

The Nine Lives of Legal Interpretation¹

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1 The Disorderly and Confusing Problem of Common Law Interpretation

Legal scholars talk and write about interpretation in terms of the meaning of words, and for many legal philosophers legal interpretation involves subsuming particular situations under general rules. However, the more you examine legal interpretation the more disorderly and confusing the whole idea of interpretation becomes.

For instance, there are the obvious illustrations of judges' interpretations of legislation or cases when they decide a particular case. Authors of textbooks and journal articles provide their own interpretations of cases and lines of cases. Joanne Conaghan and Wade Mansell² offer a critical interpretation of tort law which is quite different from John Fleming's view³ of tort law. Scholars who write comments on judicial decisions have interpretations of the decisions that differ from the interpretations of judges who made the decisions. Comparative lawyers interpret the similarities and differences regarding different jurisdictions.

The mass media provide the public with a steady stream of interpretations of judicial decisions, legal practices, court practices, and criminal dramas. The interpretations of judicial decisions found in newspapers range from accurate reports written for lawyers to salacious gossip, condemnations of criminals, and blow-by-blow descriptions of some crime committed. Television's 'talking heads' obsess about the likely outcome of the criminal trials of famous people. And paperback novels provide us with both fast-paced stories of evil doing and pointed criticisms of the legal world.

¹ I would like to thank Philip McShane, Professor Emeritus Mount Saint Vincent University, for commenting on a draft of this paper.

² J. Conaghan and W. Mansell, *The Wrongs of Tort*, Pluto Press, London, 1993.

³ J.G. Fleming, *The Law of Torts*, The Law Book Company, Sydney, 1987.

Scholars even have their own interpretations of legal systems. Konrad Zweigert and Hein Kotz⁴ have one interpretation of Islamic law and Joseph Schacht⁵ has another. Opposing lawyers have conflicting interpretations of events and conflicting interpretations of what the outcome of a particular case should be. Legal philosophers are notorious for coming up with competing interpretations of legal phenomena. There are even competing interpretations of what judges do when deciding cases. Jerome Frank⁶ focuses on hunches; Alan Hutcheson⁷ focuses on rhetorical justification. We even have general interpretations of law. One group presumes that law is objective, neutral, and value-free, but others assert that law is politics.

It is evident that many interpretations have a historical dimension. Law teachers, lawyers, and judges play the role of amateur historians when they trace legal developments through lines of cases. We also have historical interpretations written by professional legal historians. W.R. Cornish and G. deN. Clark,⁸ for instance, place the emergence of negligence law in its legal and social context in England. We even have histories of legal philosophy. Not only are there historical narratives, but there are also critical interpretations of histories and historians. Alan Watson⁹ traces the history of the *concept of law* from Suarez to Grotius to Pufendorf to Austin criticizing each successive figure for neglecting an important aspect of law so that today our understanding of law is impoverished.

In a legal system that is proudly adversarial it is not surprising that criticism plays a key role. It is easy to identify interpretations that are critical of one thing or another. Appeal court judges criticize the judgments of lower court judges. Legal scholars criticize the decisions of judges in case commentaries and they criticize particular pieces of legislation, such as recent anti-terrorist laws, for conflicting with democratic principles. Teachers of jurisprudence devote most of their time to pointing out the weaknesses of particular legal philosophies. Legal scholars offer conflicting interpretations of judging in that some believe that judges should apply the law, not make it, and they heap criticism on those who assert that law is deeply political. As their name suggests critical legal scholars have been highly critical of the attitudes,

⁴ K. Zweigert and H. Kotz, *An Introduction to Comparative Law*, Clarendon Press, Oxford, 1998.

⁵ J. Schacht, *An Introduction to Islamic Law*, Clarendon Paperbacks, Oxford, 1982.

⁶ J. Frank, *Law and the Modern Mind*, Stevens & Sons, London, 1949.

⁷ A. Hutcheson, *It's All in the Game: A Nonfoundational Approach to Law and Adjudication*, Duke University Press, Durham, 2000.

⁸ W.R. Cornish and G. deN. Clark, *Law and Society in England 1750-1950*, Sweet & Maxwell, London, 1989.

⁹ A. Watson, *Failures of the Legal Imagination*, Scottish Academic Press, Edinburgh, 1988.

practices, and values taught in law schools. But not all interpretations are negative. Adamson Hoebel and Karl Llewellyn¹⁰ provide interpretations of what makes a good judge.

A type of legal interpretation trying to capture the essence of law can be detected in that legal philosophers argue that law is: commands, rules, custom, principles, or rights. In direct conflict with this interpretation is an interpretation of law that claims to be anti-foundational. According to this interpretation, law is contingent in the sense that there is no inherent meaning residing in legal texts. Meaning depends on the interpreter.

There is no shortage of interpretations that spell out how some activity or practice should be performed. Interpretations of how statutory interpretation should be performed can be identified: the literal rule, the golden rule, and the mischief rule. We also have competing views on how constitutions should be interpreted: according to the original intent of the Founding Fathers *versus* purposive and contextual interpretations. Legal doctrines such as the doctrine of precedent and the doctrine of *res ipsa loquitur* are interpretations of how lawyers and judges should act in various circumstances. Neil MacCormick¹¹ offers both a description and a prescription of legal justification.

Interpretation is also an important part of legal research. Our collections of law reports depend on someone or some group finding, reading, and selecting cases. In their efforts to find and organize legal materials law clerks and junior lawyers have to interpret what they find. These documents have to be interpreted. Unearthing, translating, and then reaching an understanding of Hammurabi's Code, for instance, depended on research. The promulgation of China's Unified Contract Law depended on extensive efforts to interpret and evaluate the different ways contract law operates throughout the world.

It is obvious that interpretation is something that is rich and varied. However, such contexts point to a larger problem. Interpretation covers just about everything that everyone in the legal profession does. Is it possible to make sense of these apparently disorderly and confused examples of interpretation?

2 A Possible Ordering of Legal Interpretation

Broadly speaking, two orientations in legal interpretation can be identified.¹² There is an orientation to the *past* in that legal researchers, interpreters of legal texts, and legal historians are focused on past events, cases, documents and texts. But legal interpretation is also oriented to *future* actions when people are concerned with legal doctrines, law

¹⁰ K. Llewellyn and E.A. Hoebel, *The Cheyenne Way*, University of Oklahoma Press, Norman, 1983.

¹¹ N. MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1994.

reform, and judging which solution best fits a particular situation. Let's try to distinguish between the various types of interpretation by identifying differing aims of interpretation.

Past-Oriented Interpretation. There is a type of interpretation performed by researchers aimed at determining the relevance of legal documents to particular questions, problems, issues, cases, and contexts. Here the primary aim of interpretation is to locate, select, collect, and organize the relevant documents to be examined.

There is a second type of interpretation that is aimed at settling and expressing what arguments, cases, legislation, documents, and manuscripts, in fact, mean. This type of interpretation, of course, depends on the work of researchers providing the relevant materials.

A third type of interpretation, performed by legal historians, is primarily aimed at figuring out and expressing what was going forward in particular groups, at particular times, in particular places that, for the most part, contemporaries did not know. Of course, historians make use of relevant interpreted materials.

The fourth type of interpretation is aimed at criticizing interpretations of texts, legal histories, legal philosophies, legal policies and doctrines, law reforms, legal practice, and judicial decisions. The raw materials for such critical analyses are interpretations and histories.

These four types of past-oriented interpretation can be named in the light of their primary concerns: (1) *research*, (2) *interpretation per se*, (3) *history*, and (4) *critical analysis*.

Future-Oriented Interpretation. Legal interpretation is oriented to the future in the sense that it is concerned with transforming a problematic situation in some way. Three types of future-oriented interpretation can be identified.

The aim of one type of future-oriented interpretation is to choose the best or the most appropriate course of action in a particular situation. For instance, calling a particular witness, asking for a particular document, or awarding damages, all depend on an interpretation of what best fits a situation. We can call this type of interpretation *executive reflection*.

But interpreting which course of action to take in a particular case depends on having a range of plausible interpretations from which to select. Opposing lawyers provide judges with interpretations of what should be done. Comparative lawyers enlarge the range of possible and probable options by examining how similar problems are tackled in foreign legal jurisdictions. The aim of this type of interpretation is to come up with what possibly and plausibly could be done and then

¹² This section and the following section draw on Bernard Lonergan's work *Method in Theology*, Darton, Longman, & Todd, London, 1975 and the many works of Philip McShane on functional specialization which can be found at www.philipmcshane.ca.

organizing those options. Let's call this type of future-oriented interpretation *systematic planning*.

The third type of future-oriented interpretation is exemplified by policies and doctrines directing how legal interpretation should be performed. Modern charters and bills of rights can be seen as the efforts of a community to interpret themselves, to thematize a doctrine of behaviour and the grounds of that behaviour. They can be seen as interpretations of the general direction in which a state wants to move.

To put it simply, legal interpretation is future-oriented to the extent that (1) *legal policies and doctrines*, (2) *systematic planning*, and (3) *executive reflection* are concerned with what the future could be.

3 The Need for Detached Criticism and Creative Fantasy

Let's investigate how the seven different types of interpretation identified above might be related to each other. It is easy to envisage that *legal researchers* would pass on materials to *interpreters* who would settle their meaning, and that *legal historians* would draw on interpretations of texts in order to settle what was going forward. It is also easy to see that *choosing what to do* in a particular situation depends on coming up with a range of *possible and plausible options* which, in turn, depend on *policies and doctrines* for their shape and direction.

Presumably our legal policies and doctrines depend on our history. But if we swing directly from history to policy our policies would be the result of accidents, matters of convention, luck, nationality, power, and bias, rather than emerging from a tradition of critical evaluation and creativity. Is there a better way of moving from the past to the future?

I identified *critical analysis* as one type of interpretation, but the illustrations above are evidence that critical analysis is not performed in a systematic fashion. Generally, we see criticism in law as partisan shufflings and biased assessments related to some personal or political agenda. In fact, it is commonly accepted that one criticism is just as good as the next one. Serious detached reflection on, and critical assessment of, legal histories, historical periods, various movements in law, and the attitudes and practices of law teachers, legal scholars, lawyers, and judges remains a neglected zone of inquiry.

It is evident that part of getting from the past to the future in an intelligent fashion (in the minimal sense that we would not want to make the same mistake twice or make things worse) would require *taking a stand* on what was good and bad in the past and then defending that position. It would also require taking a stand on what other people have written and done. Further, judging good moves and failures, and resolving conflicts points to the need for a comprehensive viewpoint – an integral perspective – to be held by the person doing the assessment. Perhaps it would be handy to have a group that specialized in detached criticism. They could concern themselves with promoting open and clear

thinking, creative insights, and imaginative critical judgments, and also with exposing and attacking inattention, stupidity, ignorance, bad judgments, inadequate plans, bias, and rationalizations. If a soccer team reflects on its past performance at half-time, and if fighter pilots debrief after each mission, it makes sense to have a group of people do the same for law.

In order to move from a detached critical evaluation of the past to expressing legal policies **and** doctrines, there is also an evident need for envisaging the direction of fundamental improvements. In other words, we need to build on the work of the people taking a stand on the past by thinking out the fundamental needs of a community and formulating the general norms of progress (whatever we might mean by progress). The aim of such people would be to think out the best possible direction for what could happen in the future. In the legal field, the concern would be the ongoing advancement of law. If law is trying to mediate progress there is an obvious need for creative interpretation, for *creative fantasy*. So why not have a group of people interested in the future, imagining beyond present possibilities, wondering whether we could do things differently, asking if there is something better than the adversarial system, for instance, fantasizing what might work, envisaging the probabilities of new ideas being implemented, asking what law will be like in the next millennium. Unfortunately, this sort of creative edge on the future and thinking about the long term are rare in present day legal thinking.

The move from past-oriented interpretations to future-oriented interpretations, in particular the move from *history* to *policy and doctrine* depends on *critical analysis* and *creative fantasy*. Either we have a critical assessment of the past and a forward creative turn in law or else we will have law dominated by stale precedents and the grudging and reluctant admission of novelty into legal thinking. Hence it makes sense to order the various types of interpretation in the following way: *legal research*, *legal interpretation per se*, *legal history*, *critical analysis*, *creative fantasy*, *legal policy and doctrine*, *systematic planning*, and *executive reflection*.

I have arranged each of these eight types of legal interpretation in terms of how their particular aims are functionally related to each other. Legal research provides the raw materials for interpreters. Historians use interpretations of texts as their raw materials. Critical analysts settle conflicts among interpreters and historians and take a stand on what was good and bad in the past. They would pass on their findings to a group specializing in creative fantasy who would work at coming come up with general directions for the future. In turn, policy makers would take up their work when formulating policies and doctrines, and so on to systematic planning and executive reflection.

But there is a ninth type of interpretation that stands outside these eight. This type of interpretation is directed toward communicating some

aspect of the other eight types of interpretation to people who are not engaged in any of the other eight types of interpretation. You can think of a specialist in critical analysis or legal doctrine talking to lay people.

4 The Value of Ordering Different Types of Interpretation

Let's investigate the benefits of this type of ordering on the display of confusion in legal interpretation illustrated in Part One. Lawyers, media people, judges, historians do *research*, but you can perhaps now see that that the task of selecting, translating, and organizing texts is quite different from the job of settling what they, in fact, mean. Further, legal textbooks and casebooks, newspaper and TV stories, summaries of past decisions, and explanations of the Islamic law (without critical elements) are *interpretations* per se. It is also evident that lawyers and judges and professional legal historians are both engaged (with varying degrees of competence) in settling what was going forward. Not only is it evident that legal scholars and legal philosophers share a critical bent, but that criticisms of tort law, legal theories, and political views on law are a special type of interpretation, called critical analysis. The doctrine of precedent and statements that interpretations should be "purposive" or done according to the "original intent" can now be seen as interpretive policies and doctrines. The work of comparative lawyers such as Zweigert and Kotz can now be understood in the larger context of systematic planning, coming up with ways to do things better. Judicial decisions can now be more accurately seen as answers to the question "What is the most appropriate thing to do in a particular situation?" in the light of what specialists engaged in the other seven types of interpretation have learned.

It seems clear that if we want to do interpretation well then we should divide up the work along the lines of eight interpretive specialties and then collaborate. It would be up to legal philosophers to face the challenges of critical analysis and creative fantasy. Finally, it is useful to locate my own interpretation of legal interpretation among the nine types of interpretation. It would be classified as a random piece of *critical analysis* aimed toward *creative fantasy* insofar as I suggest that it would be better if we thus divided up the work and collaborated.