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The Adversarial System, Professional Monopoly and Injustice

Summary

The American adversarial system stands on the supposed equality of the parties before the judge. But in hard, complex cases, fact-finding, evidence, knowledge require highly professional expert advice. This is not open to all. So there is a kind of monopoly of expertise and evidence-formation laying in the big law firms hands.

In the EU, agencies such as EFSA, relying on independent experts, somehow guard the objective formation of knowledge and supply reliable data open to consultation and to parties.

The American legal system is in need of a serious reform.

§ 1

Karen Alter writes that the European legal system has become the most effective international legal system in existence.¹ There is an international rule of law that works in Europe. The transformation of the European legal system was orchestrated by the ECJ. The EU could therefore provide a case of globalization and could be analysed as such. One of the most important achievements of this process has been a supranational law, making European law hierarchically supreme to national law. This process led to the creation of new institutions, the agencies, to ensure both efficiency and protection of rights. A case in point is the European Food Safety Authority or EFSA. In a unique way, it combines independence and a delegation or mandate from the EU Commission authority.

It is both an executive or regulatory agency and an oversight body. EFSA has some implicit constitutional features which distinguish it among the regulatory agencies in the United States and member-states. EFSA plays an important role as a source of information for the protection of European citizens' fundamental rights, counterbalancing the powers that special groups, companies, governments and parliaments enjoy and exercise on the decision-making processes.

Regulatory reforms reveal how much administrative law is central in democracy. Knowledge is a primary requirement for the appropriate workings of a justice system in a democracy. The globalisation of law in Europe has thus generated an entity which combines aspects coming from different national traditions. It is an entity which also can contest even the special interests of member-states.

§ 2

I purport to suggest that the rise of law firms has generated a monopoly power of special interests exercised in the definition and recognition of interests in the adversarial system which assumes equality among competing parties. Inequality destroys justice as it is rendered in the adversarial systems or common law courts. It hampers the legal process and tends to identify special interests as general rights, thereby undermining the interpretive and the constitutional processes.

¹ K. J. Alter, *Establishing the supremacy of European law. The making of an international rule of law in Europe*, Oxford, Oxford University Press, 2001.

Equality is indispensable, a core concern that must be considered in the design and assessment of procedural systems.² If a party enjoyed a monopoly of evidence, or facts, his position in court would undermine procedural rules of adjudication which assume equality as a prerequisite.³

Mashaw writes and I quote:

Insofar as adjudicatory procedure is perceived to be adversarial and dispute resolving, the degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated.⁴

§ 3

The development of independent courts, judicial independence and impartiality, has been rightly regarded as a critical breakthrough in constitutional history. But this 18th century model, founded on English history, has no adequate explanatory power of the present judicial processes in democracies. What I mean is that the model does not work rightly where it should be, in theory, most appropriate: adversarial adjudication. One of the best account of adversarial adjudication has been put forward by L.L. Fuller which follows closely the mode of procedure adopted by the courts in common law countries.⁵

The claim is that adversarial adjudication has the following elements. First, the parties participate in a special way which consists in each being able to present arguments and proof towards a decision in its favour. Secondly, the parties and the adjudicators are in a special relationship which requires the latter to base decisions on the proofs and argument which have been presented by the parties. The adjudicator is not free to seek additional material, and impartiality between the parties is of course fundamental. The third element is that the dispute must be settled on the basis of standards which are acknowledged by the parties as appropriate. The standards need not have the precision of rules but may well be of a more abstract nature.⁶

If one side in adversarial adjudication is ill-equipped, it cannot afford access to the system or has less time and money to pursue evidence, or less skill in developing legal claims, then what emerges as the strongest case might not necessarily be the better case.⁷

Professor Balkin remarks that:

There are lots of true legal propositions; indeed, so many that I can't even begin to list them. They are true by legal convention, in virtue of the social practices that constitute law. As Susan Haack⁸ puts it, they are

2 W. B. Rubenstein, The concept of equality in civil procedure, "Cardozo Law Review", vol. 23: 5, 2002, 1865–1873

3 L. Fuller, The forms and limits of Adjudication, 92 "Harvard Law Review", 353, 1978. Ken Scott, Two modes of the civil process, 27 "Stanford law review", 937, 1975.

4 J. Mashaw, Administrative due process: the quest for a dignitari theory, 61 "Buffalo University Law Review", 885 1981. Bureaucratic justice. Managing social security disability claims, 1983, reprinting Three factors in search of a theory of value, 44, "University of Chicago Law Review", 28, 46–57, 1976.

5 L.L. Fuller, The forms and limits of adjudication, "Harvard Law Review", 92, 1978, 353

6 D. J.Galligan, Due process and fair procedures. A study of administrative procedures, Oxford, Clarendon Press, 1996

7 Lassier , 452 U.S., at 28.

8 Susan Haack, Law and Truth: Pre-Modernism, Modernism and Post-Modernism, Address at Federalist Society Conference on Law and Truth at Yale Law School (Mar. 1–2, 2002). Siegel, In the Eyes of the Law: Reflections on the Authority of Legal Discourse, in Lawis histories: Narrative and rhetoric in the law, (Peter Brooks and Paul Gewirtz eds., 1996)

true as legal claims. Or as common law lawyers would put it, they are true in the eyes of the law.⁵ In fact, one of the most interesting features of law as a system of social conventions is its ability to make things true or, to put it another way, to create legal categories that permit characterizations of situations and practices that are true or false. My point, however, is not simply that propositions of law are true in virtue of legal conventions. It is rather that law creates truth – it makes things true as a matter of law. It makes things true in the eyes of the law. And when law makes things true in its own eyes, this has important consequences in the world.

When law allows companies to create 401(k) plans, or when it provides general statutes of incorporation, it defines institutions and practices that people can bring into being. **It makes possible true and false statements** about these institutions and practices, and about rights and responsibilities with respect to them.

If a litigant wields a privileged position on technical expertise, access and management of knowledge, then she enjoys a power to which the legal system is **blind**. In fact, the litigant will dominate the presentation of evidence and the articulation of legal reasoning, the characterization of situations, the creation of legal facts, before the jury. She can perform the miracle of changing abuse or dominant positions into legal truth.

§ 4

I can mention several reasons for this difficulty, which hampers the justice system. The first being that the historical model is grounded on the adversarial system stressing equality between the parties. Again, I do not deny that the difficult and slow achievement of this arrangement is a landmark in the history of democracy and provides effective safeguards before inequalities of power before the courts.

But I would suggest that equality before the law has gradually become a rhetorical game of words, rather than an effective legal and constitutional instrument, in the pursuit of truth, thereby shackling the foundations of the legal order and its capacity to ensure the recognition and implementation of rights and duties.

The adversarial model has been an answer to royal and princely despotism, asserting equality before the state tribunals, and thus under the law. But the historical and social context has changed since the 17th century. And social contexts matters because they determine the structure of interactions among players, as the critical law school reminds us.

The rise and rapid growth and proliferation of law firms, and legal professionalism, have obviously changed the functions that individual solicitors and barristers have played for centuries as independent players⁹. They have been the main interpreters and bearers of the principle of equality before the law. The growth of big law-firms has reduced the range of independence individual solicitors and barristers once enjoyed.¹⁰

The new law firms act as collective actors, or corporations that monopolise entire markets, especially in the cases involving specialized technical expertise and powerful clients. Lawyers have come to acquire a dominant position and even a monopoly of interest's definition and representation in courts. The biggest law-firms thus come to constitute a dominant legal elite and a safeguard of the primacy of special interests.

9 R. Abel, *English lawyers between market and state. The politics of professionalism*, Oxford, Oxford University Press, 2003

10 K.N.Llewellyn, *The Bar specializes- With what results?* "Annals of the American Academy of political and social sciences", 177,1933.

The large law firm is a success story. They command a bigger share of the expanding legal market. Even the downturn in the 1990s has not substantially damaged their relative standing as suppliers of legal services.¹¹

Serving the most powerful clients, which can finance the research needed to present their cases, law firms tend to become the arbiters of legal arguments and reasoning, of legal knowledge, the identification of interests and rights and duties. Establishing a professional monopoly, law firms become the masters of the legal process and somehow dictate the conditions for justice.

§ 5

Another critical factor is the process of rationalization of contemporary societies requiring an increasing technical expertise in a number of fields going well beyond the traditional boundaries of legal discourses. Ascertainment of facts, even standing, does quite often involve research, expert scientific advice, which is difficult to get and highly expensive. Providing adequate evidence in such cases is obviously crucial for the proper work of justice and injustice.

Access to highly qualified experts tends to become the exclusive preserve or monopoly of the dominant law firms. A condition which generates inequality in the cases of ordinary citizens suing companies or powerfully organised interests or prominent people.

It is a structural inequality which hampers and distorts the proper course of justice, because even trial judges can find it very difficult to find and evaluate evidence in courts according to the usual standards of impartiality and soundness if a party is unable to deploy his arguments and facts. So the law may make things true and untrue and, more importantly, **true things untrue**. What is at stake is legal reasoning hampered by a restricted access to fact-finding and evaluation of facts. It is indeed a pillar of the modern justice system that knowledge, the pursuit of truth is open to the parties, judges and juries without restrictions.

In this respect, I would suggest, therefore, that the judicial system cannot serve the ideals and principles of impartiality and fairness in the pursuit of truth that it purports to fulfil.

§ 6

This situation could be particularly serious in common law countries, especially in the United States. At least in theory, courts are established to provide protection of equality before the law and are the main sources of social knowledge, the temple of professionalism. Parties are, therefore, the fundamental sources of knowledge offered to courts, with the expert witness assistance.

The Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 47 seems a perfect metaphor for this position. *Daubert* is read as contrasting the kind of "junk science" that can be procured by self-interested litigants in courtroom tort litigation with "good science" produced by disinterested scientists under the norms of the scientific method and peer review.¹²

11 M. Galanter and T. Palay, The many features of the big law firm, "South Carolina law review", 5, 1994, 905-928

12 509 U.S. 579 (1993).

In America, courts are the main defence from arbitrary rule and abuse. The common law status is seen as neutral, and pre-political, even in the sphere of market-ordering and market values. Exactly where, in my view, inequalities are more dramatic and distort the fairness that procedural rules should guarantee.

In American Trucking, the Environmental Protection Agency (EPA) based its action on the weight of just such peer-reviewed, epidemiological studies – in that case suggesting some 15,000 to 20,000 excess deaths (and many thousands more episodes of excess disease) were occurring annually across the United States from exposure to ozone and particulates under the then-existing standards. Among these studies, EPA relied on the so-called “Six Cities Study,” which was a twenty-year longitudinal collection of studies measuring air-pollution effects among thousands of people in diverse settings – a massive research effort that alone had spawned over 100 publications.¹³

Throughout the congressional hearings in 1997 over EPA’s proposed revisions, industry critics and their congressional allies repeatedly sought to challenge the Six Cities Study on numerous grounds: failure to adequately consider other possible confounding factors, failure to precisely define a safe ambient level for particulates, and lack of access to the data “underlying” the study, apparently including the detailed confidential medical information provided to the researchers by thousands of citizen-participants. For present purposes, what matters is not the likelihood that any of these objections had merit but instead the complete sea-change in industry’s objections to precisely the type of peer-reviewed epidemiology that had been held up as the gold standard in Daubert. Of course, what had changed in the case of air pollution was that the results of the science did not favor industry. The only “good science” apparently was “my science.”

The situation is somehow different in Europe where civil services have emerged during the struggles for the formation of the nation-states and have managed to gain some professional independence, as is the case in England.

In western European states, built upon public law traditions, administrative law or *droit administratif*, civil services have been entrusted with the duties and functions which common law courts usually exercise in the United States. It is the task of civil services to exercise a proper oversight ensuring that the legal and administrative requirements are met. Civil service becomes the source of highly technical knowledge which can be provided in courts in cases of controversy.

Monopoly of expertise, and knowledge, thus, does not fall entirely into the law firms’ hands. The civil services duties, if properly served, counterbalance the law firms’ power, knowledge for private purposes, producing objective knowledge or learning, as a public service, in the general interest, contributing to the consolidation of democracy and the interpretation of rights and duties, according to the standards of objectivity, accuracy, fairness, transparency, promoting what Habermas calls *Öffentlichkeit*.¹⁴

I would suggest we can evaluate the importance of this aspect referring to freedom of information and public service. The debates on free speech have not originated from the problem of professional monopolies. But free speech was invoked as against

13 L. Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the “Gatekeeper” Function to Scientific and Non-Scientific Expert Evidence:Kuhmo’s Expansion of Daubert, 34 AKRON L. REV. 689, 704 n.58 (2000) (discussing the Bendectin litigation and contrasting the industry’s reliance on “information published on Bendectin” resulting from “tests based on human statistics” and the testimony of plaintiff’s experts based on animal-cell studies, live-animal studies, and chemical structure analysis).

14 J. Habermas, *Der Strukturwandel der Öffentlichkeit*, Frankfurt, Suhrkamp, 1968.

government secrecy, against the state monopoly of reason, even legal reasoning. Absolutist states refused to justify their acts in the light of an open, public debate, thereby depriving a party, of the right to knowledge and exercise of reason.

In England, Lord Denning emphasised the fundamental importance of information of general interest and the right of the public to receive it¹⁵. What is at stake here is not only information but fact-finding or research, search for truth.

Indeed, Chief Justice Chandrachud of India says that

The right to free speech is an important right of the citizen, in the exercise of which he is entitled to bring to the notice of the public at large the infirmities from which any institution suffers, including institutions which administer justice.¹⁶

Common law courts should therefore be balanced by a public service entrusted with oversight duties and protected by special interests. What I mean is the constitutionalization of independent knowledge as a public service or duty, along similar lines provided for the protection of free expression and communication.¹⁷ The European court of justice has taken this problem seriously and recently it has sentenced on the constitutional nature of knowledge. A point made by Lord Justice Shaw, saying that the opportunity of free public discussion of a subject of general concern should in general and always not be unduly curtailed.

An example of a new institutional and constitutional experiment is the European Food Safety Authority, established a few years ago, following the debate on the Meroni Doctrine and the delegation of power to the community agencies. EFSA provides public information and scientific knowledge offered by independent experts and brings knowledge to bear upon the European Commission, the Council, Parliament, and the effective law-making processes.

In this way, knowledge comes to be incorporated into the law-making process and becomes a standard of accountability and a guide-line of decision-making. Objective knowledge is thus a pillar of democracy, as indeed Sir Karl Popper suggested¹⁸. Not surprisingly, democracy theory has not yet devoted a serious consideration to this aspect of the democratic process while economic theory has been increasingly interested in knowledge.¹⁹ Economists and sociologists have drawn attention to knowledge economics but they usually see it as an entrepreneurial strategy of markets²⁰.

In the United States, agencies are not required to disclose their underlying data from the studies on which the agency was relying that indicated public-health risks. In the American Trucking II case the District Court was under no illusions about the burdens that would attend such a data-access requirement. As the court concluded:

15 Lord Denning, *Shering chemicals v Falkland Ltd*, 1981, AC The Primodos Affair

16 M. R. Parashar v Farooq Abdulla, 1984, SC, 618 (Indian Supreme Court)

17 M. R. Parashar v Farooq Abdulla, 1984, SC, 617 (Indian Supreme Court)

18 K.R. Popper, *Objective knowledge; an evolutionary approach* Oxford, Clarendon Press, 1972. P.P. Mueller-Schmidt, *Die philosophischen Grundlagen der Theorie der offenen Gesellschaft*; zu K. R. Poppers Philosophie des kritischen Rationalismus. Heidelberg, F. H. Kerle, 1970. *The open society and its enemies*. [Rev. ed.] Princeton, Princeton University Press, 1950.

19 See, for instance, G. Sartori, *Comparative constitutional engineering: an inquiry into structures, incentives, and outcomes*, 2nd ed., New York University Press, 1997; *Democratic theory*. Based on the author's translation of *Democrazia e definizione* (2d ed.), Westport, Conn., Greenwood Press 1973 and 1962.

20 I. Nonaka and H. Takeuchi, *The knowledge-creating company*, Oxford, Oxford University Press, 1995; R. Daft and A. Lewin, *Where are the theories for the new organizational forms? An editorial essays "Organizational science"*, 1993, 4, i-iv; M. Aoki and R. Dore, *The Japanese firm: the source of competitive strength*, Oxford, Oxford University Press, 1999.

[W]e agree with Environment Protection Agency(EPA) that requiring agencies to obtain and publicize the data underlying all studies on which they rely "would be impractical and unnecessary." As EPA persuasively stated "If EPA and other governmental agencies could not rely on published studies without conducting an independent analysis of the enormous volume of raw data underlying them, then much plainly relevant scientific information would become unavailable to EPA for use in setting standards to protect public health and the environment"²¹

EFSA differs from American regulatory agencies because it is both a research and supervising entity, entrusted with a public service. It is a new kind of agency, a new creature, in the context of administrative history. For centuries, European nation-states have struggled to subject the civil services to the executive and legislatures, while America has established agencies as instruments of implementation of legislation, rather than a supervising bodies independent of executive and legislative powers in the discharging of public interest duties.²²

In the EFSA case, knowledge provides the framework for the policy process. Research is a prerequisite for effective scrutiny and oversight. A duty with which the Agency has been entrusted by the EU Commission mandate. Policy-Rules cannot be produced without a proper examination of facts, based on sound scientific underlying data and independent experts. If the Agency is entrusted with the duty of suggesting policy-decisions, and therefore making rules, scientific knowledge, and critical evaluation of results, are fundamental for reaching the appropriate decisions about the rules to be made. A decision making process fairer than the usual procedures of formal and informal consultation of corporate interests that ministers usually adopt²³. Taking expert advice is not so transparent and efficient as having a panel, a network, of independent scientists., a scientific review group.²⁴ Scientific independence is one of the pillars of the new paradigm of administrative law.

It is worth considering how significant the growth has been in corporate-sponsored research on campus in America. To some extent, this is a function of a reduction in federal financial support for university research (which fell between 1969 and 1990 from over 19% to 12%),²⁵ not to mention the reduction in overall public financial support for colleges and universities in general (which fell, for example, in Canada from 60% in 1980 to 40% in 1999).²⁶ By necessity, therefore, universities have had to look elsewhere for support. Corporations' interests in university-based research in the United States undoubtedly also stem from the Bayh-Dole Act of 1980,²⁷ which allowed universities to patent the results of research that had been funded through federal grants, thereby opening the possibility of earning royalties by licensing innovations to private corporations²⁸. Before 1980, universities were producing about 250 patents per year; in 1998 alone, universities produced over 4800 patent applications.

There is no mistaking an increase in the research relationships between private corporations and universities. An editorial in the journal *Science* noted that, as of 1996, corporate funding had grown markedly to comprise up to 7% of "overall univer-

21 Am. Trucking II, 283 F. 3d at 372 (quoting 62 Fed. Reg. at 38,689).

22 C. R. Sunstein, *After the rights revolution. Reconceiving the regulatory state*, Cambridge, Harvard University Press, 1990.

23 Report of Hansard Society Committee, *Making the Law* (Hansard Society), London, 1992.

24 The United Kingdom Parliament, Fifth Report, Select Committee on Agriculture.

25 M S. Anderson, *The Complex Relations Between the Academy and Industry*, 72 "Journal of Higher Education", 2001, 226, 231.

26 P. Desruisseaux, *Canadian Professors Decry Power of Companies in Campus Research*, Chron. On Higher Education, Nov. 12, 1999, p. A59.

27 Patent and Trademark Law Amendments Act, Pub. L. No. 96-517, 94 Stat. 3015 (1980).

28 Council on Governmental Relations, *The Bayh-Dole Act: A Guide to the Law and Implementing Regulations* (Sept. 1999), at <http://www.cogr.edu/bayh-dole.htm>.

sity research" budgets.²⁹ For research in the life sciences generally, estimates of the share of corporate funding in the mid-1990s ranged between 9%⁶⁵ and 11%.³⁰ At some universities, corporate research support is higher. At the Massachusetts Institute of Technology, for example, even in 1986 industrial funding comprised 15% of the overall research budget, and at Carnegie-Mellon University, this figure was 23%.³¹ There are also particular areas where corporate support is especially marked. In the field of biomedical research, between 1980 and 2000, corporate funding grew to comprise 62% of spending on such research annually.

The corporate pressures constrain independent advice. Furthermore, taking expert advice on an individual base does not commit the minister to objective findings. Universities, for their part, are often more eager than corporations to form alliances. The Berkeley-Novartis arrangement, for example, was instigated by the university itself when Gordon Rausser, Dean of the Natural Resources College, sent inquiries to sixteen agricultural, biotechnology, and life sciences companies. A published study of university-business partnerships revealed that, as a general matter, universities were too eager to enter into such partnerships because they were "overestimating the opportunities for financial gain and underestimating the financial risks." Before leaving the Harvard presidency in 1991, Derek Bok observed that universities "appear less and less as charitable institutions seeking the truth and serving students and more and more as huge commercial operations that differ from corporations only because there are no shareholders and no dividends."

But in the EFSA case, scientific advice comes as the result of investigation and joint evaluation by a panel of experts who express their views as a body, having a precise collective voice in the assessment of risks to which our communities may be exposed.

In the European Union, the combination of research, supervision and public interest is a new historical phenomenon, generated by the encounter of the traditions of the member-states. It was indeed the UK Parliament, which raised the problem of independent scientific review and public access to data as a general regulatory principle of public policies.

The Agriculture Committee writes:

To avoid the charge in future that "significant amounts of public money [have been] spent on TB control measures that were inadequately thought through and were not subject to adequate scientific scrutiny, it is essential that future policy in this area is based on sound science and conclusive evidence and commands the full commitment of all parties involved³²

The present European legal framework, and the duties and functions EFSA has been entrusted with, constitute a public space of interaction and communication guaranteed by a peer review system independent of corporate pressures which constrains the independence even of university-based research in Europe and the United States. It is a proper constitutional space, generating and protecting the right to know and sound rule-making and therefore accountability and democracy.

EFSA is an offspring of the British FSA (Food Safety Authority) and its regulatory philosophy. In my view, the British connection deserves a closer analysis, as a source of independent and public knowledge and regulatory philosophy, adopted and reinter-

29 D. S. Zinberg, Editorial, A Cautionary Tale, 273 *SCIENCE* 411, 411 (1996).

30 D. Blumenthal et al., Relationships between Academic Institutions and Industry in the Life Sciences – An Industry Survey, 334 *New England Journal of Medicine*, 368, 369 (1996) (using 1994 data).

31 D. Blumenthal et al., Participation of Life-Science Faculty in Research Relationships with Industry, 335 *NEJM*. 1734, 1738 (1996) (using 1995 data).

32 Bovine tuberculosis in the UK

preted by the EU. It is an interesting case of institution-building in the making of Europe and a landmark achievement.

§ 7 Concluding remarks

This activity provides a body of knowledge which can be invoked in court at the disposal of parties and trial judges. Legal hermeneutics can thus be exercised on appropriate evidence open to the court. Hermeneutics without appropriate evidence to be considered is blind to fundamental rights.

Access to evidence is obviously crucial for an appropriate legal process. Indeed, legal reasoning and hermeneutics stands upon the collection and evaluation

A party having the monopoly of evidence, being able to manipulate the presentation of its case to the trial judges, becomes the master of the hermeneutical process fixing rights and duties. Interpretive authority tends to lie in an illegitimate player's hands. The neutrality of principles is seriously undermined.

This tendency can be particularly disturbing where commercial speech has been constitutionalised. It means that capital invested in advertising can simply abridge individual and collective rights in all walks of life and be recognised as constitutional rights when, in fact, they mean the supremacy of private interests **over** the constitution and the negation of accountability and transparency. It is a kind of commercial speech relativism that may destroy the foundations of our constitutional democracy.

Indeed, this situation may well undermine the standard of freedom, efficiency, fairness and equality upon which the effectiveness and efficiency of modern constitutions stand. When fairness, equality, and knowledge become the preserve of a special group pursuing private or special interests, the mask they can monopolise at will, democracy has come to an end.

Special interests become the overarching standards to which the constitution is subjected establishing a kind of dictatorship. This arrangement does indeed oppress public discussion in the marketplace of ideas, the free trade of ideas, rightly regarded as one of the foundations of democracy.³³

33 *Abrahams v United States*, 250, U.S 616, 610, (1919); *Cohen v California*, 409, U.S., 15, 26 (1971)