LINGUISTIC PERSPECTIVES ON LEGAL "CONSTRUCTION": THE ADVANTAGES OF A SOCIAL SEMIOTIC APPROACH

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Law is made through language, and the study of language is linguistics. Just as it is possible to distinguish between formal and functional linguistics, different approaches to the theorised modelling of language, it is also possible to distinguish between formal and functional approaches to the theorised modelling of language and law. Having described the major differences between these two approaches, the paper offers more detail on a specific functional model, that of systemic functional linguistics (SFL), in which meaning-making is understood in a social context ("language as social semiotic"). Using this model, and with reference to the writing of Twining and Miers[1] *on "the relativity of doubt" and the "unhappy interpreter", the paper then explores two questions of statutory interpretation: first, how can evident differences in interpretation of the relevance of a statute to the facts of a case arise? Secondly, exemplified from particular cases, how is it possible that those engaged in legal discourse construct the interpretation of the statute and/or the facts of the case to achieve the outcome they desire?*

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[1] WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES (London, Weidenfeld & Nicolson, 1976; 5th ed. Cambridge, C.U.P. 2012). Twining is the Emeritus Quain Professor of Jurisprudence at University College London; Miers is Emeritus Professor of the School of Law and Politics at Cardiff University.

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I. TWO APPROACHES TO THE STUDY OF LAW AND LANGUAGE

Law is made through language, and the study of language is linguistics. So, it is unsurprising that just as one can distinguish between formal and functional linguistics as different approaches to the theorised modelling of language, one can distinguish between formal and functional approaches to the theorised modelling of law. For an illustrative contrast, we can compare passages from two so-called handbooks, *The Oxford Handbook of Language and Law*[2], published in 2012, and *The Routledge Handbook of Forensic Linguistics*[3], published in 2010.

For *The Oxford Handbook of Language and Law,* the editors write that their introduction identifies "the issues that we believe can and should be addressed by the

[2] THE OXFORD HANDBOOK OF LANGUAGE AND LAW 6 (Lawrence M. Solan & Peter M. Tiersma eds., Oxford, O.U.P., 2012).
[3] THE ROUTLEDGE HANDBOOK OF FORENSIC LINGUISTICS 1 (Malcolm Coulthard & Alison Johnson eds., Taylor & Francis Group, 2010).

cross-disciplinary study of language and law". One issue so identified is that of "Interpreting Laws", and under that heading, we read the following passage:

> "Laws are written to be followed. The very fact that there is some doubt about their interpretation means that something has gone wrong. For the most part, understanding and describing the linguistic issues that generate legal interpretative problems is a task for linguists, psychologists and philosophers. With respect to the interpretation of statutes, the problems are largely conceptual. While all kinds of interpretative issues arise from time to time, the biggest problem is to decide whether statutory language should be construed broadly, within the outer boundaries of a word's set of meanings, or more narrowly, to include instances of ordinary usage. This, in turn, motivates a detailed exploration of the kinds of indeterminacy that arise in statutory cases, including vagueness, ambiguity, and the use of broad language that is not vague or ambiguous, but which is not sufficiently informative either."[4]

Compare, in contrast, the following passage from *The Routledge Handbook of Forensic Linguistics*, again taken from the editors' introduction:

> "When Halliday wrote 'language is as it is because of what it has to do' a functional theory was born, giving us a perspective of meaning-making that is grounded in social purpose and in the many varied and complex contexts in which we find ourselves. Context is dynamic and socially constructed through and by discourse – both in its linguistic and non-linguistic semiotic modes – and we know that the legal world is context-rich. […] [In this book] leading scholars from the disciplines of linguistics, law, criminology and sociology examine the ways that language has and is being used, who is using it, how they are writing, where they are speaking, why they are interacting in that way and what is being accomplished through that interaction."[5]

[4] *Supra* note 2.
[5] *Supra* note 3.

Immediately, we can note the different interdisciplinary turn of these two approaches: the first turns to "psychologists and philosophers", the second to "scholars in sociology". Both mention those in linguistics, but the linguists of each are unlikely to share the same theoretical assumptions about their discipline. The "Halliday" mentioned by the Routledge Handbook is M.A.K. Halliday, associated with the development of linguistic theory now known as systemic functional linguistics (SFL). The SFL model of "language as social semiotic" – assuming an explicit concern with the social function of language – is written into the Routledge introduction, but incompatible with the Oxford Handbook orientation. To explore this incompatibility – and before focusing particularly on "language and law" – it is necessary to elaborate a little on linguistic theory more generally.

II. LINGUISTIC THEORIES

In a brief historical account, Halliday describes two perspectives to the study of language, which he terms the "logical-philosophical" and the "ethnographic-descriptive". "They are not really impossible to reconcile with one another," he writes, "[b]ut from time to time in the history of linguistics they drift exaggeratedly apart […] and this is what happened in the mid-twentieth century, leading to an almost total breakdown of communication between the two." [6] Philosophical grammar tries to explain the system of language without regard to its use, to study the code in isolation from behaviour; this perspective has been dominant in the United States, most famously from the work of Noam Chomsky in the study of "competence" (the native-speaker's knowledge of "well-formed" sentences)[7]. Effectively a parallel discipline of "pragmatics" had to be

[6] M.A.K. HALLIDAY, *Language as Code and Language as Behaviour: a Systemic-functional Interpretation of the Nature and Ontogenesis of Dialogue*, in THE SEMIOTICS OF CULTURE AND LANGUAGE VOL.1: LANGUAGE AS SOCIAL SEMIOTIC, 4-5 (Robin Fawcett, M.A.K. Halliday, Sydney M. Lamb and Adam Makkai., eds., London, Frances Pinter, 1984).

[7] NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (MIT, 1965). Chomsky's "competence" is sometimes related to Ferdinand de Saussure's *la langue* (COURSE IN GENERAL LINGUISTICS, 1916). However, Paul Thibault argues that Saussure does not focus on code in isolation. Rather it is a misreading of Saussure's *la langue* (language system) and *parole* (individual language activity): "the crucial factor in Saussure's view is the role played by the language system. *Langue* is a transindividual social-semiological system. It is not a matter of external sensations or sensory inputs being 'associated' with ideas by internal neural activity. … No association between concept and acoustic image can take place in the absence of a socially shared system of semiological values. That is why Saussure shifts the explanatory basis away from his starting point – the individual act – to the 'social fact' of *langue*". PAUL THIBAULT, REREADING SAUSSURE 141 (London & New York, Routledge,1997).

established to study "performance", language in use, as, for example, in speech act theory.[8]

To illustrate this perspective on linguistics in an early formation, here is the opening paragraph of Chapter 2, "The Independence of Grammar", in Chomsky's 1957 publication, *Syntactic Structures*:

> "2.1 From now on, I will consider a *language* to be a set (finite or infinite) of sentences, each finite in length and constructed out of a finite set of elements. All natural languages in their spoken or written form are languages in this sense since each natural language has a finite number of phonemes (or letters in its alphabet), and each sentence is representable as a finite sequence of these phonemes (or letters), though there are infinitely many sentences. Similarly, the set of "sentences" of some formalized system of mathematics can be considered a language. The fundamental aim in the linguistic analysis of a language L is to separate the *grammatical* sequences: which are the sentences of L from the *ungrammatical* sequences which are not sentences of L and to study the structure of the grammatical sequences. The grammar of L will thus be a device that generates all of the grammatical sequences of L and none of the ungrammatical ones."[9]

Notice the verb "consider" in the opening statement – this is a theory emerging *a priori* from the theorist's mental attention. It will favour a cognitive focus; recall that the Oxford Handbook included psychologists among those relevant to the task of understanding "legal interpretative problems". Chomsky's text continues:

> "One way to test the adequacy of a grammar proposed for L is to determine whether or not the sequences that it generates are actually grammatical, i.e., acceptable to a native speaker, etc. We can take certain steps towards providing a behavioral criterion for grammaticalness so that this test of adequacy can be carried out. For the purposes of this discussion, however, suppose that we assume intuitive knowledge of the grammatical sentences of English and ask what sort

[8] See, for example, SPEECH ACT THEORY AND PRAGMATICS (John Searle, F. Kiefer & M. Bierwisch eds., Boston, D. Reidel, 1980).
[9] NOAM CHOMSKY, SYNTACTIC STRUCTURES 13 (MIT, 1957).

> of grammar will be able to do the job of producing these in some effective and illuminating way. We thus face a familiar task of explication of some intuitive concept – in this case, the concept "grammatical in English," and more generally, the concept "grammatical"."[10]

This approach to language analysis begins with the intuition of the theorist, but the empirical testing of these intuitions will still rely on a cognitive turn: what the native speaker knows as an individual. Thus, by definition, embodied practice in the social environment may be language, but it is not "a language". Further, as already intimated, in his later (1965) publication, *Aspects of the Theory of Syntax*, Chomsky introduces the terms competence and performance to distinguish between the native-speaker's knowledge of "well-formed" sentences and the speaker's use of language. It is competence which is to be the object of linguistic attention.

In contrast to the "formalist" approach just described, the "ethnographic-descriptive" perspective on the study of language tends to interpret language as a resource for practice. Whereas the philosophical perspective divorces the code of linguistics from the behaviour of pragmatics, the ethnographic perspective brings code and behaviour together in the one linguistics: code as "potential for behavior" and behavior as "an instance, an actualization" of that potential. The earlier proponents of this perspective, for the most part European, include the German-American anthropologists Franz Boas and Edward Sapir, the linguists of the Czechoslovakian Prague School, the Danish linguists Louis Hjemslev and Hans Jørgen Uldall, and, most relevant to SFL, the anthropologist Bronislaw Malinoski, who influenced Halliday's teacher J.R. Firth, founding linguistics professor of the University of London.[11]

[10] *Id.*

[11] From 1919 to 1928, Firth was a Professor of English at the University of Punjab at Lahore. His later academic appointments were in London, but he obviously retained his interest in India: between 1937 and 1938 Firth held a research fellowship in India, where his studies included the languages Gujarati and Telugu.

III. LINGUISTIC "ACTUALIZATION" IN THE LAW: LEGAL CONTEXTS AND TEXTS

In her article, "The language of the law", Yon Maley draws up the following table of various legal contexts (here called "discourse situations") and their associated texts.[12]

DISCOURSE SITUATION	DISCOURSE SITUATION	DISCOURSE SITUATION	DISCOURSE SITUATION
Sources of law; originating points of legal process	Pre-trial processes	Trial processes	Recording and law-making
legislature (legislature/subject)	police/video interview (authority/subject, witness)	court proceedings examination, cross-examination, re-ex (counsel/witness)	case reports (judge/defendant, judge/other judges)
regulations, by-laws (authority/subject)	pleadings (lawyer/lawyer)	intervention, rules and procedures (judge/counsel) (judge/official)	
precedents (judges/defendants)	consultation (lawyer/lawyer) (lawyer/client)	jury summation (judge/jury)	
wills, contracts etc. (two parties)	subpoena, jury summons (authority/subject, witness)	decision (judge/defendant)	
WRITTEN TEXTS LEGAL DISCOURSES	SPOKEN & WRITTEN TEXTS LEGAL DISCOURSES	SPOKEN TEXTS LEGAL DISCOURSES	WRITTEN TEXTS LEGAL DISCOURSES

[12] YON MALEY, *The language of the law* in LANGUAGE & THE LAW 16 (John Gibbons ed., London, Longman, 1994).

For this study on "linguistic perspectives on legal construction", I will focus on texts listed in the upper left and upper right corners of the table, that is, on text originating in the legislature (the upper left) and its recorded interpretation in judicial reports (the upper right) – in short, on statutory interpretation, a topic of increasing concern in legal theory.

IV. STATUTORY INTERPRETATION

A statute is an Act of Parliament, a written text of law. It is drafted initially as a Bill; its text is then debated, and perhaps amended, through the parliament. Finally, when passed by a majority in both the lower and upper houses of its legislature, the agreed text becomes written law.

In the Anglo tradition, statute law developed within the historical context of the common law, typically – and the traditional reference to cite here is *Heydon's Case* of 1584 – to remedy "a mischief": that is, some perceived problem in the common law.

> "And it was resolved by them, that for the sure and true interpretation of all statutes in general four things are to be discerned and considered:
> 1st. What was the common law before the making of the Act.
> 2nd. What was the mischief and defect for which the common law did not provide.
> 3rd. What remedy the Parliament hath resolved and
> 4th. The true reason of the remedy;
> and then the office of all the Judges is always to **make such construction** as shall suppress the mischief, and advance the remedy, and to **suppress subtle inventions and evasions** for continuance of the mischief, and to **add force and life** to the cure and remedy, according to the true intent of the makers of the Act."[13]

However, from the 19th century on, the balance of common law and statute law has changed dramatically. According to Felix Frankfurter, a Justice of the United States Supreme Court, speaking in 1947:

[13] Heydon's Case (1584) 3 Co Rep 7a at 7b; 76 ER 637 at 638.

> "... even as late as 1875 more than 40% of the controversies were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero."[14]

Further, in 2002, Michael Kirby, then a Justice of the High Court of Australia, but speaking in Britain, said:

> "... the construction of statutes is now, probably, the single most important aspect of legal and judicial work [...] The world of common law principle is in retreat [...] Where statute speaks [...] there is no escaping the duty to give meaning to its words. That is what I, and every other judge in the countries of the world that observe the rule of law, spend most of our time doing."[15]

Note that Kirby includes all jurisdictions "that observe the rule of law" in his generalisation, not only those in the common law tradition.

The interpretation of statutes provokes some anxiety; relevant comments in the context of particular cases are not hard to find as, for example, in the following principal judgment from the Supreme Court of Victoria (Australia) Court of Appeal:

> "[1] As so often in the work of an appellate court, this appeal turns on **a question of statutory interpretation.** […]
>
> [2] Interpreting statutory provisions requires **consideration of the legislative context** and – where relevant – the legislative history. But, as the High Court has repeatedly emphasized […], the task of statutory interpretation begins, and ends, **with the words which Parliament has used.** For it is through the statutory text that the legislature expresses, and communicates, its intention."[16]

Here legal interpretation appears to be in a bind in terms of differing linguistic theories: on the one hand, acknowledging the importance of context (the Charybdis of functionalism) and on the other, a necessary focus on the wording of the statute (the

[14] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 527 COLUMBIA L. REV. 47 (1947).
[15] Michael Kirby, *Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts*, 24 STATUTE LAW REVIEW 95, 96-97 (2003).
[16] Director of Public Prosecutions v. Walters (A Pseudonym) (2015) 49 VR 356, at 358.

Scylla of formalism). Overall, however, the court is in no doubt that the wording of the text is primary. Its judgment continues, quoting a prior judgment:

> "[3] As this court said in *Treasurer of Victoria v. Tabcorp Holdings Ltd*,[17] there are powerful reasons of principle for giving primacy to the statutory text. First, the separation of powers requires nothing less. Axiomatically, it is for the Parliament to legislate and for the courts to interpret. Close adherence to the text, and to the **natural and ordinary meaning of the words** used, avoids the twin dangers of a court "constructing its own idea of a desirable policy", or making 'some a priori assumption about its purpose'. (*emphasis added)*
>
> Secondly, giving the text its **natural and ordinary meaning** maximises the comprehensibility and accessibility of statute law and the accountability of the legislature." *(emphasis added)*

The phrase "natural and ordinary meaning" would be a red rag to Critical Discourse critics, such as Norman Fairclough in his work on language and power.[18] Critical discourse scholars strongly critique this kind of literal and decontextualized reading practice, in which the interpreter represses or is unaware of their social positioning as the interpreting subject.

In the common law, "the judge speaks", and in the earlier quote, Justice Kirby has whimsically personified the statute, "where statute speaks". However, the judicial demands are very different. In the common law tradition, the judge remembers previous similar cases, previous judgments – an interpretation of similarity or lack of similarity between particular sets of facts – which leads her/him by a kind of logical induction to a similar or dissimilar judgment. Tony Blackshield describes this as law as a process, evolving in time.[19]

In contrast, written statute law, from an idealist formalist perspective, works more by the logical reasoning of the syllogism, that is, by deduction, where the major premise, that is, the general statement, is the wording of the Act, and the minor premise is the particular circumstances of the case; the legal judgment should then inevitably follow.

[17] Treasurer of Victoria v. Tabcorp Holdings Ltd (2014) VSCA 143.
[18] NORMAN FAIRCLOUGH, LANGUAGE AND POWER (3rd ed., London, Routledge, 2015).
[19] TONY BLACKSHIELD, *Judicial reasoning***,** in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA 373-76 (Tony Blackshield, Michael Coper & George Williams eds., 2001).

This is law as a static product, timeless in its evocation. From this formalist perspective, doubt in legal interpretation is equated with objective failure. As the Oxford Handbook put it, "Laws are written to be followed. The very fact that there is some doubt about their interpretation means that something has gone wrong."[20] This comment forcibly reminds me of Michael Reddy's critique of the "conduit metaphor" of human communication, the metaphor referring to the "common-sense" understanding of meaning going directly from speaker A to speaker B. (This is an understanding which is implicit in the talk of "natural and ordinary meaning".) Reddy comments that, on the contrary, in human communication, what should surprise us is that it often goes right![21] The corollary of Reddy's approach is to focus not, as in the formalist approach, on what generates legal interpretive problems, but rather on what facilitates legal communication. From the functional perspective of systemic linguistic theory, this means that the written statute, if it is to be interpretable as language, must be viewed as a text within a social context. Such an approach enables one, at least, to explore: *first*, how can evident differences in interpretation of the relevance of a statute to the facts of a case arise? And *secondly*, how is it possible that those engaged in legal discourse can manipulate the interpretation of the statute and/or the facts of the case in order to achieve the outcome they desire?

V. SYSTEMIC FUNCTIONAL LINGUISTICS (SFL) AND LEGAL INTERPRETATION

Halliday's *Introduction to Functional Grammar* has appeared in four editions since 1985, the last two (2004 and 2014) co-authored with C.M.I.M. Matthiessen. The first chapter, now titled "The Architecture of Language", describes five dimensions of language: structure, system, stratification, instantiation, metafunction. Two are particularly relevant to this discussion of legal interpretation: the hierarchy of stratification (abstraction) and the cline of instantiation (generalization).[22]

Stratification refers to the modelling of levels of language: the extra-linguistic level of context; the semantic level of meaning; the level of the lexicogrammar (the vocabulary and grammar of the wording); the expression level of both phonology (for

[20] *Supra* note 2.
[21] MICHAEL REDDY, *The Conduit Metaphor – A Case of Frame Conflict in our Language about Language*, in METAPHOR AND THOUGHT 285-324 (Andrew Ortony ed., Cambridge, CUP, 1979).
[22] M.A.K. HALLIDAY AND C.M.I.M. MATTHIESSEN, INTRODUCTION TO FUNCTIONAL GRAMMAR 24-30 (Abingdon, U.K. & New York, Routledge, 4th ed. 2014). Henceforth HALLIDAY & MATTHIESSEN (2014).

speech) and graphology (for written language, as in the expression of statutes). Each level realizes that above it and is realized by that below it. Halliday has written

> "Realization is probably the most difficult single concept in linguistics. It is the relationship of "meaning-&-meant" which, in semiotic systems, replaces the "cause-&-effect" relation of classical physical systems. Unlike cause, realization is not a relationship in real time. It is a two-way relationship that we can only gloss by using more than one word to describe it: to say that wordings (lexicogrammatical formations) ***realize*** meanings (semantic formations) means both that wordings **express** meanings and that wordings **construct** meanings."[23] (*author's emphasis)*

This is something like the comment in the Routledge Handbook that "Context is dynamic and socially constructed through and by discourse – both in its linguistic and non-linguistic semiotic modes."[24] Halliday sometimes prefers the word *construe* rather than *construct*, which he glosses as "***construed*** – that is, constructed in the semiotic sense". In legal usage, "construction" is habitually used for what the judge does, as in the early quote from Kirby on "... the construction of statutes", but just what the individual judge understands s/he is doing is exactly the question.[25]

Instantiation, the dimension of generality, refers to a cline of language, from maximum potential or macro perspective to specific instance or micro perspective, with intermediate positions. It operates at all levels of stratification. Moving along the dimension of instantiation allows an interpreter to admit more or less of the potential context and/or language into the interpretation of this particular instance. The following table gives a simple example relevant to a statute, with the levels of stratification on the vertical axis and three points on the cline of instantiation on the horizontal axis.

[23] M.A.K. HALLIDAY, *Systemic Grammar and the Concept of a "Science of Language"* in ON LANGUAGE AND LINGUISTICS 210 (COLLECTED WORKS VOL. 3, Jonathan Webster ed., London, Continuum, 2003).
[24] *Supra* note 3.
[25] Peter M. Tiersma tries to distinguish the performative "construction" of the judge from the "interpretation" of everyday use. *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction* 73 WASH. U. L. Q. 1095 (1995).

Potential	Intermediate Potential	Instance
context of culture	intermediate context e.g. Australian legal culture	context of situation of an Australian statute (Hasan's 'relevant context': a semiotic construct of field, tenor and mode [26])
semantic system	legal discourse	meaningful specific statute
lexicogrammatical system	legal wording	wording of specific statute
graphic system of expression	legal graphology	graphology of specific statute

The process of interpretation proceeds in terms of these two dimensions. For the reader of a written text, the stratification dimension means

i. recognizing the graphic marks on the page as the graphic expression, the organized use, of a particular language;
ii. understanding that expression as the wording of the text at the level of lexicogrammar;
iii. construing the meanings of the text at the level of semantics; and finally,
iv. construing an extra-linguistic context of situation that is, making sense of the text.

However, taking into account the dimension of instantiation, at each level the construal is understood in the potential of that level as previously experienced by the reader. One could imagine each level as a small circle of text surrounded by a larger circle of potential, the resource of the reader's previous experience. So, using the limitations of my own resources: my previous experience of Telugu does not enable me to move from graphetics to graphology; I cannot identify the organization of the script. On the other hand, in Finland, I could recognize the roman letters used for the graphic expression, but I could not construe the wording; I do not know the non-Indo-European features of

[26] Later mentioned in relation to "perturbation". RUQAIYA HASAN, *The Place of Context in a Systemic Functional Model*, in CONTINUUM COMPANION TO SYSTEMIC FUNCTIONAL LINGUISTICS 178 (M.A.K. Halliday & Jonathan J. Webster eds., London, Continuum, 2009). The terms field, tenor and mode are briefly described in footnote 29.

Finnish. In Italy, my youthful Latin study means I can identify much of the wording and construe some of the meanings, but I do not really know the language. And finally, at the extra-linguistic level of context: a delightful little book by the Italian physicist Carlo Rovelli, *Seven Brief Lessons on Physics*, though I can understand all the English of its translation, leaves me still puzzled by loop quantum gravity; I lack sufficient context in the disciplinary context of physics to make complete sense of it.[27] Thus the accumulative potential of previous experience widens, until, at the level of context of situation, all the reader's previous experience of the language system and the context of culture potentially contributes to "making sense of the text".

The following figure illustrates the same topic, though adding a third SFL dimension – that of metafunction – to the two discussed above.[28] Each metafunction intersects with stratification and instantiation, so that the relation of instance and resource is co-existent for each metafunction.[29]

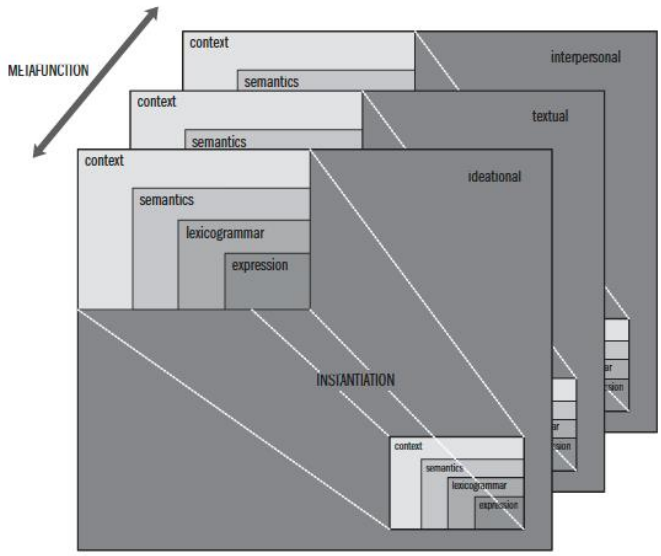

Fig. 1-12 Metafunction

[27] CARLO RAVELLI, SEVEN BRIEF LESSONS ON PHYSICS (Penguin, 2014).
[28] HALLIDAY & MATTHIESSEN 31 (2014).
[29] Halliday derives three metafunctions from the functional evolution of language: ideational meanings evolved to construe experience, interpersonal meanings evolved to enact social processes, and textual meanings evolved to produce text coherent with its environment of use. (*id.* 29). Each metafunction realizes an aspect of the context of situation: ideational metafunction and field; interpersonal metafunction and tenor; textual metafunction and mode. The study of interpersonal meaning and its realization of tenor in legal texts is of particular significance, as discussed in Rosemary Huisman, *Modality and the Law*, 5 ANNUAL REVIEW OF FUNCTIONAL LINGUISTICS 7-21 (2014).

Returning to just the intersection of the two dimensions of stratification and instantiation, we find different approaches to statutory interpretation can be plotted on the grid.

For more formalist theories, the upper level of stratification is that of semantics, construed from the wording of the text. To a greater and lesser degree, such theories may permit movement back and forth on the cline of instantiation at the semantic level, which may allow the inclusion of a more general potential of legal meanings; for example, the interpretation given to the statute in previous judgments. However, they do not include movement "upwards" into the level of context; that is, they assume that the statute ought to have a determinate legal meaning. It is not a meaning that must be adjusted for the context of the specific case.

In contrast, for those theories that do allow the upper SFL level of context, the meaning of the statute can only be fully construed in an understanding of the context of the particular case. The potential of this context – of legal culture and even more widely of general culture – is extensive. The standard Australian textbook on statutory interpretation, Pearce and Geddes, has one chapter on "Intrinsic or Grammatical Aids to Interpretation" (Chapter 4) and another chapter on "Extrinsic Aids to Interpretation" (Chapter 3).[30] The latter is lengthy and various but includes, for example, the use of parliamentary, executive and related materials, such as reports of law reform commissions, reports of parliamentary committees, the application of common law principles, international agreements etc. As already mentioned, legal interpretation is often referred to as "construction". The more the potential legal and even broader social context is admitted to the construction, the broader the range of so-called "extrinsic materials" which may contribute to interpretation.

The foregoing discussion answers my first question: how can evident differences in interpretation of the relevance of a statute to the facts of a case arise? They arise because particular interpreters make more or less use of the full potential of the language dimensions of instantiation and stratification. This difference of use becomes striking in considering my second question, to which I now turn.

[30] D.C. PEARCE AND R.S.GEDDES, STATUTORY INTERPRETATION IN AUSTRALIA (8th ed. 2014). (The 9th edition came out in late 2019 but I shall refer to the 8th edition of 2014.)

VI. THE UNHAPPY INTERPRETER AND THE "RELATIVITY OF DOUBT"

How is it possible that those engaged in legal discourse can manipulate the interpretation of the statute and/or the facts of the case in order to achieve the outcome they desire? The Oxford Handbook begins, "Laws are written to be followed. The very fact that there is some doubt about their interpretation means that something has gone wrong."[31] However, in the practical experience of actual judges interpreting actual statutes, the "biggest problem" is rarely that of doubt about their interpretation, but rather that the meaning is clear and the judge does not like it![32] What, if anything, can be done?

In their book, *How to Do Things with Rules* (obviously a play on J.L. Austin's 1955 book, *How to Do Things with Words),* the legal scholars William Twining and David Miers have an amusing take on this dilemma; they speak of the happy and unhappy interpreter and "the relativity of doubt".[33] "Doubt", they write, "is a relative matter. It is not uncommon in both legal and non-legal contexts for some participants to express doubts about the interpretation or application of a rule, while others maintain that it is clear."[34] Their observation contrasts with the assumption in the Oxford Handbook that it is in the text, rather than in the interpreter, that difficulties arise. Thus, the Handbook speaks of the need for "a detailed exploration of the kinds of indeterminacy that arise in statutory cases, including vagueness, ambiguity, and the use of broad language that is not vague or ambiguous, but which is not sufficiently informative either."[35] However, for Twining and Miers, from the same wording, interpreters can disagree on whether a text is indeterminate in meaning or not.

Twining and Miers go further, however. For their unhappy interpreter, "although the scope of the rule may be clear, at least on the surface, it is an obstacle to his securing the result he desires." Two responses are possible. One, in a nineteenth century English report, is nicely formalistic:

> "If the precise words used are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it

[31] *Supra* note 2.
[32] Tony Blackshield, in conversation.
[33] WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES (London, Weidenfeld & Nicolson, 1976; 5th ed. Cambridge, C.U.P. 2012).
[34] *Id.* 96-98.
[35] *Supra* note 2.

> do lead, in our view of the case, to an absurdity or manifest injustice […] [W]e assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."[36]

But, as doubt is a relative matter, the second response of the unhappy interpreter can be to encourage doubt; as Twining and Miers put it, "the unhappy interpreter may be able to pave the way for a less obvious interpretation, by creating or establishing a doubt that then needs to be resolved." The unhappy interpreter can do this in one of two ways. First, s/he can dispute the construal of meaning and context of the situation from the statute's wording, a movement on the dimension of stratification. Or, secondly, s/he may not dispute the construal of meaning from the wording of the text, but insist that the context of situation. the interpretative sense made in this legal instance, must take in more of the potential context. This is a movement on the dimension of instantiation.

As already intimated, these matters are centrally relevant to questions of "ambiguity" and "vagueness" in the Oxford Handbook account. In his chapter in that book, "Ambiguity and Vagueness in Legal Interpretation," Ralf Poscher writes, "Few topics in the theory of language are as closely related to legal interpretation as the linguistic indeterminacy associated with ambiguity and vagueness."[37] In a colloquial sense, Poscher points out, "both vagueness and ambiguity are employed generically to indicate indeterminacy." They can, however, he suggests, be distinguished: "ambiguity ... is about multiple meanings; vagueness is about meaning in borderline cases" (128-29.) So, for Poscher these are two categories of indeterminacy that can be identified **in the text**.

Again we see how "the theory of language" brought to a topic pre-determines what can be said. Those who assume a formalist theory, one in which the upper level of linguistic study is semantics, discuss semantic indeterminacy "in the text" and consign the study of social context, language in use, to that other discipline: pragmatics. But to accommodate the "relativity of doubt" described by Twining and Miers, relating not only

[36] *Id.* 167, quoting Chief Justice Jervis in Abley v. Dale (1851) 11 C. B. 378 at 391, 138 ER 519 at 525.
[37] Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in THE OXFORD HANDBOOK ON LANGUAGE AND LAW 128-44 (Lawrence M. Solan & Peter M. Tiersma eds., Oxford, O.U.P., 2011).)

to differences of interpretation by different readers but also to the deliberate fostering of doubt by "unhappy interpreters", one needs a functional theory of language in which meanings and context realize each other. There is no separate discipline of "pragmatics".

A formalist account, in contrast, can even pit meaning and context against each other! Consider Poscher's comments on "vagueness":

> "Pragmatic vagueness is central to legal interpretation. Law is not about semantics but about the pragmatic shaping of social relations in the broadest sense. Law's relation to language is instrumental. The law uses linguistic expressions to establish regulations in order to achieve social goals. The instrumental role of language in law explains why the pragmatic purpose of a regulation is such a powerful argument in law. This does not imply that semantics have no import. For whoever has to interpret the law, the semantics of the expressions are the primary means of deciphering the social purpose of a regulation, but the pragmatic social purpose can override semantic conventions – even if certain forms of textualism debate the legitimacy of this ubiquitous feature of legal practice."[38]

With such a formalist distinction between semantics and pragmatics, appeals to the text and appeals to extrinsic materials are represented as oppositional. Theoretical approaches that maintain this distinction cannot explain, as a functional model can, how the "unhappy interpreter", through recontextualizing the text, can *introduce* doubt into the meaning of the text. Earlier I mentioned Ruqaiya Hasan's concept of "relevant context" (of field, tenor and mode). Hasan contrasted this relevant context with what she called the "material situational setting", which nonetheless could "perturb" the context, and become "relevant" under certain conditions, such as the condition of informal conversation, in which speakers may readily change topics as their attention changes.[39] In effect, the "unhappy interpreter" can deliberately set out to cause such perturbation. Thus, vagueness and ambiguity, however categorised, are not intrinsic attributes of the wording of the text. Rather they are a realization at the level of semantics/meaning of a

[38] *Id.* 135.
[39] RUQAIYA HASAN, *The Place of Context in a Systemic Functional Model*, in CONTINUUM COMPANION TO SYSTEMIC FUNCTIONAL LINGUISTICS 178 (M.A.K. Halliday & Jonathan J. Webster eds., London, Continuum, 2009).

context of a situation which has been assumed as relevant by the particular interpreter of the legal text.

VII. EXAMPLES OF "PERTURBATION" IN LEGAL CONSTRUCTION

The first way for the unhappy interpreter to try to establish doubt is by disputing "the construal- of meaning and context of the situation from the wording" of the statute, a movement on the dimension of stratification (the dimension of abstraction). The following example is from South Africa.[40]

Under the South African Criminal Procedure Act of 1977, a defendant wishing to challenge the voluntary nature of a confession bore the onus of proof. This situation was to be reversed in the new South African Constitution. In the transition period, an interim Constitution came into force on 27 April 1994, and it determined that in trials begun on or after that date, the new situation would apply; that is, the old provision of "reverse onus on the defendant" would no longer apply.

But in a particular case, whether the interim Constitution did apply depended on the interpretation of a transitional provision, which included:

> "(8) All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed."[41]

An initial problem was whether the prosecution *was* "pending" when the interim Constitution commenced on 27 April 1994, but assuming that the proceedings *were* pending "immediately before" 27 April, the second problem was what exactly was *meant* by saying that they should be "dealt with as if this Constitution had not been passed". An apparently clear reading was that the "reverse onus" on a defendant should still apply, an interpretation which did not please the judge, Justice Mahomed:

[40] The example is extracted from detailed case notes prepared by Tony Blackshield for his Comparative Constitutional Law course given at NALSAR University of Law, Hyderabad, in 2020. The case is State v. Mhlungu, 1995(3) SA 867.
[41] *Id.*

> **"Mahomed J [880]:** [T]he direction that pending proceedings 'shall be dealt with' as if the Constitution had not been passed […] is an unusually colloquial expression to be found in a formal statutory instrument. If the intention of the law-maker was to say that pending proceedings should be adjudicated on the basis that the Constitution in all respects should be ignored, it could have used clearer language [...] [T]he *Criminal Procedure Act* 51 of 1977 […] [used the words] 'they should be continued and concluded' […]
>
> **[881]** 'Deal with' is a more protean, inherently more tentative idea [...] The phrase […] has different nuances but one of its well recognized meanings is to 'Take action, act, proceed (in a matter) [...] Set to work, practise'. These are perfectly appropriate expressions to confer authority on a Court or tribunal to *proceed with* or *take action* under the authority vesting in it in terms of 'the law then in force' [...] If the intention of the Constitution was to say that pending matters should be 'continued and concluded' as if the Constitution had not been passed it would have been a simple matter to say so in such a phrase of well-known usage in our statute law instead of recourse being had to something so colloquial, flabby and uncertain as 'deal with' […]"

By the end of all that, the declared protean – that is diversely meaning – words "dealt with" have been rendered legally opaque rather than merely ambiguous.

The second way for the unhappy interpreter to try to establish doubt is by insisting that a wider context, more of the potential legal context, must be brought into the specific interpretation of the particular legal instance, that is, a movement on the dimension of instantiation (a dimension of generalisation). In the following three examples, the reasoning moves progressively to positions of more general potential.

The opinion of the Supreme Court of the United States in *King v. Burwell,* supported by six justices, found Obamacare – more formally the Affordable Care Act – to be legitimate. Three justices were in dissent.[42] The reasonings are replete with comments on statutory interpretation which illustrate its demands and the inventive

[42] King v. Burwell, 576 US 988, 135 S. Ct. 2480 (2015).

responses of the justices. The problem arose from a lacuna in the drafting: the text of Section 36B should have mentioned both Federal and State Exchanges but its wording mentioned State Exchanges only. The following extracts show those in accord, the unhappy interpreters of its clear meaning, arguing to introduce ambiguity into its interpretation.

> "It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. [...] But oftentimes the "meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." […] So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." [...] Our duty, after all, is "to construe statutes, not isolated provisions."[43]

and so

> "These provisions suggest that the Act may not always use the phrase "established by the State" in its most natural sense. Thus, the meaning of that phrase may not be as clear as it appears when read out of context."[44]

and

> "The Affordable Care Act contains more than a few examples of inartful drafting [....] Anyway, we "must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." [...] After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase "an Exchange established by the State under [Section 18031]" is unambiguous."[45]

This double negative is a tentative way of saying "we can conclude that the phrase is ambiguous" – a bald conclusion they are moving towards with some delicacy at this stage of their reasoning!

[43] *Id.* at 2489.
[44] *Id*. at 2490.
[45] *Id*. at 2492.

The Justices acknowledge they are aware of the dangers of this kind of argument but have found it "appropriate in this case":

> "Reliance on context and structure in statutory interpretation is a "subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself." For the reasons we have given, however, such reliance is appropriate in this case and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid."[46]

So finally, no longer tentative, they assert their reading of the text-in-context, reading the words "an exchange established by the State" to refer to "State and Federal Exchanges":

> "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt."[47]

Justice Scalia, in dissent, regards these reasonings as preposterous. Among his comments, he expostulates: *Pure applesauce,* (US slang*: "*nonsense", "rubbish").[48] Though it is an example of unwanted textual clarity rather than textual vagueness, Poscher might find this case a classic example of textual wording *versus* pragmatic purpose, and Scalia a representative of "certain forms of textualism". [49]

It was noted earlier that, from an idealist formalist perspective, written statute law works more like a logical syllogism; the major premise is the wording of the Act, the minor premise is the particular circumstances of the case, and the legal judgment should

[46] *Id.* at 2495-96.
[47] *Id.* at 2496.
[48] *Id.* at 2501.
[49] Though Scalia is not unaware of context when it suits his argument, see for example Smith v. United States, 508 US 223, 241-42 (1993).

inevitably follow. "Inartful drafting....", as that in the Affordable Care Act is said to be, can undermine the pertinent application of this logic. However, another challenge to this modelling arises when the particular circumstances reveal a lacuna in the Act. This is a problem of legislation rather than drafting; in SFL terms, the legislators had not envisaged a potential context of situation. The following case exemplifies such a dilemma.

In the Australian High Court case of *Al-Kateb v. Godwin*,[50] The Australian Migration Act established that an illegal non-citizen could be detained until they could be deported. However, Al-Kateb was a stateless person whom no other country would agree to accept. The Act did not cover this situation. Could Al-Kateb be indefinitely detained? In a bench of seven judges, a majority of four effectively said he could be. The Australian High Court, unlike that in the USA, does not usually give one opinion of the court; each Australian justice, for both the majority and the dissent, may give her/his own reasons for judgment, or concur with a joint judgment of one or more fellow justices. Six of the seven justices wrote their own reasons. I have written one paper, and Tony Blackshield and I together another paper, on this case, examining the contrasting interpretative strategies of the different justices.[51] For example, Justice Hayne in the majority finds the wording of the Act "intractable" (para 241). (An illegal non-citizen must be detained until he can be deported …). Each of the three dissenters offers a different argument: first, an intrinsic argument (of stratification), that "time" in the wording of the Act could not be construed as "timeless" (Gummow J.); secondly, an extrinsic argument (of legal potential), that relevant decisions in international law should be taken into the Australian legal context for the decision (Kirby J.); and thirdly, an extrinsic argument invoking the Australian legal culture at its most general, the opinion of then Chief Justice Gleeson that, invoking the principle of legality, any infringement of human rights must be legislated explicitly (*habeas corpus* is one such right).

[50] Al-Kateb v. Godwin (2004) 219 CLR 562.

[51] Rosemary Huisman and Tony Blackshield, *Tenor in Judicial Reasoning: majority and dissenting judgments in the High Court of Australia (*Al-Kateb v. Godwin, *2004),* 9 LINGUISTICS AND THE HUMAN SCIENCES 229-48 (2014); ROSEMARY HUISMAN, *The trace of time in judicial reasoning: a case of conflicting argument in the High Court of Australia (*Al-Kateb v. Godwin, 2004*),* in TIME AND TRACE 256-75 (Sabine Gross and Steve Ostovich eds., Leiden & Boston, Brill, 2016).

Subsequently, Gleeson's opinion provoked the most comment, and I quote it in part: [52]

> **"para 19.** Where what is involved is the **interpretation** of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new. In 1908, in this Court, O'Connor J. referred to a passage from the fourth edition of *Maxwell on Statutes* which stated that "[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness""[53] (*emphasis added).*

Unlike India, with Part III of its Constitution directly concerned with "Fundamental human rights", Australia has no Bill of Rights but Gleeson's reasoning, especially in his quoting of *Maxwell on Statutes*, asserts that Australian statute law is interpreted in the context of fundamental principles, derived presumably from the common law. It might be suggested that the desire for "irresistible clearness" of legislative production of text is subject to the same criticism as the desire to give "natural and ordinary meaning of the words used" to the judicial interpretation of text, as earlier exemplified. However, the situation is not identical; the legislature produces legal text

[52] 219 CLR at 577.

[53] Gleeson is quoting from Potter v. Minahan (1908) 7 CLR 277 at 204. Gleeson's successor as Australian Chief Justice, Robert French, has pointed out that the passage in *Maxwell on Statutes* was in turn derived from the judgment of United States Chief Justice John Marshall in United States v. Fisher, 6 United States Reports 358, at 390 (1805).

from its legislative intention (though it may effect that intention clumsily), but the judiciary must construe any understanding of that intention from the produced text. (Justice Scalia, on the Affordable Care Act, found any such construal irrelevant.)

My final example exemplifies the elephant in the room of statutory interpretation; that is of course, the Constitution. Constitutional cases are those where the most authoritative level of the judiciary must decide whether the legislature has passed statutes that are invalid by the tenets of the relevant Constitution. The Constitution is then a kind of super-Act – where the buck stops! – but, as for an ordinary act, individual judicial reasoning may favour a formalist or a more functional perspective towards interpretation. A case of the latter kind is *Brown v. Board of Education of Topeka*, decided in 1954.[54] This is the famous case which desegregated schools in the United States, a social outcome which the judiciary would have known would provoke civil unrest, especially in the southern states. This is not really an example of an unhappy interpreter in the law, but rather an example of those in the law wanting to speak beyond the context of the law. The language is worth studying, for unlike the typical constitutional case in which learned judges are writing to be read by learned lawyers, its register – that is, its choices of meanings and wordings – appears to be written to communicate to a wider social audience. Although the legality of the Court's opinion rests on the 14th Amendment of the United States Constitution, the reasons, as in the short extract below, focus with "irresistible clarity" on the wider social context of the case, wider that is, than the potential legal context:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the

[54] 347 US 483 US (1954).

> opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."[55]

On the dimension of instantiation, this opinion moves well beyond the potential legal context to the more general context of American culture, to what is important "to our democratic society", required for the performance of "public responsibilities" and "good citizenship".

VIII. CONCLUSION: THE ADVANTAGES OF A SOCIAL SEMIOTIC APPROACH TO LEGAL "CONSTRUCTION"

This paper began with the assertion that law is made through language and the study of language is linguistics. An approach, such as that of SFL, which studies "language as social semiotic" also enables the study of "law as social semiotic". This phrase describes the interpenetration of legal text and social context – as is exemplified in the study of particular judicial reasonings – and understanding this interpenetration helps to explain the complexity of legal interpretation. On the one hand, legal interpretation is meaningful within the social context of its practice. At the same time, legal interpretation gives meaning to that social context. As quoted previously (Section I) from the *Routledge Handbook of Forensic Linguistics*, "Context is dynamic and socially constructed through and by discourse – both in its linguistic and non-linguistic semiotic modes."

[55] *Id.* at 493.