Freudian Analysis of a Judgment

Whoever has eyes to see and ears to hear
convinces himself that mortals can keep no secret hidden.
He whose lips are silent prattles with his fingertips,
and self betrayal gushes forth through all the pores of his skin.

Sigmund Freud

Foo Check Teck examines the evolution of the legal system through the developments in the fields of psychology and technology.

The institutional structure of the English legal system began to take shape in the 12th century. By the 15th century, the English judges had settled upon deciding cases by integrating common law, equity and the statutes. Thus, English judicial decision-making is very highly evolved. Yet no systems — natural or legal — are forever unchanging. However, change is by no means easy. In this article, we argue why our legal system — and in particular judicial decision-making, has to evolve along with the unfolding of two major developments in the sciences — psychology and technology.

We shall first discuss psychology.

Psychology and the Law

Any research on the mind of a judge should include a consideration of psychology — the science of the human mind. This argument is not new. The founder of judicial psychology is Hans Gross, a contemporary of Sigmund Freud. He showed, for example, how a witness revealed the truth towards the end of a testimony. In a Freudian slip, he unconsciously signed his real name. Over time, others after him have established criminal psychology as a discipline. Comparatively less attention is devoted to psychological studies of judicial decision-making. Recently, Lawrence Wrightsman, the author of Judicial Decision Making (underlying theory being social cognition), even raised this poser:

Is psychology even relevant for judicial decision-making?

We illustrate, by way of a recent judgment, how relevant Freudian psychopathology is for understanding the mind of a judge. In particular, how Freudian techniques may yield insights to impulses from the deeper Unconscious. Next, we will present the underlying conceptual model for Freudian analysis of a judgment.

Conceptual Model

To grasp the mind of a judge, one may begin with his judgment, for the judgment is tangible as an output of his mind that had been put to the case in coming to a judicial decision. Indeed, the judgment becomes part of a growing body of legal knowledge. The functioning of the mind is largely (90%) unconscious (see Figure 1: Conceptual Model for Freudian Analysis of a Judgment). Whilst neuroscience is documenting the neural firing patterns of the human brain to better understand how our mind works, the Unconscious still remains largely a mystery.

Figure 1

To understand the working of the Unconscious, we turn to Freud, the founding father of psychoanalysis, and to cite from his popular Psychopathology of Everyday Life specifically to the underlying theory of ‘parapraxes’ as Freud had presented in 1915–1917 through his Introductory Lectures on Psycho Analysis. ‘Parapraxes’ may be said to be relatively unimportant actions or behaviours and yet these unveil the Unconscious. As a judgment is in writing, we turn our attention to Chap VI, ‘Mistakes in Reading and Writing’. What is most interesting about the Unconscious is that it never lies. If so, Freudian slips — words written upon impulse — may unmask the deeper, Unconscious reasons for a behaviour, and in our case here, towards a deeper, more profound Unconscious ratio for the judicial decision. Even more intriguing — and most interesting — the person, that is the judge, may himself not even realise this!
The Singapore Law Gazette

Lapses in Writing — Freud Himself

Freud wrongly spelt an obstetrician’s name as Buckrhard instead of Burckhard. Yet he was supposed to be consciously checking through his own proofs on neurology and psychiatry. Freud reported his insights to the Unconscious from the incident as follows:

I had praised the treatise of this obstetrician entitled The Influence of Birth on the Origin of Infantile Paralysis, and I was not conscious of the least enmity toward him. But an author in Vienna, who had angered me by an adverse criticism of my Interpretation of Dreams, bears the same name.6

Freud was not aware he was unconsciously hostile towards the obstetrician and thus the slip. Freud was succinct in explaining:

It was as if in writing the name Burckhard, meaning the obstetrician, a wicked thought concerning the other Buckrhard had obtruded itself. [Emphasis added.]

On impulse, the Unconscious seized the opportunity for vengeance. ‘Buckrhard’ was a despised imagery within the Unconscious. Thus the Unconscious in Freud was up against ‘Burckhard’ as a symbol.

For the conscious judicial decision-making, it is assumed that the judge decides as he had been trained to do within the confines of statutes, cases and evidence. It is trite knowledge that judgments are analysed for their ratio decidendi. That which is not part of the reasoning necessarily leading to the decision of the judge is deemed the obiter dicta. Thus, what is deemed obiter is the relatively less important part of a judgment. Within the hierarchical system of the English courts, the discoverable ratio of a higher court binds the lower. For in English legal theory, the doctrine of precedent limits how the judge is to decide upon a given case. Yet for Freudian analysis, words in the obiter are the keys for unlocking the Unconscious. Here we turn to the judgment.

The Judgment

Here we attempt to apply Freudian insights to the processes of the mind to a controversial, if not highly criticised judgment.7 The decision of Judge Awang (now retired) had been severely criticised in the popular press.8 Hamid Sultan Abu Backer had even raised the issue of judicial propriety in the judgment. Interestingly, the author, having analysed the judgment in depth, then made a call for the reform on the ethics of the judiciary:

The judiciary itself can make provision in the Judges Code of Ethics to ensure that judicial propriety is maintained at the highest level.

Since then there have been other developments9 but these are outside the scope of this article. Our interest is only in enabling us to extend, by an empirical analysis of a judgment, on our model of the mind of a judge.10

Most promisingly in applying Freudian analysis, the relevant words and phrases were found to slip out towards the end of the judgment; the phrases that Judge Awang himself in an interview alluded to as but obiter dictum.11 Whilst there is clearly scope for a deeper psychoanalysis, we deliberately constrained ourselves to our objective. That is to illustrate how in this judgment the Unconscious has a contributory if not major role towards the judicial decision. In so doing, we may build on our model of the mind of a judge. Now we turn to the relevant ending segment of his judgment:

I seize [possibly an impulse of the Unconscious] this opportunity to record a few observations that a worrisome trend or culture, not borne out of Malaysian culture, has evolved ... [Emphasis added.]

The word seize clearly suggests an impulsive thought — Unconscious obtruding upon the conscious mind. This is reinforced by opportunity — for the Unconscious to leave its imprint. The substance of Judge Awang’s critique:

... where public institutions or government departments do not seem to care to respond to letters or reports received from the public. Such letters or reports seemed simply ignored, invariably no response or acknowledgement or receipt whatsoever has been made, for example, from personal knowledge [read, personally offended] in a few [two; his son and daughter] cases; ...

Following up with:

... where my son had applied for a temporary work permit which was refused, and I wrote an appeal to the authority concerned; ...

And the frustration of being let down:

In both cases there were no acknowledgement despite reminders, although earlier on, personal assurances of favourable consideration had been given [read, disappointment and frustration]. [Commentary added.]

Having applied Freudian analysis, we turn to our enhanced model.

Mind of the Judge

In our earlier model, the mind of a judge is analogous to neural network. That judicial decision process is but back propagation towards an optimal set of implicit weights. The goal of such iterative, back propagation,12 is for optimisation. Simply put, the judge reaches an early decision about the case and his mind then iterates backwards. The judgment represents an optimal solution to resolving the case. In the above case, Freudian analysis was applied to illustrate how the Unconscious may have protruded upon the judgment. That is the judgment carried an Unconscious imprint — one betraying a deeper ratio for the judicial decision. Our model may thus be enhanced to allow for the possible role...
of the Unconscious (see Figure 2: Judicial Decision). We now turn to discuss some wider implications.

Law, Psychology and the AI Judge

Law is much older than psychology. As discussed earlier, legal institutions began in the 12th century and 300 years later, judges converged upon deciding on cases very much the same way as they do now. Psychoanalysis as a field of investigation emerged largely in the early 20th century. It is therefore not surprising for Wrights to still raise the poser. For many psychologists, judgments are just too technical for psychoanalysis. There are but one too many rules, doctrines, precedents, principles, cases constraining judicial thinking. It is even far less likely for legal practitioners to embark upon Freudian analyses of judgments. Buried by their own cases, they can hardly find time to psychoanalyse judgments. Yet psychoanalysis of the judgment of Judge Awang, through Freudian analysis, may yield altogether new perspectives on how the mind of a judge may actually work.

This Freudian analysis reinforces my arguments first mooted in the 2001 Judicial Decision Support System (‘JDSS’) Conference in Chicago13 on the possible roles for ‘artificial judges’ — intelligent judging machines. After all, one of the popular metaphors of the English judicial system is in its functioning as a ‘machinery’. Despite the popular conception of artificial intelligent machines — AI judges — as cold and impersonal, we argue that there will at least be strict impartiality. For whilst the AI judge does not have a conscience, it equally does not have an Unconscious to contend with. Perhaps the solution lies in enhancing judicial impartiality (eg in personal damages assessment cases)14 through judges being aided by artificially intelligent machines.

Foo Check Teck
Nanyang Technological University
E-mail: mctfoo@ntu.edu.sg

[*We refers to the author, in the manner of speaking.]

Endnotes:
1 Quoted by HF Ellenberger, The Discovery of the Unconscious: The History and Evolution of Dynamic Psychiatry (1970) Basic Books, p 449. From the footnote, Freud wrote this in 1901 in German, although it was published only in 1906.
2 ‘CJ to errant lawyers: Shape up or pay up’, The Straits Times, 5 January 2003.
4 Website: \WINODWS\TEMP\News Updates from June 2000 to the present.html.
6 Dr AA Brill (ed), Book I, Psychopathology of Everyday Life in the Basic Writings of Sigmund Freud (1938) Random House, p 89.
7 In the High Court in Sabah nd Sarawak (Kota Kinabalu), Election Petition K5/99, Harris Mohd Salleh v The Returning Officer, Ismail Bin Majin, Yong Teck Lee, Saudin bin Kadir, Gamporon bin Lajab@Mohd Zulkifli bin Lajah, Yahya bin VP Kasim, Chong Eng Leong@Ching Eng Leong and Election Commission of Malaysia consolidated with Election Petition K11/99, Chong Eng Leong@Ching Eng Leong v The Sabah State Election Officer, Ismail bin Majin as the Returning Officer and Yong Teck Lee.
9 For example, there had been legislative changes to the Election Offences Act 1954 (Act 5) to allow for appeal.
12 For a fuller discussion, see endnote 10, p 26.
14 A current research project at Nanyang Technological University, School of Mechanical and Production Engineering, supervised by Dr Foo Check Teck.