Pragmatics in Legal Interpretation

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Introduction

From doctor-patient interaction and service encounters through to job interviews, a pragmatic dimension contributes to the meaning of all semiotic practices and is not confined to everyday conversation. This chapter considers how the pragmatic dimension of meaning should be understood in relation to the language of law in particular. We outline a number of factors which complicate the interpretation of legal texts; we describe how interpretation in law has treated indirect and implied meaning; and we ask how far further dialogue between linguistic pragmatics and law is likely to enrich the thinking and practice of either field.

In approaching these topics, we should first clarify what we mean by "language of law" (for comparative exposition see Mattila 2013; for discussion, Durant and Leung 2016). Most obviously, this term refers to "technical", legal language (i.e. the combination of terms of art and ordinary words used in legal documents such as constitutions, statutes, wills and contracts). But this chapter uses the term also to refer to two other kinds of discourse that are "legal" in a wider sense. We discuss utterances whose meaning is disputed in court or in legal proceedings leading

to trial (i.e. content adjudication of contested language, for example what an alleged defamatory or threatening statement means, or what is implied by an advert against which a complaint has been made). And although we do not discuss the topic at length, we also note how pragmatic issues arise in the discourse of legal procedure. Such discourse includes arrest notifications, police interviews, jury instructions, courtroom advocacy, cross-examination, spoken courtroom rituals and judicial opinions made up of a complex mix of spoken and written styles.

The role and significance of pragmatics differs between these three domains. In legal 'construction'– the name given to a process of ascertaining meaning for some statement of law to a defined legal standard - both the aim and interpretive process to be applied are part of a specialised body of techniques (Bennion 2001; Twining and Miers 2010). In content adjudication, by contrast (Durant 2010), the aim is to establish the "ordinary signification" of a contested utterance typically to the standard of an average, reasonable general user of the language. Pragmatic analysis may be persuasive as to the likelihood of a particular interpretation being ascribed on a given occasion, if a court allows expert assistance. The linguistic analysis is nevertheless not concerned with fundamental issues of law, and does not confer legal authority on any particular, preferred meaning. In the third domain, which concerns the wider field of discourse used in legal practice, the approach to analysis (e.g. regarding the comprehensibility of jury instructions) is similar to socio-pragmatic investigation of professional discourses such as medical consultations or business negotiations (Cummings 2005; Cutting 2008; O'Keeffe, Clancy and Adolphs 2011). In discussing meaning issues related to these three types of legal language, which are all "legal" but have different statuses in the system of law, this chapter considers how far concepts and approaches developed in linguistic pragmatics may contribute to

understanding problems of meaning uncertainty that arise in law (which is also an interdisciplinary, highly specialised field premised on close scrutiny of linguistic meaning).

Pervasiveness of pragmatic issues in law

On most definitions (e.g., as compared for example in Levinson 1983; Archer and Grundy 2011), pragmatics is concerned with how meaning is recovered from utterances whose form under-determines their interpretation. The act of interpreting, as a result, requires inference prompted by a range of contextual variables: factors which have the effect of extending or altering an apparently stated meaning. In some circumstances, a very different, additional proposition may be communicated, which may be described as an intended speaker meaning, as opposed to the encoded meaning conventionally associated with the language forms used. Understanding the relation between what is said and its context is thought to be guided by some kind of general principle; different formulations of such principles, including Grice's Co-operative Principle (1975), Leech's various maxims (1983), Sperber and Wilson's Principle of Relevance (1995), and Levinson's heuristics (2000) have been put forward in different research traditions.

Theoretically, it is not the contextual variables themselves (such as time, place, participants, topic of discourse, mutually accessible background beliefs and other kinds of contextual assumption) that constitute the object of linguistic enquiry. Nor is it the resulting meanings, which (combined with informant intuitions) supply the field with data rather than findings. What is primarily of interest is the explanatory power of the mechanisms thought to govern the relation between utterance, context and meaning. This concern with communicative principles distinguishes research in pragmatics from more descriptive approaches to investigating interpretation in hermeneutics, stylistics, or literary criticism, though the distinction may be

blurred by more theoretical work in those fields and by more descriptive socio-pragmatic and 'pragmatics and discourse analysis' studies (Cutting 2008). The explanatory emphasis also differs from law, where, although there is a large literature on interpretation, the overall goal is both a practical and normative one: adjudication in a given case. While many outstanding judges do not place a high value on reading theoretical work on legal interpretation, the idea of a pragmaticist not actively engaged with theoretical or explanatory issues is almost unthinkable.

There is a further contrast between linguistics and law here. For linguistics, the theoretical boundary between semantics and pragmatics has been highly significant, distinguished on the basis of contrasting meaning phenomena each field investigates and approaches followed (Turner 1999). By contrast, this linguistically important boundary is of little or no interest in law, which typically views implied meaning as part of the "ordinary" or "natural" meaning of words (for comprehensive discussion, see Slocum 2015). Frequent judicial statements affirm, for example, that the grammatical meaning of a legal statement includes both what is expressed and what is implied, sometimes what is said to be 'necessarily or properly implied' (Bennion 2001: 36). The "plain meaning" of a non-technical word or series of words is what it means to an average, reasonable person, irrespective of what combination of code and inference brings that meaning into being.

Given that pragmatic dimensions of meaning are a continuous rather than occasional aspect of discourse, it is hardly surprising that such concerns are pervasive in law, even if not acknowledged as such. Concern with implied meaning may be especially pronounced in common law systems, where the meaning ascribed to any expression or utterance will be

minutely scrutinised by opposing parties, motivated to do so by the adversarial character of litigation (Tannen 1999). In such proceedings, bending and stretching meaning as far as possible in order to squeeze in or exclude some implication is a legitimate, in fact professionally responsible, task of advocacy.

What makes pragmatic aspects of interpretation particularly interesting in relation to law is that contextual variability of meaning highlights potential uncertainty in the interpretation of authoritative legal documents. Assessments differ among legal scholars as to how much uncertainty is introduced in this way, or how often (and in which substantive areas of law), or how far difficulties of interpretation undermine the consistency and fairness of legal proceedings. In *The Language of Statutes*, Lawrence Solan argues that, despite potential for uncertainty, 'law works… most of the time' (Solan 2010:5). For Solan, statutory interpretation mostly succeeds in arriving at sensible and fair interpretations which are less disrupted by semantic and pragmatic side issues than might be anticipated. His view is based not on complacency but on analysis: Solan examines scope for interpretive uncertainty through interdisciplinary study of legal measures, linguistic patterns, and psychological processes of understanding – in this way drawing extensively on scholarship in linguistic pragmatics.

Main pragmatic phenomena of interest in law

In this section, we outline several pragmatic areas likely to be of interest in legal interpretation (areas which are also taken into account in legal drafting; see Butt 2013). In particular, we consider semantic indeterminacy and pragmatic enrichment; implied and indirect meaning; and ambiguity of reference. Some other important topics in pragmatics (e.g., pragmatic markers,

politeness, presupposition, or meaning production in conversational dialogue) may be of less interest in relation to legal texts and documents. For instance, they may be significant in assessing linguistic evidence based on kinds of ordinary language use (e.g., threats, social media trolling, suicide letters), but less significant as regards the construction of authoritative legal texts.

Expressed in terms? Semantic indeterminacy and pragmatic enrichment

Perhaps the most frequent question in legal interpretation concerns how "narrow" or "wide" the meaning of a word or phrase is: what its scope is, or what the extension is of the concept it denotes. In practice, this legal question is usually asked (e.g., in the interpretation of statutes) in the form: does X constitute a Y within the meaning of the Act? Or, in relation to privately created legal documents, is an X in this contract, will or trust a member of class Y?

Examples which have called for judicial clarification include what amounts, constitutionally, to "cruel and unusual punishment' in the US Eighth Amendment; what a "fair rate" or "safe system of work" may be; whether a skateboard, aeroplane or ambulance is a "vehicle"; when "carrying a gun" is no longer carrying a gun; what "pay" is, for the purpose of equal pay provisions; what sexual "consent" means; what is required to "assign" a tenancy; when something is "reasonable" or "objectionable"; and what state of mind or intention is essential when someone does something "wilfully" or "recklessly". All these words or phrases could be described as ambiguous in everyday speech, even though the alternative meanings or use they allow may result from different semantic properties, including (legal) homonymy (Tiersma, 1999: 111-112), polysemy, ambiguity (in the narrower, technical sense of two distinct meanings between which a

choice must be made in a given context; for discussion, see Schane 2006), reference, generality, or vagueness (Endicott 2000; Cutting 2007).

A substantial body of legal case law gathers around the proper construction of each problematic term, reflecting the difficulty that courts face in adjudicating borderline cases (for background, exemplification and commentary, see Hutton 2014). Such borderlines matter a great deal because, while the semantics of a word or phrase may be indefinite or fuzzy, the legal outcome when an adjudicated borderline meaning is applied in a given fact-situation is binary (two values: guilty/not guilty; liable /not liable).

Determining meaning in such circumstances clearly involves pragmatic considerations, in that any interpretation must be arrived at by contextual inference, filling out an incomplete, encoded semantic meaning on the basis of pragmatic features such as co-text, accessible background knowledge and relevant purpose. Intention will be central, but an interpretive choice must be made between different kinds of intention, including: the subjective, historical intention of an author or authors; an attributed, objective (or external) assessment of collective and cumulative intent of the legislature; and intention modernised to fit contemporary norms or sense of legal purpose, either of the specific legislation or of principles of law more generally. A great deal of attention in statutory interpretation has been given to these alternatives, as well in legal theory.

Historically, interpretive questions of interpretation were complicated in common law systems by a stated (arguably sometimes overstated) primacy given to “literal” interpretation. In recent years, however, that emphasis (which has affinities with a ‘code’ model of communication;

Mattelart and Mattelart 1998) has been displaced by other approaches in a development that, in acknowledging the importance of context, intention and purpose, parallels the similarly recent shift in linguistics from semantics to pragmatics. In modern pragmatics, questions of under-determined meaning resulting in vagueness and ambiguity are typically understood in terms of the concept of pragmatic enrichment. Theories such as Relevance Theory, for example (Sperber and Wilson 1995; Clark 2012), suggest that it is impossible to eliminate all the multiple possible senses available for any utterance except one, by disambiguation, then assign reference to referring expressions and arrive by this means at a unique propositional form that will be the utterance's meaning. Rather, some degree of inferential enrichment of particular expressions must routinely take place, widening, narrowing or approximating an under-specified meaning until it creates an occasion-specific, ad hoc concept adequate to the particular context and conveys a relevant meaning for the purpose of the communication.

This pragmatic view of semantically incomplete but modulated pragmatic meaning is not incompatible with a jurisprudential tradition inspired by HLA Hart's linguistically oriented work *The Concept of Law* (Hart 1994 [1961]). As part of a wider argument about how law works, Hart's explanation of broad terminology in law started from the idea that any large social group must formulate general rules rather than particular directions to individuals, and so will inevitably be concerned with questions of fit between particular acts or entities and general classes to which they belong. Hart was optimistic that in plain or paradigm cases it would be clear which instances are subsumed by which category. But he acknowledged – in a manner anticipating prototype theory (Rosch 1975) rather than adhering to conceptual models based on Aristotelian, essential (necessary and sufficient) conditions and accidents – that there would be

peripheral cases right through to "open texture", or indeterminacy, at category boundaries. The resulting scope for context-dependent judgment allows judicial discretion, which may then be viewed either negatively, as potentially usurping the authority of the legislature, or positively, as a creative force allowing development of the law in response to changed circumstances or unforeseen needs - even if interpretation is exposed in this process as not being fully systematic or mechanical (the latter, for Hart, an impossibility to which law should not even aspire).

Implied and indirect meaning

Utterances, it has been suggested, often contain incomplete propositions or are semantically under-determined. Readers rely on contextual knowledge and attributions of intention and purpose of other participants in arriving at a complete proposition that makes sense (often by specifying place, time, scope, relationship between clauses, etc.). The mental work a listener does to bridge the gap in meaning in order to achieve coherence relies on inference (though some uncertainty persists as regards the precise boundary between inference and other psychological processes involved; Kintsch 1998).

Existing linguistic rules of construction (i.e. established guidelines or rules for judges to apply in interpreting) include maxims such as *expressio unius*, a maxim which presumes that expression of one thing implies exclusion of another. A maxim of this kind encourages legal draftsmen to leave as little room for ambiguity as possible, often by including every possible scenario and synonym that can be imagined, in a style that Lord Hoffmann famously described in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 as 'torrential'. The resulting proliferation of detail, expressed as long lists of examples in statutes

and contracts (e.g., 'rest, residue and remainder'), nevertheless still cannot prevent implicatures from having an important, and not only obfuscating role in legal interpretation. Long lists draw disproportionate attention to anything specific that may conceivably have been left out. Given the impossibility of any law as formulated predicting all future eventualities, however, general principles often need to be inferred from specific examples and applied to other, new examples. Other, non-linguistic canons then restrict the scope of such interpretation. One example is the rule of *contra proferentem*, which requires that, if ambiguity in a clause or document cannot be resolved in any other way, the clause or document should be construed against the interests of the person who put it forward; another is the rule of *leniter*, which requires courts to decide a meaning in favour of the defendant if that meaning has not been literally expressed in the relevant provision (see Solan 2010 for detailed account).

Related discussion arises with respect to other areas of legal language besides legislation. In content adjudication, for example, implied meaning must be inferred for contested utterances such as alleged defamatory statements and potentially misleading advertising claims often on the basis of very precisely pleaded contextual background material. In verbal exchanges in the courtroom, too, the question arises whether one commits perjury, or lying under oath, if the alleged dishonesty is found in an implied rather than expressed message. Sometimes, for example, witnesses provide a statement that is literally true but misleading (e.g., saying yes when asked whether you have two siblings, when in fact you have four). Answers of this kind violate Grice's maxim of quantity, inviting deliberation regarding intended speaker meaning rather than only the directly expressed meaning. It could be argued, however, that Gricean principles may not apply to cross-examination in an adversarial courtroom, though Tiersma (1990) argues

against this view, urging that focus should be on what a witness meant by his or her answer (what Tiersma calls 'a communicative approach' to analysing false statements, 1990: 375) rather than on literal truth.

Another way of understanding indirectly communicated meaning is by seeing speech events as actions. Speech acts (such as promising, appointing, objecting, accusing) are acts that a speaker performs by making an utterance, including in legal settings. The special class of speech acts known as explicit performatives, whose form directly expresses the nature of the act being performed, are predictably everywhere in law, given law's concern with creating and modifying legal relations. Analyses such as Tiersma (1999) show how the notion of performatives can accordingly help in understanding both the form and functioning of operative legal documents; and Schane (2006) offers detailed examination of promising in contract law. Speech acts are significant in many legal contexts, including confessing, revoking, declaring, testifying and sentencing. Indeed, Austin's (1962) first statement of categories of performatives (much debated and radically altered subsequently) consisted of verdictives, exercitives, commissives, behabitives, and expositives - all stereotypical actions performed by language in the legal context.

In addition to performatives, indirect and presumed speech acts are also of particular interest to law. In a US Supreme Court judgment, Justice Oliver Wendell Holmes explained why falsely shouting 'Fire!' in a crowded theatre creates responsibility for the false warning with its damaging consequences, despite the locution causing panic and danger only if interpreted as an indirect act. Given such importance associated with speech acts, it is unsurprising that speech act analysis has been used to describe what constitutes a felicitous (or successful) act of threatening,

whether performed explicitly or indirectly; and what constitutes an admission or bribery event (e.g., bribery consists of a problem, proposal, completion and extension; see Shuy 1993: 20-65).

Where speech functions as conduct, it appears to follow that it should be subject to social regulation in the same manner as other non-verbal behaviour, subject to whatever exemption or privilege is retained for freedom of expression reasons (i.e. to protect communication of information, ideas and opinion). Exploring the boundary between these two principles, Greenawalt (1989) has argued that some utterances which change the social context in which we live are 'situation-altering utterances'. They are therefore genuine borderline areas for the concept of protected speech in relation to two important boundaries: one between assertion and situation-altering utterance; the other between exhortation and crime. While both boundaries are clearly speech act related, neither exactly matches the established linguistic distinction between locutionary, illocutionary, and perlocutionary force.

Ambiguity of reference

Perhaps the clearest area of reliance by language on context for interpretation is deixis. Deictic expressions point to their referents, calling for contextual information to be supplied regarding time, place, or speaker identity (Levinson 2004). In the early history of the common law, courts were conducted primarily by oral means, in face-to-face meetings or moot settings; mostly spoken utterances rather than written documents carried authority and were legally binding (Baker 2002; Goodrich 1986). Over time, however, emphasis in creating, enforcing and contesting legal obligations gradually shifted to less contextually supported, textual materials, requiring changes both of communicative style in drafting and in approaches to interpretation

that prioritise close reading. In this process, pronouns and other deictics became increasingly problematic, wherever exophoric reference (from text to situation) had become either impossible or impermissible. Pronouns also became problematic where co-textual connections are expressed (from text to referents within the same text). Disambiguation of pronoun reference is nevertheless often dependent on context in a more abstract sense, with resulting contestations of meaning despite efforts made in drafting to avoid uncertain antecedents by repeating nouns.

Pragmatic issues related to deictics can occur in relation to evidence as well as statutory interpretation. Pronoun reference was the crux, for example, of a bribery case documented by Shuy (1993: 44-46). A felicitous (successful or complete) bribe, Shuy argues, consists of a problem statement, a proposal and a completion. In Texas, personal contribution to a political campaign was permissible, but contribution from an organisation illegal. Pronoun references were accordingly crucial in analysing the legality or otherwise of the offer or acceptance of the contribution under scrutiny. Finding indisputable evidence, Shuy discovered, was not straightforward, given potential ambiguity as to what "we" may refer to, and how "I" may be used not only to refer to oneself as an individual but also as an agent of an organisation.

Deictic issues also combine with other interpretive questions. In a famous (or notorious) 1952 English murder case, referring "it" clashed with fossilised use of the same pronoun in an established idiom (Coulthard 1994). Defendants Derek Bentley and Christopher Craig had broken into a London warehouse. When police officers arrived at the scene, Bentley was alleged to have shouted, 'Let him have it, Chris' shortly before Craig shot dead a police constable. The referent of the pronoun *it* meant life or death for Bentley when, at trial, the prosecution submitted

that he had been a party to murder, on the English law principle of common criminal purpose, or joint enterprise. The pronoun "it" potentially referred to a bullet, as part of the idiom *let him have it*, meaning shoot or kill; alternatively "it" might have referred to the gun Craig was holding, as part of a plea to Craig to surrender. Bentley was found guilty and hanged in 1953, but granted a posthumous pardon in 1998.

A further source of ambiguity in reference comes from how phrases and clauses may be ambiguous in terms of their syntax, or how they may be put together in lists, conveying potentially different kinds of linkage between ideas. In an English case highlighted by Butt (2013) and discussed in Durant and Leung (2016:26-7), a testator had left property to 'charitable institutions and organisations'; this created an interpretive difficulty – resolved according to "ordinary English usage" – whether 'charitable' qualifies both 'institutions' and 'organisations', or only 'institutions' (potentially leaving open the possibility of gifts to 'organisations' irrespective of whether they had charitable purposes). Connectives such as *and*, *or*, and *if*, are also recognised in pragmatics as sometimes implying asymmetric connections of sequence and causality (Levinson 1983; Sweetser 1990); where this occurs at an important point in a contract or will, disambiguation can only be achieved by pragmatic means. Drafters recognise that conjunction, coordination and subordination are powerful tools in writing compact legal texts, though legal maxims have also developed such as *eiusdem generis* ('general items in a list should be construed as falling within the same class as more specific items in the same list') and *noscitur a sociis* ('the meaning of a word or phrase is controlled by the words or phrases associated with it') as restrictive influences on construction in such circumstances.

A slightly longer example shows how disambiguation of connectives may be approached in ways that differ significantly between natural language processing and legal analysis. A Hong Kong case, *Lam Chit Man v. Cheung Shun Lin* (CACV 1046/2001), was required to clarify whether a finding or decision of the Court of First Instance could be admitted as evidence of the law of a country or territory outside Hong Kong. The court considered whether a key phrase 'in the High Court or in the Supreme Court of England' (s59, Evidence Ordinance [Cap. 8]) referred to the '[High Court in England] *or* [the Supreme Court of England]', or alternatively to 'the [High Court of Hong Kong] *or* [the Supreme Court of England]'. The difficulty of interpreting the disjunctive connective was compounded because, while s3 of the Interpretation and General Clauses Ordinance (Cap. 1) stipulates that 'High Court' means the High Court of the Hong Kong Special Administrative Region (HKSAR), the also authoritative Chinese text of the same law states '英格蘭高等法院或最高法院' (literally *England's High Court or Supreme Court*). To resolve the textual ambiguity, the Court appealed to context, but in a manner guided by authority rather than accessibility of contextual information: it compared the Ordinance with the Courts Act 1971 of England, which showed that the phrase 'High Court' would be redundant if it did not refer to the High Court of HKSAR.

Interaction between linguistics and law on meaning

As is evident in the brief descriptions presented in the previous section, linguistic and legal interpretation are quite different disciplines despite their common object of analysis, having only loosely overlapping aims, terminology, methods, and standards of evidence. Most obviously, linguistic pragmatics is descriptive and explanatory, while law is normative. Rules of interpretation within law are also normative, as is reflected in their emphasis on authorities and

on “correct” construction. Linguistic rules, by contrast (except in fields such as prescriptive grammar) describe actual usage rather than limit it.

As regards implied and inferred meaning, the two fields have nevertheless been interwoven at various points in their development. Interaction between the two can be found for example in the history of rhetoric (closely connected with logic in the classical Trivium, and showing a major forensic dimension as far back as Aristotle’s *The Art of Rhetoric* 2004). Religious exegesis, as well as traditions of hermeneutics, has also been shown by Goodrich and others to have shaped legal interpretation (Goodrich 1986). Analysis of meaning in the philosophy of language, especially in 20th century work by “ordinary language” philosophers such Austin and Grice, has exerted influence both on pragmatics (Chapman 2000) and, initially via H. L. A Hart, on modern jurisprudence. The resulting situation is one with two distinct traditions of scholarship on meaning, applying different terminologies and approaches in their consideration of areas such as criminal communicative acts (e.g., bribery, threats, conspiracy, deception, encouragement of suicide, or perjury); what constitutes hate speech; and inchoate crimes where provocative or offensive language functions as a prelude to physical action. What utterances mean, including indirectly, what speech acts utterances perform, and what effects they give rise to as a consequence, are all questions which pose major challenges to any criminal justice system and to resolution of civil law disputes, as well as testing the scope of protection to be afforded under any prevailing right of freedom of expression (Barendt 2005).

Legal interpretation, however, rather than linguistics, is the authoritative sub-system for dealing with meaning in law. Linguistic interpretation has less influence. Engagement between linguistic

pragmatics and legal interpretation falls into two broad categories influenced by this unequal authority.

The first category consists of 'forensic linguistic' applications of linguistic expertise (Coulthard and Johnson 2007; Gibbons 2003). Such evidence tends to be less common on pragmatic topics than on phonetic, sociolinguistic, or stylistic topics, even in jurisdictions where frequent use is made of linguistic expertise. This is partly because determining meaning is a province which the courts, assisted by juries, regard as fundamental to the system of law they administer (and in which they are therefore sufficiently expert). Linguistic evidence is, in any case, always subject to admissibility restrictions that vary significantly between jurisdictions. Examples of expert pragmatic evidence can nevertheless be found, if infrequently, in fields including trademark disputes, forced confessions, bribery and conspiracy cases, health and safety warning and product liability cases, and certain kinds of defamation action (concerned with "innuendo meanings"), as well as other types of action.

The second category of pragmatic engagement with legal interpretation involves critical commentary, rather than courtroom evidence, on topics including how far approaches which model conversational uses of language apply, should apply, or may in some other way be relevant to legal principles of interpretation. Such work is also considered to be forensic linguistics, or regarded as a sub-field within "language and law" (less usually, within jurisprudence). A perspicuous early study along such lines was Geis' examination, using Gricean categories, of the pragmatic dimension of US television advertising claims (Geis 1982); other

studies include Tiersma's (1990) use of Grice in analysing perjury; and Sinclair's (1985) use of speech act theory to examine how legislatures communicate through statutes.

Until recently, however, perhaps more influential has been linguistically-oriented work on implied meaning and inferential interpretation developed outside pragmatics itself. A series of legal essays by Fish (1990, 1994), emerging from his earlier work in literary stylistics on how analysis of intention and rhetorical strategy is needed to supplement narrowly semantic descriptions of meaning, influentially addressed interpretive procedures underpinning US Supreme Court opinions. In doing so, Fish's work entered into vigorous controversy across the range of complex positions between so-called "textualists" (who typically uphold the primacy of the legal text) and "intentionalists" (who typically argue that law is whatever was intended by the legislature). Some of Fish's essays also examine the potentially confusingly named approach to judicial reasoning known as 'legal pragmatism', which queries how far legal interpretation is rule-governed or systematic, and asks how far judicial decision-making may be based on moral or ideological considerations more than either the narrowly stated or wider, communicated meaning of the law.

Alongside comprehensive reviews of legal interpretation to be found in Barak (2005) and Greenawalt (2010), two more specific analyses have been put forward of whether, and how well, linguistic theories of communication apply to legal language. Marmor (2008, 2014) has suggested that, in crucial respects, the pragmatics of legal language is unique and involves considerations absent from ordinary conversational contexts. In particular he argues that, because the Gricean framework is based on an underlying principle of cooperation, the normative

consideration that rational communicators orientate themselves towards successful communication is suspended in the adversarial practice of litigation. Carston (2012), noting similarities between interpretive heuristics in legal interpretation and dominant principles of neo-Gricean pragmatics, examines how far Relevance Theory, as a pragmatic theory based more directly than Grice on principles of human cognition, can shed light on the processes involved in legal interpretation. Carston's analysis concludes with doubt as to how far models of natural language processing, even cognitively realistic ones such as Relevance Theory, can adequately account for legal interpretation, despite apparent similarities between pragmatic maxims and specialised canons of legal interpretation, not least because the latter are only one aspect of a more complex process of judicial reasoning. Issues arising have been examined in detail by legal philosophers working at the interface between law and linguistics (e.g. Marmor and Soames 2014; Matczak 2015; Slocum 2015 and 2016).

Examples and discussion

Alongside this rapidly expanding theoretical literature, a substantial body of work also exists, both in law and in forensic linguistics, focusing on detailed analysis of particular cases (see for example Manchester et al. 2000; Schane 2006; Solan 2010). We have alluded to some cases above, by citing their crux words or phrases and by brief summary. At the same time, we have stressed that legal reasoning goes far beyond word glossing, bringing together complex linguistic, factual, and legal considerations. For this reason, in a short chapter it is impossible to develop any significant number of illustrations to a suitable level of detail. In the two case outlines we now present in this section, we seek instead simply to identify challenges likely to arise in

considering linguistic and legal considerations together, and to suggest that case analysis must address both similarities and differences between pragmatic and legal analysis.

Inferred meaning across two legally adopted languages

Pragmatic interpretation becomes more sophisticated but also more challenging when meaning must be given to legal measures across languages in a bilingual or multilingual jurisdiction (e.g., the European Union, which now has 24 official languages; Leung forthcoming). In such jurisdictions, slightly different interpretations might be inferred from alternative language versions of the same law. Where this is at issue, it is not only that semantic, literal, or explicitly expressed meaning may become destabilised; the inferential or contextual element of what is supposed to be the same legislation may also vary between the two language populations. Given that predictability is an essential quality of law, contextual variation in this respect introduces unwelcome uncertainty in legal interpretation.

In *Kumari v Director of Immigration* (HCAL 76/2009), a judicial review case concerned with immigration law in Hong Kong, an important interpretive issue turned on the meaning of family rights based on Article 37 of The Basic Law, an article which provides for 'freedom of marriage of Hong Kong residents and their right to raise a family freely'. The Director of Immigration had declined to issue a dependent visa to the 58 year old mother of a Hong Kong permanent resident by birth, whose family originated from Nepal. The point at issue for the court was the scope of the phrase 'the right to raise a family freely'. The English text appears ambiguous as to which generation(s) are included by the notion of "family". Discussion of the issue was complicated by the fact that the Hong Kong Bill of Rights (despite not being applicable in this case) provides for

the protection of family, and the United Nation Human Rights Committee has interpreted "family" as being inclusive of extended, not only immediate family. On the other hand, the equivalent phrase in the Chinese version of the Basic Law is '自願生育的權利', which denotes a right to procreate and to foster children voluntarily, and does not include taking care of or maintaining parents. Importantly, but contextually rather than expressed in terms, Article 37 was specifically written to exempt residents of Hong Kong from the one-child policy practised on the Chinese Mainland. The court thus decided that Article 37 was irrelevant to the case and dismissed the application for review.

In this case it is also worth noting that the Chinese version of the Basic Law prevails in case of discrepancies, while Chinese and English legislative texts in Hong Kong enjoy equal status. Other bilingual and multilingual jurisdictions also assign different statuses to their languages (Leung 2012). Complex relationships of authority between texts, as well as potentially conflicting contextual considerations, therefore add to the increasingly frequent and widespread challenge of interpreting bilingual and multilingual law.

Content adjudication

Our second example, a UK defamation action widely discussed in the national press and media, *Lord McAlpine of West Green v Sally Bercow* [2013] EWHC 1342 (QB), shows how even in one language legal interpretation takes place at more than one level. In defamation, courts interpret the content of allegedly defamatory statements made in non-legal settings, but within a framework used to characterise communication that is largely based on legal homonyms (i.e. terms which bear both technical and general meanings); such terms have undergone, and

continue to undergo, contextual modulation of their meaning in construction in the developing case law.

The contested tweet in this case was sent by Sally Bercow (an occasional TV personality and wife of the Speaker of the UK House of Commons). It was alleged to impute that a prominent former Conservative politician, Lord McAlpine, was the unnamed person at the centre of news reports and online rumour regarding allegations of child abuse by 'a leading conservative' in a care home during the 1970s and 1980s. The implied identification was mistaken, however, and a case of mistaken identity.

In a preliminary hearing to determine the meaning of the words complained of, the court sought to establish what the seven tweeted words meant: 'Why is Lord McAlpine trending? *Innocent face*'. Contestation of the tweet's meaning focused on two competing claims. The claimant's contention was that the tweet meant he was a paedophile guilty of abusing boys living in care. His lawyers submitted that 'innocent face' was insincere and ironic, a nudge to readers to link McAlpine's name to wrongdoing by referring obliquely to a contextually salient story. There was no other reason, it was submitted, for McAlpine to be trending on Twitter at the time (and so no other relevance for the tweet to have been posted). The defendant's contention was that the tweet simply raised a question, was delivered deadpan rather than ironically, and, if commenting on a controversial story, was not taking sides. On this view, the tweet invited no particular inference.

In deciding what the tweet meant, separately from either of the submissions by the parties, the judge took into account contextual assumptions including an interest in political stories likely to

be prominent among Bercow's 56,000 followers, and the likely familiarity of readers with the contextual assumption that Lord McAlpine had been a senior Tory figure. Against that backdrop of assumptions, the judge ruled that many readers would have linked McAlpine's name to a search to identify the alleged paedophile because there is a recognised tendency to use social media to identify wrong-doers. The rhetorical question form of the tweet, in context, did not prevent an ironic or insincere effect as its communicated meaning. In conclusion, the judge ruled that a hypothetical reasonable reader would infer that Lord McAlpine was trending because he was the unnamed, alleged abuser, and that therefore the tweet conveyed an inevitably defamatory accusation of criminality.

This interpretation, which in many respects resembles conversational interpretation, was nevertheless arrived at within a framework based on assumptions about communication and interpretation that overlap with, but also diverge from, both established pragmatic understandings and lay beliefs about communication. Those assumptions include at least the following: that for the purpose of defamation a publication has only one "meaning", even if read by up to 56,000 people in an online environment potentially spread across different places and social backgrounds; that a tweet's meaning is particularised as how it was read at the dates and times on which it was repeatedly "published" (meaning read on each occasion under the then applicable "multiple publication" rule in defamation), rather than viewed as a property of the words or inferences encouraged by those words; that nevertheless no evidence should be admissible on what any individual reader might claim to have understood the publication to mean (hence, no witnesses at the hearing); that, rather, the tweet's meaning is "objective", in the sense of matching intuitions of a "reasonable" reader of the relevant genre of tweet, neither avid

for scandal nor so naive as to fail to make warranted inferences; and that "meaning" divides into two categories, which permit different kinds and amounts of submissible evidence but which have no clear boundary: "natural and ordinary signification of the words" (including inferences based on general knowledge), and "innuendo" (including inferences based on specialised knowledge – in this case, for example, the audience's knowledge of Lord McAlpine's political profile and the content of the BBC *Newsnight* story).

Pragmatics in law

The two case studies in the preceding section foreground differences as well as similarities between reasoning that takes place in legal interpretation and in other contexts of natural language processing. In its efforts to uphold legal authority and control meaning uncertainty, law appears to superimpose on spontaneous processes of discourse comprehension a range of additional interpretive measures – collectively, rules of interpretation for statutes and other legal texts (as well as other features of common law reasoning) – which seek to achieve a balance between explicit and authoritative definition of terms and explicitly-stated inferential frameworks for interpretive troubleshooting where uncertainty persists.

In highlighting differences as well as similarities, the case studies also draw attention to how quickly any discussion of the linguistic pragmatics of legal interpretation must engage with a question of technicality and purpose: how far can pragmatics influence or contribute to law, which has its own terminology and procedures for analysing meaning as well as the social authority to decide meaning without reference to any academic discipline?

Answers to this question seem likely to differ between different spheres of law, hence the significance of the distinction made at the beginning of this chapter between three domains that may all be considered in some sense "legal language". Efforts to reform courtroom procedure, for example, might be responsive to linguistic analysis, perhaps in order to mitigate unduly formal or antiquated procedures, forms of address, unequal gender participation, or other markers of power relations. In media content adjudication, the judicial and jury intuitions that guide interpretation may in exceptional circumstances be supplemented by expert evidence, functioning either to demonstrate specific findings or as a "tour guide", setting out how interpretive issues can be scientifically investigated (Solan 1998). Statutory interpretation might be enhanced by opportunities to engage the public in debate (e.g., on how decision-making functions in the higher courts), as has sometimes happened in relation to particular controversial cases and, in the USA, throughout the textualist/intentionalist debate. Potentially, there appear to be many rather than one singular role for increased dialogue between linguistic pragmatics and law.

Sometimes, however, answers to the question of usefulness are put forward which seem to presuppose some more uniform concept of legal discourse. This appears to be so with Marmor's article, cited above, which argues that pragmatic principles are unlikely to assist in understanding legal language because law is a specialised language game with different rules that are unlikely to be founded on Gricean principle: not 'a cooperative exchange of information' but rather 'a form of strategic behaviour' (Marmor 2008: 423). Such an account is only likely to be compelling, however, if we abstract away not only from the many different genres and settings of legal language use, but also from various levels and stages of interpretation. Some aspects of

interpretation may follow Gricean principles, if only as an essential basis for legal interaction to function through discourse at all, while others may introduce legally contrived rules and constraints. As Carston points out, referring to Hart (Carston 2012: 17), there are reasons to suppose that cooperation and competition/strategy are not necessarily always at odds.

Carston argues, by contrast, that the major challenge thrown up by examining legal interpretation from the perspective of pragmatics is more persuasively that the scope of "relevant context" within which any legal utterance or text is to be interpreted remains unclear. What does seem clear across common law systems, however, is that the scope of relevant context available in interpretation has gradually been extended. Through a series of individually small judicial steps, relevant context in interpreting statutes (with parallels in relation to other kinds of legal document) has grown from little or none in historic "literal" interpretation, through use of internal aids such as immediate co-text, the overall text and long title of an Act, via external aids to do with background including selected legislative history, preparatory documents, and subsequent interpretational development, into more abstract contexts of the purpose of the legislation and fundamental principles of law.

Suggestions for further reading

Carston, R. (2012) 'Legal texts and canons of construction: A view from current pragmatic theory', in M. Freeman (ed.) *Law and Language: Current Legal Issues*. Oxford: Oxford University Press, 8-33.

This important chapter examines how far legal use of language shares pragmatic characteristics with conversational uses. It identifies a degree of convergence between interpretive heuristics in modern pragmatics and in long-established, informal judicial maxims.

Fish, S. (1990) *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Oxford: Clarendon Press.

As he had done in literary studies, in the essays in this book Stanley Fish highlights an important inferential and rhetorical dimension in interpretation that he argues runs through legal interpretation – indeed, through all interpretation.

Hutton, C. (2014) *Word Meaning and Legal Interpretation: an Introductory Guide*. Basingstoke: Palgrave.

In this clear and informative study, Hutton brings together key concepts in linguistics, philosophy and law which explain how ordinary words, commonsense categories and problems of classification are approached in legal cases.

Marmor, A. (2014) *The Language of Law*. Oxford: Oxford University Press.

This book builds on Marmor's influential earlier analyses of pragmatics and speech-act theory in suggesting that the strategic nature of communication in the legal domain requires new ways of

understanding key distinctions, including those made in law between what is said and what is implicated, and between vagueness, ambiguity, and polysemy.

Marmor, A. and Soames, S. (eds.) (2011) *Philosophical Foundations of Language in the Law.* Oxford: Oxford University Press.

This collection of essays offers a state-of-the-art collection of thinking on the relation between philosophical understanding of language and topics in legal interpretation. It includes concise accounts of their relevant research by authors including Timothy Endicott, Jeremy Waldron, and Mark Greenberg.

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