Barristers as Postmodernists

They're both twentieth-century not ancient, and both offer a barren and self-referential cognitive framework that only succeed in disingenuously establishing unnecessary problem fields

By J Vivian Cooke

Although few who strut their trade around Gandon's halls or chilly country courthouses in gowns, collar bands, and — sometimes — horse-hair wigs would acknowledge it, theirs is a profession whose intellectual habits are not ancient but quintessentially late-twentieth century. Despite appearances, the barristers' profession is undeniably postmodernist.

Courtroom advocacy is textbook postmodernism which, as befits a critical and philosophical movement that rejects fixed meanings, eludes standard definition. However, writers in this tradition can be identified by their shared characteristics:

- **contested knowledge claims are determined by relative power relationships;**
- **methodology is prioritised when determining which contested knowledge claims are accepted;**
- **intertextuality that results from the reification of text is central; and**
- **complexity and abstraction are embraced, to privilege knowledge claims.**

If you deconstruct the component performative acts and utterances that constitute legal practice, you can tick each characteristic of postmodernism from this list.

In an adversarial legal system, opposing counsel assert both different interpretations of the law, and, contradictory facts, while simultaneously seeking to delegitimise the assertions of knowledge advanced by the opposing side. To decide which of these conflicting knowledge claims will be accepted, jurors make determinations in matters of fact, and judges in matters of law. A trial judge's interpretation of the law can be overturned by another judge holding a superior position within the court hierarchy. Contested claims of facts or knowledge are not resolved by referencing an external objective or verifiable ontological standard.

- contested knowledge claims are determined by relative power relationships – **tick**

In court proceedings, claims of fact can only be accepted as legitimate if they conform to the legal rules of evidence. No matter how accurately an asserted fact describes what actually happened, no matter how true it is, if it is inconsistent with the methods of adducing evidence as specified by law it will be discarded. A court may reject evidence obtained through an illegal search or under a flawed warrant without conceding that such evidence is untrue in a substantive sense. This narrows the possibilities of any existence capable of being considered in court to those which conform to this limiting methodology. Hume's inversion of epistemology over ontology — that only what can be perceived can be thought of being capable of existing — is further narrowed to *esse est testificor*.

- methodology is prioritised when determining which contested knowledge claims are accepted — **tick**

Law cannot be separated from text - indeed, it can be said that law can only be found in text. And the fundamental function of a lawyer is precisely this reification of legal principles from abstraction into text. The law is mainly legislation and cases; texts include contracts, deeds, confessions, affidavits. In the law, as in postmodernism, text is everything and, as a consequence, barristers are predominantly pre-occupied in textual production (their own texts when drafting opinions) and reproduction (the law).

What distinguishes the good barrister from the ordinary (apart from the fees they charge) is the capacity interpret and apply case law in the settings of specific cases. The capacity to reference and critically analyse parallel texts long predates the emergence of postmodernism's hermeneutics and its preoccupation with semiotic study. However, both fields share an understanding that texts do not have a fixed meaning but must be constantly defined and reproduced depending on the context of their use. This approach underpins the judicial doctrine of constitutions as "living instruments" which allow you to recognise, or ignore, rights like those to contraception, and — as with the overturning of Roe v Wade — abortion.

- intertextuality that results from the reification of text is central – **tick**
- Or, as Derrida might put it, "il n'y a plus de hors-texte" – **coche**

Even in the most relaxed social settings, neither members of the law library nor postmodernists have conversations – they engage in discourse. Discourse as a substitute for dialogue internalises complexity and expresses abstraction by using deliberately obtuse jargon and unnecessarily complex theories. Both deploy these, not so much as rhetorical techniques, but more as critical devices exercised in the destruction of arguments that inhibit the discovery or exchange of facts. Moreover, the use of language that is reshaped with multiple conceptual layers that are not amenable to explanation by simple language is a means of asserting an exclusive domain of expertise. Lawyers have successfully institutionalised their claim as gatekeepers of knowledge in the "right of audience" which prevents lay litigants representing others in court proceedings.

- complexity and abstraction are embraced, to privilege knowledge claims – **tick**

Barristers have centuries of experience in passing off as reality a network of images and signs without an external referent, that collapse the distinction between what is represented and the representation itself, in what Baudrillard would recognise as "hyper-reality".

If there is a distinction to be drawn between barristers and postmodernists it is this obvious anomaly: the former use tradition to manufacture the simulacra of reality, while the latter rely on technology and modern media to mediate experience to reality.

Postmodernism became an intellectual dead-end when it became impossible to deny that it was a barren and self-referential cognitive framework that only succeeded in disingenuously establishing unnecessary problem fields. Barristers struggle daily to avoid such a fate.

> Contested claims of facts or knowledge are not resolved by referencing an external objective or verifiable ontological standard