Language and Law

A resource book for students

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Chapter A6

Interpreting Legislative Texts

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disappeared from either the occasional reality or more frequent cultural perception of legal advocacy. Modern linguistic descriptions of advocacy therefore offer the prospect of showing what stylistic characteristics are actually involved; which techniques, if any, have been retained from the earlier rhetorical tradition; and how residual features have been adapted to fit the modern structures and contemporary style of legal proceedings.

Current practice: style, moves and event structure

In the course of an analysis of a corpus of modern Crown Court jury trials, the British linguist Chris Heffer describes the role of an advocate, at least in criminal trials, in a manner that contrasts markedly with the role we infer from the Burke extract above:

> The counsel is above all a strategist engaged in acts of persuasion: persuading the jury of the guilt or innocence of the defendant: convincing the judge of the legal admissibility or otherwise of an item of evidence; coercing the witness into answering in a certain fashion.
> (Heffer 2005: 95)

The contrast with Burke here is not only between high-flown public monologue and strategic effort to engage with the jury in order to persuade them. It is also to do with an organisational rather than oratorical emphasis, requiring orchestration of the voices of others as much as projection of the advocate's own voice. And as in other situations, speaking cannot be disconnected from listening. A modern trial will also involve long periods during which the advocate listens, taking material into account in anticipation of making a response later rather than speaking straight away – hence the theatrical metaphor often invoked in relation to legal trials of a play consisting of a series of acts.

Advocacy is not just a texture of eloquence. Rather, it operates at a number of levels: there is the immediate stylistic level of choosing appropriate words and sentence structures to match the needs of courtroom interaction and expectations of relevant addressees; there is a speech act level calling for choices whether, and with what strength, to assert, ask questions, request clarification, object, exhort; there is a level of more complex discourse moves including crafted monologues, taking witnesses through their evidence, and interacting with opposing counsel and the judge(s); and there is the macro-strategic level of managing the trial's overall, combined narrative and expository schema (which we explore in Unit D3, D4 and D5).

INTERPRETING LEGISLATIVE TEXTS A6

Few issues are more important in language and law than how meanings are given to written legal texts. In this unit, we show how emphasis in law on singular, correct interpretation differs from the descriptive and explanatory approach adopted in linguistics. In Unit B6, we extend this discussion by considering the reasoning processes

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used in 'construction' (i.e. legal interpretation) to arrive at the meaning of problematic words and phrases in texts whose legal effect depends on their legislative purpose, not only on the meaning of individual words or grammatical relations between them.

Legal interpretation as a specialised approach

When we interpret utterances in everyday conversation or casual reading, we pay attention both to linguistic cues to meaning (e.g. choice of words) and to contextual cues as regards speaker intention. Legal approaches to meaning follow everyday strategies in interpretation, but in different ways. Three differences are significant:

1 Legal interpretation (often referred to as **construction**, from the word *construe*) takes a normative approach to attributing meaning. It ascribes singular, correct legal meanings by *deciding* meaning where there is doubt or disagreement.
2 The process of ascribing a meaning, which occurs spontaneously in everyday communication, often takes place through an explicit process of argument. The legal interpreter, usually a judge, takes into account not only linguistic meaning, but also legal considerations such as the purpose of the relevant legislation.
3 In litigation, legal wording may be tested in an adversarial setting. Common-law proceedings allow alternative interpretations to be argued, but require courts to follow specialised interpretive procedures in arriving at a legally correct outcome.

This specialised approach to interpretation in law can make the process baffling to someone who insists that **natural language processing** is always an instantaneous and spontaneous process.

Disputes over meaning

Although legal language is drafted as precisely as possible, courts often find themselves having to decide the legal meaning of disputed words before they can apply the law. In a world of alternative understandings of facts, ideas and values, as well as differing preferences as regards behaviour, law is often relied on as the social institution to 'fix' – in both senses of 'define' and 'resolve' – contested concepts in a society. Think, for example, of what words such as *marriage*, *extremist*, *indigenous*, *traditional*, *terrorist* or *life* mean. Inevitably, questions arise regarding what concept or concepts such words denote; what range of characteristics or behaviour they subsume; and how they are to be understood in different contexts of use. Those questions are amplified when the society in which the words are used experiences major change in terms of technology or values.

Interpretive difficulties arise not only with individual word meaning, but from the linguistic contexts in which the words occur. Syntactic ambiguity, uncertainty created by punctuation, collocation with other words in a list, combination with other words using the alternative connectives *and* versus *or*, and the grammatical scope of added modifiers: all these, individually or in combination, can create local interpretive difficulty.

For instance, if a will provides that money should be given to 'charitable institutions and organisations', the question arises as to precisely which people, conducting what

kinds of activity, constitute an *institution* or an *organisation*; this question is tied to what kinds of activity are *charitable*. These are matters of lexical meaning. But the question whether, under the will, donations can only be made to organisations that are charitable, or whether it is only the 'institutions' that need to be charitable – and whether donations must be made to both kinds of body or only either one of them – are different kinds of question: these are questions to do with how the already problematic words are configured into phrases and sentences, and how those phrases and sentences should be interpreted in context.

Many interpretive difficulties in law nevertheless gather around contested individual words. Consider the following example:

- A UK case concerned with Hindu cremation (*R (Ghai) v. Newcastle City Council* [2010]) addressed the problem that cremation of human remains could lawfully take place only within a building. Hindu beliefs required, by contrast, that cremation should occur in a place where sunlight can fall directly on the body as it is cremated. Did a place for cremation consisting of roofs supported on pillars, with low walls and a connecting balustrade, satisfy the requirement of being a 'building'?

A question of interpretation of this kind is hardly rare, given the vagueness, polysemy and contextual variation in meaning of many if not most words. Hutton (2014) offers an analysis of a large number of such word-interpretation issues, chosen from cases in a number of jurisdictions. Was a racing pigeon a *pigeon*? Whether two deaths in the same incident were *coinciding*. Whether a Jaffa cake is a *biscuit*. Did a wiretap constitute a *search*? Is the Cherokee nation a *foreign state* in relation to the United States? Whether a post-operative transgender woman is a *woman* for the purpose of marriage.

Interpretive issues in law, as can be seen in these examples, can arise in relation to different word classes. Problems are not confined to nouns, but also occur with verbs (to *murder*, to *associate with*), adjectives (*alive*), and adverbs (*foreseeably*, *forthwith*), as well as phrases rather than single words (e.g. *best endeavours*, *in the vicinity*). Further, because law governs virtually all areas of activity (health, family, commerce, crime, sport, etc.), problems of word and phrase meaning are not restricted to a particular semantic field. An English prosecution of prostitutes who invited their customers from behind windows and from an upstairs balcony, for example, turned on whether they were soliciting 'in the street'. A US case discussed by Schane (2006: 38–9) turned on whether matching skirts and blouses were 'ladies' dresses' for the purpose of a lease protecting the exclusive right of a retail store to sell 'ladies' dresses, coats and suits' within a particular building.

Uncertainty of meaning

Words have a number of **dimensions of meaning**. These range from what concept or concepts the word **denotes** and what class of entities it can **refer** to through to **connotations** and other kinds of personal association. The full extent of a word's meaning varies between situations and language users. But because of the kind of judgments law is called on to make, it is the **scope of word meaning** that presents the

most persistent legal difficulty: is X (a reported fact) a member of a (legally stated) superordinate class Y? To understand how fundamental this question is in law, we need to consider the sense relation of **hyponymy** and the concept of inclusion it conveys.

The so-called **classical model of categories**, often associated with Aristotle but reflected in modern semantic theories such as Katz and Fodor's (1963) system of semantic features, suggests that category membership is a matter of essential attributes (or necessary and sufficient conditions). For something to be a *bird*, it must be animate, not human, have wings and a beak, make a nest, lay eggs, and so on. The resulting system of categories has clear boundaries but also allows anomalies: birds that cannot fly or that lay eggs on the ground, etc. In contrast, Rosch's (1978) psychological theory of **prototypes** proposed fuzzier categories that allow for different statuses of membership, based on **goodness-of-exemplar** (GOE) characteristics. Her prototype approach, subsequently developed in psychology and cognitive linguistics, results in a spread of category members ranging from core exemplars through to marginal, borderline cases. While a *robin* might (in some cultures) be a prototypical bird, an *ostrich* is less representative of the category. This is not because it lacks the essential attribute of flight, but because it is a less frequently encountered example of the category: informants typically mention it later when listing members of the category and verify its membership of the category slower in experiments.

These alternative models of categories come into play in law in interesting ways. First, because laws are enacted as general provisions to be applied in varied circumstances, legal interpretation is almost continuously concerned with testing the fit between general concepts and individual persons, facts, and circumstances. In disputed cases, courts rule on whether borderline instances fall one side or the other of a category boundary. What, for example, are a medical patient's *needs*: do certain resources or treatments come within the meaning of *needs* or not? Hard legal cases are often concerned, among other things, with whether low goodness-of-exemplar entities should enjoy rights (or be required to fulfil obligations) associated with a category to which they appear marginal, or whether an action at the periphery of a category falls within that category for the purpose of a particular law. By deciding which side of a categorical line something falls, legal judgments assign to peripheral instances legal consequences seemingly more suited to dichotomous, or clear-cut, boundaries between categories.

One widely discussed legal example illustrates the complexity. What types of moving machine can be a *vehicle*? Conceptually prototypical vehicles, such as cars, move along roads. But other exemplars show different degrees of closeness to the prototype: from tractors and ambulances, through roller skates and buggies, tapering to a periphery of candidates including aeroplanes. Deciding, in relation to a public park that forbids vehicles, whether someone riding a bike, driving a lawnmower or entering by ambulance to assist an injured person is guilty of an offence depends in part on how the word *vehicle* is construed. Yet enforcement of an adverse judgment may involve penalties suited to more uniform membership of or exclusion from the category.

Difficulties surrounding *vehicle* have been at issue in a number of legal cases (including at least one about aeroplanes). Seemingly inspired by one of those cases (the US Supreme Court case *McBoyle v. United States* (1931)), the English legal theorist H. L. A. Hart discussed a hypothetical legal rule, **No vehicles in the park**, in his *The*

Concept of Law (1994 [1961]: 126–30). Hart argued that legal rules are formulated in general categories provided by ordinary language, but those categories, stated without reference to context, cannot be 'closed' in relation to the variety of possible facts. There will instead be a 'penumbra of uncertainty' at any given category's borderline, such that a kind of **open texture** emerges when general classifying terms are confronted with particular facts. (A theoretically contrasting, but not incompatible, discussion of *vehicle*, from a cognitive semantic perspective, can be found in Croft and Cruse (2004: 92); see also our discussion of legal problems associated with translation of *vehicle* in Unit C10.)

Figurative imagery used in legal discussion of meaning

Use of words and phrases such as 'open texture' and 'penumbra' to characterise word meanings and categories is figurative. Hutton (2014: 26–9) examines use of such figurative language in judicial reasoning, especially in frequent appeals to binary oppositions in determining a word's scope.

The term 'scope' itself, Hutton points out, is a visual-spatial metaphor. Below a top-level contrast between 'literal' or 'plain' meaning and 'purposive' styles of adjudication (which we consider in Unit B6), a number of metaphorical contrasts are commonly invoked. One contrast, Hutton shows, depicts meaning as conceptual space: 'narrow' meanings contrast with 'broad', 'wide' or 'expansive' ones. Another trope involves degree of permissiveness: 'strict', and 'restrictive', meanings contrast with 'liberal' ones. The 'letter' is contrasted with the 'spirit' of a text's meaning. 'Ordinary' and 'natural' meaning is contrasted with 'forced', 'strained' or 'artificial' interpretation.

Through mobilisation of such conceptual contrasts, an entity may be judged to 'fall within' or 'fall outside' a legal category. So, a wide meaning of *vehicle* might include a power-assisted bike or trolley, whereas a narrow meaning might exclude those modes of locomotion. A strict interpretation of *tomato* might insist it is a fruit, while a liberal meaning might acknowledge common reference to tomatoes as vegetables.

In law, a range of factors are taken into consideration in deciding word meaning. An 1890s US case concerned with what a *tomato* was found that trade usage did not differ materially from popular usage; and dictionary definitions (used as an aid to memory and understanding) did not lend support to the idea that tomatoes were fruit. How tomatoes are consumed also suggested they were vegetables, and the court decided to give the word that 'ordinary' meaning (Hutton 2014: 80–3). The matching skirts and blouses case referred to above also drew on **extrinsic evidence**, including commercial usage and evidence of practices in the relevant trade. The skirts and blouses were not dresses, and there had been no violation of the covenant; but the vendor was required to price the two garments individually to reflect this, and not to compel customers to buy a matching set (Schane 2006: 39).

In the Hindu cremation case, Lord Neuberger emphasised that while the meaning of *building* inevitably depends on context:

> it would not be right to take a somewhat artificially narrow meaning of the word, and then see whether the context justifies a more expansive meaning. It is more appropriate to take its more natural, wider meaning, and then consider whether, and if so to what extent, that meaning is cut down by the context in which the word is used.

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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