Language and Law

A resource book for students

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Chapter A7

The Vocabulary of Legal Power

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A number of the terms and contrasts that we have seen are used to characterise legal meaning are in play here, alongside the semantically vague adjectives 'right' and 'appropriate' (which cut across procedural, legal and moral vocabularies). Lord Neuberger's conclusion was that *building* should be given 'its natural and relatively wide meaning', such that Mr Ghai's wishes in relation to cremation could be accommodated within the relevant regulations.

This approach may appear to make the interpretive process vague, especially as English courts are not obliged to repeat the construction of undefined words from earlier cases, or reflect how the same word is used in other areas of legislation (though they often do). The purpose of confining cremations within buildings differs in obvious ways from, for example, the aim of the Theft Act 1968 (where *building* is also defined and has been tested in numerous cases). The Theft Act highlights a combination of specificity and contextual variability required in legal construction of word meaning. In s. 9(3), *building* is defined to include 'an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having habitation in it is not there as well as at times when he is in'. It is as much legal purpose as closeness to prototype that subsumes an uninhabited waterborne vessel within the meaning of *building* but still finds a partly sideless room with a roof problematic.

Word meaning in context

Reference in legal interpretation to purpose (e.g. as communicated by the long title of a legislative act; see Thread 3) is a reminder that although words function as concentrated nodes of meaning, they are shaded or modulated on any occasion of use by other factors. Those factors include: the other words around them (**co-text**); previous instances of the same word elsewhere in the same discourse; the situation in which they are used; and background knowledge likely to be drawn on by an interpreter. If we are to understand how word meanings are used and contested in legal settings, therefore, it is necessary to situate interpretive disputes in both the legislative text around the word and also in how we inevitably draw selectively on surrounding, contextual information.

A7 THE VOCABULARY OF LEGAL POWER

In this unit, we examine the relationship between language, law and power, a connection we touch on in different ways throughout the book. Here, we address the specific question whether legal concepts merely describe, actively give effect to, or obscure social power. First, we introduce two key concepts at the intersection between any society's political and legal spheres: *power* and *order*. Then we explain why use of such words is difficult to disentangle when thinking about legal language. Finally, we examine how language use may suggest different possible relationships that law can create between power and order.

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Power, order and law

Law is often defined in terms of *power* and *order*. Both terms are **polysemous**: that is, they have various related senses. The multiple senses are used, and meaningful, in law in various ways; and this makes it potentially difficult to grasp fully how law is using them (because their meaning in a given context might involve one or other shading of meaning). The words *power* and *order* are prime examples of a general tendency in legal language: that while words appear to have precise senses, their meaning in a given context can only be gauged by understanding relations between some or all of the possible senses available.

Consider *power* first, which is a highly abstract term. *Power* has been used and understood in many different ways in social science (e.g. as military, economic and political power) as well as in other contexts. In social relations, *power* signifies force or capability that confers an ability to influence situations, events or people. Often, such influence takes place without cooperation from relevant other actors. Capability to influence, accordingly, extends to authority, control and coercion. By a **metonymic** shift of meaning, in international relations the (now count noun) *power* means a country (or social group) considered to possess power in the other sense (e.g. an *emerging power*, *regional power*, *great power* or even *superpower*).

For any such power or powers, the (uncountable) abstract resource, power, is built up in a number of ways: through ability to impose political will by military force; by commercial monopoly or supremacy; or by projected personal power ranging from charismatic leadership, symbolism and ritual through to direct domination and subordination of others. Some forms of power are in consequence 'hard', or coercive; others are 'soft', working by persuasion and influence. Operating in tandem with political and enforcement agencies, law exercises both hard and soft power: it imposes obligations backed by sanctions including imprisonment, bans and fines (and, in some countries, execution), and it gives effect to incentives, voluntary codes and other alternative regulatory measures.

Now consider *order* and *orders*. *Orders*, in a narrow sense, are commands given by someone in a position of authority to bring about a change in a state of affairs perceived as not going in the right direction: a state of affairs not being *in order*, in a different but related sense of the term. The first of these senses of *order* has specific applications in law, being used to refer to legal decisions and documents such as *court orders*, *formal orders* and *restraining orders*. The second sense of *order* is different: it is the meaning present in *social order* and also found in the common phrase *law and order*. The meaning of this phrase can either denote a specific characteristic or condition of a society (one that has both law and order), or, confusingly, if the words are read together, then as a description of law being used to maintain or even create order: law brings about order by containing disorder. A still more abstract and neutral sense of *order* refers to how things are arranged, as in *alphabetical order*. And a further, related sense of the word, now with a positive connotation, refers to a system in which everything falls in the right place and seems to run satisfactorily by itself.

Given this range of meanings, precisely what *legal order* means appears **ambiguous**. The phrase may be used to describe how law is organised (e.g. the *international legal order*). Rarely in academic publications but frequently in everyday usage, the phrase

can alternatively carry ideological and moral content: the way things should be run as compared with the alternatives, for example in polemics concerned with imposing or restoring legal order.

The concepts expressed by the words *power* and *order* often interact in discourse about politics and law. Consider the following sentence taken from the economic liberal thinker Friedrich Hayek (1978: 128):

> The effective limitation of power is the most important problem of social order.

What this sentence means depends largely on tension created between the two contrasted words *power* and *order*; and contrast between the two terms is developed in the argument being made: that while government is indispensable in protecting a society against coercion and violence from others (by using power to maintain order), as soon as it acquires a monopoly over use of force (and so has too much unconstrained power), then government itself becomes a threat (to social order). As we will see below, law – specifically constitutional law – is often the mediator of tensions of this kind.

Metalanguage of law and social organisation

How law conceptualises the relation between power and order follows from the kind of social organisation in which a legal system is embedded. This is often reflected in the **metalanguage** used to talk about law. We can see this in three highly simplified forms of social organisation:

1 In some forms of social organisation, such as tyranny or despotism, the power of a sovereign may be unlimited (i.e. there is no clear constitutional order). While in some circumstances such social organisation might be thought desirable, in order to protect a population from war and fear (as in the analysis offered by the philosopher Thomas Hobbes in *Leviathan*; 2008 [1651]), the practical **discourse of power** adopted in such circumstances will consist of commands from a sovereign, and compliance, supplication and appeasement from everyone else. The ruling power need not always be an individual: authoritarian governments also present themselves under a shield of law. For example, the Nazi regime referred to their legal measures as 'Gleichschaltung' (meaning 'synchronisation', 'bringing into line', or 'a forced kind of coordination'). From a contrasting perspective, Pedro Albizu Campos, leader of a Puerto Rican independence movement during the 1930s, famously commented that 'When tyranny is law, revolution is order', critiquing what happens when power (both the count noun and the abstract resource) is presented falsely as law.
2 In modern liberal democratic states, power is shared out by forms of political participation, including elections. Government power is constrained by a constitution: a body of law that defines the powers of and relationships between branches of government. The constitution of such states typically maintains a **separation of powers** between three branches of government (the executive, judiciary and legislative body), a separation believed to provide checks and balances preventing abuse by any one of these 'powers'. In other words, in such societies,

law is used to structure political 'power' into a distinctive 'order'. The rhetoric (or use of language) involved in law, in this perspective, aspires to be 'socially constitutive' in the manner envisaged by James Boyd White (see Unit D5): a two-way traffic of ideas between specialised professional practice (involving legal training, rules and deliberation in particular cases) and a participative legal culture of explanation, debate and consultation.

3 **Marxist theories of law**, by contrast, and a range of non-Marxist critical approaches influenced by them, conceive law differently. Law, in such frameworks, is a 'superstructure' brought into existence by private possession of the means of production with its consequent division of society into classes. The two main social functions law then performs are accordingly to regulate relations of possession and to control the struggle between classes (Hirst 1979). Taking the form (in more recent European Marxist theories, such as the work of Althusser) of an **ideological state apparatus** supplementing repressive state powers including use of an army, law restates existing relations of production in the form of delegated powers and rights (especially property rights). In such legal restatement, it secures a structure of political domination. In order to rationalise social relations of power, legal uses of language in this context disguise economic and political inequality as equality under the law, mystifying the relationship that actually holds between power and population.

The contrasts emphasised here highlight alternative ways in which uses of language to describe law translate different types and degrees of political power into what we recognise as legal systems, converting power into legal order. Language used to describe law is in this context therefore not just language describing law, but language managing a complex relationship between law and a wider ideological system from which such legal language must translate.

The language of constitutions

The general importance of the points made so far is that different social organisations are based on varying configurations of law, power and order. Many such configurations are specified in written or unwritten **constitutions**, which prescribe how political power will be channelled into, and stated as, the legal system. Some countries (including the UK) have no written constitution, but consider themselves nevertheless to have one in the sense of a set of principles performing the same function. Where a constitution *is* a written document, or group of documents, it sets out what are regarded to be fundamental principles of its form of government. The constitution, sometimes described by a different rubric such as **basic law**, may prescribe how rulers are chosen and how they can be called to account or removed. It may also regulate the behaviour of the main political actors; and it may indicate what rights an individual has against abuse of power (see Adler 2007). Such constitutions are legal instruments promulgated at particular historical moments, often following a political upheaval such as a revolution, civil war, or decolonisation. Once ratified, however, a constitution will typically have entrenched status; this means it can only be properly amended or repealed by some special procedure.

From a linguistic perspective, what makes constitutions interesting is that providing a framework for even the most basic principles underpinning the structure and purposes of a whole society calls for a great deal of detail. Article 1 of the US Bill of Rights (signed 1789, ratified 1791) suggests that some sections may be conceived in this way:

> After the first enumeration required by the first article of the Constitution, there shall be one Representative for every 30,000 until the number shall amount to 100, after which the proportion shall be so regulated by Congress, that there shall be not less than 100 Representatives, nor less than one Representative for every 40,000 persons, until the number of Representatives shall amount to 200; after which the proportion shall . . .

Alongside highly specified measures of this kind (whose precise quantification nevertheless distracts from how contextually influenced the figures inevitably were), other measures are expressed in very broad terms. Contrast Article 1 above, for example, with Article 3, generally known as the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Each phrase of this article calls for (and has received) close scrutiny, not least because measures of this second type raise difficult problems of interpretation concerned first with how general they are, and second with how far they do or should reflect the thinking and values of the period in which they were written, despite being intended to remain in force for an open-ended future period.

Faced with major interpretive challenges of many kinds, the field of constitutional law in any given society queries and interrogates, as well as states, that country's legal form of organisation. An **apex court** such as the US Supreme Court must combine these two processes in judgments that clarify constitutive rules that distribute power within the society (of the kind illustrated above: 'there shall be one Representative for every 30,000') while ensuring that the society's regulative rules are complied with (e.g. 'shall make no law respecting an establishment of religion'). Interpreted and reinterpreted in case law, the US Constitution – to take this pre-eminent example – has prompted an accumulating record (a 'living document') of arguments exploring fundamental questions concerned with the intentions, presumptions and general meanings represented by written constitutional words.

Constitutions, commands and rules

Constitutional arguments and decisions are a public process through which law engages with and dispenses political power, while also limiting power according to the principles of a distinct legal order. That process may be contrasted with what happens in most legal disputes, which are not concerned with testing the constitutive rules of a legal system, but more narrowly with applying its provisions. These two processes engage

different aspects of power and require different powers. Critical approaches to law tend to emphasise law's closeness to singular, homogeneous *power*. But most statutes and legal procedures are concerned with plural *powers*: compartmentalised packets of delegated authority and duty conferred on and exercised by different legal actors (e.g. police officers, bailiffs, judges, etc.).

All this makes the functioning of language in law harder to comprehend, partly because of the roles played by polysemy and vagueness in many of the keywords involved. Something of what *order* signifies, for example, that *power* does not, is a reconstruction of coercive power into a system of social regulation observing the **rule of law** (a principle subject to divergent interpretations but often functionally contrasted with the 'rule of man').

Nor does the effect of different uses of keywords in law end with power and order. Introducing the idea of the 'rule' of law in fact extends the semantic task, because implementing the 'rule of law' will only involve 'rules' if rules are how law works (since *rule*, as a general social condition, may be exercised either by a ruler who issues commands or by one who follows rules). *Rule* and *order* can both denote states of affairs, or 'systems', or they can mean what people do to influence the actions of others (as those others carry out commands or comply with general instructions). It is almost impossible to extricate law's relationship with power and order from conceptual problems inherent in the terminology involved. Yet beyond the questions of terminology, how power is exercised in language also depends on how, in practice, rules, commands and orders operate.

REGULATION OF LANGUAGE USE A8

In this unit, we switch to a different perspective on language and law: how language used in situations other than 'legal' contexts – in general communication – is treated if it becomes the subject matter of litigation. Examples of when this happens include cases of alleged bribery, harassment, trademark infringement, insulting or abusive verbal behaviour, defamation, and actions in a number of other fields. How language is treated in such circumstances differs from interpretation of statutes (where the language was drafted in anticipation of being read according to legal norms). It also differs from how oral or written evidence is treated in court (because the significance of evidential language lies primarily in what is reported rather than in effects on an addressee or other person of what is being expressed). In the 'general language' situations we now discuss, the main legal focus is on the meaning and effects of communication in the field of regulated public behaviour.

Communications in trouble

To begin, we outline the many ways in which verbal communication gets into trouble with the law, either by constituting criminal behaviour (i.e. where prosecution may

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