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A Linguistic-Pragmatic Note on Indeterminacy in Legal Language

Key words: vagueness, indeterminacy, ambiguity, law, legal language

Introduction

This paper comments on selected aspects of vagueness found in contemporary English legal language (LL henceforth),[1] briefly indicates terminological problems related to vagueness and indeterminacy in language in general, and provides examples of vagueness with emphasis on its relation to ambiguity in the legal context.

The discussion presented in this essay is a 'work-in-progress' report; it naturally evokes the relation between legal texts and their context, the problem of how linguistic forms acquire their contextual meaning and how linguistic expressions are disambiguated, thus placing the analysis in the centre of linguistic pragmatics.

1. Vagueness and law – basic issues

Various aspects of vagueness have been much discussed in literature; the concept forms one of the main issues in philosophy, especially the philosophy of

[1] In the present paper the notion of LL has been narrowed down to the language of normative legal texts, such as statutes, conventions, contracts, wills, certificates, and excludes the language of legal proceedings, e.g. the language of the courtroom or legal consultations.

language[2] and theoretical linguistics (cf. Shapiro 2006, Schiffer 2006, Williamson 1994; see Odrowąż-Sypniewska 2000 for an overview of the problem in the Polish language), but can also be found within specialised applied linguistic studies (e.g. Bhatia et al. 2005). Vagueness is also one of central concepts in the philosophy of law (e.g. Endicott 2000), thus pertinent to interdisciplinary studies.

There are numerous technical definitions of vagueness. In a very broad sense vagueness can be understood as a type of modality, a (semi-)grammatical category able to modify the meaning of linguistic expressions, but most often it is contrasted with ambiguity, where vagueness suggests unclear, underspecified reference while ambiguity is characterised by presence of multiple reference. Vagueness has also been defined as an instance of 'incomplete definition', which incurs an incomplete, imprecise acquisition of the meaning of a predicate. From the philosophical perspective it is most often presented as either 'an epistemic phenomenon'[3] (Williamson 1994) or a more technically semantic problem where, having accepted that statements are either true or false, vagueness corresponds to 'cases of unclarity' in which language users are unable to determine the value of vague expressions. A related view suggests that vagueness emerges where there are 'borderline cases'. There have been numerous proposals to further (sub-)categorise vagueness; Kempson (1977: 124f.) differentiates between four main types of vagueness in language and identifies them as: 1) referential, 2) indeterminacy of meaning, 3) lack of specification, and 4) disjunction of the specification. In the Polish philosophical literature two main types of vagueness have been analysed with the use of two Polish terms: 'nieostrość' (in literal translation 'unsharpness') and 'niewyraźność' (literally 'vagueness' or 'unclarity', 'dullness') (cf. e.g. Odrowąż-Sypniewska 2005: 229 on Pelc's classification and Odrowąż-Sypniewska 2000).

In the English language, among theoretical-linguistic notions related to vagueness, next to the most antonymous ambiguity, there are 'fuzziness' and 'generality of sense', which however seem to be less technical than vagueness

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[2] It goes beyond the scope of the present paper but is worth attention that even the term 'philosophy of language' can be relatively vague. A distinction is often drawn between the concepts of 'philosophy of language', 'linguistic philosophy' and 'the philosophy of linguistics' where the names are to be indicative of the focus of relevant studies (cf. Davies 2006: 23 or Davies 2003: 90). Thus the concept of vagueness may be perceived as linguistic, supra-linguistic, generally semiotic, or cognitive.

[3] According to this view there are truth values for all expressions, however, language users are unable to detect their existence and to recognize the right value.

itself. The approaches are varied and not always consistent; for example Zhang (1998) claims that fuzziness is inherent in expressions which irrespective of context have no clear-cut referential boundaries, while three other categories, i.e. vagueness together with generality and ambiguity, can be resolved, eliminated in context. Cases of yet another concept, that of polysemy, i.e. different but etymologically-related meanings, are typically recognised as semantic ambiguity. There have also been attempts to differentiate between semantic and pragmatic types of vagueness and ambiguity (e.g. Fredsted 1998 with focus on Grice and Kierkegaard's notion of 'indirect communication', Zhang 1998 mentioned above, Tałasiewicz 2002 in Polish), which, however, do not seem to offer sound theoretical explanation either, pushing all arising problems towards resolution in specific communicative situations. Thus, unless it is accepted that meaning is solely interpretable in context and in fact entirely belongs in it, the theories are not readily applicable, nor much informative. It seems that vagueness is so pervasive in language that it can hardly be offered a clear definition against related notions and often, for practical reasons, researchers resign sub-categorisation. With relation to bilingual and multilingual laws which operate in multi-lingual or supranational legal systems, Cao decided to group all instances of indeterminate meaning under one cover term of 'inter-lingual uncertainty', which in her analysis comprises "linguistic vagueness, generality and ambiguity" (Cao 2007: 70).[4]

Despite the pervasive nature of vagueness and indeterminacy in language the fact that all linguistic expressions are naturally 'incomplete' and must be disambiguated in context is often underestimated by linguists. The illusion that meaning can be secured and well-defined is generally accepted especially in the case of LL and other specialised languages, known as languages of restricted semantic domains, whose contexts are by definition narrowed and (relatively) pre-defined. It is noteworthy that lawyers more often than linguists present LL as a domain in which "there is no guaranty of the successful arrival of the message, because language has a life in context that is beyond the control of the speaker" (Endicott 2000: 16, citing David Gray Carston, a deconstructionist).

With regard the language of the law vagueness gives rise to a number of interesting questions. First of all, it is questionable whether linguists can be

[4] Deborah Cao (2007) cites a number of illustrative examples from a variety of sources, including the bilingual and bi-legal systems of Hong-Kong and Canada respectively, as well as selected decisions of the European Court of Justice, which show that in contrastive studies vagueness or ambiguity can be language- or system-bound.

considered real experts on LL whose system falls outside linguists' academia; lawyers' analyses of vagueness point to the fact that law and linguistics are basically different and cannot be subjected to analysis with the use of the same criteria because law regulates legal relations in the world in the broadest possible sociological context, while linguistics operates within itself and there are hardly any linguistic experts 'outside' the domain. As Hutton suggests "[linguists] are not professional experts: their professional standards and professional knowledge are largely discipline-internal" (Hutton 1996: 295).

With regard LL it seems remarkable that the opening sentence of Keith C. Culver's (2004: 1) article on vagueness in the law claims that "[i]t will surprise no one to hear that laws are often vague, and, moreover, that laws are vague for a variety of reasons" as it seems that generally people hold quite contrary expectations as to the presence of vagueness in the law. It is typically believed that law is (or should be) constructed via stable, clear and explicit language, which allows to sufficiently secure meaning and successfully direct people's behaviour within legal transactions and whose expressions secure unitary, not readily disputable a reading. It may further be surprising for lay people that quite often lawyers are not critical of vagueness present in the law and find it both functional and necessary a feature. Following that view, Timothy A. O. Endicott (2000, 2002), a legal theorist and practitioner, sets 'an indeterminacy claim' according to which vagueness is inseparable part to law, much in the tradition of another legal theorist – H. L. A. Hart, who suggested that "[n]atural languages like English are […] irreducibly open-textured" (Hart 1961: 127) and that LL inescapably inherits this feature. It is thus evident that indeterminacy does not have to influence LL in a negative way. Its discourse can stay coherent and relatively stable even when vague terms and expressions are present. Legal theorists point to the fact that vagueness allows judges to apply the law in an efficient way and that creating some degree of generality is necessary at the time of drafting. This once more evokes the fact that law can hardly be identified with linguistic expressions, at least in a straightforward way, because LL sets standards of behaviour which are extralinguistic, social and anthropological in nature.

The feature that language is underdetermined can further be related to the standard view of adjudication or the principle of bivalence. Thus, vagueness in the law can often stand in conflict with the concept that propositions of law are 'juridically bivalent', i.e. judges always have means to understand expressed

propositions such that they apply or fail to apply to a given situation. Sometimes the power to define vague concepts can be vested in people (cf. e.g. Dworkin 1986), citizens of the state; for example, normative terms such as 'safe speed' or 'reasonable care' must be defined and recognized by people subjected to the law in question. Under this view, the semantics of the expressions and the resulting legal operational value is not vague within the system, but rather 'measured' against its 'results' in the world. For example, the semantic value of the concept 'safe speed' depends on factors such as the weather conditions, time of the day, type of road, etc. Then, should the need arise, judges have to use their discretion when they apply particular laws or judge certain contexts. It should also be noted that the semantics of such expressions is context-specific and restricted, e.g. in "careless driving" "careless" means 'careless in the legal domain', in the law and for the law and its purposes and cannot be directly identified with folk understanding of the concept.

A related claim that certain linguistic expressions, especially epistemic ones, may differ in their value depending on the context in which they are uttered has also been suggested in philosophical-linguistic contextualism. As Peter Ludlow suggests "[t]ypically, one may think of contexts with lower epistemic standards as holding in informal chats in a bar, while higher standards might hold in a court of law or a discussion of scepticism in an epistemology class" (Ludlow 2005: 11). It may be concluded that the legal context statements require a higher 'degree of justification' than is present in everyday interactions and this fact should be part to contextual knowledge of language users in the legal domain.

Language of the law evidently presents the world through the prism of legal categorisation, which is functional and allows lawyers to apply relevant laws to cases. This imposed categorisation also results in that most types of vagueness in the law can successfully be identified as cases of ambiguity because legal expressions, especially definitions and categories, refer to particular legal institutions rather than unsanctioned 'free' meanings. In the legal context it is usually the case that interpretation of linguistic forms is in fact a process of matching them to certain legal typologies and categories, e.g. recognition that a particular action is an instance of stealing and classifies as theft, or determining that a particular form of behaviour constitutes a breach of contract. It is not without reason that quite often legal theorists discuss instances of apparently linguistic vagueness in terms of ambiguity, cf. Solan's (2004) examples of legal 'pernicious ambiguity' which include the phrases 'reasonably intelligent judge'

and 'reasonable doubt'. This prevalence of the legal over the (purely) linguistic is neither uncommon nor surprising. The vision is further reinforced by a quotation from a judge:

> When numerous courts disagree about the meaning of language, the language cannot be characterized as having plain meaning. Rather, the language is ambiguous; it is capable of being understood in two or more different senses by reasonably well-informed persons even though one interpretation might on careful analysis seem more suitable to this court
>
> (Chief Justice Abrahamson on different interpretations re: *Peace vs. Northwestern National Insurance Co.* cited in Solan 2004: 876)

The quotation above emphasises the heavy burden of legal classifications. A number of illustrations of 'socially-embedded' meanings constituting borderline cases, for which there arises difficulty in matching the situations and relevant legal categories have also been provided by Toolan (2000).

Apparently, the problem of vagueness in the law evokes a special type of linguistic relativity in that lawyers' perception of language in the legal context is limited and processed via the prism of the legal system. Thus, the reality which they access really is 'at the mercy of [their] language'.[5]

2. Examples of vague linguistic forms in the law[6]

LL includes various instances of vagueness and can be vague for a number of reasons. Laws can be just poorly drafted, thus unsuccessful. Expressions such as 'on the day' are typically found equivocal as it is difficult to determine whether in the legal context 'day' refers to 'daylight time', '24-hour time span', etc. Thus, most often vagueness in the law can be identified as intensional vagueness, where the terms, e.g. 'vehicle', 'fault', 'freedom', are indeterminate and may require definition. Other types of vagueness involve higher-order judgement dependent abstract vagueness, which may require further refinement, or extensions. In general, as mentioned above, vagueness can produce deeply undesirable

[5] Cf. Sapir's classical statement: "Human beings do not live in the objective world alone, nor alone in the world of social activity […], but are very much at the mercy of the particular language which has become the medium of expression for their society". (Sapir 1958 (1929): 69)

[6] Selected aspects of legal vague expressions which are discussed in the present paper have also been commented on in Witczak-Plisiecka (2007).

effects in the legal context but can also be functional and desirable. In extreme 'negative' cases indeterminacy in language leads to the violation of the principle of bivalence and there may be situations when law can be seen as both applicable to a situation and not, while its proposition is not 'truth functional'. Selected examples of common 'legal' vagueness of various nature are presented below.

Among instances of legal vagueness the behaviour of **modal verbs**, and especially the modal verb *shall*, offers an interesting field of study. *Shall* in the legal context is typically used as an auxiliary of command and preserves its etymologically 'original' aspect of deonticity, whose force prevails (cf. Trosborg's (1995) quantitative analysis). However, this specialised reading is only explicit to people who are characterised by certain expertise in LL. For lay people the deontic use of *shall* is not transparent and appears to carry information about the future, much closer to prediction than command. As a result the deontic *shall* has been not only recommended or criticised but also praised by legal theorists (cf. Witczak-Plisiecka 2001 and 2007 for relevant literature). There appear to be differences in its understanding between e.g. the British legal culture and other legal cultures (cf. Williams 2005) and thus the reading of the semantics of *shall* is (legal) context-dependent and relies on the successful recognition of the register.

The tables below show concordances of the modal verb *shall* retrieved from a corpus of normative legal documents.[7]

Table. A sample from a concordance of the modal verb *shall* in the legal context

N	Concordance	Set	Word No.	File %
2681	, the original document	**shall** be deemed not to	77 805	\irl\compan~f.txt 96
2682	rs occurs, the company	**shall** send to the registra	17 881	\irl\compan~f.txt 22
2683	the original document	**shall** be deemed not to	77 308	\irl\compan~f.txt 95
2684	-three of this Act" there	**shall** be substituted „sent	79 934	\uk\power~17.txt 72
2685	ee. 10. Dáil Éireann	**shall** be summoned and	3 895	\irl\const~14.txt 26
2686	times and places as he	**shall** determine. Article	10 041	\irl\const~14.txt 67
2687	at case, subsection (5)	**shall** have effect as if fo	22 048	\irl\emplo~1a.txt 68
2688	as „a shadow director")	**shall** be treated for the	8 659	\irl\compan~f.txt 11
2689	section 21(3)(a) above	**shall** ensure that records	11 591	\uk\power~17.txt 10
2690	ubsection (5), a person	**shall not** act as auditor	61 374	\irl\compan~f.txt 75
2691	om this section applies	**shall** also be qualified fo	61 707	\irl\compan~f.txt 76

[7] The data comes from a corpus of legal documents compiled by the author and analysed with the use of WordSmith Tools at the Institute of English Studies, Lodz, Poland.

The corpus data confirms that the modal *shall* is used in the legal context primarily with the deontic force, however, this force is not devoid of certain aspects of *futurum*, which can be seen as a projection of the deonticity into the future. Thus, the precision encoded in LL is evidently both limited and relative to the user.

LL also makes use of specialised terminology, which, as has been mentioned above, can be vague. One group of typically **vague terms** and formulae includes lexemes and expressions which denote indeterminate abstract standards and abstract evaluative expressions. The examples of technical legal expressions culled from normative legal texts have been presented as example (1) below:

(1)

- *reasonable limits / doubt / person / care / use of ...*
- *due process / diligence / care / regard*
- *cruel and unusual punishment*
- *satisfactory conditions*
- *reckless driving*
- *safe distance / speed*
- *(measures having) equivalent effect*
- *relevant measures*
- *in the best interest of (e.g. the child)*
- *a proper proportion of the amount*
- *obscene or indecent materials*
- *hate language*
- *freedom of speech*
- *dangerous weapon*

It is evident that it is a matter of interpretation and apparently of application of available legal rules that results in determining whether an action has been performed "with due care" and "due regard", whether the driver applied "safe speed" and kept "safe distance", etc. It is also evident that a lot of indeterminacy in the context arises from the fact that legal expressions have to cover numerous unpredictable situations: the terms produce focal points of reference phrased for flexibility rather than exhaustively precise definitions. This type of vagueness can be beneficial with the interpretation being 'postponed' and vested in the hands of lawyers of the future, cf. Tiersma's quotation of the Supreme Court opinion on the concept of 'due process':

> 'Due process' … is not a technical conception with a fixed content unrelated to time, place and circumstances, but is flexible, calling for such procedural protections as the particular situation demands (after Tiersma 1999).

In his discussion Tiersma further emphasises context-dependency of the meaning of terms such as 'due' or 'reasonable' which change not only with largely synchronic changes of situations, but also over time as concepts evolve along with society.

At the other point of the spectrum, there is negativity of vagueness, vagueness which can be detrimental whenever it leads to situations where at least two conflicting readings of a legal rule can be suggested.[8] Such vagueness is especially notorious in criminal law, where actions allowed and prohibited need to be well-defined. One of the solutions found in the law is listing examples of restricted behaviour, e.g. of what counts as 'harassment' under a particular restraining order. Such lists, much in the *noscitur a sociis* mode, can lead not only to a better definition of a vague term but also expand the semantic scope of the term and result in including types of action which are not normally associated with it.

Vagueness can also be manifested on a contrastive level. For example, the distinction between two legal concept that of 'murder' and 'manslaughter' is evidently indeterminate and the interpretation, as a result classification of an action as either is dependent on quite arbitrary decisions of the jury and the judge in a particular situation (cf. comments in Felkins 1998 and 2004).

That vagueness is pervasive in language can also be seen in rules whose aim is to secure clear meaning in normative texts, which are common in common law systems, cf. the 'void for vagueness' definition cited below:

(2) **void for vagueness**

adj. referring to a statute defining a crime which is so vague that a reasonable person of at least average intelligence could not determine what elements constitute the crime. Such a vague statute is unconstitutional on the basis that a defendant could not defend against a charge of a crime which he/she could not understand, and thus would be

[8] It is noteworthy that researchers sometimes approached vagueness as if it created three categories, i.e. positive, negative, and 'unclear' middle cases (cf. Bix 1993: 32 on Sainsbury).

denied "d u e p r o c e s s" mandated by the 5th Amendment, applied to the states by the 14th Amendment. (source: law.com.dictionary, emphasis added).

It is evident that the definition whose aim is to fight vagueness in the law includes expressions which are underspecified. It can hardly be judged whether a person is 'reasonable' or what counts as 'at least average intelligence' or 'average intelligence' even accepting psychological standards. In fact even court rulings explicitly admit that language is inherently indeterminate, cf. comments included in *Rose vs. Locke*[9]: "Many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties".

Conclusions

The (possible) discrepancy between everyday understanding of language and its specialised 'legal' meaning involves the problem of how meaning is recovered or constructed in particular contexts. Many pragmatic theories claim that understanding of any message involves both decoding and inference. This seems especially relevant in the context of LL. What language users understand to be the code should theoretically be 'given', i.e. explicit, while the remaining part, and in fact most of the processes involved in communication, are about inferring, 'guessing' right semantic values, and involve making use of context in a very broad sense, i.e. knowledge of the world, expectations, all sorts of experience. The accessibility of LL is thus relative to the level of expertise in it and as a result the understanding and perception of vagueness which it involves is relative to the user's experience and familiarity with the legal domain. As a result, particular expressions are found vague by selected audiences and non-vague by other language users. Lawyers appear to make use of quite a hermetic code, which is hardly accessible to people not trained in the law who may not even perceive the very existence of the code and its markers. Vagueness in the legal context may thus be further differentiated into exoteric and esoteric types, i.e. that for or of the outsiders and insiders, two types of audiences. In this context it seems relevant to recall Katz's claim that linguistic indeterminacy "allows speakers to make use of contextual features to speak far more concisely than otherwise. […] Pragmatics saves us from […] wasteful verbosity' (Katz

[9] *Rose vs. Locke* 423 U.S. 48 1975 at http://www.findlaw.com (internal citations removed).

1977: 19–20 as quoted in Carston 2002: 35). Thus, legal indeterminacy can often be a short-cut for lawyers who are able to recognise legal institutions hidden behind apparently every-day terminology. Furthermore, linguistic vagueness may not be recognised as vagueness by lawyers and can sometimes even be seen as ambiguity, cf. discussion above. It arises from linguistic forms but is resolved on a broader semiotic level as legal texts, unlike most other types of linguistic communication, and more like rites and customs, belong to a (relatively) well-defined and powerful system of the law and communicate more than their purely semantic-linguistic meaning.

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Wyrażenia nieostre w języku prawa w świetle pragmatyki językowej

(streszczenie)

Niniejszy artykuł porusza problemy nieostrości form językowych w angielskich tekstach prawnych. Praca zawiera omówienie problemów terminologicznych związanych z kategoryzacją nieostrości w języku angielskim oraz analizę wybranych przykładów wyrażeń nieostrych, występujących w angielskojęzycznych tekstach normatywnych. Analizowane przykłady zawierają wyrażenia modalne, a w szczególności deontyczne użycia czasownika *shall* oraz wybrane związki frazeologiczne charakterystyczne dla rejestru prawnego.

W przedstawianych rozważaniach porusza się także z punktu widzenia pragmatyki językowej problem kodu językowego i inferencji. Teza artykułu jest taka: nieostrość obecna w tekstach prawnych w wielu wypadkach jest lub może być niwelowana w wyniku odniesienia do kontekstu, który ‘dookreśla’ znaczenie pozornie ogólnych lub nieostrych form językowych.