

ABRIDGEMENT AND CONFERRAL OF JURIDICAL PERSONALITY

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Key words: Juridical personality, meta-law, epideictic rhetoric, tropes, artefact, slavery.

Abstract

The significance of this paper is in its identification of a supra-legislative process, *a priori* to the legal system, delivered as rhetorical dialectic among great state orators. The paper's objective is to examine this rhetorical process, to see how it might be constituted and superadded to the legal system's recognition of juridical personality. Juridical personality is important in domestic law as well as in international law, because it indicates who has access to the legal system. This article is structured to pose the question as to how this meta-system of law might be superadded onto the legal system. The article's argument tries to prove that such a meta-law consists of a special kind of public oratorical rhetoric, comprised of special arrangements of rhetorical tropes

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embedded in epideictic rhetoric. The paper's methodology arises from the dialectic discourse between Bentham and Hart, in which laws were considered to be artefacts of the human will. The article will suggest that with a natural devolution of juridical personality to the most reasoning and legally competent persons always in operation, the sovereign could simply alter it, by application of epideictic rhetoric. This could control the cohort of juridical personalities in the sovereign's sole interests.

Introduction

The significance of this paper is in its identification of a supra-national legislative process, *a priori* to the legal system, contrived as rhetorical dialectic among great state orators, to the sometime detriment of members of society. This dialectic operates on people's juridical personalities,¹ namely, their ability to engage in the legal system and seek its remedies. The paper is even the more significant, as it deals with transnational legislative rhetoric beyond the control of the subject populations. Further, it revives a moribund field of scholarly rhetorical theory, formerly taught widely in the schools as epideictic oratory, but now used mainly at the transnational level. Also, the paper conducts a critical theoretical analysis of juridical personality, a concept masked by the apparent quality of the legal system. While society lauds the intelligence and subtlety of its legal system as its mode of dispute resolution, it ignores discussion of whether the system is accessible.

The paper's objective is to critically examine this rhetorical process, to see how it might be structured. The concepts in this article are not new. Rather, their currency has fallen out of the education system, even although the state uses these techniques to great effect, to this day. This discussion tries to revive the importance of these hidden instruments of governance, to explain their effect on rights and the courts' jurisprudence.

¹ See B Smith, 'Legal Personality' (1928) 37(3) *The Yale Law Journal* 283, 283.

Juridical personality is important in domestic law as well as in international law. It interacts with the meta-legal system of international law. Its operation could be observed in Germany's mass manufacture of concentration camp corpses, which came after the historically and politically intelligible preparation of what Arendt called the living corpses.² It was intelligible because it followed a plain logic of necessary and catastrophic movements. First was the destruction of the juridical person.³ Then came the murder of the moral person.⁴ Finally came the destruction of unique identity, the spontaneity through which a person might still call an action "mine".⁵ It was a necessary and catastrophic process of reducing human persons to animal slavery, and this article investigates the necessity in that process. Only that human destruction beginning with obliteration of the juridical and moral personality could create this kind of systemic significance.

It was a three-part process of destruction. Annihilation of the juridical personality required the deprivation of all civil and political rights. It made some categories of person outside the law's protection, through denationalization, and consequently making individuals into outlaws. This meant that the concentration camp inmates were nonagents. They had no capacity for civil or criminal legal action. Mostly, these individuals were innocent. They were jailed only for who they were. Murder of the moral persons required incapacitation of their consciences' operation. For this, the concentration camps made death anonymous. This robbed death of its natural meaning as the conclusion of the fulfilled life.⁶ This destruction of individuality began with the removal of all distinguishing characteristics, it continued by sadistic torture, and proceeded with systematic ruin of human bodies. It was calculated to destroy everyone's

² H Arendt, *The Origins of Totalitarianism*, (Meridian, 1958) 447.

³ *Ibid* 447.

⁴ *Ibid* 451.

⁵ *Ibid* 453.

⁶ *Ibid* 452.

human dignity.⁷ More than six million human beings died in Germany during NAZI times, but no one could ascertain how many juridical persons perished first.

Arendt's analysis shows catastrophic and irresistible movements against the interests of the people. Apparently, they were powerless to resist this process of regulation against human character, where people were punished and destroyed merely for acting according to their natural characters. Therefore, this article proposes to critically investigate the rhetoric associated with those catastrophic changes, referred to above. Argument is structured to pose the question as to how this apparently *a priori* system of law might be superadded onto the legal system. Since it is *a priori* to domestic law, and to an extent, extrinsic to the legal and legislative systems, a better term for it would be "meta-law",⁸ for purposes of this paper's discussion. Therefore, this article's argument tries to prove that such a meta-law consists of a special kind of public oratorical rhetoric, comprised of special arrangements of rhetorical tropes. Directly relevant to this context, Quintilian called a trope the conversion of a word or phrase, from a proper sense to another kind of signification, noting that tropes were deployed in order to increase greatly a word or phrase's force or power.⁹

The paper's methodology arises from dialectic discourse between words of Bentham and words of Hart. Bentham's view was that laws were only either commands, prohibitions, or, permissions. Only as such, they were artefacts of the human will.¹⁰ For Bentham,

⁷ Ibid 454.

⁸ The term "meta-law" means outside, but essential to, the practice of law. Meta-legal would mean something in the ethical domain *a priori* to law, but affecting and circumscribing court doctrines. It is likely that meta-legal process subsists in the public mind as an unconscious process.

⁹ Quintilian, *Institutes of Oratory*, VIII. 6. 1.

¹⁰ Artefact. Something observed in a scientific investigation, or experiment, that is not naturally present, but occurs as a result of the preparative or investigative procedure. *Oxford English Dictionary*, 2nd edn, (Clarendon Press, 1989).

such artefacts excluded the subsistence of the natural law,¹¹ based as it was on natural kinship relations. However Hart rebutted this by noting that legislators must still be guided by natural and rational precepts, and they must use these natural laws with reason to critique the current law.¹² Thus, arguably, there is dialectic discourse between those who say law is merely commands, prohibitions or permissions, and those who say legal reasoning must be guided by natural law and reason. It is from this dialectic that the artefacts of the human will might arise. They may be unintended consequences of a rhetorical process. They might arise due to the rhetorical constriction of legal reasoning to mere commands, prohibitions or permissions. Thus, this article proposes an investigation into the kind of tropes giving rise to those catastrophic changes, as referred to above.

Argument begins with an introduction to the 2008 Australian High Court case law on slavery, as it apparently ignored grievances associated with the plaintiff's status. Then follows an examination of Gorgias' *Encomium to Helen*,¹³ to see how epideictic rhetoric could veil catastrophic meta-law within publicly-acceptable procedural systems. Discussion follows through the arguments of later rhetorical scholars, to show how a rhetorical device might be used to trigger inevitable and necessary catastrophic shifts, beyond the resistance consequent on public cognisance. Argument proceeds by applying these well established, but rarely considered, rhetorical ideas to the legal doctrines surrounding juridical personality and slavery. This step is essential because juridical personality seems to be subject to court doctrine - taken and given apparently capriciously at any time, with serious and possibly unintended consequences. An examination of the nature of juridical personality will require a prior brief consideration of the nature of rights, duties, privileges and their correlates. This is based on the

¹¹ Jeremy Bentham, *The Collected Works of Jeremy Bentham* (Oxford University Press, 1990), "Of Laws in General" 26

¹² H L A Hart, 'Bentham and the Demystification of the Law' (1973) 36(1) *The Modern Law Review* 2, 4.

¹³ D M MacDowell, (ed), *Gorgias, Encomium of Helen* (Bristol Classic Press, 2005).

premise, discussed above, that the destruction of juridical personality is necessarily *a priori* to the systematic annihilation of rights.

The article will suggest that, with a natural devolution of juridical personality to the most reasoning and legally competent persons always in operation, the sovereign could simply alter the effluxion of this devolution, by application of epideictic rhetoric. For example, same-sex marriage, presented as the trope of “marriage equality”, conferred juridical personality on a cohort of people by altering this sovereign process. This could control the group of juridical personalities, in the sovereign’s sole interests. It tends to sustain the view that meta-law is an artefact of sovereign artifice, to control access to the courts, in the sovereign’s sole interests.

Slavery

As discussed above, slavery is the end point of annihilating the juridical personality. In the 2008 Australian High Court case of *R v Tang*,¹⁴ the High Court upheld Mr Tang’s slavery conviction, based on a breach of the criminal statutory provision,¹⁵ but declined to take on board the more expansive understanding of the ‘powers attaching to the right of ownership’ that the Australian Human Rights and Equal Opportunity Commission (HREOC) had put forward. The HREOC, as intervener, constructed its view of the law on slavery based heavily on the *Kumarac Case*.¹⁶ It identified a non-exhaustive list of the 13

¹⁴ (2008) 237 CLR 1. Mr Tang had operated a Melbourne brothel and was convicted of slavery.

¹⁵ Slavery has been a criminal offence in Australia since the Imperial Slave Trade Act of 1824. In 1999, the Commonwealth of Australia Government inserted a collection of slavery offences into division 270 of the Criminal Code Act 1995 (Cth). Section 270.1 of the Criminal Code defines the term ‘slavery’ as “the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person”. It is an offence under section 270.3(1) to: possess a slave, or exercise over a slave any of the other powers attaching to the right of ownership; engage in slave trading; enter into any commercial transaction involving a slave; or exercise control or direction over, or provide finance for, any act of slave trading or any commercial transaction involving a slave. *Criminal Code 1995* (Australia), div 270.

¹⁶ *Prosecutor v Kumarac*, Case No. IT-96-23 (22 February 2001).

indicia of slavery that would infer a power attaching to a right of ownership had been exercised. At the head of that list was the partial or total destruction of the juridical personality of the victim.¹⁷ However, since slavery was said to have been unknown to the English common law,¹⁸ people with the status of a slave, or *de facto* slaves, could not benefit from manumission.¹⁹ In this way, their *de facto* status of slavery was irremediable at common law.

The International Court for the Former Yugoslavia (ICTY) had heard some forced labour cases under the heading of enslavement. Enslavement came under Article 5(c) of the Statute of the Tribunal.²⁰ Forced labour also might be charged as a violation of the laws or customs of war under Article 3 or as a form of persecution pursuant to Article 5(h).²¹ The ICTY carried out a detailed analysis of the required elements of enslavement in *Prosecutor v Kunarac*.²² The facts of that case were grounded on various acts of sexual abuse. The Court elaborated a definition of enslavement in *Kunarac*, then applied it in the forced labour case of *Krnjelac*.²³

In *Kunarac*, the defendants were charged with enslavement for, among other things, detaining two girls in a house for many months and treating them as their personal

¹⁷ Amicus Curiae Brief, *R v Tang* (High Court of Australia) (HREOC, Submission in Support for Leave to Intervene and Submissions on the Appeal, 5 May 2008)

¹⁸ W Blackstone, *Blackstone's Commentaries Vol, III* (William Young Birch, 1883) 79.

¹⁹ Although there is evidence that villeins could be manumitted. Blackstone, above 18, 95, 97, 400.

²⁰ *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

²¹ Article 5 deals generally with 'crimes against humanity'. Both 'enslavement' and 'persecution' are listed there. Article 3 deals with violations of the laws and customs of war. Slavery has been held to be a violation of customary international law. See *Krnjelac* Trial Judgment paras. 352-353.

²² *Prosecutor v Kunarac*, Case No. IT-96-23 (22 February 2001).

²³ *Prosecutor v Kunarac*, Case No. IT-96-23 (22 February 2001) and Case No. IT-96-23-A (12 June 2002) (Appeals Chamber); International Labour Office, 'Casebook of Court Decisions', 2009, p. 19.

property. The girls had to do all the housework and comply with all the defendants' sexual requirements.²⁴

The question before the Trial Chamber was what was meant by enslavement as a crime against humanity under Article 5(c). The Trial Chamber reviewed the applicable laws. These included the Slavery Conventions,²⁵ the Forced Labour Convention,²⁶ the Nuremberg Charter,²⁷ decisions of the European Court of Human Rights,²⁸ including *Van der Musselle*,²⁹ and the works of the United Nations International Law Commission.³⁰ The Trial Chamber held that enslavement was a crime in customary international law, which consisted of the exercise of any, or all, of the powers ascribing to the right of ownership over a person,³¹ for which property might be considered as a trope. The Trial Chamber decided that enslavement incorporated elements of forced labour and stated several factors as relevant.³²

The Appeals Chamber confirmed the chief thesis of the Trial Chamber that the customary concept of slavery, which was defined in the 1926 Slavery Convention and referred to as chattel slavery, had developed further to include various new forms of

²⁴ International Labour Office, *Casebook of Court Decisions* (International Labour Office, 2009) 19.

²⁵ *Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926*.

²⁶ *Convention concerning Forced or Compulsory Labour* (Entry into force: 01 May 1932).

²⁷ *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 1945.

²⁸ See European Court of Human Rights, *Guide On Article 4 Of The Convention Prohibition Of Slavery And Forced Labour* (European Court of Human Rights, 2014).

²⁹ *Van der Musselle v Belgium* - 8919/80 [1983] ECHR 13 (23 November 1983).

³⁰ See the *Statute of the International Law Commission* 1947.

³¹ *Kumarac Trial Judgment* para 539.

³² Elements of control and ownership: the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example: the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity; psychological oppression or socio-economic conditions. Further indications of enslavement include: exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship, sex, prostitution and human trafficking. International Labour Office, *Casebook of Court Decisions* (International Labour Office, 2009) 20.

slavery. Each of these was also based on the exercise of any or all of the powers attaching to the right of ownership, where a right is nothing more than a claim. This claim might be enforced in the court if the court were to ascribe sufficient juridical personality to the claimant. The Appeals Chamber held that in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there was certain destruction of the juridical personality. This destruction was greater in chattel slavery, but the differences were only of degree. The Appeals Chamber held that these new forms of slavery formed a part of enslavement as a Crime Against Humanity under the customary international law.³³

The High Court of Australia ignored the argument based in international case law, slavery being unknown to the English common law. It only existed for the Court as a statutory crime. The differential status issues appeared to be non-justiciable. The fact that slavery existed exposed a paradox in the Court's methodology. Slavery must be partially non-justiciable, by virtue of the Courts' omitting to cognise people of abridged juridical personality. This failure of cognition arguably suggests an elision in the court's jurisdiction. The next section examines this kind of elision and some of its consequences.

A Priori or Meta-Law

Around the world, governments have been locking up enslaved victims of human trafficking as if they were the perpetrators of that heinous international crime.³⁴ The irony demands explanation. They could secure express public consent for this merely on the basis of the trope "turn back the boats". Arguably, this was at once catastrophic in its consequences, and at once ironic, while innocent people were either turned back into the

³³ *Kunarac Appeals Judgment* at para. 117.

³⁴ S Hoffman, *Fear, insecurity, & risk: Refugee journeys from Iraq to Australia*, Doctoral dissertation, 2010, Retrieved 20 November 2014 <<http://researchrepository.murdoch.edu.au/4459/>>.

wild seas, or jailed without judicial hearing for an indefinite time. It was a mass making of jailed innocent prey, without the victims' ability to move the court to exercise the public power in their interests. They were people with abridged juridical personality. Juridical personality is that unique form of personality known only to the law. Juridical means symbolic,³⁵ and Smith argued that society could confer juridical personality.³⁶ It is unclear how society could be moved to do this, or whether it was true.

Sometimes, juridical personality coincides with real human personality. Sometimes it does not. It is of central concern in international law because of the differential status of personalities in the laws of states, citizens and others. International instruments are reduced routinely to municipal law, using due and proper process. The resultant regulations are no doubt lawful. This process has its genesis in great kings speaking to each other, in the public domain, on matters of positioning by arms, with great power of oratorical voice. Such international instruments are thus the language of kings and queens as between themselves, and, therefore arguably within the field of the *jus cogens* in international law.³⁷ This could be illustrated as follows. The nature of the civilian procedure in the English Court of Chivalry arose in the 1631 case of *Rea v Ramsay*,³⁸ in which the Court of Chivalry convened to award a trial by duel. However, later the King stopped the fight. Foreshadowing a civilian procedure, Chief Justice Fineux was said to have told King Henry VIII that the jurisdiction of the Court of Chivalry belonged to the law of arms and war between kings, and therefore not to the law of England.³⁹ This suggests that sovereign international discourse cannot be justiciable in municipal courts.

³⁵ KF von Savigny, *Das Recht des Besitzes: Eine civilistische Abhandlung* (Gerold, 1865) 206.

³⁶ Smith, above 1, 283.

³⁷ A peremptory norm is also called *ius cogens*. It is Latin for "compelling law", and is a fundamental principle of international law. A *ius cogens* norm is accepted by the international community of states, and from which no derogation is allowed. States generally agree that *ius cogens* includes the prohibition of genocide, maritime piracy, all forms of slavery, torture, non-refoulement and wars of aggression and territorial aggrandisement. M C Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59(4) *Law and Contemporary Problems* 63, 68.

³⁸ *Cobbett's Complete Collection of State Trials, Vol III*, (Hansard, 1809) 483.

³⁹ *Ibid* 483n.

It is a jurisdictional elision, as municipal courts are unable to adjudicate matters of parties to international wars.

Many catastrophic laws have their narrative genesis in the *jus cogens* of international law. By way of illustration, emanating from the China warring states period, the *Lüxing* chapter of the *Shangshu*,⁴⁰ dating from no later than the fourth century BCE, reported that Chi You created social disorder. This disorder spread throughout other lands to otherwise peaceful people, and thus, their kings had to learn how to control it. The barbarian Miao people were the first to respond to these international conditions. They controlled it before anyone else, by ignoring virtue and resorting to restraining people with cruel punishments. They created what they called the five oppressive penalties, and just called them the law. This simple effect of the calling of something the law arising from a purely rhetorical act, was thus *a priori* to law. In consequence of a mere process of naming, and in the face of outside public threats of disorder, they killed and slaughtered the innocent, excessively chopped off body parts, severed ears, conducted beatings and branding. The people's juridical personality was abridged by a rhetorical act of the state's rulers.

The *Lüxing* chapter went on to say, by way of hymnal oratory, that the "god-on-high" took pity on the innocent people and created terror to put an end to the oppressive rulers,⁴¹ inferring some kind of external invasion. This suggested an ethical manoeuvre of some superadded sovereign power, somehow veiled by hymnal oratory from ordinary public perception. The next section discusses a basis of this kind of rhetorical manoeuvre.

⁴⁰ 书经, Marquis Lü on Punishments, chapt 55.

⁴¹ M Puett, 'Sages, Ministers, and Rebels: Narratives from Early China Concerning the Initial Creation of the State' (1998) 58(2) *Harvard Journal of Asiatic Studies* 425, 436-438.

The Encomium of Helen

Rhetorical oratory delivers the three outcomes of pre-legal ethical deliberation: admonishment, exhortation and rebuke.⁴² This section investigates the foundations of rhetorical meta-laws, by reviewing their appearance in the time of the sophist Gorgias,⁴³ during the axial age.⁴⁴ Gorgias made quite a lot of money in his work of instructing wealthy people of high status, in the arts of wisdom, by means of public debates and private instruction.⁴⁵ This indicated his instruction had perceived high value to the ruling classes, from which it might be inferred that his instruction was useful in ruling. The *Encomium of Helen* was his rhetorical exercise, apparently designed for didactic purposes.⁴⁶ It was the language of inherent excellences, different from hymn⁴⁷ and epainos⁴⁸ because an epainos was brief, but an encomium was developed artistically.⁴⁹ Thus, Gorgias' method was one of artifice.

In *The Encomium to Helen*, Helen was the most notorious woman of Greece. She abandoned her husband Menelaus to run away with Paris, Prince of Troy. The encomium explained it was wrong to apportion blame to Helen. After epitomising her

⁴² Aristotle, *The Nichomachean Ethics* (Harvard University Press, 1999), 67.

⁴³ GB Kerferd, *The Sophistic Movement* (Cambridge University Press, 1999) 45.

⁴⁴ "The most extraordinary events are concentrated in this period. Confucius and Lao-tse were living in China, all the schools of Chinese philosophy came into being, including those of Mo-ti, Chuang-tse, Lieh-tsu and a host of others; India produced the Upanishads and Buddha and, like China, ran the whole gamut of philosophical possibilities down to skepticism, to materialism, sophism and nihilism; in Iran Zarathustra taught a challenging view of the world as a struggle between good and evil; in Palestine the prophets made their appearance, from Elijah, by way of Isaiah and Jeremiah to Deutero-Isaiah; Greece witnessed the appearance of Homer, of the Philosophers—Parmenides, Heraclitus and Plato—of the tragedians, Thucydides and Archimedes. Everything implied by these names developed during these few centuries almost simultaneously in China, India, and the West, without any one of these regions knowing of the others." K Jaspers, *The Origin and Goal of History* (Yale University Press, 1953) part I, chap 1.

⁴⁵ Kerferd, above 43, 26.

⁴⁶ Ibid 30.

⁴⁷ Hymn. A book, film, or other composition praising someone or something. Oxford English Dictionary, above 10.

⁴⁸ Epainos means praise. The Oxford Classical Dictionary, (Clarendon Press, 2012) 505.

⁴⁹ GA Kennedy, *Progymnasmata – Greek Textbooks of Prose Composition and Rhetoric* (Society of Biblical Literature, 2003) 108.

birth and her marriage, it suggested four possible causes for why she went to Troy. They were: (a) mere chance by virtue of the gods; (b) excess of force; (c) persuasive oratory; or, (d) the exigencies of love. Each of these was overpowering and irresistible. If she were subjected to any of them, she would be blameless. Rather than praise Helen, the encomium defended her from criticism. Gorgias demonstrated that speech was too powerful a sovereign. It could either arouse or assuage fear, sorrow, pity or joy.⁵⁰ His method suggested such overwhelming force, that the audience could only agree Helen was a mere pawn in the events of her life.

However, the *Encomium to Helen* pursued a schema of truth. Its stated purpose was to use speech for constructing the truth. It advised against any action based on either contingent facts or opinion,⁵¹ because speech could have the same bodily effect as drugs. Action followed inevitably and necessarily from belief. With a mastery of the art of rhetoric, the speaker could compel people to do anything he wanted.⁵²

The encomium demonstrated that persuasion could be veiled as mere instruction or a demonstration to professionals of oratorical skill. Gorgias could captivate the learned, using their own professional discourses,⁵³ thereby minimising opposition to his veiled message. Their professional discourses gave him access to their systems of command, which he could interweave into his apparent truth.

The question arises as to how Gorgias could ground his rhetoric, sufficient to move the will of the audience physically, as might a law physically move an audience either to remove or confer juridical personality.

⁵⁰ Gorgias, above 13, 12.

⁵¹ Ibid 14.

⁵² Ibid 15.

⁵³ Ibid 15.

Gorgias' Epideictic Style

This section critically examines the techniques of Gorgias. Rhetoricians agreed that there were only three kinds of rhetoric. The first was the deliberative, about public affairs, or in general to persuade someone to do something or accept a point of view. Deliberative rhetoric would have a topic of either expediency or in expediency, by means of exhortation or dehortation. Forensic rhetoric was where someone sought to defend or condemn someone's action. It had a subject of justice or injustice and was by means of accusation or defence. Epideictic rhetoric was also known as demonstrative, declamatory, panegyric or ceremonial. It was the most ornate kind of oratory, concerned primarily with the present.⁵⁴ It tended to shade into the other two types. Orators used epideictic rhetoric for the particular topics of honour and dishonour, achieved by means of praise and blame.⁵⁵ With these bases, the epideictic style could be used for either denunciation or promotion, or even the kind of "terror" calculated to put an end to oppressive rulers, as discussed above. It achieved these ends by dealing with virtues and vices, personal assets and achievements.⁵⁶

A partial list of pairs of virtues and vices was: courage and cowardice; temperance and indulgence; justice and injustice; liberality and selfishness; prudence and rashness; gentleness and brutality; loyalty and disloyalty.⁵⁷ Other assets and achievements could be used. Examples could be physical attributes, external circumstances such as family background, education, economic status, political, social and religious affiliations, and friends; achievements, such as work achieved, services rendered, honours won, offices

⁵⁴ E P J Corbett and R J Connors, *Classical Rhetoric for the Modern Student* 4th edn, (Oxford University Press, 1999) 23, 24.

⁵⁵ Ibid 24.

⁵⁶ Ibid 127.

⁵⁷ Ibid 128.

held, wise sayings and testimonials.⁵⁸ Epideictic rhetoric could thus be deployed to confer differential status, separating out those of such a status that they ought to be punished. It could be seen as the rhetoric of the ruler, because it suggested an inherent authority to confer or withdraw status. Those deploying epideictic rhetoric ornamented their oratory with references to the higher attributes, without requiring any reference to facts. Therefore, an artefact could arise where the epideictic rhetoric conflicted with the facts while being entirely plausible. This suggested conversion of a word, or phrase, from a proper sense to another kind of signification.

Epideictic rhetoric presented itself as a mere verbal artifice, an apparent contrivance of utterance in whatever discourse used, such as within the lawyers' or the physicians' discourses.⁵⁹ Considering it as the rhetor's contrived display of skill, the epideictic rhetor naturally demonstrated his skill before a learned audience, who alone felt qualified to assess his skill. The epideictic rhetor might advocate any position, however frivolous or however serious, just as long as he could parade his rhetorical skills.⁶⁰ He could hide his work behind a veil of skill demonstration. An example might be a King's discourse designed to demonstrate regal character while veiling a new policy announcement. The audience would enjoy the regal speech for its regality, and not cognise its artefact of a new command policy.

The Gorgian rhetoric did not show existing things to the audience and did not need to ground its argument in the facts.⁶¹ Because many underlying discourses might subsist, it opposed dogmatic adherence to one single discourse as the sole path to constructing the truth. Instead, it construed what was accepted as rational and transparent, underlying its efforts for persuasion. This allowed the rhetor to relate the presented virtues to whatever

⁵⁸ Ibid 129.

⁵⁹ S Consigny, 'Gorgias's Use of the Epideictic' (1992) 25(3) *Philosophy & Rhetoric* 281.

⁶⁰ Ibid 281.

⁶¹ Ibid 287.

discourses people already accepted and used.⁶² The rhetor might confer status, or lack of it, or even withdraw it, in an acceptable way to the audience, through the recognized protocols of a particular discourse being spoken.⁶³ For example, the rhetor proposing same-sex marriage would simply utter the human rights trope “marriage equality”, conferring the status of marriage on same-sex couples. With an understanding of the various professional discourses, their rules and their protocols, the orator could ignore reality and persuade the most learned, by reference to the discourse of their own cultus.⁶⁴ With a masterful display of the cultic procedural rules, the epideictic rhetor could veil the force of any inferred command within apparent audience agreement.

In consequence of this, Gorgias could offer an ornamented epideictic oration, purporting to admonish the audience with relevant facets of honor and virtue, appealing to the propriety of the audience cultus without reference to facts, but veiling direct commands to them. Arguably, these commands would be artefacts of the epideictic methodology, and would precipitate action, which evidenced meta-law. Later, when the audience realised that they had been moved beyond their cognizance, and without their express consent, this would amount to a catastrophic manipulation of the human will by an external human will.

The next section considers these artefacts of epideictic methodology, to see how sovereign commands could be transmitted into the mass audience.

⁶² Ibid 288.

⁶³ Corbett, above 54, 51. But consider the concept of cultus as apotropaic use of magical thinking to institutionalise a ritual perpetuation of the past, relying on public memory to ground deception by artifice, based on the lures of persuasive rhetoric.

⁶⁴ Cultus means the routinized ritual process, evidenced in public loyalty, representing certain inner principles and meanings, performed publicly without reference to those inner meanings.

Necessary, Inevitable and Catastrophic

Rhetoric was the art of using language either to persuade or to influence others. It was the body of rules a speaker or writer had to follow for expression with maximal eloquence. This meant rhetoric was, on the one hand, the ability to create an event, and, on the other hand, a mandatory code requiring obedience.⁶⁵

A rhetorical discourse had power to cause events. As examples, it could produce events of persuasion, of understanding, or of revelation. Rhetorical analysts attempted to account for these discourse events by identifying structures, patterns and figures constituting the rhetoric. However, there was a problematic and discontinuous relationship between the structures of tropes and the persuasion of rhetoric.⁶⁶ Description of the structure was inadequate to explain the cause of an event. The analyst could not ascertain which particular events a discourse had generated. Thus, rhetoric must have been a composite discourse of structure and event.⁶⁷ This suggested that the perception of any event inferred the prior and completed operation of some operative rhetorical structure, beyond the human consciousness.⁶⁸

⁶⁵ J Culler, 'On Trope and Persuasion' (1978) 9(3) *New Literary History* 607, 608.

⁶⁶ See below for a full discussion of tropes, where a trope will be described as the conversion of a word or phrase, from a proper sense to another kind of signification.

⁶⁷ Culler, above 65, 608.

⁶⁸ A suitable place to examine that fundamental part of the rhetoric called tropes, would be with Quintilian in his seminal work on rhetoric, *The Institutes of Oratory*. Quintilian called a trope the conversion of a word or phrase, from a proper sense of another kind of signification. This would be to increase the word or phrase's force. Quintilian, above 9, VIII. 6. 1. He categorized those tropes, which were most important and most frequently in use. In this categorization, he stated that the purpose of some was for adding to significance, and for others, merely for ornament. Some tropes were within words used correctly, and others were in words used metaphorically. Tropes could occur in single words, in thoughts, or inside the very structure of the composition. Quintilian, above 9, VIII. 6. 2. In the tropes used for adding to or amending significance, there might also be embellishment. However, some were intended only for decoration. Quintilian, above 9, VIII. 6. 3. The most common trope was metaphor. (A figure of speech in which a word or phrase is applied to an object or action to which it is not literally applicable: "when we speak of gene maps and gene mapping, we use a cartographic metaphor". Oxford English Dictionary, above 10.) Even the illiterate used it unconsciously. However, when used, it would always be apparent. Quintilian, above 9, VIII. 6. 4. It increased the profusion of the language by borrowing what the language

Kellner argued that, within rhetoric, there was an apparent absence of any identified nexus between superficial sentence structures and the innate fabric of the text, suggesting veiled transmission of information. This included the thought structure underlying the work⁶⁹ and suggested the text might subsist in the unconscious. However, tropes, in particular, had developed recognised and natural transforming powers, causing a rapid expansion in the field of rhetorical critique. This new cognition of trope-based critical strategies arose from the master tropes schema of renaissance rhetoric.⁷⁰ These were metaphor, metonymy, synecdoche, and irony. This four-trope system allowed so many ways of prioritizing the human experience that it deserved detailed attention.⁷¹

The four-trope series had a natural movement through a stable course. It was a natural series in a state of flux. There was movement from metaphor, as an *a priori* naming phase, to metonymy, the process of formalization within a cultus. Then there was a movement to the integrative synecdoche, where the audience assimilated the communicated information. Then there was a final audience awakening that all of these four methods were turns relative to each other, in sequence, and that the whole process

did not have. In doing this, a noun or a verb might be transferred from a place in the language where it belonged. Alternatively, it might go to another location where there was either no correct word or where the metaphorical word was better than the proper form. Quintilian, above 9, VIII. 6. 5. Where this transference lacked necessity, added significance, or ornamentation, the transference would be vicious. Quintilian, above 9, VIII. 6. 6. Arguably, such transference could confer reduced juridical status, as discussed below. The trope synecdoche (A figure of speech in which a part is made to represent the whole or vice versa, as in England lost by six wickets (meaning ‘the English cricket team’). Oxford English Dictionary, above 10.) gave variety additional to metaphor in language, by understanding plural from singular, whole from part, genus from species, following from preceding and the reverse. Quintilian, above 9, VIII. 6. 19. The trope of metonymy (The substitution of the name of an attribute or adjunct for that of the thing meant, for example suit for business executive, or the turf for horse racing. Oxford English Dictionary, above 10.) was not so different to synecdoche as it was the substituting of one word for another. It indicated an invention by the inventor or something possessed by the possessor. Quintilian, above 9, VIII. 6. 23. Thus, custom permitted oratory to signify what was contained from what contained it. For example, consider: “well-mannered cities”; “a cup was drunk”; and “a happy age”, Quintilian, above 9, VIII. 6. 24, or even a rights-bearing foetus.

⁶⁹ H Kellner, ‘The Inflationary Trope as Narrative Theory: Structure or Allegory?’ (1981) 11(1) *Diacritics* 14, 14.

⁷⁰ Ibid 15; and see below for D’Angelo’s explanation of the genesis of the four master tropes.

⁷¹ Ibid 16.

had been ironic.⁷² The entire process having been ironic, irony necessarily inferred prior and completed operation of the four-trope series.

The preceding suggests the tropes were the system by which the mind conceived the world through language. These four master tropes represented a sequential program with natural forces of propulsion. Thus, Vossius' statement was incorrect that the order of the tropes, as was conventional to thinkers among 17th-century rhetoricians, was due to their frequency of appearance.⁷³ It was this precise order of the four-trope system that was effective to exploit the mind's innate propensity for understanding by narrative structure.⁷⁴

These successive changes seemed unrestrained, catastrophically abrupt, and their movements apparently discontinuous. This inferred an automatic, unconscious activity of the mind.⁷⁵ Catastrophic trope movement might be the primary indicium of the force of public persuasion, such as public acceptance of ironic policy outcomes. People might well be persuaded by this meta-law that a human being was not a juridical person.

Vico was one of the first arguing for four primary tropes, from which all the figures arose.⁷⁶ Vico had considered these tropes as representing the stages of consciousness on its automatic road to abstractness.⁷⁷ The tropes described relationships between phenomena in the experiential world.⁷⁸ The four master tropes were a movement from global, through analytic, then through synthetic processes. In this contextual frame, metaphor was holistic, metonymy dispersive, synecdoche integrative, and irony was

⁷² Ibid.

⁷³ G-J Vossius, 'Rhetorique de l'ironie' (1978) 30 *Poétique* 495, 497.

⁷⁴ Kellner, above 69, 17.

⁷⁵ Ibid 28.

⁷⁶ FJ D'Angelo, 'Prolegomena to a Rhetoric of Tropes' (1987) 6(1) *Rhetoric Review* 32, 32.

⁷⁷ G Vico, *The New Science* 3rd edn, (Cornell University Press, 1970) 85-91.

⁷⁸ D'Angelo, above 76, 33, 34.

reflective.⁷⁹ It suggested that an orator might make a general statement, a metaphor, and the audience themselves might consequently and necessarily synthesise an ironic outcome by reflection.

It was relevant to this proposition of over-determined audience response that,⁸⁰ in her study of the psychology of metaphor, Gertrude Buck⁸¹ regarded metaphor as the necessary stage, through which speech must pass to arrive at literalism. She had concluded that only via the metaphor might abstract ideas manifest into existence as an abstract statement of fact.⁸² Metaphor was identifiable as a necessary precondition to law, the creation of fact from ideas, and therefore was meta-law.

An epideictic orator could begin the process of government by speaking a powerful metaphor, based in honour and virtue, framed in the public cultus. A trope would always increase the power of the oratory. This metaphor might react with the population at unconscious levels, not entirely cognised until during the stages of synecdoche and metonymy. The public mind would turn, tropically, through catastrophic shifts of reason, modelled by the four master tropes. This rotation would construct new meaning in the public mind. It would resonate in the public mind, by attribution, simulated and false phenomenological properties, which would feel like real events. The public would reflect then perceive these rhetorical events as facts. This oratory would stimulate the usual real bodily responses to those events, by signalling the bodies' senses. At last, the people might speak of a certain irony, in that outcomes were inconsistent with initial suggestions and expectations. However, by this time, the oratory would have controlled the audience's bodies, beyond their cognisance, as if by the orator's personal ownership. Irony would always signal that the 4-trope series was at the point of completion, and the

⁷⁹ Ibid 34, 35.

⁸⁰ Ibid 39.

⁸¹ G Buck, *The Metaphor: A Study in the Psychology of Rhetoric* (Inland Press, 1976) 43.

⁸² Ibid.

orator would have exercised, merely by the meta-law within oration, a catastrophic power of ownership over physical human bodies. The signal of irony is arguably an artefact of metaphor used within epideictic discourse.

This suggested the possibility of people accruing duties, without express agreement, and without accruing correlated rights, via some application of meta-law. Possibly, these duties were just called “non-legal”, but were strictly enforced administratively. The next section considers the nature of the relationship between rights and duties, to see what effect on it epideictic rhetoric might have.

Rights, liabilities, duties, privileges and liberties

Just as the relationship between a word and its meaning is arbitrary,⁸³ there has been a continuing tendency to confuse legal and non-legal ideas. Often, there was a catastrophic swing from one to the other. Some ideas were arbitrarily designated as “non-legal”. Not only lay persons, but also judges sometimes tended to confuse legal and non-legal ideas. Also, an uttered term could blend these two senses, conveying uncertain meaning.⁸⁴ This section investigates the Correlativity Axiom of Hohfeld and shows how it failed, whenever epideictic rhetoric was directed at the issue. This fundamental axiom was that every right correlated with a duty. Stated another way, the existence of a right necessarily entailed the existence of a duty, and vice versa.⁸⁵ Duties without rights, coinciding in the same person, would be suggestive of enslavement.

⁸³ Bally & Sechehaye, (eds), *Course in General Linguistics – Ferdinand de Saussure* (McGraw-Hill, 1966), 127, 128.

⁸⁴ W N Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23(1) *The Yale Law Journal* 16, 21, 22.

⁸⁵ J E Penner, ‘The Analysis of Rights’ (1997) 10 *Ratio Juris* 300, 300.

Rights were illustrated in the 1895 case of *Wilson v Ward Lumber Co.*,⁸⁶ in which the court held that the commonly used meaning of the term “property” signified any external object over which someone exercised the right of property. Thus, property was metonymy, indicating that the mention of property meant effluxion of the four-trope series had already begun. This wide term included every kind of acquisition, over which a man might own or maintain an interest.⁸⁷ Professor Jeremiah Smith, when he was Mr. Justice Smith, stated in *Eaton v B. C. & M. R. R. Co.*⁸⁸ that, strictly, land was not property, but rather, the subject of property. The term “property” meant only the owner’s rights in relation to it. It signified a right over a particular thing. Property was any person’s right to possess, enjoy, use, and dispose of a thing.

Because fundamental legal relations were *sui generis*, attempts at definition would fail.⁸⁹ Hohfeld argued this problem away by saying it was better to describe the various relationships from a tabulation of opposites and correlatives, as follows. Jural opposites were: rights and no-rights; privilege and duty; power and disability; immunity and liability. Jural Correlatives were: right and duty; privilege and no-right; power and liability; immunity and disability.⁹⁰ There has been a sustained critique of Hohfeld’s schema, including the proposition that all eight concepts could be reduced to right and

⁸⁶ (1895) 67 Fed. Rep., 674, 677.

⁸⁷ (1895) 67 Fed. Rep., 674, 677.

⁸⁸ 1651 NH, 504, 511.

⁸⁹ For Bentham, definition *per genus et differentiam* (An Aristotelian pattern of definition that proceeded by citing a genus to which a term belonged, and then the difference that gave its species and so located it within the genus. The classic example was the definition of humans as rational animals. *Oxford Reference*, <<http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100317283>>, retrieved 20 April 2015), was the proper and preferred form of definition,⁸⁹ and no other would suffice. Considering the legal fictions of right, obligation or power, the logician could find no genus of any of them. This meant definitions of legal fictive terms must be by some alternate process, necessarily not definition *per genus et differentiam*. Bentham suggested that a class of fictitious entities would be identified, and then the lawyer could merely associate the right, or other fiction, to this class.⁸⁹ The association could be deceitful and lend itself to denunciation or false aggrandisement. In this way, a right was not a species of anything, but a right had many species distinguishable by means of the benefits which each conferred. CK Ogden, *Bentham’s Theory of Fictions*, reprint from the original 1932 edition, (Routledge, 2002) lxxvi, lxxviii.

⁹⁰ Hohfeld, above 84, 30.

duty.⁹¹ Also, there was an old doctrine of *damnum absque injuria*, appearing to make Hohfeld's axiom far less axiomatic. The doctrine of *damnum absque injuria* explained that some acts causing an aggrieved plaintiff would carry no remedy.⁹²

Consider that A's right against B that B should stay off A's land correlated with B's duty toward A to remain off the land. The term "right" was synonymous with the word "claim". Thus, Lord Watson stated in *Studd v Cook*⁹³ that "Any words which in a settlement of moveables would be recognized by the law of Scotland as sufficient to create a right or claim in favor of an executor . . . must receive effect if used with

⁹¹ A Halpin, *Rights and Law: Analysis and Theory* (Hart Publishing, 1999) 27-48.

⁹² Weeks' 1879 treatise proposed that the doctrine of *damnum absque injuria* might be understood as follows. A tort was a civil wrong for which compensation in damages was recoverable. This was in contradistinction to a crime, which was punished by the criminal law system in the interest of society-at-large. Every invasion of a legal right, such as the right of property, or the rights incident to the possession of property or the right of personal security, constituted a tort. So also may an injury to the person, character or reputation of another, constituted a tort. In order to constitute a tort, two things must occur: actual or legal damage to the plaintiff; and, a wrongful act committed by the defendant. In as much as a tort implied damage coupled with a wrongful act, *damnum absque injuria* was damage without a wrongful act, as the law understood the term. The literal definition of the term *damnum absque injuria* was damage without injury. However, it was difficult to conceive of a damage done without a corresponding remedy to the party alleging itself to have been damaged. Thus, enlarging the above definition, still confined to the definitions of Latin transliterators, the term might be better explained as damage, loss, harm, injury, or hurt without wrong or injustice. *Damnum*, in the civil law, was the diminution of a person's property and was either *factum*, already done, or *infectum*, apprehended or threatened. The former might arise from either mere accident or free will of another. The latter might have arisen during the exercise of a right enjoyed by the person causing it. In either case no reparation had to be made for causing it unless it was done wrongfully. In that case, the person injured was entitled to compensation. *Injuria*, in the civil law, was a broad term signifying every action contrary to law. In a specific sense, it meant the same as *contumelia*, outrage. Strictly speaking, *injuria* was a wrongful act or tort that related to the defendant, and *damnum* was the loss sustained, or harm done, by an injury, and related to the plaintiff. The injury done must be a violation of a right to which the plaintiff was entitled. Also, the plaintiff must suffer legal damages from it. Damage was defined as the loss caused by one person to another or to his property either with the design of injuring him or with negligence and carelessness or by inevitable accident. He who had caused the damage was bound to repair it, and if done with malice, might be compelled to pay beyond the actual loss. If damage was caused by accident without anyone's blame, the loss must be borne by the owner of the thing injured. However, there were certain acts done, accidents and casualties occurring, by which there was a lawful use of one's own property occasioning loss to others. For such acts, the law afforded no remedy and they were designated as *damnum absque injuria*. EP Weeks, *The Doctrine of Damnum Absque Injuria considered in its relation to the Law of Torts* (Sumner Whitney & Co, 1879) 2, 4, 6, 7, 7n, 8.

⁹³ (1883) 8 AC 577.

reference to lands in Scotland.”⁹⁴ This meant that wordage recognised by the legal cultus as creating a right of property in moveables for an executor would create a similar right of property over land. The context was hypothetical, and the implied command was based in the rules of the audience’s professional discourse. It was epideictic rhetoric using a meta-law to command a new right.

Consider the proposition that a privilege was the opposite of a duty. It correlated to a "no-right." When A had a right or claim that B must stay off A’s land, A had the privilege of entering the land. This was equivalent to saying that A had no duty to stay off the land. This meant a privilege to enter negated the duty to stay off it. However, if A contracted with B for A to go onto A’s land, then A had, in respect of B, both the privilege and duty of entering the land,⁹⁵ the metaphoric word “contract” being a legal construction and term of art, suggesting that contract signalled epideictic rhetoric.

Lord Lindley stated in *Quinn v Leathem*⁹⁶ as follows.

The plaintiff had the ordinary rights of the British subject. He was at liberty to earn his living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved the liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him.⁹⁷

⁹⁴ Ibid 597.

⁹⁵ Hohfeld, above 84, 32.

⁹⁶ (1901) AC 495.

⁹⁷ Ibid 534; Hohfeld, above 84, 36.

However, in this passage was a sudden shift, apparently a *petitio principii*, in the use of terms. First, the “liberty” in question was changed into a “right”. Then, possibly because of juxtaposition to the word “right”, the reader might assume that the correlative must be “the general duty of every one not to prevent”⁹⁸ Nevertheless, the passage simply exemplified ironic outcome in the judge’s use of the word “liberty”. It began with the seemingly irrelevant metaphoric reference to the status of the British subject.

In Mackeldey's Roman Law,⁹⁹ the author explained that positive laws contained either general principles from the rules of law or for special reasons, they established something differing from those principles. In the former case, they carried a common law, in the latter a special law. The latter would be either favorable or unfavorable to people’s rights as it enlarged or restricted the common rule. The favorable special law and the right it created in the Roman law were termed by the tropes “the benefit of the law” or, “privilege”.¹⁰⁰ Thus, the English word “privilege” was commonly used to mean a particular legal advantage belonging to some individual or class of people. There were judicial opinions¹⁰¹ recognizing this meaning.¹⁰² From this, the dominant technical meaning of the word “privilege” was the negation of the legal duty.¹⁰³ The best synonym of legal “privilege” would be legal “liberty”.¹⁰⁴ Thus, a duty could be negated with the epideictic “special” law.

There were instances of standalone duties, such as criminal law duties, public law duties. Examples would be a duty to pay taxes, a duty imposed by regulators, and, duties to

⁹⁸ Hohfeld, above 84, 37.

⁹⁹ F Mackeldey, *Handbook of the Roman Law*, Volumes 1-2 (T and J W Johnson, 1883) 164.

¹⁰⁰ The same view is taken, but less explicitly, in Rudolph Sohm, *Sohm's Institutes of Roman Law* 2nd edn, (Oxford University Press, 1901) 28.

¹⁰¹ *Smith v Floyd* (1893), 140 N. Y., 337, 342; *Lonas v State* (1871). 3 Heisk, 287, 306, 307; *Territory v Stokes* (1881), 2 N. M., 161, 169, 170; *Ripley v Knight* (1878), 123 Mass., 515, 519; *Dike v State* (1888), 38 Minn., 366; *Re Miller* (1893), 1 QB 327.

¹⁰² Hohfeld, above 84, 38.

¹⁰³ *Ibid* 39.

¹⁰⁴ *Ibid* 42.

plants, animals, or inanimate objects.¹⁰⁵ These appeared to breach the correlation axiom, because they were duties direct to the sovereign, where the sovereign was the source of meta-law.

It was possible that Hohfeld directed his analysis only to private law, excluding the public and criminal laws. Private and public law duties to the dead did not correlate with a right.¹⁰⁶ The ostensibly *sui generis* rights to treat people, animals and inanimate objects in particular ways were liberties, which correlated with no-rights.¹⁰⁷ Since they were not rights, their actuality failed to refute Hohfeld's correlativity axiom, stated above.¹⁰⁸

Under undisturbed common law, an individual acquired legal personality upon live birth. Thus, a foetus did not have legal rights. According to the correlativity axiom, therefore, no one owed a duty of care to a foetus. Thus, substandard conduct that injured a foetus could not be a breach of duty to that foetus. Prenatal injuries were irrecoverable. When courts ultimately allowed recovery for injuries sustained in utero, first by viable and then by nonviable fetuses, they usually did so through an extension of legal personhood. To determine this personhood, they followed the latest biomedical knowledge, arguably epideictic, without needing to challenge the correlative axiom. The most critical stage in the expansion of pre-birth legal protection concerned preconception misconduct. Allowing recovery for harm caused by such conduct invalidated the correlativity axiom.¹⁰⁹ One could not argue that preconception conduct breached a duty that correlated with the victim's right, because prior to conception the victim could have no rights. Nonetheless, as observed by Justice White, "an increasing number of courts have

¹⁰⁵ R Perry, 'Correlativity', (2009) 28(6) *Law and Philosophy* 537, 581, 582.

¹⁰⁶ *Ibid* 581.

¹⁰⁷ A R White, *Rights* (Oxford University Press, 1984) 64, presenting Hart's view that duties imposed by criminal law are not correlative with rights.

¹⁰⁸ Perry, above 105, 581.

¹⁰⁹ *Ibid* 582.

recognized a right to recover even for prenatal injuries caused by torts committed prior to conception”,¹¹⁰ and they have done so in various settings.

The confluence of the defendant’s acts or omissions and foreseeability of harm to a future and unconceived child determined a duty of care. This appeared to get around the correlativity axiom. This kind of duty of care was a separate duty because the unconceived foetus was not a person capable of acquiring legal rights. This suggested the duty of care was an abstract duty, uncorrelated to any right.¹¹¹

Hohfeld’s Correlativity Axiom appears to break down easily according to the rules stated in Mackeldey’s Roman Law.¹¹² The relationship between rights and duties appears to be arbitrary. A special law indicates a rule that will break down the axiom. From the examples, above, the process of breaking down the axiom appears to be the deployment of epideictic rhetoric, to make special laws from applying a metaphor as meta-law. As special laws disturb and overturn the common law, they suggest irony as a signal of a prior use of epideictic rhetoric. When the Axiom breaks down, people may incur duties without any correlated rights, the limiting point to which is slavery.

Three Legal Persons and Their Interests

Having suggested meta-law was a trope process, turning through inevitable catastrophic shifts, this section seeks to categorise the various descriptions of juridical personality. It seeks this in order to verify whether or not these categories themselves were tropic. If they were indeed tropic, the reader would expect they might behave like the meta-law. Representing these schools, Naffine posited three legal persons, Juridical Personality

¹¹⁰ *UAW v Johnson Controls, Inc.*, 499 U.S. 187, 213 (1991) (White, J., concurring).

¹¹¹ Perry, above 105, 583.

¹¹² Mackeldey, above 99, 164.

Type A, Juridical Personality Type B and Juridical Personality Type C. Type A theorists disagreed that the legal personality must build on the metaphysical person. Type B scholars assumed that humanity was the genesis of moral and legal claims grounding legal personality. Type C scholars regarded metaphysical persons as the basis of legal personality.¹¹³

In Type A, legal personality was nothing more than the formal capacity, or ability, to carry a legal right, and therefore, to participate in legal relations.¹¹⁴ On this basis, foetuses might be regarded as persons, their rights coalescing at birth.¹¹⁵ These contingent rights of the foetus were recognised in the Australian case of *Watt v Rama*.¹¹⁶ Type A did not necessarily carry any status.

The Type B definition was of any reasonable being. It came closest to the ordinary language meaning and was the accepted formal legal definition of person as an animate being.¹¹⁷ Someone became a legal person in this sense upon birth, as legally defined, and ceased being a legal person upon entire brain death, also legally defined.¹¹⁸ Status inhering in Type B was due to the person's stage of life.

The responsible subject Type C departed from ordinary meanings of the word "person". Like Type A, it was a technical legal term, with a meaning wholly interior to law. Not all human beings qualified for the status of a Type C person. Only the rational, and thus, the legally competent sat within Type C. Full legal personality of this kind required an

¹¹³ N Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66(3) *The Modern Law Review*, 346, 350.

¹¹⁴ *Ibid*.

¹¹⁵ J Seymour, *Childbirth and the Law* (Oxford University Press, 2000).

¹¹⁶ [1972] VR 353.

¹¹⁷ Naffine, above 113, 353.

¹¹⁸ A Heldrich and A F Steiner, 'Legal Personality' in M A Glendon (ed), *International Encyclopaedia of Comparative Law Vol 4: Persons and Family* (J C B Mohr, 1995) 3, 4.

ability to initiate court actions, or to be sued.¹¹⁹ This legally and mentally competent adult human was the essential holder of rights.¹²⁰ As the typical subject of rights and duties, Type C was the normal human being acting in a unitary capacity, in his or her own right.¹²¹ In Type C, there was the classic contractor,¹²² personally accountable for civil and criminal actions, possessing the entire scope of legal rights and responsibilities. Type C conformed to the theoretical construction, applicable in the criminal law, that a human being was a rational creature. He or she was free to choose his or her acts and deserved punishment whenever choosing to act immorally.¹²³

Thus the legal system preferred the status of Type C, over Type B, and in turn, over Type A. Any movement in preference and status from Type A to Type B to Type C entailed a progressive exclusion of human beings from the special status of person, steadily reducing the size of the community of legally competent persons.¹²⁴ Change from Type A to Type B imposed a requirement for a particular human form. It had to be integrated and complete, self-functioning and individuated from the mother. This movement from Type A to Type B must exclude the unconceived, those foetuses not surviving birth,¹²⁵ animals, and the deceased. This symbolic movement also raised questions about the fullness of personality of the pregnant woman. The movement to Type C imposed additional requirements of cognitive individuation, with Type B adding biological limitations, and Type C adding intellectual and moral definitional

¹¹⁹ R Tur, 'The "Person" in Law' in A Peacocke and G Gillett (eds), *Persons and Personality: A Contemporary Inquiry* (Basil Blackwell, 1987) 119.

¹²⁰ M H Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14(1) *Canadian Journal of Law and Jurisprudence* 29, 36.

¹²¹ Smith, above 1, 287.

¹²² A concise description of the contractor of the classical period is to be found in B Coote, 'The Essence of Contract' (1988) 1 *Journal of Contract Law* 183. P S Atiyah has most fully documented the waxing and waning of this classical contractor in P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979). Atiyah has observed nevertheless that the idea that contract law enforces 'the private autonomy of contracting parties' is still with us. P S Atiyah, *Essays on Contract* (Clarendon Press, 1986) 11.

¹²³ L Waller and C R Williams, *Criminal Law Text and Cases* 8th edn, (Butterworths, 2001) 258.

¹²⁴ Naffine, above 113, 366.

¹²⁵ *Ibid* 365.

restrictions.¹²⁶ Natural recognition of differential status implied a necessary and inevitable movement from Type A to Type B to Type C, thereby automatically and inevitably removing people's juridical personalities, and their rights. This shift, cognate to the catastrophic shifts in the four-trope series, would limit the cohort of juridical persons to the most rational and legally competent, all others suffering the irony of a realisation of slavery without their express consent.

Within this cohort of juridically competent persons, to be a legally competent person was to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, was to confer legal personality.¹²⁷ If a society coerced a person to act or forbear in favor of a second person, the latter had the right, and the former owed the duty.¹²⁸ Thus, this predictability of social coercion shaped rights and duties. Rights and duties generated the legal personality. Both Salmond and Holland stated their most satisfactory definition of legal personality as capacity for legal relations.¹²⁹ However, the word "capacity" suggested an instance where the subject had the capacity for legal relations, without being a party to them. For example, a minor with a capacity to marry might not be necessarily married. However, if society conferred legal personality, then the minor was made a party to legal relations.¹³⁰

Legal personality should be described either as an abstraction predicating legal relations or as a mere name for the precondition to being party to legal relations. However, Gray thought there could be no right, and, therefore, no consequent legal personality, without

¹²⁶ Ibid 366.

¹²⁷ J C Gray, *The Nature and Sources Of The Law* 2d edn, (Columbia University Press, 1921) 27; J W Salmond, *Jurisprudence: Or The Theory of the Law* 5th edn, (Stevens and Haynes, 1916) 272; T E Holland, *The Elements of Jurisprudence* 9th edn, (West, 1900) 88; F Pollock, *A First Book Of Jurisprudence* (Burt Franklin, 1923) 114.

¹²⁸ A L Corbin, 'Legal Analysis and Terminology' (1919) 29(2) *Yale Law Journal* 163, 163; A L Corbin, 'Jural Relations and Their Classification' (1921) 30(3) *Yale Law Journal* 226, 226.; O W Holmes, *The Common Law: The Collected Works of Justice Holmes* (University of Chicago Press, 1881), 167 et seq.

¹²⁹ Salmond, above 127, 88, 91.

¹³⁰ Smith, above 1, 283.

the will to exercise that right.¹³¹ Despite the premise that a will was necessarily *a priori* to a right, Gray explained with great irony how some human beings without a will, and inanimate objects, had legal personality.¹³² Salmond rejoined that no being was capable of rights without being capable of interests susceptible to the acts of others. No being was capable of duties unless also capable of acts affecting the interests of others.¹³³ However, the same attribution of the right also attributed the corresponding interest. He defined a legal person as any being to whom the law attributed the capacity of interests and consequent rights, and of acts and consequent duties.

As long as the sovereign had unlimited power of attribution to safeguard its interests, neither theory hindered its giving legal personality to anything or anyone.¹³⁴ For example, the sovereign could, by oratory, attribute reason to an unreasoning person. This sustained the view that meta-law was an artefact of sovereign artifice in the sovereign's sole interests, with these sovereign interests tending to minimise the community of juridical persons.

Conclusion

The High Court of Australia's decision in *R v Tang* exposed a paradox in the Court's reasoning. By this reasoning, slavery must be only partially justiciable, by virtue of the Courts' elision in cognising people of abridged juridical personality. This elision is catastrophic. Many catastrophic laws have their narrative genesis in the *jus cogens* of international law, and the *Lixing* chapter was just one example of such a process. It suggested the natural outcome of abridging people's juridical personality would be an ethical manoeuvre of some invasive sovereign power.

¹³¹ Gray, above 127, 25, 26.

¹³² *Ibid* 28.

¹³³ Salmond, above 127, 273.

¹³⁴ Smith, above 1, 284.

Such a manoeuvre could be seen in Gorgias's encomium, demonstrating that persuasion could be veiled as mere instruction, or as a mere presentation to professionals of oratorical skill. Gorgias could captivate the learned, using their own professional discourses, thereby minimising opposition to his veiled message. Arguably, these commands would be artefacts of Gorgias's epideictic methodology, and would precipitate audience action, which evidenced meta-law. Later, when the audience realised that they had been moved beyond their cognisance, and without their express consent, this would amount to a catastrophic manipulation of the human will by an external human will.

An epideictic orator could begin the process of government by speaking a powerful metaphor, based in honour and virtue, framed within the recognised public cultus. This metaphor might react with the population at unconscious levels. The public mind would turn, tropically, through catastrophic shifts of reason. This rotation would construct new meaning in the public mind, feeling to them like real events, and upon due reflection, perceived as real facts. Therefore, this oratory would stimulate real bodily responses to those events, by signalling the bodies' senses. Irony would always signal that the 4-trope series was at the point of completion, and the orator would have exercised, merely by the meta-law within oration, a catastrophic power of ownership over physical human bodies. The signal of irony is arguably an artefact of the use of metaphor within epideictic discourse. In this way, people could accrue additional duties, without express agreement, and without accruing correlated rights.

Hohfeld's Correlativity Axiom appeared to break down easily according to the rules stated in Mackeldey's Roman Law, rendering the relationship between rights and duties as arbitrary. A special law disturbing the common law indicated a rule that would break down the Axiom. This process of breaking down the Axiom could be achieved with epideictic rhetoric. When the Axiom broke down, people could incur duties without any

correlated rights, the limiting point to which was slavery. This inferred that a breakdown in Hohfeld's Axiom would be signalled as the irony of involuntary slavery, such as, for example, with the jailing of victims of human trafficking.

In this way, differential status implied a necessary and inevitable movement from P1 to P2 to P3 personalities, thereby automatically and inevitably removing people's juridical personalities, and their rights. This shift, analogous to the catastrophic shifts in the four-trope series, would limit the cohort of juridical persons to the most rational and legally competent, all others suffering the irony of reduction to slavery without express consent. This sequence arguably operates all the time.

With a natural devolution of juridical personality to the most reasoning and legally competent persons always in operation, the sovereign could simply alter its course, by application of epideictic rhetoric. For example, same-sex marriage presented as the trope of "marriage equality" confers juridical personality on a cohort of people, by altering the Type A-Type B-Type C process. This could control the cohort of juridical personalities in the sovereign's sole interests. It sustains the view that meta-law is an artefact of sovereign artifice, to control access to the courts, merely by an epideictic act of attribution, in the sovereign's sole interests.