

# WHAT THE LAW SAYS? REFLECTIONS ON LITERAL INTERPRETATION

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This article discusses the idea that legal interpretation should be based on the general usage of language, or in other words, on the literal meaning of utterances. This standard of interpretation has been called grammatical or literal interpretation.<sup>1</sup> The aim of this article is to study what kind of linguistic and philosophical presuppositions underlie this principle of interpretation. Thus the principle is reviewed in a critical manner. The central question is what help we can get from it in legal interpretation.

Consider a rule that forbids you to take a vehicle into a park. According to the principle of literal interpretation, we must study what the word 'vehicle' means if we want to know whether we are allowed to take our skateboard inside the park walls. The decision whether or not skateboards are allowed rests on the literal meaning of the utterance 'vehicles are forbidden in this park.' This way the obedience conditions of this sentence depend on the literal meaning of it. It is shown in this article that this idea is problematic in the light of theories of language. Literal meaning is not something that we can rest our legal decisions on.

## 1. Semantics and pragmatics

We can divide the study of language into syntactics, semantics and pragmatics. Leaving syntactics aside, we generally define semantics as the study of meaning of linguistic entities, whereas pragmatics is seen to focus on the use of these entities in actual situations. This division is nevertheless often difficult to uphold, because semantic research is often flavoured by at least some pragmatic considerations. Pure semantics is not sufficient for research on meaning. For instance speech act theory combines semantics and pragmatics: '[...] the study of the meanings of sentences and the study

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<sup>1</sup> See Aarnio 1987, 101. Literal meaning is used as a criterion of interpretation also on the level of EC law, although in a limited extent. See Bengoetxea 1993, 234-237.

of speech acts are not two independent studies but one study from two different points of view' (Searle 1980, 18).

Similarly, when speaking of linguistic meaning we can make a division into semantic and pragmatic meaning. However, this division is by no means unambiguous.<sup>2</sup> Nevertheless, we can take as a starting point that meaning has two elements, it is made up of semantic and pragmatic content. The content is pragmatic if it derives not from the content of a sentence but from the fact that the sentence is uttered (Bach 2005, 55). On the other hand, the semantic content of a sentence includes some criteria, for example truth conditions, for the meaning of the sentence. For instance, we can list criteria for the assertion that something is a 'vehicle.' These may be for instance that the object is solid, it can move, it makes a certain noise etc.

In line with the division into semantic and pragmatic content, we can say that sentences have semantic content whereas utterances have not. The meaning of an utterance is pragmatic. It includes what the speaker meant by uttering the sentence. Thus 'utterance' means an act of uttering and the content of an utterance is the content of the speaker's communicative intention (Bach 2001a, 256). It is not the same thing as the semantic content of a sentence.<sup>3</sup>

We can say of someone that by saying or doing something he meant so-and-so. This is different from saying that a given sentence means so-and-so or that a given word or phrase means so-and-so.<sup>4</sup> Hence there is a difference between what a speaker says and what he means.<sup>5</sup> It can sometimes be the case that these conjoin, so that what the speaker said is (more or less) what he meant. This way the pragmatic meaning of the utterance can be similar to the semantic meaning of the sentence. Often, though, this is not the case.

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<sup>2</sup> See Pietroski 2005, 271: 'The right concept of linguistic meaning may still be undreamt of.' See also Recanati 2001, 75-77.

<sup>3</sup> See also Searle 1978, 209: sentence meaning and speaker's utterance meaning have to be separated. However, the distinction between sentence and utterance is not the same as the distinction between type and token. Utterances are not identical with sentence tokens.

<sup>4</sup> See Grice 1991, 65.

<sup>5</sup> Or intends.

## 2. Literal meaning

An important question for the topic of this paper is whether such a thing as literal meaning exists.<sup>6</sup> This discussion can easily be blurred by focusing on ‘existing’ in a wrong way. If we ask whether a word or a sentence has a literal meaning that is fixed and given, the answer is no. Words and sentences do not have literal meaning in this way. It is not an ontological property of a word that it means so-and-so.

It was above stated that the semantic meaning of a sentence involves criteria for the sentence to be used correctly (or for it to be true). However, these criteria are not given, they are not properties of the sentence. Literal meaning seen this way would entail that the criteria for the meaning of a word or a sentence are fixed and completely determined.

However, for a word or a sentence to have meaning at all, there have to be some criteria for the use of it. If we do not have any criteria for the use of a word, then the word has no meaning. In the case of ‘vehicle,’ the only way for this word to have meaning is that there are criteria for its use. If we can use the word ‘vehicle’ to refer to any object that we see, the word doesn’t mean anything. But it is important to notice that the list of criteria is never complete, it is infinite and it can also change.

The concept of literal meaning is ambiguous. It rests on the division into semantic and pragmatic content and because there is no complete consensus on this division, also the notion of literal meaning is debatable.<sup>7</sup> The following view is held in this article: There can be a standard use of a word or a sentence and in this way it can ‘have’ a literal meaning. This is when a certain set of criteria for the meaning of a word is widely shared by the communicators of the language. We can sometimes check in a dictionary what the literal meaning of a word is. However, the dictionary does not *determine* the literal meaning of a word, it only shows examples of these literal meanings. Also different linguistic contexts may entail different literal meanings of the same word. One dictionary may give one of these meanings, another a couple more. I will return to the question of the contextual nature of literal meaning in chapter 6.

A factor that should be noted is that the literal meaning of a word may change. A non-literal use of a word may in time become literal, it can become the standard way of using the word. This has bearing on the idea that the literal meaning of words can be used as an argument in legal interpretation.

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<sup>6</sup> The phenomenon that I call literal meaning has also been called ‘standard’ or ‘plain’ or ‘core’ meaning.

<sup>7</sup> See e.g. Bach 2001b.

What is especially interesting for a lawyer is not whether there exists such a thing as literal meaning but how we can know what this meaning is concerning a certain word. The problem is that we cannot determine what the literal meaning of a word is with the kind of certainty that a lawyer yearns for. There is no referee in the game of language who can decide what the literal meaning of a word is.

### 3. Literalism and contextualism

Two theoretical frameworks in contemporary philosophy of language can be seen to diverge on the questions of meaning: literalism and contextualism. Although the definitions of such schools of thought are always simplifications, the two views can be explained as follows. According to literalism, we can ascribe truth-conditional content to sentences independently of the speech act which the sentence is used to perform. The idea then is that semantics is autonomous with regard to pragmatics. Contextualism, on the other hand, holds that speech acts are primary elements of meaning and only in the context of speech acts does a sentence express a determinate content.<sup>8</sup> Of course there are many varieties of both positions and also some intermediate positions that represent a mixture of the two views.

Most literalists today agree that sentences in natural language are irreducibly context sensitive. However, literalism still argues that a sentence has a content and this content is a semantic notion. It can be separated from the pragmatic notion of the content of a speech act. The meaning of a sentence is fixed by the rules of a language, not only the speaker's intentions. The intention of the speaker does affect the content of an utterance: it is always subordinated to and controlled by the conventional meaning of the utterance. (Recanati 2005, 173-175.) So the central question that divides literalists and contextualists is how independent is the semantic content of a sentence from the pragmatic content of an utterance in which the sentence is uttered.

One example of a literalist theory has been put forward by *Herman Cappelen* and *Ernie Lepore*. According to them, speakers use sentences to do different things: make claims, assertions, suggestions etc. The contents of these speech acts can be different from the semantic content of the utterances, which is the case, for instance, when we use irony. However, the authors claim that the speech act content has no bearing on the semantic content of the utterance. (Cappelen and Lepore 2005, 211.) In

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<sup>8</sup> See Recanati 2005, 171.

other words, an utterance always has semantic content and speech act content, which sometimes are the same but sometimes not.

What the users of language usually care about when they communicate is the speech act content. They are interested in what the speaker said, asserted or claimed, and in this way the most important content when communication is concerned is speech act content. Still, they maintain that semantic content has a role to play in communication. Sometimes the communicators do not share a context, which leads to the case of the speaker and the audience being in different contexts. Or they have incomplete information about each other. A listener or a reader may not know anything of a speaker's or writer's beliefs or perceptual environment, and vice versa. In cases like this, the content that the speaker can expect the audience to understand is the semantic content. This content can also be transmitted, for instance, through indirect quotation and by other forms which involve a situation in which the speaker and the hearer have no direct contact whatsoever. In these cases the utterance semantically expressed is the only way to avoid misunderstanding. Semantic content is a sort of starting point for communication. (Cappelen and Lepore 2005, 211-215.) If we have no knowledge of the speaker and his intentions, the semantic content of a sentence that he utters is the only content that we have. In this case the content of the sentence has to determine the content of the utterance. However, it seems like a very rare situation when we would not have any way of knowing or even guessing what the speaker means by his utterance.

#### **4. Literal meaning is not totally independent of context**

It would be an oversimplification to say that pragmatic content is determined by context and semantic content is not. Literal meaning is also context-dependent. According to Searle, for 'a large number of cases the notion of the literal meaning of a sentence only has application relative to a set of background assumptions, and [...] these background assumptions are not all and could not all be realized in the semantic structure of the sentence [...]' (Searle 1978, 210). Even unambiguous sentences do not have a context-free literal meaning that determines whether an utterance is literally true or false. This can be demonstrated by the sentence 'the cat is on the mat.' First of all, this sentence that seems to have a clear literal meaning independent of any context contains indexical elements. We need to know which cat is being referred to in order for us to understand the utterance. But these elements are in a way realized in the semantic content of the sentence. Thus if we see a picture of a cat lying on a mat we can say that 'the cat is on

the mat.’ However, the problem arises if we imagine a picture in which the cat and the mat are floating in outer space. Is the cat on the mat then? The literal meaning of the sentence requires some further assumptions. The literal application for the sentence ‘the cat is on the mat’ requires at least a gravitational field. But even if we got the assumption about a gravitational field represented as a part of the semantic content of the sentence, there would still be an indefinite number of other contextual assumptions missing. Hence every unambiguous sentence does not have a literal meaning which is context free and which determines for every context whether or not an utterance of that sentence in that context is literally true or false. (Ibid. 210-214).

Considering imperative sentences, the problem prevails. We can take as example an unambiguous sentence like ‘shut the door.’ We can picture a standard scene in which it has clear literal application. There is a room in which the speaker and the hearer are located and the room has an open door. However, if we change this picture, the sentence can lose its application. Suppose that the speaker and hearer are sitting with the door in the middle of a desert. The obedience conditions for the sentence are not so clear anymore. Even if we would spell out all presuppositions for the obedience conditions of the sentence, i.e. that there is a room etc., we are still faced with problems. Suppose the speaker utters ‘shut the door’ and literally means what he says. The hearer then chops the door, its frame, hinges and latch from the wall, sets them up somewhere else and then moves the door on its hinges so that it latches the frame. Has he shut the door? (Ibid. 217.) These examples show that even if the speaker says exactly what he means, there is no way of eliminating the contextual dependence of the sentence.<sup>9</sup> Under certain contextual presuppositions we can say that the hearer obeyed the command, under others way say that he did not.

## **5. Interpretative arguments**

After this general discussion I now turn to legal theory. With the help of the framework presented above, the focus of this article now shifts to legal interpretation and the theory of interpretative arguments that is held by many scholars. In the centre of this discussion is the idea of linguistic arguments as arguments for (or justification of) legal interpretation.

According to some legal theorists, interpretation is not only what we do when we try to find the meaning of something, but legal interpretation also includes the

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<sup>9</sup> See also Bach 2001a, 256-257.

activity of choosing one interpretation over other possible ones and justifying this choice.<sup>10</sup> The choice of one interpretation over others can be justified by the help of a set of interpretative arguments.<sup>11</sup> The idea is that a text is always open to different interpretations and different people may have different opinions on what is the most reasonable in the context. Therefore we have to have some means of determining what actually is the most reasonable in the context.<sup>12</sup> It is usually the judge who has to settle the matter. He interprets the text in order to justify a decision. Legal theory usually specifies four main categories of arguments

- linguistic arguments, i.e. the plain meaning of words used in ordinary language (or in legal language),
- systemic arguments,
- teleological-evaluative arguments,
- arguments referring to an author's intention.

## **6. Linguistic arguments**

According to the principle of literal interpretation, linguistic arguments can and should be used in legal interpretation. This article claims that it is doubtful if linguistic arguments can function as help for interpretation or as a way of justifying a choice of meaning. In fact, also the notion of linguistic arguments is quite ambiguous. What first of all has to be settled concerning these arguments is what they really entail. 'Plain meaning of words' (MacCormick 2005, 125) implies that linguistic arguments refer to what I call literal meaning. The idea is that we can find help in interpreting legal texts by studying what words literally mean. However, as was shown above, literal meaning is never totally independent of context. The literal meaning of a command does not determine its obedience conditions.

Certain conditions have been postulated by legal theorists for the application of linguistic arguments. First of all, the text has to be intelligible in ordinary language.

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<sup>10</sup> See e.g. Aarnio 1987, 107-111, Summers & Taruffo 1996, 464.

<sup>11</sup> See MacCormick 2005, 124.

<sup>12</sup> Are interpretative arguments then methods of interpretation or simply arguments for persuasion? Is the idea that these arguments help the interpreter to come to an interpretation and that way understand the meaning of a text, or are these arguments only a means of justifying an interpretation that the interpreter for some reason or another wants to adopt?

Even if it is, there are still many factors that can weaken the force of the argument. The background linguistic conventions may not wholly exclude other meanings. The way the words are used in the statute may cast doubt on the appropriateness of the meaning that such words have in similar sentences in ordinary life. Where the statutory term is vague, the argument based on ordinary or technical meaning may be weak, as is the case when the statute is old, and so on. Nevertheless it has been concluded that ‘the argument from ordinary meaning and the argument from technical meaning have in many settings perfectly clear conditions and consequences of application for resolving interpretational problems in law.’ (MacCormick & Summers 1996, 512-513.) In the light of the discussion on literal meaning that was presented above, it is hard to be this optimistic.

One problem with linguistic arguments is that if we see the literal meaning of words as a tool that should help a judge to interpret a legal text, then he should have a means of checking what the plain meaning of words actually is. This idea supposes that words have meaning in themselves, as if a meaning were given to them from above. A situation that has been put forward as an example of when linguistic arguments are needed is when there is a quarrel between two or more parties on the proper meaning of a text. The literal meaning of a word is then seen as an argument to resolve the matter by deciding on one meaning over the others. But the problem is that it is usually very hard to decide what the literal meaning of a word is. There is no unambiguous and objective source where we can check what the literal meaning of a word includes and what it excludes.

What is interesting about the notion of linguistic arguments is that it is difficult to see how they can work in practice, how they facilitate the work of a judge trying to solve a case. If the judge has doubts about how to interpret an utterance in a text of law, what is he to do then? If it is vague in the sense that it includes a word that is evaluative as for instance ‘reasonable,’ then what help is it to him to say that he should use the literal meaning of the word as starting point? What the judge should be interested in is the pragmatic meaning of the utterance, not the literal meaning of the words used in it. Hence it is of no use to look in a dictionary, because the dictionary cannot solve this question. It only gives examples on what words mean or how they are often used, but it says nothing of what the word means *in this text*. It is of no use to know what ‘reasonable’ literally means when you have to decide on what is reasonable in this particular case according to this text of law. Even when the dictionary gives an exact meaning of a word, then the judge has to interpret also this new word.

## **7. Legal interpretation cannot be based on semantic content**

According to the distinction made earlier into semantic and pragmatic content, the pragmatic one should be of primary interest in legal interpretation. If we consider the rule that forbids you to take vehicles into the park, the salient concern for a judge trying to decide a case cannot be what the literal meaning of the word 'vehicle' is.<sup>13</sup> What he should be interested in is what the utterance 'vehicles are forbidden in this park' means. Well, somebody may object to this by saying that in order for us to be able to know what the utterance means, we have to know what the words in the utterance mean. But it is not that simple. The semantic meanings of the words that are used in the utterance do not fully constitute the pragmatic meaning of the utterance. Even the truth-conditions of our utterances are not compositionally determined by the meanings of words and their syntactic arrangement. They are shaped by contextual expectations and world knowledge. This goes for all utterances, however literal they are. (Recanati 2001, 274.)

An important thing to consider is that problems of legal interpretation are usually not problems concerning the meaning of individual words. According to Lon Fuller it is not possible to interpret a word in a statute without knowing the aim of the statute (Fuller 1958, 664). He illustrates his point by considering an incomplete utterance: 'All improvements must be promptly reported to...' According to him the word 'improvement' is here almost as vague as the symbol X. When the sentence is filled out and we grasp the aim of it, also the word 'improvement' gets its meaning. (Ibid. 665.) It is not the individual words and their literal meaning that determine how a rule is obeyed.

What underlies the idea of linguistic arguments is the thought that the problem of legal interpretation, as in the vehicle example, is foremost a problem that concerns language. Because it is a problem of language, what becomes central in legal interpretation is the meaning of words and sentences. This has to do with the way legal theory often distinguishes between norms and norm formulations. Legal texts are formulations that express legal norms. Thus we interpret these norm formulations with the aim of finding norms.<sup>14</sup> However, it can also be claimed that the problem of interpretation should primarily concern the norm, not its formulation. Interpretation

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<sup>13</sup> See H.L.A. Hart 1958, 607. In this classic article he discusses what objects are to be held 'vehicles' and thus denied entry to the park. He asks if toy automobiles are to be called 'vehicles' for the purpose of the rule or not. Thus the formulation of the problem is quite interesting, as it concentrates on the meaning of the word 'vehicle.'

<sup>14</sup> See Aarnio 1987, 60-62.

does not relate essentially to words and sentences, but to the thought or the intention with which these words are used. The task of interpretation is to determine the meaning of the norm, not its formulation. Of course this does not deny the fact that the formulation has a major role in shaping the content of the norm. Even if the semantic content of 'vehicles are forbidden' contributes to the pragmatic meaning of the utterance, in which this sentence is expressed, it does not determine its meaning.

## **8. Conclusions**

It seems that the sketch on meaning drawn in this article does not support the principle of literal interpretation. Reference to linguistic arguments for justification of an interpretation is therefore probably hidden reference to something else, some other principles or standards. What these may be in a certain case depends of course on many factors, at least on the nature of the case and the judge in question.

One reason why the principle of literal interpretation keeps appearing in legal theory can be that by reference to linguistic arguments we suggest that we base a legal decision on something 'objective.' However, in the light of the argumentation presented in here, it seems that reference to linguistic arguments removes by no means the element of subjective choice that the interpreter has to make. Because of the context dependence of semantic content, an element of uncertainty, one could even say of choice, prevails also on the level of linguistic meaning. Language simply does not function as a chart from which we can draw the right answer to a question of interpretation. Therefore the idea that literal meaning can be a means of justifying a choice of legal interpretation becomes odd; we are justifying one choice by another.

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