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Review

The Pragmatic Turn in Law: Inference and Interpretation in Legal Discourse

Janet Giltrow and Dieter Stein (eds.) (2017)

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Reviewed by Sol Azuelos-Atias

A publication in the domain of law and language is always, for me, a reason to celebrate. This is true in particular of the present publication whose name, *The Pragmatic Turn in Law: Inference and Interpretation in Legal Discourse*, attests that it focuses on application of pragmatic considerations in the process of legal interpretation – including, in particular, judicial interpretation of the law.

The main theme of the publication seems to centre on the question of how flexible, or 'creative', judges can be when they interpret a section of law. Allott and Shaer explain that the term 'legal interpretation' has been used to refer to activities that are 'creative' as well as those that are 'investigative'. The investigative activity of legal utterance interpretation consists in attempting to understand the utterance content of legislative speech. This is a variety of utterance interpretation which, they claim, is an attempt to infer what the utterer intended to convey by her utterance.

The second activity, described as 'legal interpretation', is a kind of creative decision-making; what is called legal 'interpretation' can be creative in part as judges have discretion when, for instance, the rule that the statute sets up does not deter-

Affiliation
University of Haifa, Israel
email: solaz@research.haifa.ac.il

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mine an action in the matter in question. However, quoting Endicott, Allott and Shaer explain that, instead of claiming authority to invent a resolution to a dispute, judges have a natural inclination to see what they are doing as interpreting what others have decided.

Judges incline, then, to present their decisions as interpretations, whether these decisions are based on investigative or creative activities of legal interpretation. This tendency might raise the suspicion that some principles, in particular pragmatic principles, might enable excessive freedom of interpretation: it might seem that applying certain pragmatic principles in judicial interpretation of the legal norm might enable the 'interpreters' to cross the line between creative decision-making and legal activism.

Some of the contributors to the present publication are worried that pragmatic principles might enable excessive freedom of judicial interpretation, while others doubt the possibility of limiting this freedom. Their point is, it seems, that any limit of this kind must specify the maximal legitimate deviation from the legislature's intended meaning, and some of the contributors seem to doubt that the intended meaning of any author, including the legislature, can be determined with any certainty.

Janet Giltrow discusses the degree to which the meaning of the sentence depends on the context of its utterance. The ideal in the study of law and language is to anchor meaning beyond contexts, as seems to be required by the principle of equality before the law. The problem is that meaning is dependent on the context as revealed when, for example, a hearer considers the reference of indexicals (*here*, *yesterday*, *me*) or the identification of implicatures (meanings which are unstated but intended by the speaker to be inferred from what is stated).

Giltrow worries that a pragmatic principle can claim that meaning in language is inevitably context-dependent – or 'vastly' underdetermined by code or system. She explains that 'context' should not be defined by material terms and coordinates of time and space but by social roles and mutual consciousness. Social roles were discussed in Levinson (1979) as Activity Types constraining language users' contributions, where these types constitute events such as interviewing for a job, teaching a class or playing cricket. The constraints on speakers are functional: that is, they are known by their use in advancing the social activity. Hearers estimate speakers' meaning from the assumptions composing their shared knowledge of the typified activity. Another pragmatic theory, Relevance Theory, configures context as a domain of mutual assumptions on which communicative acts have cognitive effects.

It should be admitted that these notions of 'context' might seem hopelessly vague (especially when read outside the context of the linguistic theories in question); these notions of 'context' may, therefore, raise the suspicion that use of pragmatic considerations for interpretation might give the interpreter excessive

freedom of interpretation. Giltrow exemplifies this risk with an excellent survey of Canadian Court decisions in Aboriginal claims to rights and lands.

She explains that the term *unceded territory* is inferentially active and legally endorsed by Canadian courts. From the legal point of view, Aboriginal rights and titles in land are based on eleven treaties that were signed from 1871 to 1921 in order to regulate the relationship between the Canadian Crown and Aboriginal peoples (or 'First Nations'). These treaties provided the Dominion of Canada with large tracts of land – *ceded territory* – in exchange for promises made to the Aboriginal people from the area in question. The term *unceded territory* is inferentially active and legally endorsed, for example, in *R. v. Marshall* No. 1 3 SCR 456. The Supreme Court inferred that the Mi'kmaq right to hunt and fish was (in pragmatic terms) presupposed by the following clause from the 1760 Treaty of Peace and Friendship between the Mi'kmaq and the British Crown (the Mi'kmaq agent engages):

> I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.

Other examples showing that the term *unceded territory* is inferentially active and legally endorsed by decisions of Canadian courts include the Supreme Court decision in *Delgamuukw v. British Columbia* ([1997] 3 SCR 1010), which found that aboriginal title to land existed in principle, and *R. v. Tsilhqot'in* [2014], which applied this principle in giving the Xeni Gwet'in title to 1750 square kilometres of British Columbia.

Giltrow emphasises that while the *Marshall* decision can be read as pragmatically anchored in legal wording, and exerting pragmatic (rather than semantic) efforts to interpret the wording, the *Tsilhqot'in* decision proceeds along a different pragmatic scale. It derives an inference from assumptions in the context of interpretation: namely, the inference that the Xeni Gwet'in own the land in question. The Court looked for evidence of 'regular use' and found such proof, from which inferences could be made, in records of the Xeni Gwet'in keeping some off the land while permitting access to others.

What worries Giltrow is that written evidence had been available all along. Traders acting for both English and French investors sent back to Europe journals recording observations of the customs, practices and attitudes of the Aboriginal peoples they did business with. Some of the most emphatically stated of these observations were those that recorded the behaviour from which control of territory could be inferred. The question is, of course, why could control – and title – not be inferred for the Tsilhqot'in until 2014? Why for 125 years was the 'court system' as experienced by Aboriginal peoples 'unsympathetic'?

Giltrow explains that the context for inference changed over the 250 years Aboriginal peoples had been petitioning the relevant courts. In the first phase of reasoning, when relations between Europeans and Aboriginal peoples were based on trade, the inference of Aboriginal control of territory was readily drawn from context. But when the era of settlement arrived, and then the era of resource extraction, such inference was no longer readily drawn.

Giltrow worries that the *Tsilhqot'in* decision might illustrate an outer limit of the pragmatic study of legal reasoning: in this decision the court could be said to be opening the door to inference not guaranteed by the speaker, or even readily accessible from what is said, but still within the broadest conceivable intention of this ostensive action of communicating a decision.

Nicholas Allott and Benjamin Shaer seem to doubt the possibility of knowing what exactly was the intended meaning of the legislature; they argue that investigative interpretation of statutes and other legal texts is of a piece with utterance interpretation more generally, in which the text produced by the utterer is a clue to what the utterer intended to communicate. They hold that in the general case, language-users grasp meaning by figuring out the best explanation for this Speaker saying this, now, and in this way, to this Hearer. This view is in some tension with the claim advocated by Marmor (2008: 425) that

> the content prescribed by the legislature is nearly always exactly 'the content which is determined by the syntax and semantics of the expression uttered'.

Allott and Shaer undertake to provide substantial evidence against this claim. This evidence takes the form of legislative examples of linguistic underdetermination of legal speech act content. One way in which content goes beyond what is unambiguously encoded by the written word is reflected in the use of indexical expressions (*it*, *she*, *that time*). Determination of the referent of an indexical requires the hearer to make inferences, given the number of potential antecedents that each indexical has in the surrounding sentence. Another way in which content goes beyond what is unambiguously encoded is structural ambiguity; for example, the attachment of modifiers.

Allott and Shaer summon examples of legal texts where interpretation requires some inference; the idea is that whenever the linguistic material uttered does not encode a single proposition, there remains inferential work for the hearer or reader to do. The logic of this argument is, of course, impeccable. It cannot be denied that any indexical occurring in the text of any section of law provides substantial evidence against the claim that the content prescribed by the legislature is 'nearly always exactly the content which is determined by *the syntax and semantics* of the expression uttered'. And this is just as true regarding Allott and Shaer's other examples of ambiguity.

It should be noted, however, that the view attributed to Marmor is an extremely limited view of coded content; without further analysis, the examples of Allott and Shaer are powerless against somewhat wider views as, for example, the claim that 'the content prescribed by the legislature is nearly always exactly the compositional meaning built up from *the primary or strict meanings of the composite parts in a rule-governed fashion*' (p. 83).

This widening of the claim advanced, according to Allott and Shaer (p. 83) by Marmor (that the content prescribed by the legislature is nearly always exactly 'the content which is determined by the syntax and semantics of the expression uttered') assumes that the content prescribed by the legislature is defined by Slocum's notion of literal meaning as the compositional meaning that accords with the primary or strict meanings of the words and is not figurative or metaphorical (p. 120). Slocum's notion is based on Murphy and Koskela's view (2010: 36) that 'The principle of compositionality states that the meaning of a complex linguistic expression is built up from the meanings of its composite parts in a rule-governed fashion' (footnote 4 to p. 120).

There can be no doubt that in the vast majority of Allott and Shaer's examples, the ambiguity involved can be resolved in a rule-governed fashion by inferences guided by universally accepted pragmatic principles like *the principle of charity* or by obvious pragmatic principles. One example of such an obvious principle is, I believe, the principle of Relevance Theory that says 'the speaker phrases her message by the utterance making it as easy for the addressee to comprehend as is possible for her' (Wilson and Sperber 2004: 615).[1] (Relevance Theory assumes that in communicating certain messages, speakers intend the communications to succeed – namely, they intend that the addressees will comprehend their messages.) Combining the principle of charity and the relevance theoretic principle may resolve many ambiguities in legal texts.

Take, for one example, indexical references; it is obviously easiest to identify the reference of an indexical if this reference is given by the indexical's closest grammatically suitable antecedent. The vast majority of ambiguities involving indexical reference can indeed be resolved in a rule-governed fashion by applying the default rule that says that 'the reference of any indexical is given by the closest grammatically suitable antecedent – unless the principle of charity gives a basis for thinking otherwise'.

Or take, as another example, the attachments of modifiers; it is obviously easiest to identify the modified constituent if this constituent is the head of the syntactical phrase containing the modifier. The vast majority of ambiguities involving modifier attachment can be resolved in a rule-governed fashion by applying the default rule that says the modified constituent is the head of the syntactical phrase containing the modifier – unless the principle of charity gives a basis for thinking otherwise.

Some such broadening of the notion of 'utterance content' seems to be the motivation behind the views of Slocum and Stein. Brian G. Slocum seems to hold that the enactment's text alone is never decisive and that the circumstances may be controlling (in cases where particular circumstances were not contemplated by the enactment's intention): he seems to agree with Flanagan (2010) that a particular case will always contain some circumstance not covered by the enactment, where that omission alone cannot determine whether a circumstance is relevant in deciding if the interest in question should prevail.

Saying that the circumstance may be controlling is saying, of course, that pragmatic consideration may be unavoidable. Slocum shares, accordingly, Giltrow's worry that application of pragmatic considerations in the process of judicial interpretation might make the law's meaning underdetermined by code or system. He offers what is (at least as I see it) an ingenious insight for addressing such concerns. Slocum considers the idea that legal meaning is constrained by the 'communicative meaning' of the texts in question, where communicative meaning is roughly synonymous with what an appropriate hearer would most reasonably take a speaker to be trying to convey in employing a given verbal vehicle in the given communicative context. In this suggestion, Slocum makes a strong case, following Recanati (2004), for the 'primary' pragmatic processes used in ordinary interpretation by the reasonable hearer (unselfconscious and 'untutored').

However, unlike the 'literal meaning' (the compositional meaning built up from the primary or strict meanings of the composite parts in a rule-governed fashion), the communicative meaning is determined in accordance with some extra-textual standard, such as the purpose of the provision, its intended meaning, or some notion of public good or morality.

Slocum concludes that the 'primary' pragmatic processes used in ordinary interpretation by reasonable people for reconstruction of 'ordinary' meaning should be separated from other pragmatic principles, whose use in the process of judicial interpretation of the law should be regarded as illegitimate. I could not agree more with this conclusion. However, on the basis of several judicial opinions I analysed using relevance theoretic principles (see, for example, Azuelos-Atias, 2010), I would personally question Slocum's view that Relevance Theory is too focused on context-rich occasions to be demonstrably formulated and thereby useful in legal domains.

Dieter Stein seems to take into consideration the full significance of the evidence presented by Allott and Shaer. His starting point is that, in light of recent theories of how meanings are actually construed by inferencing in discourse and in law, it is untenable to stick to any idea of self-contained texts that consist of words put together compositionally so as to contain all relevant meanings.

There is in pragmatics an assumption of a 'strong linguistic underdeterminacy:

encoded linguistic meaning may do little more than provide a skeletal framework which is both augmented (into explicatures) and complemented (with implicatures) by fast, effective mechanisms of pragmatic inference' (Carston 2002: 258). Any notion of 'literal' or 'in the text' must confront and deal with this strong linguistic underdeterminacy. Stein discusses, therefore, the issue of what it means to say that 'the meaning resides in the text' and if it is possible to linguistically explicate a notion of 'literal meaning'.

According to Relevance Theory, for example, hearers construct and test interpretive hypotheses in order of their accessibility, and once they have found an interpretation which satisfies their expectation of relevance they stop. Recanati (2004) has elaborated this picture further by a distinction between 'primary' and 'secondary' pragmatic processes. Primary pragmatic processes are of a 'saturational' or 'enriching' nature insofar as they are necessary to establish a proposition as something that could serve as a 'literal' meaning for the linguist. To these saturational processes belong indexicals, cases of reference resolution with null surface forms, but also genitives. It is a definitional feature of these primary pragmatic processes that they are below the level of consciousness and are triggered 'automatically' by linguistic expressions. Some of these primary saturational processes would presumably be 'semantically implicated' content, such that, for example, 'managed to find' implicates that 'finding A was expected to involve some difficulty'.

Secondary pragmatic processes are triggered by broader external factors: they typically include communicational, discursive and conversational functions, typically the classic conversational implicatures. It seems that some kind of 'templates' – 'clusters of items of contextual information' – have to be available in order for these primary and secondary pragmatic processes to be possible.

Stein's point is that the end point of the inference process described by relevance theoreticians is the 'legal meaning' that so centrally figures in discussions of legal interpretation. He explains that any notion of 'literal' meaning is as doubtful as it is difficult to define in more general linguistic terms. Therefore, in order to define an operational specific legal type of 'legal' literal meaning that could hold water, a good candidate might be a level of meaning-building that follows the application of all primary pragmatic processes under the special auspices of specific legal templates. The 'legal meaning' is, then, an end product of inference processes that are compatible with the inference rules that specifically characterise legal discourse.

Stein assumes that in addition to legal concepts, legal discourse is characterised by specific rules of meaning-building. He explains that there are indications in law of some awareness that there have to be such inference rules in order to get from text to interpretation. They are, as part of legal methodology, embedded

in the 'canons of interpretation'. These canons testify, according to Stein, to an awareness in the legal professions that there have to be rules of inference, i.e. of meaning construction.

Stein suggests, accordingly, a three-step project for scholars of law and language. Linguistic and pragmatic theory can suggest, as a first logical step, a line or series of steps in an incremental hierarchy of adding meaning from 'langue' meanings in the sentence up to conversational implicatures. As a next step, the practice in law of identifying a 'literal meaning' or 'what is in the text' (on the arguably shaky assumption that there is such a unitary level) can then be explicated in terms of this cline. A next step could then be a reasoned suggestion from the side of linguistics to formulate explicit principles, based on this cline, as to what could operationally be defined as a 'literal meaning' in the field of law, based on functional considerations of necessities in this field. Such a way of proceeding appears to be a promising research paradigm for a linguistically supported judicial practice.

A linguistic, pragmatic explicitation of canons would go some way towards establishing inference rules that are definitional for legal genres only. So at this point in the present discussion, the pragmatic characterisation of legal discourse includes not only specific versions of inference strategies for 'filling in' or 'saturation' types of implicatures on all levels of language, but also rules for accessing paths or inferential strategies and types of knowledge 'legitimately' accessed by different schools and methods of interpretation. Arguably, these are all part of the 'template' of a given legal genre.

Stein suggests, then, that legal interpretation be more explicit about the steps involved in constructing meanings in discourse and the principles that are at work. He holds that the analytical tools of a broadly conceived discipline of pragmatics can be used for this end. Stein is realistic enough to acknowledge that this may or may not have repercussions in the practice of the decision-making business; however, he explains that the precedent-based common law system requires massive inferencing processes in establishing what counts as precedent on the basis of written-formulated judgments that still need to be 'interpreted' in the non-technical, everyday sense of comprehension.

Lawrence M. Solan put this theoretic discussion of the preconditions of an investigative activity of legal utterance interpretation in proportion by examining how different areas of law resolve one particular type of semantic ambiguity that occurs in various legal contexts.

The ambiguity in question has to do with 'definite descriptions': expressions of the form '*the* so and so' where 'so and so' is some predicate implying existence and uniqueness of the described entity (a person, a legal persona or groups of these); Solan uses 'the author of this letter' as an example of expressions of this kind. A

description of a certain entity can be used by a speaker who knows the identity of the entity in question or by a speaker who does not know it; the first kind of use is called, accordingly, 'transparent' and the second 'opaque'.

Linguistic contexts characterised by this kind of ambiguity between transparent and opaque uses of a definite description are called 'opaque contexts'. For example, the description 'my grandchildren' makes the will of a person leaving a sum to his grandchildren an opaque context: interpreted as a transparent description, it means the grandchildren alive at the time the will was drafted, while it means 'whoever my grandchildren happen to be at the time of my death', if interpreted as an opaque one.

Solan explains that the law resolves this kind of ambiguity in different ways for different contexts, and concludes that the very fact that the law adjusts to the legal context at hand in resolving ambiguity demonstrates that there is no escaping pragmatic considerations in legal interpretation. In the realm of statutory interpretation, the law resolves the ambiguity every which way, sometimes quite obviously along political lines, sometimes reasoning from the purpose of the statute, sometimes not recognising the ambiguity at all. Solan emphasises that the case-by-case resolution of opaque context, including cases in which one of the readings (the opaque reading) goes unnoticed entirely, is totally absent in the domain of the interpretation of wills. The law of wills acknowledges both readings and chooses one of them – the opaque reading – as presumptively valid, subject to evidence that the person who wrote the will had intended the transparent reading.

This is a pragmatic approach to the law of wills: the establishment of a default rule based on actual experience. In the law governing statutory interpretation there seems to be a legal mess, with courts sometimes appearing formalist by not acknowledging the ambiguity at all, while at other times presenting sophisticated analysis. The law, then, is not uniform in its treatment of opaque contexts. Uniformity is crucial, of course, for theoretical elegance, but Solan explains that the law should not be uniform: if the best understanding of what someone intended to leave in his will requires one interpretation, and the best understanding of what conduct a particular criminal law was intended to ban requires another, so be it.

Note

1. 'The communicator wants to be understood. It is therefore in her interest – within the limits of her own capabilities and preferences – to make her ostensive stimulus as easy as possible for the audience to understand' (Wilson and Sperber 2004: 615).

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