The Context and Media of Legal Discourse

The Context and Media of Legal Discourse

Edited by

Girolamo Tessuto, Vijay K. Bhatia,
Ruth Breeze, Nicholas Brownlees
and Martin Solly

Cambridge
Scholars
Publishing

The Context and Media of Legal Discourse

Series: Legal Discourse and Communication

Edited by Girolamo Tessuto, Vijay K. Bhatia, Ruth Breeze,
Nicholas Brownlees and Martin Solly

This book first published 2020

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN (10): 1-5275-4477-X
ISBN (13): 978-1-5275-4477-2

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

SERIES EDITOR'S PREFACE

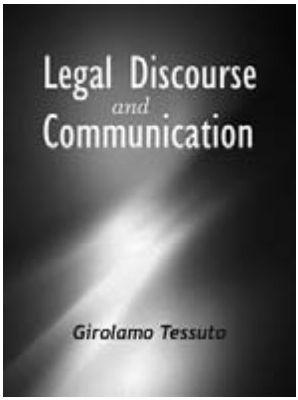
This volume grew out of the 5th International Conference *Legal Discourse: Context, Media and Social Power* (24-25-26 May 2018) organised by the **Centre for Research in Language and Law** (**CRILL**) of the English Language Chair of the Law Department of the Università degli Studi della Campania 'Luigi Vanvitelli'. As usual, this conference was attended by internationally prominent keynote speakers, Professors **John A. Bateman** (English Applied Linguistics, Faculty of Linguistics and Literary Sciences, Bremen University, Germany), **Vijay K. Bhatia** (CEO and Academic Director of *ESP Communication Services*, Past President of *LSP and Professional Communication Association*, Hong Kong), **Delia C. Chiaro** (English Language and Translation, Department of Interpreting and Translation, University of Bologna, Italy), **Jan Engberg** (Knowledge Communication, School of Communication and Culture, Aarhus University, Denmark), and **Giuliana E. Garzone** (English Language and Translation, Department of Studies on Language Mediation and Intercultural Communication, University of Milan, Italy), although regrettably Professor Emeritus **John M. Swales** (Linguistics, English Language Institute, University of Michigan, Ann Arbor, United States) was eventually unable to attend. Alongside these scholars lecturing on different topics relevant to the conference theme, an impressive response was received from young and senior researchers as well as practitioners, both nationally and internationally, contributing to a large number (almost 50) of single and joint papers.

Like its sister book of selected articles (*Social Media in Legal Practice*, edited by V. K. Bhatia and G. Tessuto, Routledge, 2020), this publication is a careful selection from those papers presenting research from all forms of discourse theory, data and methods touched on at the conference, and reshaped into articles after a double-blind peer review by the international academic community for inclusion in this *Legal Discourse and Communication* refereed, international academic series of the Cambridge Scholars publishing portfolio. This series supports the delivery of CRILL commitment in disseminating authentic peer-reviewed knowledge in the field to both scholars and practitioners, and provides the sum of the individual book titles originating from earlier CRILL conferences.

I would like to recognize the expertise of some eminent senior academics (Vijay K. Bhatia, Nicholas Brownlees, Ruth Breeze, Martin Solly) to peer-review the various conference contributions included in this book alongside myself, as well as other members from the *Legal Discourse and Communication* Advisory Board for their feedback on the ideas and approaches presented by contributors to this volume, ensuring that our series title continues to have relevancy and credibility in the disciplines of language and law. Last but not least, massive thanks go to Stephen J. Spedding (member of CRILL Management Unit) for his hard work in collecting and checking sources as well as dealing with technical and language editing for this publication.

Girolamo Tessuto
Conference Chair
CRILL Director

Legal Discourse and Communication double-blind refereed international series



INTRODUCTION

GIROLAMO TESSUTO

Over the most recent decades, 'new', digital communication media, comprising both the Internet and mobile media (e.g. email, social media sites, websites and Internet-based radio and television), and the ongoing digitilization of the 'old', traditional (print) media (e.g. printed books, newspapers and magazines), have exploded across the world by instantiating across several settings. Not only have digital technologies reconfigured spaces in, for instance, publishing, journalism, public relations, education, commerce and politics, they have also introduced substantial changes to communication among organizations, institutions, communities and individuals. This influence of digital "media practices" (Couldry 2012) runs deep in contemporary "mediatization" (Lundby 2009; Couldry 2012) or "mediation" (Agha 2011; Hjarvard 2014) that follow the "increasing involvement of media in all spheres of life", thus recognizing "media as an irreducible dimension of all social processes" (Couldry 2012: 137), and characterizing changes in practices, cultures, and institutions in societies themselves.

These transformative processes of media use and content have thus changed the way that people expect to find, share, and discuss information in the "public sphere" (Benkler 2006) or the "virtual sphere 2.0" (Papacharissi 2009), and opened up new, highly valued models for public engagement and participation alongside the combination of identity/lifestyle construction and the maintenance of social relations (Livingstone 2008). Very clearly, the relational dynamics of interpersonal and interactive digital media are shapers of the nature (constraints and allowances) of social practices operationalised by language and discourse as well as by other semiotic resources in communicating, producing and understanding specific knowledge across the wider Internet 'community' spaces. However, an understanding of these dynamics as grounded in the communicative practices of varying media forms also naturally extends the Goffmanian (1983) analogy for social "interaction order" by considering, for instance, that the algorithmic engines used by Google bring people and messages of social activity together on account of data generated by users, and

therefore identify the ways in which individuals accomplish interaction in a variety of online social contexts.

When it comes to the field of law, digital communication technologies are still in play to foreground a variety of legal discourse and communication practices unfolding in today's media environments, and to similarly merge with the fabric of everyday life. While recent inquiries have taken on board the complexity and dynamism of discursive as well as textual practices enabled by social participants across academic, professional, and institutional legal contexts (Bhatia et al. 2014; Tessuto and Salvi 2015; Tessuto et al. 2016; Tessuto et al. 2018), what we see as neatly fitting into this co-edited volume is a more nuanced, rounded perspective on linguistic and discursive practices and procedures arising from the increasingly mediatized world of legal communication.

For us dealing with the traditionally self-reflexive (conservative) representation of the community in question shifting to digitalized formats and genres more than ever before, the use of law by the media makes it relevant to emphasize knowledge of legal discourse as being "distributed across multiple people, specific social practices, and various tools, technologies, and procedures" that are joined together by the very notion of "community of practice" (Gee 1999: 65; Wenger 1998). This "focus on social and cultural interaction" (Gee 1999: 61), then, allows for a paradigm shift which reconciles "patterns of behaviour, as well as cultures and institutions" [that are] "produced and reproduced" in new patterns of social interaction (Gee 1999: 61), and therefore balances forces for tradition and innovation by helping large and dispersed groups of individuals structure their communities of practice or collectivities of virtual participation around different discourses and communicative plans in domain-specific media sites. The upshot of this is that the variety of communicative contexts, purposes, and activities served by interpersonal and interactive digital media in the ongoing field square with the relationships that (individual and institutional) participants have to each other and to the social and cultural environment. And this, in turn, offers insights into how participants' online behaviours shape their digital identities or personae, that is, how they show different behaviour patterns in different contexts (such as private vs. professional), and get things done in domain-specific communication.

Yet, as part of the changes that occur when communication patterns are transformed by new communication tools, knowledge of mediatized legal discourse shaped by socio-cultural interactions also turns on the genre and new media-oriented avenues, and grasps "how established print genres are imported into a new medium or how genre variants or even new genres

develop and emerge in electronic environments" through what is referred to as the "principle of genre-re-mediation" (Bawarshi and Reiff 2010: 160). On the one hand, this principle stands out as one of the moulding forces of mediatized legal discourse processes and practices and draws together a number of key aspects of context that are crucial to the production and interpretation of domain-specific communication (spoken and written). On the other, the principle takes hold of other factors, such as "globalization" and "commodification" (Agha 2011), which are in operation to trigger changes to legal communication with its media use.

With these transformative processes lying across the media, culture and society, the constructive influence of digital media on the universe of legal discourse manifests itself in the use of legal aid websites or other online resources such as those promoting public awareness of a referendum for new legislation; the use of social media comments, images and videos in a range of court cases involving all types of legal issues (e.g. employment, crime, bankruptcy, immigration); and the use of micro-blogging sites such as Twitter and Tumblr, among others. Through platforms like Twitter, for instance, it is easy to see how a nexus between conversations about the law is offered inside and outside the courtroom, thus functioning as an inclusive and interactive site for public debate as well as providing re-tweeted refrainings to be likely linked to established media sources. These ways of making the most of social media for the legal industry not only come with their own set of rules and procedures by attracting specific audiences for different activities and purposes, but most significantly facilitate community-based input, content-sharing and collaboration through a joint focus on changing patterns of interaction between social actors. By the same token, the influence of media can be found squarely at the forefront of other semiotic instances or modes of legal discourse, as is shown by Web-based articles, news reports, blogs, forums and comment spaces, or other media output, which eventually become co-constitutive of transformative discourses, genres, styles, and modalities.

Just as these and other instances of textual genre make pieces in the media logic of interpersonal and interactive communication and hold together with discourse analytical approaches to *texts*, *contexts*, *actions and interactions* alongside *power and ideology* (Jones, Chik, Hafner 2015), so too they make their way into creative, yet indeed complex, forms of legal discourse practices in everyday professional actions and situations through language use. Under these circumstances, much of the way digital media combine the elements of various domain-specific discourses not only depends on how we make sense of the "orders of discourse"

(Fairclough 2003), but more significantly on how we square the idea of a "socio-pragmatic space" with "contextualization" (Bhatia 2004, 2017), which allows for "interdiscursive performance in specialized and narrowly defined professional, disciplinary and cultural contexts" (Bhatia 2017: 29). This way of 'critically' moving across the contextual boundaries of media sites becomes an instrument for the construction of interdiscursive and interdisciplinary process, practice, exploitation and management of public and private discursive space, and tells us about the role, identity, power, and ideology-constructing effects that bear upon those who use novel forms of legal discourse created or re-created by digital communication media.

This book in outline

Against this background, the present volume brings together a different set of inquiry for language and discourse analytical studies, and provides new insights into diverse and complex contexts of legal discourse and activity performed across a variety of socially and culturally informed digital media transformations. The nine chapters in this volume are organised into four Parts addressing topical issues of legal discourse (written and spoken) performed by Web-mediated technologies and (social) media usage in professional and institutional contexts of communication. Analyses of such issues rely on specific perspectives, varied applications, and different methodological procedures necessary to provide a multifaceted overview of the ongoing research and knowledge.

Part One of the book opens with two studies offering **Perspectives on the nature of legal meaning in digital communication: critical discourse and contextualist semantics**.

In the first chapter, *Collective Intentions in the Law and in Contextualist Semantics*, **Ross Charnock** provides the 'big context' for his study by informing the reader about undisputed theories explaining the influence of social media on the opinions and beliefs of individuals. When it comes to the law, however, personal perceptions and intentions are seen as fundamental in that courts are expected not just to interpret contracts to accord with the intentions of the parties, and, in cases of contested wills, to give effect to the intention of the testator, but also to prove intent in order to obtain a criminal conviction. Yet, according to the philosophical definition, unlike personal objectives or agreed plans of action, intentions correspond rather to private perceptions fundamental to the study of meaning, and are taken to be essentially incommunicable. Moreover, the author points out, judges have occasionally recognised that the intentions

of others cannot be known. What is more problematic is that collectivities cannot have intentions at all, and it may be expected that cases involving group behaviour will be of particular difficulty, as is seen where crimes are committed during riots, or in the application of the rule of joint enterprise. The author's suggestion is that where individual beliefs and opinions are influenced by group behaviour, instead of taking this as an aggravating factor, the law should allow judges to consider the intentions of the relevant collectivity, just as they already presuppose such intentions on the part of 'the legislature' in cases of statute construction, and to take account of their influence on the behaviour of the individual. On this basis, then, the author examines the treatment of these and related problems in the common law, with particular reference to 'trolling' and defamation on social media, and proposes an approach to the notion of collective intention inspired by the semantic theory of contextualism.

This way of perspectivizing new courses in professional legal research and practice goes forward with the 'critical' perspective to discourse analysis in the second chapter *Construing Sustainability in Europe. Voluntary Contribution to Society or a Mandatory Legal Obligation?* by **Tarja Salmi-Tolonen**. In her study, the author first reviews how critical discourse studies techniques can be applied to the development of legal thinking, and secondly, discusses whether critical discourse analysis helps disclose the change and development in the concepts of sustainability and corporate social responsibility constructed both in legal documents and in the media. Based on the author's assumption that the concepts have developed and altered from voluntary contributions to society and environment towards a mandatory legal obligation, the current analysis thus draws on the theoretical frameworks of critical discourse analysis (Fairclough 1992; Wodak et al. 2015; Forchtner et al. 2017) by relying on approaches to text-immanent, socio-diagnostic, prospective and retrospective analyses and critique. The material studied consists of official documents, communications and strategy papers of the EU starting from the Green Paper of 2001 to 2017, as well as a small corpus of some Member State communications and press coverage analysed and compared with the official documents. Preliminary findings show that construing sustainability and stance towards CSR are evolving in Europe on the scale from voluntary to mandatory.

Part Two includes three studies dealing with **Popularization of online media resources and use of big data agenda for law and ethics**. In the third chapter, *Multimodal Institutional Knowledge Dissemination and Popularization in an EU Context – Explanatory Ambition in Focus*, **Jan Engberg** gets his study focused directly on legal institutions which, like

the EU institutions (e.g. Parliament and Court), are senders of performative, domain-internal communication as well as popularizing, domain-external communication. He goes on by saying that the bulk of research into the communication of legal institutions in general has been on the domain-internal performative side in the form of studies of statutory texts as well as decision texts, as these texts are rightly seen as the central communicative efforts of this type of institutions when fulfilling their institutional role. With such texts, then, legal institutions perform their societal role as solvers of clashes of interest between citizens, either by prescribing solutions before the problems have occurred (statutory texts) or by issuing solutions to actual problems when they have materialized (decision texts). The institutions issuing such texts perform their formal powers on constitutional grounds. In this way, they do not formally rely on any acceptance by the subjects of their communication in order for their communication to be successful, and the EU Court of Justice, for instance, relies on the binding powers of its decisions. However, as the branch of the sociology of law tells us, the author argues, there is more to actual efficiency of law than just constitutional powers. In this context, the softer side of institutional communication of legal institutions comes into focus, in which institutions inform about their activities and about themselves. Against this background, the author's study focuses upon this type of institutional communication, that is, one which is often treated under the heading of popularization, or knowledge dissemination, as part of today's online media resources. The author then provides clear statements of the rationale of his approach to popularizing online communication of two EU institutions - the European Parliament and the Court of Justice of the EU - and does so by posing four main questions:

> What types of online resources (e.g. web sites and pdf documents) do the institutions use?
> What aspects of multimodal communication are actually applied in the institutional communication of the two institutions?
> What level of knowledge complexity do the institutions aim at in their popularization efforts?
> What is the kind of relation the institutions aim at achieving between themselves and the citizens of the EU?

Following these questions, he then investigates the knowledge asymmetry relation between institutions and citizens.

In the fourth chapter, *Too Good to Be True. A Discourse Analysis of the Australian Online Scam Prevention Website*, **Maria Cristina Aiezza**

establishes the context of the study by claiming that the exponential growth of information technology has brought about revolutionary changes in commerce, banking, communications and human relationships. At the same time, though, the Internet has also offered new opportunities for less scrupulous subjects to pursue their personal interests by taking advantage of others. In particular, online scams have become an extremely common phenomenon: fraudsters make use of web-mediated communications in the form of emails, social networks, mobile apps, and so on to trick their victims into giving away personal information or money. Such cybercrimes, the author adds, may be pursued for committing different kinds of offences, such as those arising from misleading and deceptive conduct under consumer protection laws, fraud laws and other criminal laws. Yet, it is extremely difficult for government agencies to identify scammers and take action against them, especially considering that scammers may be based in a foreign country. The Australian Competition and Consumer Commission (ACCC) reports that nearly $83m (€55m) was lost to scams in 2016, with online scams outnumbering phone-based frauds. Scammers may persuade their victims through deceptive narratives, misleading a target audience into believing false information. Police forces and regulators are continuously required to learn about the new and devious methods scammers use to help web users avoid frauds. Run by the ACCC, the ScamWatch platform provides information to online users, consumers and small businesses about how to recognise, avoid and report scams. Based on this, the author considers the resources provided on ScamWatch to support web users and offer legal aid. In particular, she focuses on the popularisation methods enacted by the ACCC to instruct users about techniques, approach and methods used by scammers. In addition, the author takes a genre perspective to examine the ACCC guidelines and reveals the textual realizations (e.g. philanthropic fundraising, love message) used alongside deceptive features exploited by fraudsters.

In the fifth chapter, *Legal and Ethical Issues in Big Data Discourse*, **Maria Cristina Paganoni** briefly explains the rationale of her study by discussing the ways Big Data affect major ethical concerns such as informed consent, confidentiality, privacy and de-identification as well as legal discourse, where reformulating human rights in the light of data usage has become a pressing requirement (O'Connell 2016; Bishop 2017). This is why the intersection between Big Data and law is now gaining momentum among researchers (Corrales, Fenwick, Forgó 2017), who remark on the emergence of novel configurations of basic rights and, at the same time, on the innovations that Big Data bring about to legal science

(Zödi 2017). Based on this, the author explores the interplay between law and ethics as it surfaces through the discourse of private and public institutions, governments and supranational bodies (e.g. the European Union). Through a discourse-analytic approach to a representative corpus of state-of-the-art regulatory documents and policy papers in English, the author then identifies how law and ethics overlap discursively, and infers ideological shifts likely to arise from the mandatory legal frameworks provided by Big Data.

Part Three provides an understanding of the **Challenges for sharing economy and models for contested domains in online platforms**.

In the sixth chapter, *The Sharing Economy: Resemanticising the Enterprise*, **William Bromwich** focuses down to the problem of the "new economy" where an increasing number of platforms exist thanks to community-based input, content-sharing and collaboration. They all seek to project an image of themselves as caring, sharing communities, in which the participants are inspired by community spirit and altruism. To the extent that user-generated content is made freely available by reviewers (non-profit Wiki, for-profit TripAdvisor, Yelp and AirBnB), the author argues, the narrative constructed using terms such as "community", "members" and "sharing" appears to find some justification. Altruistic behaviour of this kind, however, is only one aspect of the "sharing economy". By means of "data mining" techniques, self-styled "tech giants" generate increasingly lucrative revenue streams, that are not distributed to the "members" of the "community" in the way that joint stock companies distribute dividends to shareholders. In this connection, the author finds Bhatia's concept of interdiscursivity as being particularly useful to cast light on cases in which the discourse of contract law and company law is relegated to the "Terms and Conditions of Use" on the online platforms, whereas the discourse that enjoys the highest visibility is a "caring, sharing" narrative at odds with the substantial revenue streams generated by online advertising and commission. In addition to the characterization of (unpaid) reviewers as "community members", the author examines the characterization of (low paid) drivers (Uber, Deliveroo, Amazon), underlining the fact that the terminology of employment law is either resemanticized or completely eliminated, and the employment status of drivers and delivery staff downgraded to that of "independent contractors" and "community members" by means of discourse practices that are an occluded (legal) genre not in the public domain. In just one case, the author finds, Deliveroo's company policy resemanticizing the employment relationship for the purposes of

dissimulation is made available to the public domain, albeit inadvertently, thus casting light on these interdiscursive practices.

In the seventh chapter, *Contesting Legislation: Campaigning against International Trade Agreements in the Public Knowledge Domain*, **Janet Bowker** starts with the established view of the dissemination of knowledge about legislation and law enforcement from specialist to non-specialist which is usually viewed as constructive and productive, enabling the public to act more responsibly and take more informed decisions. The legitimacy of the legal sources of this information is normally unquestioned. Her study, instead, considers an area, namely that of international corporate law, which has become the focus of concerted opposition and radical contestation on the part of public activists in major campaigning organizations. This area, in particular, deals with mega-regional trade and investment agreements (including the TTIP, the Transatlantic Trade and Investment Partnership), and the dispute system derived from these, the ISDS, Investor-State Dispute Settlement mechanism. The data for this study come from the online publications of "Friends of the Earth", more specifically from the topic section "Economic Justice and Resisting Neoliberalism". A corpus-based approach to these data is used to address two main questions:

> How far are the legal sources actually used in the argumentation of this form of public journalism, and for what purposes?
> What are the discursive strategies, frames and forms used to construct the organization's own rationale for de-legitimization?

In answering these questions, the author's theoretical frameworks are mainly chosen from those of Argumentation Theory based on formal logic schema, and Critical Discourse Analysis based on the process of knowledge *authentification* and the construction of ideology. Such blended methodology is used by the author to identify and interpret the following features in the corpus: argumentation markers, information framing devices, logical schema, the language of persuasion and evaluation, citation and attribution. A study of this kind may serve to understand more about the discursive construction of campaigning in the public knowledge domain, particularly with regard to the creation and defence of ideological positions, and answers the questions as to whether recourse to reasoned argument is indispensable to one's cause, or whether it is one exempted from "the burden of proof".

Part Four closes this volume by dealing with **Issues in media fictional representation of the legal profession and projection of witness position in the courtroom**.

In the eighth chapter, *A Most Reviled Profession: Fictional Representations, Cultivation Theory and Public Perceptions of US Lawyers*, **Shaeda Isani** sets the scene of her study with the line "The first thing we do is kill all the lawyers" from Shakespeare's late 16th century *Henry VI,* which continues to illustrate the negative public perceptions that still haunt lawyers today. After an overview of the intrinsic factors relative to the profession as a whole, the author looks at the phenomenon from the angle of fictional print and filmic media and situates it as being specific to American lawyers (as opposed to British and/or Continental lawyers). Using theories from media studies, she hypothesizes that negative public perceptions of lawyers in America are shaped by powerful vectors extrinsic to the profession, i.e. popular fictional representations, notably lawyer films and TV series. To do this, the author presents first the different manifestations which corroborate the existence of the negative image of American lawyers (Galanter 1998). She then examines a palette of fictional cinematic and television representations of American lawyers in a diachronic approach from the 1950s to today, highlighting the tendency to focus on the flawed nature of the profession (Isani 2005, Asimow 2009).The second part of the study analyses these fictional representations in the light of media and communication cultivation theories which study the long-term effects of television viewing, the creation of "television reality", and the correlation between fictional representations and public perceptions (Morgan 1986). To pin down the phenomenon as specific to lawyers (as opposed to other professionals in America), the author presents findings reported by media cultivation theorists regarding public response to television representations of doctors (Record 2011), which she correlates to the same regarding lawyers. To conclude, given the fact that law-related films and television series are mostly authored by lawyers themselves, the author looks at the phenomenon through the prism of media gratification theories which study how viewers seek out specific media to satisfy specific needs. In this light, she raises the question of whether authorial imaginary fashions reader perceptions or, inversely, and with a manifestly commercial purpose, whether reader expectations bend the authorial imaginary.

In the ninth chapter, *Witness Identity Construction In Trial Testimonies: The Case of a Strong Witness*, **Anna Iegorova and George Ypsilandis** are inspired by positioning theory (Bamberg 2004; Davies and Harré, 1990; Harré and van Langenhove 1991; Harré and Moghaddam

2003) to elucidate the process of witness identity construction throughout testimony in trial, with the aim of revealing strategies adopted by participants (lawyers and witnesses) in the ongoing co-construction and de-construction process. The dataset is retrieved from a well-known trial *(The People vs. O. J. Simpson)*, which provides the corpus of investigation. The data and findings are grouped in the following two major categories of identity construction which rest on the Aristotelian Ethos:

A. The first is found in testimonies through explicit and implied evaluation of the witness' moral identity and moral grounds for actions in the past (facts from their biography, facts related to the case), in the present (evaluation of the witness' conduct in the courtroom), and even in the future (the witness' plans as related to the outcome of the case).
B. The second links to direct and implied evaluations of others, the protagonists in their stories: their moral tenets and actions.

In both cases, the witnesses seek to position themselves as morally virtuous in order to gain credibility in the court. In addition, even when their moral tenets are contested, a strong witness can find ways to mitigate the damage done to their identity.

Concluding remarks

All of the contributing authors to this volume have engaged in a distinctively 'critical dialogue' with past and present directions in the wider language and law research studies. They have presented key, field-based issues of legal discourse analysis within a variety of traditions that investigate the relations between language, structure and agency in mainstream linguistics. By including corpus-based discourse analysis, critical genre and discourse analysis, argumentation and contextualist analysis, and multimodal discourse analysis, among others, this volume provides clear descriptions and analytical insights into legal discourse of various texts and genres, and highlights the ways digital media are produced and consumed alongside the social activities and purposes employed and the social roles, identities, ideologies and power constructed through the authenticity of legal discourse contexts called upon by the media, thus offering new insights into how we may think about mediatised texts, genres, and social interaction through situated language use.

In co-editing this volume, we wanted to publish the diverse range of research into specific issues arising from the crucial role of legal discourse

in its various media contexts and multimodal semiotic phenomena, and demonstrate what a 'critical dialogue' can bring to our analysis and understanding of both discourse and society. Like its sister volume (*Social Media in Legal Practice*), therefore, this publication provides a rich platform for readers, whether old or new researchers, including PhD students, to engage with those issues through a series of selected and innovative chapters, and brings them up to date with the current understanding of legal language, discourse and communication in today's digital media knowledge and representation.

Bibliography

Agha, Asif 2011. Meet Mediatization. Editorial. *Language & Communication* 31(3): 163-170.

Bawarshi, Anis S. / Reiff, Mary J. 2010. *Genre: An Introduction to History, Theory, Research, and Pedagogy*. West Lafayette: Parlor Press.

Benkler, Yochai. 2006. *The Wealth of Networks*. New Haven, CT: Yale University Press.

Bhatia, Vijay K. 2004. *Worlds of Written Discourse*. London: Continuum.

—. 2017. *Critical Genre Analysis. Investigating Interdiscursive Performance in Professional Practice.* London/New York: Routledge.

Bhatia, Vijay K. / Garzone, Giuliana / Salvi, Rita / Tessuto, Girolamo / Williams, Christopher (eds.) 2014. *Language and Law in Professional Discourse: Issues and Perspectives*. Newcastle upon Tyne: Cambridge Scholars Publishing (UK).

Couldry, Nick 2012. *Media Society World: Social Theory and Digital Media Practice*. Cambridge: Polity.

Goffman Erving 1983. The interaction order: American Sociological Association, 1982, Presidential Address. *American Sociological Review* 48: 1-17.

Fairclough, Norman 2003. *Analysing Discourse. Textual Analysis for Social Research*. London: Routledge.

Gee, James P. 1999. The Future of the Social Turn: Social Minds and the New Capitalism. *Research on Language and Social Interaction*, 32 (1&2): 61-68.

Hjarvard, Stig 2014. *From Mediation to Mediatization: The Institutionalization of New Media.* In Hepp, Anreas / Krotz, Friedrich (eds.), *Mediatized Worlds: Culture and Society in a Media Age.* Basingtoke: Palgrave, 123-139.

Jones, Rodney H. / Chik, Alice / Hafner, Christoph A. (eds.) 2015. Discourse analysis and digital practices. In Jones, Rodney. H. / Chik, Alice / Hafner, Christoph A. (eds.), *Discourse and Digital Practices: Doing Discourse Analysis in the Digital Age*. London: Routledge, 1-17.

Livingstone, Sonia 2008. Taking Risky Opportunities in Youthful Content Creation: Teenagers' Use of Social Networking Sites for Intimacy, Privacy and Self-Expression. *New Media & Society* 10(3): 393-411.

Lundby, Knut. (ed.) 2009. Introduction: 'Mediatization' as Key. In Lundby, Knut (ed.), *Mediatization: Concept, Changes, Consequences*. New York: Peter Lang, 1-18.

Papacharissi, Zizi. 2009. The Virtual Sphere 2.0. The Internet, the Public Sphere, and Beyond. In Chadwick, Andrew / Howard, Philip N. (eds.), *Routledge Handbook of Internet Politics*. New York: Routledge, 230-245.

Tessuto, Girolamo / Salvi, Rita (eds.) 2015. *Language and Law in Social Practice Research. E-Book of Selected Articles*. Mantova: Universitatis Studiorum.

Tessuto, Girolamo / Bhatia, Vijay K. / Garzone, Giuliana / Salvi, Rita / Williams, Christopher (eds.) 2016. *Constructing Legal Discourses and Social Practices: Issues and Perspectives*. In *Legal Discourse and Communication*. Newcastle upon Tyne: Cambridge Scholars Publishing (UK).

Tessuto, Girolamo / Bhatia, Vijay K. / Engberg, Jan (eds.) 2018. *Frameworks for Discursive Actions and Practices of the Law*. In *Legal Discourse and Communication*. Newcastle upon Tyne: Cambridge Scholars Publishing (UK).

Wenger, Etienne 1998. *Communities of Practice: Learning, Meaning and Identity*. Cambridge, Cambridge University Press.

PART I:

PERSPECTIVES ON THE NATURE OF LEGAL MEANING IN DIGITAL COMMUNICATION - CRITICAL DISCOURSE AND CONTEXTUALIST SEMANTICS

CHAPTER ONE

COLLECTIVE INTENTIONS IN THE LAW AND IN CONTEXTUALIST SEMANTICS

ROSS CHARNOCK

Introduction: 'Intent' in theory and in practice

The notion of intent is fundamental in law. Contracts must be interpreted so as to give effect to the intentions of the parties, wills must be interpreted in accordance with the intention of the testator and statutes must be construed in such a way as to conform to the intention of the legislature. In penal law, the criminal intent, the 'mens rea', is constitutive of the crime. This is often taken as implicit, even where there is no reference to intent in the text of the law under consideration.[1]

But the discovery and demonstration of intent is more difficult than it looks. At the time of writing, a petrol bomber was telling a court, probably truthfully, that he "didn't intend to hurt anyone". No doubt he failed to think it through. He may not have realised that there may be people in the vicinity, and certainly no one in particular. In which case it would be difficult to show "malice aforethought". In practice, murder often seems to constitute an exception to the rule, as, in spite of the presumption that 'intent' is necessary, its absence will not prevent the court from finding guilt. This is justified by the fact that, because according to the "objective" test, the accused should have known what would happen, and was reckless of the consequences.

[1] "There was a presumption that when Parliament makes the commission of certain acts an offence it intends that mens rea shall be a constituent of that offence whether or not there is any reference to the knowledge or state of mind of the accused." (*Tesco Supermarkets v Nattrass* HL 1972, *per* Lord Reid). In the US it is notable that the constitutionality of Trump's rules on immigration is tested by reference to his 'intent' as revealed by his 'tweets' during the election campaign.

Ivey v Genting Casinos (2017)[2] concerned the concept of "cheating" even where none of the techniques used were against the rules of the casino, and there was no accusation of dishonesty against the player, who had succeeded in winning 7 million pounds at 'Punto Banco', a variant of Baccarat, in a single evening. The Casino persuaded Lord Hughes to declare his superlative skill unfair. In consequence, in spite of the defendant's sincere belief that his actions were honest by the standards of ordinary and reasonable people, he was nevertheless found to have been 'cheating', albeit "honest cheating", in itself an improbable concept.

One reason for the fact that the notion of 'intent' is so problematic is that, on the philosophical level, according to the conventional definition, intentions are considered incommunicable. This is a consequence of the problem of 'other minds'. Intentions in this philosophical sense include not just personal experiences or perceptions, for example of pain, or of colours, but also involve meaning and reference, as well as understanding generally. Just as no one can share another's experiences to the extent that they could feel pain or pleasure on the other's behalf, it is not possible to share the intentions of another person.

Unsurprisingly, jurists have been aware of the problem of 'other minds' for centuries, and recognise that the intentions of others cannot be established objectively. The words of Bryan CJ, in a 1477 judgment, are frequently cited, notably by Denning MR in *Gould v Gould* (1969):

> [F]or it is common learning that the intent of a man cannot be tried, for the devil himself knows not the intent of a man.[3]

Yet the justice system continues to function with reasonable success, the judges having adopted practical solutions to these theoretical problems. The question remains as to whether these solutions are intellectually acceptable.

---

[2] Full legal references are provided at the end of the chapter.

[3] Also cited by Blackburn J in *Brogden v Metropolitan Ry* (1877), himself citing Brett CJ from memory, referring this time to "the thought of man". Similarly, Justice Douglas dissenting in *Scales v US* (1961) on the interpretation of the 'Smith Act' 1961. The original statement by Bryan CJ in Anon (1478), in a case concerning punishment for thoughts (of treason) rather than for words and deeds, was cited in extenso by Cecil H. S. Fifoot (1949: 252-4).

Judicial solutions

The practical solutions adopted in the courts regarding both 'mens rea' and linguistic meaning, are well known to the point of being taken for granted. It will be apparent, however, that these generally adopted solutions appear unsatisfactory and even incoherent on the theoretical level. Yet, because of the impracticality of any of the more theoretical solutions which may have been proposed, they continue to be accepted. The challenge is therefore to find a more plausible explanation of how the courts continue to function.

Legal interpretation: speaker's intentional meaning

Regarding legal interpretation, given the impossibility of establishing exactly what was meant by an individual, especially when the context of utterance is no longer available or appropriate, judges generally claim to limit themselves to the literal meaning of the words used, supposedly the closest approximation available to the speakers intended meaning.

As long ago as the *Sussex Peerage Case* (1844), Tindall CJ stated that

> [i]f the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.[4]

Thus the literal meaning of the words used predominates, often to the detriment of what was meant by one or sometimes both the parties, as in the contract case of *Hotchkiss v Nat City Bank* (1911):

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. (*Hotchkiss v Nat City Bank* 1911, *per* Justice Hand)

---

[4] This so-called "literal rule" was confirmed more recently by Lord Reid in *Black-Clawson*. "In the comparatively few cases where the words of a statutory provision are only capable of having one meaning, that is an end of the matter and no further enquiry is permissible." (*Black-Clawson v Papierwerke* 1975, per Lord Reid).