Semiotics and Legal Theory

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PREFACE

This book is an exercise in exposition, comparison, criticism and construction. I have taken two very different intellectual traditions, structuralist semiotics as represented by A.J. Greimas and modern (mainly positivist) legal theory as represented by Hart, MacCormick, Dworkin and Kelsen, and by juxtaposing them have sought to clarify and assess their respective semiotic presuppositions, in order to lay some foundations for a semiotically sensitive theory of law. This latter end could, no doubt, have been achieved without the weight of preceding exposition, which forms the bulk of Parts Two and Three. But that is not my style; I do not seek to conceal, as is common in some circles, the stimulation I receive from critical reflection upon the work of others. More important, I hope that this exercise in comparative theory will serve the cause of inter-disciplinary communication. The book is designed for both jurists and semioticians. To facilitate access across the disciplinary divide, I have included at the head of each chapter an abstract, which serves as both summary and conclusion to each section.

Semiotics and Legal Theory is the result of a project conceived in the late seventies. My interest in structuralism was first generated by a sense of dissatisfaction with the working methods and theoretical sensitivity of comparative legal history, a dissatisfaction which I expressed in some of my work on early Jewish Law (1975:ch.1, 1980c, 1980d). But I rapidly realised that the development of a structuralist methodology for legal history required an analysis of the structuralist contribution to legal theory. I offered a preliminary account of this as an overgrown paper to the 1979 conference of the (U.K.) Association for Legal and Social Philosophy at Durham. In

1980, I was awarded a Personal Research Grant by the Social Science Research Council, to develop this work further. It soon became apparent to me that 'structuralism' was as diverse as is 'legal theory', and that I must choose between a 'Cook's tour' of structuralism and a thorough presentation of one strand within it. The choice of the latter route, represented particularly by Part Two of this book, was facilitated by the availability from within that tradition of a 'pilot' application of its methods to a legal text. Through a critical exposition of this particular approach, I hope to reveal the major theoretical and methodological issues which arise throughout much of the structuralist tradition. At the same time, I have sought, particularly in the notes, to provide a broader indication of the range of work which is now available. Structuralism, if defined more loosely than is done in this book (where it is taken to mean the application of linguistic methods to units of discourse larger than a sentence) can be understood to include both Chomskian linguistics and Piagetian cognitive developmental psychology. But for reasons of both space and coherence, consideration of their relationship to legal studies has been excluded from the present work, and will appear elsewhere.

In the course of the last four years, my work has been greatly assisted by numerous institutions and individuals, from whom not only the present book but also the associated work in progress derives benefit. The project was conceived and executed in my years as Head of the Department of Law at Liverpool Polytechnic, and owes much to the tolerance and interest of my colleagues there. It received considerable impetus from a grant awarded by the SSRC, which made it possible for me to take six months' leave from my normal duties. Further travel and research assistance was generously provided by the British Academy in 1983, and by the British Council in 1984. The limitations of written discourse as a medium of communication are only too apparent to someone seeking to penetrate the arcana of a new discipline, and such progress as I have made would have been impossible without a wide range of personal contacts, and reactions to my lectures and conference papers. I am indebted to colleagues at the Law Schools of Osgoode Hall, Berkeley, Yale, Paris, Exeter and Cardiff, to the Comparative Literature Department at Beer Sheva, the Religious Studies Department at Lancaster, the Social

Studies Department at Liverpool Polytechnic, the Jean Piaget Centre at Manchester Polytechnic, and the School of Interdisciplinary Human Studies at the University of Bradford, for hosting seminars, and giving me the benefit of their reactions to various papers related to this book. Colleagues in America, France, Italy and Israel (where I spent a stimulating term as a Lady Davis Visiting Professor), as well as nearer to home, have kindly discussed various problems with me, and I should like to record my gratitude to them: Bruce Ackerman, Paul Amselek, **André-Jean Arnaud**, Anthony Beck, Hanina Ben Menahem, Danièle Bourcier, Albert Brimo, Massimo Brutti, Antonio and Gaetano Carcaterra, **Domenico Carzo**, Noam Chomsky, Amadeo Conte, Brenda Danet, Pierre Dauchy, **Mary Douglas**, Itamar Eben-Zoar, Yaron Ezrahi, Paolo Fabbri, Harel Fisch, Howard Gardner, Ruth Gavison, A.J. Greimas, **Peter Goodrich**, Donald Hermann, **Keekok Lee**, Alan Jenkins, **Mario Jori**, **Georges Kalinowski**, Duncan Kennedy, Frank Kermode, Stephan Körner, **Eric Landowski**, **Pierre Lerat**, Etienne Le Roy, Claude Lévi-Strauss, Mario Losano, Avishai Margalit, Antonio Anselmo Martino, **Stanley Paulson**, Menachem Perry, Massimo Piattelli-Palmarini, Shlomit Rimon, Ino Rossi, Natan Rotenstreich, Marina Sbisà, Uberto Scarpelli, David Schiff, Dimitri Segal, J.L. Sourioux, Dan Sperber, Sidney Strauss, Yan Thomas, Tuen Van Dijk, Helen Weinreich-Haste, Michel Villey.

A number of these colleagues (whose names are emboldened) have further assisted me by commenting on drafts of my work, as also have Roque Carrion-Wam, Michael Freeman, Neil MacCormick, Michael Moore, Iain Stewart and Tom Torrance. Above all, I must express my appreciation to two good friends: the semiotician Eric Landowski and the philosopher Stanley Paulson commented at various times on almost two full drafts of the present book.

Both my immediate colleagues and my family have rendered practical assistance going far beyond mere tolerance. I am especially indebted to my colleagues in the Liverpool Polytechnic Library, without whose ever-courteous and efficient operation of the Inter-Library Loans Service my research would have been impossible, and to my friend Roy Sharp, Head of the Department of Graphic Design, who kindly assisted with the diagrams. A huge amount of typing was undertaken by my father. The book is

dedicated to my children - poor compensation for the hours of which they have been deprived. Nor was Judith terribly amused, at the time, by the contribution she unwittingly made to the analysis of black v. white (section 4.3).

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PART ONE

Introduction

CHAPTER ONE

Mapping the Issues

(1.1) The range of legal and semiotic theories: Jurisprudential theories are often classified as naturalist, positivist or realist. Both naturalism and positivism see law as a reified system, but differ according to whether it is a matter only of human convention, or whether it includes (often rational) universals. Realism commonly rejects the reification of law, in favour of a view of legal rules related to human goals, practices and psychological states. Semiotic theories admit of similar classification. Chomsky stresses the universals of human language systems; structural semantics propose conventional systems of meaning; pragmatic theories often deny the autonomy of such systems, and view meaning in relation to the goals of human communication and the practices of its participants. Some exponents of linguistic realism criticise the formalist emphasis on 'langue' rather than 'parole' (Saussure) or 'competence' rather than 'performance' (Chomsky). **(1.2) Law as a Semiotic System:** The analysis of law involves the taking of positions on this range of legal and semiotic theories. Law may be regarded as a dual semiotic system, the language in which it is expressed and the discursive system expressed by that language. If so, choices still need to be made as to the type of semiotic analysis to be applied to the discursive system. The effect of differences between Peircian (pragmatic) and Saussurian (structuralist) semiotics are sketched in respect of the structure of semiosis (binary or triadic, representing different views of the status of the 'referent'), the classification of signs ('signals' or 'signs'), their processes (interpretation or decoding) and

functions (communication, signification, connotation and the role of communicative intent). **(1.3) Law, Semiotics and Philosophy:** In legal philosophy Scandinavian legal realism has come closest to the view that language is central to the nature of law but in so doing it endorses a functionalist approach, akin to that of the 'speech act' tradition, viewing legal language primarily in terms of the goals and intentions of authors. European semiotics stresses the contribution of the language-system, of which the speaker may only be partly conscious. Both semiotics and legal theory offer attemps to mediate between these positions. Individualist and collectivist conceptions of action are reflected in the rival traditions.

1.1 THE RANGE OF LEGAL AND SEMIOTIC THEORIES

The question 'What is law ?' has many meanings, and its polysemicity is increasingly recognised in legal theory. It may mean: what universals, if any, are found in that phenomenon to which we attach the name 'law' ?; what are the origins of that phenomenon to which we attach the name 'law' ?; what do we seek to refer to when we use the word 'law' ?; what underlying concept is pre-supposed in our use of the word 'law' ?; what kind of objectivity, if any, corresponds to our concept 'law' ?; what empirical realities are to be observed in that to which we refer as 'law' ? Lurking behind all these questions is the further epistemological issue: why should our answer to any one - more likely, in practice, to any cluster of these questions - be regarded as significant ?

Legal theories may be crudely classified as naturalist, positivist or realist. Naturalists claim the existence of universals, often relating to the origins of law, and regard them as significant in contributing to the presence of an objective reality, the legal system. Positivists eschew such universals (at least for the purposes of legal theory), and, where they adopt criteria from the origins of law in order to construct an objective legal reality, their choice of origins reflect views on the significance of human action (individual or social). Realists eschew not only universals but also the claim to an objective legal reality, and instead regard as significant the empirical phenomena of the law, together

with their causes and effects. Sometimes such realism extends to a scepticism of the very concept of normativity - a distinguishing feature of legal systems which is regarded as central by both naturalists and positivists.

Such fundamental issues as these have assumed a multitude of specific forms in the history of legal thought. This book addresses itself principally to the most prominent modern debates within positivism. The mold of classical legal positivism has, in the twentieth century, been cracking. Dworkin, while remaining at heart within the family of legal positivism, has offered criticisms inspired by both naturalism and realism; Kelsen, in his later period, made significant concessions to realism. These tensions within contemporary legal positivism are fully explored in Part Three, in terms of the semiotic presuppositions of some of its different versions. For the moment, it suffices to provide a basic account of the issues as they are presently debated.

Natural law theorists contend that human enactment is not the exclusive source of legal obligation; 'nature' is also such a source. A version of this approach goes back to the Stoic identification of nature with human reason. Sometimes it is claimed that this reason has been placed in human nature by God, but others in the rationalist tradition of natural law (and notably Grotius) see this further claim as inessential. Through this common human nature, mankind universally perceives the importance of certain basic norms. This leads, on the one hand, to an intuitive theory of morality, but more strongly to a theory of natural law: these basic norms are not merely fundamental rules which any system of human law **ought** to include; they are legal rules by their very nature.

Jurisprudential positivism rejects this approach. In terms of general philosophy, it claims that an 'ought' (whether moral or legal) cannot be derived from an 'is' (such as a human sentiment, albeit universal); in jurisprudential terms, it thus adheres to the view that there is no necessary connection between law and morality. Law is a matter exclusively of human choice, and where it incorporates elements of morality, that incorporation is contingent upon the exercise of such a choice within particular legal systems. The need to provide an account of law which does not commit the 'naturalistic fallacy' of deriving an 'ought' from an 'is' is taken most seriously by Hans Kelsen, who

argues that the legal character of a norm depends exclusively upon its conformity with a superior norm within a hierarchical normative system, the apex of the system consisting of a 'basic norm' (**Grundnorm**) which is the logical presupposition on which the normative validity of the rest of the system depends. For Kelsen, any account of legal validity must be 'pure', in order to avoid the naturalistic fallacy; it must avoid any reductionism to such facts as are the subject matter of politics, psychology, sociology or economics.

Hart's version of positivism has many elements in common with that of Kelsen, but is less radical in its rejection of fact-reductionism, and departs from the Kelsenian view in the emphasis it places upon two particular 'central characteristics' of legal systems. For Hart, legal validity ultimately rests upon acceptance (a psychological fact) by officialdom of the normative character of the legal system. That system is characterised by the interaction of two distinct types of rules - 'primary' and 'secondary'. Primary rules concern the behaviour of the subjects of the system; secondary rules are chiefly concerned with the recognition and change of primary rules, and the manner of adjudication of disputes. It is a central characteristic of legal systems that its norms represent neither mere regularities of behaviour, nor responses to coercion, but rather are accepted from the 'internal point of view'. The legal systems of advanced societies rest upon acceptance, particularly by officialdom, of the view that one ought to follow primary rules because failure to do so would be breach of the secondary rules, and such failure would be a matter of reproach.

The secondary rules of the Hartian legal system thus depend upon convention, not nature. Their content, too, reflects the orientation of positivism towards an image of law based upon human choice. Whereas it might be conceptually possible within Hart's theory to envisage a legal system which adopts natural law (in the sense described above) as its criterion of recognition, what we actually find is the use of legal 'institutions' as the media through which such human choices are made. For these and other reasons, Hart holds strongly to the view that there is no necessary connection between law and morality. At the same time, he is very much concerned with the question of the morality of law: what rules law ought to contain as a

matter of morality (his particular moral philosophy being constructed on utilitarian lines), even though he denies that any such arguments make the resulting norms legal.

Jurisprudential positivism, especially as represented by Hart, has been attacked by Ronald Dworkin on the grounds that no sufficient account of the workings of legal systems can be provided in terms of Hart's secondary rules. In particular, the central place of any 'ultimate' or 'master' rule of recognition is contested. The latter, Dworkin argues, can at best provide an account of but one component of the legal system - legal 'rules'. They cannot account for an equally important part of the legal system, namely 'legal principles'. Some critics of Dworkin have maintained that Hart's theory can readily accommodate this argument: that the distinction between 'rules' and 'principles', and the manner in which the two categories operate, is a matter of degree rather than a difference in kind, and that secondary rules of recognition can be formulated in such a manner as to include the workings of 'principles'. But there is more at stake in Dworkin's attack on positivism than the mere formulation of secondary rules of recognition. For Dworkin argues that the workings of 'principles' reflect a view of legal systems as not sufficiently accounted for by acts of human choice, but as including - at any moment of time - rational implications which have not yet been the subject of human choice. Thus, whereas the positivist views the legal system as a set of rules already established by acts of human choice (within the institutionalised legal system) combined with a discretion (authorised by the legal system) to decide new questions which have not yet been so determined, Dworkin rejects any such notion of discretion (which he labels 'strong'), and argues that it is necessary for the judge to act as if there already exists - before and independent of particular acts of will within the legal system - a privileged answer to any question which may arise for legal determination. But Dworkin distances himself from traditional theories of natural law in the following respect: the ultimate source of his (sometime) 'one correct answer' is not any universal morality or universal human reason, but rather the morality and political values of a particular human community.

Even within mainstream positivism, we encounter significant differences in defining the object 'law'. The nineteenth century English legal philosopher John Austin

distinguished between 'law properly so called' and 'law strictly so called'. The former, the proper use of the term 'law', was any 'rule laid down for the guidance of an intelligent being by an intelligent being having power over him'; it included rules laid down by the members of a club, on pain of exclusion, and other imperatives which do not rely on state coercion. 'Laws strictly so called', on the other hand, were laid down in the context of sovereignty; these alone were 'positive law', and constituted the proper subject matter of jurisprudence. Even Hart, who rejects definitions (by way of necessary and sufficient conditions) of the complex concept 'law', accepts the distinction between 'paradigm' instances of law (such as a municipal legal system) and more remote instances, such as international law. Much depends upon the purpose of the classificatory exercise.

Within the class of realist theories of law, considerable diversity may also be found. Scandinavian realists have tended to reduce law to the psychological states of the participants - their feeling of obligation, mediated through language; American realists have stressed regularities of legal behaviour - what courts and others actually do - as forming the basis of predictions (predictions which might very well vary from official statements of the 'rule'). The difference between the two approaches reflects to some degree the battle-lines in psychology over behaviourism. The American research tends to view rules from an 'external viewpoint', rather than as a direct account of the attitudes of the participants. Others have taken a sociological rather than a psychological route, seeing law in terms of grand social movements, whether it be in the direction of a conservatively-oriented Historical Jurisprudence, which values legal evolution insofar as it preserves traditional values, or a liberal Sociology of Law devoted to maximising social engineering in aid of social democracy, or a Marxist Jurisprudence which sees the reality of the law as its reflection of causal (predominantly economic) processes leading inexorably to the socialist revolution. The Scandinavian realists have shown the greatest interest in legal language; their work forms an important bridge between traditional jurisprudence and the semiotics of law. The modern 'critical legal studies' movement has sometimes sought to integrate aspects of modern semiotics into its eclectic theoretical base. (1) Modern North American legal

scholarship has begun to show an interest also in deconstruction (2) and hermeneutics (3).

The Range of Semiotic Theories

Semiotic theories display a comparable range of questions and approaches. Indeed, it would not be difficult to classify semiotic theories under the same rubrics of naturalist, positivist and realist.

Naturalism in semiotics is today most prominently represented by the philosophical claims which Chomsky takes to be implied by his account of linguistic, and particularly syntactic, structures. Chomsky seeks to provide an account of a universal linguistic competence, which in his view can best be explained in terms of the human genetic endowment. Like natural law theory, Chomsky relies heavily upon a form of rationalism, in his case that derived from Descartes. Opposition to such claims has come from two directions. On the one hand, there are those who approve of Chomsky's methods, and of the ontological presuppositions which they reflect, but who reject the naturalist conclusion. John Lyons, for example, accepts the feasibility of studying semantics 'as such', but rejects - or regards as unnecessary or unproven - such claims to innatism which Chomsky appears to make. By contrast Geoffrey Sampson rejects the whole notion that language may be studied 'as such', in the sense of a snapshot picture of a language system, rather than as an historical, changing phenomenon, to be viewed always in the context of its uses (e.g. 1980a:73f.). That latter viewpoint is more conventionally characterised in terms of the dominance of pragmatics over semantics.

The semiotic approach of the school of A.J. Greimas, which forms the principal focus of interest of Part Two of this book, may be characterised as predominantly (though by no means exclusively) positivist in this sense. It builds upon the tradition of structural semantics, which claims both the possibility and the desirability of a formal account of the system of meanings in a language, viewed synchronically. (4) That approach, derived from the tradition of Saussure, has its origin in linguistics. In common with other forms of structuralist theory, Greimasian semiotics then claims that units of language larger than the individual sentence - discursive units - are susceptible to the same methods of