International Journal of Law in Context, 9,4 pp. 437–441 (2013) © Cambridge University Press 2013
doi:10.1017/S1744552313000232

Recovering legal fictions: an introduction

Maksymilian Del Mar[1]
Queen Mary, University of London

Aside from some occasional exceptions, the topic of legal fictions has largely disappeared from the agenda of the legal academy. It was not always so: arguably, the topic used to be a hot jurisprudential potato.[2] Further, the topic of fictions and fictionalism generally continues to be debated amongst philosophers. Why, one might ask, is the topic so neglected in contemporary legal scholarship? This is not the moment for a thorough investigation into the reasons for the neglect, but here is one speculative thought: traditionally, the topic of legal fictions sits at the crossroads of legal theory and legal history – and that, most unfortunately, is a crossing all too rarely made today.

It was, after all, Sir Henry Maine who, in his *Ancient Law* (1861), identified legal fictions as one of the three engines of legal change. Maine did think that fictions were a relatively primitive way of changing the law – and that societies progressed to employ the other two engines: equity, and finally legislation. Lon Fuller, too, when he turned to the topic of legal fictions in the 1930s (with a series of three ambitious papers), asserted that 'it seems exceedingly questionable whether it is ever truly convenient to employ a fiction where the judge introducing the reform can state the new rule in non-fictitious terms' (see Fuller, 1930–31, p. 524). Fictions, it seems, have often been thought of as training wheels or scaffolding to discard once a certain level of maturity and confidence had been reached. One could tolerate them, pragmatically, but only to a certain extent – the ideal was to do without them.

Should we, then, take the disappearance of the topic of legal fictions to signify that legal scholars believe that such progress has been achieved in their legal systems that fictions are no longer relied on in legal practice? If that were true, it would be a naive belief, but it is more likely that what has happened is that, at least in part due to the lack of collaboration between legal theorists and legal historians, topics such as legal fictions have quietly slipped off the radar.

Some might be surprised at the placement of the topic of legal fictions at the crossroads of legal theory and legal history. Is it not old-fashioned metaphysics, which we have rightly banished in these post-, or perhaps now post-post-modernist times? Or, is it not better framed as a topic at the intersection of law and science, with legal fictions indicating the way in which the law deals with the unknown – defined, in this scientific age, to constitute that which has not yet been pronounced upon by science (with the implication being, once again, that legal fictions are a blight on legal practice, better forgotten than brought to light)? These are all possible ways to frame the topic of legal fictions, but it does seem more likely that the reason why legal fictions have disappeared from the agenda is the lack of theoretically rich work on the mechanics of legal change.

The possibility of, and need for, collaboration between legal theory and legal history is not the only thing at stake in a debate over legal fictions. The topic raises issues also to do with the

1 m.delmar@qmul.ac.uk

2 Consider, for instance, the extensive discussion of legal fictions in Roscoe Pound's textbook on *Jurisprudence* (1959).

https://doi.org/10.1017/S1744552313000232 Published online by Cambridge University Press

politics of legal reasoning: Do practitioners use legal fictions as a way of insulating themselves from the broader community, using technical shorthand in ways that no lay person could understand? Is employing fictions a method for making law while appearing to merely apply it? Further, the topic is of general importance to our understanding of legal reasoning: on one plausible view of them, legal fictions are one of the ways in which legal reasoners bridge gaps between pre-existing rules and new facts. So understood, they are born in large part out of necessity, as judges, caught in the tempestuous march of particular disputes coming before them, do what they can to resolve those disputes without damaging, too drastically, the fabric of the law. In that sense, they raise the spectre of pragmatism: How pragmatic is legal reasoning, and how pragmatic ought it to be? To what extent can we appeal to pragmatic values in evaluating the modes and devices employed in legal reasoning? In short, at stake in the topic of legal fictions – at least insofar as they are relied upon in adjudicatory processes – is pragmatism itself.[3]

What, then, are legal fictions? It turns out that that is a very tricky question, partly because the label of legal fiction is used rather loosely in the literature, sometimes referring to one or another kind of fiction. As Michael Quinn discusses in this Special Issue, Jeremy Bentham identified three kinds of legal fictions: first (and following Quinn's nomenclature), 'legal/moral fictitious entities', which included concepts such as obligation and power; second, 'procedural or linguistic expedients', such as the Roman Law rule to treat foreigners as if they were Roman citizens; and third, 'theoretical fictions' (or 'fallacies' for Bentham), such as the thesis that judges do not make law. Others, such as Pierre Olivier (1975), made distinctions between judicial and legislative use of fictions, while some have also sought to include within the ambit of the topic, the use of fictions by citizens, e.g. completing three fictitious sales in order to be free of one's father's rule in Roman law.

Arguably, the domain of theoretical fictions – sometimes also called 'jurisprudential fictions' (e.g. by Fuller 1930–31, p. 903) – is a relatively separate one, and perhaps not best classified under the canopy of fictions at all. After all, what some in this context call a fiction, others defend as reality: in other words, calling something a theoretical fiction is simply another way of signalling one's disagreement with that theory. Similarly so with concepts, such as obligation, power or – the notorious one – legal personality: these are probably better thought of as 'virtual' (rather than fictional) devices, as they are more abstract or artificial than false; using them is not accompanied by some awareness of making a false assertion – at best, one is conscious of artificially (or poetically!) extending a concept that once had very concrete origins.[4] The most likely ground of common exploration, then, amongst legal scholars debating legal fictions, is the employment of certain devices in the adjudicatory process – these being devices that one employs with some awareness of falsity, e.g. asserting, for the purposes of applying the relevant rule in the present case, that some fact has been proven, whereas there is either no proof that that fact exists or there is proof to the contrary.[5]

On the whole, the papers in this Special Issue pursue this common ground, i.e. they focus on delineating and evaluating the use of legal fictions in adjudication. The one exception to this is Michael Quinn's paper, which has a broader canvas. Quinn certainly discusses what he calls, as above, 'procedural or linguistic expedients', but this is in the context of grappling with the (at least apparent) inconsistencies in Bentham's writings on fictions (of all three kinds). In

3 One should not, in this respect, assume – as one otherwise might – that a pragmatist would endorse the use of legal fictions: e.g. E.W. Thomas (2005) argues against their 'artificiality' on pragmatic grounds: see 313.

4 One of the concrete 'images' assigned by Bentham to obligation is that of a man tied up: see Quinn's paper in this special issue.

5 For example, there being proof that an estranged husband did not 'occupy' a certain residence, the court introduced the concept of 'beneficial occupation', thereby allowing his wife and children to sue him for payment of assessed rates (see *Des Salle D'Epinoix v Royal Borough of Kensington and Chelsea* [1970] 1 All ER 18.

https://doi.org/10.1017/S1744552313000232 Published online by Cambridge University Press

reconstructing Bentham's view, Quinn also most helpfully compares Bentham to both Fuller and Hans Vaihinger, the former drawing heavily on the latter (especially in Fuller's third paper on fictions). Quinn's assessment of the comparison is that although all three agree that much, if not all, of language is figurative or metaphorical – and as such fictional – they disagree on the extent to which, and the way in which, such falsehoods can be removed from language. For Bentham, normative abstractions – of the kind the law trades in on a daily basis, e.g. right, obligation, power, title, etc. – are properly subject to the method of paraphrasis, i.e. relating the entities in those propositions to real entities – which, for Bentham, and especially in the context of normative abstractions, ultimately are the sensations of pleasure and pain. As is well known, one of the key motivations for Bentham in proposing such methods as paraphrasis is greater control over what he saw as the otherwise all-too-powerful and corrupt exercise of judicial power, which utilised – to him – nonsensical language (such as talk of natural rights) to justify outcomes that served their interests. The more general observation to make here, whether one talks of legal fictions or not, is, as Quinn puts it, that 'perhaps the most significant power wielded by judges and politicians is an epistemological power, a power precisely to supply the analogies by which the rest of us make sense of legal and political events'. Bentham was particularly alive to this power, and he distrusted it so much that he sought to replace it with a legislative science that would guide and evaluate the conduct of human beings objectively, i.e. based on experience, observation, experiment and reflection, and rooted as firmly as possible in the sensations of pleasure and pain. Bentham did not tolerate (what he considered to be) loose talk, for he did not tolerate loose power. The only way we, as citizens, could protect ourselves from such power was to keep on a tight leash the language with which we were governed: surely – whatever one thinks of Bentham's take on fictions, or the prospects of paraphrasis – that is not a lesson that we can afford to ignore.

Interestingly, although Karen Petroski's focus is quite different to Quinn's – she looks squarely at the judicial use of legal fictions in the US – the issue of the remoteness of the language citizens are governed by is very much present. Indeed, Petroski's running theme is that legal fictions (e.g. the legal personhood of a corporation, legal equality, and the party status of an organisation in litigation) are employed by judges when signalling their sense of futility in the prospects of a further justification to a non-legal audience. On this view, the relative autonomy of legal language, and perhaps also the relative insularity of the legal profession, breeds legal fictions. Petroski, however, is not critical as Bentham is of such practices – her approach is more sociological in character, if not apologetic: she says, for instance, that we will continue to use fictions 'because legal conventions of communication will always be slightly ought of step with conventions used outside the legal sphere, and many legal actors acting in good faith will likely continue to note and compensate for that disparity.' It would be interesting to reflect further on whether this inevitability of law being 'out of step' is, on the whole, a good thing: is there value in the law being somewhat insulated from whatever holds the greatest epistemological sway in a particular age, whether it be myth, religion or science?

Petroski is sensitive to a community's linguistic conventions, as these remain stable, and to some extent change, over time. The method she employs – that of specialised discourse analysis – allows her to unearth the above-mentioned rhetorical and communicative functions of legal fictions in legal judgments. Petroski does not, however, limit herself to judicial pronouncements: in keeping with Fuller's third paper in his series – with its Vaihinger-inspired exploration of similarities between the languages of law and science – Petroski also investigates legal scholarship on scientific evidence. According to Petroski, these writings display a curious ambivalence: on the one hand, they place scientific discourse on a pedestal, using it as a standard against which to evaluate legal discourse; on the other hand, they are, in her own words, 'growing less and less confident that legal readers share a common understanding of how the phenomenal world should be described or how legal discourse ought to be changed to accommodate [that]'. What emerges from both of

https://doi.org/10.1017/S1744552313000232 Published online by Cambridge University Press

these analyses is that when we debate legal fictions, we should be mindful not only of the relationship between pre-existing rules (or norms) and the facts of new cases, but also of the relationship between different kinds of communities of language use: legal fictions, it seems, are destined to flourish in gaps, including the gaps between communities and their discourses. They are like little white flags: they plead innocence, but betray an underlying friction.

The issue of the relationship between scientific and legal discourse is also very much at the forefront of Randy Gordon's contribution. Gordon considers the way in which the law borrows from other disciplines, and in particular those blessed with the status of science, in order to solve its own problems. He does this by investigating a particular problem facing class litigation in the context of securities law in the US. In particular, Gordon shows how courts have drawn on the fraud-on-the-market theory developed in economics to solve the gap (yet another one!) between the substantive requirement of individual reliance under securities legislation with the procedural requirement of predominance of common interest governing class actions. One of Gordon's many valuable observations is that the fraud-on-the-market theory began life as a presumption, but 'hardened' over a period of fifteen years, there having been no successful rebuttal of the presumption since that first case. There are, to be sure, differences between fictions and presumptions – arguably even conclusive presumptions – for presumptions might be said, unlike fictions, to take a stance on the likelihood of certain facts having occurred (e.g. thinking it likely that there actually was reliance). But that is not to say that something that begins life as a presumption cannot become a fiction, e.g. with the passage of time, the original theory underlying the presumption might have been demonstrated – by, say, the overwhelming agreement of economists – to be false, but the rule has remained, now more appropriately characterised as a fiction (there now being awareness of falsity, rather than hope for factual accuracy). Whether one thinks that such presumptions-turned-fictions are a positive feature of legal practice is one thing – though one might argue here, if one is minded to be critical, that the real culprit is the lack of coherence between substantive and procedural requirements in two different, but related areas of the law. The more general lesson, however, is that something of great interest is happening when judges and practitioners turn to the sciences (or any discourse regarded to be authoritative in that particular age) for assistance in solving legal problems: as Gordon says, 'when law is using a hypothesis [e.g. from economics] to settle a fact, that may be an indication we are in the presence of a fiction', which makes it all the more vital that in this age of such blind belief in the authority of science, we pay particular attention to fictions.

What one thinks of fictions does depend, to a great extent, on one's pool of examples: whereas Gordon, as above, discusses a presumption that has hardened into a fiction, I look, in my paper, at examples of the use of devices that begin as fictions, and then *either* harden into explicit rules or dissolve into thin air. Fictions, it seems to me, can be incredibly flexible resources, and all the more useful for that. This is particularly so when they are employed initially in the face of a justifiable demand for a remedy in the absence of some evidence otherwise required by the pre-existing rule, whether that be (as is typically the case) evidence of some causal link or an intention. Such fictions are useful, in my estimation, because they allow the present court to exercise tentative cognition, allowing the community of legal practitioners as a whole to wait for future developments to see if it wants to create a new, explicit rule, permanently suspending the evidentiary requirement of the previous rule, or whether it wants to go back to the pre-existing rule and insist on the evidentiary requirement being proved after all (thereby placing in quarantine the case that introduced the fiction in the first place). It is a pity that legal fictions – perhaps like many other modes and devices of legal reasoning – have been often evaluated on the basis of one isolated example, and given that is so, it is not wholly surprising that many legal scholars have asked: But why invent fictions when, with a little extra effort, one can simply introduce an explicit rule? The general argument of my paper is that we ought to analyse and

https://doi.org/10.1017/S1744552313000232 Published online by Cambridge University Press

evaluate the use of modes and devices of legal reasoning, including legal fictions, by paying attention to their utility to legal practice across time. There is great utility, sometimes, in waiting, in lying low, in exercising modesty in expression, and fictions, on the account I adopt, are a stand-out device for doing just that. Such an ethic of gradualism should not feel alien to common lawyers: fictions are, on this view, not a relic to be eliminated, but a reminder of the value of tentative fact-anchored exploration and communication across time as to what operative facts it might be best to attach to what normative consequences.

I have taken the papers slightly out of sequence: mine follows first, followed by Quinn's, then Petroski's, and then Gordon's. But I hope the above shows that, in whatever sequence one takes them, the commonality of themes amongst these papers is striking. To express but one of these again: legal fictions tend to arise in various kinds of gaps – gaps between what one considers to be real and less real (let us say, more or less distant from anything one can experience); gaps between rules and their requirements and the facts that can be or have been proven; gaps between communities and their discourses; gaps between substantive and procedural requirements; and gaps between courts across time. If we are to maintain the idea that fictions are a sign of immaturity – that we best do without them – then we also have to defend the idea that we can attain a state in which such gaps do not arise. That strikes me as an impossible dream, if not a nightmare.

It remains to close on a note of thanks. The papers collected here first began life as a workshop at the IVR Congress in Frankfurt, in the summer of 2011. On behalf of the other contributors to this issue, let me thank all the participants in that workshop. I recall the moment the idea of a discussion on legal fictions occurred to me: I was sitting in a corner in a dark bar in Berlin, reading Fuller's articles under a dim light. I was bowled over by their ambition, and their flights of fancy. Why, I wondered, had we forgotten about legal fictions? It might have been the German beer, but I hope I was not altogether wrong about the dizzying pleasures of thinking about legal fictions. I am grateful to my fellow contributors for their willingness to look again at this most perplexing of devices of legal reasoning, and for the editors of this journal, for hosting our little exploration.

References

FULLER, Lon (1930–31) 'Legal Fictions', *Illinois Law Review* 25: 363–99, 513–46, 877–910.

MAINE, Sir Henry (1931 [1861]) *Ancient Law*. London: Oxford University Press.

OLIVIER, Pierre (1975) *Legal Fictions in Practice and Legal Science*. Rotterdam: Rotterdam University Press.

POUND, Roscoe (1959) *Jurisprudence*. St Paul, MN: West Publishing Co.

THOMAS, E. W. (2005) *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*. Cambridge: Cambridge University Press.

https://doi.org/10.1017/S1744552313000232 Published online by Cambridge University Press