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Borderlands of Law

Legal Limits

by Nicholas Hasluck

Federation Press, 2013, 234 pages, \$49.95

This latest book by novelist and retired judge Nicholas Hasluck (Supreme Court of Western Australia) is an erudite collection of essays on the relations of law and literature. As the title suggests, it also explores the limits at and beyond which the processes of law become problematic—the borderlands between law and justice, between the facts and the deeper truths. There is much in the book to interest the general reader as well as the lawyer, and the often complex issues it raises for consideration are made readily comprehensible.

Most would assume that law is concerned only with matters of fact and deducible probability. It hates mystery and ambiguity. But in pursuit of the facts, stories are told as a matter of procedural fairness, conflicting points of view compared and evaluated, alibis heard and considered. As Hasluck says, “The system depends upon stories being told well”, and the career success of advocates in criminal law depends on their skill in relating their clients’ stories, or, if they represent the other side, the story as understood by the prosecution.

For its part, imaginative literature repeatedly impinges on the arena of law, being so often “concerned with transgression, moments of personal dilemma, and the dangerous and pernicious side of things”, as Hasluck reminds us. The law and its processes are central to the plots of countless novels from Dickens’s *Bleak House* and Melville’s *Billy Budd* to Kafka’s *The Trial*, where, as Hasluck says, the law is seen as “an indeterminate text shaped by power relationships”, as many postmodernists would argue it indeed is.

Advocates regularly reduce complex truths to what are effectively lies upon reality, though Hasluck does not put it quite so strongly:

The experienced advocate knows how to make a single moment or a few words stand for much else in the same way that a writer will use an allegory or symbol to represent a host of complexities. A skilful advocate is adept

at reducing the story to a short but effective form.

Thus “the liaison between law and literature may be more intimate than is commonly suggested”. Injustice can result from the law’s insistence on its rules of evidence, which include immediate relevance and verifiable fact, “excluding complexities and subtle truths about human behaviour”, truths embodied persuasively in numerous works of imaginative literature.

As in literature, words are often open to conflicting interpretations in legal cases, and life can rest in the balance. In a famous English trial a burglar was sentenced to death on the basis of having, when confronted by a policeman, shouted to his armed accomplice, “Let him have it!” That could be interpreted as a command to surrender the weapon, but was interpreted as a command to kill. In one of my favourite films, *The Conversation* (1974), the words between two lovers walking in a public park are overheard and taped, via high-tech, long-distance listening equipment operated by a specialist employed by the woman’s husband. One of the lovers says to the other, “He’d kill us if he could.” The intonation is not entirely clear. On playing that passage on the tape, the specialist concludes that his employer is a likely killer, and his sympathies thenceforth attach to the lovers. When, towards the end of the film, he realises that the words were “He’d kill *us* if he could”, he knows that the lovers are the intending killers, but it’s too late. They’ve just killed the husband.

In one of the chapters, Hasluck examines in some detail the novels of Ian Callinan, mostly written in the years when Callinan was sitting on the High Court. It is extremely rare for a judge to be at the same time a novelist. Callinan’s novels involve issues of justice and injustice explored within conflictive character-relationships and conflicting philosophies. One of them, *The Lawyer and the Libertine*, is also a thinly-disguised characterisation of real Australian postwar politicians. Hasluck, I think, devotes too many words to retelling the plot of this novel, which he finds lacking in point of theme and implausible in its characters. Having read *The Lawyer and the Libertine* I assume it was intended primarily as an entertaining and overtly reductionist novel on the cultural and political themes it treats. Callinan makes no pretence at being fair to the unfathomable complexities of anyone’s human nature, though he is certainly interested in frailties and pretence. Much of Hasluck’s chapter “Beyond the High Court” is devoted to Callinan’s novels, and given the quite severe critique being offered, one wonders why. Is it enough that they show “the way in which the novel

can be used to advantage in exploring significant legal themes”?

I found more interesting and revealing Hasluck's consideration, in another chapter, of his own novel *Dismissal*, in which he details his narrative strategies in fictionalising the events of 1975 Canberra.

Legal Limits has a wider ambit than the interrelations of law and literature, though the symbiosis between the two is always in the background. Hasluck is concerned, among other things, with the potential injustices involved in tribunals set up to prosecute not just behaviour but speech, and (effectively) thought crime. If a person has some hitherto unheard-of right not to be offended, what then becomes of free speech?

In this brave new world of kindspeak and crimespeak, admission of guilt is always presumed to involve remorse, but there is no reason why it necessarily should. J.M. Coetzee in his novel *Disgrace* offers an instructive case: a university lecturer pleads guilty to the crime of sexual harassment, but will not issue an apology. “You charged me, and I pleaded guilty to the charge. That is all you need from me.” No it's not, the chairman replies, “we want more”. A public apology has to be issued in writing, appropriately phrased, even if the offending party does not feel remorse. We now live in an Orwellian world. Personally, having read Orwell, I think Big Brother should be shot, and I would shoot him myself, without apologies to anyone.

The case of Andrew Bolt is handled very effectively, and Hasluck is perfectly correct in saying:

The gravest threat to human rights, a crime against humanity perhaps, is to subvert the power of independent thought by depriving a person of the capacity to convey what he or she feels deeply. The language of human rights will be deficient if it speaks only in abstractions and fails to acknowledge this reality.

Of course he recognises the limits of free speech, “dubious utterances or activities on the borderline of legitimacy”, including racial vilification and defamation—the latter, properly speaking, beyond the borderline.

Hasluck subjects international systems of human rights to merited scepticism and suspicion. Fortunately, he argues, they are constrained by their need to be implemented by nation-states and local judges, and any application will necessarily be affected and modified by local cultures. That is faint reassurance, if a little better than nothing.

Flux is a major theme. Things change. Public and private attitudes transform themselves from

decade to decade on a host of legally-relevant issues, including homosexuality and adultery, the former once a crime, the latter once a fault in the eyes of a divorce court. In Shakespeare's time you could say “Adultery? Yes, I'm guilty of it, but that was in another country, and besides, the wench is dead”, and you would be heard with an ironising, sceptical smile. Today there's no longer the need to explain, it's so common it's practically acceptable. Legally it's entirely acceptable.

Hasluck offers a good example of shifting sands, the Orr Case. In the late 1950s Sydney Sparkes Orr, Professor of Philosophy at the University of Tasmania, was accused by the father of one of his students of having seduced her, and was promptly dismissed by the university. His defence went all the way to the High Court but was unsuccessful. Academic opinion sided almost entirely with him (it was the Age of Free Love, loudly promoted by academics and other intellectuals, just one decade before the very different Age of Feminism), and Orr's vacated chair was blacklisted by the academics' union. By the 1990s, thirty years on, academic opinion seemed to be wholly against him, as exemplified by Cassandra Pybus's book *Gross Moral Turpitude*. The shift meant nothing morally, of course. There was no “progress” here. Academic attitudes had shifted, and one set of prejudices had been replaced by another. Nothing, certainly not “the facts”, had been objectively resolved, or ever will be.

Other issues dealt with in this thought-provoking collection of essays include protective detention (where a sexual criminal, for instance, can be detained beyond his period of sentence in the public interest), and the question whether judges should be appointed as court-annexed mediators:

If unsophisticated complainants are encouraged to initiate legal proceedings in the belief that their rights will be vindicated, it might seem confusing and counter-productive to require them to then participate in a process of court-annexed mediation in which they feel obliged to compromise their claims. Outcomes of this kind might gradually erode the standing of the courts as open forums for the vindication of rights, bearing in mind that settlements in the course of mediation will inevitably be negotiated behind closed doors.

It is a useful process in certain circumstances, but in Hasluck's view it should always be conducted “in conjunction with a credible threat of judicial determination”.

The book raises other issues to do with the borderlands of law, too many to be adequately treated

in a brief review such as this. At the end of the collection there is an afterword by Peter Johnston on Hasluck's early historical novel *The Bellarmine Jug*, which can be used, Johnston shows, "as a means of jurisprudential study" around the Hart-Fuller debate and its consequences (should morality have an essential role in legal determination?).

Legal Limits should be required reading in any university course on the inter-relations of law and literature. The post-structuralists and deconstructionists within literature departments have done their best to undermine a system of law they view as hegemonic and in need of white-anting, and it is important that more constructive and convincing cross-disciplinary studies such as Hasluck's be read alongside them.

Philip Ayres's most recent book is Fortunate Voyager: The Life of Ninian Stephen (Miegunyah, 2013).
