Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

LAW IS TEXT

ANTHONY BECK
Inglaterra

Law may be characterized as the interpretation of texts. The start of a legal system dates from the inception of the practice of identifying and applying norms of human conduct by interpreting words. In the early stages there may well be disagreement as to the words which are to be the basis of interpretation. The texts for legal interpretation will not have been established, nor will hierarchies between texts have been fixed. All that will be recognized will be the basis for finding norms in the activity of interpretation. In the mature legal system it will be possible to identify three phenomena: agreement as to the texts and their hierarchy, complex codes of interpretation, and the norms recognized by the process of interpreting the texts.

The purpose of this paper is to begin to explore the process of interpreting legal writing by examining the procedures used by lawyers by applying the technique developed in literary criticism of relating the text to the literature, or writing, of which it forms part.

The analogy between legal and literary materials imposes three concepts on the legal process. First, the written sources of law are to be regarded as forming a complete source or Writing. Secondly, a text is seen as the basis not only of its literal denotation but of a connoted meaning which is analyzable in terms of distinct codes. Thirdly, attention is concentrated on reading and re-reading the text as a complex and active process of interpretation.

The Writing of law.

The law Writing includes all the sources of a particular legal system. The concept of law which this implies is that of a social rule establishing texts as the basis for the interpreting activity. Each jurisdiction will have its own Writing. Indeed a jurisdiction in this sense may be defined by reference to the established Writing. The Writing will include for common law countries statutes and the reports of decided

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

cases. Methodologically the criterion for inclusion in a law Writing is the treatment of the denoted discourse as the basis for interpretation. However, the language of law Writing will inevitably be meta-linguistic. Meta-language is enmeshed in the natural language to which it relates in two ways. The meaning or signified element in the meta-language encompasses the meaning of numerous words in the natural language. Secondly, the meta-language itself incorporates words used in the same way as in the natural language. Thus, the meaning of law writing even at the denoted level can be said to oscillate between the law meaning and the natural language meaning. For example, the terms thief and murderer are not used in law texts simply as part of the language of the law Writing. The Writing of the broader culture of natural language may be left indeterminate theoretically.

The law Writing must be conceived both as the denoted discourse and also as containing the connotation of texts. Connotatively non-law texts are just as relevant as legal texts. The broader Writing of natural language is just as much part of connotation as the law Writing. Where Professor Dworkin attempted and failed to make good a distinction between rules and principles, a clear and coherent division can be made between denoted text and connotation. It is not the case that rules have an all or nothing application and enjoy an incoherent relationship with principles. It is the case that the denoted text is interpreted in the legal process by reference to connoting material found both in law Writing and in the broader culture. Connotation cannot be reduced to the apodoiectic form if x, then y. For example, the reasonable man in the common law cannot be reduced to a single principle. Nor can his recurrence in different legal contexts be explained by an appeal to principles. He can be accommodated by the analysis of connotation in terms of codes.

The connotation of legal texts.

The notion of semiotic codes in literary texts was pioneered by Roland Barthes. He offers only layers of metaphors for their identification. From the metaphors can be distilled the following characteristics:

1. Each code rests on Writing beyond the text.
2. This extra-textual material is read alongside the textual denotation.
3. The extra-textual may dominate the textual.
4. The extra-textual has many strands or voices more than one of which may be present at any one point in the text.

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

From the last quality it follows that the analysis of a text requires a step-by-step approach. There is no single conclusion of the significance of the text. There is only a complex of connoted meanings to be spun out from moment to moment. All these elements of the literary text can be adopted by recognizing legal sources, statutes and precedents, as texts which carry, and operate through, codes. There is no ratio decidendi of a reported decision severable from the connoted codes. However, we must mark clearly the fundamental differences between the literary text and the legal. The crucial differences are:

a) each reported interpretation of the legal text becomes part of a code for that text;
b) each sign in the text is part of the code of similar signs in the law Writing;
c) each legal text orients towards the code of validity of the legal system;
d) legal texts are structured according to the apodoiectic code;
e) each legal text refers to the code of enforcement;
f) each legal text refers to the codes of interpretation;
g) connotation of legal texts is largely institutionalized by the institutional basis of the law Writing;
h) finally, connotative links between text and codes, and between codes, rests not on metaphor and antithesis as in literature, but on identity or similarity of categories.

The eight distinctive features of legal connotation refer only to the law Writing. In addition, of course, the law text connotes what is contained in the non-legal culture in a way which is not esentially different from the literary, albeit that the law text is dispositive of rights and duties, is normative.

The distinction between a legal and non-legal decision must be made. The reliance on texts must in some measure be regarded as obligatory, though it is not necessarily the case that the idea of a social rule is best fitted to explain the practice. The limitations of rule concepts is that we think of rules in the context of games. This obscures not only the comprehensiveness of legal rules but also the involuntariness of members participation in a legal system. The hallmarks of a legal system indeed may be thought of as the qualities of wide-ranging application of norms derived from texts and their institutionalized enforcement. Because of the narrow area in space and time regulated by the rules of games, the problems of connota-

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

tion in the rules of games are few or non-existent. However this may be, no attempt is here being made to do away entirely with Hart's useful concept of power-conferring social rules. Thus, we will employ the criterion for law as the existence of a social rule that disputes be settled by norms found throught the interpretation of texts. The criterion for law must go one stage further. It must establish which texts are to serve for the process of interpretation. We will rely on a modified version of Hart's concept. The existence of law requires a social rule identifying certain texts as the ones to be interpreted. The essential category of law is not command, rule or principle, but text and its supplement, the connotation of text. Texts do not spontaneously yield commands, rules or principles. This is to insist on placing interpretation at the centre of the legal process and of legal theory. The judge always has discretion in interpreting the text so long as his conduct amounts to interpreting all relevant texts. Relevance may be established procedurally, as by a pleading which invokes a certain text. Generally it is a question of connotation. For legal rules are the codes, though not the only codes, for the interpretation of legal texts. The codes establish the relevance of the texts to fact situations. The only necessary and sufficient condition proposed by the text theory for a legal decision is that it is made by the interpretation of relevant texts. Where a court makes a decision unfettered by text, it is not acting legally at all. It is certainly exercising power but it may be called political power and this should be distinguished from the legal variety. The line may not always or often be clearly drawn. Legal philosophy performs a dubious service in refusing to draw it or only drawing it unrealistically. The text theory recognizes the interpretation at work both in core cases and in hard cases: in both it is problematic. The crucial area of nonlegal decisions by judges is preserved.

What is important and difficult in analysing reading is identifying the substance of the connotations. By analysing connotation in terms of codes at least two advantages are obtained for legal theory.

First, in both hard and core cases three elements are seen to operate in the judicial process —establishing the facts, establishing the text, and bringing the connotation to bear—. Clearly all three elements are inter-related. The theory treats the trial, in particular witness evidence, as a form of writing. The connoted text itself connotes the text of the evidence. The finding of facts is treated as an integral part of the interpretative judicial process, not left out of theory altogether. This will have useful consequences for bringing judicial fact-finding within the field of jurisprudencial study.

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

Secondly, what it is proposed is a descriptive theory, there is no question of what the judge ought to do in any particular case except so far as social rules for identifying texts and the identification of relevant texts may be considered. Judicial freedom is seen to be far greater from the viewpoint of the text thesis and jurisprudential criticism more open-ended. The corrollary of this is that far more is required in the analysis of judicial interpretation not only in hard but also in core cases. As Dworkin argues, it is inadequate to say with Hart that the judge has a discretion of some kind in the hard case. It is stultifying to insist that only a decision on the basis of the principles identified by Dworkin is truly legal. The justification for characterizing law as interpretation by indeterminate codes, for not limiting judicial principles to those underlying the established institutions of society, for, fundamentally, abandoning the insistence on a criterion for legal decisions which is exclusionary and narrowly determinate, is that doing so provides a true and adequate characterization of social reality and offers an impetus to reasoned criticism.

At this point it may be helpful to discuss an example of text theory. The decision chosen was selected quite arbitrarily but it provides abundant material for investigation of connotation. In *R.v.Feely* ([1973] 1 All E.R. 341) the Court of Appeal (Criminal Division) had to decide whether an employee who took money from his employer's till intending to repay it, stole the cash. The appeal turned on the interpretation of the word "dishonestly" in the definition of theft in the Theft Act. 1968, s.1. The arguments used in the judgement of the court were these:

1. The word dishonestly is in common use. It is a question of fact what a word in common use means.
2. Jurors are familiar with the problem in their own lives of deciding what is honest or dishonest.
3. Questions of fact are for juries to decide.
4. A distinguished judge. Lord Reid, had said in a House of Lords judgment that usage was a question of fact.
5. Taking property without moral obloquy is not within the concept of stealing either at common law or under the Theft Act. 1968.
6. A conviction for stealing is bound to lower the reputation of the accused in the estimation of right thinking people.
7. There are no grounds for distinguishing the cases of one who passes a cheque with no funds at the bank from one who takes money from a till.

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

The conclusion was accordingly reached that interpretation of "Dishonestly" should be left to the jury. The conventional view which characterizes a legal decision as the application of rules or principles to the facts, will consider only arguments 1, 3 and 4. For this kind of analysis it is enough to say that the decision distinguished ordinary words in a statute from technical legal words and drew a rule from the speech of Lord Reid that the meaning of ordinary words is a question of fact. The court then applied the established division of function between judge and jury: questions of fact are for the jury. And so it was left to the jury to decide whether Mr. Feely had been dishonest in borrowing from the till. On a deeper view of principles and bearing in mind secondary rules, the court can be seen to be recognizing the principle or rule that it should follow precedent. In contrast, the text thesis considers all the numbered arguments equally. They are understood as parts of codes extending into legal and popular culture. The most prominent code is the antithesis of legal/ordinary language. On the one hand the law is technical, the mystery of a distinct class remote from ordinary people. On the other, the ordinary people are the repository of decent standards, and the jury is the representative sample embodying all the qualities of the general class. This piece of ideology is far too implausible to rate as a rule or principle of the system but as a code it is quite plainly the recurring and consistent theme and basis of the court's judgment. Consider the argument numbered seven. This compared passing a dud cheque in good faith with borrowing from the till. It arose from an attempt by counsel to suggest a purely technical approach to the problem of interpretation. The argument which defeated his attempt embodies the code of the gentlemanly use of cheques as contrasted with the till-borrowing habits of the shop assistant class. It supports the demotic code of the jury be refusing to distinguish the two practices. Argument number 5 which considers the moral side of theft is concerned to reconcile the two sides of the code, the legalistic with the popular. In this code the popular is privileged over the legal. More generally, the reasonable man, the man on the Clapham omnibus, is given preference by the code over Mr. Justice Cocklecarrot. There is no way in which this ideology can be reduced to a principle without loss or distortion. Of course there are other codes whose voices are heard in the judgment, for example, the code of judicial remoteness —it is the jurymen who are familiar with the problem in their own lives of deciding what is honest and dishonest. Impliedly they gain such experience from grubbing in the marketplace of ordinary life—. The judiciary are above such gross problems. There is also the code

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

of the charismatic judge whose words reflect his inspired insight. Lord Reid is quoted as if his ipsissima verba are sufficient base for a legal rule. Only his personal eminence is needed to support his opinion.

It may be argued that there is no end to the number of codes an ingenious and alert member may discover to be operating in a judgment. There is no objection to this view in the text theory. The text is recognized as fertile. Each interpretation effects a closure. The closure is necessary for the judicial process but it is never final. The text survives to form the basis of other and possibly different interpretations themselves temporary closures. It may be recognised consistently with the text theory that the ideology of the interpreter directs the interpretation. In the legal application of semiotic theory there need be no division between semioticist and Marxist in this respect. Of course society and history and the economic base contribute to codes embodies in the text as well as does the ideology of the interpreter. Texts are diachronic, interpretation is part of a synchrony. This is one of the reasons for the tensions and distortions of texts involved in the production of synchronous description of the law. The synchronous description produced form the multitudinous assembly of diachronous texts is falsely treated by legal theory as law. The text theory treats it properly as connotation of texts.

Finally, we will say a little more about reading legal texts. Just as Barthes has perceived in the reading of a literary text, so for legal texts, the reading is an arduous activity. Reading the text is not merelly a mechanical subservient operation. The complexity of codes also means that successive re-reading yields different interpretations. Barthes did not acknowledge the distinct ideology of each group of interpreters nor the creative quality of interpretation. The codes are sources of creativity. The point of new creation is when a fresh interpretative connection is made between code and text. Connections between code and a particular piece of writing is precisely what takes place in a trial in a court of law. The trial is a verbal realization of the past: it is itself a writing, a text. The procedures and evidence are parts of the writing of the trial. The function of the court is in part to relate this writing to established codes. This of course goes on at the same time as making the connection between the writing and the denoted legal discourse of the relevant legal texts. Ethno-methodology has brought out how much of evidence is concerned with the allocation of blame (*Atkinson and Drew.*) Blame itself is a bringing to bear of particular codes on facts evidenced, or rather on the writing denoted by the taking of evidence. Verdicts however adopt the code of impartiality and impersonality. It is conventional, for

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

example, for the decision of the jury to be unquestionable in the sense that their verdict is presented without arguments being provided justifying it. A similar convention dictates the tone and style of judgments. They are spoken as by no individual voice, addressing no human audience. The code of impartiality struggles to overthrow the contingent nature of interpretation. A legal theory which takes this code as a scientific account of what has taken place in the trial and ignores interpretation is simply projecting an ideology which obscures complex and important processes of social life. The text thesis undermines the monolithic crudities of legal theories based on rules and principles. It is symptomatic that the latter class of theory relies so heavily on analogies between law and games. The unacknowleged differences between law and games do not only involve the involuntariness of participation in law, but also the crucial part that connotation and interpretation play in legal systems.

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx https://biblio.juridicas.unam.mx/bjv Libro completo en: https://goo.gl/hZTCLH

BIBLIOGRAPHY

Atkinson J. M. and Drew P., "Order in Court", Oxford Socio Legal Studies Centre, 1979.
Barthes R., "S/Z", tr. Richard Miller (London: Cape) 1975.
Dworkin R., "Taking Rights Seriously", (London: Duckworth) 1978.
Hart H.L.A., "The Concept of Law", Clarendon Press, Oxford, 1961.

DR © 1982. Instituto de Investigaciones Jurídicas - Universidad Nacional Autónoma de México