LEGAL DISCOURSE AND FICTIONALITY: METATHEORETICAL CONSIDERATIONS

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This chapter discusses one sort of fictional text—the legal fiction—in a metatheoretical context framed, at the most general level, by the universalist-relativist and the positive/positivist-sceptical/oppositionalist tensions, particularly as they appear in Critical Theory and postmodernist thinking. Some inherent paradoxes and contradictions are discussed. Law is considered as a form of social practice carried in discourse, primarily verbal discourse, with both seen as generated by abstract, perhaps universal, systems of knowledge and principle. Both are also semiotic, hence radically engaged with the not-real, and hence, in this and other ways, close to the fictional, a category presented as comprising various types and degrees of fictionality. Some legal fictions are discussed as examples of the deliberate introduction of the counterfactual and imaginary into legal reasoning.

I Introduction

Issues concerning the nature and status of legal discourse (henceforth referred to as Legal Discourse in deference to the importance of this set of representational forms) are particularly relevant in a collection such as this.

Everyday life offers many examples of situations in which the discursive and the legal, or quasi-legal, interact not only with one another but with other forms of representation and social action. In the USA especially there is a more or less continuous struggle over one aspect or another of ‘freedom of speech’, as famously guaranteed by the First Amendment to the American Constitution. Attempts to control what is referred to there as ‘hate speech’ (the dysphemistic expression is itself a significant linguistic choice) in ways that do not violate citizens’ rights in this regard find themselves constantly opposed by defenders of individual rights generally, and of the inviolability of the sacred Scripture that is The Constitution (see Fish, 1994, for one anti-fundamentalist view that might be described as radical-progressive, or not, as the discussion to follow will perhaps reveal).

In the UK, at the time of writing, the British Home Secretary is the subject of much criticism for the enfeebled content of what would be a ground-breaking Freedom of Information Act of Parliament in this country. It has been drafted partly to rationalize Britain’s need to align domestic legislation
with the demands of the European Convention on Human Rights, which now forms the framework for legal process in the British jurisdictions and constrains the final Court of Appeal.\textsuperscript{1} The ECHR contains significant guarantees with regard to information and communication, especially in respect of government-held and government-generated information.

More broadly in our increasingly globalized, mediatized discursive firmament, the attempts in various jurisdictions to regulate Internet activity (e.g. the ill-fated Communications and Decency Act in the USA), the massive international effort to protect Intellectual Property Rights, the EU’s chaotic controls on cross-border broadcasting within the Union, the complaints by Third World/Less Developed Countries about electronic colonialism first articulated in the MacBride Report of 1980 and sustained via the United Nations Commission ever since and much more confirm the importance of law-talk and writing in the fabric of our everyday ‘cyberian’ lives.

An example even closer to moment-by-moment lived behaviour might be the debates about what in the mid-1990s came to be called Political Correctness (see Dunant, 1994; Wilson, 1996). This term is itself ‘political’, a pejorative coinage used by those who felt that the linguistic reforms of the 1970s and later had gone too far and deserved ridicule. The speed with which spoof PC replacements for various conventional forms deemed ‘-ist’ in one way or another (‘cognitively-challenged’ has its uses in education, but is one of many spin-offs from the list invented for satirical purposes) is perhaps an indicator of the moods and attitudes present in the linguistic communities whose personal behaviour was affected by the original sanitization process, and then by the satire upon it (whether perceived as satire or not).

A final example of the closeness of the issues to everyday life might be the campaigns against bureaucratic and jargonized language, for so long—and still—a weapon at the disposal of those possessed of institutional power. In the USA, the Carter Administration brought in legislation designed to ensure that government documents were written so as to ensure the widest intelligibility. In Britain, the Plain English Campaign (now The Clear English Campaign, because ‘plain’ is not necessarily ‘clear’—see Scott, 1996) was founded in 1979 by two Citizens’ Advice Bureau workers who found that a high proportion of their clients had problems caused or exacerbated by the profound unintelligibility of the letters, forms etc. by means of which they were expected to communicate with the institutional state apparatus.

By deliberately resurrecting a fragment of language from the period in referring to ISAs\textsuperscript{2} we may be helped to the conclusion that, indeed, the legal, the linguistic (as well as other discursive forms/semiotic resources) and the political-ideological are severally intertwined, perhaps even mutually constitutive.

\textsuperscript{1} See The Guardian newspaper’s useful website, www.newsunlimited.co.uk/freedom.

\textsuperscript{2} Ideological State Apparatus.