oppression is being subjected to a public law criminal trial without an opportunity to put his case or answer the charges.

One way of testing whether there has been fairness in a trial is whether the basic elements of legal reasoning have been met: has there been an opportunity to consider the elements of the rule or charge and have all parties been invited to speak about them? It

40 Robertson. Natural Justice or Procedural Fairness. Speech. 4 September 2015. URL: <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-robertson/robertson-j-20150904>

would be hard to reach a transparent 'judgment' on the law or facts, in the sense that Waddams spoke of them, without this.

Portia barely raised these new charges when she answered them. She gave neither Antonio nor Shylock the proper opportunity to address them, and drew her own conclusions about intent. So not only has Portia controlled the context of the speech, but she denies the private citizens the ability to speak in their own defence. If there was a point to be made, Portia showed prejudice in not allowing it to be aired.

In what appears to be compete submission to this arbitrary form of justice, Shylock simply says "I am content.". [41]

Conclusions on this issue

In *The Merchant of Venice* there are two broad frames, or world views that are encompassed during the trial. These include, firstly, the initial focus within the area of private law: the private moneylending agreement and the security. Secondly, there is the public law, what we could describe as a matter concerning the State and its citizens, or criminal law.

Using this analysis, we see that Portia has the command of the law, chooses the frame of reference, and in turn, dictates not only what elements of the law in each frame of reference are discussed, but what the proper interpretation should be. She avoids close examination of particular events.

On the other hand, at the beginning of the play, Shylock is, relatively, quote open in his speech. The Duke does not exercise the terms of the law directly. He sends for someone to speak for the law, and it turns out that person is Portia[42]. Even up to the point before the trial starts, Shylock is willing to speak to the Duke about some of the deepest divisions in society, and to point out the way in which the elite

41 *The Merchant of Venice*, The Oxford Shakespeare. 4.1.390, page 207.
42 *The Merchant of Venice*, The Oxford Shakespeare. 4.1.142-145, page 195.

keep slaves for themselves. He asks, what has he done wrong, by this measure? However, during the trial, neither one of the parties (neither Antonio nor Shylock) are able to to shape the path of the reasoning, the choice of frames or the logical destination.

In some respects, it is Shylock's impatience and desire to have the matter dealt with swiftly that prevents further reflelction. However, it is ultimately Portia's foresight, and her distinterest in hearing from Shylock or Antonio on relevant matters that represents a denial of natural justice, and a superficial and prejudicial determination of the matter.

When someone speaks, it is not merely that we hear them, but that we have an opportunity to control time enough to discuss the matters with them. Before the trial proper, when Shylock asks the Duke why he cannot control another as the society he is in controls slaves, there is no answer. And when Bassanio speaks to Shylock before the Duke's arrival Shylock says "I am not bound to please thee with my answers."[43]

This important element of rhetorical attention reminds us of how the powerful gain control of others' minds and behaviour. It is not only that the powers that dominate have the power to control public speech, as they do when they create public laws, but they also deny others the ability to change the focus of attention, or the world view that determines the logical conclusions. It is this important duty to raise matters for discussion that occupies, or should occupy the media's attention in our reporting on politics.

And in the end, Shylock says, as a person who has resigned themselves to simply accepting the dominant view without opposition : "I am content". Justice in the play is really about who is entitled to freely speak in their own interests.

43 *The Merchant of Venice*, The Oxford Shakespeare. 4.1.64, page 191.

General Conclusions

A conventional discussion about reasoning with logic, implies the freedom to decide on a worldview (as the first premise), and individual elements, and then to test them. However, *The Merchant of Venice* reminds us that law is not merely about logic and testing the existence of an element in a proposition. In fact, reasoning with laws depends on how it is situated. It involve elements of freedom, and power and control. Oppression is demonstrated by who is allowed to speak freely and at a sensible pace.

One of the reasons I have taken the time to prepare a two mind model is that it reminds us that just by speaking, and with the support of the State, a person may gain the attention of and potentially control the thoughts of another.

So when Gramsci wrote of the unconscious domination of anothers thoughts as a form of oppression, what he called 'hegemony', the exact manner in which this was achieved, and how laws specifically might be involved in this, was left for others to work through. One of the ways, I submit, is through the control of public speech. If the law speaks, but no one else is allowed to, then something has the semblance of reasoning, but there is insufficient time to dwell on points that need attention. The flow of thoughts is at the bidding of the State, or the powers that be.

The control of law's ability to speak is not only through the creation of words that are associated with the words of the State, in statutes, but through the words used by officials and representatives of the State, including judges.

Here, Portia assumes those powers by donning the attire and personality of a man of the Court. It is not her own personality, yet through this she controls the conversation and therefore the reasoning. In those circumstances, the basically semblances of justice can be lost.

The conversation covers far more than it should. Natural justice is completely overlooked.

This is less a study in legal reasoning as it is in the domination of the mind, by controlling speech, and inviting hegemony. But where it is important, so far as legal reasoning is concerned, is that it reminds us that judges must create an environment where all views can be freely heard, and all points that are troubling have time to be aired. If not, then there will be cases, and juries, whose minds are overbone by the influence of those that are speaking without giving time for the accused, or the weak or disadvantaged, to do injustice.