Language and Law

A resource book for students

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Chapter B6

Pragmatics and Legal Interpretation

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by calculating probabilities or by scrutinizing inferential chains'; instead, he suggests, they decide whether a narrative 'possesses the "lifelikeness" that appears to mark it as true'. The potential criticism that other lives are reduced in such advocacy to jurors' own expectations, or even prejudices, is countered by the requirement of supporting evidence and the fundamental principle of judgment by peers.

The proposition that it is easier to impress jurors with stories than with statistical information is based on empirical evidence. Wells (1992) reports how, when a mock jury was told that 80 per cent of tyres of the Blue Bus Co., but only 20 per cent of the alternative Grey Bus Co., matched the tracks of a bus that had killed a dog, few (around 10 per cent) found the Blue Bus Co. liable for damages. With a different mock jury group, an eyewitness took the witness stand and testified that he saw that the bus was blue. Even though the jurors were told that eyewitness accounts have been shown to be only 80 per cent accurate in making such identifications, a significantly greater number of mock jurors (around 70 per cent) found the Blue Bus Co. liable in this condition of the experiment.

From one perspective, rhetorical strategies are extralegal factors that should not affect the outcome of a case in an ideal, rational legal system. On the other hand, legal advocacy provides ammunition for lawyers to use, at least in common-law adversarial systems, in the knowledge that the outcome of each case will be determined by the court after competing submissions and evidence have been presented as coherently and vigorously as possible by the respective parties. In this sense, an adversarial (rather than inquisitorial) structure for trials depends on competitive testing of arguments and evidence followed by detached judgment, even if a different balance of legal, factual and emotional components is likely to be found as between bench and jury trials, and in other adjudicative forums.

PRAGMATICS AND LEGAL INTERPRETATION B6

Unless there is a reason not to, legal interpretation presumes that legislative texts are optimal in conveying a legislature's intention, even if in practice word meaning will vary because it is inevitably context sensitive. 'Construing' a legal text, as a result, involves pragmatic aspects in addition to the semantics of language and the specialised forms of reasoning associated with legal rules. In this unit, we outline the role of contextual interpretation in legal meaning. We also consider alternative judicial approaches to legal interpretation. In conclusion, we broach the question of how closely approaches to interpreting legal texts should be expected to resemble linguistic understanding of the ways meaning is created in everyday language use.

Semantic and pragmatic aspects of meaning
Legal indeterminacy that results from **linguistic indeterminacy** (such as ambiguity and vagueness) seems at first to be concerned with semantic dimensions of meaning: with

the denotational meaning of words and syntactic relations between them. As we see in Unit A6, however, determining even the meaning of isolated words and phrases (*building*, *in the street*, *dresses*) also involves pragmatic considerations.

Pragmatic theories (e.g. Gricean accounts of meaning, and relevance theory; Sperber and Wilson 1995) show how discourse interpretation proceeds in part through contextual inference. The reader or hearer fills out an incomplete, encoded semantic representation using cues given by co-text, accessible background knowledge and inferred purpose. Pragmatic studies investigate a cumulative process of **inferential enrichment** that widens, narrows and approximates linguistically **encoded meaning** according to context, as the reader or hearer seeks to understand the intended meaning of an utterance (Wilson and Carston 2007).

Legislative intent

Legal interpretation is similarly concerned with ascertaining intended meaning (though in law this is a complicated assumption, as we will see). The meaning looked for in a law is the meaning intended by the legislature and conveyed by the words used in the statute. But the phrase 'conveyed by' here obscures major complexity, because the interpretive process takes place in a different context (the courtroom) from that of the enacting legislature (the lawmaking assembly and related drafting bodies).

Claiming that the meaning attributed by a court amounts to the legislature's *intended* meaning faces several major difficulties that any approach to legal interpretation must overcome:

1   If meaning is understood literally (in law, as the 'plain', 'ordinary' or 'popular' meaning, or as **natural signification**), interpretation requires judges to assume that the drafter created an autonomous document: one whose meaning does not depend on contextually varying inference or extrinsic evidence.
2   Allowance needs to be made for the **collective authorship** characteristic of a legislature (as contrasted with a single lawgiver); collective 'intention' must be ascribed to a body of legislators who have different political agendas and convictions. Legislation, including the choice of enacted words, is often a result of negotiation and compromise.
3   Intention must be differentiated between: (i) meanings anticipated to apply to all conceivable situations; and (ii) attitudes, values and lifestyles specific to the historical moment or social situation in which the legislation was passed.
4   Some kind of resolution needs to be achieved between the subjective intention of particular, historical authors, and an objective intention 'modernised' by others in ways that adapt the narrow linguistic meaning to contemporary norms or sense of legal purpose.

A great deal of legal scholarship has been devoted to examining approaches that result from different ways of viewing these problems, especially literal and purposive statutory interpretation (see Barak 2005). Although all interpretation of legislative language is influenced by contextual factors, the significance of pragmatic interpretation is more evident in purposive reading of the law (for discussion, see Durant and Leung 2016).

Approaches to legal interpretation

The name given to the process of ascertaining meaning for a statement of law is legal construction. Efforts made to control meaning, and so embody the rule of law by achieving clarity and consistency, superimpose on spontaneous processes of discourse comprehension a range of additional interpretive measures. These include rules of interpretation (Bennion 2001; Barak 2005); and also, reflexively, rules governing rule handling itself (Twining and Miers 2010).

Historically, questions surrounding interpretation have been complicated in common-law systems by the sometimes overstated primacy of **literal interpretation**, an approach that flourished in the second half of the nineteenth century and early twentieth century, and which has enjoyed renewed influence in contemporary variants described as **textualism** (advanced in US law especially by Justice Antonin Scalia; Scalia and Garner 2012). However, emphasis on strict interpretation of particular words has been marginalised in English law in recent years by approaches that attach increased importance to context, intention and purpose: **purposive interpretation**.

Basing our description here on Manchester and Salter's (2011) comprehensive discussion of statutory interpretation in English law and the recent influence of European law on common-law approaches, we now summarise the two broad approaches.

Literal interpretation and the golden rule

A 'literal' rule (sometimes known as the **plain meaning rule**) requires word-for-word reading of the law, through which words are given their natural or ordinary meaning. Judges base such meaning either on their own understanding, or their understanding of how words are comprehended by others in the population generally or relevant groups of people. Judges may consult a dictionary definition in arriving at such a meaning.

The legal term **golden rule** (which originated in mid-nineteenth-century English legal judgments) refers in its varied formulations to decisions to depart from literal interpretation where a court decides not to give words their ordinary signification because such a meaning would result in 'manifest absurdity' that could not have been the legislature's intention. In applying the golden rule, the court 'takes the whole statute together', appealing to meaning in the word's immediate legal context.

Purposive interpretation and the mischief rule

While usually distinguished from one another in law textbooks, and associated with different historical periods, the purposive approach and the **mischief rule** both seek to establish legal meaning as the meaning intended by the legislature (for English law, by parliament). In contrast with the literal approach and golden rule, which emphasise words in their immediate linguistic context, the mischief rule and purposive approach take account of legal purpose. They give more weight to the idea that legislative intention might not be adequately conveyed by the words themselves (e.g. because not all new situations can be foreseen in drafting provisions).

The notion of a mischief rule has its origins in a 1584 English case, *Heydon's case*. In that case, the court resolved that 'for the sure and true interpretation of statutes', four things 'should be discerned and considered': what the common law was before

the making of the act; what the mischief and defect was for which the common law could not provide; what remedy parliament 'resolved and appointed to cure the disease of the Commonwealth'; and the need for judges to interpret words so as to suppress that mischief and advance a remedy. There was no indication in *Heydon's case* that the mischief rule should only be used in cases where the meaning of words is ambiguous; but the rule has mostly only been invoked in such circumstances.

Constraints on legal interpretation

Laws are written by draftsmen to embody the intent of a legislature; but once they have been enacted, they are interpreted and applied by judges in particular cases independently of the legislature that formulated them. Legal rules, as well as being stated in statutes, are in this way polished – in some circumstances, arguably modified – by judges in deciding cases where there are matters not covered by the relevant statute or when the applicable meaning of some word or phrasing in a statute is uncertain.

This process of judicial decision-making is constrained, however, by relevant propositions of law (what is called the **ratio decidendi**, often abbreviated to 'ratio') developed in earlier decisions. Such legal propositions do not necessarily take a clearly stated form (e.g. being found in a specific sentence), because the legal proposition emerges in relation to particular facts of the particular case. Nevertheless, the ratio creates a precedent that may be binding, depending on the relative position in the court hierarchy of the court establishing the rule and the subsequent court contemplating its use. Detailed rules guide the application of precedent cases; but the process overall amounts to a kind of cumulative interpretation, as courts build on decisions made by earlier courts. This is known as the doctrine of **stare decisis**: in specified circumstances, later courts are required to stand by decisions made by earlier ones.

What are the practical consequences of this complex procedure of legal interpretation as regards how meaning is actually attributed? Two aspects stand out.

Different notions of context

In pragmatic theories, such as Gricean accounts of implied and inferred meaning, meaning is arrived at by a hearer making inferences that combine what is explicitly said with contextual inferences in order to arrive at the relevant meaning. Context typically includes features of the immediate speech situation (including participants and their relationship) plus a wide range of accessible assumptions about the world that can be activated with different amounts of processing effort. Pragmatic theories based on notions of cognitive effort and reward, such as relevance theory, focus on spontaneous effort made by hearers to find relevant meaning when an intention to communicate with them is signalled.

Hermeneutic models for ascribing legal meaning differ in significant respects, not least in that the interpretive effort made is typically methodical, conscious and rule-governed rather than spontaneous. When courts go beyond the literal meaning of words, their allowance of contextual inference is highly constrained, limited to taking account of precisely specified features of context, either 'intrinsic' or 'extrinsic' to the statute in question.

❏ So-called **intrinsic material** may include other provisions within the statute, as well as marginal or side notes, headings, any preamble, and the long title (but not the short title, which is provided for reference purposes only). Use of such aids as practical guidance in understanding what a statute means underscores the communicative significance of genre conventions in legal texts (see Thread 3).

❏ **Extrinsic material** may include explanatory notes published in tandem with (recent) legislation; other statutory provisions, whether in the same field or in other fields of law; general common-law principles; parliamentary materials; some classes of pre-parliamentary publication (e.g. law commission reports); international treaties and conventions; and in some circumstances policy considerations (effectively the judge's view of what the best policy for the law to adopt would be).

Appeal to maxims

In addition to use of such materials, courts also rely in interpreting on general presumptions, some of which relate directly to language and some to the conceptual nature of legal rules.

These interpretive presumptions take the form of **canons** or **maxims**. They are interpretive rules, but resemble accumulated wisdom rather than collectively forming a principled rule system or psychologically realistic model of processing. In practice, judges do not refer to which rule they have applied, if any; and the complexity of fit between rule, wording of the law in question, and the fact situation to which the rule is applied may also obscure how (or even if) a particular rule has been followed.

Such maxims often have Latin names. These include **expressio unius** (**exclusio alterius**): a maxim that presumes that expression of one thing implies exclusion of another. This presumption has the result that where one thing is mentioned within a class, this mention by implication excludes other things in the same class. Another maxim is the **contra proferentem** rule, which requires that if ambiguity in a clause or document cannot be resolved in any other way, then the words should be construed against the interests of the person who put the clause forward. Another is the rule of **lenity**, which requires courts to decide meaning in favour of the defendant if a different, specific meaning has not been expressed in the relevant provision. Others are the rule known as **eiusdem generis**, which stipulates that a word should be given a meaning that is of the same kind or nature as other words listed with it; and **noscitur a sociis** is a rule requiring that the meaning of a word or phrase should be guided by words or phrases associated with it.

Other established presumptions are less like practical wisdom gained from interpretive experience than deeper-seated assumptions. These include a presumption that a statute creating criminal offences should require a blameworthy state of mind (**mens rea**) on the part of the defendant; that a statute linked to possible imprisonment should be interpreted strictly in favour of the individual; that a statutory provision is not intended to make changes in existing law beyond those expressly stated; and that a statute will comply with a country's obligations under international treaties and conventions.

Law as an interpretive social institution

The combination of careful legislative preparation and drafting, rules governing statutory interpretation, and cumulative development of legal interpretation through

case law creates a complex and rigorous procedure for examining meaning and for monitoring meanings that have been ascribed. At the same time, the process retains flexibility, which allows legal interpretation to respond to changing circumstances. Manchester and Salter (2011) in fact devote a substantial proportion of their analysis to looking at what they call the **dynamics of precedent**: essentially how words, concepts and rules based on them evolve over time in difficult areas of law, including unlawful *detention* of mental health patients, *equal* pay and marital *rape.*

International variation

So far, our exposition in this unit has been based on English law, though the general principles apply across common-law systems. Since the interpretive processes as we have described them are a normative set of procedures governed by legal institutions, their detail varies both over time and between legal jurisdictions. The English approach to legal interpretation outlined above, for example, has gradually changed since the coming into force of the Human Rights Act 1998, in the direction of interpretive practices developed in non-common-law systems in Continental Europe.

The gradual accommodation to changing styles of interpretation in English law has not, however, precipitated anything like the controversy to be found in US law over the relative merits of textualist and intentionalist approaches. According to textualists, the first rule of interpretation must be, as with a literal approach more generally, fidelity to ordinary meaning; judges should not speculate about what lawmakers intended to say or achieve in enacting a legal text. The major proponent of textualism, the eminent US judge Justice Scalia, has argued that 'The text is the law, and it is the text that must be observed', echoing a warning expressed in an earlier period by Justice Oliver Wendell Holmes (1809–1894) that 'We do not inquire what the legislature meant; we ask only what the statute means' (Scalia 1997: 22–3).

This complex controversy between different approaches to legal interpretation in US law will continue. But there is another changing horizon also to be considered: that of international, 'world' law in fields including international trade, human rights, and criminal behaviour, including war crimes and genocide. In public international law, to take one area, a cluster of key words and phrases (including *self-determination*, *indigenous*, *sovereignty*, *torture*, *slavery*, *aggression*, *piracy*, *genocide*, *occupation* and *security*, among others) have shown themselves to be exposed to contested interpretation in forums, including international courts, tribunals and treaty negotiations. Tensions over the meaning to be given to such terms are exacerbated not only by differences between national legal systems, but by differences between the languages in which international law is expressed, since complex meanings are carried across but shaded differently in different languages. Such tensions, it appears, present new interpretive difficulties with important global ramifications.

Laws as a unique form of linguistic expression?

Legal enactments are undoubtedly communicative acts, not only literal statements. But in some views, they are more than either. According to Greenberg (2011), enactments are rules expressed in words and embodied in documents, but conceptually distinct from the either the words or the documents in which they are expressed. Rules,

including legal rules, can after all be unwritten, tacit or implied (a theme explored in Twining and Miers 2010). It might therefore be the rule, rather than the language in which a rule is expressed, that should be examined for meaning. Greenberg argues that **communication theories of law** (i.e. frameworks for interpreting legal texts based on likeness to principles underlying general communication, especially personal communication) cannot provide a satisfactory account of how statutes contribute to law's content or effects.

Legislative systems, Greenberg argues, have aims that are not reducible to their communicative content as analysed according to linguistic (including pragmatic) standards and principles. Rather, what is distinctive about laws may be precisely that they use linguistic means for unique, normative and symbolic purposes. Those purposes, Greenberg notes, range from specifying conceptual rules and ensuring that legal standards will be enforced and complied with, through to advancing justice, fostering the legitimacy of the legal system, preserving the status quo, and promoting a particular ideology. Because laws operate in these combined ways, he concludes, the legal 'meaning' of statutes and other legal instruments is only partly communicated by the words in which they are expressed; legal meaning is not reducible to those words – or to our customary ways of understanding most other kinds of language use. We pursue these fundamental questions in Unit D6, as well as more generally in Thread 8.

LEGAL SPEECH ACTS   B7

Unit A7 examines the vocabulary used in describing the relationship among law, power and order. We note there that language can *describe* power (e.g. a textbook may begin, 'Power consists of . . .'); or it can *reflect* power (e.g. the sociolect used by a judge might signify a powerful social class). We can also say that patterns in language use may *correlate* with power (e.g. the status of participants in a legal interaction may match their speaking skills). But can we say that legal discourse actually exercises or *performs* power? In this unit, we look at linguistic approaches based on speech act theory that suggest that it does. In particular, we look at linguistic 'performatives', as enablers of action, before addressing the question of how performative speech acts relate to the wider practice of devising and following legal 'rules'.

How to do things with words: linguistic performatives

First, it is necessary to provide a context for the linguistic concepts we will draw on. Although there were earlier, analogous approaches in rhetoric, the idea that language can be used in a **performative** way is usually associated with a pioneering work by the Oxford philosopher J. L. Austin (1911–1960), *How to Do Things with Words* (1962), compiled from a series of lectures he had delivered at Harvard in the 1950s. Austin noted various utterances that he felt functioned in interesting and unexamined ways, including examples such as: *I name this ship* Queen Elizabeth, *I promise* and *I do* [take