

Resilience of Authority in Law

What is authority?

- Represents an authentic source
- Validity
- Truth
- Weight
- A binding rule
- The most reliable source of a binding rule
- The most persuasive or convincing iteration of a binding rule

Bibliographic perspective of law

- Publishing perspective
- Publishers have an interest in authority
- Langdell: ...law can only be learned and taught in a university by means of printed books...if printed books are the ultimate sources of all legal knowledge,—if every student who would obtain any mastery of law as a science must resort to these ultimate sources...
- Authority is not only established by reports series but also indexing tools.

Berring and Cognitive Authority

Cognitive authority, that is the process by which a person accepts the veracity or status of a sources is, in law, bestowed by publication. (Berring 2000)

The centrality of classification in the common law which has created a way of not only navigating rules, but has also created a structure within which law may be comprehended. (Berring 2000)

Free text searching enables a researcher to engage with the database in an idiosyncratic way. So searching can be completely unstructured. (Berring 1994)

It was the access to the complete unqualified range of West's judgments containing contradictory legal propositions which led to the development of *legal realism*. (Berring 1987)

Berring becomes authoritative

- ‘Nearly everything else written on the topic accepts and elaborates on Berring's ideas. Because his ideas have been so widely accepted, anyone wishing to understand the influences of legal information on American legal culture and the development of American law must start with an understanding of the model that he developed over the course of his research and ruminations.’ (Danner 2007)
- ‘The law is not simply a body of information or knowledge, but a body of authoritative information, *and the legal process cannot be dependent upon the medium of communication whose reliability is open to question*. Authority and authenticity have been embedded in print materials. They are not yet embedded as well or as clearly in electronic materials.’ (Katsh 1995)

Predictions

- ‘The future of the profession is tied, therefore, to how invested it is in an increasingly outmoded information paradigm or whether it will be able to reorient itself in response to a new communications environment, *one that may ask lawyers to approach conflict in new ways and one that does not support the status of professions in the same way as occurred in the past*’ (Ross 2002)
- ‘For present purposes, this legal and historical scholarship is significant because it supports the general proposition that *shifts in how law is communicated affect the way law is understood and practiced*. Prior shifts in the communication of law contributed to, or caused, law to change and develop.’ (Kuh 2008)

Predictions

- Lawyers will develop incoherent arguments or pursue marginal cases supported by weak authority. (Kuh 2008)
- Online access to law will expose law's lack of coherence and structure.
- Law will become subjective and malleable.
- Expertise in law will only arise through specialisation. (Berring 1987)

Testing the hypotheses

- For over a decade the assumptions weren't tested by empirical research
- Judith Lihosit 'Research in the Wild: CALR and the Role of Informal Apprenticeship in Attorney Training' (2009)
- My own research 2013 interviewing law librarians.
- They were qualified by length of service. It was essential that the librarians had at least 20 years' experience. I had picked the mid-1990s as the period when the World Wide Web became a mature end user service for consumers and researchers. Prior to 1995 there were expensive time based dial-up services and CDs which usually only librarians were able to access. So the mid-1990s are the years when legal practitioners were commencing research from their desktops. All the librarians interviewed had between 20 and 25 years' experience in law libraries. One of the law librarians had retired and her experience was valid up to 2005.

In terms of respect for authority not much has changed.

- Lihosit: legal practice is analogous to an apprenticeship
- Law librarians: technology had changed; the notion of the library as place had changed; the embedding of library expertise in practice groups had changed but the fundamental role of a library in inculcating good authoritative practice had not.

How can this resilience be explained?

- Theories of information science can help us understand how authority is established in the legal profession.
- It is arguably not dependent on hard copy publishing, or publishing at all.
- Social informatics
- Cognitive authority
- Classification
- Sense making
- Small worlds
- Law as a sociotechnical practice
- Law as a community of practice

Social Informatics

The discipline which explores the interaction between technology and institutional use of information.

ICTs [Information and Communications Technologies] do not exist in social or technological isolation. Their 'cultural and institutional contexts' influence the ways in which they are developed, the kinds of workable configurations that are proposed, how they are implemented and used, and the range of consequences that occur for organizations and other social groupings. (Kling 2000)

NB Information is social or collegial.

Patrick Wilson—Cognitive authority

‘Cognitive authority is curiously different from the other familiar kinds of authority, that of the person who is in a position to tell others what to do. Administrative authority, as we can call it, involves a recognised right to command others, within certain prescribed limits...Cognitive authority is influence on one’s thoughts that one would consciously recognise as proper.’ (1983)

The focus is the use or consumption of knowledge as produced by a particular knowledge industry. Wilson characterises these works as representing ‘conversations’ amongst professionals. The community of professionals judges, then rates, and validates this knowledge.

Classification

- Berring writes of classification as if the taxonomy of law was objective and fixed.
- Classification doesn't necessarily operate this way.
- Bowker and Star *Sorting Things Out: Classification and its Consequences* (1999)
- While the process of classification can be ideological it ultimately becomes invisible.
- *Boundary objects* are those objects that both inhabit several communities of practice and satisfy the informational requirements of each of them. Boundary objects are thus both plastic enough to adapt to local needs and constraints of the several parties employing them, yet robust enough to maintain a common identity across sites. They are weakly structured in common use and become strongly structured in individual-site use.

Perspective and context

- Sense making (Dervin)—context is everything
- Small worlds (Chatman)
- Law as a sociotechnical practice
- Law as a community of practice

The Common Law

As authors and editors, they were likely to be keeping an eye on each other's work and on any decision likely to affect their work. As barristers they belonged to a tightly knit class centralised in a small part of London. It was in many ways a class ideally suited for the protection of liberty and the rule of law. It was a moody murmurous class. Its members were prone to gossip and asperity amongst themselves, conscious of the infirmities of each other and of the judiciary, in constant touch at breakfast, dinner, lunch and tea, or while moving to and from court, and eager to pass on any errors in law books or developments which might affect their accuracy... Their works reveal a general professional consensus. Writings of that kind generated out of that professional tradition are capable of constituting a source of law in their own right. *ACC v Stoddart* [2011] HCA 47 at [135] per Heydon J