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Problems of Comprehension in Criminal Proceedings

1. Introductory Remarks

The application of law is social practice. To a great extent it consists of dealing with texts: texts in which rules, commentaries and supreme court decisions are handed down as well as forms and files that linguistically process reality in a specific way (see Seibert 1981). Wherever the 'oral' principle is in effect - most strictly in criminal proceedings - all of the facts that will be needed to form the basis of the dispensation of justice have to be put forward, processed and judged directly (and under time pressure).

Traditionally speaking, problems of comprehension in the judicial sphere have been treated from the viewpoint of the comprehensibility of texts that are easily accessible and that can be analyzed by conventional methods. The problems that laypersons encounter were ascribed to the 'technical language' of such texts. The collection of specifically legal linguistic means was even elevated to the status of a 'language', which persons not versed in law simply did not know. Thus they were said to be at a disadvantage in the various sectors of legal communication. The presumed systematic character remained unexamined; research of technical language studied largely isolated linguistic levels (lexical semantics, syntax). Actual language use and its dynamics, especially in oral communication with its mechanisms of assuring comprehension by means of certain patterns of repair, was hardly considered. Nor were any concrete investigations made as to how institutional conditions have a linguistic effect - this would need to be clarified in a linguistic analysis of institutions.

A more differentiated view is incorporated in the "Agents of the Institution" (Ehlich/Rehbein 1980), where it says that, in fact, it is the specialized technical approach to facts of everyday life rather than the layperson's conceptions of law that creates the actual barrier to understanding. For the German judicial system, this approach is often characterized as 'abstracting normative thinking', which is far removed from the concrete case as it is perceived from the viewpoint of the people concerned and as it appears in their subjective processing.

The use of specific linguistic means, the formation of certain attitudes towards facts of the case or a specific organization of knowledge are basically nothing but features of institutional practice. Criticism directed at incomprehensible legal communication can only achieve its goal if it is substantiated by concrete analysis of institutions. Pragmatic discourse analysis avoids the risk of viewing technical language, linguistic means, forms of knowledge, underlying norms, etc. in isolation; it systematically focuses on the dynamic interaction of such factors in actual communication situations. It then turns out that there are no simple solutions to the problem of comprehension. One finds comprehension problems among all of the parties involved in legal communication. However, these problems are more likely to show up among agents of the institution, insofar as their discourse position facilitates their initiation of repair. Wherever all of the participants are interested in clarifying the matter, cooperative forms of repair are achieved. The cases that are more characteristic of institutions, however, are those cases where strategy and tactics determine the pattern of repair.

2. Strategic Action: an Example

A frequently encountered opinion is that in court proceedings there is a clear-cut separation between communicative interaction about the facts of the case and their legal judgement. This view corresponds to the judicial doctrine of subsumtion: the judge establishes certain facts in the case (1), relates them to the legal norms applicable to such facts (2) and draws the conclusions stipulated by law (3). Even if one should wish to adhere to the opinion that the dispensation of justice is nothing but an act of insertion into a logical inference pattern (syllogism modus barbara), in actual practice the question is: how does one arrive at an insertable formulation of the facts (1) and how should one interpret the legal norms (2)?

Let us first look at point (1): the facts of the case simply do not exist independent of the objectives, interests and presentation skills of the participants nor will the agent of the institution consider these facts independent of any potential judicial application. Thus the dynamics of working out the facts on the basis of communicative processes precede the judgement. This practice is what interests us here.

To start with, the actors move within the institutionally given patterns of action. A characteristic threepart sequence, for example, is REQUEST FOR INFORMATION - PROVIDING INFORMATION - ACKNOWLEDGMENT (purpose: to transfer relevant facts of the case to the institutional knowledge). Within this scope, the actors pursue specific goals, which are systematically related to the rendition of judgement as the immanent purpose of the proceedings. We speak here of strategies. A defendant, for example, can describe the circumstances in question in such a way that he cannot possibly be the perpetrator: he is pursuing a strategy of DENIAL with the objective of being acquitted. A system of strategies can be discovered for the interrogators as well.

Strategies can be concealed. Complex strategies often, in fact, presuppose that the person concerned does not see through them. Thus the problem of comprehension enters into the picture at different levels. At the same time, a pattern of repair for comprehension problems can be strategically utilized behind the interlocutor's back, so to speak. This is what the analysis in the following example intends to show:

Example 1

01	D	Ja (ja) und denn/und dann sind wer da/(irgendwie müssen wa/)warn
		Yeah (yeah) and then/and then we're there/(somehow we must/)we was
02	D	wir da anne Tür dranne und/wir hatten kein Werkzeug, gar
		there messing around with the door and/we had no tools, nothing with
03	D	nichts bei ä ham wir eben hier die Tür mitte Stange aufgemacht, (Leute
		us uh we just have opened the door here with the bar, (people
	J	Was
		What
04	D	ham/) Ja, da lach ne Stange vor de/is son Bauernhof oder wat
		have/) Yeah, there was a bar lying in front of the/some kinda
	J	für ne Stange?
		kind of bar?

05 D das is. Auf jeden Fall ham wer die Tür/
farm or somethin like that. In any case, we have the door/
J Wer denn "wir"?
Who is "we"?

06 D Ja, einmal war er dran, einmal war ich da dran.
Yeah, once it was him, once it was me.
J Also Sie beide alleine?
So both of you alone?

07 D Ja. Nee, einwandfrei.
Yes. Naw, absolutely.
J Nich noch n dritter oder vierter oder fünfter?
Not a third or forth or fifth person?

08 D Ja aber/weiß ich ja au
Yeah but/I don't know
J Ja, was wollten Sie denn da bei/bei W.?
Well, what were you doing out there at/at W.?

09 D nich. Wahrscheinlich wollten wer irgendwie was klauen, aber ich weiß ja
either. I guess somehow we wanted to swipe something, but I dunno how

10 D nich, wies dazu gekommen is, weil ich ganz genau weiß, da is ja gar
it all started, 'cause I know real well, there's nothin' even out there

11 D nichts zu klauen. Ich hab ja da ge/ich war ja da beschäftigt da.
to swipe. I was out there doin'/I was working out there.

Notation

D	defendant
J	Judge
( )	transcriptionist doubt
/	cutoff
⟋	speaking louder

This example is part of a crime reconstruction discourse. The defendants have not denied the theft of which they are being accused, but have chosen the

strategy DENYING CULPABILITY with the argument of drunkenness. Nevertheless they have agreed to participate in the reconstruction; the interruptions of the presiding judge lead to segmented NARRATION. **D** starts off by telling how the two of them got into the premises of the W. Company, located in what used to be a farm.

(1) We had no tools.
(2) We opened the door with the bar.

This already indicates that the door was probably opened by force. For the defendant, the lack of burglary tools is a strategically important point because it speaks against a premeditated crime and points to a 'spontaneous' crime under the influence of alcohol.

What is of interest to us is the question of comprehension in line 03f.

> This is a way of initiating the pattern of repair. Its purpose is to suspend the ongoing discourse in order to repair a problem of comprehension. Ensuring comprehension has priority because otherwise the communicative purposes cannot be achieved. Repairing the problem with the help of the speaker presupposes that he knows where the problem lies. Even merely localizing the interpretandum can be difficult and can make the pattern of repair complex. The purpose of the pattern has been achieved when the listener has an interpretans which creates comprehension.

To start with, the question of comprehension seems perfectly normal: the interlocutor has used a nominal group - the instrumental information "mitte Stange"/"with the bar" - with a definite article, thus presupposing that the object of reference is known or identifiable. If this presupposition is not correct, in other words, if the listener does not really know what is being talked about, he has a comprehension problem; the linguistic expression becomes the interpretandum for which a suitable interpretans must be sought.

An alternative that must be excluded is the interpretation that the bar is a part of the door normally used for opening it. Such a relation of belonging would also be expressed by the definite article in the nominal group. The question remains as to what makes the bar so relevant for the presiding judge that he turns to external repair.

The answer lies in the institutional need to distinguish between 'petty' and 'grand theft'. A feature of the offense of grand theft is, among other things, entering with a "tool not intended for proper opening" (Article 243 of the Penal Code). Thus the legal pattern of knowledge makes it necessary to clarify this point. Hence, the presiding judge's problem is that the description of the defendant is not explicit enough before the legal background for the purposes of judicial classification. In other words, the facts of the case are not institutionally interpretable in this form, they need to be transformed in such a way that they meet the requirements. This example shows the dynamics of the application of the law: the mapping of facts that can simply be inserted into a subsumtion pattern is more of an exception.

Thus we can assume that for strategic reasons the presiding judge selects external repair in such a way that the interpretandum does not become apparent. His objective is to shed light on the above-mentioned institutional viewpoint, which he is concealing. The comprehension question of the type "what kind of an X" is only aimed at referential specification by means of additional predication(s), for example, with respect to the nature of the material (bar made of iron), relationship to other objects, location. At the same time, such a specification could provide the presiding judge with a clarification in the sense of institutional relevance.

Now let us consider the problem from the viewpoint of the defendant. For his internal repair, the question asked by the presiding judge has already provided an interpretandum. That is what one normally deals with if no indications for another localization are also made. The answer (line 04f.) allows us to conclude that the interpretandum is localized in the manner in which it was presented. The origin ("lach da"/"was lying") and the relationship to the surroundings ("Bauernhof"/"farm") are selected as the interpretans and verbalized; this time the nominal group is given the status of indefiniteness. The referential specification incorporates everyday knowledge about what kind of (work) material can be found on a farm. Such a conceptional association in the field of knowledge does not have to be made explicit ("is son Bauernhof"/ "some kinda farm"). An indication is given that the remaining indefiniteness is to be disregarded and not discussed any further - this is accomplished especially by the words ("oder wat das is"/"or somethin' like that" (line 04f.) as an "speech act augmentation" (see Rehbein 1979) intended as listener guidance, whereas the introductory expression "auf jeden Fall"/"in any case"

orients the listener to the subsequent thematic step. The guidance shows that the defendant sees his possibilities for being specific als altogether very slight.

For the presiding judge, the specification is sufficient for him to fill in the legal scheme in this process, the bar becomes the burglary tool and the action described ("aufmachen"/"open", line 03) becomes BURGLARY. Illocutionally speaking, the defendant's statements can be interpreted as a CONFESSION.

In line 05 the attempt by D to present the facts is once again interrupted by a comprehension question. The constantly used deixis "wir"/"we" is evidently no longer adequate at this point, so it becomes the interpretandum. The problem is apparently localized in the fact that although such a speaker-inclusive "wir"/"we" indicates more than one person, it does not specify anything about the number and identity of any persons besides the speaker. Of course, it is often possible to grasp a specification from the context. That is also the case here, showing that one can assume that the presiding judge understands in a normal sense.

At this point it is necessary to include the legal scheme of knowledge as the background. After the criminal act (burglary) has been clarified, the perpetrators must be identified as precisely as possible. Specifically, the question is whether both defendants were involved in the burglary.

For the internal repair by the defendant, the interpretandum must cause difficulties; in the case of a normal understanding of the discourse, it is clear which persons he was referring to with the word "wir"/"we". In this case, a different interpretandum must be sought in this particular internal repair. One can speak here of a comprehension problem of the second level: the speaker did not understand what the listener did not understand.

For the defendant, if we look at his answer (line 06), the only potential interpretandum is the question as to how the two of them opened the door together. Accordingly, the concrete manner of cooperation is provided as the interpretans. Thus the comprehension problem has not been localized in the realm of the institutionally required referential clarification ('For which X is the following true: X is included in "we"?'). With respect to the actual institutional requirement, the anaphora "er"/"him" (line 06) only gives a slight specification (gender, number).

Thus it is clear that the interpretandum identified by the interlocutor is at first the subject of internal repair in which the speaker's plan and the reconstructed listener's plan are then incorporated. Here it is also possible to include the question as to the seriousness or rather the honesty of the interlocutor. 'Simulated non-comprehension' must be viewed as being on the strategic level. In order to operate on this level, it is necessary to create a specific plan which incorporates the deduced strategy of the interlocutor into one's own planning, thereby trying to counteract it. The problem can, of course, be argued out openly in the discourse. In the internal repair, the original interpretandum - after the success of appropriate search and localization activities - must be replaced by another. By expressing a suitable interpretans, another spiral in the pursuit of understanding could be undertaken.

In this example, the presiding judge - assuming normal comprehension - was able to draw a conclusion that fulfilled the institutional requirements, which he, in fact, cognitively does (indicated by the word "also"/"so" in line 06); however, he continues with a REFORMULATION to exclude all other conceivable reference alternatives (see Hoffmann 1983: 177f.).

> The purpose of this pattern is to gain a basic position for the decision; the agent of the institution arranges for the presented facts of the case to be confirmed in his own words (and thus in a modified claim to the truth). This is an institutionally significant linguistic procedure needed in order to fulfill the task described above - that is to prepare the facts of the case for the legal decision.

The focus here is emphasized by loud speaking. The addition of another, only negatively changed reformulation (line 07) shows the importance which the agent of the institution attaches to the clarification of this point; this emphasis cannot necessarily be understood by the defendant or on the basis of "institutional knowledge of the first level" (Ehlich/Rehbein 1977). On the contrary, from this perspective, the interpretation suggests itself that one's own statements are considered to be dishonest or implausible. That is the reason for the colloquial CONFIRMATION "einwandfrei"/"absolutely" (07), which can serve as an indicator of an appropriate interpretans created by the defendant; the interpretandum for him would be the selection of the pattern of action by the presiding judge.

All in all, it must be pointed out that the objectives of the interrogator must remain unclear. For the defendant, a reconstruction of the speaker's plan as a listener's plan must remain deficitary. At the same time he can arrive at the conclusion that he is being accused of dishonesty (or rather that basic communication principles are being affected). This can have the effect that he adjusts his behavior accordingly and that consequently a shift towards an 'antagonistic mode of discourse' (see Hoffmann 1983: 14) actually takes place. This, however, can conceivably make the interrogation meaningless and, in the end, the process may have to be decided on the basis of evidence.

Many strategies can only be successful if they remain concealed, hence they presuppose precisely non-comprehension or rather insufficiency for internal repair. The actors can derive benefit from the basic knowledge asymmetry in the court procedure: clients can take advantage of the fact that the agents of the institution do not know anything about the segment of reality in question or that they only know general features of it (e.g. location); due to the inadequate institutional knowledge on the part of the clients, agents of institutions have access to strategic options with which they can already steer the presentation of facts in the direction of complying with judicial relevance. Then another possibility is that for one person, a comprehension problem is still localized in the range of 'communication about the facts of the case', meeting the requirements that exist for the listener to be able to comprehend what is being said, whereas the other person is pursuing broader strategies. This is a structural problem, rooted in the institutional circumstances, which seems to be insoluble. Therefore, even such an elementary linguistic mode of operation such as repairing comprehension problems can be institutionally functionalized. This pattern is even quite suitable for this due to its frequency, universal application possibilities and its extreme pressure. It is precisely the adjacency of cooperative and strategic repair of comprehension problems that sheds light on this form of communication. The fact that it works smoothly and is relatively rarely discovered is because of the fundamental asymmetry of the knowledge.

The situation is completely different in the area of 'communication about the facts of the case'. The interrogator as a non-participant is dependent on the client's assertions which will allow him to gain an idea about the crime (location, course of events, perpetrators, etc.) going beyond what he understands on the basis of his knowledge. His discourse position makes it easier

for him to repair comprehension problems locally and explicitly; of course, he remains dependent on the other person's willingness to cooperate as well as on the latter's linguistic and tactical skill. There is a constant risk of fading out relevant facts, of insufficient 'resolution' of the complexity of reality. The question of cooperation, however, is closely related to the problem of strategic action. The presentation of facts by defendants and witnesses, whenever they are capable of calculating rationally, is geared towards their specific strategic goals. These goals can have a 'filter function'. After all, a defendant or witness can fall back on the limitation of his knowledge or on an insoluble 'comprehension problem' so as to avoid having to provide more precise information than he wants to.

As far as comprehension problems in the area of regulating the proceedings are concerned - and such problems are characteristic for clients of the institution - a functional solution seems typical which incorporates the repair into restoring the suspended course of action as smoothly as possible while setting aside a clarification as far as knowledge is concerned. After all, institutional discourse is organized in such a manner that the client is bound by a certain position of action and only to a slight extent by institutional knowledge. Hence, a merely partial understanding is precisely the prerequisite for the success of the discourse.

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