Language and Law: ways to bridge the gap(s)

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Abstract. *This essay explores the gap(s) between language and law regarding the concepts of language and how they affect legal practice. It seeks to identify and bridge the gap(s) between the two fields of knowledge, articulating the elements that permeate across, over and through the two disciplines in an attempt to understand such complexity. The reflection focuses on how the following three topics are viewed both from the perspective of the study of language and from the perspective of law: (1) the meanings of "pragmatic" and "pragmatism" with historically diverse backgrounds and deep epistemological differences in terms of scientific practices, (2) as a consequence, the different conceptions of language , language, text, speech etc., and (3) the lack of discussion on the research methodology, interpretation and production of meaning in the two sciences. The conclusion is that the bridge between language and law has not yet been built because the many attempts that have been made towards that direction focused on abstract models of ideal languages from the perspective of linguistics; and Law has built its point of view by developing a language concept based on the common sense of language teachers. All of this being governed by the paradigm of correction or based on classical logic and rhetoric.*

*Keywords: **Philosophy of Language, Linguistics Pragmatics, Legal Pragmatics.***

Introduction

What are the gaps between Language and Law? Identifying these gaps is the first step. I have observed that since the 1980s, in Brazil, the relationship between Language & Law or Law & Language, has not been consolidated as a research topic. We have just started an exchange between the two areas. The main obstacle is the lack of familiarization of lawyers with studies of linguists and vice versa. At the conference "Language & Law: the multiple turns and new research agendas in Law", carried out at the Law Department of the Catholic University of Pernambuco, in Recife, from the 3rd to the 6th of September, 2012, we were able to observe some of the difficulties in understanding how each field

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builds its knowledge. We meet again here, on the other side of the ocean, at another law school, trying to bridge the gap(s) between Language and Law. I noticed at that past event, as well as in the works that I reviewed for this 3ʳᵈ European Conference, that the main gap(s) between our different fields of knowledge are:

1. The knowledge we build from the various meanings of "pragmatics" and "pragmatism", with historically different origins and profound epistemological differences in our scientific work;
2. And consequently, different conceptions of language, words, text, discourse, interpretation etc.;
3. The lack of debate on the methodology of investigation of the two sciences, since its formulation in ancient Greek thought until today.

I will reflect upon these three topics, trying to identify gaps and connect the two knowledge domains, articulating elements that pass between, beyond and through the two disciplines, in an attempt to understand the complexity.

Linguistics Applied to Law

The application of linguistics in situations of judgment reflects a discourse trying to modernize justice. The studies of language in the legal area each represent a possible application of the assumptions and postulates of linguistics to the language 'of' courts and to the language 'in' courts in the various contexts of use, oral or written, in legal practice. Such studies do not yet characterize a specific and systematic exchange as in psycholinguistics, sociolinguistics, legal sociology and many other areas in which the theoretical and methodological apparatus are brought into cooperation for the interdisciplinary construction of another object of study.

Apparently, this exchange, so important for building bridges, will not take place so easily. In his article, Hutton (1996: 205–214), in a vehement tone, questions and makes objections on the relevance of the linguistic concepts for interpretive disciplines such as literary criticism, and especially Law. Regarding the contributions of forensic linguists, Hutton lists three types of obstacles:

(1) Linguists' theoretical concepts, and their central postulates as a discipline, building specific metalanguages:

(a) providing evidence to the court,

(b) producing and observing transcriptions and (c) identifying individual voices, constitute a specialized discourse on the idealizations of linguists and on the abstractions that linguists have been making outside the current "language behavior."

Hutton states that linguists propose that transcripts have the same importance of oral materials produced in court, under questionable assumptions that the courts operate interpreting fragments of speech or reading transcriptions. The principal objection for him is that the linguistic analysis does not account for the meaning of a specific statement on a specific occasion. "Linguistics has, in effect, developed a third realm of nature for itself, treating language as sui generis and developing for it a corresponding unique methodology and terminology, shared neither by the social sciences nor by the natural sciences" (Hutton, 1996: 209).

(2) Linguistics is not a science in the same proportion as Chemistry is. "Linguistic intuitions were a means into the system, not a means of analyzing the system. In this sense

linguistic analyses are subject neither to empirical confirmation or disconfirmation, nor are they accountable to social judgments about their correctness, relevance, plausibility or importance" (Hutton, 1996: 209). The author introduces his argument taking as a starting point the fact that linguistics is not an experimental science and does not work with invariants. Its method does not have the property of repeatability, nor is finalistic (practical purpose) or timeless, etc. Hutton accuses Linguistics of making use of *post factum* procedures, intuitions, simplification, using internal theories from heuristic categories and procedures:

By searching for fundamentals in the philosophy of science to develop his critique, the author has omitted at least thirty years in the history of schools of thought outlined by epistemology. The crisis of the humanities, the sciences that have man as an object of study, to which the author refers, went through successive historic moments: Humanism, Positivism (Comte), Historicism (Dilthey), Relativism (Max Weber). The specificity of the objects of study of the humanities seeks its foundations in the notion of phenomenon, in a refusal to treat societies as stages of culture and civilization in a universal historical process as the natural sciences do based on Darwin's notion of evolution. Structuralism shows that the exchange and circulation of specific objects is a way to build society as a whole, so the exchange and circulation of the word, of the linguistic systems, organizes and relates to other symbolic systems and defines the general and specific structure of a society, organizing social relations. The postulates of Marxism allow us to understand the human elements (historical and social institutions) with their links on historicity and materiality of human existence, allowing the rational interpretation of the various plans that overlap.

The anachronism of the ideal of science conceived by Hutton (1996) in the arguments developed in order to disallow linguistics as a competent domain of knowledge to give support to Law, however, gives rise to the possibility of working in an interdisciplinary way to point out the third obstacle:

(3) Linguists work with the idealization of linguistic behavior in the pursuit of certain invariant categories among all the categories, in the world's 'disorder', without depleting the complexity of the phenomena under study, based on remote conceptions of language. In this respect – idealization – the author establishes equivalence between the attitudes of lawyers and linguists, when faced with the categorization process (imputed to linguists) and when faced with the act of classification inherent to judicial rulings (imputed to law professionals). Because "Neither lawyers nor linguists have a monopoly of the truth, and both could learn from each other, and benefit from the chance to examine each other's presupposition about language". (Hutton, 1996: 209)

"Pragmatics" and "Pragmatism"

The first topic that I would like to consider is the various meanings of "pragmatics" and "pragmatism" that are adopted by both linguists and lawyers. The terms "pragmatics" and "pragmatism" have been used interchangeably or equivalently, and they do not mean the same thing. *Pragma*, a word of Greek origin, means thing or object, especially in the sense of something made or produced, and the verb *pracein* means to act or to do. The Romans translated *pragma* into the Latin word *res*, which is the generic term for thing, losing, in the translation, the "act or do", a meaning that was present in the original

Greek term. That explains the existence of similar names for practices/interpretations deeply different from each other.

"Pragmatics" and "pragmatism" are notions used concurrently in Philosophy, Language studies and Law. In a broad sense, "pragmatism" or "pragmatic philosophy" refers to concepts of philosophy advocating not only a distinction between theory and practice, but above all, the primacy of practical reason over theoretical reason. Its fundamentals are based in Kant, whose last work was called *Anthropology from a Pragmatic Point of View* [1798], as well as in some of the contemporary philosophy schools. In the United States, the philosopher Charles Sanders Peirce (1977)applies the notion of pragmatism not only to the Sign Theory that he developed within his research into semiotics, but to the conception of truth that he advocates in his definition of science. According to Peirce, scientific theories are sets of hypothesis whose validity can only be determined by taking into account their effectiveness and success, i.e., their results, effects and consequences, thus the practice of science itself. The psychologist William James and Oliver Wendell Holmes (1995), an American judge of the Supreme Court of the United States embraced his ideas. William James (1997), while also adopting the criterion of truth as success and effectiveness, gave them a more psychological and moral nature. He developed a "pragmatic philosophy" or "utilitarian philosophy" which led Peirce into adopting the term "pragmaticism" in order to dissociate himself from James, and characterize his own conception of semiotics.

Later, John Dewey (1971) followed James' ideas, developing a philosophy focusing on the practice, in an ethical and practical sense, analyzing society and culture, and proposing a philosophical system that combined the scientific study of psychology with the German Idealism. He exercised great influence in the American philosophy in the 1930s and the 1940s. Richard Rorty (1982) stands out in advocating what has been characterized as neo-pragmatism. Harvard's philosopher Stanley Cavell (1995) can also be included among those who represent contemporary pragmatism.

Law's reality exists only through its verbal expression. That is the reason for the legal philosophers' concern with the linguistic turn, to which they repeatedly refer. However, the linguistic turn operated last century is based on the assumption that is common to many areas of human and social knowledge: the fact that language (in its syntactical, formal, logical, structural, semantic, discursive aspects) allows operations such as thinking, knowing, deducting; i.e., operations supposedly "mental" or "cognitive" derived from the split between thought and language are nothing more than a dichotomizing construct of positivism. In this sense, why call it "*neo-pragmatism*" if the approach is still positivist?

The so-called pragmatic turn is led, in German philosophy, by Jürgen Habermas (1987; 1990; 1994) and his friend and collaborator Karl-Otto Apel (1996) inspired by Peirce's pragmatism and pragmatic philosophy of language. They developed the pragmatics concept by focusing on the analysis of the conditions of possibility of communication, their assumptions and their implications, in the fields of ethics and politics, and considering the discourse theory law.

The Habermasian theory of communicative competence arises in the field of law as a new way to articulate and justify a broader conception of rationality in order to rethink the normative foundations of the legal theory in the society. Habermas, however, pre-

pares his theory of communicative competence, starting by defining universal pragmatics, based on Chomsky's transformational generative grammar (Chomsky, 1975). The author evokes the notions of linguistic competence and linguistic performance with a view to the linguistic universals theory (formal and substantive). The task of the theory of communicative competence is to explain the operations performed by speaker and listener, with the aid of pragmatic universals, when they use sentences (or extra-verbal expressions) in verbalizations that Habermans called "utterances", in order to establish an understanding of the state of things. The contexts of certain speech situations also contain various extralinguistic elements (e.g., the speaker's psychic constitution, their factual knowledge, skills, etc.), which constitute the object of empirical pragmatics. Regarding this, Habermas also refers to the speech acts theory developed by Austin (1977) and Searle (1969).

The use of pragmatics, as a background, also applies to the so-called hermeneutic turn promoted by Heidegger (2003) and Gadamer (2002) in philosophical hermeneutics, a contemporary theory that emerged in the middle of the twentieth century and was characterized, in broad terms, by the idea that truth is the consequence of an interpretation. Pragmatics, in this case, leads to relativism and the criticism that is made is that relativism is equivalent to "anything goes", both from an ethical standpoint, as for knowledge production. In the legal field, relativism is criticized for generating social insecurity, where "everything" becomes contingent. We will not discuss here the question of the limits of hermeneutics and the idea of pre-understanding that the methodological principles of interpretation and explanation assume.

But the linguistic pragmatics presupposes a conception of language according to which the meaning is relative to certain contexts and should be considered based on linguistic terms and expressions used in these contexts. This is not equivalent to the "anything goes" of the relativism because the meaning is not seen as arbitrary, but as context dependent. Usage involves the determination of rules and conditions that characterize the specific contexts in which meaning is constituted. Claiming that meaning is "relative to the context" is not the same as confirming semantic, cognitive, or ethical "relativism", if "relativism" means that all points of view are equivalent and are equally valid. On the contrary, the consideration of rules, conventions and conditions excludes arbitrariness, explaining the process of constitution and alteration of the meaning of a word or linguistic expression as dependent, even on who produces it.

As can be seen, linguists and legal professionals build their objects of study under various theoretical perspectives and assumptions. In the field of linguistic pragmatics, Charles William Morris (1979) was the first to use this term, contemporaneously. The author distinguishes three levels of linguistic analysis: syntax (interrelation of the signs), semantics (relation between the signs and the world), and pragmatics to designate the study of the relation between signs and interpreters. Rudolf Carnap (2002), the logician and philosopher of science of German origin, with whom Morris has worked in Chicago, defined pragmatics as the study of language in relation to its speakers or users. More recently, the term "pragmatics" has come to encompass all language studies related to its use in communication.

The philosophy of pragmatic language values common language and the concrete use of language as its main research focus, considering semantics and syntax only as constructs of abstract theoretical. The ordinary language philosophy of Gilbert Ryle

(2002), the speech act theory of Austin, the conception of language games of Wittgenstein, among others, may be included in this perspective.

In summary, it is basically a philosophical view according to which the study of language should be conducted in a pragmatic perspective, i.e. as a concrete social practice, therefore examining the constitution of linguistic meaning in the interaction between speaker and listener, the context of use, the socio-cultural elements implied by use, and goals, and the effects and consequences of these uses. Pragmatics would not only be a segment of language studies, but its main area of research.

In my dissertation (1992) I mention the Solomon's judgment case based on the discussion between Weissbourd and Mertz (1985). The authors, to address the issue of linguistic pragmatics and relevance of context, refer to the Old Testament. They tell that two women, who lived together, each had a baby. On the first night, after childbirth, one of the babies died because the mother had lain down upon him. This mother then swapped her dead child for the living one without letting the other mother notice and there was no witness to this fact. The birth mother of the child who lived woke at dawn to breastfeed her child, and then was surprised. The two mothers claimed the child before King Solomon, who then ordered the guard to cut the child in two with his sword. Then one of the women begged the king to keep the boy alive, as she let the other woman keep him. The other woman said: "Neither mine nor yours, let it be cut in two." The king ruled: "Give the living child to the first woman, do not kill it, because she is his real mother."

From that situation, the researchers understand that Solomon dismissed the conflict of the two women who requested custody of the child based on inferences and world knowledge, and not based on the semantic content of the speech of the first woman. The decision to grant custody of the child to the woman who begged the king to keep the boy alive was due to the observation of contextual data: the altruistic behavior of the real mother.

One of the conclusions of Weissbourd and Mertz (1985), while doing research in African cultures, is that our Western cultures built their justice systems as if we had created another world based on institutionalized facts, a world consisting of individuals, corporations and semiotic properties. The authors regret that the effective use of speech that emerges from situations is not a reality for us.

The meaning of language for lawyers and for linguists

The second topic is perhaps one of the biggest gaps between language and the law: the different conceptions of language, speech, text, among others, that the two domains of knowledge have. According to a study conducted in 2002, from a sample that consisted of ten legal hermeneutics treaties, the conception of language that permeates law manuals is that of the representation of the world, of an instrument, in which the words have a literal meaning (Colares, 2002: 207-249).

The notion that permeates Streck *et al.* (2009) takes as a reference Homer's literary text "The Odyssey" as a metaphor or analogy between the interpretation of the Constitution and the reaction of Ulysses to the song of the sirens. In the article entitled "Ulysses and the sirens: About activisms court and the dangers of Creating a" new constitutional convention "by the judicial power" the authors state that:

> Since Ulysses knew of the effect of the sirens' enchanting song, he tells his sub-
> ordinates to chain him to the mast of the ship, and, under no circumstances,
> obey any order he may later give to unchain him. In other words, Ulysses knew
> he would not resist, and therefore created a self-restraint not to succumb later.
> (Streck *et al.*, 2009: 76)

In the 31 other occurrences of the word "text", the term is used to refer to the Constitu-
tion, as a finished product prepared by Brazilian constituents of 1988. In none of the uses
does it refer to a Text Linguistics (knowledge domain with legitimacy to define what a
text is) concept of text. Thus, to the authors "constitutions serve as the chains of Ulysses,
and through them the politicians set some restrictions not to succumb to the despotism
of the future majorities (parliamentary or monocratic)."

The Constitution is considered as an aid that may imprison the significance at-
tributed by the "politicians", the legislators, in a timeless manner, "Always remaining
identical to itself" regardless of who reads it, as if the significance was glued to the con-
stitutional text as a label affixed by the legislature, and as if every magistrate had only
to "decode" it. In the same article there are 20 occurrences of the word "interpretation".
The authors admit the difficulties of finding a theory of legal interpretation in the con-
text of this movement caused by the appearance of new constitutions that established
the Democratic State. According to Barretto (1999):

> this moment enabled the creation and redefinition of a series of legal institu-
> tions, such as the so-called "general clauses", the "vague legal concepts", "ab-
> stract rules" and, of course, the so-called "constitutional principles".

There is a disproportionate preference for measurement and verification issues in the
relation between words and ontological units (objects, states of affairs, events), the main
focus is logical truth, rationality, in spite of the non-classical logics (logic of knowledge
or epistemic logics, doxastic logics; tense logics, modal logics (concepts of necessity and
possibility) which are attempts of the logicians to apply the inference systems to natural
languages.

In law, the *eternal*, or the alleged neutrality of legal discourse in relation to political
and social issues of the country is based on the idea that judges are mere *law-abiding
individuals*, *trapped* – as Ulysses was chained – by the dictates of the rules elaborated by
the legislative, being the legal discourse responsible for implementing the principle of
justice, under the authority of the state. The conception of language as an instrument,
with a literal meaning stiffened by legal dogmatics, permeates the illusion of neutrality.
And, seeing as neutrality is just a myth, "the speech intended to be 'neutral', naive, also
contains an ideology – that of their own objectivity" (Koch, 2004: 17).

Some Conclusions

Methodologically, the reactions to the turns: linguistic, pragmatic and hermeneutic re-
flect the fear of facing the temporariness of the notion of truth. The truth would not be,
as in logics, the result of the correspondence between the theoretical propositions and
the nature of the reality they describe, as in positivism, i.e., known truths regardless of
context, in a social vacuum. We cannot establish a set of propositions, i.e., a reality in
itself, in a conclusive way, by comparison with a reality that does not depend on these
propositions. Propositions are formulated in ordinary language, in certain languages his-
torically located, and consist of the results and consequences of what they state about
reality.

Well, the emergent or urgent approximation between language and the law consists of reviewing the methodologies of the two sciences. The assertion that the linguistic pragmatics would make science unviable refers to the traditional realist conception of science as a conclusive and definitive knowledge of a reality considered in it.

Science and scientific theories are, unlike the realist conception, to be considered as more of a "language game" according to Wittgenstein, with their own rules, conventions and objectives. A theory is an explanatory model of reality, a set of hypothetical propositions that aim to explain a particular domain of reality. The pragmatic notions of effects and consequences are critical to the evaluation of scientific results and experiments, and for falsifying and validating scientific hypotheses.

As demonstrated, language is the primary medium through which Legal actions are performed. Reiterating what I have already written at other times: the conditions of the use of language include multiple aspects, simultaneous and successive, in the institutional context of justice, creating a "new object", and should extrapolate the mere linguistic analysis to construct an object of study of an interdisciplinary nature: language uses governed by legal principles. The task of this "new" field of knowledge Language and the Law will be to describe the nature of this semiosis, considering the need to interpret authentic legal texts in social contexts. The conclusion is that the bridge between language and law has not yet been built because the many attempts that have been made towards that direction focused on *abstract models of ideal languages* from the perspective of linguistics; and Law has built its point of view by developing a language concept based on the common sense of language teachers. All of this being governed by the paradigm of correction or based on classical logic and rhetoric.

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