PRAGMATICS AND LEGAL CULTURE: A GENERAL FRAMEWORK

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> In a competition, who is a better painter, Zeuxis painted grapes which looked so life-like that the birds came to taste from them. Parrhasios, his friend, however, painted a veil such that Zeuxis, turning toward him said, *Well, and now show us what you have painted behind it*.
>
> (Gombrich 1960: 173; cf. also MacCormac and Stamenov 1996: 20)

I. LEGAL CULTURE AND PRAGMATICS

1. Introduction: both sides of the same river

1.1. This paper deals with culture, cognition and pragmatics, on the one hand, and with legal culture, organizations and institutions, on the other. The aim is to explore methodological and theoretical possibilities of tying up these two broad domains, which usually remain disconnected or, at least, analytically bounded: the law & society tradition and contemporary pragmatics. Moreover, authors working in these topics in the mainstream river of culture in both domains tend to embrace intuitively some epistemic assumptions about their object, which places them either in the micro-analysis of linguistic and communicative events or, on the contrary, in the macro-analysis of legal institutions stemming from sociological indicators.

But, what is the link? Is it actually possible to have an analysis of a courtroom-interaction without consideration of explanations on a broader context or environment? And, on the reverse side, what kind of relationship (if any) may be established between sociological indicators and the form and content of a single argument in a concrete situation?

1.2. Furthermore, as a sociolegal research group, we have four situated reasons to fill up this gap.

First, as the GRES work has shown in many recent papers and ethnographies, it is no longer possible to think about a pure or homogeneous contemporary legal culture within the professionals' behavior in Spain[1]. Especially among young professionals -judges, prosecutors, lawyers-, there is at the moment a *mixed* or *hybrid* legal culture stemming from many sources of languages and experiences. Legal language, common sensical arguments and different moral codes are involved in a kind of cooperative behavior and collaborative reasoning produced within legal institutions and organizations both in formal and informal situations -e.g. jury trials, pre-trial bargainings, mediations, etc. Thus, the task of modeling regular patterns is not trivial. A cross-epistemic methodology is needed in order to understand the way in which new collective properties emerge from singular situations and how individual coordinated behavior produces collective identities which have many feed-back effects on every single individual.

The second reason deals with the GRES participation in the elaboration of the *Quantitative Database on European Judicial Systems*, among other specialized research groups. This European Network has selected about thirty general variables in order to produce a comparative study on the situation of justice in Europe. Comparing legal cultures is a difficult task, which not only implies reliable information about litigation rates, judicial organization and legal professions, but also first-hand knowledge about behavior: procedures, experiences, styles of argumentation, cultural models and ways of judging and dealing. Which kind of relations are supposed to be established between the general variables and the concrete practices? How overcoming is the different level of analysis implied by a sociological «indicator» and the result of a set of observations?

The third reason is related to the answer to the latter question. During the first year of the introduction of the jury system in Spain, we have videotaped and transcribed four murder cases in the Barcelona Superior Court (each case lasted approximately one week in Court). We have done this work going along with the *ad hoc* team created in the Prosecutors' Office to observe and implement new procedures and strategies before the Jury[2]. Therefore, we have gathered a valuable set of data about the behavior of Magistrates, Prosecutors and Lawyers in the new situation. What is the link between new and old procedural knowledge? Behavioral and mind patterns are never created *ex-novo*, but produced in a complex network of previous experiences, organizational constraints and cultural models which are to some extent and in some way shared by all participants.

Finally, there is still one more reason to reunificate the field of law and pragmatics. Our work reaches a normative or regulative practical dimension in the task of assessing professionals. In the GRES courses on communication, language and argumentation for judges, prosecutors and lawyers, we are often consulted about everyday problems. How may the judge's task of communicating with jurors be improved? How can we know that our questioning has been well-understood by witnesses? Which is the best way to reorganize the judicial setting in order to facilitate the ruling? Are there any means of reducing the communicative distance between judges and citizens?

The scope of building up some practical rules that may be tested in the legal settings adds complexity to our task, but this guideline is also a useful way of getting some feedback from our own hallmarks. This is a way of disbelieving eternal truths and keeping ourselves alert and critical with respect to our own findings.

2. **Legal culture**

2.1. From the many notions of culture that we have been provided by the social sciences, I will distinguish three main traditions or huge trends: (i) *culture* as *elite-knowledge* (Berlin, Arendt, Heller, etc.); (ii) *culture* as *Weltanschauung* of everyday-life within a human community (Tylor, Malinowski, Boas, Mead, Leach, etc.); (iii) *culture* as *social knowledge* or practical knowledge belonging to a social group performing coordinated or planned tasks (Becker, Parsons, Shils, Simon, March, etc.).

We may speak of culture as **knowledge**, **behavior** and **organization**.

2.2. This can be easily transported into the legal scholarship tradition: (i) *law culture*: dogmatic or formal construction of law (as in the case of the Italian School of *cultura giuridica*: Tarello and Rossi); (ii) *legal culture* (*internal* and *external* stemming from the actors within a 'legal system': values and beliefs of internal agents -judges, prosecutors, etc-; beliefs and opinions about the legal system of external lay people among the population) (Friedman, Schreiber, Toharia, etc.); (iii) *legal culture* as 'professional or practical knowledge which has been produced and enacted inside the organizational setting of institutions' (Abel, Gessner, Feest, etc.).

The latter two notions represent roughly the most common concepts embraced by the *Law & Society* tradition (imported from the Almond's concept of 'political culture' in the sixties).

Lawrence Friedman and Harry N. Schreiber (1996: 1) recently put the question in this way:

«*Scholars have used the term in a number of senses. Sometimes the phrase describes legal consciousness -attitudes, values, beliefs, and expectations about law and the legal system. At other times, scholars employ the term in a broader but somewhat vaguer meaning -to capture what is distinctive about patterns of thought and behavior in, say, American law. Some sweep even more into the category: legal institutions and the distinctive way they function. In any case, the term refers to the* ***living law****, to law as a dynamic process; if the dry texts of statutes and cases, and the organizational charts that describe legal institutions are the bones and skeleton of a legal system, then legal culture is what makes the system move and breathe*».

This position has received several well-grounded criticisms: (i) its working more as an *idealtypen* than a set of variables (R. Cotterrell); (ii) its lack or difficulty of measurability (E. Blankenburg). Besides, it may be noticed that the notion of «legal system» is a dubious borrowing from the emic self-represention through which jurists and law scholars describe law.

However, the current increasing globalization and legal changing process has produced recently a revival of the notion of *legal culture* and its correlated task of comparing legal cultures. It is not my aim to object to such a research line. On the contrary, I will state that cultural, cognitive, organizational and institutional analysis are what is required in order to get some insight into the social transformation of law and state. But, how can this be done?

2.3. The comparison between German and Dutch legal institutions has led Erhard Blankenburg to the proposal of splitting up the concept in various levels of analysis on behavior and indicators of institutions. Thus, «legal cultures» -in plural- is a term that designates the interrelationship of various empirically grounded levels.

«*For the comparison of German and Dutch legal cultures the following four levels seem appropriate:*

** starting with patterns of legal behavior such as become visible in litigation or remain invisible such as avoidance of lawyers and courts;*

** trying to relate them to patterns of legal consciousness and thereby differentiating between expectations of the general public and values, beliefs and attitudes of professional elites;*

** which leads us to institutional features such as the legal training, the composition of the legal profession, the organization of courts and the infrastructure of access to them; and finally the relation of these to scholarship and the patterns of legal discourse.*

** To round up, it would be desirable to relate these behavioral and institutional factors to explaining differences in the body of substantive law*» (Blankenburg 1997: 51).

In a way, a «legal pattern» is considered to exist when there is institutional bases to discover it through the dynamic structure of repeated occurrences of cases. I think that Blankenburg's remark focusing on institutions is a very useful and crucial point to understand the shaping of ongoing processes.

However, the problem of linking this general institutional shaping of legal behavior and the more concrete procedures of thinking, judging, deciding and ruling still remains unsolved. What is a «pattern of legal discourse»? What does «legal consciousness» exactly mean?

The old American Judge O.W. Holmes, a century ago, already stated in one of his celebrated dissenting opinions that «general rules do not solve concrete cases».

Perhaps the problem lies in the conception of such «patterns» as patterns, that is to say, general models of regular thinking and arguing «constrained», or «bounded», or «determined» by general hallmarks or macrosociological variables as a global «context». But, still, what is the link? Local contexts cannot be confused with the abstract models we may build up in order to get some understanding of the world.

«*Recent work in a number of different fields has called into question the adequacy of earlier definitions of context in favor of a more dynamic view of the relationship between linguistic and non-linguistic dimensions of communicative events. Instead of viewing context as a set of variables that statistically surround strips of talk, context and talk are now argued to stand in a mutually reflexive relationship to each other, with talk, and the interpretative work it generates, shaping context as much as context shapes talk*» (Goodwin and Duranti 1997: 31).

Let us reflect on this. Perhaps the pragmatic analysis of legal culture could help in cutting the knot. I am thinking about some kind of cross-pragmatic analysis of legal cultures, relating sociological indicators with locally graduated reflexive and changing performances of legal behavior. That is to say, considering legal discourses as an aspect of human behavior and not only as mere linguistic or communicative phenomena. And, inversely, considering the outer or external context of any situated interaction as the dynamic construal of an internal environment by individuals within collective life and coordinated actions. In this way, big data (on litigation rates, amount of cases...) could be seen not only as the quantitative measure of

a process, but also as a qualitative indicator of something that is considered within the single decisions made by the people involved in the many tasks and organizational levels of professional life.

I believe this interface between inner and outer context, inner and outer environment to be the place where pragmatics of language, communication, cognition and culture operate.

3. **Pragmatics**

3.1. I would like to begin with the link among three linguistic and cognitive phenomena which underly our common grounds. I borrow them from the well-known short articles written by Douglas R. Hofstadter as a regular column for *Scientific American*:

(1) **Multi-layered self-reference**

«*This sentence contains exactly threee erors*» (Hofstadter 1986: 7).

(2) **Default assumptions**

«*A father and his son were driving to a ball game when their car stalled on the railroad tracks. In the distance a train whistle blew a warning. Frantically, the father tried to start the engine, but in his panic, he couldn't turn the key, and the car was hit by the onrushing train. An ambulance sped to the scene and picked them up. On the way to the hospital, the father died. The son was still alive but his condition was very serious, and he needed immediate surgery. The moment they arrived at the hospital, he was wheeled into an emergency operating room, and the surgeon came in, expecting a routine case. However, on seeing the boy, the surgeon blanchered and muttered, 'I can't operate on this boy -he's my son'*» (Hofstadter 1986: 136).

(3) **Self-assumptions about cultural identity**

«*A group of parents arranged a tour of a hospital for a tour of twenty children: ten boys and ten girls. At the end of the tour, hospital officials presented each child with a cap: doctors' caps for the boys, nurses' caps for the girls. The parents, outraged at this sexism, went to see the hospital administration. They were promised that, in the future, this would be corrected. The next year, a similar tour was arranged, and at the end, the parents came back to pick up their children. What did they find, but the exact same thing -all the boys had on doctors' hats, all the girls had on nurses' hats! Steaming, they stormed up to the director's office and demanded an explanation. The director gently told them, 'But it was totally different this year: we offered them all whichever hat they wanted'*» (Hofstadter 1986: 156).

It took certainly a while to realize what the third error was, which is the clue for the right understanding of the second story and why people have a tendency to cope with common expectatives about their own behavior.

Multilayered self-reference, default assumptions and self-assumptions about cultural identity are examples of the entangled complexity of cultural patterns in our minds. Discourse levels of abstraction do not

occur in the midst of some mental vacuum or semiotic zero-degree. They are grounded on cultural multi-layered procedures and mental processes which have been described during the last twenty years by the cognitive sciences (social psychology, AI, neuroscience, psycholinguistics), but which are still far to be fully explained.

It is unclear, for instance, what the links between the physical dynamics of neural networks and the emergent consciousness in the mind are. Seemingly, the description of these links require chaotic and non-linear patterns. But this remains to be proved. The proposal of a «secret symmetry interface» between brain and mind is only a large new paradigm or framework that assumes, by the way, the end of the computational metaphor. This reinforces the old Herbert Simon's dictum (1969): complexity lies in the world, not in the mind.

«*The brain indeed computes but its computations are not uniform; it performs in a very sensitive way due to even the tiniest changes in the conditions of the outside world as well as those due to tuning of different subsystem in it; the results of the brain 'computations' even if due to self organizing processes, represent, and quite veridically so in the case of perception,* ***the situation not of the brain, but of the outside world*** (PC)» (Mac Cormac and Stamenov 1996: 9).

The «real» model of the real is simply not the best model.

3.2. In an old paper only recently published on mind, fractals and legal discourse, we tried to map the subliminal pattern of a Prosecutor's final discourse in a murder case (Casanovas, Mach, Ardèvol 1998). We showed that behind the apparent disorder of his speech, discourse and the self-production of external context (internal environment) evolved through and within a set of modulators which constitute a kind of «language without grammar» or «language through language». We called these discourse modulators «pragmatic markers», in spite of the linguistic tradition of semantic or discourse markers (Shiffrin, Fraser, Redeker...) which reserves the term 'marker' for salient index or grammaticalized features. We assumed that *contexts* in verbal and living communication are created through the pragmatic markers device. Thus, contexts created within discourses are mediators between discourse and environment.

I would like to content now that contexts are also **generative** , that is to say, their structure allows the generation of sequences of **pragmatic forms** encoded in the organizational structure of every individual mind participating in the communicative flow. From this point of view, we may describe interaction as the continuous context modification among participants on communicative events. Let me add that interaction itself may be patterned in the participants' mind, especially if they belong to an organization, have been trained within the organizational mood and share some kind of previous learned collective, cooperative or coordinated experiences. We will define **institutions** as the link among all the organizations involved in the generation of specific contexts in particular settings (Courts, Agencies, Corporations, etc.).

Certainly, professional legal teams of all sorts -judges, prosecutors, lawyers- have these common features. Thus, in the rush of the exercise of decision-making processes, bounded by time and space limitations, they generate usual contexts clearly mastered by their professional competence. Some researchers, e.g. Susan U. Phillips (1996), have emphasized the role of routinization of language and expression in Courts Proceedings.

When transcribed in a delayed observation, contexts are usually viewed as what I have called **discourse spaces** (Casanovas 1994): elicited settings or *loci* within the discursive flow clearly marked by conversational or argumentation shifting.

3.3. From this point of view, perhaps we should reorganize the pragmatic study of legal discourses as a **theory of context generation**. The outlines of such a theory could be articulated around four main subjects envolving linguistic and cognitive phenomena: (i) reference, (ii) inference, (iii) coherence, (iv) metaphor.

Please do notice that it is not stated neither that these broad categories are enough to describe contexts nor that they are the only way to describe them. They are to be read only as a framework (or springboard) for shifting from the traditional view of these devices as linguistic, rhetorical or discursive to the perspective of considering them social and cognitive. There is a twisting-turn to be performed here: from a referential or inferential pragmatics to a contextual and communicative pragmatics. In this sense, the very search for linguistic theories of «something» called reference, inference, cohesion or metaphor may constitute a hidden agenda in itself blurring the consciousness of fundamental communicative phenomena about language, reflexivity and the metaoperational ability of speakers and hearers.

(i) **Reference**

Reference is one of the main subjects of semantic theories. Both truth-conditional theories and cognitive ones focus in some kind of function of the outside world in order to assess «meaning» to a sentence, utterance, clause or proposition.

From a pragmatic point of view, it has been shown[3] that cognitive theories involving mental spaces (G. Fauconnier) or «idealized cognitive models» (G. Lakoff) are based, in short, in a merely referential view codified in functions that trigger the mapping of the models (e.g. Nunberg's Identification Principle)[4].

But recent psychological empirical research on reference displays a more socialized and less semiotic view: the act of referencing is above all sociologically grounded in a way that prevents the synthesis in a sole principle of all possible functions.

«*Our data fully support the notion that reference-making is an interactive process involving both participants in a dialogue. As the examples from earlier studies of adult dialogues show, such collaborative sequences* ***can*** *be initiated by a wide variety of descriptions of the entity being introduced. (...) Questions with their changes in word order and intonation seem likely to* ***combine*** *to highlight important points in a*

sequence of instructions where new information is being introduced. In addition, by separating the process of establishing whether an item is known, 'grounding', before instructing, the speaker initiates a collaborative sequence where the listener is invitated to participate, thereby ensuring that any knowledge mismatches are swiftly identified. Such collaborative introductory sequences are thus very effective way of establishing mutual knowledge and overcoming the perceptual problems of discriminating the perceptually similar unstressed articles» (Anne H. Anderson 1995: 34-35).

William F. Hanks (1996) contents that deictic reference entails at least three kinds of relations: (i) paradigmatic oppositions between categories, (ii) syntagmatic contrasts between different components of discourse, (iii) relative symmetry of the **indexical origo**[5]. Therefore, reference is being described as a social act of shared (or unshared) knowledge.

(ii) **Inference**

Consider the following example on the construction of «collaborative floors». The exchange takes place in a funeral:

Mary: but if there's no spouse I mean / and there's very few relatives left/
Mary: it doesn't really seem much of a- (LAUGHING) mhm/
Sally: mhm/
Jen: it does seem- =mhm=
Meg: but it does-

Jennifer Coates (1996: 60) notes that other speakers' comments on Mary's first utterance repeat the lack of completeness but, besides that, everyone understood what was being said. From this and other cases, she states that all the participants in the construction of talk «don't function as individual speakers».

A complementary and reversal example is furnished by the following redundant overlapping repetitions in judges' argumentation of a difficult case:

- J1: entre uno que se va a a-aa
- C.A.: /a por el coche p.
- J1: a buscar el coche + el otro que empieza a salir porque los dos hermanitos se adelantaron + se quedo solo el hermanito primero + y al quedarse solo este si ca:ro que levanto la ca:ro
- *J3: /ca:ro y le pego' {+}*
- *C.A.: le pego'*
- *J3: le pego ca:ro*
- *J1: y le pego'* con la mano o con lo que sea + y lo tumbo' (') + como ahra ha dicho el
- J3: / y es cuando el otro saco la barra
- J1: = y entonces el otro que ve eso salta la barra y se va pues normalmente a buscarlo + y entonces cuando esta esto es

cuando le pegaron//

The ongoing discourse flows through a framework which is a sort of discovering lansdcape. What people have in mind is not a string of sequential reasoning, but a set of tools for triggering clear epresentational models of the world. But the way of getting this result does not need to be in itself representational. Thus, I wonder whether the concept of «inference» proper -either «elaborative» or «collaborative»- is necessary for the description of these collective phenomena.

(iii) **Coherence**

As ethnomethodologists and conversationalists quikly realized, hearers extract meaning also from their effort to make sense of the speakers' utterances. «*There seem to be no limits to what can count as coherent: speakers are able to exploit the fact that hearers will work hard to extract meaning from what they say*» (Coates 1995: 56-57).

This ability has been referred to as **global vs. local coherence**. And I emphasize the fact that there is a subtle common turn here which is performed by most linguists. From the notion of «making sense of» the reader is gently lead to another related but different notion: «assessing coherence to».

Talmy Givón suggests that flexible and negotiated aspects of coherence may pertain to both its local and global structure. In Givón's view:

«*(a) Discourse has both local and global coherence structure.*

(b) Grammar must have evolved as a mechanism for speeding up the processing of both local and aspects of text coherence.

(c) Vocabulary-cued -Kintsch's 'knowledge driven'- text processing remains a parallel channel of text processing» (Givón 1995: 81).

(iv) **Metaphor**

There is a huge amount of work on this topic. Duranti (1997) has noticed that researchers' interests have shifted from the functional view of metaphors as ways of controlling our social and natural environment to the cognitive theories that see metaphors as processes of mapping cultural schemata from one to another domain of experience (e.g. G. Lakoff and Johnson 1980, G. Lakoff 1987).

But this shifting turn is forced to rely on prototype or folk theories of culture and mind, and this is an unproved assertion yet.

My idea is a simpler one, connecting metaphors not with a simplified model of the world (a «prototype» or «idealized cognitive model»), but with the concrete features of the organizational and local setting in which a metaphor functions as shortcut for a fast and more effective communication and action. From this point of view a «metaphor is not a metaphor», we could say, but a mid interactional device between the general outlines of the organizational dynamics and the concrete way in which individuals perform their task. This is a mechanism of «collective reasoning», if such a thing is conceded to exist. This does not ensure

the symmetry and homogeneity between institutional knowledge and local concrete knowledge, yet, it is the measure of the difference which allows professional people in institutions to cope with new information, unpredictable and unsolved situations.

3.4. In the former examples we may observe the outstanding place of **context building** in the new trends of discourse and conversational analysis. Context is viewed as the dynamic, self-constructed and interactive place for a **participation framework** (Goodwin 1995: 132) or **participation system** (Duranti 1997: 46) on language and communication.

«*The primordial locus for the constitution of intelligebility and coherence through human discourse is face-to-face interaction. Coherence within conversation is a pervasive, temporally unfolding task. As part of this process* ***context*** *-the phenomenal environment that provides for the ongoing intelligibility of talk, action and situation- is both attended to and reconstituted. Thus, a key framework providing for the relevant interpretation of both what an utterance means, and the types of action it is performing, is the* ***sequence*** *from which it emerges*» (Goodwin, 1995: 131-132).

Despite the appearences, I believe this orientation to be in fact not pragmatic but semantic. Goodwin conceives interaction, spontaneous talk and conversation more as a set of narrative phenomena than of pragmatic devices. Then, he focusses on what he calls **assessments**:

«*Assessments provide an example of a small activity system that can emerge, develop, and die within the boundaries of a single turn, while also having the potential to extend over multiple turns, and to bound units considerably larger than the turn. Assessments also provide participants with resources for displaying evaluations of events and people in ways that are relevant to larger projects that they are engaged in*» (Goodwin and Goodwin 1996: 181).

An example of assessment could be the evaluative use of «beatiful» in the following exchange (ibid.: 154):

«(1) Eileen: *Paul and I got ta the first green,*
And this ***beautiful****, Irish Setter.*
Came tearin up on ta the first gree(h)n
and tried ta steal Pau(h)l's go(h)lf ball.

(2) Curt: *This guy had, a* ***beautiful****, thirty two O:lds.*»

Within the same semantic orientation, some authors conceive interactions as **symbolic mediations**, as **decontextualisation/ recontextualisation** processes performed by subjects (Py and Grossen 1997: 4), or even, like the late Gumperz does (1997: 231) directly as **interpretive processes**. Thus prosody, paralinguistic signs, code choice and choice of lexical forms are conceptualized as levels of speech production as integrative-cues. Gumperz's notion of interpretation relies on **inferencing**[6].

In this way, cognition is reduced to conscious inferences from the salient features of discourse. I wonder whether this is the best way to approach the question.

I prefer to start with the non-return point made clear by Jack Goody in his many works about writing as technology (e.g. Goody 1998): this perspective that views inferencing as the only way to describe reasoning is deeply rooted in our historically bounded sociocentric beliefs about interpretation. In fact, interpretation and logic are linked to written texts. Or in most cultures, orality displays an astonishing array of thinking and interpretive mechanisms which are difficult to qualify as «inferences». «*Oral or non-written cultures have their own forms of logic or sequential reasoning*» (Goody 1998: 116).

If this is so, cultural plasticity of mind may have many ways of acting through the reflexivity displayed within multi-layered references, self-constructed identities, default assumptions and other related phenomena.

3.5. Silverstein (1996) has called «metapragmatics» the attempt to capture these levels of unfolded indexicality. I believe this redundant. «Pragmatic markers» or «pragmatic transcribers» should be enough to describe from a certain perspective the situated and cognitive modulation of discourses that people are able to perform in everyday talks, judgements and argumentations. We have described with some detail such a technique in another place[7]. It is now time to close the bond between pragmatics and legal culture.

What describing, explaining and comparing legal cultures mean is getting some understanding on the inner and outer contextual behavior of people acting formally and informally within the so-called legal language in the so-called legal settings.

In this sense, we can build up some integrated models of legal behavior taking into account the conditional constraints implied by global organizations and institutions in local settings. But these constraints are by no means ‘natural’ or ‘psychological’ (even if they are mentally managed). They are a by-product of socially grounded processes.

Some global features are incorporated by individuals. But not all. There remains room for a genuine local knowledge that emerges through and within the construction of contexts.

I retain this being the most important thing, because «inferences» or «references» are themselves produced through the network created through the context construction. Besides, the context produces also the feed-back of information which is needed to have control over the processes. This is the reason for using fractals as a measure, when this operation is possible.

But what is searched is not any «discourse pattern», «legal meaning» or «argumentative model» based on a metaphorical view of reference and a mimetical conception of «form» with respect to mathematics and logics. What may be described is the inner and outer dynamics of context-construals which lead from the

most concrete decisions and actings to the emergence of global properties of collective phenomena. Thereby, the task of comparing legal cultures with dissimilar variables and sociological indicators becomes easier. Moreover, I think that this kind of local/environmental knowledge decreases the risk of getting perverse effects as a consequence of the sociologist's intervention in social life. Even more, getting involved in the processes he is studying becomes a precondition for the validity of his results and assessments. Perhaps this is what pragmatics is all about: getting behind the Parrhassios's veil.

To define is to distrust.
(Laurence Sterne, *Tristram Shandy*, 1760, 1980: 158)

II. **PRAGMATICS AND THE TRANSFORMATION OF CONTEMPORARY LAW**

4. **Introduction: distrusting the field**

4.1. I would now like to focuse again on reference, coherence, inference and metaphor, but from another point of view. My aim is also to get as well the problem of context generation. However, this time, I will choose as starting point a quite different springboard. I would like to draw a broader landscape. This time the problem will not be the link between legal culture and pragmatics, but the fact that contemporary legal culture is shifting away from the grounds that the Rule of Law (*Rechtstaat, Etat de Droit, Stato di Diritto*, *Estado de Derecho*) represented for law during the 19th and 20th centuries.

As a matter of fact, as we will see later on, many legal scholars and philosophers of law have theorized about the relationships between law and pragmatics during the second half of the 20th cetury. Seemingly, there are already a great amount of studies from a sociolinguistic, discursive or ethnographic perspective facing law or legal settings, writings and talk. All these theoretical approaches and empirical findings must be taken into account. However, I think that a move or stroke from language to communication and cognition, and from law to legal culture and legal arenas, should be done in order to shed some light into the contemporary situation of the legal field.

4.2. I would neither like to fall down in any historicism here, even if history is important[8]. Vico's *De Constantia jurisprudentis* (1721) recalls for us that 'pragmatic' meant 'lawyer' in Ancient Greece. All the pragmatic devices about «form conveying meaning» (W. O'Barr 1982) or *ars discendi et disserendi* (W. Ong 1959; M. Fumaroli 1992) have been known, developed and exploited in the Western rich literary tradition from the 16th to the 19th centuries.

Humanists as Pierre de la Ramée, J.L. Vives, R. Agricola, or brilliant writers as F. Rabelais and J. Swift were experts in metaphors, cathaphors, analogies, elipsis and the like, but above all, they mastered the play with and upon the reader's understanding. I cannot help bringing in the following dialogic example from Laurence Sterne. This is a description of a legal case, in which the initial naivety of the reader is strucked by means of the writer's successive mockery and layered unfolding turns:

(i) «In that spacious HALL, a coalition of the gown [the profession of law], from all the barrs of it, driving a damn'd, dirty, vexatious cause before them with all their might and main, the wrong way; -kicking it out of the great doors, instead of, in, -and with such fury in their looks, and such a degree of inveteracy in their manner of kicking it, as if the laws had been originally made for the peace and preservation of mankind: -perhaps a more enormous mistake committed by them still, a litigated point fairly hung up; -for instance, *Whether John o'Nokes his nose, could stand in Tom o'Stiles his face* [emphasis added], without a trespass, or not, -rashly determined by them in five and twenty minutes, which, with the cautious pro's and con's required in so intrincate a proceeding, might have taken up as many months, -and if carried on upon a military plan, as your honours known, an ACTION should be, *with all the stratagems practicable therein, -such as feints, -forced marhes, -surprizes, -ambuscades, -mask-batteries, and a thousand other strokes of generalship which consist in catching at all advantages on both sides, -might reasonably have lasted them as many years, finding food and raiment all that term for a centumvirate of the profession* [e.a.]» (1980: 145).

(ii) «I define a nose, as follows, -intreating only beforehand, and beseeching my readers, both male and female, of what age, complexion, and condition soever, for the love of God and their own souls, to guard against the temptations and suggestions of the devil, and suffer him by no art or wile to put any other ideas into their minds, than what I put into my definition. -For by the word *Nose*, throughout all this chapter of noses, and in every other part of my work, where the word *Nose* occurs, -I declare, by that word I mean a Nose, and nothing more, or less»[9] (1980: 159).

(iii) «-Fair and softly, gentle reader! -where is thy fancy carrying thee? -If there is truth in man, by my great grandfather's nose, *I mean the external organ of smelling, or that part of man which stands prominent in his face* [e.a.], -and which painters say, in good jolly noses and well-proportioned faces, should comprehend a full third, -that is, measuring downwards from the setting on of the hair.

-What a life of it has an author, at this pass!» (1980: 161).

The terrible priest introduced disorder anywhere[10], either in morals or in textual time and space. This very treatise of epistemology and rhetorics which is *Tristram Shandy* (1760) sets up an interactive network with the reader's mind and its implicit commonsensical knowledge. According with the rhetorical art, inferences (*juditium, deductio*) have to be balanced with creative reframing (*ingenium, inventio*), back and forth, bottom-up and top-down, all along a text which is not conceived as linear any more:

(iv) «*Writing, when properly managed, (as you may be sure I think mine is) is but a different name for conversation* [e.a.]: [...]» (1980: 77).

(v) «-How could you, Madam, be so inattentive in reading the last chapter? I told you in it, *That my mother was not a papist*. -Papist! You told me no such thing, Sir. Madam, I beg leave to repeat it over again, That I told you as plain, at least, as words, *by direct inference* [e.a.], could tell you such a thing. -Then, Sir, I must have miss'd a page. -No, Madam, -you have not miss'd a word. -Then I was asleep, Sir. -My pride, Madam, cannot allow you that refuge. -Then, I declare, I know nothing at all about the matter. -That, Madam, is the very fault I lay to your charge; and as a punishment for it, I do insist upon it, that you immediately turn back, that is, as soon as you get to the next full stop, and read the whole chapter over again [...].

-But here comes my fair Lady. Have you read over again the chapter, Madam, as I desired you? -You have: *And did you not observe the passage, upon the second reading, which admits the inference?* [e.a.] -Not a word like it! Then, Madam, be pleased to ponder well the last line but one of the chapter, where I take upon me to say, 'It was *necessary* I should be born before I was christen'd.' *Had my mother, Madam, been a Papist, that consequence did not follow*» (1980: 40-41).

4.3. What I mean with these examples is that there is a stright parallelism, on one hand, between what we call «Pragmatics» and what Sterne -and all the humanist tradition- called «Dialectics» and, on the other hand, between what we call «Discourse analysis» and what Sterne -and all he humanist tradition- called «Rhetorics».

The reader is induced to *manipulate* his own reading, understanding and comprehension, bringing forth new contexts and new interactive schemas, questioning the sense of what he has figured out by means of new clues and searchs for information from his previous records and memories. This manipulation is not only intellectual, but *physical*: reading a book is not a result but an interactive process in which any paragraphs require to be re-read and re-enacted. Meaning cannot be conceived as a mental representation, but as a complete move of 'assessing coherence to' -including perception, cognition and action, or, in other words, including the reflexive allocation of the reader proper within his inner and outer environment. In this operation, local and global knowledge are also re-enacted.

Well. If this were already set in the 18th century, then, why this ironic view about what can be done with a legal case switched so drastically in the 19th century?

5. **Pragmatics and legal theory**

5.1. Broadly speaking, legal theorists have in our century thought about the link between pragmatics and law from these general assumptions: (i) autonomy of the legal field; (ii) law as object of especialized knowledge; (iii) dichotomy of 'legal'/'illegal' behavior, 'valid'/'invalid' law, or 'official'/'unofficial' actors; (iv) dichotomy of 'civil society' and 'State'; (v) 'language' and 'logic' as separate epistemological subjects; (vi) legal reasoning as a subfield of practical reason or deductive reasoning; (vii) law as a conceptual 'system' of rules, norms or behavior; (viii) legal processes as 'adjudication of rights', 'application of rules' or

'implementation of policies'; (ix) 'cases' as the punctual or singular interplay between 'facts' and 'rules' (or 'norms'); (x) 'legal theory' as productive of a kind of social and positive knowledge, but different from sociological or anthropological one.

My aim is not to offer a piece of intellectual history. I will try to show that either in the so-called positivists or realists theories of law, the relationships between pragmatics and law have been thought: (i) through an implicitly assumed *functionalism*, and (ii) through an explicitly assumed *linguisticism.* It can be noticed, conversely, that some of the trends of contemporary pragmatics, in the developments of speech-acts theory and relevance theory, have the same kind of assumptions, becoming very suitable as starting points for new versions of legal positivism or realism (applications of logical normative systems or institutionalist theories of law). Pragmatics, then, is viewed as a subfield of linguistics or of philosophy of language (linguistic actions being a part of a general theory of human action).

5.2. Some contemporary legal philosophers share this position. From a logic point of view, C. Alchourrón and E. Bulygin (1981, 1984) distinguish between a *hylethic* and an *expressive* conception of norms as abstract entities. The former one is (almost) entierely semantic or conceptually independent of any context and use. The latter is, according to them, a pragmatic conception: norms are the result of a *prescriptive use* of language. A sentence expressing the same proposition can be used to perform different things: asserting, questioning, ordering, advising, etc. The result of these actions would be an assertion, a question, a command or an advice. In order to avoid proliferation of prescriptive acts, the authors ground their logic of normative systems on the former conception. Thus, a coherent semantics of valid law is suggested as a conceptual guideline for legal theory.

Other philosophers of deontic logic, as G.A. Conte (1986), have proposed the aristotelic distinction between *poiesis* and *praxis*, and the Husserlian-Wittgensteinian concept of *Lebensform*, to perform a broad phenomenological taxonomy of prescriptive acts which include the difference between *pragmema* and *praxema* to identify the *deontic loci* for constitutive rules and meta-rules. *Lebensform* is defined as a set of eidetico-constitutive rules. Thus, «*deontic models constitutive of a praxis are hermeneutical models of action*» (1986: 32). In this way, the rules of law are compared to the rules of a game.

It is not difficult to notice that functionalism is produced when such notions are introduced methodologically in empirical data analysis: they take for granted the 'functions' that it is supposed that are to be discovered by the empirical analysis. Definitions are not explanations. A logical 'functor' is not the blueprint of a set of variables. However, from this point of view, legal theory is divided into normative *static systems* (definitory) and *dynamic systems* (rule-governed internal transformations of valid 'existing' norms).

Similarly, Neil MacCormick and Ota Weinberger (1992) inspired by Searle's distinction between *brute* and *institutional facts*, have proposed since 1974 a description by means of systems of constitutive rules shaping the institutional side of law:

«*Our ITL [institutional theory of law] offers to the sociology of law (and to the sociology in general) an ontology we think essential to any realist analysis which pretends a description or an explanation of the legal sphere*» (1992: 8).

These theories are explicitly normative (in the Kelsenian and Hartian sense). But even realist theories of law make this kind of strong functional assumptions which, most interestingly, are also unexpectedly shared by some contemporary pragmatic views.

5.3. One year before Searle's *Speech-Acts*, the Scandinavian legal philosopher Alf Ross (1968), published an integrative theory of practical and theoretical reason in which:

«*Speech is a concrete linguistic phenomenon. A speech-act is (1) a phonetic sequence, (2) with a correct syntactic structure (3) with semantic meaning and (4) pragmatic function.*»

Please, do observe that we have in fact a double pragmatic function here: (i) the assumption of the Austinian performative hypothesis of language-effects within a 'standard' communicative situation (including 'standard' speakers and hearers); (ii) a secondary performative hypothesis in which concrete speech-acts *integrate* the syntactic, semantic and pragmatic semiotic dimensions of language; that is to say, in which *meaning* is a function of the enactment of these three dimensions.

It is my contention that this double bind turn is also performed by pragma-linguistic theories which maintain the structural inferential move from linguistic competence instead of exploring other more flexible cognitive possibilities.

Paul Grice's distinction between *natural* and *nonnatural meaning*, and the correlative notions of *implicature* and *explicature* (1975), Gerald Gazdar's work on *presuppositions* and inferencing (1979), Peter Cole's notion of *radical pragmatics* (1982); Dan Sperber's and Deirdre Wilson's *relevance theory* (1986); Diane Blakemore's notion of *cognitive constraints* on linguistic inferences (and the correlative exclusion of sociopragmatics from the properly linguistic field), are perhaps the most salient among them. *Language* and *pragmatic competence* are not viewed as processes of developed cultural abilities, but as natural in themselves. Thus, the dychotomies between language and speech, knowledge and competence, language and reality (a truth-valued theory for reference), are sustained through this mysterious integrative secondary function. The result is *order*: an ordered and coherent *linguistic world* which is quite similar to the *legal world* of normative theorists. The real one is put aside from the theory.

6. **Pragmatics and contemporary legal culture**

6.1. Now, an ordered world is just what we do not have nowadays in the legal field. The authors of the most influential legal theories in our century, Hans Kelsen (*Reine Rechtslehre* 1934-1960), Herbert Hart (*The concept of law* 1961) and Alf Ross (*On law and justice* 1959) were at the same time, as political philosophers, theorists of the constitutional Rule of Law and, in the case of Hart and Ross, theorists of the Welfare State

after the II World War. American Legal Realists -such as K. Llewellyn or J. Frank- fighted for administrative and political reforms, straightly engaged to the Roosevelt's New Deal. The connection between law and public government was still strong.

Or, changes in the law field since the end of Cold War are deep and without return, either in Europe or in USA. The crisis of the *Welfare* State -not of the State itself- and the raise of an economic globalized world have produced primarily a great impact on the demography, shape, practices and consciousness of legal professions. A lawyer is not *a* lawyer any more, but a corporate member of legal enterprises in a new and broad legal transnational and translocal market.

These changes are well-known among the *Law & Society* scholars. E.g., D. Trubeck, Y. Dezalay, R. Buchanan and J.R. Davis (1994: 408-409) offer the following list of assumptions *before* any theorizing on contemporary law:

* Changing Production Patterns
* Linking of Financial Markets
* Increasing Importance of Multinational Firms
* Increasing Importance of Trade and Growth of Regional Trading Blocs
* Structural Adjustment and Privatization
* Hegemony of Neo-Liberal Concepts of Economic Relations
* A Worldwide Trend Toward Democratization and Protection of Human Rights
* The Emergence of Supranational and Transnational Actors Promoting Human Rights and Democracy

'Sociological justice' (D. Black 1989), 'flexible law' (D. Druckman, Ch. Mitchell 1995), 'soft law' (G. Zagrebelsky 1995); 'ius commune' (A.J. Arnaud, 1998; P. Casanovas 1998c), 'ius mercatoria' (V. Olgiati 1997), are some of the expressions recently used to designate this emerging situation in the new civil society of 'the informational age' (M. Castells 1997). A kind of non-normative, non-ruled, non-preestablished law which is used to frame new dispute-solving models and to articulate the mixed and managerial models of organizations (governments, law firms, transnational enterprises).

«*What has emerged in recent years is not merely a new version of legal sociology, but a new conception of law itself. The sociological model of law differs radically from the jurisprudential model -or lawyers'- model that has long dominated legal thinking in the Western world.*

In the traditional conception, law is fundamentally an affair of rules. The explanation of a legal decision normally lies with one or more rules by which the established facts are assessed. By contrast, the sociological model directs our focus to the social structure of a case -to who is involved in it- and this explains how it is handled. The rules provide the language of law, but the social structure of the case provides the grammar by which this language is expressed» (D. Black, 1989: 19).

Some of social features of the new legal situation could be summarized as follows:

(i) increasing litigation rates in all areas (criminal, commercial, liability, administrative law...);

(ii) institutionalization and emerging market of alternative models for dispute-solving (arbitration, conciliation, mediation);

(iii) changing procedural subjects (mostly corporations: financial entities and transnational enterprises);

(iv) emerging symbolic uses of traditional law-instruments (decrees, statutes, etc), either for or against the dominant models of law governance;

(v) new ways of 'de-regulation', 're-regulation' and 'delegalization' in the relationships between local, state and federal governments and the professional world of social services (health, mental health, social security, etc.);

(vi) new 'collective subjects' with 'collective rights' (women, immigrants, ethnic movements, etc.);

(vii) emphasis on identitary processes, with a new civil sphere of relationships between subjects and rights;

(viii) impact of technology at all levels on collective organizations, institutions and administrations.

Danièle Bourcier (1996) has shown some 'inductives loops' [*boucles inductifs*] in the informatization process of law and the State[11]. She has often insisted on the fact that the impact of technology in legal writing -*l'écriture du droit*- changes the nature of contemporary law.

However, within the new global/local situation, I believe this symbolic nature is being transformed as well from the inside: through the values, forms, practices and structure of *talk* -better than 'speech'- in flexible agreements, punctual negotiations, shorter court decision-making processes. Remember? Sterne again: « *Writing, when properly managed, is but a different name for conversation...*».

This is the reason why the shift from a normative or deontic view to a broader cultural understanding of changes is so important. 'Talk' means cognitive skills, shared and unshared knowledge, common grounds for reasoning, arguing and dealing within dynamically built frameworks.

Stemming from similar premises, Elizabeth Mertz has suggested a «moderate social constructionist» vision of law. Preliminarily she defines her position as follows (trying to put problems, better than presenting solutions):

«*(1) a view of law as 'underdeterminate' (but not entirely indeterminate); (2) an understanding that legal representations of social identities as fixed or coherent are often fictional, serving other than their apparent purposes; (3) a critical view of the constitution of the 'local' in legal discourse, with careful attention paid to the ways in which local units and identities are actually created (at least in part) from the 'top down', through interaction with national and international legal discourses; (4) a similarly critical understanding of the ways in which concepts such as 'customary law', 'authentic indigenous voices', and 'rationality' themselves reflect very particular social constructions that are far from neutral reflections of reality; and (5) a sophisticated analysis of the power of legal language to create epistemological frames. These frames, while giving the appearance of neutrality, may constrain legal discussions of social issues in ways that leave important aspects of situations go unheard*» (E. Mertz 1994: 1245).

But, how will such a program be dealt with? Which are the methodological trends and the epistemological positions?

It is my contention that Pragmatics may be one of the main tools -perhaps the most important tool- in order to get some understanding of the impact on the professional behavior of the radical changes that occurs in contemporary law. The condition is to push further enough the theoretical framework. Not surprisingly, Mertz's latter work on legal education claims for a contextual perspective[12].

6.2. Since the seminal researches by W. Labov, H. Sacks, M.A.K. Halliday, D. Hymes and Ch.O. Frake, talk has been one of the main subjects for linguistic anthropology, sociolinguistics and ethnomethodology[13].

Sometimes, this sociolinguistic turn has been viewed as 'applied linguistics' and, thus, the legal field -especially Court language- as one of the possible areas under study among many others (medical encounters, journalism, political arenas, etc.). This involves the adoption of an internalized view in which the landscape of law is perceived from the description of linguistic phenomena, without questioning the legal framework and practices under observation. The cycle is completed, then, when the linguist becomes involved in the legal proceedings as an expert witness (e.g. R. Shuy 1993).

However, I think that assuming this position on linguistics and law implies the assumption of the self-legtimated and self-constructed theoretical and epistemological autonomy for both domains. Perhaps it is a good time to build up new social theories on contemporary law within pragmatic theoretical backbones. Constructing models on the contextual framing of law implies a bit more than a good description of examining witnesses or requesting evidence, because it requires an integrated social knowledge about relevant features of the packs of information which are processed in the interaction.

We have a great deal of good empirical work already done about language and law -order in court; diminishing effects; powerless and powerful talk; lawyers' categorization; lawyers' control on clients; hypercorrect, formal and informal style; syntactic structure of questions; legal jargon; impact of the judge's instructions and counsels' final reports on jury understanding; jury deliberation and decision-making; contextual variation in language use; code-switching in arguments and so on.

But the problems arise when some kind of comparison between legal cultures or a general understanding of people's legal behavior is intended, relying on legal discourse analysis only, *without* taking into account some more sociological, anthropological, psychological and economic data[14]. Actual legal interactions and communicative situations integrate all these dimensions in a complex way.

How this operation can be done in legal sociology is the subject of the present Workshop.

NOTES

1. Casanovas 1998b.; Poblet 1998.

2. Casanovas, Poblet 1997.

3. Casanovas 1998b; Casanovas and Moreso 1998.

4. Fauconnier 1985; Lakoff 1987; Fauconnier and Sweetser 1996

5. «*The origo consists of the social relation between participants, and symmetry is a way of describing the degree to which their respective orientations overlap. The greater the mutuality, reciprocity and commonality between participants, the more symmetric the origo. The more symmetric the origo, the greater the range of paradigmatic selections available to the speaker for the purpose of reference*» (Hanks 1996: 70-71).

6. «*Situated interpretation of any utterance is always a matter of inferences made within the context of an interactive exchange, the nature of which is constrained both by what is said and by how is it interpreted*» (Gumperz 1996: 230).

7. Casanovas 1994, 1998a, 1998b; Poblet, Pascual, Roig, Comín, Casanovas 1998.

8. A more detailed explanation in P. Casanovas (1998a); J.J. Moreso and P. Casanovas (1998).

9. This paragraph follows in this way: «'Because', quoth my great grandmother, repeating the words again, -'you have little or no nose, Sir'-
S'death! cried my grandfather, clapping his hand upon his nose, -'tis not so small as that comes to; -'tis a full inch longer than my father's» (ibid.).

10. Sterne is playing on the grottesque well-known analogy between the nose and the phallus, exploited e.g. by F. Rabelais in *Gargantua et Pantagruel*. See M. Bajtin (1998: 82).

11. «*L'Etat est le support permanent d'une instance de pouvoir: il se réalise dans des discours opérationnels, y compris celui du droit. Ces activités ont pour objectif de renforcer l'unification d'une société et la production juridique contribue à traduire cette figure symbolique dans un ordre rationnel: la codification en est une de ses manifestations. Les nouvelles technologies de l'information en seron le prolongement. Ces technologies doivent traduire cette activité textuelle en activité informationnelle*» (D. Bourcier 1996: 241).

12. «*As we unpack the powerful linguistic practice through which law students are socialized, we can perceive not only the role of recontextualization in socialization to this form of professional life, but also the shape of a particular ideology of entextualization and recontextualization that is central to wider legal practice*» (E. Mertz 1995: 5).

13. Ch.O. Frake wrote lately as a «Postcript» for an edition of his selected essays:
«*It is not, however, just that the ethnographer must talk to people to get his work done. It is also the case that the ethnographer's work, after all, is to describe what people do. An what people do mostly is talk. Another great mistery in my life has been to understand how social scientists of all breeds have so long been able to ignore this simple fact. Yet it is through talk that people construe their cultural worlds, display and recreate their social orders, plan and critique their activities, and praise and condemn their fellows. Most of the studies [I have done] reflect attempts to take seriously what it is people happen to be talking about and to take seriously, as well, the social act of talking itself*» (Charles O. Frake, 1980: 334).

14. This is the core of Cicourel's criticism on Schegloff (1997), and of Hartland's criticism on Danet and Goodrich (1993). Discourse analysis cannot be autonomous not for empirical but for theoretical reasons. There is no «grammar» to be socially discovered once cognition and the plasticity of mind is taken into account in contextualization processes. There is a gap between a set concept such as «discursive formations» and concrete utterances in actual discourses. This problem deals with the feaseability of «social reproduction».

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