A Note on Legal Semiotics

JOHN FROW

It has become a commonplace to think of the law as a textual practice, and analysis of the linguistic specificity of legal discourse would seem a logical way to explore the textual or discursive construction of the juridical real. There are major difficulties, however, with most of the currently employed forms of linguistic analysis of the law.

These forms of analysis include the following:

1. Traditional lexical, morphosyntactic and semantic analyses, including, for example, the study of lexicons and of the rules of relation between legal and non-legal vocabularies; or Crystal and Davy’s (1969) analysis of the lexical and syntactic structures of legal documents.\(^1\)

2. Study of modes of juridical enunciation, and in particular of performatives. This form of analysis has been encouraged by the fact that legal positivism theorises the foundations of law as an originary speech act—an act of will, a sovereign intention which is manifest in each legal rule and in the structure of the system of rules; to this is later added a stress on the metadiscursive specification of the conditions of functioning and validity of the primary rules. Thus the most interesting aspect of the work of Sourrioux and Lerat is their distinction between different classes of speech act, including not only performatives in the strict sense but also what they call ‘official constatives’ (third-person declarations of the accomplishment of the conditions of some official act) and ‘executory decisions’, expressing an authorised performance of the law or of a judgement (1975: 53).

3. Analysis of the rhetorical and logical structures of legal discourse, including Perelman’s (1963) studies in legal rhetoric and the logical semantics of Kalinowski (1965).

The limitation of all such analyses can be expressed in the argument that the institution of the law cannot be read off from the structure of legal rules. A legal proposition does not control its consequences or the
institutional conditions which bring these consequences about. Nor does it display, either upon its surface or in its deep structure, the relations of consent and of force which give it its binding power. Finally, a legal proposition does not control the historical changes in its social force: the meanings it will carry, the functions it will fulfil, both within the formal system of the law and in everyday understandings and applications (cf. Renner 1949).

Moreover, the structure of legal discourse is not unitary between domains and between levels, and this has consistently frustrated attempts at generalisation from linguistic analysis. The exemplary failure here is the collaborative analysis undertaken by Greimas and Landowski (1976) of a statute regulating the institutions known as sociétés commerciales.

Greimas and Landowski posit dual processes of the construction of meaning. The first, that of the production juridique, operates through the legislative speech act. Its function is to bring objects into being in an act of naming: that is, to establish a semiotic object—indeed, a semiotic universe—with juridical validity. This process is not a creation out of nothing. It involves a selection and transformation of elements from extrajudicial discourse; the conferral on them of a referential status within the juridical system; their demarcation from neighbouring semantic domains; and thus their integration in the system of juridical terms (1976: 85). In its source, then, the juridical system is ‘an absolute performative word establishing a conventional and explicit order of the world’, calling, in its organisation, ‘entities and things into existence by its act of enunciation, and attributing to them precise functions delimited by rules of prescription and prohibition’ (1976: 91).

In addition to the specificity of its lexicon, juridical discourse is marked by its subjection to a juridical grammar which aims at complete explicitness. Resembling a school textbook in its presentation, the grammar

\[
\begin{align*}
\text{takes the form of a rather disorganised inventory of definitions and prescriptions, not of a hierarchy of concepts or a deductive series of rules; it has the appearance of a syntagmatics, essentially concerned with the correct formation of utterances and larger discursive units (like the if ... then construction, for example), whilst leaving implicit the taxonomy of fundamental categories which, insofar as it}
\end{align*}
\]
constitutes a system, produces the grammatical discourse of the law (1976: 88).

The explicitness of the grammar is announced as such. Thus the initial utterance in the statute analysed, ‘Le président de la République promulgue la loi dont la teneur suit’, ‘is not only the expression of a delegated collective will; as an act of utterance, it establishes, like the divine fiat, the sum of juridical utterances which will only exist as a result of this original performative act’ (1976: 88). Here Greimas and Landowski clearly align themselves with a positivist account of the foundational speech act. Let me reserve my criticisms of it, however, until after discussion of the second process of meaning construction that Greimas and Landowski identify.

This second stage depends upon the virtuality of the production of meaning in the legislative act—upon an incompleteness which is then remedied in the process of judicial verification of the instituted statutory language. The verification by a judge of the status of legislative utterances is at once the conversion of ‘potential communications of law into actual communications of law’, and a restatement (re-dire) by which he/she confirms that the rule ‘has been duly endowed with legal semioticity under those canonic rules which give the legislator this particular communicative power’ (Jackson 1985: 35). This process of verification is enforced in two ways: first, ‘with the help of a metalanguage, invoked to pronounce upon the internal coherence of its concepts and rules’, and second, ‘by comparing all the utterances generated by the grammar in question with the canonical forms it has established’ (Greimas and Landowski 1976: 19).

What is crucial here is the secondary and parasitic status of this re-dire, this supplementary and confirmatory speech. Its condition of possibility is the law’s ‘particular structure of delegation of power, the replacement of the original sender of juridical messages, the legislator, by a substitute sender [un destinataire suppléant] who is called upon to restate the law and whom one calls “justice” ’ (1976: 19). The magistrate, the ‘justice’, incarnates the system of law; but as a substitute for the legislator he/she—or rather, this position—is rigidly subordinated to that of the legislator. The judge’s function of repetition obscures the constitutive role of the judicial discourse.
It may be that Greimas and Landowski are repeating here, in a way that a semiotician working in the common law tradition would not, one of the basic ideologies of the French civil law tradition. In doing so, however, they fail to come to terms with what narrows the distance between these two traditions: the cumulative elaboration, outside the instance of the legislature, of interpretation and doctrine.

The central objection to Greimas and Landowski’s project concerns precisely the privileging of the legislative and judicial instances over all other instances, and in turn the privileging of the legislative over the judicial, in such a way as to confirm the positivist view of law as essentially grounded in its transcendental source, in relation to which all other acts of legal discourse are no more than secondary effects, without density and without constitutive force. The methodological trick here is that this unitary source, which guarantees the coherence of the legal system as a whole, is derived by Greimas and Landowski from the analysis—a rigorously immanent analysis—of a single text; one which is studied, moreover, in isolation from its relation to other texts, from its administrative consequences, from legal doctrine concerning corporations, and in general from its commercial and social functions.

Once we raise our eyes, however, from the study of a single text, and a single kind of text, it might become somewhat less self-evident that the legal system, or the system of rules, is either self-contained or homogeneous. Let me posit three different dimensions on which we can think the heterogeneity of the law. The first concerns the multiplicity of legal domains: torts, taxation law, criminal law, corporate law, constitutional law, and international law all have quite distinct and irreducible objects and goals, and regulate distinct spheres of life according to distinct structures of normativity. In the second place, the law does not work solely at the level of a ‘pure’ discursive mode. Its regulatory functions are typically embedded in administrative apparatuses, in formal procedures, in systems of registration, validation, and documentation, and in the coercive apparatus that enforces judicial orders. Thus Pashukanis writes that the working of the law requires exact criteria, statutes, interpretation of the statute, casuistry, law-courts, and the compulsory execution of court decisions. For this reason alone one cannot limit oneself, when analysing the legal
form, to “pure ideology”, nor can one disregard the whole of this objectively existing machinery’ (1983: 44). Finally, the law is constituted by quite heterogeneous discourses, including that of the legislative statute (black letter law), legal argument and advocacy, judicial decision, elaborated doctrine (both casuistic and academic), commentary, paraphrase, summary, index, newspaper reports, expert and lay testimony, bureaucratic documents, forms of pleading, contracts, and the everyday gossip through which the categories of the law are translated into ‘experience’.

This heterogeneity means that no one genre can be privileged as the determinant of all legal effects. Thus O’Barr, citing the relative neglect of analysis of the discourses and discursive strategies of the courtroom, as well as of paralinguistic phenomena, is correct in arguing that ‘most treatises on legal language by lawyers either ignore spoken language or make the tacit assumption that spoken language in legal contexts is merely the actualisation of the written variety’ (1982: 24) (although here too it must be emphasised that a purely discursive or semiotic analysis of the courtroom is likely to miss much of the point, because of the importance of extra-legal factors in deciding outcomes, and because much of the ‘administration of justice’ is not reflected at all in courtroom processes—for example, most ‘cases’ never come to trial) (Goodrich 1986: 19).

Given this heterogeneity of the legal, it seems to me that the concept of law can best be thought as the complex set of discursive relations between domains, between ontological levels, and above all—and representing these relations—between discursive genres. More precisely, it must be studied as a system of interdiscursive relations, including, but not limited to, the relations between a metadiscourse and an object discourse. I use the term metadiscourse here in two senses: first, that of a higher-order discourse which explains the rules governing the working of an object discourse (this is a hierarchical conception); and second, that of any discourse which takes another discourse as its object (since discourses at any level can do this, this is a non-hierarchical conception).

To reject the positivist conception of a pregiven hierarchy of relations between the levels of juridical discourse, based on metadiscursive
control and an ontology of determinations, would entail putting stress both on the disjunction between discourses, and on the strategic acts by which discourses are knitted together. This is Lyotard's argument in *Le Différend*: that 'two sentences belonging to heterogeneous regimes cannot be translated the one into the other. They can be linked to each other in accordance with a goal fixed by a genre of discourse' (1983: 10). This linkage, however, is not an external concatenation. It is rather an intersection which is already internal to each utterance and which is predicated on the heterogeneity of utterances (Weber 1985: 106).

Every sentence, that is to say, is shaped in a relationship to the otherness of other sentences. It is because of this that the structure of discourse cannot be thought in terms of a suprasentential 'grammar of discourse' which would govern the assembly of sentences within a coherent intradiscourse. Even less can it be thought through a 'pragmatics' which would explain the structure of a discursive 'inside' in terms of its relations to an extra-discursive 'outside'. Gadet and Péccheux summarise their argument against these positions by writing that the concept of discursivity demands to be explained:

in terms of the existence of an interdiscourse as the constitutive effect of exterior, independent and anterior sequences on the given sequence. The 'radical outside' would then no longer be the (extralinguistic) system of knowledges and beliefs, taking the form of ideas and objects thought by a subject; it would reside in the specific order of interdiscourse as discursive effects inscribed in (real or virtual) archival fields, in Foucault's sense of the word (1981: 170).

This order of interdiscourse is structured according to strategic teleologies. Discourse genres are strategies for winning; but, as Lyotard (1983: 198) adds, 'they are strategies of no-one' ('*les genres de discours sont des stratégies. De personne*').

*University of Queensland*

**Notes**

1. For an overview of linguistic analyses cf. the special issue of *Text* (1984) on legal discourse.
References

Gadet F & M Pècheux 1981 *La langue introuvable* ‘Théorie’ Maspéro Paris
Greimas A 1976 *Sémiotique et sciences sociales* Seuil Paris
Kalinowski G 1965 *Introduction à la logique juridique* P.U.F. Paris
Lyotard Jean-Francois 1983 *Le Differend* Minuit Paris
— Text 1984 4: 1-3
Author/s:
Frow, John A.

Title:
A note on legal semiotics

Date:
1995

Citation:

Publication Status:
Published

Persistent Link:
http://hdl.handle.net/11343/34476

File Description:
A note on legal semiotics