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# Interpretation, Law and the Construction of Meaning

*Collected Papers on Legal Interpretation in Theory, Adjudication and Political Practice*

Springer

# INTERPRETATION, LAW AND THE CONSTRUCTION OF MEANING

## Collected Papers on Legal Interpretation in Theory, Adjudication and Political Practice

*by*

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Wouter WERNER is Professor of public international law at the *Vrije Universiteit*, Amsterdam. His main fields of interest are the theory of international law and the legal regime regulating the use of force in international relations.

# INTRODUCTION

ANNE WAGNER, WOUTER WERNER AND DEBORAH CAO

Semiotic theories have emphasized the contextual and dynamic nature of meaning and knowledge. As one of the founding fathers of semiotics has argued, all meaning emerges in a triadic structure, where a 'sign stands for an object, not in all respects, but in reference to a sort of idea ... the ground'.[1] This understanding of the construction of meaning rules out the possibility of a fixed foundation of knowledge. All knowledge is mediated by a sign, which can only be interpreted by reference to yet another sign, its ground. In the same fashion, legal semiotics has emphasized the dynamic character of legal concepts and stressed the importance of interpretation and the construction of meaning. In response to new problems, changing power structures, changing societal norms and new faces of injustice, established doctrines are reconsidered, reformulated and partly replaced by competing doctrines and hypotheses.[2]

The open and conjectural nature of legal knowledge raises some foundational questions regarding the nature and function of law. How is, for example, the openness of legal rules to be reconciled with the quest for final authority? Who has the power to define words and concepts in a concrete case? How is the construction of meaning in law affected by societal discourses? Such questions are closely related to the central topic of this volume: the problem of legal interpretation and the construction of meaning within and through law.

The contributions to this volume are based on a selected number of papers that were presented at the 2004 International Roundtable for the Semiotics of Law in Lyon. The contributions reflect the connectedness, as well as the diversity, of the community of legal semioticians. While all contributions deal with issues of interpretation and the construction of meaning, the fields of application as well as the theoretical underpinnings of the contributions are broad. We hope that this 'diversity in unity' will contribute to a fruitful discussion on the foundations and application of semiotic theories of law.

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[1] Charles Sanders Peirce, *Collected Papers* (Cambridge: Harvard University Press, 1931-1935), Vol. II, at 34.

[2] See for an analysis of the dynamics of law and legal interpretation Roberta Kevelson's seminal work, *The Law as a System of Signs* (New York: Plum Press, 1988).

Part I of this volume discusses the problem of legal interpretation from a more general, theoretical perspective. The four chapters in this part discuss the topic of legal interpretation from different, yet overlapping perspectives: institutionalism (van Schooten), contextualism (Charnock), legal rhetoric (Soboleva) and communicative rationality (Cao). All four chapters explicitly relate the problem of interpretation to the notion of intersubjectivity and emphasize that legal interpretation is embedded in wider social practice. Thus, van Schooten examines the importance of common societal beliefs that shape the law to law and structure the interplay between legal rules, the application of those rules and social interaction. In a similar fashion, Charnock criticizes the literal rule of construction and argues that the content of legal rules is established by consensus in the relevant community. Soboleva sets out how *topoi,* or commonplaces, guide legal reasoning and function as constraining and disciplining structures. Finally, Cao takes up the Habermassian notion of communicative rationality to explain legislative and judicial acts. By contrast to approaches to (legal) speech acts that derive meaning primarily from intention, Habermas stresses the importance of intersubjectivity and acceptability, thus echoing the Piercian reading of the relation between the construction of meaning, intersubjectivity and rationality.[3]

The notion of intersubjectivity also figures prominently in Part II of this volume that deals with the problem of interpretation in judicial reasoning. In Chapters Five, Six and Seven, Baldwin, Henket and Azar, discuss respectively one of the most delicate topics related to the application and interpretation of law: the construction of legally relevant facts in legal proceedings. In several respects, Baldwin and Henket take different positions towards the role and construction of facts in legal proceedings, as may be inferred from the respective titles of their contributions: 'Who needs fact when you got narrative?' (Baldwin) and 'Taking facts seriously' (Henket), whereas Azar, in his paper, approaches judicial reasoning from a different angle: in terms of ambiguity and indeterminacy[4] where law and language often intercept. Indeed, Azar

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[3] See for example Habermas's discussion of Pierce in J. Habermas, *Texte und Kontexte*, Suhrkamp (Frankfurt: a.M., 1991).

[4] For more information, see L. Solan, 'Vagueness and Ambiguity in Legal Interpretation', 73-96, in J. Engberg, M. Gotti, V. Bhatia and D. Heller (eds.), *Vagueness in Normative Texts* (Bern: Peter Lang, coll. Linguistic Insights, 2005), vol. 23, A. Wagner, 'Semiotic Analysis of the Multistage Dynamic at the Core of Indeterminacy in Legal Language', 173-200, in J. Engberg, M. Gotti, V. Bhatia

insists that these are crucial features in legal discourse analysis where the role of 'de-vaguefying' or 'desambiguation' still remains crucial for the interpreters. Azar argues that judges tend to adopt an anti-pragmatic approach in such disputed cases treating them as cases of vagueness instead of what they actually are, that is, cases of ambiguity. In their contributions, Baldwin and Henket give concrete analyses to legal interpretation and both agree on two important points. First, judges and juries base their decisions on the most convincing narrative of facts - on narrative coherence rather than on 'correct representation' as such. Second, such a semiotic understanding of judicial practice does not rule out the possibility of critique. Notions such as due process, communicative rationality or accuracy do not lose their meaning in non-positivistic readings of judicial reasoning.

Part III of this volume takes up the interplay between law and globalization and the role of law in (international) politics and thus touches upon the question of who is able to define legal words and concepts in concrete circumstances. The power to define has played a crucial role in the formation of Latin-American States, as the contributions of Benavides Vanegas and Virtanen demonstrate.

Benavides Vanegas discusses how the fight for independence, as well as the conceptualization of 'the nation', in Colombia was shaped by the 'coloniality of power' and the dominant European legal and political concepts. The initial struggles for independence, Benavides Vanegas argues, should be interpreted as struggles for equality within the Spanish nation, while the later process of nation building was based on a logic of inclusion and exclusion that can only be understood in terms of predominant racial definitions and hierarchies. Without a proper understanding of the coloniality of power, current discussions on nationalism in the era of globalization start from the wrong place. The chapter by Virtanen shows how in the Brazilian Amazon, economic globalization and integration in an authoritarian central State have reshaped local cultures and disciplined local populations. However, Virtanen's

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and D. Heller (eds.), *Vagueness in Normative Texts* (Bern: Peter Lang, coll. Linguistic Insights, 2005), vol.23.

James B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston/Toronto: Little Brown, 1973), Brian Bix, 'Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?' (2003) *Ratio Juris* 16: 281-295.

chapter also warns against simplistic, unidirectional interpretations of the process of globalization. Based on Lotman's semiotics of borders and identity, Virtanen argues that 'current international relations are characterized by interpenetration of different normative systems' and could in some areas – such as international certification – lead to 'interesting alternative(s) to the prevalent forms of unidirectional and homogenising globalization.' Agnes Schreiner, on the other hand, deals with the willingness of Aborigines to demonstrate the struggle for their rights and their 'traditional connection to the land' in Australia, analyzing their art of memory which is 'a big play of combinatorial exchanges'. She insists on, and grounds this argument, in the deep semiotic analyses of two particular landmarks, i.e., the Manggalili and the Djarrakpi.

# CONTENTS

# PART I

# LEGAL THEORY

# CHAPTER 1

# *Law as Fact, Law as Fiction: A Tripartite Model of Legal Communication*

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## 1. Introduction

Regardless of the concept of law that is adopted – whether the viewpoint that law is '[t]he prophecies of what the courts do in fact ...',[1] or the viewpoint that law is a system of norms, a separate universe of normativity, apart from the factual effects in the real world[2] – enacting legislation is generally recognized as an act of communication. Even in the latter legal-positivist view, the working of the law (the effectiveness of the law) cannot be completely set aside. Kelsen's basic assumption is that the relationship between norm and fact, between rule and conduct, is logically irreducible in nature. From the fact that something *is*, it cannot be concluded that it *ought* to exist. The same is true for the opposite: if something *ought* to be, it cannot be concluded that it *is*.[3] This conclusion is the basis of the concept of law as a hierarchical system of *norms*, separate from factual considerations, i.e. *conduct*. However, the gap between norm and fact is not quite as unproblematic as Kelsen indicates. He states that the validly enacted norm needs to have a minimum degree of effect (working) in the real world in order to be a legitimate norm.[4] This implies that the conduct prescribed in the legal rule has to be 'realistic'. For example, the legal rule enacted in Tsarist Russia, which prescribed that every female prisoner had to give birth to a child of the male sex every year, is, in this sense, not a legitimate legal norm. The interdependence of the legitimate rule and its social effect illustrates the problematic character of strict separation.

For a long time, the processes that take place in the relationship between a rule and its materialization have been, to some extent, like a

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[1]Oliver Wendell Holmes, 'The Path of the Law', *Harvard Law Review* 457 (1897), 461.

[2]Hans Kelsen, *Reine Rechtslehre* (Wien: Österreichische Staatsdruckerei, 1992), 5.

[3]*Supra* n. 2, at 5-9.

[4]*Supra* n. 2, at 10-14, 215-221.



*A. Wagner et al. (eds.), Interpretation, Law and the Construction of Meaning*, 3–20.

black box; rules enter on one side and norm-conforming conduct comes out on the other. Lack of insight into these processes resulted in the creation of several models of legal communication.[5] Although the legal effects differ, most models are in essence based upon linear causality of goal-oriented legislation. The legal 'message' is 'transported' in a one-sided 'flow model' of information, that is, from 'law-giver' to 'law-taker', from sender to receiver. This metaphor presupposes the possibility of transmittable legal information: the words obviously express a meaningful 'message'. This raises the question of what this 'message' is and how it is communicated.

Institutional legal theory has adopted a concept of law through which a reciprocal element can be added to the one-sided models of legal communication, i.e. by defining the meaning of legal information in a semiotic-pragmatic way. In Section 2, I will analyze institutional legal theory, its concept of law, the metaphors used, and the consequences for the ideas about meaning transmission and sense construction. In particular Ruiter's tripartite conceptual model will be analysed: the interplay between rule, rule application, and social practices. In Section 3, a case study of Article 11 of the Dutch Constitution - the protection of personal integrity - is presented. Finally, in Section 4 the case study will be analysed by means of Ruiter's institutional model.

## 2. Institutional Legal Theory: Reciprocal Dimensions?

### *2.1 Legal language*

What has been described as the 'linguistic turn' in science, at the beginning of the 20th century, has pushed the question of language and communication processes more and more to the centre of theorizing; it emphasized the centrality of symbols and meaning to social life. A dichotomy frequently cited in this respect is the dual character of language. On the one hand, descriptive language is a representation of the real, factual world – the real world constitutes the touchstone, the test, for the truth or untruth of the spoken or written words. If the words constitute untruth, the *words* have to be adapted to the brute facts of the real world. On the other

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[5]For an elaboration and description of several models of legal communication, see my 'Instrumental Legislation and Communication Theories', in Hanneke van Schooten (ed.), *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Liverpool: Deborah Charles Publications, 1999), 183-211.

hand, with the use of language 'speech acts' can be performed.[6] An example of a classic speech act can be found in the Bible. In Genesis, the words of God took effect according to their literal sense: 'Let there be light, and there was light.'[7] The light came into being because He so commanded; and everything else on earth was created in the same way: by commands of God. In this example, the effects of the commands (or imperatives) were physical. The almighty Creator was supposed to be capable of bringing about light, herbs, animals, etc., through his words. However, the effects of imperatives in legal language are not physical: they bring about 'legal effects'; rights, duties, and legal qualities. In legal language, the legal norm is the touchstone, the test for the correctness or incorrectness of the actual or factual behaviour. The legal rule expresses reality, or some part thereof, in words. The words of the legal rule cast realizations ahead; they determine behaviour before it has taken place; they express future behaviour and events. The latter function of language provides the opposite image of the former: the real world has to be adapted to the words, not the reverse. Legal language aims at creating a new world.

This brings us to the second characteristic of legal language, i.e. the observation that its terminology has no physical counterpart or reference in the world of fact, while terms like 'chair', 'tree', and 'house' do. The terms 'right', 'duty', and 'legal quality' cannot be pointed out as 'facts'. Herbert Hart called this phenomenon 'the anomaly of legal language'.[8]

Nevertheless, legal terminology plays an important role in social life. Often without a proper understanding of the phenomenon, 'property' is obtained, 'contracts' are signed, 'states' are created, 'rights' are granted, 'borders' are fixed, and 'marriage ceremonies' are performed. Relatively uniform ideas of ownership, states, and all kinds of rights and their corresponding duties and legal qualities are disseminated among the general public. The regular use of these terms, if correctly applied, is connected to uniform ideas about corresponding behaviour. Here, we recognize 'institutional facts' – the opposite of 'brute facts' – i.e. acts that exist by virtue of rules, like playing chess exists by virtue of the rules of

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[6]John R. Searle, *Speech Acts*: *An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1970).
[7]Genesis 1:3-4.
[8]H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 22-23.