Area 5. Legal interpretation

Legal interpretation and the forms of laws

Authors: Nicholas Allott (nicholas.allott@gmail.com); Benjamin Shaer (ben.shaer@gmail.com)

Abstract

We have argued elsewhere that provisions in criminal statutes mostly have the linguistic form and the interpretation of conditionals, as shown schematically in (1a) and illustrated in (1b): (1a) If there is behaviour X, then a crime Y has been committed, and the penalty is Z. (1b) If any person ... makes a statement material in [a judicial] proceeding, which he knows to be false or does not believe to be true, he shall be guilty of perjury ... (Perjury Act 1911) We have further argued that provisions as in (1) proscribe certain actions because of what they are—part of criminal law—and not because they are orders to citizens. Many laws do explicitly tell their subjects what (not) to do, but (to our knowledge) the proscribed actions are not crimes but rather administrative infractions. Such a proscription is illustrated in (2): (2) The operator of any vehicle shall not make a U-turn upon any street in a business district... (New York City Department of Transportation, Traffic Rules) What, however, is common to all laws is that they have some jurisdiction to which they apply. This aspect of laws is considered by Fogal (2018), who distinguishes between the jurisdiction in which a statute applies and the conditions of the statute's application, as indicated in (3): (3) N.Y. state law requires all x, where x is in New York, that if x is driving, x does not turn right at red lights. Fogal's analysis captures three distinct possibilities for not breaking the law: (1) being outside the relevant jurisdiction; (2) being within the jurisdiction but not meeting the condition of application; and (3) being within the jurisdiction and meeting the conditions for the law to apply but complying with the law. The above remarks suggest that the linguistic form of a law does not provide direct access to its interpretation but instead calls for a significant amount of pragmatic inferencing, contrary to the claims of some authors (e.g., Marmor, 2011). Moreover, this inferential work involves determining the jurisdiction to which a statute applies and distinguishing the conditions on the provision's application from the behaviour proscribed. However, the language of laws may be a closer guide to their meanings than this suggests. For example, the jurisdiction that Fogal states as though part of the content of his New York law might be understood rather as an institutional fact about laws enacted there. We end with cautionary remarks about seeing normative force as a necessary part of the content of a law, given that criminal provisions are primarily fact-creating, as noted above, and that laws may permit rather than require some action.

References

Fogal, D. (2018). On the scope, jurisdiction, and application of rationality and the law. *Problema*, *12*, 21-57.

Marmor, A. (2011). Can the law imply more than it says? In A. Marmor, & S. Soames (Eds.), *Philosophical foundations of language in the law*. OUR.

Keywords: normative force; jurisdiction; legal interpretation; pragmatics; conditionals

Biodata

Nicholas Allott is a Senior Lecturer in English at the University of Oslo. His research interests involve pragmatics, inference and rationality in communication, word meaning and lexical modulation, legal language and interpretation, and the philosophy of linguistics.

Benjamin Shaer is an Adjunct Research Professor in the School of Linguistics and Language Studies and the Department of Law and Legal Studies at Carleton University. Besides, Dr Shaer is a policy analyst in Canada. His research involves applying current syntax, semantics, and pragmatics to practical and theoretical issues in legal interpretation.

The Wittgensteinian rule-following paradox in Kelsen's account of legal interpretation

Author: Cristiano de Aguiar Portela Moita (cristiano_apm@hotmail.com)

Abstract

According to Kelsen's account, interpreters' legal interpretation is a necessary activity carried out by interpreters to grasp the meaning of a superior norm to execute it or to produce an inferior norm. The norm has the character of a frame to be filled with more than one possibility of fulfilment. That means that the determination of the act of production of a norm or execution is never complete, thus always existing room for discretion. From a scientific point of view of the positive order, there is no criterion to determine the correct result, all of them properly deemed `legal' or `conform with the law', as much as there is no method that leads to a correct result, but only to a correct concurrent possibility. In this paper, I aim to show that Kelsen's account of the legal interpretation amounts to a paradox: If a norm is always subjected to interpretation, and if the result of this interpretation might lead to different possibilities, then how a norm could guide the interpreter after all? It seems that the interpreter would indeed create a norm but never apply an existing one. The legal organ, as an interpreter, would never be in a position to apply an existent norm; the individuals would never be in a position to act according to a norm; the scientist would never be in a position to describe existent norms - for, in every circumstance, the norm is subjected to interpretation. This version of the paradox is inspired by the one famously displayed by Wittgenstein in his remarks about rule-following (esp. PU 198, 201). After sketching Kelsen's account of legal interpretation, I intend to explore Wittgenstein's considerations about rule-following and the paradox above mentioned. Finally, drawing from these considerations, I will conclude by suggesting that: 1) a norm might have a correct meaning in a specific but day-to-day situation, which is the one that corresponds to an existing practice; 2) a norm can only be efficacious if applied or followed according to this meaning—i.e., as an existing practice; 3) cognoscitive interpretation is only possible if the interpreter follows some rules and do not interpret them (otherwise, the legal interpretation would amount to an endless activity); and 4) correctness understood as a unique meaning extracted from a text is false; but that is just not how we use the word 'correctness'. Though this

paper contains a Cristiano critique of Kelsen's account, I want to suggest that we should highlight the role played by efficacy as a condition of the validity of the law but as an important element of legal interpretation.

Keywords: Kelsen's interpretation; Wittgenstein's paradox; correct interpretation

Biodata

I have a Masters in Law with a dissertation about the possible influences of philosophical hermeneutics on legal practice. I lecture Philosophy of Law, Constitutional Law and Legal Hermeneutics in an undergraduate course in Brazil. I am also interested in legal epistemology, constitutional law and procedural law. I am a member of the *British Wittgenstein Society and Group of Studies Nietzsche* in Brazil. I am currently studying for my PhD in Germany with a focus on the intersection between legal philosophy and linguistic philosophy. My objective is to address potential outcomes of the latest fields of research in Wittgensteinian philosophy, namely aspect-seeing and hinge epistemology, into the legal philosophy, especially concerning legal interpretations and deep disagreements—and vice-versa—i.e., grasping different aspects of the normative legal practice and shed light on the philosophy of language applied to social sciences. This paper highlights the role played by efficacy (as specific practices) in the legal interpretation—an activity usually considered a mental activity undertaken by the interpreter, apart from concrete practices.

Interpretive strategies of regulatory legislation

Author: Carlo Garbarino (carlo.garbarino@unibocconi.it)

Abstract

Currently, there is an expansion of regulatory legislation, imposing limitations on personal liberties. This issue is due to societal concerns, including environmental constraints and the global health problem as epitomised by the COVID pandemic. These statutory materials are often complex and present critical problems in interpretation—i.e., the attribution of meaning to written legal texts. The proposed interpretations are often backed by 'reasons' and 'arguments' that reflect interpretive strategies by different actors: the purpose of the research is to shed light on the main modes of such interpretive activities through a survey of those 'reasons' and 'arguments'. The research problem is that current legal cultures mainly focus on the 'complexity' of legislation in terms of an objective technical problem but do not put enough emphasis on interpretive process. Thus, it is appropriate to define what are the main reasons and arguments and what exactly are the strategies that are employed by different actors when they interpret and apply complex regulatory legislation. We critically review the state of the art of literature on interpretation. We rely on the approach which challenges the conception according to which the interpreter `reveals' the pre-existing meaning of the norm, and thus we assert that a distinction should be made between the 'text' and the 'meaning' of a rule, as such a `meaning' is one of many potentially available outcomes of competing for interpretive strategies. We also rely on the literature about reasons and arguments that support interpretive decisions. Based on the above, the hypothesis is that different 'actors' (administrative agencies, courts, scholars and practitioners) employ competitive 'interpretative strategies' of a single rule (or set of rules) so that the actual meaning of

those rules is the outcome of a law-in-action process. Consequently. the research question is to describe these interpretive strategies and how are cluster around two polarities: on the one hand, strict or literal interpretation of statutes based on semantic and syntactic techniques, and, on the other hand, purposive interpretation based on extra-textual elements such as the function or rationale of the provisions. We adopt a descriptive method that focuses on areas of law (such as administrative regulations or taxation) that mainly impose limitations on recipients and compile a set of reasons arguments effectively used belonging to the two polarities of strict interpretation and purposive interpretation. The potential impact of the research is to deliver a well-ordered archive of reasons and arguments effectively used by actors when they interpret regulatory statutes of a restrictive nature. This archive can be used to understand the process better and streamline certain complexities that are often due to a limited understanding of the relevance of interpretive processes.

References

Alexy, R. (2009). *A theory of legal argumentation.*

MacCormick, D. N., & Summers, R. S. (2016). *Interpreting statutes.*

Perelman, C., & Olbrechts-Tyteca, L. (1969). *The new rhetoric: A treatise on argumentation.*

Twining, W., & Miers, D. (2010). *How to do things with rules.*

Keywords: reasons; arguments; interpretation; regulation, legislation

Biodata

Carlo Garbarino is a Professor of Law at Bocconi University Milan; Senior Emily Noel Fellow, NYU Law School, 2016-17; Hauser Global Visiting Faculty, NYU Law School, 2013-14 and 2019-20. He has been Grotius Research Scholar, University of Michigan, Senior Fellow of the Melbourne Law School, and Visiting Professor at the University of Michigan Law School, Levin College of Law of the University of Florida, Faculdade de Direito Universidade de São Paulo, Sorbonne Université. He regularly teaches at the Wirtschaftsuniversität Wien. Activities relevant to the topic: Member of the organising committee of the 2nd International Workshop Network Analysis in Law, Krakow, December 11-12, 2014, and Law and Big Data Workshop, Scientific Committee, University of San Diego, June 12, 2015. Relevant papers: Un Modello di Rete di Produzione di Norme Basato su Agenti Differenziati, in *Materiali per una storia della Cultura Giuridica*, 2014, pp.85-113; Normative Mind and Mental Content of Rules, in *Materiali per una storia della Cultura Giuridica*, 2021, pp.157-183.

On the role of language and law in defining crimes and the effects of linguistic and legal shifts on criminal cases

Author: Marie-Hélène Girard (marie-helene.girard2@mcgill.ca)

Abstract

The research aimed to examine the large-scale inter and intralingual legal translation and legal transposition in national criminal jurisdictions of a single crime, that of genocide. The question at hand was whether a 'universal' crime could remain 'universal' both in form and substance when translated on a very large scale. What are the overall effects of this process on the universal meaning, understanding and applicability of the crime? Having been translated and transposed by 131 States worldwide and counting, the concept of genocide was the ideal candidate to explore this paradigm and research question. Drawing from Lerat's model of shared legal concept (2013), Gémar's four constituent elements of the legal language (1990, p. 720) and Prieto Ramos' analysis of communicative situations (2014, p. 122), the method was designed to identify linguistic and legal shifts in the definition of the crime and compare them across a large number of legal texts. Some 84 national definitions of the crime in French, English, Spanish and Portuguese have been studied, in which we identified 1,249 legal and linguistic shifts pertaining to 279 categories. Linguistic shifts are concerned with choices made at lexical, syntactical and stylistic levels, whereas legal shifts fall within the ambit of political debates and disagreements at national levels. Results show that all legal shifts have substantial effects on criminal cases. In contrast, the effects of linguistic shifts are less obvious, more insidious, but they can nevertheless have the same substantial effects as legal shifts. Both linguistic and legal shifts can render the crime known and agreed upon by the international community partially or entirely inoperable in a national jurisdiction. They both have irreversible effects on criminal cases, from admissibility criteria to sentencing. This presentation will focus on the hidden dimensions and effects of linguistic shifts on criminal cases and the role that language experts should play in the translation and transposition process to avoid such fatal outcomes. We will see that the smallest lexical, syntactical or stylistic shift can have consequences on the level of admissibility of the crime. Furthermore, drawing from a few cases of interpreting the language of the crime in national criminal cases—i.e. Canada, Guatemala, Argentina and Brazil, we will show the effects of both linguistic and legal shifts on the applicability of the crime in national courts.

References

Gémar, J.-C. (1990). Les fondements du langage du droit comme langue de spécialité. Du sens et de la forme du texte juridique. *Revue Générale de Droit*, *21*, 717-738.

Lerat, P. (2013). Les conceptualisations juridiques partagées. *Revue Internationale de Sémiotique Juridique*, *26*, 747-760.

Prieto Ramos, F. (2014). Parameters for problem-solving in legal translation: Implications for legal lexicography and institutional terminology management. In A. Wagner, L. Cheng, & K. Kui Sin (Eds.), *The Ashgate handbook of legal translation* (pp. 121-134). Abingdon: Routledge.

Keywords: legal translation; legal effects; linguistics shifts; legal shifts; language crimes

Biodata

Marie-Hélène Girard is an Assistant Professor of Legal Translation and jurilinguistics and the Graduate Diploma in Legal Translation at McGill University, where she oversees the brand-new 30-credit graduate diploma, the first fully online program of its kind in North America. Before joining McGill, she worked as a lecturer at the

University of Montreal and as a research assistant for the Legal Translation in International Institutional Settings: Scope, Strategies and Quality Markers Project at the University of Geneva's Faculty of Translation and Interpreting (Switzerland). In addition to her academic credentials, she has worked as an in-house translator and run her own freelance business for the past 15 years, serving a wide range of corporate, institutional and public-sector clients. She received her PhD from the University of Geneva in 2019. Her thesis defence on translating the concept of genocide into national criminal laws and legal languages worldwide earned her a podium spot in the prestigious MT180 competition (link). She is also an alumna of the Université de Montréal, where she completed her bachelor's and master's degrees in translation studies. Her current research focuses on jurilinguistics in the Canadian context and cross-national settings.

Legitimate and cynical interpretations of text

Author: Timothy Habick (timothy.habick@gmail.com)

Abstract

The modal verb 'will' in English is used, depending on pragmatic circumstances, to convey several distinct meanings, marking futurity as well as prediction (It will rain tomorrow), insistence (I will succeed!), commitment (I will pay you $500), inclination (Yes, I will clean the bathroom, Mom, [-when I feel like it]), or braggadocio (I will drink you all under the table!). Given those diverse possibilities of meaning, forensic situations can arise where one interpretation could benefit one party to an agreement while disadvantaging the other party. If the stakes are high, one party might ask a forensic linguist to exploit the inherent lexical ambiguities to justify a favoured interpretation as legitimate; the other party will then need to justify another interpretation. On what bases can an interpretation be justified as legitimate while some others must be rejected as unsupported by relevant evidence? Most high-stakes documents are designed to withstand exacting scrutiny from adversarial or litigious readers, so it is often straightforward to explain why an intended meaning is the only reasonable one. That explanation must be based on the full range of grammatical rules, conventions, and good-faith expectations of the relevant language-dialect-register-jargon. A linguist engaged for the opposition will try to uncover a legitimate interpretation that others had missed. One key principle must apply: Any interpretation compliant with all relevant linguistic, logical, and pragmatic rules of the relevant dialect qualifies as a legitimate interpretation, regardless of the writer's intentions and regardless of the most popular interpretation. Illegitimate interpretations are those requiring the violation of at least one relevant rule of the relevant dialect. The impersonal speech act of high-stakes documents typically precludes any interactional negotiation of unclear meanings, so readers legitimately expect materials to comply with Grice's maxims fully. The writers of such documents, for their part, legitimately expect readers to be cooperative in their interpretations too. Cooperative in this regard means drawing register-appropriate inferences, not interpretations justifiable in irrelevant pragmatic contexts. Debt collection letters are discourse structures with high-stakes consequences for debtors. Most U.S. states require debt collection agencies to advise debtors of their legal rights regarding the consequences of their response or failure to respond to collection letters. For sufficiently old debts (time-barred debts), collection letters must clarify the consequences of compliance and noncompliance with

the demand for payment of funds. Specifically, the collection letter must specify, 'The law limits how long you can be sued on a debt. Because of the age of your debt, [our agency] will not sue you for it.' For the second sentence, some states specify 'cannot sue', whereas other states specify 'will not sue.' In this paper, I explore a case in which one party claimed that the will of inclination, not a commitment, is a legitimate interpretation, leading the debtor to disadvantageous decisions. In this paper, I argue that readers of high-stakes financial documents have no right to misconstrue the modal auxiliary of commitment in English, just as the writers had no right to misuse it.

Keywords: interpretation; high-stakes documents

Biodata

Timothy Habick is a linguist involved daily in evaluating the language used in high-stakes communications and textual material, especially for the creation of fair and reliable assessments. This professional work involves a linguistic discourse analysis and a logical analysis of materials used for assessment purposes. As a forensic linguist, Dr Habick applies linguistic principles in the service of social and legal justice in disputes regarding the reasonable interpretation of controversial communications. He earned a PhD degree in linguistics from the University of Illinois, Urbana, in 1980. His dissertation was the first microsociolinguistic study of the speech of a small community based on spectrographic analysis of speech samples. In 2000, along with other former members of the Reasoning Group at ETS, Dr Habick founded Reasoning, Inc., a corporation that provides linguistic, logical, and psychometric analyses for educational and professional testing purposes. Through Reasoning, Inc., he has served clients such as ETS, the Law School Admission Council (LSAC), and many others. Dr Habick has written forensic linguistic reports for cases involving defamation, authorship attribution, trademarks, and the legitimate interpretation of contested documents, test questions, and survey questions.

Interconstitutional interpretation

Author: Jason Mazzone (mazzonej@illinois.edu)

Abstract

Many countries (and states within countries) have had multiple constitutions. However, a new constitution rarely means that the predecessor constitution is just set aside and ignored. Instead, courts and other constitutional interpreters routinely look to predecessor constitutions of the same polity when interpreting the existing constitution. This practice, which we call interconstitutional interpretation, raises questions concerning constitutional meaning, constitutional change, and democratic legitimacy. Among other features of the practice of interconstitutional interpretation, courts view that if constitution B repeats provisions from predecessor constitution A, constitution B assigns to that provision the very same meaning the provision had in predecessor constitution A. Likewise, courts take the position that if new constitution B does not specifically repudiate judicial interpretations of the provision under predecessor constitution A, constitution B, by including the provision interpreted, is to be understood to have ratified those earlier judicial interpretations. Interconstitutional practices challenge many conventional approaches to constitutional interpretation. For

one thing, the practice can easily produce a failure in constitutional communication. For instance, where constitution B replaces constitution A and repeats a provision contained in A, the communicative intent of that provision could be deemed 1) to convey to the public a certain proposition through the clause of the second constitution; 2) to convey the same content that the same clause in the predecessor constitution conveyed to the public; or 3) to convey the content that judges assigned to that clause in the predecessor constitution. Unless these three possibilities converge on a single meaning, a choice among them is required. Judges tend to gravitate to 3). However, those who wrote and ratified the new constitution might have been unaware of or inadequately informed about prior judicial decisions and may have imagined themselves either to be repudiating what came before or, at a minimum, generating a constitution whose meaning reflected contemporary understandings. Interconstitutional practices can thus make it exceedingly difficult to adopt a new constitution that breaks from predecessor constitution(s), even after a political revolution or another episode of constitutional transformation. The practices challenge core ideas of popular sovereignty and also to a path-dependency problem when it comes to adopting a new constitution. For countries with long histories of democratic constitutional governance and new constitutional democracies alike, interconstitutional interpretation can thwart reform. Interconstitutional interpretation is pervasive, but it has received virtually no scholarly attention. Our paper explores the phenomenon and implications of interconstitutional interpretation by drawing on examples from constitutions and courts worldwide, both at the national and sub-unit (or state) levels. The analysis we present is based upon theories of interpretation developed in the work of legal scholars who are focused on single constitutions and also on shared meaning approaches to language, in work by linguists and philosophers, and with particular attention to applications developed from the work of philosopher Paul Grice and others who have followed his approach.

Keywords: constitutional change; textualism; historicism

Biodata

Jason Mazzone is the Albert E. Jenner, Jr. Professor of Law at the University of Illinois at Urbana-Champaign and Director of the Illinois Program in Constitutional Theory, History, and Law. Professor Mazzone's primary field of research and teaching is constitutional law and history. He works principally on constitutional structure and institutional design issues with a particular focus on relationships between structural arrangements and individual rights. Professor Mazzone is a member of the American Law Institute and a fellow of the European Law Institute. He is Chair of the Illinois-Bologna Conference on Comparative Constitutional History, a member of the Advisory Board of the Italian Law Journal, and a member of the International Association of Constitutional Law Research Group on Constitutionalism in Illiberal Democracies. His scholarship has been cited by many courts, including the Supreme Court of the United States. He is a regular media commentator, and he has written about legal issues for *The New York Times* and other national newspapers.

The impact of semantic theories in interpreting international law instruments and texts; from semantic sign to pragmatic inference

Author: Seyed Mohammad Hossein Mirzadeh (interprete3@gmail.com)

Abstract

One of the most important issues classified in the communicative system of International Law (I. L.) is to define relations between semantic theory and the nature of I. L. language. In this regard, the question that arises here is what kind of norms have a sematic phase in the I. L. communicative process? That is to say, if we accept that I. L. enjoys its language and kind of communicative system, how can we prove intersections between semantic fundaments and written language of the international legal system? Taking into consideration the common and ordinary communicative systems of international law—under sociological criteria of English and French, we should find semantic similarities and differences between the texts which are made in these languages and those which these languages are translated to, like Spanish, Persian, Arabic and so forth. The semantic phase, which is studied under linguistic enquiries and standards, consists of concepts like signify, signifier and the structural basis of a word and its functions in phrases and sentences for relations and correlations. For this reason, we could rely on semantic criteria when we are going to translate one word from the source text into another word—which supposedly is the equivalence of that word—in another language. Therefore, by this traductological process, we should evaluate the whole phenomena like a linguistic-legal one under which both disciplines could help us decodify the right semantic meaning, leading to a better pragmatic and communicative equivalence. According to Babylon- Fabre, semantic theory has to do with traductological phase between languages. That is to say, we have a translation by itself, we have translated text which is the fruit of translation, and we have linguistic analysis and, of course, psychoanalysis. These phenomena have to do with every translating process from one language into another regardless of the nature or type of language used in this aspect. Suppose it is an ordinary language or a specific type of language, which is international law. In every case, it is necessary to discover a semantic side of the text in both S and T languages (S stands for Source and T stands for Target). In this paper, we are to study the case of semantic theory, presenting some basic notions and then evaluating intersections between this concept and international legal texts, which could help us get the real difficulties of the process of communication in international law. The difficulty arises from the existing differences between communicative systems of each language of the world that are semantical- pragmatically influenced by cultural, philosophical, historical, and other factors. In a descriptive mode, we specify these relationships and define the traductological process of the language of I. L. to be understood in order to a better communicative process between I. L. users and subjects; which surely leads to create an atmosphere based on understanding and cooperation which have been enumerated by different scholars like Paul Grice and Sperber and Wilson.

Keywords: international law; linguistics; semantics; pragmatics; interdisciplinary studies

Biodata

Seyed Mohammad Hossein Mirzadeh holds a PhD in International Law and in Language Studies. Dr Mirzadeh is an interdisciplinary researcher who has published extensively on pragmatics, international law and conference interpreting. He has also

worked as translator and interpreter of Spanish, English, Persian and Portuguese for ten years.

Implicit Law

Author: Kevin Toh (k.toh@ucl.ac.uk)

Abstract

Interpretive practices of courts and other adjudicative bodies indicate that the law of any community comprises not only 1) an explicit part that consists of enactments, judicial decisions, and settled legal practices, but also 2) an implicit part which judges rely on in adjudicating novel issues not addressed by any part of the explicit law. In general, legal positivists have been resistant to recognising implicit law, while natural law theorists have conceived implicit law in moralised terms. Both views are inadequate and appear to be discredited when checked against considered interpretative judgments. This paper broached a new way of conceiving implicit law by exploiting two analogies: 1) an analogy between implicit law and implied fictional truths—i.e., what are true in fiction but are not explicitly specified as such by the author or artist; and 2) an analogy between the interpretive principles that we rely on to generate implied fictional truths (what are often called 'principles of a generation' in philosophical aesthetics), and the principles that we rely on to construct counterfactual scenarios that are involved in our backwards-looking moral emotions such as regret and relief. The last set of principles appear to be very deep-seated and fundamental features of our psychological makeup. Furthermore, the two aforementioned analogical arguments suggest that the principles we rely on to generate implicit law are similarly deep-seated and fundamental features of our psychological makeup. The overall implication that this paper teases out is that the implicit law of any legal system is a set of neither moral principles, as natural law theorists argue, nor of principles that we agree on or manufacture as legal positivists conceive laws in general. Instead of being a product of human making, the implicit law of any legal system is likely a product of human makeup. This conception of implicit law has surprising implications, which the paper traces out, for diagnosing intractable interpretive disputes that frequently occur in the law.

Keywords: implicit law; implied fictional truths; principles of generation; backwards-looking emotions; legal disagreements

Biodata

Kevin Toh is a Professor of Philosophy of Law at University College London, Faculty of Laws. He is the author of several articles in the philosophy of law and has also ventured into philosophical ethics and constitutional theory. He has previously taught at the philosophy departments of Indiana University in Bloomington and San Francisco State University. He has held visiting positions and fellowships at University College and the Oxford Centre in Ethics and Philosophy of Law at the University of Oxford,

University of Texas School of Law, and the Institute for Advanced Studies in the Humanities at the University of Edinburgh.

Conceptual metaphors and legal interpretation: A Polish perspective

Authors: Iwona Witczak-Plisiecka (iwona.plisiecka@uni.lodz.pl); Sylwia Wojtczak (swojtczak@wpia.uni.lodz.pl)

Abstract

The paper offers comments on the metaphorical dimension of legal language crucial for legal cognition and interpretation. The authors discuss selected metaphors in the context of the Polish legislation, mainly normative texts and their interpretation in the context of legal procedures, with the aim to show how the metaphorical dimension of language can be used and abused. The perspective on metaphors accepted in the study follows the tradition of cognitive linguistics as represented by G. Lakoff, M. Johnson, M. Turner, and G. Fauconnier. It is thus believed that metaphors are omnipresent in language, and what is even more important-metaphor functions as an instrument in human cognition. From a legal perspective, it is crucial that there are different levels of metaphorical imagery, and metaphorical images may be seen as a spectrum spanning `dead metaphors'—i.e. inevitable linguistic images that can just happen to act irrespective of any premeditated action on the part of the legislator on one end, and metaphorical images whose function is primarily pragmatic and persuasive on the other end. In the central part of the spectrum, there are metaphors whose main aim is to elucidate concepts, just to describe—but at the same time often constitute—the world of legal obligations and entitlements. In the paper, we want to demonstrate that the metaphorical dimension of language can cross-cut the interface between language and law in various ways. Sometimes problems may appear when the linguistic image of a legal institution becomes obsolete and detached from reality. For instance, in a rather innocent way, the legal concept of `stealing', which traditionally referred to 'replacement' of an object, proved to be inadequate and troublesome in the context of intellectual property and 'stealing' in the cyberspace where the deed was closer to cloning than 'removing'. Next to such issues related to the changes in the social environment, there are metaphors in legal texts that can be deliberately used to emphasise or cover selected aspects of meaning. This can be illustrated with the language used in the Polish parliamentary act on criminal liability of collected entities, in which different (conflicting) images, corresponding to different heuristics tradition were used in the text to 'cover' the inevitable lack of harmonisation between the E.U. law (related to common law) and Polish law (mainly modelled on German laws). Referring to Polish normative texts, we show how crucial it is for lawyers (including first of all interpreters and drafters) to understand how metaphors (may) work in the legal context. We also point to selected strategies applied by crafty lawyers in order to not so much use as abuse the fact that metaphors always both foreground and background selected aspects of the concept in question. The discussion is based on the data obtained in the project financed by the Polish National Science Centre: Metaphor as a mechanism to understand the language

of law and legal language and to experience law (quoting examples of Polish legal language) No. OSF, ID 220257, 2013/09/B/HS5/02529.

Keywords: legal language; metaphor; law; legal interpretation

Biodata

Iwona Witczak-Plisiecka is a Professor of Linguistics (MPhil in Linguistics, TCD, Ireland, PhD and Dr Hab. in Linguistics, University of Lodz, Poland). Her research areas include natural language analysis in the interface of semantics and pragmatics, with a focus on speech acts and actions, legal language, free speech and hate speech, and sociolinguistics issues such as varieties of English. She authored two monographs, over ten edited volumes, and over 50 articles and chapters. The monographs include: *Language, law and speech acts: Pragmatic meaning in English legal texts* (2007, Lodz: WSSM) and *From speech acts to speech actions* (2013, Lodz: University of Lodz Press). Selected papers were focused on legal speech acts, the function of the legal 'shall', vagueness and ambiguity in the law. She acted as Investigator in the project financed by the National Science Centre entitled *Metaphor as a mechanism to understand the language of law and legal language, and to experience law* (quoting examples of Polish legal language), no. DEC-2013/09/B/HS5/02529. Currently, she is head of the Department of English Language and Applied Linguistics at the University of Lodz, Poland, and editor-in-chief of *Research in Language*, *an International Journal of Linguistics*.

Sylwia Wojtczak is a Professor of Law and head of the Department of Law Policy at the University of Lodz, Poland. Her main research interests are legal axiology, the problem of legal cognition and reasoning and the influence of computer technologies on legal culture. She authored *The metaphorical engine of legal reasoning and legal interpretation* (2017) and co-authored *Metafory konceptualne jako narzedzia rozumowania i poznania prawniczego* [*Conceptual metaphors as instruments of legal reasoning and cognizing of the law*] (2017) with Iwona Witczak-Plisiecka and Rafal Augustyn. She was Principal Investigator in the project financed by the National Science Centre entitled *Metaphor as a mechanism to understand the language of law and legal language and to experience law* (quoting examples of Polish legal language, no. DEC-2013/09/B/HS5/02529. In 2010-2013 she was Investigator in project no. NN 110239429 financed by the National Science Centre, coordinated by prof. Dr hab. Krzysztof Palecki (UJ) and entitled *Neutralization of Values in Law*. Now she is Investigator in the project *Civil Law and Artificial Intelligence* supervised by dr hab. Pawel Ksiezak, prof. U.L. and financed by the National Science Centre, no. UMO-2018/29/B/HS5/00421.