UNCERTAINTY AS PART OF CERTAINTY: APPRECIATING THE LIMITS OF DEFINITIONAL CLARITY AND EMBRACING THE UNCERTAINTY INHERENT IN ANY MATTER OF COMPLEXITY

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1 Much of our processes of reasoning and knowing in both law and science appear to be focused on attaining "certainty" (a particular, binary and categorical conception of certainty). Certainty is often seen (and rightly so) as a natural goal for a civilised legal system. It is, however, sometimes illusory. Some concepts may only be described, explored and evaluated. The differences between definition on the one hand and description, exploration and evaluation on the other reflect different approaches to interacting with the world: one abstract, concrete and decontextualised; the other more experiential and contextualised, and necessarily less explicit and clear. True "certainty" in many situations comes from embracing this uncertainty, and reconciling the two approaches in order to appreciate and understand the indefinable whole. In thinking about these issues, which have been a subject of consideration for a long time, I have been stimulated by the work of Dr Iain McGilchrist and his magisterial book, *The Master and his Emissary*.[1]

2 The need for certainty is part of the human search for order and security. But certainty is only certainty as far as it can be. Sometimes the most certainty one can achieve is a space, not a line or a point. In order to regulate the use of power – a fundamental aspect of the law – lawyers and jurists often seek to impose certainty through the reduction of legal principle into textually expressed statements of logical rules. These expressions regularly manifest themselves as rigid rules. Often the language used is as clean, sharp and closed as possible. By "closed", I mean not open-textured.[2] I mean language that helps form lines and boundaries, but that is not sufficiently general to allow a conception to live within it. Textually imposed certainty, especially using language I have described can lose something– the relational, value-based aspects of principle and the need to understand context in order to provide a realistic and appropriate answer to a legal question about human engagement. This is because context

[1] Iain McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, 2009).
[2] As to which, see Joseph Campbell and Richard Campbell, "Why statutory interpretation is done as it is done" (2014) 34 *Australian Bar Review* 1 at 9-10.

(human and legal) is critical. For instance a causal question may well be answered differently depending upon the context of the question. Different rules of responsibility bring different values and human demands of justice to the context and so to the decision itself.

3   These kinds of considerations are central to understanding proof. Proof and judgments of fact are in the end human, not statistical or scientific, conclusions. Mathematical or statistical probability is or can be an important part of the conclusion. The open-textured language of principles such as that embodied in *Briginshaw v Briginshaw*[3] and the notion of persuasion of the mind and the close relationship between rules of responsibility and causal questions (that is the importance in causal questions as to why one is asking the question) are examples of the human considerations governing important legal questions.

4   The limitations upon textually-derived definitional clarity arise in part from the fundamental constraints of language itself. Legal method is founded in language, and relies upon text to explain as far as possible. Definition is dependent upon text. Vivid description is similarly dependent upon our capabilities for linguistic expression. However, it must be remembered that language is a tool for expressing meaning. In a legal context, it is a tool for giving form and shape to legal rules and principles that must be applied to a factual reality that cannot be rendered completely in text.

5   Thus, there is a point at which definitional clarity – the search for certainty through seeking exhaustively or overly precisely to define concepts – exhausts its utility. This arises from the implicit nature of the particular conception in question and the limits of the explanatory power of language. To truly understand some conceptions, description, context, evaluation and intuition need to be appreciated. Together they form an indefinable whole that has some textually definable parts. This is why "uncertainty" is a necessary part of certainty. Uncertainty must not be forced out in the creation of some abstract representational "reality". If one does so one cannot understand holistically some concepts, legal principles or factual matrices that have a human reality to them. Context and values have a crucial role. They are aspects of understanding the whole. They cannot always be defined; though they can often be illuminate by words of generality, rather than of definitional precision.

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[3] [1938] HCA 34; 60 CLR 336 at 361-362.

6   As Dr McGilchrist explains, these problems and ways of thought apply across human experience. They are not limited to the law. He writes of Wittgenstein's reference to the "false clarity" that "sometimes the mere formulation in language brings".[4] Language's impact on thought is "to give it clarity and solidity" but this may result in "artificial precision".[5] McGilchrist expresses this as a reflection of the left hemisphere of the brain and its existence as a closed system that is self-referential.[6] It uses language to manipulate fixed quantities and gives clarity within that environment. The right hemisphere modality, by contrast, is not static and appreciates the implicit, in broader context.[7] It embraces the necessity of uncertainty. It does not seek to obliterate it by definition.[8] The left is representational and mechanical, rather than contextual and experiential.[9]

7   These different modalities described by McGilchrist are reflected in different ways of thinking about the law. While it can be left to others better qualified to explore the ways these approaches of thought might impact upon science, there are analogies that can be drawn between law and language and certain scientific phenomena. These highlight the role of uncertainty.

8   The first relates to the role of uncertainty in quantum mechanics and the work of the likes of Niels Bohr, Erwin Schrödinger and Werner Heisenberg. Heisenberg had emphasised the role of observation, and how uncertainty existed about the properties of subatomic particles until such properties were fixed by the process of observation. Bohr, in developing his interpretation, proposed that such a particle could exist as both a particle and a waveform. These were complementary – not either or, but an indefinable whole that was simultaneously both. The process of measurement was what imposed certainty upon this whole. The method of measurement determined whether it was one form or another, and so measuring affected (changed) the subject of measurement. Bohr's interpretation is an embracing of the whole, with our human intervention affecting the reality. I will leave it to others to assess whether I have understood these things and expressed them appropriately but if these are legitimate comments, they show analogies to the role of expression in language in the law. That textual expression can ossify, decontextualize and artificialise (and so change) a conception that is to

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[4] McGilchrist, *op cit* 1 at 157.
[5] McGilchrist, *op cit* 1 at 157.
[6] McGilchrist, *op cit* 1 at 174.
[7] McGilchrist, *op cit* 1 at 174.
[8] McGilchrist, *op cit* 1 at 174.
[9] McGilchrist, *op cit* 1 at 174-175.

be applied to human conduct that is dynamic and indefinably human into one that is fixed, abstract and not human. Expression can affect the conception as it is understood and so as it appears to people.

9   In law, the need to recognise the role of uncertainty in order to make a holistic, contextual evaluation of a legal problem arises from the humanly relational, contextual and experiential problems that the law is required to resolve. The law is not a bundle of mechanical rules, able to be algorithmically organised and manipulated. There is often need for there to be a translation of the human to the legal. This phrase captures the key reason for why uncertainty is important as part of legal certainty – in order to capture the relational human characteristics that are necessarily embedded in the law, and that are critical to the resolution of legal problems.

10   The significance of all this includes the need to appreciate the place of open-textured language in providing sufficient generality[10] for indefinable conceptions to subsist, to appreciate the limits of text, to appreciate the dangers of the self-referential apparent certainty of closed worlds and of closed language that seeks to define to certainty, to appreciate that the most important concepts in the law are not capable of definition – not least of which are justice, fairness, conscience, and truth, to appreciate the ever present danger in chasing the goal of apparent certainty where certainty is elusive, and to appreciate that one cannot reduce the world wholly to words.

11   Lawyers like scientists have to deal with and describe uncertainty, with the tools at hand – words, symbols and ideas. This is an exacting exercise. But its exacting nature does not mean that one capitulates to the temptation of an easy answer.

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[10] See the reference by Gageler J in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [42] to the "studied generality" of the language in *Warren v Coombes* [1979] HCA 9; 142 CLR 531.