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A Short Note on Interpretation of Legal Texts.

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“In the final analysis, it’s my assessment that this worthwhile opportunity to humanly rehabilitate effectively enough, now is nigh. Enough over-zealous legal deterrence. Continuation of my punishment thus only negates society’s tentative reforms, exceeding equitable treatment.”

So writes Harry Starks in the fictional letter to *The Times* [1]. We can interpret Starks’s letter on two levels: as a fictional letter in itself implicitly accepting its veracity as a self-contained text colluding with the author, or on another level as a piece of allegedly external (true) text located within a piece of fiction, in collusion with the fictional character. What are we to do? We can read the letter as an independent self-contained text in itself yet at the same time, when the text ceases to have any obvious connection with our-known reality, as a coded message to the internal logic and plot of the fictional piece of work, reflecting the author’s own reality.

Whatever the level and function of the text its veracity remains untouched and unmoving, although it’s meaning as usefulness (which can be thought of as precedent in legal texts) shifts according to our interpretation and understanding of the text. So, on one level we have a coded message, but only coded because it makes no sense to us, as it is addressed to the third party here, the fictional hero in this part of the book. This represents internal logical and interpretative consistency (as if it were written in another language which we cannot understand or speak), and on the other we experience a piece of text that contains words and sentences which superficially should, our logic tells us, be capable of interpretation and understanding but so concatenated as to subvert and challenge our interpretative consensus.

This suggests that a text (whether legal or otherwise) is not something in a Kantian sense, that can somehow ‘yield’ to the forceful and inevitable logic of interpretative techniques, for a ‘technique’ is no more than a method, or process, designed to confirm *a priori* understanding. But rather that the uniqueness or singularity of the interpreted understanding [2] of the text is located in the text itself, in its context and history. One could argue that interpretive techniques amount to no more than a myth and if so as Barthes observed, “*Myth deprives the object which it speaks of all History*” [3] the myth of interpretation deprives the text of its sense or its ‘History’, or in other words the myth (or legal fiction) declares meaning redundant, even if it allows understanding and coherence.

In this short note I wish to argue that the conventional legal interpretative technique is not a process that can somehow ‘yield’ unique or singular ‘interpretation’ simply because interpretation is not static objective, dispassionate, process somehow operating on a legal text to extract a true unique or singular meaning. On the contrary the very act of interpretation disrupts, modifies and transforms the legal text whereby the searched for ‘meaning’ suddenly becomes meaningless and sense of justice is a process of coherence and reference. Such an experience of interpretation is reminiscent of our experience of the development of common law.

Such a transformation could for instance take on a historical form, the reader’s persona, or in the legal context the experience of justice, a guide to conduct and ways to avoid punishment, or even law itself.

In other words, as Vining suggests “interpretation in law is... [always interpretation] of the law” [4]. Although

this statement appears at first reading to be circular, in fact it refers to the transformational nature of interpretation and of bringing into the process the interpreter's background theory. In short, only through transformation can an interpreter do justice to a text of law and law itself.

However, so far we have assumed that we can actually identify a legal text to interpret. A text can be thought of as a series of marks produced by the author in a physical form, some physical existing object that can be read, examined or considered by the reader [5]. But as Vining describes legal texts are generated and reformed through argument and thus necessarily temporal. Accordingly, one could suggest that each unique court decision is an intermediate statement of law subject to the possibility of reconstruction (interpretation) in argument but contingent on the formalities imposed by the hierarchies of legal argument. Each decision contains seeds of its future and yet also its destruction ever ready to yield to a new interpretation.

Moreover, a piece of statute law could be considered as coming closest in form to a pure literary (non-legal) text, yet because it is law its very existence is dependant on its interpretation, each time it is considered by the court or the lawyer the text is interpreted and re-interpreted leading to a new reconfigured legal text. As Vining writes, "...the clever litigator work[s] against that which is self-evident...Once an appellate opinion is written, of course it appears the case always was what it came to be." [6] Thus it seems that in law due to the fact the authorship is concealed and not unique, even the text itself shifts on each re-writing and re-reading.

Bearing in mind the shifting nature of a legal 'text' we can briefly consider some approaches to interpretation of legal texts. Vining, for instance, discusses the self-delusion involved in the search for an objective distillation of intent or 'meaning' through the interpretative search for absolute meaning [7] in legal texts. He observes that reading "statutes for their intent", the paying of close attention to nuance and form in them, may be a necessary and even desirable form of self-delusion" [8].

Thus one can conclude that the self-delusion and, more significantly the necessity of the desire for self-delusion is a crucial pre-condition to legal interpretation for, as we saw above, law's purpose, unlike fiction, is not to reach for the author's actual/intended meaning, because there is no one author of a legal text, and the sense of a text and its justice is its transformation through interpretation. Instead, law driven by the desire for self-delusion maintains law's search for legal existence even if its justification is a legal fiction. In fact, we are told that law's search is not for meaning, or truth but simply for some pre-determined yet flexible normative form to guide our conduct, this we are tempted to call process of interpretation of legal texts.

To illustrate this point, we can for instance consider the notion of 'intention to create legal relations' used in contract law. To sustain itself as 'contract' recognised at law, law necessarily needs to recognise the notion of 'intention to create legal relations'. This sounds fine until we notice that the 'intention' has little reference to the actual personal intentions of the parties but is reached after the interpreter's background theories have sifted out the legally irrelevant facts to construct a notion of legal intention, if only as a convenient legal device or fiction. This shows that the process interpretation referred to in the title here is not a straightforward process of intellectual mining for hidden meanings.

On the contrary, the driving force which determines the necessary 'intention to create legal relations' is the desire for a necessary self-delusion (or legal fiction). Law of contract is not actually interested in establishing the actual parties' true intention in entering into the actual contract [9] itself, save in so far as any apparent 'injustice' of the case outcome is likely to weaken the ideal or the myth (or legal fiction) of the legal construction of a 'contract' as a matter of legal interpretation.

In the light of the above brief discussion, perhaps we can suggest that the view that legal interpretation is non-transformative, free of determination by assumptions and law itself and thus should yield a 'unique or singular interpretation' in the sense of a unique illumination, insight or singular meaning is no more than a rocky and

fatal outcrop of the desire for self-delusion of the 'search' for a singular meaning. It is suggested that the self-delusion (sometimes manifest as a legal fiction) is the notion that interpretation concerns some sort of 'extraction' of a final and universal overarching meaning from a legal text.

Another way of approaching the same idea that a unique or singular meaning cannot necessarily be derived through the application of interpretative technique but that interpretation is transformation without a sense of meaning, is to start the discussion from the conventional assumption that legal texts (that is both statutes and court decisions) are canonical in nature. We are not unfamiliar in the doctrinal approach in law to hear references to cases and textbooks as being 'canonical'.

So for instance, Stern [10] argues, albeit only from a Judeo-Christian perspective, that the 'pretences and claims' of interpretations of religious texts, and particularly the bible, can be invoked in legal context. He identifies the essential minimal purpose of a canonical text as a text that requires to "be interpreted to gain guidance for [social or legal] practice" [11] the point being that a canonical text is interpreted not for its meaning but for its sense and reference.

He goes on to identify two primary characteristics of canonical interpretation. The first is the pretence that the "interpreter must...claim that he (*sic*) has special knowledge and authority [for instance as a lawyer or judge] that is in principle unavailable to everyone. This special knowledge and authority are institutionally accredited by a church or a profession in a given field." [12] The second pretence is the "claim that the interpretation is binding for all within his (*sic*) religious tradition." [13] We can see the clear and obvious analogy with practice and legal education.

Finally he notes that the canonical interpretational approach consists essentially of "sense and reference. Meaning is wholly dispensable." [14] Affirming the view that interpretation is transformational and not about the search or discovery of some hidden immutable but universal meaning of and truth in the text. All you need is sense, that is internal coherence, and reference that is the transformed interpretation has some transient status as precedent and is therefore binding. Or in biblical terms, canonical interpretation provides 'some guidance on conduct'.

Next, drawing on the work of Kim Scheppele [15] by reference to her discussion of the 'hard decision' in *Riggs v Palmer* [16] she demonstrates that any legal interpretation will necessarily involve the use of "a background theory about a larger purpose of the statute that cannot be directly drawn for the statute's words." [17] Meaning that interpretation of legal texts cannot yield singular or unique interpretations, for in using background theory each act of interpretation transforms the text into a successor text shaped by the interpreter's background theory, and background theory here could include prejudice, predilection, and indisposition.

I have sought to argue here that the conventional theories of interpretation, often loosely but conveniently abbreviated for instance to the literal or purposive approaches, fail to problematise the process of interpretation sufficiently, and in fact operate to perpetuate the myth of self-delusion. Accordingly, the validity of the accepted notion of interpretative theory as offering unique or singular opening to understanding of legal texts, is in doubt. Furthermore, it cannot logically follow that the proposition legal texts somehow have the potential to yield unique or singular interpretation beyond a shared belief in a myth of such singular objectivity.

Footnotes and references.

[1] Jake Arnott, *The Long Firm* (1999, Hodder and Stoughton) at 276.

[2] 'Understanding' is used here purposefully to exclude 'meaning'.

[3] Quoted in Elizabeth. J. W. Hinds, "The Spirit of Trade: Olaudah Equino's Conversion, Legalism and the Merchant's Life" *African American Review* 32, (1998) 4: 635-647 (from Barthes' *Mythologies*).

[4] Joseph Vining "Generalization in Interpretative Theory" *Representations* (1990) 30: 24.

[5] See further: Joseph Vining Note 3 at 2

[6] Joseph Vining (1990) at p2.

[7] Please note that here 'meaning' is used loosely as short hand for coherence, internal consistency and status.

[8] Joseph Vining (1990) at p5.

[9] See for instance Lord Denning in *Storer v Manchester City Council* [1974] 3 All ER 824 "In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying 'I did not intend to contract', if by his words he has done so."

[10] Laurent Stern "On Interpreting" *The Journal of Aesthetics and Art Criticism* (1980) 39: 2.

[11] Laurent Stern (1980) 39:2 at 120.

[12] Laurent Stern (1980) 39:2 at 126.

[13] Laurent Stern (1980) 39:2 at 120.

[14] Laurent Stern (1980) 39:2 at 128.

[15] Kim Lane Scheppele "Facing Facts in Legal Interpretation" *Representations* (1990) 30.

[16] This was a case heard in New York Court of Appeal in 1889. The question asked of the court was to decide whether a grandson who had feared that he would be cut out of the grandfather's will and then killed him to before the grandfather could change his will should be entitled to inherit under the will. The law as it stood did not prevent Elmer Palmer inheriting in such circumstances, and the judges spent much time debating the rules of interpretation. A literal approach would have allowed Elmer to inherit even though this outcome was morally repugnant to the court, and presumably the public. So Judge Earl invented the notion of "equitable construction" inferring an intention to the legislature which was not expressed in the statute. Scheppele wonders why in order to avoid the contortions the court did not use other ideas to resolve the problem such as for instance the notion of constructive trust. A constructive trust would have preserved the integrity of the donor's words, the law, and yet allowed equity to distribute the inheritance fairly to ensure that Elmer holds his ill-gotten gains for the benefit of the truly entitled beneficiaries.

[17] Kim Lane Scheppele (1980) 30 at 47.

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