A Pragmatically Oriented Theory of Legal Interpretation

Vittorio Villa
Based on a dynamic approach to the understanding of meaning, the author develops what he calls a pragmatically oriented theory of legal interpretation. This theory differs both from formalistic and anti-formalistic approaches to legal interpretation, for interpretation is, according to the author, at the same time a discovery of some levels of meaning and a construction of other levels of meaning. Meaning is thus understood as a gradual entity, which forms at various levels. It implies both the inter-linguistic dimension (i.e. sense) and the language-world relation (i.e. reference). It is never produced all at once, but is rather formed progressively, that is, step by step. In this, the context is essential. The context is only provided in a concrete (real or paradigmatic) case for which we are to interpret a certain legal disposition. For that reason, it is a judge as the interpreter of the text who (besides the author of the text) necessarily contributes to the final definition of its meaning. The article is published in the English original and in its Slovenian translation by Tilen Štajnpihler.

**Key words:** legal interpretation; formalist, anti-formalist, eclectic, and pragmatically oriented theory of legal interpretation; static and dynamic theory of meaning; sense, reference, context

1 THE CENTRAL ROLE OF INTERPRETATION IN CONTEMPORARY LEGAL THEORIES

Interpretation is at the centre of attention today, much more than in the past, in the most significant trends of contemporary legal theory (for instance, in analytical legal theory and in legal hermeneutics). It is true that it has always been considered a necessary and prejudicial element for carrying out the “ordinary” activities of judges and jurists; in traditional legal theories, nevertheless, interpretation was considered by and large a “sector topic”, though one of decisive importance. If, for instance, we consider the work of Kelsen, certainly the main exponent of the normativist current of legal positivism in the last century, we see that in his main work legal interpretation is discussed in
the last chapter\textsuperscript{1}, and hence after that all the basic problems for Kelsen’s legal theory have been dealt with and resolved: problems, that is to say, linked to identification and attribution of validity to legal norms inside a system that encompasses them in a unitary way. For Kelsen, in short, interpretation begins to work upon norms whose existence has already been verified, independently of interpretation (in the light of the category of validity); thus for Kelsen interpretation does not participate in the process through which legal norms come into being.

Today, instead, some of the most significant works in legal theory are developed precisely as theories of interpretation, and have this focal point as their central theme. This is the case, for instance, of Dworkin’s theory\textsuperscript{2} and MacCormick’s theory\textsuperscript{3}. In these works, interpretation is no longer one of the conclusive parts, though a necessary one, of a legal theory that has already been developed examining other notions, considered as prejudicial, but on the contrary logically constitutes a priority element in relation to the others. It should be noticed that it is not a quantitative aspect; just as Viola and Zaccaria say\textsuperscript{4}, what happens is not so much that the chapter of interpretation becomes bigger but that the theory of interpretation becomes fundamental for the description of law itself. The study of interpretation, in other words, comes into play precisely when the issue of the existence of law and its validity has to be faced.

I would now like to point out some of the reasons justifying this different role that interpretation plays in contemporary legal theories. Three basic reasons will be pointed out, the first of a legal-philosophical character, the second of an institutional character, and the third of a theoretical character.

The first reason, of a legal-philosophical character, is linked to the spread, both in analytical and in hermeneutical trends, of a legal conception that can appropriately be labelled as “theory of law as a social practice.” The “theory of law as a social practice” is a conception that is strongly critical of the objectivist conception, dominant until the 1960s. In this connection, according to the former, legal rules do not represent objective data (whether normative or factual) that are available to description and logically exist in an autonomous way in relation to the various activities (interpretation, use, application) which will afterwards make reference to them; by contrast, for the approach that looks at law as a social practice legal rules exist, in a strict sense, only insofar as they are

\textsuperscript{1} See Hans Kelsen, Reine Rechtslehre, Wien, Franz Deuticke, 1960; Ital. translation La dottrina pura del diritto, Torino, Einaudi, 1975, ch. VIII.


part of a normative social practice, that is to say insofar as they are interpreted, used, applied, mentioned, considered as the basis for criticisms and justifications, and so forth, by the members of a community of rule followers⁵, many of whom adopt the internal point of view⁶ (a “critical-reflexive” attitude towards rules that are accepted as such).

The second reason is that of an institutional character. I use this expression to highlight the fact that this reason is linked to the present-day conformation of our institutions, and that is to say of that legal system, today prevalent in western countries, that we call a constitutional legal state. From this point of view, it can be noticed that the presence of this new institutional model challenges the traditional notion, one of a formal character, of legal validity. Today we are more and more convinced that elements linked to content are part of the characterization of this notion; and here legal interpretation plays an important role, and precisely in the process of checking the material validity of a legal norm. Indeed, it is through interpretation (both of the constitutional principles involved and of the norms whose constitutional legitimacy is being debated) that it is possible to verify the conformity or not of the content of the legislative norm to the constitutional principle. But, it must be stressed, saying this amounts to maintaining that interpretation is a decisive element of the process through which norms take on normative existence, acquiring, precisely, the property of validity; a property that, as the most recent theories suggest, is acquired in a dynamic way, and no longer “all at once”⁷.

The third reason has a more specifically theoretical character and concerns the major diffusion of the thesis that distinguishes between legal sentences and legal norms. From this point of view, it is maintained that meaning does not magically belong to the sentences from which interpretation starts, but is the result of the interpretative activity that has the norm as its result; and hence norms, in all those cases in which they are incorporated in sentences expressly formulated by the legislator, constitute possible meanings of legislative dispositions⁸.

If this basic theoretical assumption is shared, then recognition of the fundamental importance of interpretation is blended with the attribution of an inalienable productive and creative role to interpretative activity directly carried

---

⁸ Giovanni Tarello has been the first to develop this thesis, now widely accepted inside analytical trends. See Giovanni Tarello, L’interpretazione della legge, Milano, Giuffrè, 1980, 9–10.
out by jurisprudence (and indirectly by doctrine). The central idea here is that the judges are called on to cooperate with the legislator in preparing normative messages to send out to citizens, and precisely because such messages are not complete without the interpretative intervention of jurisprudence. Hence, from this point of view, legal interpretation has a not eliminable creative function of its own.

Well, if we specifically look at the work of judges in the specific Italian institutional context (which constitutes the privileged field of reference of my analysis), we can notice that today the degree of creativeness of judicial interpretation has enormously increased, for a series of different reasons, three of which I am interested in highlighting.

The first reason is linked to the alluvial production of new law, through the emanation, particularly in private law, of “special laws”, unshackled by unitary reference to the system of our civil code and of its principles, which has concerned our legal organization since the 1960s. One thinks for example of the “statuto dei lavoratori”, the reform of family law, laws on rents and agrarian contracts, the introduction of divorce, and so forth.

The second reason is linked to the intensification, among judges, of interpretative attitudes that are avowedly anti-formalist. These attitudes – particularly widespread at the end of the 1960s (with the judicial “activism” of the so-called “magistrati d’assalto”), and then, in the early 90s, with “Tangentopoli” (which began in 1992) – are also expressed through the use of interpretative strategies that are much more concerned to enact “justice in the concrete case” than to find the inspiring reason for decisions in the ratio legis. This means that the interpretative techniques used each time are often considered as rules of ex post justification of decisions already taken, rather than as guiding rules for the decisions themselves.

The third reason is linked to the emergence in our legal culture, beginning from the 1960s, of the process that Riccardo Guastini appropriately calls costituzionalizzazione of a legal system. This is a process of transformation of our system, at the end of which it can be said that it proves to be totally “impregnated” by constitutional norms. It must be clarified that this cultural process does not so much concern the presence of the constitution in itself, but rather the understanding of it on the part of legal culture, and above all of jurists and operators. This way of seeing and interpreting the constitution hinges on the conviction of its “pervasiveness” and its “capacity to influence” directly every aspect of the life of a legal system. Well, this process determines a sort of over-interpretation of the constitution, that is to say that interpretative attitude through which the decision is taken to give the constitutional text an extensive

---

interpretation. An *extensive interpretation* works in such a way as to derive from the existing constitutional norms, possibly with the use of analogical argument, a vast series of *implicit* norms, able to discipline any type of “constitutionally significant” behaviour.

It must be added that for many jurists (but also for public opinion) this increase in the “degree of judicial creativeness” constitutes a very worrying element. The fact is that though it is often not the result of a free choice by the judge but the “necessary” outcome of the attitude that today our institutional order takes; however, it could constitute a danger for our democratic institutions, because in actual fact it involves the possibility that the judge too, as well as the legislator, may become a “creator of new law” (though in an “interstitial” way). Behaving in this way, the judge not only endangers the fundamental principle of *law certainty*, but potentially also challenges the basis of our democratic order: the *principle of the separation of powers*, as a result of which only the legislator would be the depositary of the power to produce new law.

This whole series of vicissitudes places the theme of legal interpretation even more at the centre of attention. Certainly, the task of a theory of legal interpretation cannot be that of offering concrete remedies to this state of affairs, although, in our field, as in all human sciences, theoretical reflections have some effects on the phenomena studied and have normative implications for all the participants in these practices; but it can certainly be that of providing, for instance, an adequate reconstructive analysis of this activity, so as to see whether it really exposes our legal organization to such major risks. Well, my objective, in this essay, is precisely to show how judicial interpretation, once it is correctly interpreted and practised, does not constitute a danger for our democratic order. It is possible, in other words, to develop a theory of interpretation that accounts, together, both for what are ultimately the physiological features of judicial creativeness and for the constraints to which it is subject, constraints that link the judge to the legislator. From this point of view, I will try to delineate a *pragmatically oriented approach* to legal interpretation. An approach of this kind is based on the recent *contextualistic* trend in semantics, which recognize the necessary intervention of *pragmatics*, at all levels, in processes of attribution of meaning. On the basis of these presuppositions, it is possible to show not only that the process of attribution of meaning to legal dispositions cannot be complete without reference to the *specific pragmatical context* in which the interpreter is placed each time; but also that this process always takes place inside a set of constraints imposed by the semantic content of the starting sentence (the legal disposition to be interpreted).
2 SOME OUTLINE DEFINITIONS OF A GENERAL CHARACTER

I am convinced that it is not possible to speak directly about legal interpretation without being prejudicially concerned to give some introductory definitions of a general character, and first of all a unitary definition of “interpretation” encompassing the various activities that can be considered interpretative. Unlike the “Scuola di Genova” (and particularly Guastini\(^{10}\) and Chiassoni\(^{11}\)), I do not believe that the peculiar features of legal interpretation can prevent us from tracing out a picture of a more general character also allowing us to notice important similarities between legal interpretation and other interpretative activities in a sense akin to it (for example, literary criticism). Legal interpretation, after all, is only one of the possible specifications of a notion of a more general character designating one of the most basic modalities through which we, as human beings, try to understand the world around us, be it the “natural world” or the “cultural” one.

I will now present a conceptual definition of “interpretation”, particularly appropriate to what Gallie calls essentially contested concepts\(^{12}\), i.e. notions structurally open to discussion and susceptible to being reconstructed in quite different ways, all supported by “good arguments.” In all cases in which the definiendum is constituted by notions of this kind, I have worked out and applied a model of definition that I call conceptual definition, whose purpose, minimal but not for this less important, is identifying the common conceptual basis, if there is any, that is to say the shared assumptions (“deemed certain”) by several conceptions that are different or even alternative to one another, referring to the same object\(^{13}\). From this point of view, the scheme that I will follow in this essay will have a tri-polar character: the starting point will be the general concept of interpretation, from which through successive specifications I will derive the most specific concept of legal interpretation; secondly, from this more specific concept I will derive some major conceptions of legal interpretation, those that have historically alternated with one another on the stage of western legal organizations since the beginning of the 19th century (when a new “legal object” started to take shape, namely modern law). These conceptions, in turn, are expressed through various theories, which constitute their particular specifications, in historically determined contexts.

---

For instance, the eclectic or mixed conception is one of the three major conceptions that I will present in this essay. However, it can take many different shapes: I will first present the traditional version of the eclectic theory (that of Hart), and then I will oppose to it my own personal reconstruction, which I call pragmatically oriented theory of legal interpretation.

Let us now try to identify the conceptual assumption common to all the various conceptions of interpretation that have been developed in the most varied spheres (natural sciences, human sciences, field of art and music, and so forth). It can be condensed in the following way: “interpretation is the activity through which meaning is attributed to any object.”

This definition has the merit of establishing a conceptual relation between “interpretation” and “meaning.” A conceptual relationship is an internal relation between two elements, such that the two elements of the relationship are conceptually connected, making it impossible to account for the one without being forced to consider the other.

Well, affirming the existence of this type of relationship, within interpretation, means maintaining that the relation between meaning and interpretation is so tight and pervasive as to lead us to believe that it is not possible conceptually to work out definitions and theories of interpretation that are not also, necessarily, definitions and theories of meaning, and vice versa. In short, one can only think about the notion of meaning through the notion of interpretation, and vice versa. It can be said, therefore, in more general terms, that a theory of interpretation is also, necessarily, a theory of meaning, and vice versa. It is precisely from this point of view that we can legitimately speak of a conceptual or internal relation between interpretation and meaning.

From this point of view, I do not agree with what Riccardo Guastini states, namely that the theory of interpretation does not need any theory of meaning, not even a theory that deals with meaning in natural languages, because the only theory which it really needs is one that reconstructs the – absolutely peculiar – practice of attribution of meaning in the legal sphere. In this essay I will try to show, instead, that in order better to understand legal interpretation as a process of attribution of meaning to legal texts it is absolutely fundamental to understand what “attributing meaning” means, in our field as in others; and understanding what “attributing meaning” means is nothing but a way of working out a theory of meaning, to be precise an anti-essentialist theory, according

---


15 Riccardo Guastini, Due esercizi di non-cognitivismo, Analisi e diritto 1999, 278–279 (www.giuri.unige.it/intro/dipist/digita/filo/testi/).
to which meaning is not an entity or an essence to be discovered but a product of interpretative practices.

The conceptual definition of legal interpretation can be worked out on *three different levels*, which are set at decreasing degrees of generality.

The first level corresponds, actually, to the conceptual definition given before. It is that *very general meaning of interpretation*, whereby there is interpretation every time meaning is attributed to any object, and that is to say every time that a given object communicates something to us, presenting itself as a sign or a set of signs to be decoded.

On the second level we find a *more specific sense of interpretation*, which is of greater interest to us here, because it is what concerns all contexts in which interpretations of *human and/or cultural facts* are produced, that is to say of facts produced by ourselves (symphonies, novels, works of art, legal norms, intentions, etc.).

The third level represents a further specification of the second level. Indeed, within the sphere constituted by interpretation of cultural facts we can distinguish a more specific level, consisting in *interpretation of texts*. Legal interpretation, in the paradigmatic sense in which it is commonly understood within continental legal organizations, presents itself precisely as *interpretation of legal texts*, and therefore it is set at this third level.

### 3 SOME DEFINITIONS CONCERNING LEGAL INTERPRETATION

Interpretation of legal texts is not, however, the only way in which, within the field of legal experience, interpretations are produced; texts are not the only “legal objects” which can be subjected to interpretations. Here it is necessary to make a distinction, so as to avoid possible misunderstandings. First of all there is a *broad meaning of legal interpretation*, which concerns all interpretative activities that take place in the legal field of experience. With reference to these activities I will use the phrase “interpretation in law.” In the field of reference of this locution there are certainly interpretations of texts (for instance of legislative dispositions), but there are also interpretations of “objects” that are not texts: for example, judges and jurists are well able to interpret *behaviours* too, as in the case of negotiatory behaviours of the parties involved in stipulating a contract, or in the case of *customary practices* (regarding which, for instance, it is necessary to verify the element of *opinio juris ac necessitatis*).

Secondly, there is a *narrow sense of legal interpretation*, with reference to which I will use the locution “interpretation of law”, which concerns *interpretative activity focused on texts*, an activity brought into being by jurists, judges,
public officers, and so on; an activity whose object is precisely legal documents (for instance laws, regulations, sentences, contracts, and so forth). It is precisely to this type of interpretation that this essay will be devoted.

Hence I will deal with what I have called the narrow sense of legal interpretation, to distinguish it from the broad sense (“interpretation in law”) mentioned above. From this point of view, we can define, following Chiassoni, legal textual interpretation as “the activity that consists in determining the meaning of a disposition (the basic component of every legal text), deriving from it one or more explicit norms, accredited as legally correct interpretations of them”\(^\text{16}\).

Within textual legal interpretation, I will particularly examine what can be considered, in legal organizations with codified law, as the paradigmatic instance of textual legal interpretation, the interpretation of law, as it is traditionally called. Its object is interpretation of legal sentences having force of law, but also dispositions that are part of constitutional texts. This type of activity has common features in all legal organizations with codified law.

It must be specified here that, in accordance with the point of view that I will maintain in this essay, interpretation of legal dispositions is not an “optional” activity only carried out on some occasions, for instance only in cases in which ascertainment of the meaning of these dispositions raises some doubts of an interpretative character. A fairly influential theory of interpretation, which today still has its epigones\(^\text{17}\) and is in line with the well-known saying “in claris non fit interpretatio”, adopts instead a very narrow sense of interpretation, according to which, in presence of dispositions with a clear meaning, there is no interpretation strictly speaking. However, in accordance with the definition given above, I maintain that every disposition requires interpretation, from the clearest to the obscurest. I stress again, here, that the norm is the arrival point of an interpretative process that starts from the disposition. According to my pragmatically oriented approach, the norm itself is expressed by an utterance of the sentence that contains the meaning of the disposition itself. It is a basic point of my conception that there isn’t a qualitative distinction between “clear cases” (for which no interpretation would be needed) and “hard cases” (for which it would be needed). An interpretation can be considered as “clear” only after it has been made\(^\text{18}\).

Lastly, it must be added that in a pragmatically oriented conception of legal interpretation the pragmatic dimension – the one linked to contexts of application and uses of norms (including both “single concrete cases”, which judges are competent for, and “typical cases”, which jurists are competent for) – is a

---

\(^\text{16}\) Pierluigi Chiassoni, Tècnica dell'interpretazione giuridica, Bologna, Il Mulino 2007, 50.


\(^\text{18}\) Riccardo Guastini, Dalle fonti alle norme, Torino, Giappichelli, 1990, 80.
necessary dimension of interpretative activity and inevitably involves all dispositions.

It must be stressed that, in accordance with the definition proposed above, there is no interpretation, at least in the narrow sense accepted here, in all those cases in which judges create (interstitially), in a strong sense, new law, for instance when there is no explicit disposition able to regulate a concrete case (integration of lacunae); nor must we consider as interpretative activities, though they are connected to the latter, some activities that appear as preliminary to interpretation in a strict sense (activities for instance, serving prejudicially to verify the validity of the disposition to be interpreted), or those that start from it (like ones, which jurists are competent for, serving for carrying out subsequent operations of dogmatic arrangement of the normative material interpreted). Undoubtedly, in a broad sense of “interpretation”, we can legitimately consider the activities with which implicit norms are produced norms that do not have a disposition as their starting point as interpretative activities. Nevertheless, in this text my field of reference will be the narrow sense of legal interpretation, in its specific paradigmatic instance (the interpretation of dispositions).

There is an important point that it is necessary to clarify prejudicially in speaking of legal interpretation seen as an activity serving to attribute meaning to legal sentences. In accordance with the semantic theory that I accept here (a theory which I will qualify later on as semantic contextualism), only utterances of sentences can express a complete meaning, and precisely as expressions of sentences that are brought into being in given contexts. In short, it is only within a specific context of use that the sentence, expressed by a given speech act, enacts a complete communicative message.

This perspective is fully in harmony with ordinary language philosophy, the conception of analytical philosophy that is behind my work. As is well known, the privileged object of study of this conception is not the formalized languages of logic and mathematics but the non-specialist natural languages, the ordinary languages of our daily life; and hence also legal language because, as a technicized language, it is sufficiently similar to ordinary language. Analytical philosophy of ordinary language, unlike ideal language philosophy, maintains that ordinary language must be left “as it is”, since what appear to be its defects (inconsistencies, ambiguities, lacunae, and so forth) are in reality the features that make possible its “elastic adaptation” to the demands of daily life.

---

19 In a very similar vein, Jori prefers to use the locution “linguaggio amministrato”. See Mario Jori, Definizioni legislative e pragmatica giuridica, Analisi e diritto 1995, 123–124.

More particularly, an analytical philosophy of ordinary language that consistently adopts a *pragmatically oriented* approach (as I too endeavour to do), conceives such language as a social practice of a linguistic-communicative type, a coordinated set of *speech acts* that constitute the proper tools for producing different types of statements (informative, prescriptive, evaluative, optative, etc., statements). From this point of view, it is not the sentence considered in itself and for itself that could express a complete semantic content, but if anything it is the use made of it by the speaker that produces this effect, in the sense of both meaning and function (language in itself, i.e. abstracting from its concrete use, is absolutely “inert”). When language refers to the world, its when it “says something to someone”, this reference is always mediated by linguistic use; and this means that there is no full reference by language to the “objects of the world” except inside the specific ways in which we use such language to refer to something, for instance in order to say “true things.” This use, it needs to be stressed, is always manifested in a *speech act*, and therefore it always has a *contextual projection*.

A last distinction has to be made in order to complete the starting categorial picture of our analysis, above all for the purpose of more precisely establishing the object I will deal with in this essay. In the definition that I have given of “interpretation in a narrow sense”, i.e. of “textual legal interpretation”, we can already identify two different dimensions of interpretative activity, which it is now necessary to distinguish more clearly.

The first dimension is the *structural* one, mentioned in the first part of the definition, when reference is made to “activity that consists in determining the meaning of a disposition.” From this first point of view the object of the analysis is how interpretation is carried out, i.e. the type of relationship that should be established between “interpretation” and “meaning.” The questions which this analysis is made to answer, from this point of view, are the following: what does it mean to attribute meaning to a disposition? Does it mean discovering something existing, or does it mean creating something completely new? Or does it even mean bringing into being a different activity from the first two (possibly a mixture of both)?

In this essay I will deal above all precisely with this first profile. In developing this type of analysis, because of the conceptual relationship between “interpretation” and “meaning”, I will necessarily have to deal with questions of theory of meaning, particularly in order to clarify the semantic basis of the theories that I criticize and the different basis of my own approach to interpretation.

The second profile is highlighted in the second part of the definition, where reference is made to “explicit norms, accredited as legally correct interpretations of them.” It concerns the substance of interpretative activity, and therefore,
for instance, the reason why, in cases in which various meanings are attributable to the disposition, one of them is chosen rather than another. In relation to this second profile, it seems appropriate to me to use the locution “theory of legal reasoning”. Here, as it is clear, we enter a sphere of problems that is different from the previous one, because it is a matter of facing the complex issue of the arguments or interpretative directives that each time are used and/or must be used in support of a decision.

It is now possible to put a little order in the labels used for characterizing the various aspects of interpretation in a narrow sense. With reference to activity that deals with taking into account both profiles of this activity, it is possible to use the phrase “general theory of legal interpretation”, while for the first profile we should speak of structural theory of legal interpretation, and for the second of theory of legal argumentation. For reasons of expository convenience, however, here, except where indicated, I will use the locution “theory of legal interpretation” to characterize the specific object of our study, and that is to say the narrow notion of legal interpretation, in its structural profile.

4 THREE CONCEPTIONS OF LEGAL INTERPRETATION

In examining these conceptions, we assume that the historical context in which to place the analysis is represented by legal organizations in the western world, with particular attention to our own, in the time span going from the period in which modern codified law came into being, at the beginning of the 19th century, to the contemporary age.

Well, even a fleeting glance at the main theories of interpretation that have followed one another in this framework shows that they have mostly been placed at two opposite extremes, in the widespread conviction, moreover, that there was nothing in between. An exception, in more recent times (beginning from the 1960s), has come from some attempts to work out a third “middle” position, attempts that can be labelled as eclectic theories. Throughout the 19th century and during part of the 20th century, instead, there was a sort of polarization of the discussion, with a clash, in an opposition often conceived as mutually exclusive, between two big blocks of theories; which, in their turn, can be included in two wider conceptions of interpretation. I will call the first conception interpretative formalism and the second interpretative anti-formalism. Interpretative formalism first developed, at the beginning of the 19th century, through Scuola dell’esegesi in France and Scuola storica and Pandettistica in Germany; interpretative anti-formalism originally developed in France and in Germany as a reaction to formalism, through three big trends: Giurisprudenza degli inrteressi, Giurisprudenza teleologica and Scuola del diiritto libero...
These two big conceptions of interpretation, formalism and anti-formalism, are continually encountered in modern and contemporary legal culture, in a very complicated interlacement in which a crisis in the one very often makes way for the advent of the other. The causes of this complex vicissitude are not only juridical, but are also linked to the strong conditioning process caused by the surrounding context on the various available models of the role and function of the jurist-interpreter and the judge-interpreter; and when we speak of “surrounding context” we refer to elements of an institutional, socio-economic, cultural and ethical-political character, changes in which, in relation to the given situation in which the subject matter waiting for a legal decision finds itself, can provoke chain reactions in legal culture, and therefore also in the way of conceiving the role of interpretation. These reactions can go in two opposite directions (and can also occur simultaneously and in a conflicting way in a given context), that is to say can move in the direction of an attempt to oppose changes and try to safeguard the original intent of the legislator regarding the subjects that are undergoing a process of evolution (and in this case formalistic trends will prevail); or move in the direction of favouring and/or guiding these changes and therefore valorising the elements of discontinuity and interruption in relation to the original situation (and in this case anti-formalist trends will prevail). For instance, in a given context, there may be a change of a cultural character in the way of conceiving, interpreting and using a given constitutional text (as has happened in our country in the last few decades through what Guastini calls a process of costituzionalizzazione); or a change in socio-economic relationships; or, again, a change of an ethical character in the predominantly shared social ethic inside the given political community; and so forth.

It must also be added, from the historical point of view, that formalistic conceptions take hold, generally, in periods of historical-cultural proximity to phases in which a certain legal system goes through important moments of codification, or at any rate of major juridical renewal. In these situations one can easily expect to find the greatest harmony, a “common feeling”, among jurists, judges and legislator. Besides, jurists always participate as protagonists in these processes of renewal, working in close contact with the legislator, as happened in the case of Scuola dell’Esegesi, in which jurists helped to edit the Napoleonic Code in order then to submit it afterwards to interpretation. This “common feeling” is destined, however, to go through a crisis as the distance, historical and cultural, increases in relation to the period of codification; the socio-economic reality tends to produce ever-new phenomena, possibly not contemplated by the existing normative framework. In short, a more and more marked separation is produced between “legal culture of codification” and “present-day legal culture.” Just this, as can be seen, is the propitious climate for the triumph of anti-formalist positions, within which it is believed that the jurist and the judge can – or
even must – resolve interpretative and applicative issues by directly examining the socio-economic reality, rather than looking at the normative system.

If we look to the relationship between interpretation and meaning, which constitutes the specific field of reference of our analysis, it is possible to give two definitions of the first two conceptions at issue. From this point of view, *interpretative formalism* basically presupposes the thesis that, in the original versions, the attribution of meaning to dispositions, in its *genuine sense*, is the *immediate discovery of an existing meaning*, however determined; or in every case, in the most up-to-date versions, is the prejudicial and unproblematic recognition of a stable semantic nucleus, which exists prior to all adjustments linked to the various contexts in which the disposition is applied.

From the strictly semantic point of visit, the theory of meaning – implicitly – presupposed by these trends is in particular harmony with a semantic theory that today is prevalent (not without opposition, however), which we can qualify as *literalism*21. It is that semantic conception according to which in all spheres in which interpretation of texts and spoken language is practised there is a complete meaning of the sentence obtained by “interpreting”, a meaning that exists prior to its concrete use in communication, which constitutes the object of a sort of “sudden action of understanding” (which, as we shall see, implies a static vision of interpretation); this means that *elements of a pragmatical character* (linked to the use of communication in the speech acts with which it is expressed and received) do not interact with this original semantic dimension.

By contrast, *interpretative anti-formalism* presupposes the thesis that the attribution of meaning to a disposition, in its *genuine sense*, is *creation of a new meaning*. The various anti-formalist theories then tend to be differentiated by the more or less increasing weight attributed to the creative element in interpretation; and by the more or less decreasing weight taken on by the constraint represented, for the interpreter, by the starting text. The central idea, though expressed in different ways, is at all events that the decisive moment of interpretation is that of the “sudden creation” of meaning in the light of the context in which the interpreter (but above all the judge) is situated; a context that, with all its variables (ethical-political ideologies present in the field, underlying socio-economic situations, interests at stake) represents a much stronger constraint than the text of the relevant dispositions for deciding the case in hand.

From the semantic point of view, anti-formalism, in its most extreme versions, shares the thesis that the legal text taken as a starting point does not constitute a major constraint for the interpreter, except as an element that, appropriately remodelled, intervenes *ex post* to justify a semantic choice made on other bases. What can constitute a constraint for the interpreter is represented

---

by previous interpretations (all the more so if they are “authoritative”) of the sentence to be interpreted; but the meaning of the disposition, strictly speaking, is created, in a sort of “sudden process”, by the interpreter, on the basis of the constraints and indications that arise from the context. In this case too, as for the formalist positions, it is important to notice that these conceptions reproduce, though often only implicitly, a “background” semantic conception. If we look carefully, we see that it has many points in common with a contemporary conception, today very influential, that goes by the name of radical contextualism. This conception abandons the very notion of linguistic meaning as something that exists prior to communication-reception of the message. What exists prior to the single interpretative act is a sort of “collection of previous applications” of linguistic expressions in similar contexts, applications legitimized in a sense by the linguistic community (and therefore “authoritative” applications). But there are no meanings shared by speakers before the beginning of a communicative exchange; it is only pragmatics, in the last analysis, that decides the meaning of expressions and sentences.

In order to mention eclectic theories, in their traditional version, it is necessary to start from the formulation that Hart gave of them, at the beginnings of the 1960s, in his famous book The Concept of Law. Hart attempts to mediate between the two opposing conceptions of formalism and anti-formalism: interpretation is substantially situated both in the dimension of discovery and in that of creation, but always in an alternative key. Indeed, Hart says that in some cases (“easy cases”) the dimension of discovery is present in interpretation, in an exclusive way, while in other cases (“hard cases”), always in an exclusive way, that of creation is present. But Hart makes it very clear that the presence of the one excludes the presence of the other.

An example can serve to make this position clearer. Let us suppose that a provision by the town council (perfectly valid) states that “it is forbidden for vehicles to circulate in municipal parks”, and that, at the entrance to a park that can certainly be classified as a “municipal park” (there is a list of such parks), there is an officer responsible for getting it respected, and hence an officer that has to interpret the provision in question, so as to be able to apply it to all the concrete cases that can arise in the future, cases for which permission to enter the park or not will depend, also and above all, on the way he interprets the term “vehicle.” Well, according to Hart, for a whole series of unproblematic concrete cases (“easy cases”), the officer will have no particular difficulties of an


23 Hart 1994 (n. 6), ch. VIII.
interpretative character; these are the cases, for instance, in which the people that ask for permission to enter come with cars or with motorcycles. In all these cases, in short, according to the approach to the eclectic or mixed theory developed by Hart, the officer-judge will *discover a previously existing meaning* of the disposition-circular, and he will easily reach the solution to the concrete case. Here interpretation of the general term “vehicle” lies within the *nucleus of certainty*. In these cases, in short, interpretative formalism would be to right speak of “discovery of a previously existing meaning.”

However, a whole series of other cases could arise in which the solution would not be so simple. Let us suppose, for instance, that a boy with a little pedal car asks to enter the park: this is an object that in ordinary language would normally be considered a vehicle, but it might not be one for the purposes of the provision, if we bear in mind its *rationale* (which we suppose to be “protecting the peace and quiet and safety of the people in the garden”). The situation could then be more complicated if the boy’s car was “electric”, and so quite noisy, though not able to harm the people walking in the garden.

Well, for Hart, in cases like this one (a “hard case”) legal norms no longer offer clear guidance. The interpreter has to make a discretionary interpretative choice, though certainly not an arbitrary one (in that it is supported by arguments), because the meaning of the term in question is found in the *penumbra area*. In the case of the “boy’s electric car” the officer-interpreter finds himself, in short, having to reconcile conflicting demands (the “right to circulate freely”, the “right of other people not to be hampered in the exercise of their own right to circulate”, “the safety demand of the people in the park”, and so forth), in a situation in which total satisfaction of one of these demands or aims could involve complete sacrifice of the others. The way in which the judge will effect *reconciliation* (mediating between the various demands) or *balancing* (sacrificing some of them to the advantage of others) will obviously determine the meaning that he will give to the term “vehicle”. In other words, if the toy car is considered “a vehicle”, then it cannot enter the park; if, instead, it is not considered such, then it can enter.

In this second series of cases, for Hart, instead, interpretative anti-formalism would be right: the judge, in a sense, “would create new law for the concrete case”; though in the weak sense of a choice between one of the available interpretative options for the circular in question.

Finally we have available all the ingredients of the mixed theory, as it was traditionally formulated by Hart. Here interpretation is both “discovery” and “creation”, but never both simultaneously. *Interpretation discovers meanings in easy cases, and creates new meanings in hard cases.*

In this case too it may be useful to examine this theory in the light of the most recent debate in contemporary semantic theory, as we have done for the
other two conceptions. Well, it seems to me that this mixed theory implicitly harks back to the most recent and sophisticated versions of literalism (syncretic view, indexicalism\textsuperscript{24}), in which recognition of the presence of a complete meaning of the sentence, existing prior to interpretation, goes hand in hand with admission of the necessary role of completion and enrichment (a process that in semantic jargon is called “saturation”\textsuperscript{25}) of the meaning of the sentence itself through pragmatic processes.

5 THE COMMON SEMANTIC PRESUPPOSITION OF THESE THREE CONCEPTIONS

Over and above the specific criticisms that can be made of each of the three conceptions, there is another type of criticism that is perhaps even more destructive for all of them, because it attacks a “background” presupposition that all three conceptions seem to share, despite the big differences that also exist between them. I mean that, despite appearances to the contrary, these three approaches to interpretation are not after all so opposite to one another in each respect. In actual fact, precisely according to the outlook chosen here, that of the necessary relation between meaning and interpretation, despite the big theoretical differences between them the three conceptions – from the point of view of the theory of interpretation – end up sharing a certain way of conceiving the relation between the latter and the dispositions to be interpreted; it is a conception that, from the semantic point of view, derives from a certain view of “meaning” (a static vision of meaning).

The basic point is that, within the theory of interpretation, all three conceptions maintain a dichotomic opposition between “discovery” and “creation”, on the basis of which there are no “alternatives”: either interpretation “discovers something” or, on the contrary, “it creates something”, but it can never do both things at once. From this opposition it derives, from a semantic point of view, a view of meaning that can be considered static.

This is a very important point, on which it is worth dwelling a little. By a “static vision of meaning” I mean the idea that meaning, “discovered” (formalism) or “created” (anti-formalism), or “sometimes discovered” and “sometimes created” (eclectic theory), is at all events something that is produced “all at once”, in “a single solution.” Meaning, in short, is seen as an entity that is discovered or is produced “all together” and not, as I will maintain soon, as the result of a

\textsuperscript{24} A good analysis of both theories can be found in Recenati 2004 (n. 21), 51–53. 85–89. An important indexicalist position is represented by Jason Stanely, Language in Context. Selected Essays, Oxford, Oxford University Press, 2007.

\textsuperscript{25} On this notion see again Recenati 2004 (n. 21), 7 ff.
dynamic process “in several phases.” Besides, it is precisely the lack of a dynamic vision of interpretation, “in different stages”, that precludes the possibility of proposing a conception that simultaneously bears both dimensions in mind.

Let us return, however, to the static vision of meaning and the way in which it is expressed by the three traditional conceptions. The fact is that if one believes that meaning is discovered, then this “entity” is considered as existing prior to interpretative activity (formalism); if instead one believes that it is created from scratch in interpretation, then the entity in question is considered as entirely produced by the interpreter (anti-formalism). Not even the mixed theory, in its traditional version, can escape this formulation: it limits itself to dichotomically distinguishing cases in which meaning is discovered from cases in which it is created.

I am convinced that none of these three approaches is able adequately to account for the truly peculiar aspect of legal interpretation (but also of interpretation in general), that, as Dworkin appropriately reminds us, is represented by the simultaneous presence of both elements, “discovery” and “creation”26. In my opinion, precisely this is the really interesting and characteristic aspect of interpretative activity, above all when it deals with texts (as legal interpretation and literary criticism).

This “static” semantic presupposition represents the true weak point that is common to formalism, anti-formalism and the mixed theory deriving from Hart. This profile of the conception of meaning does not allow these conceptions to explain adequately what, as I have said above, is the inalienable peculiarity of interpretative activity, concerning the impossibility of its being totally reduced either to the modality of discovery or to that of creation. Interpretative activity, in actual fact, participates of both modalities, through a dynamic process of attribution of meaning to dispositions, a process that therefore goes through several phases and touches on both the dimension of discovery and that of creation. It is precisely this aspect of interpretative activity that is not taken into account by the traditional perspectives.

In order to illuminate in a complete way this important profile of interpretation, my proposal, which I will develop in the next section, will be to pass from a static approach to a dynamic approach to the theory of meaning (and, accordingly, to the theory of interpretation). To do this, however, it will be necessary to look at meaning in a different way from how it is shaped by the approaches already examined; and this means attributing to this notion three particular features, which the traditional conceptions do not bother to highlight. It is necessary, that is, to build the notion of “meaning” as a notion that appears as stratified (in the sense that it contains different levels), inclusive (it includes both

sense and reference) and as having a *progressive formation* (in the sense that the attribution of meaning is a “process in several phases”). Hence, from this point of view, two basic ideas of this new perspective are, first of all, that meaning is not produced “all at once”, but constitutes the result of a process that goes through several phases, or at any rate of a process that can be analytically distinguished into several phases (though from the psychological point of view this process may even last just an instant in the interpreter’s mind); and, secondly, that in this process the meaning of a disposition tends to be progressively specified, as soon as it comes into contact with concrete application situations (in the case of the judge), or with “typical cases” (in the case of the jurist).

The locution “sequential monism” can certainly serve to give an adequate denomination to my perspective, a further denomination in respect of the denomination “pragmatically oriented”, which I will introduce in the next section. Indeed, defining the theory as *monistic* renders fairly well the idea that in the interpretative process the meaning of the disposition (as we shall see) tends to be specified in a process that however remains unitary, because it starts from a common semantic basis; adding the attribute “sequential” appropriately highlights, instead, the fact that this meaning, as the interpretation process develops, goes through several phases, reaching higher and higher levels of specification and concretization. This specification process, it must be stressed, can take different paths, and therefore branch out in several directions, also alternative ones.

It is precisely through an analytical breakdown of this process of progressive formation of meaning into several phases that one succeeds in dissipating the air of inconsistency that a dynamic vision might provoke, precisely in that it might seem that this vision invokes the simultaneous presence, in interpretation, of an activity of “discovery” and an activity of “creation.” As we shall see in the next sections, instead, the pragmatically oriented theory succeeds in avoiding this type of criticism (which would be destructive), just because it denies the presence, *at the same moment*, of both phases, and instead recognizes that there are some phases of the process of attribution of meaning that belong to the dimension of discovery, while there are other phases that belong to the dimension of creation.

6 THE CONDITIONS FOR A PRAGMATICALLY ORIENTED THEORY OF MEANING

In this section and the next I will endeavour to distance myself clearly from a *static* approach to meaning, and I will do so by developing an alternative semantic theory of a *dynamic* character, which I will apply to legal interpretation. The result will be an *eclectic* or *mixed* theory of legal interpretation, a theory,
however, that is meant as an alternative to the traditional eclectic theories. In this section I will deal with the question of what the conditions must be that a theory of meaning for legal interpretation has to satisfy. In the next one, instead, I will try to specify the main features that such a theory has.

In the first place, a theory of meaning serving our purposes cannot only be a theory that is adequate from the general semantic point of view, but also has to be appropriate for legal interpretation. For this purpose, it is thus necessary to render prejudicially explicit a series of conditions that a theory of meaning has to satisfy (from both the semantic and the legal point of view), if it wants to be considered an acceptable candidate for acting as a semantic reference model for the theory of legal interpretation. I will now present those that I consider the necessary conditions to be satisfied.

The first basic condition for the semantic theory to be such a model is full recognition of the conceptual relationship existing between meaning and interpretation, and thus of the need for the theory of interpretation expressly to adopt a theory of meaning as a reference point for a reconstructive investigation, normatively oriented, of the interpretative practices brought into being in the contexts that we have chosen as the sphere of investigation (and specifically for the context represented by our legal organization).

The second condition is that the theory of meaning adopted should be not only satisfactory from the point of view of general semantic theory but also particularly appropriate in accounting for the marked peculiarities of legal language and interpretative activity making reference to it. This means, first of all: i) that the aforesaid theory of the meaning must take into account the fact that this language has a prescriptive character, and therefore has a different function from that of informative language, on which semantic theories are normally modelled; ii) that such language is distanced by some of its characteristics from ordinary language, which constitutes the reference basis for contextualistic theories of meaning, which I look at with particular attention; iii) that legal language is in any case different from conversational language, in which there are expressed the communicative messages of daily life, these being the object of almost exclusive attention on the part of the contextualistic theories themselves.

In relation to this second condition we have touched on an important point, on which it is worth dwelling for a moment. So far we have used without particular cautions the word “context”, although it represents an extremely important element of contemporary semantic conceptions, by which the present text is inspired (contextualistic conceptions, precisely). The moment has come to give a more precise definition of this notion, a definition tailored for legal interpretation. Well, from this point of view, “context” means that set of aspects, precise and identifiable ones, of the situation (first of all certain specific spatio-temporal coordinates), in which each time the person who receives the normative
message (the interpreter-jurist and the interpreter-judge) is placed. It is worth specifying that when we speak of “situation” we want to encompass both the specific concrete situation in which each time the judge is placed in deciding a single case, and a situation that is even only hypothesized, typified or constructed as a conceptual experiment by the jurist-interpreter.

We spoke before about the important differences between conversational interpretation and legal interpretation. These differences, however, are not such as to render impracticable the use of contextualistic perspectives as a semantic basis for a theory of meaning tailored for legal interpretation. Much of what contextualism maintains on the subject of the “meaning of the speaker” can very well be applied to the “meaning of the receiver” or to the meaning of the “receiver of the message.” For contextualism, it is true, all speech acts are sensitive to the context. In the case of legal interpretation, however, we have to turn to the sensitivity of the context in which the “receiver” of the message is placed (the interpreter-jurist or the interpreter-judge), and not the sender (the legislator)\textsuperscript{27}.

The third condition particularly concerns one of the points mentioned in connection with the second condition, that is to say the fact that legal language is a prescriptive language, while contextualistic semantic theories take informative (or “descriptive”) language as the privileged reference basis for their analyses. Well, in order to apply this semantic theory to legal language, we must be able to maintain that the problems connected to the semantic content of sentences are not so different if we pass from sentences with an informative function (assertions) to those with a prescriptive function (directives). To maintain this, in my opinion it is also absolutely necessary to share the thesis according to which the difference between an assertion and a directive that exhibit the same semantic content does not lie in the content itself (which some call phrastic\textsuperscript{28}, but which I will call argument), but in the pragmatic function performed (in one case, informative function, in the other, prescriptive function); and maintaining this means affirming, in other words, that a prescriptive meaning strictly speaking does not exist\textsuperscript{29}. The same content of meaning can be modulated pragmatically

\textsuperscript{27} Francesca Poggi suitably underscores this point. See Francesca Poggi, Contesto e significa-to letterale, Analisi e diritto 2006-2007, 196–203 (www.giuri.unige.it/intro/dipist/digita/filo/testi/).

\textsuperscript{28} Here the obvious reference is to Richard Hare, The Language of Morals, London, Oxford University Press; it. transl. Il linguaggio della morale, Roma, Ubaldini, 1968, 28–32.

\textsuperscript{29} This is a thesis which many analytical philosophers (Strawson, Searle, Dummett, Kerner, Platts, etc.) share, even if they reconstruct it in different ways. Their common point of departure, at least on this specific point, is represented by Austin’s work. See, for instance, John L. Austin, Philosophical Papers (1961), Oxford, Oxford University Press, 1970, 248–251. But see also Michael Dummett, Seas of Language, Oxford, Clarendon Press, 1993, 122–123, and Mark Platts, Ways of Meaning. An Introduction to Philosophy of Language, London, Routledge & Kegan, 1979, 43.
as an assertion or as a directive, according to the type of speech act performed. In legal theory, it is the *expressive conception of norms* \(^30\), among other theories, which follows this kind of approach.

The *fourth and last condition* for building a theory of meaning “tailored” for legal interpretation concerns the way of conceiving “meaning”, and, more specifically, the question of whether it could be exclusively seen in *intra-linguistic* terms (in my lexicon, only as *sense*), as *internalistic* conceptions require; or in exclusively *extra-linguistic* terms, that is in terms of “language-world” relationship (in my lexicon, only as *reference*), as *externalistic* conceptions require; or, again, whether it is to be conceived including both dimensions (*sense* and *reference*) in meaning. This point will be treated in the next section, on the subject of the features of the pragmatically oriented theory.

### 7 THE FEATURES OF A PRAGMATICALLY ORIENTED THEORY

I will now delineate the basic features of a pragmatically oriented theory of meaning tailored for legal interpretation; which also means, because of the conceptual connection that exists between “interpretation” and “meaning”, delineating the features of a pragmatically oriented theory of legal interpretation.

The first thing to be done is to clarify the sense in which I use the locution “pragmatically oriented” \(^31\). This locution is meant to highlight an important aspect of this theory, and precisely that of the *need*, always and in all cases, for *interpretative activity to be produced in a context* (in the sense previously given to this expression); in the absence of this, one cannot speak of construction of a *complete meaning* of the disposition to be interpreted. In short, it is *pragmatics*, as a discipline that studies the effects and contexts of communication, to give a necessary marching direction to *semantics*, as a discipline that studies the conventional meanings of words.

In a pragmatically oriented theory of meaning, the role of the context is double: there is a context that we can call “distal” or “background”, which is represented by that reservoir of basic pieces of information on natural facts (for instance, on certain laws of nature) and cultural ones (for instance, on the presence of certain institutions and certain social habits), of shared practices on how to do “certain things correctly”, and so forth, which are commonly shared

---


\(^31\) The locution “pragmatically oriented theory” is used also by Dascal and Wróblewski in a quite similar way. See Marcelo Dascal and Jerzy Wróblewski, Transparency and Doubt: Understanding and Interpretation in Pragmatics and in Law, *Law and Philosophy* 7 (1988) 2, 203–224.
by the competent members – even minimally – of a certain linguistic community, and which help to fix some stable meanings in the affirmations that we make\textsuperscript{32}. If, for instance, I tell my servant “to cut the grass”, the servant, at least in normal cases, understands without any doubt, on the basis of these background assumptions, that the way in which the grass is to be cut (for instance, with a mower) is not the same as the way in which “a wool thread is cut” (with scissors); and he understands this even if there is nothing, in the conventional meaning of “cut” incorporated in my affirmation, pushing him in the first direction rather than in the second. It would be sufficient, however, to change this “ordinary background context” for the expression in question to take on a different meaning, which can also be done (and contextualist philosophers of language do it) through “conceptual experiments” serving to change, possibly in an eccentric way, some elements of the background context. If, to continue with the same example, I say to a person “cut the grass” in a context in which the earth is by now devoid of lawns, so that there only remain small and slender tufts to be cut carefully with a pair of scissors (to preserve them), then the location “cut the grass” would contextually have a different meaning.

The gist of these considerations can be summed up as follows: “there are never expressions and affirmations that are completely decontextualized; without reference contexts and speech acts the words that we pronounce and write remain completely inert.”

In addition to distal context, there is a second sense of context, which I have already introduced in the previous chapter, also using the expression “situational context”, and which some philosophers of language call “proximal context.” It concerns the “precise, local and identifiable aspects” that the receiver of the communicative message must bring into play in order to attribute a complete meaning to sentences\textsuperscript{33}.

In the example of “vehicles in the park”, it is only through concrete, real or imagined, situations that the expression “vehicle” is given a complete meaning within the speech act producing the utterance expressing that given sentence in a contextually determined way, also settling any doubts on the identification of single objects as being part or not of the “class of vehicles” (“is the pedal car a vehicle or not?”).

It is worth stressing, to conclude these considerations, that from the point of view of this theory the complete meaning of a sentence can only be produced


\textsuperscript{33} On the difference between distal context and proximal context, see Bianchi 2001 (n. 22), 268–271.
through the combined intervention of the distal context and the proximal context. Before this we only have, as starting basis, semantic frames or schemata of meaning, and that is to say the conventional meanings of the single expressions contained in the sentence, which constitute the framework of what we want to say, a space of signification that also represents a major constraint for the process of specification and concretization that will lead to the complete meaning. But, as I have said, the complete meaning is only given through the single speech act that produces an utterance of the sentence by contextualizing it.

Let us now try to delineate three basic features of this approach to meaning. First, however, it is necessary to say something else about an even more general characterization that we have attributed to this theory when, in contrasting it with the static approach, we characterized it as dynamic. In this sense, it must be specified that this theory looks at the process of linguistic communication as the fundamental dimension to refer to in order to understand the notion of meaning; thus it is a conception that addresses first of all the subjects of the communication (senders and receivers); secondly, but even more importantly, it addresses the context in which this communication is participated in. From this point of view, meaning is not placed either in an abstract and timeless logical dimension or in a psychological or mental dimension, as if it were a tertium quid between the language used for communicating and the objects it speaks about. In meaning, as we will see more clearly afterwards, both dimensions of the processes of linguistic communication coexist: the linguistic tool used (sense) and the objects referred to in communication itself (reference).

What I have said implies a particular configuration of the theory of meaning. According to this configuration, the objective of this theory is not to describe and explain, statically, the entity “meaning”, with its properties, but to account, dynamically, for a set of skills and competences linked to the production, understanding and interpretation of meanings. It is evident that in a pragmatically oriented perspective it is the dynamic dimension, related to the investigation of how meanings arise and/or how they are attributed, that has precedence over the static dimension, related to the investigation of the nature of meaning (the “what is” of meaning); it is the second dimension, in a sense, that depends on the first.

On the basis of what has just been said, it can be affirmed that this theory endeavours to overcome the artificial dichotomy that exists, in the traditional

---


conceptions of legal interpretation, between “discovering” and “creating”, a di-
chotomy that none of the three conceptions examined in the previous chap-
ter really challenges. The basic idea behind this proposal is that in a dynamic
theory of meaning it is possible to maintain the very reasonable thesis that legal
interpretation is a “mixture of discovery and creation.” This can be done in an
absolutely consistent way because the dimension of discovery and that of crea-
tion are both present, it is true, in the process of attribution of meaning, but not simultaneously; rather in different phases, and that is to say in one or the other of the different phases (which we will study in the continuation of the chapter) in which this process is articulated, precisely, dynamically.

From the dynamic approach delineated above there derive three basic fea-
tures that must be assigned to the notion of meaning and that are particularly
appropriate to the theory of legal interpretation.

Firstly, the notion of meaning is a stratified notion, which is articulated on
several different levels; secondly, it is an inclusive notion, which comprises
both the internal intra-linguistic dimension (sense) and the dimension of the
“language-world” relationship (reference); thirdly, it is a notion which implies
progressive formation of meaning, that is a meaning which is not produced “all
at once” but through a complex process that contains several phases.

In this section we will deal with the first thesis, in the next section with the
second one, and in the final section with the third one. It’s time, now, to distin-
guish three layers of meaning: meaning in a broad sense, meaning in a narrow
sense and meaning in a weak sense.

At the first level of this notion there is what we can call meaning in a broad
sense, that is to say the general meaning of the sentence interpreted (because,
as we have said, there is no complete meaning before interpretation), seen as an
instrument with which to communicate something determined. Hence in this
first layer “meaning” has to be seen as the autonomous quantum of communica-
tion that is inferable through interpretation from the sentence. With this defi-
nition I make reference to everything that is communicated in the message con-
tained in the sentence. The important thing to notice is that at this very general

36 That meaning has many dimensions or layers is a thesis widely shared in the analytic philo-
sophy of language. See, for instance, Mary Hesse, Revolutions and Reconstructions in the Phil-
268–269. In this essay, however, I follow particularly the scheme presented by Ruth Kempson,
37 Mauro Barberis, among others, agrees with this thesis. See Mauro Barberis, Il sacro testo.
38 See Giovanni Tarello, Diritto, enunciati, usi: studi di teoria e metateoria del diritto, Bologna, Il
Mulino, 1974, 146.
level the *meaning* of the sentence, in the sense of the complete communicative message expressed by it, also includes the *function*.

At the second level there is *meaning in a narrow sense*, that is to say the *topic of the sentence*, its semantic content which is inferred through interpretation, putting in brackets the element, of a pragmatic nature, relating to the function. In this second dimension it is necessary, as we have already said, clearly to separate meaning and function. It is here, in short, that the two things must be kept separate: meaning in the narrow sense (as *topic*) must be considered as independent of the function – though in a sense correlated to the latter.

The third level of meaning is represented by meaning in a *weak sense*, that is to say by the meaning of single words, and of the notions connotated by them: words and notions that help us to produce, through the interpretative activity, a complete meaning (perhaps one of the many possible meanings) of a sentence (in our case of a legal sentence). This third layer of meaning is called “weak” because it is wholly evident that the meaning of the single words, before an interpretative process is activated, does not express a complete communicative message. This does not mean, however, that the single expressions contained in sentences do not have any meaning. They have, as we will see, *basic conventional meanings*, as they result from the linguistic conventions adopted in a given language, and as, accordingly, they are encoded in dictionaries. These *weak meanings* represent the common linguistic background of the competent speakers of a natural language (and of a technicized language like legal language). It is difficult to imagine speakers of a language understanding one another and communicating together without possessing this common background; without it communicating would always be a “leap in the dark.”

In our example, the word “vehicle” used in the circular has a weak basic meaning that corresponds, by and large, to what we can find in a dictionary under the entry referring to the word in question: what we would find, in short, is a sort of a basic definition running like this: “a vehicle is a self-propelled object, with wheels, able to transport people or things”; and also, possibly, some image representing that class of objects (the image of a motorcar, for instance).

It is important to stress that the words that most interest legal interpretation are configurable as *general descriptive terms*. “Vehicle” is one of these words; but the same could also be said of more complex constructions like the phrase “country estate”, or those requiring an evaluative intervention, like “common sense of decency”. It is important to specify that the general descriptive terms connote *classes* or *notions*, and therefore have a range that contains more than one single object.

39 Tarello 1974 (n. 38), 223.
8 SENSE AND REFERENCE

I will distinguish, within meaning in a weak sense, the two dimensions of *sense* and *reference*. In this way, as I have said before, I will introduce an *inclusive* notion, of a *dualistic* type, of meaning of single words. As I have said, it is a conception that distinguishes two components of this layer of meaning that are *autonomous* (though between them there is a relationship of mutual interaction), components that will be analysed afterwards, though in a very brief and schematic form: i) *sense*, which concerns the *intra-linguistic dimension* of meaning, and skills and competences (the capacity to understand and speak a language) connected to it; ii) *reference*, which concerns the *relationships between language and reality* and the connected skills and competences related to the connection between language and world (in the case in which reference is made by general terms, of kind, of class, and so forth).

It is extremely important, for the theory of legal interpretation, to maintain an inclusive approach to the theory of meaning. Such an approach, in the limits within which it recognizes the –partial – autonomy of the dimension of sense, makes it possible to reconstruct in a semantic key the complex interpretative operations that jurists carry out when they work on the terms used by the legislator, exploring their systemic connections with other terms in legislative language and building up a complex network of legal notions; but it also makes it possible, in the limits within which the dimension of reference is inserted in that of meaning, to avoid any break between this “internal” work and the relationship with concrete cases (or more exactly with reference to the objects and events that characterize concrete cases). Moreover, adopting an inclusive conception of meaning allows one to attain some important results, in the theory of interpretation, which here, due to lack of space, can only be mentioned. The fact is that it makes it possible, first of all, to recognize that there is no clear-cut distinction between “interpretazione dottrinale” (performed by jurists) and “interpretazione operativa” (performed by judges), but if anything a strong basic homogeneity; and it makes it possible, secondly, to avoid any strong conceptual break between interpretation and application of law, activities that can be seen as two phases of a single process, at least if it is reconstructed in a semantic key.

A useful starting point for understanding more clearly the distinction between these two dimensions of meaning is to try to imagine two different types of possible questions that, even at the level of ordinary language, can be asked regarding the meaning of a word or a notion connotated by the word. Intuitively it is easy to realize that they are two different questions, which arouse two types of different issues.

---

40 The word “inclusive”, with reference to theory of meaning, is used by Hesse 1980 (n. 36), 113.
The first question concerns, precisely, the sense of a word or a notion, and can be formulated as follows: “what is the meaning of that word or notion?”

The second question, instead, concerns the reference of the word or the notion, and can be formulated as follows: “what does that word or notion refer to?”

I will begin my short analysis from sense. According to the pragmatic and dynamic vision of language as an instrument of communication, and with the vision of meaning as a product of interpretation, my investigation on sense will take as a basic thematic node not the issue of “what is that entity called sense?”, possibly mediating between thought and reality, that is to say between language and objects (in the traditional vision, of a static type, of meaning and interpretation); but instead the issue of “what does it mean to understand the sense of a word or a notion?”.

Well, “understanding the sense of these linguistic entities” means exhibiting a peculiar competence, both at the level of langue (the natural language currently spoken inside that community) and at the level of langage. Let us now seek to distinguish these two profiles a little more clearly.

“Understanding the sense”, on the langue side, means expressing the ability correctly to use the words of a language, in the presupposition, obviously, that their meaning is known, from the point of view of the notions – of the language – connotated by them; that is to say, it means being able to operate correctly the appropriate substitutions of the words whose meaning is not known, through the insertion of synonyms with a known meaning. Let us think, for instance, of a foreigner who does not understand the sentence “Mario is a bachelor” because he or she does not know the meaning of the word “bachelor” in that langue; here the explanation of the sense consists, then, in the substitution of the word in question with a synonymous word or phrase (“not married”), whose sense is instead known.

“Understanding the sense”, on the language side, means being able to master (often in an implicit way) and/or produce a whole series of assumptions pertaining to the features and properties of the objects that are part of the sphere of extension of the general terms, assumptions that constitute the outcome of the intervention of definitions, of various types, of the terms themselves. These are assumptions that can i) concern the initial phase of interpretation, in the case in which they represent the stable conceptual base (concepts, stereotypes) on which the employment of the terms being defined are founded; ii) or concern the final phase of interpretation in the case in which they help to determine the complete notions connoted by the terms themselves. It is clearly this second profile that interests legal interpretation.

Let us return to our favourite example, represented by the circular on “vehicles”, to ask ourselves what the basic conditions are for qualifying the “officer-
interpreter” as a linguistically competent member of his legal community. Here it is sufficient to limit ourselves to the second type of conditions, those that concern the level of legal language. The officer will prove to be a linguistically competent member of the legal community insofar as he is able, first of all, to identify the stable conceptual base of the notion of vehicle (relying, for instance, on the assumption, previously mentioned, that “a vehicle is a means of transport for people or things, especially mechanical and driven by man”); and, in the second place (in relation to a possible concrete case constituted by a “toy car”, driven by a child), to build a possible complete sense of the same notion, attributing determined coordinates to its field of extension (coordinates traced out, among other things, on the basis of the assumption that “a vehicle is a mechanical means of transport able to produce noises and to provoke damage to things or people”). Obviously this attribution of sense would justify his taking the decision to allow the “toy car” to enter the municipal garden.

Let us now move on to reference. On the subject of reference, what the person receiving the communicative message wants to know is: “what objects is the person communicating this message to me speaking about?” Hence this notion indicates the objects – existing, in some sense, in reality – which our words may refer to.

For the notion of reference, too, we will adopt the dynamic and pragmatically oriented approach to meaning and interpretation that we have used all through this essay. In this sense, the problem of the configuration of the reference of general terms is no longer linked to the question “what is reference?”, but, instead, to the question “how is reference acquired and/or attributed?” Within this type of formulation, the first important thing to be clarified is that the activity of identifying reference can be distinguished into three different phases, which we will now examine.

The first phase of this process is identification or recognition of paradigmatic cases. It is the phase that concerns the recognition of the paradigmatic value of some concrete instances of the class connoted by the general term involved, that is to say the recognition that some single “exemplary” objects certainly belong to the field of reference of the term. In our example, “cars” certainly constitute paradigmatic cases of the notion of “vehicle”, recognized as such by the officer-interpreter, as a linguistically competent member of the legal community.

The second phase is identification of the set of objects denoted by the term. It is the phase in which we are concerned to establish a possible sphere of extension of the term, that is to say to determine a possible class of objects to which it is applicable. It is important to specify that the field of reference, in a conception of a contextuality type, is not considered as intrinsically connected to the use of the term, but rather as susceptible of being reconstructed in different ways, in relation to the intervention of a large series of variables (the context is
“inexhaustible”\textsuperscript{41}); and these variables, in the case of legal terms, are connected above all both to the general course of the interpretation of the disposition which the terms are part of (the whole complex of “textual” and “extra-textual” elements - purpose of the disposition, principles underlying it, and so forth - serving to orient it); and to needs of an applicative character, which concern the feature of concrete situations, or of typical situation that the disposition is concerned to regulate.

What does it mean to construct a – possible – field of extension of a general term? This operation consists in an \textit{extensional broadening} of the semantic area of the term, a broadening that unfolds through a process that moves from the \textit{cases} recognized at that time as \textit{clear}, regarding which there is no doubt about their belonging to the class (the \textit{paradigmatic cases}), to the \textit{doubtful cases}, whose belonging is more uncertain. The positive result of this process depends on the \textit{degree of similarity}, if any, that is found between the two series of cases; and the \textit{importance} of this similarity for the cases at issue naturally has to be appraised (and depends, in turn, on the results that one wishes to reach through the interpretation and application procedure).

The third phase is \textit{identification of a single object that is part of the sphere of extension of the notion}. It is the \textit{terminal phase}, from a logical point of view, of the process of attribution of reference, which consists in recognizing or otherwise, in a specific concrete object, the member quality, to all intents and purposes, of the class connoted by the term. The result, \textit{positive} or \textit{negative}, of the operation of recognition depends on how the similarities, if any, between the single concrete object and the normal members of the class are evaluated, naturally on the basis of the preventive selection of the similarities deemed \textit{important}.

The phase of identification of reference, if it is set in the sphere of legal interpretation, particularly concerns the \textit{moment of application} of the law, the phase in which the judge applies the general norm, in an interpretation he makes, to the concrete case.

\section*{9 THE PROGRESSIVE FORMATION OF MEANING}

As I have said before, the third profile of a pragmatically oriented theory of meaning is constituted by the thesis that the attribution of meaning to a sentence, and more specifically, in the case that interests us most, to a legal disposition, is \textit{a process in several phases}, during which the semantic framework of the

\textsuperscript{41} Charles Travis has many times underscored this very important feature of context. See, for instance, Charles Travis, Pragmatics, in Bob Hale and Crispin Wright (Eds.), \textit{A Companion to the Philosophy of Language} (1997), Oxford, Blackwell, 1998, 87–102.
disposition is progressively specified, in contact with concrete cases or typical cases, until, through the act of utterance, a complete meaning is produced.

These various phases can usefully be linked to two big dimensions, the *conventional dimension* and the *contextual dimension*, the presence of which allows us to reach a result which is important for us: that of conceptually separating, in legal interpretation, the element of *discovery* (*conventional dimension*) and that of *creation* (*contextual dimension*). In this way we can account for the idea, which intuitively appears persuasive, that the peculiarity of interpretation consists in a “mixture of discovery and creation”, but without incurring in contradictory affirmations, which instead would happen if we maintained that discovery and creation are activities that are brought into being simultaneously in the same phase.

The *dynamic* vision of meaning, as we has said, involves the idea that meaning is a notion with progressive formation: that is to say, it is formed by degrees, passing through various phases (and therefore through progressive specification of the semantic content of the disposition in question), and not “all at once” (whether it is for discovery or creation). These phases, which as we know are distinguishable into two (but will then be broken down into several “sub-phases”), are both to be considered necessary passages for the construction of the overall meaning of the sentence.

In this process, divided into several phases, the conventional meaning (of the single expressions) is at the start of the activity of attribution of meaning to a disposition, constituting the shared starting basis (the “common semantic background” – for instance, concepts and paradigmatic cases – that the senders and receivers of the message do not question for the moment), while the contextual meaning is in the second phase of the process, which moves towards the objective of construction of a fully specified meaning, an objective that is attained whenever a concrete communicative interaction takes place.

The fact remains, however, that the final moment of complete construction of meaning of a disposition, by legal interpretation, is that of its definitive semantic specification (very often one among the various possible ones) in the various contexts of reception in which there is placed, each time, the normative message expressed by the disposition itself.

In a *dynamic* vision of meaning that is fully articulated, it is not sufficient to distinguish the two dimensions of conventional meaning and contextual meaning; it is also necessary to isolate the various specific phases of the process of progressive formation of meaning, which are part, alternatively, either of the first or of the second dimension. Only by taking these various phases into ac-

---

42 It is important to stress that, from a dynamic perspective, there is no opposition between these two dimensions. See, on this thesis, Kempson 1977 (n. 36), 5.
count in detail we can have a clearer idea of how the process of attribution of meaning to legal dispositions concretely works. Unfortunately is not possible here, for reasons of space, to examine in detail this articulation of interpretative activity into phases. I can only make a brief mention.

Let us consider the *attribution of sense*. Putting it very schematically, it goes through two phases: the first one, which concerns the recognition of the presence of the concept (the common semantic bases of a pathway that can lead to several complete notions), belongs to the conventional dimension; the second, which concerns the construction of the complete notion, belongs to the contextual dimension.

Let us now consider *attribution of reference*. Summing it up, it can be said the this process goes through three phases: the first one, which concerns the *identification of paradigmatic cases*, belongs to the conventional dimension; the second, which concerns the construction of a possible field of extension of the notion, belongs to the contextual dimension, like the third one, which regards the identification of a single object as belonging to the field of extension of the notion.

**Author’s short biography**

Vittorio Villa is a full professor of legal philosophy at the University of Palermo (Italy) and a member of the editorial board of the journal Ragion Pratica. In Palermo and in Agrigento he also teaches legal methodology. In 1996, he was a visiting professor at the University of Edinburgh. His list of publications consists of numerous essays for various journals in Italian, French, English and Spanish. He has also published a few books. In *Teorie della scienza giuridica e teorie delle scienze naturali* (Giuffrè, 1984) he discusses models and analogies between the theories of the legal science and those of the natural sciences. *Conoscenza giuridica e concetto di diritto positivo* (Giappichelli, 1993) treats the legal knowledge and the concept of positive law. The history of analytical philosophy of law is put at light in *Storia della filosofia del diritto analitica* (Il Mulino, 2003). *Il positivismo giuridico. Metodi, teorie e giudizi di valore* (Giappichelli, 2004)—is actually being translated in Portuguese.