MARCELO DASCAL AND JERZY WRÓBLEWSKI

TRANSPARENCY AND DOUBT: UNDERSTANDING AND INTERPRETATION IN PRAGMATICS AND IN LAW[1]

1. OVERVIEW

In legal practice and often also in legal theory, issues of interpretation of a law, a precedent, and even an indictment and a sentence, loom large. Sometimes such issues hinge on technical legal terms, but more often they have to do with the way certain expressions of everyday language are or should be understood in a certain context of use. Pragmatics is that part of the theory of language that undertakes – among other things[2] – to account for the principles of language use that allow for users of a language to understand each other, i.e., to interpret appropriately, in the context of use, utterances or texts. In this interdisciplinary paper, we attempt to show how a pragmatically oriented conception of interpretation in law, which makes use of some of the insights of pragmatics, can offer a fruitful solution to some traditional puzzles.

At least three principal meanings of the term 'interpretation' may be distinguished (Wróblewski 1983a: 72 f.; 1985a: 21 f.):

(a) 'Interpretation' *sensu largissimo* [SL-interpretation] means any understanding of any object as an object of culture, through the ascription to its material substratum of a meaning, a sense, or a value. This concept is, philosophically, one of the bases for claiming that the

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[1] Correspondence on this paper and offprint requests should be addressed to Professor Marcelo Dascal, Department of Philosophy, Tel Aviv University, 69978 Tel Aviv, Israel. We thank Dennis Kurzon for helpful remarks on an early draft.

[2] This proviso is necessary because pragmatics deals not only with communicative or social uses of language, but also with those uses of language that are, in some sense, purely private (e.g., in reasoning, problem-solving, dreaming, etc.). It can be thus subdivided into 'sociopragmatics' and 'psychopragmatics'. For details on this proposed subdivision of pragmatics and what it entails, see Dascal 1983, 1985, 1987. In this paper we will be concerned only with sociopragmatics.

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Kultur- or *Geisteswissenschaften*, which deal with such 'meaningful' objects, ought to be methodologically distinguished from the natural sciences (cf. Rickert 1911). Textual and philosophical hermeneutics usually draw attention to this kind of understanding or interpretation (cf. Gadamer 1976; Dascal, [forthcoming b]).

(b) 'Interpretation' *sensu largo* [L-interpretation] means an ascription of meaning to a sign treated as belonging to a certain language and as being used in accordance to the rules of that language and to accepted communicative practices. To understand a linguistic sign means, thus, to L-interpret it. Semantics and, as will be argued below, also pragmatics are concerned with interpretation in this sense.

(c) 'Interpretation' *sensu stricto* [S-interpretation] means an ascription of meaning to a linguistic sign in the case its meaning is doubtful in a communicative situation, i.e., in the case its 'direct understanding' is not sufficient for the communicative purpose at hand. Unlike L-interpretation, S-interpretation refers, thus, only to 'problematic' understanding, due to such phenomena as obscurity, ambiguity, metaphor, implicitness, indirectness, change of meaning, etc. Legal practice often faces such problems, and consequently there is a tendency to view this sense of 'interpretation' as the only relevant one for law. Pragmatics, in its narrow sense, has also tended to focus exclusively on 'problematic' understanding, i.e., on those cases where semantics alone is insufficient to determine the meaning of a linguistic sign, and contextual information must be taken into account.

It is evident that the use of the term 'interpretation' in any of the above senses and particularly in the last one implies certain assumptions about the notion of 'clarity' of meaning. This is the reason why we will approach the issue by attempting to clarify such assumptions. We will first (section 2) analyze the presuppositions underlying the classical conception of legal interpretation, traditionally expressed in terms of the maxims *clara non sunt interpretanda* and *interpretatio cessat in claris*, and explore their connections with classical epistemology and philosophy of language. Such a model will then be criticized (section 3). After a brief description of the relevant principles of pragmatics (section 4), we will present a pragmatically oriented view of legal inter-

pretation providing a defensible reading of the traditional maxims (section 5).

2. *CLARITAS* IN THE LEGAL DOCTRINE OF INTERPRETATION AND IN THE PHILOSOPHICAL TRADITION

The traditional use of the term 'interpretation' in legal discourse is restricted to S-interpretation. This is not only the case in traditional theory of interpretation, but also in the deep rooted paradigm of legal dogmatics constructed by the German historical school and legal positivism (cf. Aarnio 1983, chap. 8; Aarnio 1984; Zuleta Puceiro 1981, chaps. 1–3).

The object of S-interpretation is the legal text of an enacted legal act. The standard example is a statute enacted by parliament. The meaning of this text is either clear or not. If it is clear then there is no need to interpret it, because it is understood in a direct way. This direct understanding is not explained, but simply claimed to obtain. If the text, however, is not clear then one should determine the meaning by elimination of doubt. It is assumed that the text has a definite meaning, and the task of interpretation is to discover it.

The meaning of a legal text is usually described as the will or will-content [*voluntas legis*] of the historical law-maker.[3] Therefore, the search for the meaning in question ought to use all means relevant for reconstructing that will. On this view, however, the law-maker is not only the alleged historical agent, but also a normative construct, for he is endowed with the properties of a 'rational agent'. This means that the interpretation must follow a 'principle of charity' (cf. Dascal 1983, 121 ff.) i.e., it must ascribe to the text that meaning that maximizes its 'rationality'. For example, an interpretation that could be shown to be

[3] Dennis Kurzon reminds us that the term 'law-maker' refers, in the Continental system, to the parliament, while in the Anglo-American system it may also include the court. In the latter case, the judge, by interpreting laws and precedents, may be laying down the law. Yet, in so doing, the judge will be establishing a new legal text whose meaning will have to be determined in later court decisions.

in conflict with other, well established, aims and values of the law-maker should be rejected on the grounds that, if accepted, it would amount to attributing to the law-maker an inconsistency, i.e., a form of irrationality.

The distinction between the situation of direct understanding, when the text is assumed to be clear, and that of doubtful texts which require S-interpretation is based on the properties of the legal text itself. That is to say, it is taken to be an objective fact, which has to be cognized by the lawyer. In other words, there is an objective quality of the text, namely 'clarity', whose cognition is the pre-condition for deciding whether it is necessary to engage in S-interpretation or not.[4] The two historical maxims *clara non sun interpretanda* and *interpretatio cessat in claris* are the hallmark of this traditional doctrine.

Philosophically, this doctrine is related to the Cartesian epistemological principle of clear and distinct ideas. For Descartes, these ideas are such that they function as an absolute Archimedean point for all knowledge because, once intuited, their truth is immediately given and they are in no need for further explication. Empiricists (e.g., Locke), though denying the innateness Descartes attributes at least to some of these ideas, also assumed the existence of unquestionably clear and certain ideas, namely those that originate directly in sense impressions. On both rationalist and empiricist views, the meaning of properly used linguistic expressions can be traced back to such clear ideas, and those linguistic expressions that refer directly to them are immediately

[4] The notion of 'clarity' plays a role also in the theory of elegance in law [*elegantia juris*], which is not entirely rhetorical, as its name might suggest, but involves also logical aspects. See Stein 1961, quoted in Giuliani 1985: 9. We are setting aside those cases in which some form of 'unclarity' (e.g., vagueness or ambiguity) is *purposively* used in a legal text. In such cases, the legislature deliberately lets the court interpret the text according to the circumstances. This may either correspond to genuine unclarity (i.e., the legislature either doesn't know how or doesn't want to make the text explicit) or else to the assumption that the circumstances will easily supply the 'missing' interpretive data. Pragmatically, the latter case amounts to the stage of determining 'utterance meaning' by means of co-textual and contextual information whose nature is indicated by the text itself (see below), and hence does not involve any real unclarity or interpretation problem.

understood and require neither definition nor 'interpretation'. This assumption is clearly expressed by the influential Port Royal Logic:

> ...lorsque l'idée que les hommes ont de quelque chose est distincte, et que tous ceux qui entendent une langue forment la même idée en entendant prononcer un mot, il seroit inutile de le définir, puisqu'on a déja la fin de la définition, qui est que le mot soit attaché a une idée claire et distincte. C'est ce qui arrive dans les choses fort simples dont tous les hommes ont naturellement la même idée, de sorte que les mots par lesquels on les signifie sont entendus de la même sorte par tous ceux qui s'en servent... Tels sont les mots d'*être*, de *pensée*, d'*étendue*, d'*égalité*, de *durée*, ou de *temps*, et autres semblables. (Arnauld and Nicole 1683, p. 125)

On this view confusion may arise by virtue of the 'accessory' ideas men tend to add to the 'principal signification' of a word. These include emotive connotations (e.g., the word *mentir* excites in the mind the ideas of disdain and insult), situational specifications of a deictic (e.g., *hoc* exciting in the mind, in one context, the idea of bread and in another that of the body of Christ), figurative speech (e.g., metaphor), etc. Since such accessory ideas may vary individually, historically, and situationally, and since one is not always aware of the impact they have upon the mind, their presence is likely to produce unwarranted misunderstanding, disagreement and dispute.[5] Only then is interpretation, i.e., S-interpretation, required.

Arnauld and Nicole have considerably refined this general semantico-pragmatic framework on the occasion of its application to a famous theological-juridicial dispute.[6] Since 1665 ecclesiastical authorities demanded that all members of the clergy sign a document condemning Jansenius's doctrine, as part of an attempt to curb Port Royal's independent stance. Arnauld and Nicole observed that the proposition 'the doctrine (the meaning) of Jansenius is heretical' involves two propositions, one 'de fait' and the other 'de droit'. The latter establishes that a certain doctrine is heretical, which the former attributes to Jansenius. Signing the document means declaring one's belief in the

[5] See Arnauld and Nicole 1683, part I, chaps. 14–15. For an essentially similar approach to 'emotive meaning', see Stevenson 1944.

[6] For a detailed analysis of the semantico-pragmatic aspects of this dispute, see Dominicy 1984: 121–131.

truth of both, unless an explicit restriction is appended to it indicating that the signer accepts the 'de droit' proposition (which depends upon faith alone) on the Church's authority, but withholds judgment on the 'de fait' proposition, on which the Church cannot command assent, because it is not a matter of faith but of objective fact. The proposal of Arnauld and Nicole to append such an explicit restriction, at first accepted by the authorities, was later on rejected. Throughout the several-decades-long debate, two major problems of interpretation were at stake: (a) what is the 'meaning' of the signature itself, and (b) can one discern in Jansenius's writings the (heretical) doctrine attributed to him. Both Arnauld and Nicole and their opponents assume that both questions have definite answers, i.e., that there is a clear meaning that can be objectively attributed to both texts. The need for interpretation arises due to the disagreement as to what that meaning is, but the problem can be solved by applying the 'correct' interpretative procedure. The fact that no such agreement was reached, however, suggests that contextual factors such as ideological and political positions of the contenders influence interpretation no less than purely textual factors, and may prevent an 'objective' outcome of the process of interpretation.

Leibniz, who was in general a critic of Cartesianism, adopted on this matter a similar position, though on different grounds. He defined the clarity of a sentence as follows: "*Clara* est oratio cuius omnium vocabulorum significationes notae sunt, tantum attendenti" (Leibniz A: 6, 2, 408–9). Interpretation, on the other hand, is defined as making clear that which is not sufficiently clear in a sentence: "*Docere* est serentem facere. *Interpretari* est docere circa orationem seu circa orationem non satis cognitum facere cognitum".[7] Leibniz rejected Cartesian intuitionism, and sought to develop formal means – such as his well-known attempts to create a Universal Characteristic – to ensure clarity and

[7] These are the opening sentences of *De Interpretatione*, the first book of Leibniz's most comprehensive text on language, the *De Etymologia*. This text, written at the end of his life, has not been so far published. The quotation is from the manuscript in the Leibniz Archive in the Niedersächsischen Landesbibliothek Hannover (LH, IV, 7, B, 3, p. 28).

precision. He believed that, once formulated in the unambiguous characters of the Universal Characteristic, the truth of any statement would become a matter of calculation, leaving no room for further dispute. Certainty, defined by him as the clarity of truth ("certitudo est claritas veritatis" – Leibniz A: 6, 2, 493) would thus be achieved. In this sense, the Characteristic would function as the ultimate "judge of controversies". It should be complemented by an objective method of interpretation: an impartial judge, taking no sides in a dispute, would objectively report the arguments of each party, appropriately 'developing' their "expressions embarassées et ambiguës", and keeping "un certain ordre qui portera avec lui la clarté et l'évidence"; such a report would then serve as the basis for a decision that would be in fact obvious for any "homme de bon sens" (Leibniz A: 4, 3, 204–212). According to Leibniz, the application of these methods to judicial decisions would have to be done in such a way as not to delay such decisions indefinitely, for *brevitas* is no lesser a requirement of justice than *certitudo* (Leibniz A: 1, 1, 104). He believed, however, that with the help of a reform that would systematize the body of the Law, interpretation and decision – using the methods he outlined – could achieve certainty without sacrificing brevity (cf. Dascal 1978: 155 ff.).

3. CRITICISM OF THE TRADITIONAL DOCTRINE

This traditional doctrine of clarity and S-interpretation is criticized in many contemporary theories of legal interpretation.

The naive construction of the meaning of a legal text as the will of the historical and/or rational law-maker is rejected as obviously inadequate. Indeed, it does not demand any sophisticated criticism to demonstrate that the meaning in this sense is neither observable or recoverable by empirical linguistic procedures nor defensible as a convincing theoretical construct. The positivistic debate on the so-called 'subjective' and 'objective' theories of interpretation reveals the ambiguities inherent in this doctrine.[8] The blind alley of trying to deter-

[8] For the classical formulation of the doctrine, "Wahre Interpretation ist treue Darstellung des gesetzgeberischen Gedankens", see von Savigny 1840: vol. 1, 206. According to the standard version of the 'subjectivist theory', one takes for granted

mine the will of a 'hundred-headed parliament' as a psychological past fact is patent. We would like to focus, rather, on more recent and specific forms of criticism.

First, some authors state flatly that every legal text is interpreted (e.g., van der Kerchove 1976, 1986; Tarello 1980, chap. 1.5). This cannot be an empirical generalization, since at least in some legal practice it is evident that the text is not interpreted but rather assumed to be clear. One might construe that statement, then, as a linguistic convention: by employing the notion of L-interpretation, the thesis that each legal text, just as any other piece of discourse, is L-interpreted becomes an analytical statement. But in fact, such a statement is based on a persuasive argument which stresses the context-dependency of the meaning of any text, so that its alleged clarity is not a property of the text itself, but rather of the pair [text, context of interpretation (or application)].

Second, it is possible to demonstrate that the acknowledgment of the clarity of a text or of a doubt calling for S-interpretation is not itself based on the description of the text, but depends on evaluations by the decision-maker. That is to say, one can empirically show that, say, a court determining what is clear and what demands interpretation is not in fact relying upon inherent features of the legal text alone. There are many sources of doubt (see section 4), and in practice the decision that the text is not clear is based on an evaluation of the acceptance of the results of its use in its alleged 'direct meaning' (cf. van der Kerchove, 1976). The specific feature of the context-dependency of the reading of a text here stressed is the role played by the interpreter's background assumptions, values, aims, etc. — a factor strongly stressed by philosophical hermeneutics (cf. Gadamer, 1976).

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that the meaning of a legal text is the meaning-content of the will of the historical law-maker. According to the standard version of the 'objectivist theory', the meaning is detached from the law-maker and changes depending on the co-text and context of the interpreted rule. A possible terminological confusion arises from the fact that, in the discussion of these theories it is often argued that the former conceives of meaning as something objectively given, while the latter makes it dependent upon subjective choices by the interpreter of the legal text. For the copious literature on the subject see Wróblewski 1959: 159—169, especially notes 26, 30, 32, 38, 41, 42, 44.

A recent ruling by the U.S. Supreme Court may serve to illustrate the former two points. The court had formerly interpreted the Immigration and Nationality Act as requiring that aliens seeking asylum in the U.S. show a 'clear probability' that they will be persecuted in their home country. Since the Immigration and Naturalization Service in turn persisted in interpreting this requirement rather stringently, the court now decided that refugees need only prove a 'well-founded fear' of persecution. One of the judges accused the INS of 'seemingly purposeful blindness' in its refusal to see that Congress had intended a less stringent standard of proof. Yet, another judge pointed out that it was reasonable for the INS to find no practical distinction between 'clear probability' and 'well-founded fear' (cf. TIME Magazine, March 23, 1987: p. 28). Clearly, the attempt to clarify the meaning of the Act was unlikely to determine in an univocal way its application by a government agency, presumably motivated by concerns other than those guiding the Supreme Court.

Third, there is an argument to the effect that the traditional doctrine of clarity assumes legal language and law to have certain properties they do not in fact possess. These assumptions include (van der Kerchove 1986, 223 ff.): (a) there are legal texts whose meaning is by itself clear or evident; (b) legal terms not defined by the law-maker have in principle the same direct meaning – clear or ambiguous – they have in everyday language; (c) the lack of clarity is a result either of the ambiguity or of the indeterminacy of the usual meaning of a term or syntactical construction; (d) clarity of the rule is the general principle or at least the ideal to which all law-making should strive; (e) the acknowledgment of the clarity or obscurity of a text does not require, in itself, any interpretation.

The question is whether these assumptions are necessary to make sense of any use of the notion of clarity in legal interpretation. Our contention is that, though these assumptions are definitory of the traditional doctrine of clarity – and hence the arguments above undermine such a doctrine – they are not valid in general for *all* uses of this notion, especially not for the pragmatically-oriented doctrine we outline below. If clarity is treated as a pragmatic feature of a legal text used in a concrete situation rather than as an absolute property of

the text itself, it follows that: assumptions (a) and (c) are not necessary; assumption (d) becomes irrelevant in the context of interpretation, since it has to do with the theory of law-making and cannot be assumed to be fulfilled in existing legal texts (cf. Wróblewski, 1985b); assumption (b) cannot be taken at face value, because linguistic indefiniteness *must* be resolved in the context of application of a law (recall the Leibnizian requirement of *brevitas*), i.e., normative (or ideological) 'directives for legal interpretation' must be able to supplement common linguistic practices of interpretation (Wróblewski, 1972; 1983a: 18 ff., 46 ff.; 1985a: chap. 6); finally, assumption (e), which is implied by the adoption of the notion of S-interpretation, is itself relativized to context, acquiring thus a pragmatic meaning.

4. PRAGMATIC INTERPRETATION

The traditional doctrine of clarity and interpretation criticized above is in fact one example of a once widespread 'naive' conception of discourse understanding which either entirely overlooks pragmatics (being exclusively semantic) or else conceives of the role of pragmatics in a very narrow way. We have already seen some of the classical formulations of this conception. Its contemporary versions include, among other variations, the logical positivists' notion of an entirely explicit, unambiguous, and precise 'language of science' in which all meaningful statements about the world could in principle be formulated and univocally understood, and Popper's belief that texts have objective contents which belong to a Platonic "third world" where psychological problems of interpretation do not arise. The common core of this view is the assumption that the context-dependency of sentences is an accidental feature of only some sentences – namely those that Quine calls 'occasional sentences'. In principle, it is believed, such sentences can be transformed into 'eternal sentences' (i.e., sentences which have one and only one 'meaning' and, consequently, a fixed truth value) by replacing their 'indexical' or 'deictic' expressions (e.g., *here, today, I*, etc.) by explicit definite descriptions or names, thus removing any indefiniteness or incompleteness of meaning.

At first, pragmatics was narrowly conceived as that part of the

theory of meaning that would complement semantics in the sense of taking into account the relevant contextual information that would allow to perform the above described 'completion' or 'specification' of incomplete sentence-meanings. Let us call the meaning thus 'completed' the 'utterance-meaning'. It was soon realized, however, that (a) not only deictics are responsible for 'incompleteness' of sentence-meaning and (b) even the completed utterance-meanings may not correspond to what is actually conveyed by an utterance in a given communicative situation. Examples of (a) are the implicit comparatives such as *tall* in *John is tall*, whose interpretation implies a reference to a standard or average that has to be gathered from the context. Examples of (b) are the so-called conversational implicatures (e.g., *I have a lot of work to do today* meaning, in a given context, 'The interview is over').[9]

Given the existence of cases such as (b), it became evident that for any given utterance-meaning it is necessary to determine whether it corresponds or not to the 'speaker's-meaning'. Such a determination depends upon context. But context here intervenes in a way which is quite different from its role in 'completing' sentence-meaning to yield an utterance-meaning. For, whereas its completion function is prompted by a 'gap' (or free variable) in the sentence-meaning, which indicates the kind of contextual information to be sought, there is no incompleteness or gap in the utterance-meaning that triggers a search for a speaker's-meaning possibly different from it. It is rather an eventual 'mismatch' between the 'computed' utterance-meaning and some contextual factor that triggers such a search (in the example above, this may be the unexpectedness or irrelevance *vis-a-vis* the current conversation of the remark about having a lot of work to do). Pragmatics turned its attention to the mechanisms of 'indirectness', i.e., the ways in which speaker's-meanings differing from the ostensive utterance-meanings could nevertheless be reliably conveyed and understood. Grice's well-known system of conversational maxims (see Dascal, 1977, 1983, passim) is one such mechanism, eventually general-

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[9] For another example of a conversational implicature see note 10 below. For other examples of (b) and (a) see Dascal 1983: passim.

izable to written controversies (see Dascal [forthcoming a]) and texts in general (see Dascal and Weizman, 1987).

Yet, pragmatic interpretation cannot be restricted to working out indirect meaning. For, unless at least a summary contextual check of appropriateness is made, one can never know whether the utterance-meaning corresponds to the speaker's-meaning. Making such a check amounts to asking whether there are reasons *not* to accept the utterance-meaning at face value. If the answer is 'No', one can say that the utterance is 'transparent'. If it is 'Yes', a heuristic for generating and checking alternative interpretations is put to work until a 'No' answer is reached for a given interpretative hypothesis which is then taken to be the speaker's-meaning of the utterance in that context. Though fallible in principle, since it is not algorithmic but heuristic, not deductive (nor inductive) but abductive, this process of interpretation is in general fairly reliable and convergent.

Pragmatic interpretation is, thus, always required, even in the case of transparency. It corresponds, in a sense, to the notion of L-interpretation introduced above. In this framework, the notions of clarity and S-interpretation can be reconstructed as follows: clarity means 'transparency', i.e., endorsement of the 'computed' utterance-meaning or, if you wish, straightforward L-interpretation, while S-interpretation refers to a lack of transparency (a 'yes' answer to the checking question) that leads to a search for an 'indirect' meaning of the utterance or text.

The notion of 'speaker's meaning', which is central for the pragmatics of conversation, may cause some difficulty when applied to certain kinds of written texts. It can be argued that the purpose of interpreting, say, a literary or legal text, is not primarily to determine what the producer of the text intended to convey. Thus, one may point out that what the authors of the U.S. constitution meant by 'equal protection' is at most of historical interest, while what matters is how the present courts interpret these terms. The fact remains, however, that the courts seek an 'objective' reading of the legal text, which is not necessarily identical to its literal meaning, nor can be obtained by the mere 'filling in of gaps' characteristic of the determination of utterance meaning. It is this unique (in a given context) 'objective' meaning

of the text that corresponds to the role played in the pragmatics of conversation by the notion of 'speaker's meaning'. Accordingly, in the pragmatic account of the interpretation of certain kinds of text, the 'authors' meaning' need not have a central position, and can be viewed merely as one of the contextual factors in the interpretation process. The changes required by this modification, however, can be accommodated – as indicated above – in the general pragmatic framework here sketched (see also Dascal and Weizman, 1987).

5. *INTERPRETATIO CESSAT IN CLARIS*: A PRAGMATICALLY ORIENTED THEORY OF LEGAL INTERPRETATION

In legal practice, when the legal text to be applied is not clear enough, one engages in S-interpretation. Two relevant facts are beyond dispute: (a) not all applied legal texts are S-interpreted; and (b) sometimes the alleged clarity of the text is used as an argument for its direct understanding and against the need of S-interpretation. These two bona fide facts justify the use of the concepts of S-interpretation and clarity in the description and explanation of legal practice.

There are, thus, two types of situations (Makkonen, 1965, #5; Gottlieb, 1968, chap. 7; Wróblewski, 1983a: 33–38). First, the 'situation of isomorphy': the text fits the case under consideration directly and unproblematically, as a glove to a hand. This corresponds, in pragmatic terms, to its being (L-) interpreted 'transparently', i.e., with no need to look for a meaning other than its semantically computed utterance meaning. Second, the 'situation of (S-)interpretation': there are relevant and reasonable doubts about the applicability of the text to the case at hand, expressed by the claim that *lex non clara est*. Pragmatically, this means that the transparent reading of the text is contextually inadequate, and a search for an indirect or alternative meaning is thereby triggered.

A further undisputed fact is that the process of S-interpretation stops somewhere, rather than being carried on ad infinitum. The practical requirement of brevity is one reason for that. In addition, at some point of the process an interpretation is produced that *does* fit the case at hand, i.e., that is no longer contextually inadequate. Such an inter-

pretation is then 'clear enough' in so far as the particular use of the text is concerned, and no further search is reasonably needed. This is the import of the maxim *interpretatio cessat in claris*. It can be understood as both describing the S-interpretation process and as a second-order directive for the practice of S-interpretation, which calls for the process to stop if (reasonable) clarity is achieved (Wróblewski 1983a, 44 ff.; 1985a, 36, 52 ff.).

The pragmatization of the notion of clarity outlined above permits the sound use of this notion while maintaining the criticism of the traditional doctrine. In order to be brought to full fruition, it must be combined with a conception of the communicative acts performed in the use of legal texts formulated in a legal fuzzy language.

By 'communicative act' we understand here the use of a legal text in two types of situations. In the situation of an application of a law, the decision-maker uses the text as a normative basis for his decision, and, if the text is not clear for the case at hand, he makes an operative S-interpretation (Ferrajoli 1966, Wróblewski 1959, chap. 3; 1985a, chap. 4). Operative S-interpretation is part of an application of the law, and, as such, corresponds – to an extent – to the classical and important problem of adjudication (cf. Golding 1975, 111–113; Unger 1975, 80, 88–92). In the situation of systematization of the law in force (Aarnio 1977, chap. 3.4; 1979, chap. 4.2; 1983, chap. 8), which is the leading task of legal dogmatics (conceived here as *pars pro toto* of a legal science), doubts could occur concerning the meaning of the systematized legal texts, and then we have to do with a doctrinal S-interpretation. Some authors claim that SL-interpretation is involved in doctrinal interpretation, whereas S-interpretation is involved in operative interpretation (Plecszka and Gizbert-Studnicki 1984). But there is no need to posit different processes or kinds of interpretation for the two cases. The difference can be explained by the fact that the doubts which trigger the process of interpretation arise out of 'mismatches' between the direct reading of the text and different levels or kinds of context: in one case, the broad culturally determined background; in the other, the specific situation of the particular case to which the law is being applied.[10]

In what follows we will use as a standard example the operative

S-interpretation, discussing the fuzziness of the legal language with respect to this case. Doctrinal S-interpretation, as argued above, does not involve a different process, but differs only in that it has to do with a different kind of context, namely not facts but normative constructs and the presupposed properties of the legal system. This will be taken into account below, in our discussion of the 'systemic context'.

A legal text is formulated in legal language, which is conceived as a species or register of natural everyday language.[11] For the present purposes, two features of natural language should be recalled, namely fuzziness and context-dependency. Fuzziness is explained below in the particular case of the referential semantics dealing with names and/or descriptions found in the legal language used in the situation of application of the law. We accept the typological differentiation between fuzzy, hard, and soft languages according to their referential semantic and pragmatic properties (Wróblewski 1983b, 1985c). Context-dependency, already discussed above, is one of the features of the legal language which can either restrict or enhance the doubts that can arise in concrete situations and lead to an interpretative process.

Legal texts are formulated in a legal fuzzy language. Let us ask whether a portion of reality, x, belongs or does not belong to a class A determined by a name or description in a language L. Languages are divided in three types depending on the way in which the statement x *belongs to* A (symbolically $x \in A$) is asserted or denied. It is assumed that the user of L has a perfect linguistic competence and knows all the features of x relevant for stating the relationship between x and A.

A hard language is a language in which, for every x, it is true that either x belongs to A or that it is not the case that x belongs to A:

[1] $(x)((x \in A) \vee -(x \in A))$

A soft language is a language in which, for every x, it is not true that either x belongs to A or that it is not the case that x belongs to A:

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[10] See Dascal and Weizman 1987 for a typology of contexts and for the notion of 'mismatch'.

[11] See Wróblewski 1985c and references therein. The most up-to-date description is in Gizbert Studnicki 1986: chaps. 2, 4.

[2] $(x) \sim ((x \in A) \vee -(x \in A))$

A fuzzy language is a language in which there are x for which [1] is true and there are x for which [2] is true:

[3] $(\exists x)((x \in A) \vee \sim (x \in A)) \wedge (\exists x) \sim ((x \in A) \vee \sim (x \in A))$

The user of a hard language is always in a position to decide whether x belongs to A or not, in the ideal conditions assumed above. This is the case of an artificial language in which all names have a sufficiently precise meaning to make such decisions concerning the description of any x (within their scope) possible. The user of a soft language cannot make such decisions. It is as if he has to create (a substantial part of) the meaning of its terms from case to case. According to some theories of art, the 'language of art' is of this kind in that every interpretation creates a new meaning (cf. Gadamer 1976).

The user of a fuzzy language faces three types of situation when applying the linguistic category A to a given x. He may state that x belongs to A [positive core reference], or that x does not belong to A [negative core reference], or he may be in no position to decide whether x belongs to A or not and no improvement of his linguistic competence or his knowledge of the world could change this undecidability [the penumbra reference].

Both everyday language and legal language are fuzzy in the above sense. This means that there are cases in which the combination of linguistic and factual knowledge is such that pragmatically there is no reasonable doubt that x belongs to A or that x does not belong to A, as well as cases in which such a question is undecidable by any amount of combined linguistic and factual knowledge. In the former case, the decision can be either 'transparent' (the direct meaning of A fits the standard description of x) or 'indirect' (an alternative, appropriate meaning of A and/or a redescription of x are found by means of the pragmatic maxims of interpretation). Notice that indirectness does not entail that the decision, once reached, is more doubtful or problematic than in transparency.[12] In the fuzzy case, on the other hand, a decision

[12] In the case of the State of Israel against John Demianyuk (allegedly Ivan the Terrible of Treblinka), one of the defense attorneys was called to order and required

as to whether x should be included in A or not cannot be reached by applying pragmatic maxims alone, and it is therefore a genuine act of creative interpretation without, however, being an arbitrary stipulation.

What complicates the situation is the fact that fuzziness can strike anywhere. One cannot decide *a priori* whether a term is fuzzy or not, because unlike the ideal situation assumed above, one cannot in fact foresee all the features of reality that may turn out to be relevant to the application of a term in various situations. The term *man* in legal language, for example, has not been traditionally considered fuzzy (assuming that the special case of a fetus or *nasciturus* was explicitly addressed by legal rules). Fuzziness, however, appeared with the technological capability of keeping human organisms 'alive' with no cerebral activity. Is this organism a 'man' or not? Is the turning-off of a piece of machinery that feeds 'him' a case of taking away a man's 'life' or not? The problem is clearly not just a problem of interpretation (certainly not of S-interpretation, though one could argue that it is a good example of SL-interpretation), but of decision, guided by ethical, cultural, and other considerations. It seems that legal language's typical fuzziness, related to S-interpretation, is a peculiarity of the adjudication process that employs such a language, and involves specific pragmatic constraints, not generally shared by other kinds and uses of language.

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to apologize for suggesting that the trial was a mere propaganda affair. What prompted this reaction by the court was his objection to the prosecutor's insistence that one of the witnesses describe in detail the atrocities generally committed in Treblinka. His argument was that the fact that such atrocities occurred was not in dispute, and remarked that "...unless this [insistence on detailed description] is done for other purposes, the same purpose for which the prosecutor rented this hall for the trial", to which he immediately added "It is clear to me that it was not the court that rented the hall". As his last remark indicates, he had clearly implied (indirectly) that some propaganda intention was involved in the trial, but wanted to make clear that he did not attribute such an intention to the court itself. When apologizing, he stressed that the court was indeed right in interpreting his remark as (potentially) contemptuous to the court. That is to say, the indirect meaning or 'suggestion', assigned to the attorney's remark *via* pragmatic maxims, could be – and actually was – seen as falling under the category of 'contempt', leaving no room for (reasonable) doubt.

Turning now to contextuality, let us try to single out some of the specific ways in which it affects the understanding of legal texts. The linguistic and meta-linguistic co-text (to use Bar-Hillel's term) of legal discourse has, in addition to the fuzziness mentioned above, several specific characteristics that may generate doubts triggering an interpretative process. These include, for example, the linguistic differentiation of kinds of legal 'speech-acts' (e.g., pleading, ruling, interrogating witnesses, indicting, sentencing, legislation, etc.) and 'genres' (laws, statutes, acts, procedural rules, precedents, etc.) whose proper recognition provides the indispensable meta-linguistic frame for correct understanding. A characterization of these and other meta-lingusitic co-textual factors is beyond the scope of this paper.

Among the contextual factors relevant for understanding a legal text, we want to single out the systemic and the functional contexts. A legal text which formulates legal rules is always understood in the context of the legal system to which these rules belong. It is usually assumed that such system has – or should have – the properties of consistency, coherence and eventually completeness and lack of redundancy.[13] Whenever the direct reading of a legal text does not conform to such assumed properties, one can say that the systemic context generates a doubt that prompts a search for a more appropriate interpretation. This is in line with the principle of charity mentioned above. Facing a statute that apparently is inconsistent with other rules of the system or that is obviously redundant, for example, one should ask whether the statute has been correctly interpreted.

A legal text in which legal rules are formulated is created and is operative in a functional context. This context is rather complex because its components are all those extra-linguistic and extra-systemic factors which are thought of as relevant for the understanding of the legal text (Wróblewski 1959, chap. 7; 1983a, 43 ff.; 1985a, 46 ff., 50 ff.). The usually acknowledged components are the purposes of particular normative acts and extra-legal rules and evaluations (e.g. stemming

[13] On the systemic context in legal interpretation, see Wróblewski 1959: chap. 6; 1983a: 41 ff.; 1985a: 38–45, 49 ff. The properties of the legal system have been extensively discussed in the literature on legal theory, which cannot be cited here.

from morality and policies). The controversial issue is whether the relevant functional context is that of the time of creation of the rule or of its application. The choice between these two alternatives is evidently dependent upon the ideology or normative theory of interpretation, namely, upon the choice of either a static or a dynamic cluster of values (Wróblewski 1959, chap. 4; 1983a, 19 ff., 89 ff.; 1985a, chap. 6). Mismatches can arise between the direct reading of the text and either one or both of these functional contexts, leading to functionally generated doubts, and to the corresponding need of interpretation.

The recognition of the different sources of doubt is indispensible for the interpretative process, for it is one of the pieces of information that guide the heuristic process of finding the interpretative hypothesis that overcomes the original mismatch (cf. Dascal 1977). Thus, a doubt originating in the systemic context must be solved in such a way that the new interpretation is not inconsistent or redundant with respect to the system.

6. CONCLUSION

In the light of the above discussion, it is clear that the notion of clarity we are talking about is a pragmatic concept. It is not an inherent quality of a legal text, but depends upon its use in a given communicative situation. The relevant aspects of such a situation include the users of the language, their epistemic and axiological attitudes, as well as the specific forms of context and co-text mentioned above. When used in different situations, the same text is sometimes (pragmatically) clear and sometimes doubtful. This pragmatic notion of clarity does not rest upon the assumptions necessary for the traditional doctrine of clarity. But with its help one can describe adequately the differences between the situations in which the direct understanding of a legal text is appropriate (situation of isomorphy) and those in which there are doubts generated by various factors (situation of interpretation), one of which may be an essential fuzziness requiring interpretation.

The pragmatic concept of clarity is the counterpart of the pragmatic concept of (reasonable) doubt. A text used in a concrete communicative act is clear if there are no (reasonable) doubts concerning its

meaning. In terms of the pragmatic model described in section 4, this means that a point in the L-interpretation process has been reached where the answer to the question 'Are there any reasons not to understand the text in this sense?' is 'No'. If this point is reached the first time such a question is asked, i.e., with regard to the semantically computed 'direct' meaning, then the text is not only clear, but transparent. If it is reached later on in the process, the originally opaque text has been rendered clear through its appropriate indirect interpretation.

The pragmatic concept of clarity permits a reinterpretation of the traditional maxims *interpretatio cessat in claris* and *clara non sunt interpretanda*[14] within the framework of a pragmatically oriented theory of legal interpretation which fits the description of the current use of legal language. Neither as a starting nor as an ending point of the understanding of a text is clarity an absolute given. Consequently, legal language has to tolerate the existence of interpretative doubt, even concerning the question of whether a text must or must not be interpreted.

The fact that the law must be operative in society calls for institutional means to solve legal controversies, and such means constrain the interpretative process. Ideally, such institutional means are supposed to be able to settle *ex auctoritate* the clarity issue in any given case. As it turns out, however, authoritative decisions never settle once and for all interpretative questions, since they can be themselves – later on or even in the very same case – subject to further interpretative doubts. Though the circle or spiral of interpretation never comes to an absolute resting point, it proceeds in a sufficiently ordered and convergent way to provide a sufficient – though not absolutely certain – basis for all practical purposes.

Dept. of Philosophy
Tel Aviv University
69978 Tel Aviv
Israel

Katedra Teorii Państwa i Prawa
Wydzial Prawai Administracji
Universytet Lódzki
Vl. Narutowicza 59a
90–131 Lódz, Poland

[14] Cf. Fosterus 1613: 395. Further specifications of the clarity thesis by this author include, among other things: "In claris interpretatio facienda quae convenit cum verbis" (p. 387), and "Interpretatio non est facienda, qua a verborum claritate dissentiat" (p. 418).

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