The Meaning of "Literal Meaning"*

Lorena Ramírez Ludeña **

Abstract

Although references to literal meaning are frequent in the legal field, it is not easy to determine what "literal meaning" means. In general, it seems to be considered as unproblematic not only by many legal scholars but also by lawyers and other participants in the legal practice. In this paper I will show that this position comes about because an intuitive view of language is assumed according to which words are related by competent speakers to descriptions that determine reference. However, this descriptivist approach is shown to be problematic in reconstructing our linguistic practices. In contrast, New Theories of Reference (NTR) provide a plausible account of our common and legal uses of words. In this paper I will present a version of NTR that avoids the criticisms that are normally addressed to them. I will also show that this version of NTR has advantages when compared to the traditional descriptivist model. In the legal field, this version of NTR allows us a better understanding of how legal interpretation works.

Keywords: Literal Meaning. Descriptivism. New Theories of Reference. Legal Interpretation.

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* The title of this paper is intentionally similar to Hilary Putnam's *The Meaning of 'Meaning'* (Putnam, 1975). Whereas in his work Putnam analyses the impact of New Theories of Reference on the meaning of words, here I analyse the impact of New Theories of Reference on literal meaning. However, it is important to note that my interest is not primarily in literal meaning, but in presenting a plausible version of New Theories of Reference, to show their incidence in legal interpretation. I would like to thank Josep M. Vilajosana, Diego Papayannis, Alberto Carrio, Jose Juan Moreso, Jordi Ferrer, Lucila Fernandez, Pablo Rapetti, Andrej Kristan, Esteban Pereira, Pere Camprubí, Marisa Iglesias and Verónica Rodriguez-Blanco for their comments and suggestions regarding a previous version of this paper. I presented this paper in the University of Milan in May, 2017. I am very grateful to the participants of the seminar for their insightful comments. Special thanks to Genoveva Martí for many valuable discussions on these issues.

** Facultad de derecho, Universidad Pompeu Fabra, c/ Ramon Trias Fargas 25-27, 08005 Barcelona, Spain, lorena.ramirez@upf.edu

1. Introduction

References to literal meaning are frequent in the legal field, not only among lawyers but also among jurists and legal philosophers. It is considered to be relevant to preserving the different values that make up the rule of law, such as predictability. In criminal law, literal meaning is commonly used as an important tool to distinguish between (accepted) interpretation and (forbidden) analogy. However, it is not easy to determine what "literal meaning" means. Other expressions such as "ordinary meaning", "plain meaning" or "grammatical interpretation" are normally used in order to explain what literal meaning is, but these expressions are not very helpful since they may be understood in multiple ways[1]. In general, it can be said that literal meaning is considered to be unproblematic, though[2]. In this paper I will show that this position comes about because we frequently assume that words are related by competent speakers to descriptions that determine reference. However, this descriptivist approach is shown to be problematic in reconstructing our linguistic practices. In contrast, New Theories of Reference (NTR) provide a plausible account of our common and legal uses of words[3].

NTR have had an impact in recent debates in the philosophy of language. While not without drawbacks, the way in which they reconstruct the relation between our words and the world appeals to many philosophers of language. However, in legal philosophy the possibilities of these theories have not yet been fully exploited. In this paper I will present a version of NTR that avoids the criticisms that are normally addressed to them. I will also show that this version of NTR has advantages when compared to the traditional descriptivist model. In the legal field, this version of NTR allows us a better understanding of how legal interpretation works. I will show that it is useful for making sense of frequent references to literal meaning by judges and legal scholars, and also for reconstructing the relation between literal meaning and interpretative instruments such as legislative intent. In doing so, I will also show that the relevance conceded to literal meaning in order to preserve the different values that make up the rule of law has to be questioned.

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[1] Regarding the use of other expressions (such as "formal", "grammatical", "direct", "linguistic", "obvious" or "plain") that are not clear enough, see Mazzarese 2000.

[2] This is just a generalization. Among legal philosophers, see for example Poggi 2007, who emphasizes the problematic character of literal meaning because of the incidence of contextual elements. This view is broadly accepted among philosophers outside the legal domain, who agree on the incidence of context but disagree about when it matters and which contextual elements are relevant. See for example Searle 1970 and Recanati 2004.

[3] In order to reconstruct the basic tenets of NTR, I will mainly take into account Donnellan 1970, Putnam 1975, and Kripke 1980. Donnellan and Kripke basically focused on proper names, while Putnam explored natural kind terms.

2. Descriptivism and its problems

An intuitive conception about language is generally accepted: we associate words with descriptions and then these words refer to the objects that have the properties contained in our descriptions. For example, we *decide* – as a community – that the general term "fruit" has a meaning which points towards the description (according to the Oxford English dictionary) "edible product of a plant or tree, consisting of the seed and its envelope". As a consequence, the world is divided in two parts: the objects that are fruits, and the objects that are not, depending on whether they have, or do not have, the characteristics included in the description. And when, in the legal sphere, it is established that fruits are subject to a particular tax, this means that objects that have certain characteristics are subject to that tax. In this way, both in general and in the legal context, we decide to group together, in a particular manner, objects, which are similar but at the same time different in many aspects. We take some characteristics into account, while leaving others aside. Words refer to those objects that have the properties we have considered relevant, and speakers are competent inasmuch as they know the descriptions that constitute the meaning of those words[4].

This is an intuitive conception of language because it easily explains the way we learn and show how to use words: by using descriptions. It is also intuitive because it provides a clear explanation of the relation of reference: the objects we refer to have certain properties that we have considered relevant. This conception is assumed, with greater or lesser sophistication, in a more or less conscious way, by many individuals. Moreover, it has had a strong impact on philosophers of language[5], legal philosophers[6], and legal scholars in general. For example, in criminal law, references to literal meaning are frequent, and the relevance of ordinary language – and the descriptions we normally associate with words – has been defended[7]. It is not surprising that in the legal field descriptivism is assumed: we decide what situations we want to regulate in a particular way, and this seems to imply that we decide which properties are relevant for the law to be applied.

To adopt such a conception does not imply assuming that language in general,

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4 In philosophy of language, Frege 1998a, 1998b and Russell 1905, 1910-11 are considered to be the two most representative authors of this conception, which we could call "traditional". Nevertheless, this may be debatable if one takes into account their writings. In any case, I am not interested here in describing the position of particular authors. Rather, I want to reconstruct what may be considered the traditional conception, which is intuitive and generally accepted, in order to understand the point of departure for those who defend NTR.

5 Searle 1958.

6 Many scholars have understood Hart 1994 in this way.

7 That is to say, literal and ordinary meaning are frequently regarded as interchangeable. See Montiel and Ramírez Ludeña 2010.

and legal language in particular, is unproblematic. In the legal field, it is generally assumed that legal language is not formal, even if it is technical. In this sense, although on some occasions new terms are introduced, or day-to-day terms are redefined, this does not prevent problems of ambiguity and vagueness from occurring[8]. This understanding of language gets around the implausibility of the most radical forms of semantic and legal formalism. But merely to say that the language of the law is expressed through ordinary language, that descriptions which we commonly associate with words determine what we refer to, and that problems of ambiguity and vagueness may arise, seems to be totally insufficient to provide a plausible account of our linguistic and interpretative practices.

Amongst other considerations[9], it is important to note that it is difficult to determine what properties are relevant in ordinary language, even in the case of words we use every day and with respect to which we seem to be competent. It seems thus debatable to assume that all our uses are underpinned by shared properties that we have to know in order to be competent speakers. Even if it seems that we have a *practical* knowledge of our language, that is, we use it in an unproblematic way, it is excessively demanding to assume that we have a *theoretical* knowledge, in the sense that we know the descriptions that determine the reference and in virtue of which we are competent.

Moreover, as I will show later, sometimes different uses with many kinds of relations among them coexist in a more complex way than is shown when we normally talk about vagueness and ambiguity. In some cases, we doubt whether an ordinary use – distinct from a more technical or expert use – has been created, or if that use is wrong. Sometimes there are several uses and doubts arise with respect to which one is legally relevant. Other times it is controversial whether a new use has been generated in the legal field.

Both points – the difficulty of determining the relevant properties and the existence of multiple uses with intricate relations – show the complexities we face when we want to determine the meaning of the words we use, an issue that is especially relevant and challenging in the legal sphere. Problems with regard to literal meaning become especially important in criminal law, where the greater infringements of the most important legal interests are regulated, and legal consequences are more serious. In fact, in criminal law the distinction between (permitted) interpretation and (forbidden) analogy is made through recourse to literal interpretation, which

[8] Some terms are ambiguous because we associate them with more than one description and we have doubts about which meaning is relevant in a particular context; and there are also problems of vagueness because, despite only one meaning being relevant, there are cases that lead us to doubt whether or not they are covered by that meaning. Even if problems of ambiguity are generally seen as residual, qualitatively and quantitatively, it is understood that problems of vagueness are constant and more difficult to resolve. See, for example, Nino 1997; Moreso, and Vilajosana 2004.

[9] See Ramírez Ludeña 2018.

is related to ordinary language. It is assumed that *analogies* amount to an act of creation, by going beyond the limits of the wording. But, at the same time, *broad interpretations* – that are said to be plausible extensions of literal meaning – tend to be accepted. But what is a plausible extension of literal meaning? Does it operate as a genuine limit? If the interpreter does not have an articulated theory for identifying literal meaning[10], extending that meaning in a plausible way, and then differentiating broad interpretation from analogy, in the end her practical preferences will become determinant.

Furthermore, in the legal sphere there are multiple methods that increase the interpretative possibilities the judge can choose from[11]. There is no clear consensus on whether the interpreter is free to choose between the techniques or if there is some hierarchy and this has an impact on the role of literal meaning in legal interpretation[12].

Let us have a look at the problem by taking into account a well-known example. In Spanish criminal law, the interpretation of the term "violence" used in the legal definition of coercion (art. 172 of the Spanish Criminal Code) has been the subject of deep controversy[13]. In particular, there has been discussion as to whether the provision includes psychological coercion or assault on objects that in other criminal offences are considered as covered by the terms "intimidation" and "use of force". The problem comes from the fact that the legislator has not included those other expressions in the definition of coercion, while it has done in other definitions like, for example, sexual assault (in this regard, the art. 178 of the Spanish Criminal Code distinguishes violence from intimidation). When interpreting the term "vio-

[10] In fact, several underdeveloped views about literal meaning coexist, making reference to controversial elements such as its obvious and restrictive character.

[11] On the problems of ambiguity raised by the existence of multiple interpretative instruments, see Guastini 2012.

[12] In this context, the limited attention that these questions have received by the Spanish legal scholarship on criminal law has to be pointed out. In 2005 I conducted a research project, together with Marisa Iglesias and Íñigo Ortiz de Urbina, from the philosophy of law and the criminal law groups of the University Pompeu Fabra. We analysed the position of various authors in 15 manuals, monographs about methodology in criminal law and commentaries on the criminal code and showed that in more than a third of the cases there was not a single reference to the existence of these instruments. In those publications where the instruments were mentioned there was no proposal of a hierarchy. When a hierarchy of interpretative instruments was included it tended to lack clarity because, for example, the relevance of both literal and teleological interpretation was emphasised. It could even be said that, generally, for the authors all canons can be used with varied intensity and hierarchy, individually or combined, to reach the interpretative result pursued by the interpreter. In some cases, this freedom to choose is clearly advocated, like in Cobo del Rosal and Vives Antón 1999: 122, where the authors claim that all interpretative *dirigisme* has an authoritarian source, and goes against the liberty inherent in any scientific research as well as against open discussion about the values that characterise a democratic country. The texts are analysed and cited in detail in Ortiz de Urbina 2012.

[13] On this example, see Ragués i Vallès 2003.

lence" in the same way as in other provisions, and so excluding intimidation and use of force, seemed to be unjust, jurisprudence has proceeded to what has been called a "spiritualization" of the term "violence" for coercion. But this seems to go against a systematic interpretation, given that, if the legislator had wanted, it could have used the term "intimidation" or the expression "use of force" also in the definition of the offence of coercion. Leaving aside the different considerations at stake, it is important to note that both interpretations have been defended by making reference to different understandings of literal meaning[14].

The preceding example allows us to explore further the problems of delimitation between interpretation and creation of law that are related to literal meaning. Analogy involves broadening the scope of a term's application to cases that are not included, but are similar. Therefore, it already starts from a specific interpretation. For example, if we consider that a systematic (restrictive) interpretation is relevant for the interpretation of the criminal code, what has happened with the term "violence" involves an extension by analogy that exceeds the limits of the allowed interpretation. However, if one appeals to considerations related to the ordinary use of the word or to the protected legal good, it is possible to claim that the solution proposed by the courts is a plausible extension of literal meaning, and that it cannot be seen as a case of forbidden analogy. In any case, reflecting on the problems brought up by literal meaning and interpretative instruments such as the one that seeks the legislative intent enriches the debate about interpretative matters and avoids clear-cut distinctions that cannot be sustained. This is so, even if reflection could lead to recognizing that all the instruments (without a hierarchy) are to be accepted[15].

In conclusion, literal meaning (or ordinary meaning understood in the same way) is frequently seen as unproblematic. This is so because the traditional conception of meaning is assumed. However, I have shown that the traditional descriptivist way of understanding language is questionable. In the legal field, this means that it is problematic to associate literal meaning with the values underlying the rule of law, and that it is not useful to distinguish between interpretation and analogy.

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[14] See Ragués i Vallès 2003.

[15] The issue of interpretative methods and their hierarchy is normally addressed at a descriptive and a normative level. At a descriptive level, the instruments used by courts and doctrine are described. At a normative level, a stand is taken as to which one is better, by taking into consideration elements such as predictability or separation of powers. I am also interested in what can be called the *conceptual* level in connection to the concept of law. Can we make reference to legal correctness or point out that judges are wrong, when they invoke and apply interpretative instruments? Are all the available instruments equally admissible from a legal perspective? It should be noted that these discussions are related to the question of what counts as law and if, from a legal point of view, different instruments can be used. From another perspective and with a different aim, Greenberg 2017: 106 has also defended the relevance of analysing interpretative issues by taking into account more fundamental questions: "answers to questions about legal interpretation depend on how the content of the law is determined at a more fundamental level than legal standards". I will come back to this issue later in the article.

3. NTR and chains of communication

The traditional conception, in its many versions[16], as outlined above, has been widely criticised by supporters of NTR, who have also proposed an alternative model. In what follows, I will briefly present the criticisms raised by NTR against the traditional model and I will describe what I consider to be the central tenets of NTR.

Although supporters of NTR emphasise different aspects, it can be argued that they all share a negative thesis: it is not necessary that speakers associate words with a set of descriptions in order to refer to objects. Individuals, but also the community as a whole, often have a poor and/or wrong knowledge of those descriptions and yet are able to refer to objects. This does not seem too controversial if we think about proper names such as "Aristotle". We refer to Aristotle without needing a description that selects a single individual, and the descriptions we associate with the name may be wrong or fit a different individual. In this sense, although it is difficult to deny that we associate certain descriptions, positive and negative connotations, and other elements with the words we use, they do not explain what we refer to or how.

However, if not through descriptions, how is it that we are able to refer to objects often distant in time and space? According to supporters of NTR, reference is normally established by an act of ostension in which a name is bestowed by a declaration such as "let us call this individual 'Aristotle' ". Subsequently, users of "Aristotle" refer to the bearer of the name by virtue of being part of a network of users, a chain of communication in which each link has received "Aristotle" from a previous link (and uses it with the intention of referring to the bearer at the origin of the chain). Therefore, according to NTR, subjects refer to an object in virtue of their objective position in the chain of communication, without descriptions being necessary to refer to the object[17].

How can this model be extended to general terms? Following Putnam (1975), let us imagine that the term "water" was introduced by indicating a certain sample of the substance in a lake. This initial sample counts as a paradigmatic instance and thereafter other samples are classified by their similarity to the paradigmatic case.

According to supporters of NTR, what makes a particular sample water, and

[16] In contrast to less plausible positions which focus on speakers considered individually, there are versions of the traditional view that assume a socialised conception and focus on clusters of descriptions that are associated with the terms at the level of the whole community. Searle 1958 argues that the referent of a name is the object that satisfies a sufficient (albeit vague) level of descriptive information socially connected with the name. Despite the fact that they do not analyse in detail the nature of the relevant descriptions, legal scholars in general, and legal theorists in particular, seem to assume a position close to that of Searle. See Raz 2001: 14 ff., for an excellent analysis of the problems that individualistic conceptions have to face.

[17] Regarding the notion of chains of communication, see Almog 1984.

what determines the correct application of the term "water", may not be accessible to the speakers. Having the molecular structure H_2O is what determines that something is or is not water, and therefore the domain of application of the term "water". But the discovery of the scientific nature of water occurred long after the term started to be used. Individuals lacking that scientific information were nonetheless able to refer and were considered competent[18].

Frequently, it is assumed that NTR are committed *always* to essentialism, and *in an implausible way*. Those who defend NTR are understood as postulating the existence of shared underlying natures which are not immediately visible or observable, and which can be discovered only through scientific research and theoretical reflection. From this perspective, according to NTR hidden natures are always relevant; and they are relevant independently of our linguistic practices. However, in the version I defend, commitment to hidden natures is not inherent to NTR. Some samples are treated as paradigms, and others are classified as members of the same class because of their similarity to the paradigms. But the similarity may be superficial or focus on the function. Then, the model *does not require* that the relevant criterion is related to hidden natures. Which criterion is ultimately relevant depends on complex factors that are not semantic, *deeply related to our interests and concerns*. The novelty of the version of NTR that I am presenting here is that it leaves the door open to the idea that the criterion is related to elements which subjects do not know and which can transcend the entire community[19].

[18] Obviously, before the discovery people had descriptions corresponding to "water" even though not in chemical terms. But those descriptions did not explain reference: they were able to refer to water even if their descriptions were inaccurate. Moreover, the discovery of the molecular structure of water has not been understood as giving rise to a change in the meaning of "water".

[19] Emphasizing this point, see Martí and Ramírez Ludeña 2016. Although I do not dwell on these issues here, often, especially during the first half of the twentieth century, analytical philosophers have assumed that the only admissible (if any) kind of necessity is conceptual necessity. Therefore, it is understood that a proposition is contingent if its truth or falsity depends on how the world is, and necessary if it depends on our concepts and the relationship between them. Contingent propositions can be known *a posteriori*, and necessary *a priori*. The proposal of the supporters of NTR radically confronts the classic position. In fact, Kripke and his followers have rejected the link between the necessary and the *a priori* and have argued that there are truths that are necessary and *a posteriori*, as well as contingent *a priori* truths. The way some analytical philosophers understand necessity has also had a strong impact with regard to how they think about other possible worlds and essences. From their point of view, necessity, linked to our arbitrary conceptual decisions, determines our reflections about other possible situations. Thus, if we have chosen that "water" means a colourless, odourless and tasteless substance that quenches thirst, there is no possible world in which water is not exactly that substance, since that is what being water consists in. And this also determines the question of essences (in those cases in which they accept the discourse about them): it is essential for water to be a colourless, odourless and tasteless substance that quenches thirst, precisely because of our linguistic decision. All other features not integrated into our definition are incidental. Instead, to assume that we do not require descriptions that determine reference allows the recovery of the debate on essentialism. Since the issue of which descriptions are relevant is not fixed in advance but depends on empirical research and theo-

It is important to note that in classifying the natural world we tend to assume that our classifications and our use of words reflect the nature of things. We trust science to discover the elements of reality that are responsible for the surface behaviour of objects, outward appearances and causal interactions. In fact, given our past experiences, it seems reasonable to rely on scientific classifications since they account for important features of the world, helping us to predict and explain what happens in a better way than classifications based on superficial aspects. Although NTR emerged largely to account for scientific progress and the semantic practices of scientists, it can be said that something similar to what has been described happens with experts in the legal field. It is often assumed that terms such as "causality", "psychological disorders" or even "mens rea" have an underlying nature with respect to which different experts develop theories, and deferring to these experts helps us to solve cases in a better way[20].

The version of NTR that I am presenting here is compatible with the fact that different chains of communication may arise in connection to the same word, or that, by the use speakers make of the words, a chain of communication that was anchored in certain objects changes, thus changing the reference, too. It is also compatible with accepting that there are certain periods in which reference is indeterminate. These facts do not go against the characterization offered here, but rather show that it is plausible[21].

To show this, let us think of different groups of cases, all with a legal impact. Regarding the term "death", speakers generally understand that there is an underlying nature that has been gradually discovered by experts[22]. Although occasionally a loose use of the term is made, when relevant things are at stake such uses are understood by the speakers themselves as wrong. It is assumed that the term refers to a precise phenomenon that goes beyond the descriptions associated with it, with scientific discoveries constituting a better understanding of death. Therefore, there is a single chain of communication in which the nature of the phenomenon, largely opaque to speakers, is relevant.

In contrast to the previous example, there are cases in which two chains of communication are consolidated. In Spanish, for example, the word "vacío" is used to make reference both to places that are empty and also with the same (technical)

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rizing, it makes sense to reflect on the essential properties of objects and kinds. This then explains the revitalization of the debate about hidden natures and essences, by avoiding the prejudice arising from the assumption of the traditional model. However, by itself, the semantic conception of the supporters of NTR cannot substantiate a metaphysical question such as whether there are essences or not. What I argue is that our linguistic practices have essentialist assumptions and that this makes sense because our language does not put obstacles in its way.

20 On the term "causality", see Ramírez Ludeña 2014.

21 Martí and Ramírez Ludeña 2016.

22 For an analysis of this example and its legal consequences, see Moore 1985.

meaning as "vacuum". Therefore, regarding the word "vacío" there are two uses, and two consolidated chains. Neither of them is seen as wrong and, depending on contextual elements and various non-semantic considerations, one or the other is relevant. In cases such as "vacío" it is difficult, if not impossible, that indeterminacy arise, in the sense of particular uses that raise doubts about which chain of communication comes into play. For example, it would be absurd to invoke the expert's use if it is made explicit in a contract that the apartment has to be left *vacío*[23].

Something similar happens in the case of the term "tomato", in which there is a botanical use, relating tomatoes with fruit, but also a culinary use, which includes them among vegetables. Nevertheless, unlike what happens with "vacío", in certain particular cases doubts may arise as to which chain of communication is relevant. This happened in *Nix v. Hedden* (149 US.304, 1893), in which there was a disagreement about whether tomatoes were subject to the payment of taxes on vegetables. In that case, traders in tomatoes (Nix and others) claimed that Hedden (the tax collector) had to return the taxes already paid, arguing that tomatoes were not vegetables subject to the tax, but fruit that was exempt. The court decided in favour of Hedden, but not because it decided to ignore the *true nature* of tomatoes; the question was not whether tomatoes were fruits or vegetables, but what was the relevant use for the purposes of the regulation[24].

A different problem is posed by cases like Madagascar. Originally, the name "Madagascar" was used for a part of the continent but finally, by a widespread misconception, the term was anchored in the island today known as "Madagascar"[25]. This involved a time period in which reference was not clearly determined. The example shows that sometimes it is very difficult to determine when a new chain of communication takes place, and when one that was previously consolidated disappears.

The example of Madagascar helps us to understand the role of intentions and practices in the version of NTR that I am presenting here. Typically, a use is part of a chain of communication when the speaker intends to use the word with the same semantic function as the people she acquired it from. That is to recognise that I may use "Madagascar" to name my dog. But the intention of the speaker does not determine reference: at most, it may contribute to her joining a practice of usage in which

[23] I think that the existence of two different words in English precisely shows that it is plausible to say that – regarding "vacío" – there are two different uses (ordinary and expert), two chains of communication, that have to be differentiated. In English, vacuum is a space from which most or all of the matter has been removed, or where there is little or no matter; in contrast, "empty" is used in a looser way to mean, for example, not containing any things or people.

[24] Regarding this example, see Moreso 2010.

[25] Concerning what happened in the case of Madagascar and the problems it could pose for NTR, see Evans, 1973.

the referent has already been determined[26]. What is required is that a practice be established. Proper names such as "Madagascar" are part of a language, and they have to be embedded in a pattern of systematic use. This implies that there may be grey areas, that is, there may be uses of "Madagascar" for which it makes no sense to insist on determining whether it refers to the island or the mainland, since there was a period of time in which there was not a consolidated practice[27]. In any case, the existence of grey areas does not mean that we can deny that *now* "Madagascar" refers to the island.

Regarding indeterminacy, similar difficulties to "Madagascar" are present in the case decided by the German courts as to whether certain types of mushrooms were included or not in the regulations referred to hallucinogenic plants. In this case, it was not clear whether the best characterization of the situation was that the inclusion of fungi as plants constituted a different use of the word "plant" or a deviant one[28]. In other words, it was controversial whether legal language referred to the expert's use, or if a new chain of communication had been generated by the legislator.

A case that allows us to test NTR and the notion of chains of communication is the whale oil case. Mark Sainsbury (2014) and Ian Philips (2014) refer to a case from 1818, in which a fish oil inspector, James Maurice, demanded from Samuel Judd, an oil trader, fees derived from the inspection of whale oil barrels. Judd was of the opinion that no payment was due since the legislation referred to fish oil, and not to whale oil. After listening to experts and traders, the jury decided in favour of Maurice, forcing Judd to pay. At the time of the dispute, it seems that there were various uses (and various chains of communication) consolidated in the community. On the one hand, according to commercial use, whale oil was clearly differentiated from fish oil. On the other hand, according to the ordinary use, whales were sea creatures and, as such, were considered fish. And there was no consolidated scientific use that excluded whales from the category of fish. This case thus appears to be similar to *Nix v. Hedden*, in the sense that when the problem arises there were two consolidated chains of communication and the doubts were precisely about which chain was relevant when the regulation made reference to fish. Precisely because the way we use words is relevant it can be recognised that over a period of time both chains

[26] Here I follow Martí 2015. In this regard, she claims that «[w]hen a speaker intends to follow a practice, to abide by the rule, it is the rule, and not his intention, that does the semantic work. The referential intentions of a speaker do not determine the reference of particular uses of expressions, and so they fall outside of the realm of semantics» (Martí 2015: 82, n. 11).

[27] Establishing the practice requires success in making people use a name to refer to a thing, which in the case of Madagascar depended on a combination of errors and power (Martí 2015: 86). Martí argues that «we should not think that bestowing a name is an act; it is a process. It requires success in launching a practice, and launching practices is not something that occurs instantly» (Martí 2015: 87).

[28] This case was discussed by German doctrine and jurisprudence and concluded with a decision by the BGH (25.10.2006), which established that fungi were included in the regulation that refers to plants. Analysing this case, Montiel and Ramírez Ludeña 2010.

existed in the community. But, unlike the case of tomatoes, in which there is still today a differentiated culinary use that includes them among vegetables, in the case of the whales, their inclusion in the category of fish is now considered to be wrong. Thus, because of the consolidation of a particular scientific taxonomy that had a strong impact on the ordinary use of the terms (because of the weight we confer on experts and their findings, as I noted earlier), the chain of communication including whales among fish has disappeared[29].

In conclusion, none of these groups of cases undermines NTR. On the contrary, the notion of chains of communication allows us to offer a plausible characterization of what happens in each situation. And, contrary to what might be assumed, in none of the cases can we conclude that the way we use the terms is irrelevant (which would make these conceptions largely implausible). Our uses, complex and changeable as they are, are decisive. So, even in those cases in which the relevant similarity is related to the nature of objects, and so opaque to users, it is that similarity that matters (and not, for example, external features) because we use the words in a certain way.

NTR, as reconstructed here, have obvious advantages over the traditional model. As I have shown, since they do not assume that we need to know identifying descriptions in order to refer, they do not present a simplified image of the language of the law. The recognition of the existence of different uses, some of them eminently legal, allows us to offer a more complete image of interpretative changes, indeterminacies and disagreements[30]. But then it cannot be taken for granted that ordinary (and literal) meaning is unproblematic, as frequently happens in criminal law.

We have already seen that, according to the NTR model, it is important to distinguish between existing and accepted uses, which give rise to different chains of communication, and uses which are seen as deviant, but which may be allowed in certain contexts. Therefore, the difficulties we face in accommodating the complexity of ordinary language are recognised. It is also recognised that sometimes, since important issues are at stake, the taxonomies of experts are considered determi-

[29] Other interests and concerns have also been important contributors. For example, it is important not to underestimate the impact of documentaries and movies about whales, which have made it highly unusual, and for large segments of the population unacceptable, to refer to whales as fish.

[30] If my analysis is right, it can be said that ambiguity plays a more prominent role in the legal sphere than is generally believed. As the examples given here show, ambiguity has some impact, not only from the quantitative point of view but also from the qualitative point of view, in cases analysed and discussed by courts, legal doctrine and legal theorists. Ambiguity is widespread and relevant and its existence does not merely depend on the existence of different interpretative tools or dogmatic constructions. If we understand ambiguity in accordance with the above analysis, as derived primarily from the existence of various chains of communication in our use of terms, it is to be considered as a general phenomenon, which is caused by how our language works. That is, it is not an exclusively legal problem. It takes place in law because legal systems make use of words and expressions that are ordinarily used in different ways, and thus there are doubts about what the relevant use for legal purposes is.

nant, even if, in general, we have a poor or defective knowledge of them.

As we have seen, the notion of chains of communication does not require the rejection of descriptions, which may allow us to provide a clear characterization of what happens in certain cases. Neither does it force us to assume that hidden natures are always relevant, but only to admit that the notion of chains of communication is compatible with them[31].

Moreover, the reconstruction offered here provides us with an explanation of why we have difficulties differentiating between *interpretation*, which is allowed and *analogy*, which is not (so far as criminal law is concerned). If language operates through different and complex relations of similarity, which may not be entirely transparent to competent speakers, it is not true that we (normally) have a clear meaning, which we then decide to extend or not. Let us return to the case of the tomatoes. When the question of whether tomatoes are fruits for the purposes of tax legislation arises, it may be pointed out, according to the traditional scheme, that the term "fruit" has a meaning in accordance with ordinary use, which does not cover tomatoes. Therefore, to include them would involve recourse to analogy, which is forbidden in criminal law. But another possibility would be to point out that legislative intention is relevant and that the legislator wanted to regulate them as fruits, understanding that it is not a case of analogy but of (the best) interpretation. What this example shows is that it all depends on the criterion of interpretation that we take into account in the first place. That is, interpretative instruments are often invoked, but their content is not entirely clear, and they may be used in different ways, leading to different decisions. I think that NTR offer a more plausible picture of what happens. It seems more appropriate to note that in these cases there are two uses, one expert and another ordinary, and that the debate revolves around what is relevant for legal purposes[32]. In this context, the tomato case is more similar to the "vacío" case, in which there are two accepted uses, than to the "death" case, in which there is a scientific use and other uses that come to be considered as deviant.

[31] My claim is not that some terms work as descriptivists say, and some others according to NTR. I think that, understood in the broad sense I am presenting here, *almost all* terms work according to NTR, and only a few as descriptivism describes. Only in a few cases we, from the very beginning, associate words with descriptions that play a mediating role in reference (it may happen, for example, in the case of technical words such as "triangle"). According to the version of NTR that I am defending here, we refer without mediating descriptions being necessary to do so and the relation of similarity to exemplars plays a fundamental role. External features that can be part of a description may then become relevant, as may hidden natures. Therefore, since descriptivists argue that descriptions always play a mediating role, the version of NTR that I am presenting here is in opposition to them, denying that very thesis. But, as I have shown, this version of NTR can accommodate those cases in which descriptions become relevant.

[32] It can be said that this is clear to many jurists, independently of NTR. However, I think the version of NTR presented here allows us to provide an explanation of how the different uses arise and about what kind of disagreement is taking place.

What role do the different interpretative instruments play in this reconstruction? They serve as a mechanism to determine whether a new chain of communication has emerged or disappeared, and which chain is relevant when doubts arise. The question of whether these interpretative instruments can be organised hierarchically is re-examined in the next section.

4. Interpretative methods, considerations of justice and right answers

The next question to be addressed, and which I left open ended in the previous section, is how to understand the various interpretative techniques[33]. To this end, I have already pointed out that there is no clear consensus on the content of these instruments and their possible hierarchies. However, courts rely on them on a daily basis to justify their decisions. Therefore, it is difficult to deny the impact of interpretative methods on the interpretation and application of the law. As I noted earlier, according to the version of NTR that I am presenting here, when doubts arise these instruments may be relevant in determining whether a new chain of communication has emerged or disappeared, and which chain is relevant when doubts arise. Can we then understand that in such cases the interpreters are free to choose which of these interpretative methods to employ? Or, should we conclude that, despite appearances, there is only one *legally* right answer? Are considerations of justice relevant to the decision? Criminal legal doctrine takes different stands on the issue. And these are very controversial issues among philosophers who work on legal interpretation.

With regard to legal philosophy, the existing competing theories are not radical theories that could be thought of as simplifying the issue, but rather highly articulated conceptions that emphasise different aspects of legal practice[34]. The Genoese realists, for example, argue that the existence of multiple interpretative instruments and dogmatic constructions, among other considerations, implies that the judge has a framework of possibilities to choose from, *out of which* she creates new law[35]. For Dworkin, however, there is a single correct answer, which is the interpretation resulting from the best balance of all the values at stake, such as predictability, separation of powers, equality, etc[36]. Also frequent is the defence of an intermediate position in which it is assumed that there are some clear-cut cases but also hard cases where there is no single correct answer, and where the judge has discretion

[33] I have already addressed this question in some of my works, such as Ramírez Ludeña 2012.

[34] However, since I just want to present several positions in order to show where the relevant dispute lies, I oversimplify many complex issues in my explanation.

[35] See, for example, Guastini 2012.

[36] Dworkin 1986.

to choose from several options. In this context, although interpretative instruments play a role, there are sometimes interpretations which are consolidated and which do not raise questions. There are also cases where different instruments lead to the same solution. But in other cases doubts may arise and the judge is said to have discretion to decide[37].

The position one takes up on legal interpretation is connected with which conception of law in general is understood to be most plausible. In this sense, and continuing with the same examples, the Genoese realists aim to provide an accurate description of legal practices, leaving aside normative considerations. Taking this methodology into account, they understand that law depends on the actual practices of judges, which in their conception entails the rejection of the discourse on legal correctness. For Dworkin, however, law is an argumentative practice in which participants try to present the law and its requirements in its best light. This means, according to Dworkin, that what the law establishes depends on the best balance between the different values at stake (which means assuming a sophisticated necessary connection with morality). And this position leads to the existence of a correct answer. Finally, according to the Hartian model, law is dependent upon a convergence in certain individuals' conduct and attitudes. In particular, officials share the same criteria to identify the law of their legal system, and they are committed to them[38]. His emphasis on convergence seems to involve the position on interpretation that I have previously pointed out: when disagreement takes place, there is no legal solution to appeal to, leaving discretion to the judge. To decide those cases, judges normally invoke socially accepted interpretative canons such as the purpose of the rule or the intentions of the legislator, but Hart acknowledges that they are in fact creating new law. So, while the realists are sceptical about interpretation, and understand that (apparent) considerations of justice, among other motivations, may be relevant for the judge to decide, for Dworkin, normative considerations always play a role. For Hart, conventions are the determining factor, and when these are exhausted, there is discretion: in cases of semantic indeterminacy a right answer is lacking and the judge therefore has to make a choice in a justified way from the different possibilities that are admissible[39].

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[37] See Hart 1994. An important point to note is the difficulty of drawing a single classification in this area, since the various authors do not seem to refer to interpretation in the same way. Not all of them agree on what the object of legal interpretation is; it could be for example a written code, linguistic entities in a broader sense, or, as in the case of Dworkin, social practices. Other controversial aspects include *when* it is necessary to interpret (always, or only in difficult cases) or if the interpretation itself takes place abstractly or in relation to concrete cases. In fact, it has even been questioned whether some forms of scepticism are at odds with the other views, precisely because it is debatable whether they refer to a genuine *interpretation* of legal texts.

[38] In this sense, Hart emphasises the conventional nature of law. Regarding the conventionality of law, see Marmor 2009 and Vilajosana 2010.

[39] Again, this may be seen, and in fact is, an oversimplification of the different views. However

In the previous section I argued that chains of communication are a useful instrument to understand how language works with respect to conventional meaning. Doubts and disagreements may arise regarding the generation or extinction of a chain, or regarding which chain is relevant in a particular context. But, as I have shown, those issues do not belong to semantics, in the sense that they cannot be decided by semantic considerations. In the legal field, those doubts and disagreements are related to debates regarding legal interpretation and, ultimately, the nature of law. So, it is crucial to decide which considerations should be taken into account in different cases where doubts and disagreements arise. As I have explained, different theories of law have different conceptions of the nature of the relevant considerations. The dispute between Dworkinians and Hartians can be seen as a dispute over this very issue: for a Hartian the relevant considerations are conventional and for a Dworkinian they always depend ultimately on moral factors. Anyway, this particular dispute is not one whose resolution lies within the domain of semantics[40].

5. Conclusions

Literal meaning is frequently associated with important distinctions and with the preservation of values related to the rule of law. It is generally understood as unproblematic because a descriptivist conception about meaning tends to be assumed. But I have shown that descriptivism does not provide a plausible account of the complexity of our language, and therefore the association between descriptivism, literal meaning, and the preservation of values such as predictability has to be rejected. I think this has important implications for legal practice.

In this paper I have also shown that there is a plausible version of NTR that has great explanatory power and that overcomes the problems of the descriptivist view. In the approach I have presented, NTR are not committed to the existence of hidden essences, but rather the complexity of our language and its multiple uses are recognised. As we have seen, when doubts and disagreements arise NTR do not and cannot provide an answer, but merely allow us to reconstruct the different kinds of disagreement. This leads us to reflect on an important methodological issue that has implications for jurisprudence. When doubts and disagreements arise non-semantic considerations become relevant. In the legal field, this means taking into account methods and other instruments of interpretation that are normally invoked by legal interpreters. But then, both the existence of a right answer and what kind of considerations are relevant when making a decision depend on the theory of law that is

I think it is useful to show the relations among conventional meaning, theories of interpretation and theories of law.

[40] See Martí–Ramírez Ludeña 2016.

assumed or adopted. This implies that conceptions such as Hart's are not problematic because they assume an implausible conception about meaning. The relevant debate is not semantic but about what kind of considerations are ultimately relevant (whether social or normative): the province of jurisprudential theories.

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