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Pragmatično usmerjeni nauk o pravnem razlaganju

Izhajajoč iz dinamičnega pristopa k razumevanju tvorbe pomena avtor v tej izvirni, za *Revus* napisani razpravi izgradi pragmatično usmerjeni nauk o pravnem razlaganju. Ta se odmika tako od formalističnih kot protiformalističnih pogledov, saj je v skladu z njim razlaganje hkrati »odkrivanje« nekaterih pomenskih ravni in »ustvarjanje« drugih. Pomen vsakršnih (tudi pravnih) izrazov ali stavkov je torej obravnavan kot nekaj stopnjevitega, oblikovanega na več ravneh. Obenem vključuje znotraj-jezikovno razsežnost (smisel) in razsežnost razmerja »jezik-svet« (nanosnik). Pomen nikoli ni proizveden hipoma in v celoti, ampak je oblikovan postopno, po korakih. Pri tem je za dokončno izoblikovanje pomena bistveno upoštevati kontekst ali pomenotvorne okoliščine. Te so vedno podane šele z resničnim ali namišnjenim (tj. vzorčnim) primerom, v zvezi s katerim razlagamo neko pravno določilo. Zato je (ob avtorju) sodnik kot razlagalec besedila nujni sooblikovalec njegovega pomena. Razpravo je iz angleščine prevedel Tilen Štajnpihler.

Ključne besede: pravno razlaganje (interpretacija); formalistični, proti-formalistični, mešani in pragmatično usmerjeni nauk o razlaganju; statični in dinamični nauk o pomenu; smisel, nanosnik (referenca), kontekst (pomenotvorne okoliščine)

1 OSREDNJA VLOGA RAZLAGANJA V SODOBNIH PRAVNIH NAUKIH

Danes je razlaganje bolj kot kadar koli prej v središču pozornosti vseh najpomembnejših smeri sodobnega pravoznanstva (na primer analitičnega pravnega nauka in pravne hermenevtike). Res je, da je bilo razlaganje vedno obravnavano kot *nujna* in *predhodna* prvina »običajnega« dela sodnikov in pravnikov, vendar je bila – čeprav velikega pomena – v tradicionalnih pravnih naukih na splošno obravnavana kot »*obrobna tema*«. Če primeroma pogledamo v delo Kelsna, v preteklem stoletju vsekakor vodilnega predstavnika normativne smeri pravnega pozitivizma, vidimo, da je v njegovem glavnem delu pravno razlaganje obravna-

vano v zadnjem poglavju.[1] Po tem, torej, ko so že bili obravnavani in razrešeni vsi problemi, ki so bistveni za Kelsnov pravni nauk: to so problemi, povezani z prepoznavanjem in pripisovanjem veljavnosti pravnim normam znotraj reda, ki jih zaobjame v celoto. Za Kelsna, skratka, so predmet razlaganja norme, katerih veljavnost je bila (v luči kategorije pravne veljavnosti) že potrjena neodvisno od razlaganja; zato razlaganje ni del postopka, v katerem nastajajo pravne norme.

Drugače je danes, ko so nekatera najpomembnejša dela v pravoznanstvu izoblikovana prav kot nauki o razlaganju; razlaganje postavljajo v središče svoje obravnave. Takšna sta na primer Dworkinov[2] in MacCormickov[3] nauk. V teh delih razlaganje ni več le eden od sklepnih, čeprav nujno potrebnih sestavin pravnega nauka, ki se je pred tem oblikoval z obravnavanjem drugih pojmov. Razlaganje ni več obravnavano kot predhodna sestavina. Nasprotno, v razmerju z drugimi sestavinami pravnega nauka predstavlja logično prednostno prvino. Pri tem je treba opozoriti, da ne gre za količinski vidik. Kot pravita Viola in Zaccaria,[4] ne gre toliko za to, da bi poglavje o razlaganju postalo obsežnejše, temveč za to, da postane nauk o razlaganju temelj za opisovanje samega prava. Z drugimi besedami: preučevanje razlaganja vstopi v igro natanko takrat, ko se soočimo s problemi samega obstoja prava in njegove veljavnosti.

Na tem mestu bi rad opozoril na nekaj razlogov, ki utemeljujejo spremenjeno vlogo razlaganja v sodobnih pravnih naukih. Izpostavil bom tri osnovne razloge. Prvi razlog je *pravnofilozofskega*, drugi *institucionalnega* in tretji *teoretičnega* značaja.

Prvi, *pravnofilozofski* razlog je povezan (tako v analitični kot v hermenevtični smeri) s širjenjem pravnega pojmovanja, ki bi ga lahko ustrezno označili kot »nauk o pravu kot družbeni praksi«. To pojmovanje je močno kritično do *objektivističnega* pojmovanja, ki je prevladovalo do šestdesetih let 20. stoletja. V skladu s tem pojmovanjem pravna pravila niso neke *predmetne danosti* (bodisi normativne bodisi dejanske), ki bi jih bilo mogoče opisati. Ne gre za tvarino, ki logično obstaja neodvisno od različnih dejavnosti (razlaganje, koriščenje, uporaba) ki se bodo naknadno nanašale nanjo. Nasprotno, za pristop, ki gleda na pravo kot na *družbeno prakso*, pravna pravila (v strogem pomenu) obstajajo le, če so umeščena v *normativno družbeno prakso*. To pomeni, da obstajajo, le v kolikor jih kot osnovo za kritiko, utemeljevanje in tako naprej razlagajo, koristijo,

1 Glej Hans Kelsen, *Reine Rechtslehre*, Dunaj, Franz Deuticke, 1960, 8. poglavje. (Prva izdaja iz leta 1934 tudi v slov. prevodu Amalije Maček, *Čista teorija prava*, Ljubljana, Cankarjeva založba (Pravna obzorja), 2005.)

2 Glej Ronald Dworkin, *Law's Empire*, London, Fontana Press, 1986; ital. prevod *L'impero del diritto*, Milano, Il Saggiatore, 1989.

3 Glej Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1978; ital. prevod *Ragionamento giuridico e teoria del diritto*, Torino, Giappichelli, 2001.

4 Francesco Viola, Giuseppe Zaccaria, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Bari, Laterza, 1999, v.

uporabljajo, omenjajo, razumejo člani *skupnosti, ki se ravna po pravilih,*[5] med katerimi mnogi privzamejo pogled od znotraj[6] (tj. »kritično-refleksivni« odnos do sprejetih pravil).

Drugi razlog je *institucionalnega* značaja. Izraz uporabljam z namenom poudariti dejstvo, da je omenjeni razlog povezan z dandanašnjim oblikovanjem naših ustanov in s tem pravnega reda, ki prevladuje v zahodnih državah in ga poznamo kot *ustavno pravno državo*. Iz tega zornega kota je mogoče opaziti, da obstoj novega institucionalnega vzorca izpodbija tradicionalno predstavo o formalnem značaju pravne veljavnosti. Danes smo vse bolj prepričani, da so (tudi) vsebinske prvine del opredeljevanja pojma pravne veljavnosti. In prav v postopku preverjanja *vsebinske veljavnosti* pravne norme igra pomembno vlogo pravno razlaganje. Ravno z razlaganjem (naj bo to razlaganje vpletenih ustavnih načel ali norm, o ustavnosti katerih razpravljamo) je mogoče potrditi ali ovreči vsebinsko skladnost zakonske norme z ustavnim načelom. Vendar je treba poudariti, da pri tem ostajamo na stališču, da je razlaganje odločilna prvina postopka, v katerem norme pridobijo svoj normativni obstoj prav s pridobljeno lastnostjo veljavnosti. Ta je – v skladu z predlogi najnovejših naukov – pridobljena na dinamičen način, in ne več »hipoma in v celoti«.[7]

Tretji razlog ima bolj poudarjen *teoretični* značaj. Gre za precejšnjo razširjenost teze o ločevanju med *pravnimi stavki* in *pravnimi normami*. Iz tega zornega kota pomen ne pripada kar čudežno stavku, s katerega se razlaganje začne, temveč je plod razlagalne dejavnosti, katere izid je pravna norma. Pravne norme so torej v primerih, kadar so vsebovane v stavkih, ki jih je izrecno oblikoval zakonodajalec, šele možni pomeni teh zakonskih določb.[8]

Če sprejmemo to osnovno teoretično predpostavko, potem se priznanje, da ima razlaganje temeljni pomen, zlije s tem, da se razlagalni dejavnosti, ki jo neposredno izvaja sodstvo (in posredno pravna znanost), pripiše neodtujljivo proizvodno in ustvarjalno vlogo. Osrednja misel pri tem je, da so pri pripravi normativnih sporočil, naslovljenih na državljane, sodniki poklicani *sodelovati* z zakonodajalcem, saj brez razlagalnega poseganja sodstva ta sporočila niso popolna. Iz tega zornega kota je pravnemu razlaganju torej lastna neka ustvarjalna vloga, ki je ni mogoče zanikati.

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5 O tem glej mojo knjigo Vittorio Villa, *Il positivismo giuridico. Metodi, teorie e giudizi di valore*, Torino, Giappichelli, 2004, 79–82, 146–152, 196–197.

6 Ta slavni pojem je vpeljal Herbert L. A. Hart, *The Concept of Law* (1961), 2. izdaja z dodatkom, Oxford, Clarendon Press, 1994; ital. prevod *Il concetto di diritto*, Torino, Einaudi, 2002, 67–70, 105–108. (Prva izdaja tudi v slov. prevodu Jelke Kernev Štrajn, *Koncept prava*, Ljubljana, ŠOU, 1994.)

7 O tem glej dinamični nauk o pravni veljavnosti: Luigi Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Bari, Laterza, 1989, 97, 348–349, 476, 916.

8 Giovanni Tarello je prvi razvil to tezo, ki je danes široko sprejeta v analitičnih krogih. Glej Giovanni Tarello, *L'interpretazione della legge*, Milano, Giuffrè, 1980, 9–10.

Če kot primer pogledamo delo sodnikov v posebnem italijanskem institucionalnem kontekstu (ta v moji analizi predstavlja prednostno mesto nanašanja), lahko opazimo, da se je stopnja ustvarjalnosti sodniškega razlaganja danes močno dvignila. Za to obstaja vrsta razlogov, od katerih želim tri posebej poudariti.

Prvi razlog je povezan s postopnim tvorjenjem novega prava – še posebej na področju civilnega prava – z izdajanjem »posebnih zakonov«, ki niso vpeti v enotni red našega civilnega zakonika in njegovih načel. S tem pojavom se ukvarjamo od šestdesetih let dvajsetega stoletja naprej. Na misel pridejo primeri, kot so »zakon o delavcih«, reforma družinskega prava, zakoni o rentah in kmetijskih pogodbah, uvedba razveze zakonske zveze in tako naprej.

Drugi razlog je povezan s krepitvijo odkrito neformalistične razlagalne drže sodnikov. Ta drža – posebej razširjena je bila konec šestdesetih let (skupaj s sodniškim »aktivizmom« tako imenovanih ital. »*magistrati d'assalto*«) in nato v zgodnjih devetdesetih s »*Tangentopoli*« (ta se je pričel 1992) – se izraža tudi z uporabo razlagalnih pristopov, ki se veliko bolj ukvarjajo z vzpostavljanjem »pravičnosti v posameznem konkretnem primeru« kot pa z iskanjem navdihujočih razlogov za odločitev v *ratio legis*. To pomeni, da v posameznem trenutku uporabljene razlagalne tehnike niso razumljene kot pravila, ki usmerjajo sprejem odločitve, temveč prej kot pravila naknadne (*ex post*) utemeljitve že sprejete odločitve.

Tretji razlog pa je povezan s tokom, ki se je v naši pravni kulturi pojavil v začetku šestdesetih let prejšnjega stoletja in ki ga Riccardo Guastini ustrezno imenuje *konstitucionalizacija* pravnega reda.[9] Gre za tok preoblikovanja našega pravnega reda, pri čemer lahko ugotovimo, da je ta na koncu popolnoma »prežet« z ustavnimi normami. Treba je pojasniti, da to kulturno preoblikovanje ne zadeva toliko prisotnost same ustave kot *njeno razumevanje* v pravni kulturi, zlasti s strani vseh pravnikov in uporabnikov prava. Ta pogled na ustavo in njeno razlaganje sloni na prepričanjih o njeni »prepričevalni moči« in »sposobnosti neposredno učinkovati« na vsak vidik delovanja pravnega reda. Ta postopek omogoča torej neke vrste *prekomerno razlaganje ustave*: tj. razlagano držo, ki s sprejeto odločitvijo *razširi* pomen ustavnega besedila. *Razširjajoče razlaganje* deluje tako, da iz obstoječih ustavnih določb, po možnosti z uporabo analogije, izpeljemo celo vrsto *tiho vsebovanih* norm, s katerimi lahko obvladamo katero koli vrsto »ustavno pomembnega« ravnanja.

Dodati je treba, da je porast »sodniške ustvarjalnosti« za mnoge pravnike (kot tudi za javno mnenje) zelo zaskrbljujoč. Dejstvo pa je, da ta porast pogosto ni plod sodnikove proste izbire, temveč »nujni« izraz drže, ki jo danes zavzema naš institucionalni red. Kljub temu je omenjeni porast lahko nevaren našim de-

9 Ricardo Guastini, »La costituzionalizzazione« dell'ordinamento italiano, *Ragion Pratica* (1998) 11, 85–206.

mokratičnim ustanovam, ker dejansko vključuje možnost, da tudi sodnik tako kot zakonodajalec postane »ustvarjalec novega prava« (čeprav na »dopolnilni« način). S tem sodnik ne ogroža le temeljnega *načela pravne varnosti*, temveč lahko izpodbija tudi temelje našega demokratičnega reda: *načelo delitve oblasti;* v skladu s katerim naj bi bil le zakonodajalec nosilec pristojnosti tvoriti novo pravo.

Vse te spremembe postavljajo pravno razlaganje še bolj v središče pozornosti. Seveda naloga nauka o pravnem razlaganju ne more biti ponujanje konkretnih rešitev za obstoječe stanje, čeprav imajo na našem področju (podobno kot v vseh družboslovnih in humanističnih znanostih) teoretična premišljevanja tako določen vpliv na predmet preučevanja kakor tudi normativne posledice za vse udeležence v teh dejavnostih. Vsekakor pa nam nauk o pravnem razlaganju lahko ponudi na primer ustrezno rekonstrukcijsko analizo te dejavnosti, s katero preverimo, ali slednja naš pravni red v resnici izpostavlja tolikšnim tveganjem. Moj namen je v tem prispevku pokazati prav to, da sodniško razlaganje, ko je enkrat pravilno pojasnjeno in uporabljano, ne predstavlja nevarnosti za naš demokratični red. Z drugimi besedami: mogoče je razviti nauk o razlaganju, ki hkrati pojasni tako psihološke značilnosti sodniške ustvarjalnosti kot njene omejitve, ki sodnika vežejo na zakonodajalca. Iz tega zornega kota bom skušal orisati *pragmatično usmerjeni pristop* k pravnemu razlaganju. Tovrstni pristop temelji na mlajši *kontekstualistični* smeri v semantiki, ki priznava, da je poseganje *pragmatike* nujno na vseh ravneh postopka pripisovanja pomena. Na temelju teh predpostavk je mogoče pokazati ne le, da postopek pripisovanja pomena pravnim določilom ne more biti popoln brez nanašanja na *posebni pragmatični kontekst*, v katerega je umeščen vsakokratni razlagalec, temveč tudi, da ta postopek vedno poteka v okviru omejitev, ki jih postavlja semantična vsebina izhodiščnega stavka (tj. pravne določbe, ki jo razlagamo).

2 NEKAJ SPLOŠNIH OKVIRNIH OPREDELITEV

Prepričan sem, da ni mogoče govoriti neposredno o pravnem razlaganju, ne da bi predhodno podali nekaj splošnih, izhodiščnih opredelitev, predvsem enotne opredelitve »razlaganja«, ki zajema raznolike razlagalne dejavnosti. Drugače kot genovska šola (še posebej Guastini[10] in Chiassoni[11]) sam ne verjamem, da nam lahko posebne značilnosti pravnega razlaganja preprečijo odkriti neko splošnejšo podobo razlaganja, ki bi omogočila opaziti pomembne podobnosti med pravnim razlaganjem in sorodnimi razlagalnimi dejavnostmi (na primer *literarno kritiko*). Pravno razlaganje je navsezadnje le ena od možnih razčleni-

10 Ricardo Guastini, *Nuovi studi sull'interpretazione*, Rim, Aracne, 2008, 170–173.

11 Pierluigi Chiassoni, Codici interpretativi. Progetto di voce per un "vademecum" giuridico, *Analisi e diritto* 2002–2003, 60–62 (*www.giuri.unige.it/intro/dipist/digita/filo/testi/*).

tev splošnega pojma, ki označuje enega od najosnovnejših načinov, s katerim skušamo ljudje razumeti »naravni« ali »kulturni« svet okoli nas.

Tukaj bom predstavil pojmovno opredelitev »razlaganja«, ki posebej ustreza tistemu, kar Gallie imenuje *v svojem bistvu sporni pojmi.*[12] To so pojmi, ki so po svoji zgradbi odprti za razpravo in dovzetni za zelo drugačno rekonstrukcijo, v kolikor vse skupaj podpremo z »dobrimi argumenti«. Za vse primere, kjer je *definiendum* sestavljen iz tovrstnih pojmov, sem že pred časom izdelal in začel uporabljati obliko opredelitve, ki ji pravim *pojmovna opredelitev*. Njen *minimalni,* a zato nič manj pomembni namen je prepoznati skupno pojmovno osnovo, če ta sploh obstaja. Gre za skupne predpostavke (»štejemo jih za nesporne«), ki jih delijo različna ali celo med seboj izključujoča pojmovanja, ki se nanašajo na isti predmet.[13] Iz tega zornega kota bo imela shema, ki ji bom sledil v tem prispevku; tri-polarni značaj. Začetna točka bo *splošni pojem razlaganja*, iz katerega bom z zaporednim razčlenjevanjem izpeljal *poseben pojem pravnega razlaganja*. V nadaljevanju bom iz tega ožjega pojma izpeljal nekaj *pomembnejših pojmovanj pravnega razlaganja*, ki so se v preteklosti izmenjevale na odru zahodnih pravnih redov od začetka devetnajstega stoletja (torej v obdobju, ko se je začel oblikovati novi »pravni predmet«, poimenovan *novoveško pravo*). Ta pojmovanja se izražajo skozi različne nauke, ki v zgodovinsko določenem kontekstu pomenijo njihove posamične razčlenitve.

Primer enega od treh pomembnih pojmovanj, ki jih bom predstavil v tem prispevku, je *eklektično* ali *mešano* pojmovanje. To lahko zavzame več različnih oblik. Tako bom najprej predstavil tradicionalno različico eklektičnega nauka (tj. Hartovo) in ji v nadaljevanju zoperstavil svojo rekonstrukcijo, ki ji pravim *pragmatično usmerjeni nauk o pravnem razlaganju*.

Poskusimo zdaj opredeliti pojmovno osnovo, skupno vsem pojmovanjem razlaganja, ki so se razvila na najrazličnejših področjih (v naravoslovju, družboslovju in humanistiki, na področju umetnosti in glasbe in tako naprej). Strnemo jo lahko takole: »Razlaganje je dejavnost, s katero kakšnemu predmetu pripišemo pomen.«

Ta opredelitev je zaslužna za vzpostavitev *pojmovne vezi* med »razlago« in »pomenom«. Pojmovna zveza je neka *notranja vez* med dvema prvinama, kjer sta ti pojmovno povezani na takšen način, da je nemogoče pojasniti eno, ne da bi bili primorani obravnavati še drugo.[14]

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12 Walter B. Gallie, Essentially Contested Concepts, *Proceedings of the Aristotelian Society* LVI (1955–56), 167–198.

13 Glej ponovno mojo knjigo Villa 2004 (op. 5), 12–20.

14 O pojmu »notranje zveze« glej Gordon P. Baker, Peter M. S. Hacker, *Language, Sense and Nonsense. A Critical Investigation into Modern Theories of Language*, Oxford, Blackwell, 1984, 94–115.

Zatrjevati obstoj tovrstne zveze pri razlaganju hkrati pomeni, da je vez med pomenom in razlago tako tesna in prevladujoča, da po našem prepričanju ni mogoče pojmovno izoblikovati opredelitev razlaganja in naukov o razlaganju, če ti niso *nujno* tudi opredelitve pomena in nauki o pomenu ter obratno. Skratka, o pojmu pomena lahko razmišljamo le skozi pojem razlaganja in obratno. Splošneje torej lahko rečemo, da je nauk o razlaganju *nujno* tudi nauk o pomenu in obratno. Prav iz tega zornega kota lahko namreč legitimno govorimo o *pojmovni* oziroma *notranji zvezi* med razlaganjem in pomenom.

Iz tega zornega kota se ne strinjam s trditvijo Riccarda Guastinija,[15] da nauk o razlaganju ne potrebuje nobenega nauka o pomenu – niti nauka, ki se ukvarja s pomenom v naravnih jezikih, saj je edini nauk, ki ga v resnici potrebuje, tisti, ki rekonstruira (docela svojsko) prakso pripisovanja pomena v pravni domeni. Drugače bom poskusil sam v tem prispevku prikazati, kako je neizpodbitno nujno, da razumemo, kaj pomeni »pripisovanje pomena« tako na našem kot na drugih področjih. Le tako bomo lahko namreč bolje razumeli pravno razlaganje kot postopek pripisovanja pomena pravnim besedilom. Razumeti, kaj pomeni »pripisovanje pomena«, pa ni nič drugega kot izoblikovati nauk o pomenu, natančneje, *proti-esencialistični nauk* o pomenu, po katerem pomen ni neka tvarina ali snov, ki jo odkrijemo, temveč je proizvod razlagalnih dejavnosti.

Pojmovno opredelitev pravnega razlaganja je mogoče izoblikovati na *treh različnih ravneh*, ki si sledijo po vedno nižji stopnji splošnosti.

Prva raven pravzaprav ustreza zgoraj navedeni pojmovni opredelitvi. Gre za *zelo splošen pomen razlaganja*, po katerem govorimo o razlaganju vedno, kadar nekemu predmetu pripišemo pomen; vedno torej, ko nam kak predmet nekaj sporoča in se nam kaže kot znak ali skupek znakov, ki jih moramo razvozlati.

Bolj zanimiv za nas je tukaj *posebni pomen razlaganja*, ki ga najdemo na *drugi ravni*. Ta zadeva različne kontekste, v katerih tvorimo razlage *človeških in/ali kulturnih dejstev*. To so dejstva, ki jih proizvedemo mi (simfonije, romani, likovna dela, pravne norme, nameni in tako naprej).

Tretja raven predstavlja nadaljnje razčlenjevanje druge ravni. Tako lahko na področju razlaganja kulturnih dejstev razločimo še bolj posebno raven, ki jo predstavlja *razlaganje besedil*. Pravno razlaganje v paradigmatičnem pomenu, v katerem je pogosto razumljeno v celinskih pravnih ureditvah, se kaže prav kot *razlaganje pravnih besedil* in je tako postavljeno na to tretjo raven.

15 Ricardo Guastini, Due esercizi di non–cognitivismo, *Analisi e diritto* 1999, 278–279 (*www.giuri.unige.it/intro/dipist/digita/filo/testi/*).

3 NEKAJ OPREDELITEV GLEDE PRAVNEGA RAZLAGANJA

Razlaganje pravnih besedil ni edini način, s katerim na področju pravnega izkustva tvorimo razlage. Besedila niso edini »pravni predmeti«, ki so podvrženi razlaganju. Tu je zato treba potegniti ločnico, da se izognemo morebitnim nesporazumom. Najprej gre za *pravno razlaganje v širšem smislu*, ki zadeva vse razlagalne dejavnosti, ki se odvijajo na področju pravnega izkustva. Kadar se bom nanašal na te dejavnosti, bom uporabljal besedno zvezo »razlaganje v pravu«. Na to področje vsekakor sodi razlaganje pravnih besedil (na primer zakonodajnih določb), vendar gre tudi za razlaganje drugih »predmetov«, ki niso besedila. Tako lahko na primer sodniki in pravniki razlagajo tudi *obnašanje*, kot v primeru obnašanja strank pri pogajanjih pred sklenitvijo pogodbe ali v primeru *običajnih praks* (pri teh je treba na primer potrditi *opinio juris ac necessitatis*).

Drugič gre za *pravno razlaganje v ožjem smislu*. Kadar se bom nanašal na to, bom uporabljal besedno zvezo »razlaganje prava«, ki zadeva *razlagalno dejavnost, osredotočeno na besedila*. Gre za dejavnost, ki jo udejanjajo pravniki, sodniki, državni uradniki in tako naprej, njen predmet pa so pravni dokumenti (na primer zakoni, uredbe, stavki, pogodbe in tako naprej). Prav tej vrsti razlage sem bom posvetil v tem prispevku.

Ukvarjal se bom torej s *pravnim razlaganjem v ožjem smislu*, ki se razlikuje od zgoraj omenjenega razlaganja *v širšem smislu* (»razlaganje v pravu«). Če sledimo Chiassoniju, lahko *razlago pravnih besedil* iz tega zornega kota opredelimo kot »dejavnost določanja pomena kakemu določilu (osnovni enoti vsakega pravnega besedila), kjer iz tega določila izpeljemo enega ali več izrecnih norm, ki jih štejemo za pravno pravilne razlage tega določila.«[16]

V okviru pravnega razlaganja besedil bom posebej preučil tisto, kar je v pravnih ureditvah z uzakonjenim pravom obravnavano kot *paradigmatični primer pravnega razlaganja besedil* oziroma *razlaganje prava*, kot se temu tradicionalno reče. Gre za razlaganje pravnih stavkov z močjo prava, pa tudi drugih določil, ki so del ustavnega besedila. Tovrstna dejavnost ima skupne značilnosti v vseh pravnih redih z uzakonjenim pravom.

Tukaj je treba pojasniti, da v skladu s pogledom, ki mu bom sledil v tem prispevku, razlaganje pravnih določil ni »izbirna« dejavnost, ki bi se izvajala le ob nekaterih priložnostih; na primer le v zadevah, kjer se pri ugotavljanju pomena določil porajajo dvomi razlagalnega značaja. Precej vplivni nauk o razlaganju, ki ima še danes svoje privržence[17] in je skladen z dobro znanim rekom

16 Pierluigi Chiassoni, *Tecnica dell'interpretazione giuridica*, Bologna, Il Mulino, 2007, 50.

17 Glej na primer Andrei Marmor, *Interpretation and Legal Theory*, Oxford, Clarendon Press, 1992, 12.

»*in claris non fit interpretatio*«, sprejema namreč *razlaganje v zelo ozkem smislu*, po katerem pri določbah z jasnim pomenom, strogo rečeno, sploh ne pride do razlaganja. Vendar v skladu z zgornjo opredelitvijo razlaganja sam trdim, da *vsaka določba* (od najbolj pa do najmanj jasne) *potrebuje razlaganje*. Tu še enkrat poudarjam, da je pravna norma končna točka razlagalnega postopka, ki se začne pri določilu. Po mojem, pragmatično usmerjenem pristopu; je sama norma izražena šele z izrekanjem stavka, ki vsebuje pomen samega določila. Bistvena točka mojega pojmovanja je to, da ni kakovostne razlike med »lahkimi primeri« (pri teh naj razlaganje ne bi bilo potrebno) in »težkimi primeri« (tu naj bi bilo razlaganje potrebno). Neko razlago je mogoče obravnavati kot »lahko« šele potem, ko je razlaganje opravljeno.[18]

Nazadnje je treba dodati, da je pri pragmatično usmerjenem pojmovanju pravnega razlaganja *pragmatična razsežnost* – ta je vezana na kontekst uporabe in koriščenja norm (tako pri »posamičnih konkretnih primerih«, za katere so pristojni sodniki, kot pri »vzorčnih primerih«, za katere so pristojni pravniki) – nujna razsežnost razlagalne dejavnosti in neizogibno vključuje vsa določila.

Poudariti je treba, da v skladu z zgoraj predlagano opredelitvijo ne gre za razlaganje (vsaj v ožjem smislu, ki smo ga sprejeli tu) v vseh tistih primerih, kjer sodniki (*dopolnilno*) *ustvarjajo* (*v močnem pomenu besede*) novo pravo. Tako je na primer, kadar ni izrecnega določila, ki bi bilo zmožno urejati konkretni primer (*zapolnitev praznine*). Kot razlaganja prav tako ne smemo obravnavati nekaterih z njim povezanih dejavnosti, ki so razlaganju *predhodne* v strogem pomenu besede (na primer *predhodno* preverjanje veljavnosti določbe, ki naj bi jo razlagali), ali tistih, ki se z njim šele začenjajo (takšno je naknadno dogmatično urejanje že razložene normativne tvarine, za kar so pristojni pravniki). Nedvomno lahko kot »razlaganje« v širšem smislu upravičeno obravnavamo dejavnosti, s katerimi tvorimo *tiho vsebovane norme*, tj. norme, ki za izhodiščno točko razlaganja nimajo nobenega določila. Ne glede na to pa se bo pričujoče besedilo nanašalo na pravno razlaganje v ožjem smislu, in sicer na njegov poseben paradigmatični primer (*razlaganje določil*).

Kadar govorimo o pravnem razlaganju kot dejavnosti, ki služi pripisovanju pomena pravnim stavkom, je treba predhodno razjasniti pomembno vprašanje. V skladu s tukaj sprejetim semantičnim naukom (v nadaljevanju ga bom poimenoval *semantični kontekstualizem*) se celotni pomen lahko izrazi le *z izrekanjem stavkov*, tj. z besednim izražanjem, ki zaživi v posameznem kontekstu. Samo v posebnem kontekstu rabe, skratka, lahko nek stavek, izražen z določenim govornim dejanjem, vzpostavi celotno sporočilo.

Takšen pogled je povsem uglašen s *filozofijo običajnega jezika*; to, analitično filozofsko pojmovanje je podlaga mojemu delu. Kot je dobro znano, glavni pred-

18 Ricardo Guastini, *Dalle fonti alle norme*, Torino, Giappichelli, 1990, 80.

met preučevanja tega pojmovanja niso formalizirani jeziki logike in matematike, temveč so to *nestrokovni naravni jeziki*, običajni jeziki našega vsakdana. Sem spada tudi pravni jezik, saj je kot *tehniziran jezik*[19] dovolj podoben običajnemu jeziku. Drugače od *filozofije idealnega jezika* analitična filozofija običajnega jezika trdi, da moramo običajni jezik pustiti »takšnega, kakršen je«. Poteze, ki se kažejo kot njegove pomanjkljivosti (protislovja, dvoumnosti, praznine in tako naprej), so v resnici namreč tiste, ki omogočajo njegovo »prožno prilagajanje« potrebam vsakdanjega življenja.[20]

Bolj podrobno, analitična filozofija običajnega jezika, ki dosledno uporablja *pragmatično usmerjeni* pristop (tako sem se namenil tudi sam), dojema takšen jezik kot družbeno prakso jezikovno-sporočilne vrste. Gre za skupek usklajenih *govornih dejanj*, ki so ustrezno orodje za tvorjenje različnih vrst izjav (poročevalnih, predpisovalnih, ocenjevalnih, želelnih izjav in tako naprej). Iz tega zornega kota nek stavek na sebi ali sam zase ne more izraziti celotne semantične vsebine, temveč je lahko le govorčeva raba stavka tista, ki ima ta učinek tako v smislu pomena kot v smislu njegove vloge (jezik na sebi, ki se abstraktno dviga iz konkretne rabe, je popolnoma »inerten«). Kadar se jezik obrača na svet, kadar torej »nekomu nekaj pove«, je to nanašanje vedno posredovano z jezikovno rabo. To pomeni, da ni nobenega polnega nanašanja z jezikom na »predmete v svetu«, razen znotraj posebnih načinov, na katere nek jezik rabimo zato, da se z njim na nekaj nanašamo (na primer zato, da bi govorili »resnične stvari«). Treba je poudariti, da se ta raba vedno odraža v *govornem dejanju* in ima zato vedno *kontekstualno podobo*.

Da zaokrožimo izhodiščno kategorično sliko naše analize, je treba na koncu potegniti še eno ločnico (predvsem s ciljem, da bolj jasno predstavimo predmet, ki ga bom obravnaval v tem prispevku). Že v zgornji opredelitvi »razlaganja v ožjem smislu«, tj. »razlaganja pravnih besedil«, lahko najdemo dve razsežnosti razlagalne dejavnosti, ki ju moramo tukaj bolj jasno razmejiti.

Prva je *strukturna* razsežnost, ki je omenjena v prvem delu opredelitve, kjer je govora o »dejavnosti določanja pomena kakemu določilu.« Iz tega, prvega zornega kota je predmet analize vprašanje, *kako* razlaganje poteka. Kakšna vrsta zveze naj bo vzpostavljena med »razlaganjem« in »pomenom«? Vprašanja, na katera bomo iz tega zornega kota poskusili odgovoriti, so: Kaj pomeni, da nekemu določilu pripišemo pomen? Ali to pomeni iskanje nečesa, kar že obstaja, ali

19 V podobnem kontekstu Jori raje uporablja oznako ital. *linguaggio amministrato*. Mario Jori, Definizioni legislative e pragmatica giuridica, *Analisi e diritto* 1995, 123–124.

20 O razlikovanju med *filozofijo običajnega jezika* in *filozofijo idealnega jezika* glej Richard Rorty, Metaphilosophical Difficulties of Linguistic Philosophy. Introduction, v Richard Rorty (ur.), *The Linguistic Turn. Recent Essays in Philosophical Method*, Chicago in London, The University of Chicago Press, 1967, 7–9, 15–24; Peter Frederick Strawson, Construction and Analysis, v Alfered Jules Ayer in drugi (ur.), *The Revolution in Philosophy*, London, MacMillan, 1957, 101–104.

gre za ustvarjanje nečesa povsem novega? Ali pa to pomeni celo, da posežemo po dejavnosti, ki se razlikuje tako od »iskanja« kot »ustvarjanja« (in je po možnosti njuna mešanica)?

V tem prispevku se bom ukvarjal predvsem s pravkar omenjeno razsežnostjo. Zaradi pojmovne zveze med »razlaganjem« in »pomenom« se bom moral pri tovrstni analizi nujno ukvarjati z vprašanji nauka o pomenu. Še posebej zato, da bom tako lahko po eni strani pojasnil semantično osnovo naukov, ki jih kritiziram, in po drugi strani drugačno osnovo lastnega pristopa k razlaganju.

Druga razsežnost je poudarjena v drugem delu opredelitve in se nanaša na »izrecne norme, ki jih štejemo za pravno pravilne razlage določila.« Zadeva vsebino razlagalne dejavnosti; ukvarja se na primer z *razlogi*, *zakaj* je v primerih, kjer je mogoče določilu pripisati več pomenov, raje izbran en kot drugi. V zvezi s to, drugo razsežnostjo se mi zdi ustrezna oznaka »nauk o pravnem razlogovanju«. Očitno je, da tukaj vstopamo na področje drugačnih problemov, saj se soočamo z zapletenimi vprašanji *argumentov* ali *razlagalnih smernic*, ki vsakokrat *podpirajo* in/ali *morajo podpirati* odločitev.

Zdaj je mogoče vnesti nekaj reda med oznake, s katerimi smo opredelili različne vidike razlaganja v ožjem smislu. Pri nanašanju na dejavnost, ki jemlje v ozir obe omenjeni razsežnosti, je mogoče uporabiti oznako »splošni nauk o pravnem razlaganju«, medtem ko bomo pri prvi razsežnosti govorili o *strukturnem nauku o pravnem razlaganju*, pri drugi razsežnosti pa o *nauku o pravnem argumentiranju*. Kljub temu pa bom zaradi lažjega prikaza (razen kjer navedem drugače) uporabljal izraz »nauk o pravnem razlaganju«, s katerim bom označil posebni predmet našega preučevanja, tj. *strukturno razsežnost pravnega razlaganja v ožjem smislu*.

4 TRI POJMOVANJA PRAVNEGA RAZLAGANJA

Pri preučevanju teh pojmovanj bomo domnevali, da zgodovinski kontekst, v katerega bomo umestili analizo, predstavljajo pravni redi zahodnega sveta (s posebnim poudarkom na našem lastnem redu), in sicer v času od pojava novoveškega uzakonjenega prava v začetku devetnajstega stoletja pa vse do danes.

Že bežen pogled na glavne nauke o razlaganju, ki so se zvrstili v tem okviru, pokaže, da so bili večinoma umeščeni na dva nasprotna pola, in sicer ob razširjenem prepričanju, da ni ničesar vmes. V novejšem času (od šestdesetih let dvajsetega stoletja naprej) so bili izjema od tega nekateri poskusi izdelati tretje, »vmesno« stališče. Te je mogoče označiti kot *eklektične nauke*. Vendar pa je bila razprava skozi devetnajsto in del dvajsetega stoletja na nek način polarizirana. Šlo je za trk dveh velikih skupin naukov, pogosto dojetih kot *medsebojno izključujočih*, ki jih lahko vključimo tudi v dve širši pojmovanji razlaganja. Prvo

pojmovanje bom poimenoval *razlagalni formalizem,* drugo pa *razlagalni proti-formalizem*. Prvi se je izvorno pojavil na začetku devetnajstega stoletja kot *eksegetična šola* v Franciji in *zgodovinska šola prava* ter *pandektistika* v Nemčiji. Drugi se je kot odgovor na formalizem razvil v Franciji in Nemčiji v treh velikih smereh: *interesna jurisprudenca*, *teleološka (namenska) jurisprudenca* in *šola svobodna prava.*

Ti dve veliki pojmovanji razlaganja (formalizem in proti-formalizem) vseskozi srečujemo tudi v novoveški in sodobni pravni kulturi. Gre za zelo zapleteno razmerje, v katerem kriza enega zelo pogosto pomeni napredovanje drugega. Vzroki teh zapletenih nihanj niso le pravni. Povezani so tudi z močno pogojenostjo številnih možnih vlog in nalog pravnika-razlagalca ter sodnika-razlagalca od spremljevalnega konteksta. In ko govorimo o »spremljevalnem kontekstu«, se nanašamo na prvine institucionalnega, družbeno-ekonomskega, kulturnega in etično-političnega značaja. Gre za položaj oziroma okoliščine, v katerih se nahaja predmet pravnega odločanja, in z njimi povezane spremembe, ki lahko izzovejo verižne odzive v pravni kulturi in s tem tudi v načinu dojemanja vloge pravnega razlaganja. Ti odzivi lahko potekajo v dveh nasprotnih smereh (pri tem se lahko pojavijo tudi sočasno in si v danem kontekstu medsebojno nasprotujejo). Spremembam lahko nasprotujejo in skušajo ubraniti izvorni namen zakonodajalca glede razvijajočih se družbenih razmerij (v takšnih primerih bodo prevladale formalistične težnje). Lahko pa so spremembam naklonjene in/ali jih skušajo usmerjati, kar pomeni, da cenijo prvine pretrganosti in prekinitve z izvornim položajem (v tem primeru bodo prevladale proti-formalistične težnje). Tako lahko na primer v nekem kontekstu pride do kulturne spremembe v zvezi z razumevanjem, razlaganjem in uporabo ustavnega besedila (to se je v zadnjih desetletjih dogajalo v naši državi v *postopku konstitucionalizacije*, kot temu pravi Guastini); do spremembe družbeno-ekonomskih odnosov pa do etične spremembe – tj. spremembe v prevladujoči družbeni etiki neke politične skupnosti in tako naprej.

Če pogledamo iz zgodovinskega zornega kota, je treba dodati, da formalistična pojmovanja na splošno stopijo v ospredje v obdobjih, ki so kulturno-zgodovinsko blizu stopnjam, v katerih gre določen pravni red skozi pomembne trenutke uzakonjanja ali vsaj večjega pravnega prenavljanja. V takšnih okoliščinah lahko med pravniki, sodniki in zakonodajalcem brez težav najdemo kar največjo ubranost oziroma »skupinski občutek«. Poleg tega pravniki v postopkih prenavljanja vedno nastopajo kot glavni igralci, ki tesno sodelujejo z zakonodajalcem. Tako je bilo v primeru *eksegetične šole*, kjer so pravniki pomagali spisati Napoleonov zakonik, ki so ga nato razlagali. Temu »skupinskemu občutku« pa je usojeno, da se sooči s krizo, ki nastane z zgodovinskim in kulturnim odmikanjem od obdobja uzakonjanja. Družbeno-ekonomska resničnost namreč proizvaja vedno nove pojave, ki jih obstoječi normativni okvir morda ni predvidel.

Skratka, ustvarja se vedno večji razkorak med »pravno kulturo uzakonitev« in »sodobno pravno kulturo«. Kot je razvidno, je prav to ugodno ozračje za zmago proti-formalističnih stališč, po katerih pravnik in sodnik lahko razrešujeta (ali celo morata razreševati) razlagalne probleme in probleme uporabljanja prava bolj s preučevanjem družbeno-ekonomske resničnosti kakor z osredotočanjem na normativni red.

Če se obrnemo k razmerju med razlaganjem in pomenom, ki v naši analizi predstavlja posebno mesto nanašanja, lahko podamo opredelitvi prvih dveh pojmovanj, s katerima se tukaj ukvarjamo. Iz tega zornega kota *razlagalni formalizem* (v izvornih različicah) v osnovi predpostavlja, da je pripisovanje pomena določilom v svojem pravem smislu *hipno odkritje obstoječega pomena*, kakor koli že do njega pridemo; v vsakem primeru pa gre (v skladu z najnovejšimi različicami) za predhodno in neproblematično prepoznavanje nekega trdnega semantičnega jedra, ki obstaja neodvisno od vseh prilagoditev, povezanih z različnimi konteksti, v katerih se neko določilo uporablja.

Iz strogo semantičnega zornega kota je nauk o pomenu, ki je tiho predpostavljen v teh usmeritvah, posebej uglašen z danes prevladujočim (čeprav ne edinim zveličavnim) semantičnim naukom, ki ga lahko označimo kot *literalizem.*[21] V skladu s tem semantičnim pojmovanjem je na vseh področjih, kjer se poslužujemo razlaganja besedil in govorjene besede, mogoče dobiti celotni pomen stavka z »razlaganjem«. Gre za pomen, ki obstaja pred konkretno rabo v sporazumevanju; za pomen, ki je predmet nekakšnega »hipnega dejanja razumevanja« (to stališče, kot bomo videli, predpostavlja *statično* videnje razlage). To pomeni, da se *pragmatične prvine* (povezane z rabo sporazumevanja preko govornih dejanjih, s katerimi se pomen izraža in sprejema) ne prepletajo z izvorno semantično razsežnostjo.

V nasprotju s tem *razlagalni proti-formalizem* predpostavlja, da je pripisovanje pomena določilu v pravem smislu, *ustvarjanje novega pomena*. Različni proti-formalistični nauki se potem razlikujejo glede na sorazmerno veliko težo, ki jo pripisujejo ustvarjalni prvini razlaganja, in glede na sorazmerno majhno težo omejitev, ki jih razlagalcu postavlja izhodiščno besedilo. Čeprav izražena na različne načine, je osrednja misel v vseh primerih enaka: odločilni trenutek razlaganja je »hipno ustvarjenje« pomena v luči konteksta, v katerega je umeščen razlagalec (še najbolj med vsemi sodnik). Gre za kontekst, ki z vsemi svojimi spremenljivkami (etično-politične ideologije, ki so prisotne na nekem področju, temeljni družbeno-ekonomski položaj, vpleteni interesi) predstavlja veliko večjo omejitev kot besedilo zadevne določbe, na podlagi katere naj bi odločili v primeru, ki je pred nami.

21 Pri navezovanju na ta nauk glej François Recanati, *Literal Meaning*, Cambridge, Cambridge University Press, 2004, 3–4.

Iz semantičnega zornega kota stoji proti-formalizem (v svojih najbolj skrajnih različicah) na stališču, da izhodiščno pravno besedilo za razlagalca ne predstavlja znatne omejitve, razen kot ustrezno preoblikovana prvina za *ex-post* posredovanje pri utemeljevanju semantične izbire, ki je sicer nastala na drugi podlagi. Kar lahko predstavlja omejitev za razlagalca, so predhodne razlage stavka (toliko bolj, če so »avtoritativne«), ki je predmet razlaganja. Vendar pomen določila (v strogem smislu) ustvari razlagalec v neke vrste »hipnem postopku« na podlagi omejitev in znamenj, ki pridejo iz konteksta. Kot pri formalističnih stališčih, je tudi tukaj pomembno, da opazimo, da ta pojmovanja (sicer pogosto tiho), poustvarjajo določeno semantično pojmovanje »v ozadju«. Če pozorno pogledamo, vidimo, da imajo veliko skupnih točk z danes zelo vplivnim sodobnim pojmovanjem imenovanim *skrajni kontekstualizem*.[22] To pojmovanje zavrača sam pojem jezikovnega pomena kot nečesa, kar obstaja pred oddajo in sprejemom sporočila. Pred prvim razlagalnim dejanjem obstaja le neke vrste »zbirka predhodnega uporabljanja« jezikovnih izrazov v podobnih kontekstih, ki jo je v nekem smislu legitimirala jezikovna skupnost (in je zato »avtoritativna«). Vendar pa pred začetkom sporočilne izmenjave ni nikakršnih skupnih pomenov, ki jih delijo vsi sogovorniki. Pri končni analizi je le pragmatika tista, ki odloči o pomenu izrazov in stavkov.

Ob omenjanju tradicionalnih različic *eklektičnih naukov* je treba začeti pri oznaki, ki jo je o njih podal Hart v svoji knjigi *Koncept prava*[23] na začetku šestdesetih let 20. stoletja. Hart poskuša posredovati med nasprotujočima si pojmovanjema formalizma in proti-formalizma: razlaganje je vsebinsko umeščeno tako v razsežnost *odkrivanja* kot v razsežnost *ustvarjanja*, vendar vedno alternativno v eno ali v drugo. Tako Hart pravi, da je v nekaterih primerih (»lahki primeri«) pri razlaganju prisotna izključno razsežnost *odkrivanja*, medtem ko je v drugih primerih (»težki primeri«) vedno prisotna izključno razsežnost *ustvarjanja*. Vsekakor pa je zelo jasen glede tega, da prisotnost ene razsežnosti izključuje prisotnost druge.

To lahko bolj jasno ponazorimo s primerom. Predpostavimo, da (popolnoma veljaven) odlok mestnega sveta določa, da »je vozilom prepovedana vožnja v občinskih parkih«. Na vhodu parka, ki ga vsekakor lahko označimo kot »občinski park« (obstaja seznam takšnih parkov), stoji policist, ki je zadolžen za nadzor nad spoštovanjem omenjenega mestnega odloka. Policist mora torej odlok razlagati, če ga hoče uporabiti v vseh možnih bodočih konkretnih primerih, tj. v primerih, v katerih bosta vstop ali zavrnitev vstopa v park odvisna tudi

22 Za dobro analizo *radikalnega kontekstualizma* glej Claudia Bianchi, *La dipendenza contestuale. Per una teoria pragmatica del significato*, Neapelj, ESI, 2001, 118–19, 282–283, 304–355. Pomemben primer stališč radikalnega kontekstualizma predstavlja Ronald W. Langacker, *Foundations of Cognitive Grammar*, Stanford, Stanford University Press, 1987 (1. zvezek) in 1991 (2. zvezek).

23 Hart 1994 (op. 6), 8. poglavje.

(in predvsem) od njegove razlage izraza »vozilo«. Po Hartu policist v celi vrsti netežavnih konkretnih primerov (lahki primeri) ne bo imel posebnih težav razlagalnega značaja. Gre za primere, v katerih bodo ljudje spraševali za dovoljenje za vstop z avtomobili ali motornimi kolesi. V vseh teh primerih bo, skratka, v skladu s Hartovim pristopom k eklektičnemu ali mešanemu nauku policist-sodnik *odkril že prej obstoječi pomen* določila-odloka in tako z lahkoto našel rešitev v konkretnem primeru. Tukaj razlaga splošnega izraza »vozilo« leži v *jedru gotovosti*. Skratka, v teh primerih bi razlagalni formalizem upravičeno govoril o »odkritju predhodno obstoječega pomena«.

Vendar pa bi se lahko pojavila cela vrsta primerov, v katerih rešitev ne bi bila tako preprosta. Predpostavimo na primer, da bi za vstop v park zaprosil deček z manjšim avtomobilom na pedala. To je predmet, ki bi bil v običajnem jeziku navadno obravnavan kot vozilo, pa vendar v zvezi z odlokom to morda ne bi bil, zlasti če imamo v mislih *namen* odloka (domnevamo lahko, da je to »varovanje reda, miru ter varnosti ljudi v parku«). Položaj bi lahko bil še bolj zapleten, če bi bil dečkov avtomobil na »električni pogon« in zato precej hrupen, kljub temu pa ne bi bil zmožen poškodovati ljudi, ki se sprehajajo po parku.

Za Harta, torej, v takšnih primerih (»težki primeri«) pravne norme ne nudijo jasne usmeritve. Razlagalec mora opraviti razlagalno izbiro po prostem preudarku (ta vsekakor ni samovoljna, saj je podprta z argumenti), ker se pomen spornega izraza nahaja v *obrobnem (zasenčenem) delu*. V primeru »dečkovega avtomobila na električni pogon« se policist-razlagalec znajde v položaju, skratka, kjer mora uskladiti nasprotujoče si zahteve (»pravica prostega gibanja«, »pravica vsakogar, da ga ne ovirajo pri svobodnem gibanju«, »zahteva po varnosti ljudi v parku« in tako naprej). Gre za položaj, v katerem bi lahko popolna prevlada ene od zahtev ali enega od ciljev pomenila popolno žrtvovanje ostalih. Način, kako bo sodnik opravil *usklajevanje* (posredovanje med številnimi zahtevami) ali *tehtanje* (žrtvovanje nekaterih od njih v korist drugih), bo očitno določil pomen, ki ga bo dal izrazu »vozilo«. Z drugimi besedami, če otroški avtomobil obravnavamo kot »vozilo«, potem ne sme vstopiti v park; če, nasprotno, ni obravnavan na ta način, lahko vstopi.

V tej drugi vrsti primerov bi imel za Harta namesto tega prav razlagalni proti-formalizem: sodnik bi v nekem smislu »ustvaril novo pravo za konkretni primer«, čeprav v šibkem smislu, torej kot izbiro ene od razpoložljivih razlagalnih možnosti v zvezi z zadevnim odlokom.

Zadaj končno razpolagamo z vsemi sestavinami mešanega nauka, kot ga je tradicionalno oblikoval Hart. Razlaganje je tukaj oboje – »odkrivanje« in »ustvarjanje«, vendar nikoli oboje istočasno. *Razlaganje odkriva pomene v lahkih primerih in ustvarja nove pomene v težkih primerih*.

Kot smo to storili pri ostalih dveh pojmovanjih, je morda tudi v tem primeru koristno ta nauk preučiti v luči najnovejše razprave v sodobnih semantičnih naukih. In videti je, kot da se omenjeni mešani nauk tiho naslanja na najnovejše in dodelane različice *literalizma* (*sinkretični pogled, indeksikalizem*)[24]. Pri teh gre prepoznavanje obstoja celotnega pomena stavka, ki obstaja že pred razlaganjem, z roko v roki s priznavanjem nujne vloge dokončanja in obogatitve (postopek, ki mu v semantičnem žargonu pravimo »zasičenje«)[25] pomena samega stavka skozi pragmatične postopke.

5 SKUPNE SEMANTIČNE PREDPOSTAVKE TREH POJMOVANJ

Poleg ločenih očitkov, ki jih lahko naslovimo na vsakega od teh pojmovanj pravnega razlaganja, obstaja še druga vrsta kritike, ki je morda še bolj uničujoča za vsa tri, saj napada predpostavko »v ozadnju«, za katero se zdi, da je skupna vsem trem pojmovanjem, kljub velikim razlikam med njimi. Hočem reči, da si kljub nasprotnemu videzu trije pristopi k razlaganju navsezadnje niso nasprotni prav v vseh pogledih. V skladu s pogledom o nujni povezavi med pomenom in razlaganjem, ki smo ga izbrali tukaj, si dejansko vsa tri pojmovanja (z vidika nauka o razlaganju), ne glede na velike teoretične razlike med njimi, delijo način razumevanja vezi med razlaganjem in določbo, ki je predmet razlaganja. Gre za pojmovanje razlaganja, ki (iz semantičnega zornega kota) izhaja iz določenega pogleda na »pomen« (*statični* pogled na pomen).

Ključno je, da v okviru nauka o razlaganju vsa tri pojmovanja zatrjujejo dvodelno nasprotje med »odkrivanjem« in »ustvarjanjem«, na temelju katerega ni nobene »tretje možnosti«: bodisi razlaganje »nekaj odkriva« ali, nasprotno, »nekaj ustvarja«, vendar nikoli ne more početi obojega hkrati. Iz semantičnega zornega kota izvira iz tega nasprotja *statični* pogled na pomen.

To je zelo pomembna ugotovitev, pri kateri se je vredno še nekaj časa pomuditi. S »statičnim pogledom na pomen« mislim na stališče, po katerem je pomen, pa naj bo »odkrit« (*formalizem*), »ustvarjen« (*proti-formalizem*) ali ponekod »odkrit« in drugje »ustvarjen« (*eklektični nauk*), v vsakem primeru nekaj, kar nastane »hipoma in v celoti« oziroma z »eno rešitvijo«. Skratka, pomen je viden kot neka tvarina, ki je *odkrita* ali *ustvarjena* »v celoti«, in ne kot izid *dinamičnega* postopka v »več stopnjah«, kar bom trdil kmalu. Pravzaprav nam prav pomanjkanje dinamičnega pogleda na razlaganje (»v različnih stopnjah«) onemogoča, da bi vpeljali pojmovanje, ki nosi obe omenjeni razsežnosti.

24 Dobro analizo obeh naukov lahko najdemo v Recanati 2004 (op. 21), 51–53, 85–89. Pomembno stališče indeksikalistov predstavlja Jason Stanley, *Language in Context. Selected Essays*, Oxford, Oxford University Press, 2007.

25 O tem pojavu glej ponovno Recanati 2004 (op. 21), 7 in nasl.

A vrnimo se k statičnemu pogledu na pomen in načinu, na katerega se ta odraža v treh tradicionalnih pojmovanjih. Če smo dejansko prepričani, da pomen odkrijemo, potem ga obravnavamo kot »tvarino«, ki obstaja pred razlagalno dejavnostjo (*formalizem*). Če drugače verjamemo, da je ustvarjen »iz nič« šele z razlaganjem, potem to tvarino obravnavamo, kot da je v celoti proizvod razlagalca (*proti-formalizem*). Niti mešani nauk (v svoji tradicionalni različici) ne more uiti tej zasnovi: omejuje se na dvodelno razlikovanje med primeri, v katerih je pomen odkrit, in primeri, v katerih je ustvarjen.

Prepričan sem, da noben od teh treh pristopov ne more ustrezno pojasniti tistega resnično značilnega vidika pravnega razlaganja (tudi razlaganja na splošno), ki ga predstavlja *hkratna navzočnost* obeh elementov, »odkrivanja« in »ustvarjanja«, in na katerega nas primerno opomni Dworkin.[26] Po mojem mnenju je prav to resnično zanimiv in značilen vidik razlagalne dejavnosti, še posebej takrat, ko se ta ukvarja z besedili (kot pravno razlaganje in literarna kritika).

Ta »statična« semantična predpostavka je glavna šibka točka, skupna formalizmu, proti-formalizmu in mešanemu nauku, ki izvira od Harta. Ta vidik pojmovanja pomena tem pojmovanjem razlaganja ne dopušča, da bi ustrezno pojasnile, kot sem omenil zgoraj, kaj je neodtujljiva značilnost razlagalne dejavnosti, in sicer v zvezi z nezmožnostjo biti popolnoma skrčena bodisi v način odkrivanja bodisi v način ustvarjanja. Razlagalna dejavnost dejansko deluje v obeh načinih in sicer skozi *dinamični postopek* pripisovanja pomena določilom. Gre torej za postopek, ki poteka skozi različne stopnje in se dotakne obeh razsežnosti, odkrivanja in ustvarjanja. In prav ta vidik razlagalne dejavnosti ni zajet v tradicionalnih pogledih.

Da bi v celoti osvetlili to pomembno plat razlaganja, bom v nadaljevanju predlagal, da preidemo od *statičnega* k *dinamičnemu* pristopu k nauku o pomenu (in s tem tudi k nauku o razlaganju). Vendar bo treba zato gledati na pomen drugače, kot so ga oblikovali obravnavani pristopi. To pomeni, da bomo temu pojmu pripisali tri posebne značilnosti, ki se jih tradicionalna pojmovanja ne trudijo posebej poudariti. Pojem »pomen« je treba postaviti kot *stopnjevit* (sestavljen iz različnih stopenj) in *vključevalen* pojem (vključuje tako smisel kot nanosnik), ki se *oblikuje postopno* (to pomeni, da je pripisovanje pomena »postopek, ki poteka v več korakih«). Iz tega zornega kota dobimo torej dve osnovni zamisli novega pogleda. Prvič, da pomen ni proizveden »hipoma in v celoti«, temveč je izid postopka, ki poteka v več korakih, oziroma postopka, ki ga je mogoče v vsakem primeru analitično razstaviti na več korakov (iz psihološkega zornega kota pa lahko ta postopek v razlagalčevih mislih traja le en hip). Drugič, da se v tem postopku pomen določbe postopoma izjasnjuje, kakor hitro

26 Ronald Dworkin, *A Matter of Principle*, Cambridge Massachusetts, Harvard University Press, 1985, 146–147.

je v stiku s primeri konkretne uporabe (pred sodniki) ali »vzorčnimi primeri« (pred pravniki).

Oznaka »sekvenčni monizem« lahko vsekakor služi kot ustrezno poimenovanje mojega pogleda. Gre za nadaljnje poimenovanje v povezavi z oznako »pragmatično usmerjeni«, ki jo bom predstavil v naslednjem delu. Opredelitev nauka kot *monističnega* precej dobro predstavi misel, da se (kot bomo videli) pomen določbe podrobneje oblikuje šele v razlagalnem postopku, ki sicer ostaja enoten, saj se začne pri skupni semantični osnovi. Če dodamo oznako »sekvenčni«, pa ustrezno poudarimo dejstvo, da se sicer pomen v teku postopka razlaganja oblikuje v več korakih, pri čemer dosega vedno višjo raven razčlenjenosti in konkretizacije. Poudariti pa je treba, da lahko postopek razčlenjevanja pomena ubere različne poti in se razraste v več (tudi medsebojno izključujočih) smereh.

Prav z analitično razgradnjo postopka postopnega oblikovanja pomena v več korakih uspemo razpršiti protislovnosti v zraku, ki jih lahko izzove dinamični pogled s tem, ko se zdi, da pri razlaganju zahteva hkratno navzočnost dejavnosti »odkrivanja« in »ustvarjanja«. Kot bomo videli v naslednjih razdelkih, pa se uspe pragmatično usmerjeni nauk temu očitku (ki bi bil zanj uničujoč) izogniti prav zato, ker zanika prisotnost obeh korakov *v istem trenutku*; namesto tega pa prizna, da pripadajo nekateri koraki pripisovanja pomena razsežnosti odkrivanja, medtem ko pripadajo drugi koraki razsežnosti ustvarjanja.

6 POGOJI ZA PRAGMATIČNO USMERJENI NAUK O POMENU

V tem delu in v naslednjem si bom prizadeval jasno oddaljiti od *statičnega* pristopa k pomenu, in sicer z razvijanjem drugačnega, *dinamičnega* semantičnega nauka, ki ga bom uporabil pri pravnem razlaganju. Izid tega bo *eklektični* ali *mešani* nauk o pravnem razlaganju, ki pa je vendar mišljen kot alternativa tradicionalnim eklektičnim naukom. V tem delu se bom ukvarjal s vprašanjem, katere pogoje mora izpolniti nauk o pomenu v zvezi s pravnim razlaganjem. V naslednjem delu pa bom poskusil podrobneje pojasniti glavne značilnosti takšnega nauka.

Nauk o pomenu, ki naj služil našim namenom, ne sme biti ustrezen le iz splošnega semantičnega zornega kota, temveč mora biti primeren tudi za pravno razlaganje. Za ta namen je treba torej predhodno napraviti vidno vrsto pogojev, ki jim mora zadostiti nauk o pomenu (tako iz semantičnega kot iz pravnega vidika), če hoče biti obravnavan kot sprejemljiv kandidat za semantični okvir nanašanja v zvezi z naukom o pravnem razlaganju. Zdaj bom predstavil tiste pogoje, za katere štejem, da morajo biti za ta namen *nujno izpolnjeni*.

Prvi, osnovni pogoj, da semantični nauk postane takšen okvir nanašanja, je polno priznavanje pojmovne zveze med pomenom in razlaganjem. Treba je, torej, da *nauk o razlaganju odkrito privzame določen nauk o pomenu* kot točko nanašanja za (normativno usmerjeno) rekonstrukcijsko raziskovanje razlagalnih praks, ki se odvijajo v kontekstu, izbranem kot področje našega raziskovanja (še posebej v kontekstu našega pravnega reda).

Drugi pogoj je, da naj bo sprejeti nauk o pomenu posebej *primeren* za pojasnjevanje označenih posebnosti pravnega jezika in razlagalne dejavnosti, ki se nanaša nanj, in naj ne bi bil le *zadosten* iz zornega kota splošnega semantičnega nauka. To pomeni najprej, (i) da mora omenjeni nauk o pomenu računati s tem, da je ta jezik predpisovalnega značaja in ima torej drugačno nalogo kot poročevalni jezik, po katerem so običajno oblikovani semantični nauki; (ii) da se ta jezik po nekaterih svojih značilnostih oddaljuje od *običajnega jezika*, ki je osnova za nanašanje *kontekstualističnih* naukov o pomenu, ki jim namenjam posebno pozornost; (iii) da je pravni jezik v vsakem primeru drugačen od *pogovornega jezika*, v katerem so izražena vsakdanja sporočila, ki so skoraj izključni predmet pozornosti samih kontekstualističnih naukov.

V zvezi z drugim pogojem smo se dotaknili pomembne točke, pri kateri se je vredno za trenutek pomuditi. Doslej smo brez posebne pazljivosti uporabljali besedo »kontekst«, čeprav ta predstavlja izredno pomembno prvino sodobnih semantičnih pojmovanj, pri katerih se navdihuje pričujoče besedilo (natančneje, gre za *kontekstualistična* pojmovanja). Zdaj pa je napočil trenutek, da podamo natančnejšo opredelitev tega pojma, ki je prikrojena pravnemu razlaganju. Iz tega zornega kota pomeni »kontekst« tiste podrobne in opredeljive vidike položaja oziroma okoliščin (predvsem določene posebne prostorske in časovne koordinate), v katere je vsakokrat umeščena oseba, ki prejme neko normativno sporočilo (razlagalec-pravnik in razlagalec-sodnik). Vredno je pojasniti, da na mestih, kjer govorimo o »položaju oziroma okoliščinah«, želimo zaobjeti oboje: poseben, *konkretni položaj* (*okoliščine*), v katerega je umeščen sodnik vsakokrat, ko odloča v posameznem primeru, ter *položaj oziroma okoliščine*, ki so le *predpostavljene*, *tipizirane* ali *postavljene kot pojmovni poskus* s strani razlagalca-pravnika.

Prej smo govorili o pomembnih razlikah med *pogovornim* in *pravnim razlaganjem*. Te razlike pa vendar niso tolikšne, da bi onemogočale uporabo kontekstualističnega pogleda kot semantične osnove za nauk o pomenu, ki je prikrojen pravnemu razlaganju. Velik del tega, kar kontekstualizem zatrjuje glede »govorčevega pomena«, se da zelo dobro uporabiti tudi glede »naslovnikovega pomena« oziroma »pomena naslovnika sporočila«. Res je, da so za kontekstualizem vsa govorna dejanja občutljiva na kontekst. Vendar pa se moramo pri pravnem razlaganju obrniti k občutljivosti na kontekst, v katerega je umeščen

»naslovnik« sporočila (razlagalec-sodnik ali razlagalec-pravnik) in ne sporočevalec (zakonodajalec).[27]

Tretji pogoj posebej zadeva eno od točk, ki smo jih omenili v zvezi z drugim pogojem. Gre za dejstvo, da je pravni jezik predpisovalen jezik, medtem ko jemljejo kontekstualistični semantični nauki kot privilegirano osnovo nanašanja v svojih analizah poročevalni (ali »opisni«) jezik. Če hočemo torej ta semantični nauk uporabiti za pravni jezik, moramo zatrjevati, da se težave v zvezi s semantično vsebino stavkov ne spremenijo bistveno, če preidemo od stavkov, ki imajo poročevalno nalogo (*trditve*), k stavkom s predpisovalno nalogo (*smernice*). In če zatrjujemo to, moramo po mojem mnenju absolutno nujno deliti tudi stališče, po katerem razlika med trditvijo in smernico, ki predstavljata isto semantično vsebino, ne leži v sami vsebini (nekateri ji pravijo *frastična,*[28] sam pa bom temu rekel *argument*), temveč v pragmatični nalogi, ki jo opravljata (v enem primeru v *poročevalni nalogi* in v drugem v *predpisovalni*). S to trditvijo z drugimi besedami potrdimo, da *predpisovalni pomen* pravzaprav ne obstaja.[29] Ista pomenska vsebina je lahko, glede na vrsto opravljenega govornega dejanja, *pragmatično oblikovana* bodisi kot trditev bodisi kot smernica. V pravoznanstvu temu pristopu, med drugimi, sledi *izrazno pojmovanje norm.*[30]

Četrti in zadnji pogoj za vzpostavitev nauka o pomenu, ki je posebej »prikrojen« pravnemu razlaganju, zadeva način razumevanja »pomena«. Natančneje, gre za vprašanje, ali lahko na pomen gledamo izključno z *znotraj-jezikovnega* vidika (v moji izrazju le kot *smisel*), kot to zahtevajo *notranja* pojmovanja; ali izključno z *zunaj-jezikovnega* vidika, torej z vidika razmerja »jezik-svet« (v mojem izrazju le kot *nanosnik*), kot to zahtevajo *zunanja* pojmovanja; ali naj, spet drugače, pomen razumemo, kot da vsebuje obe razsežnosti (*smisel* in *nanosnik*)? V zvezi z značilnostmi pragmatično usmerjenega nauka bomo to točko obravnavali v naslednjem delu.

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27 Francesca Poggi to točko ustrezno podčrta. Glej Francesca Poggi, Contesto e significato letterale, *Analisi e diritto* 2006, 196–203 (*www.giuri.unige.it/intro/dipist/digita/filo/testi/*).

28 Tukaj se očitno nanašamo na Richard M. Hare, *The Language of Morals*, London, Oxford University Press; ital. prevod *Il linguaggio della morale*, Rim, Ubaldini, 1968, 28–32.

29 To je stališče, ki ga deli veliko analitičnih filozofov (Strawson, Searle, Dummett, Kerner, Platts itd.), čeprav ga postavijo na drugačen način. Njihovo skupno izhodišče, vsaj o tem podroben vprašanju predstavlja Austinovo delo. Glej npr. John L. Austin, *Philosophical Papers* (1961), Oxford, Oxford University Press, 1970, 248–251. Glej tudi Michael Dummett, *Seas of Language*, Oxford, Clarendon Press, 1993, 122–123, in Mark Platts, *Ways of Meaning. An Introduction to Philosophy of Language*, London, Routledge & Kegan, 1979, 43.

30 O tem pojmovanju glej npr. Eugenio Bulyigin, Norms and Logic. Kelsen and Weinberger on the Ontology of Norms, *Law and Philosophy* (1985) 4 (2), 146–148.

7 ZNAČILNOSTI PRAGMATIČNO USMERJENEGA NAUKA

Zdaj bom orisal osnovne značilnosti pragmatično usmerjenega nauka o pomenu, posebej prikrojenega pravnemu razlaganju. Zaradi pojmovne povezave med »razlaganjem« in »pomenom« pa to pomeni tudi orisati značilnosti pragmatično usmerjenega nauka o pravnem razlaganju.

Najprej je treba pojasniti, v kakšnem smislu uporabljam oznako »pragmatično usmerjeni«.[31] Ta oznaka je mišljena, da bi poudarila pomemben vidik tega nauka, in sicer prav *nujnost*, da razlagalna dejavnost vedno in v vseh primerih *poteka znotraj konteksta* (v doslej uporabljenem pomenu). V odsotnosti tega ne moremo govoriti o postavitvi *celotnega pomena* določila, ki ga razlagamo. Skratka, *pragmatika* kot disciplina, ki preučuje učinke in vsakokratni kontekst sporazumevanja, daje potrebno usmeritev *semantiki* kot disciplini, ki preučuje običajni pomen besed.

Pri pragmatično usmerjenem nauku o pomenu ima kontekst dvojno vlogo. Najprej gre za kontekst, ki ga lahko poimenujemo »obrobni« kontekst ali kontekst »v ozadju«. Ta predstavlja zbir osnovnih podatkov o naravnih dejstvih (na primer o določenih naravnih zakonih), kulturnih dejstvih (na primer o prisotnosti določenih institutov in določenih družbenih navad), skupnih praksah o tem, kako določene stvari »izvesti pravilno« in tako naprej, ki jih delijo vsi (vsaj minimalno) sposobni člani neke jezikovne skupnosti. Ti osnovni podatki pomagajo utrditi nekatere ustaljene pomene glede naših trditev.[32] Če na primer svojemu služabniku naročim, naj »poreže travo«, bo služabnik na podlagi teh predpostavk »v ozadju« vsaj v normalnih primerih brez vsakega dvoma razumel, da način, na katerega se poreže trava (na primer s kosilnico), ni enak načinu, na katerega »porežemo nohte« (s škarjami). Služabnik to razume, čeprav v običajnem pomenu besede »porezati«, ki je vključena v mojem naročilu, ni ničesar, kar bi ga usmerilo k prvemu namesto k drugemu načinu ravnanja. Vendar pa bi za spremembo pomena zadevnega izraza zadostovalo, če bi spremenili »običajni kontekst v ozadju«. To lahko dosežemo (in kontekstualistično usmerjeni filozofi jezika to počnejo) tudi skozi »pojmovne poskuse«, ki služijo za spreminjanje nekaterih prvin konteksta »v ozadju« (po možnosti na neobičajen način). Tako, če nadaljujem z istim primerom, lahko nekomu naročim, naj »poreže travo« v kontekstu, kjer je zemlja že popolnoma brez zelenice in

31 Oznako »pragmatično usmerjeni nauk« na podoben način uporabljata tudi Dascal in Wroblewski. Marcelo Dascal, Jerzy Wróblewski, Transparency and Doubt: Understanding and Interpretation in Pragmatics and in Law, *Law and Philosophy* (1988) 7, 203–224.

32 Za dobro znano analizo *konteksta »v ozadju«,* glej John Searle, *Expression and Meaning. Studies in the Theory of Speech*, Cambridge, Cambridge University Press, 1979, 117–131, ter The Background of Meaning, v John Searle, Ferenc Kiefer in Manfre Bierwish (ur.), *Speech Act Theory and Pragmatics*, Dordrecht, Springer, 1980, 221–232.

ostajajo le še drobni in občutljivi šopi trave, ki jo je treba previdno porezati s škarjami, če jo želimo ohraniti. Oznaka »porezati travo« bi imela tukaj kontekstualno drugačen pomen.

Bistvo tega premišljevanja je mogoče povzeti na sledeči način: »ni izrazov in trditev, ki bi bile popolnoma izvzete iz konteksta; brez kontekstov nanašanja in govornih dejanj ostajajo besede, ki jih izgovarjamo in pišemo, popolnoma inertne.«

Poleg obrobnega konteksta, obstaja še kontekst v drugem smislu (predstavil sem ga že v predhodnem poglavju), ki uporablja tudi izraz »položajni kontekst«. Nekateri filozofi jezika pravijo temu tudi »osrednji kontekst«. Ta zadeva »natančne, lokalne in opredeljive vidike«, ki jih mora upoštevati naslovnik nekega sporočila, da lahko posameznim stavkom pripiše celotni pomen.[33]

V primeru »vozil v parku« dobi izraz »vozilo« celotni pomen šele skozi konkretne (resnične ali namišljene) položaje oziroma okoliščine, in sicer z govornim dejanjem, ki proizvede izjavo, s katero se zadevni stavek izrazi na kontekstualno opredeljujoč način. To ovrže tudi vse dvome glede prepoznavanja, ali posamični predmeti pripadajo oziroma ne pripadajo »skupini vozil« (»ali je otroški avtomobil na pedala vozilo ali ne?«).

V zaključku teh obravnavanj je vredno poudariti, da je lahko iz zornega kota tega nauka celotni pomen nekega stavka proizveden le z združenim posredovanjem *obrobnega* in *osrednjega konteksta*. Pred tem imamo kot začetno osnovo le semantične *okvire* ali *sheme* pomenov. To so *običajni pomeni* posameznih izrazov v nekem stavku, ki sestavljajo okvir tega, kar hočemo povedati. Gre za pomensko določena mesta, ki predstavljajo tudi precejšnjo omejitev za postopek razčlenjevanja in konkretizacije, ki nas bo pripeljal do celotnega pomena. Vendar, kot sem rekel, dobimo celotni pomen le s posamičnim govornim dejanjem, ki proizvede izjavo stavka s tem, ko ga umesti v kontekst.

Poskusimo zdaj orisati tri osnovne značilnosti tega pristopa k pomenu. Vendar pa je treba najprej povedati nekaj več o splošnejši oznaki, ki smo jo pripisali temu nauku, ko smo ga v nasprotju s *statičnim* pristopom označili kot *dinamičnega*. V tem smislu je treba pojasniti, da gleda ta nauk na *postopek jezikovnega sporazumevanja* kot na temeljno razsežnost, na katero se je treba nasloniti, če hočemo razumeti pojem pomen. Gre torej za pojmovanje, ki naslavlja, prvič, *subjekte sporazumevanja* (sporočevalce in naslovnike) ter drugič, in to je še pomembneje, *kontekst*, v katerem se sporazumevanje odvija. Iz tega zornega kota pomen ni umeščen niti v abstraktno in brezčasno *logično razsežnost* niti v *psihološko ali miselno razsežnost*; kot bi bil *tertium quid* med jezikom, v katerem poteka sporazumevanje in predmeti, o katerih ta govori. Kot bomo jasneje videli v nadaljevanju, soobstajata pri pomenu obe razsežnosti postopka jezikovnega

33 O razlikovanju med *obrobnim* in *osrednjim kontekstom* glej Bianchi 2001 (op. 22), 268–271.

sporočanja: uporabljeno jezikovno orodje (*smisel*) in predmeti, na katere se pri samem sporočanju nanašamo (*nanosnik*).

Kar sem povedal; nakazuje na določeno (iz)oblikovanost nauka o pomenu. Glede na to (iz)oblikovanost ni cilj tega nauka, da bi *statično* opisal in razložil tvarino »pomena« skupaj z njenimi lastnostmi, temveč da *dinamično* pojasni *vrsto veščin in sposobnosti, ki so povezane s proizvajanjem, razumevanjem in razlaganjem pomenov*.[34] Očitno je, da ima v pragmatično usmerjenemu pogledu *dinamična* razsežnost, ki je povezana z raziskovanjem nastajanja in/ali pripisovanja pomenov, prednost pred *statično* razsežnostjo, ki je povezana z raziskovanjem *narave pomena* (»kaj je« pomena). Druga razsežnost je tista, ki je v nekem smislu odvisna od prve.[35]

Na podlagi pravkar povedanega lahko trdimo, da si bo ta nauk prizadeval preseči umetno razdvojenost med »odkrivanjem« in »ustvarjanjem«, ki obstaja v tradicionalnih pojmovanjih pravnega razlaganja. Te razdvojenosti v resnici ne izzove nobeno od treh pojmovanj, ki smo jih obravnavali v prejšnjem poglavju. Osnovna misel za tem predlogom je, da je mogoče v okviru *dinamičnega* nauka o pomenu stati na precej razumnem stališču, da je pravno razlaganje »mešanica odkrivanja in ustvarjanja«. To je mogoče doseči na popolnoma neprotisloven način, saj sta v postopku pripisovanja pomena res prisotni obe razsežnosti, tako razsežnost odkrivanja kot ustvarjanja, vendar *ne istočasno*, temveč v različnih korakih; torej v enem ali drugem od različnih korakov (te bomo preučili v nadaljevanju poglavja), v katerih se ta postopek *dinamično* odraža.

Iz zgoraj orisanega dinamičnega pristopa izhajajo tri osnovne značilnosti, ki jih je treba dodeliti pojmu pomen, in ki so posebej primerne za nauk o pravnem razlaganju.

Prvič, pomen je *stopnjevit* pojem, oblikovan na več različnih ravneh;[36] drugič, gre za *vključevalni* pojem, ki vključuje znotraj-jezikovno razsežnost (*smisel*) in razsežnost razmerja »jezik-svet« (*nanosnik*); tretjič, gre za pojem, ki vključu-

34 To stališče dobro poudari Michael Dummett, What is a Theory of Meaning? (II), v Gareth Evans in John McDowell (ur.), *Truth and Meaning. Essays in Semantics*, Oxford, Clarendon Press, 1976, 69–72. Glej tudi Paul Grice, *Studies in the Ways of Words*, Harvard, Harvard University Press, 1989, 25 in nasl.

35 Za relativno nov, splošni pragmatični pristop k filozofiji jezika glej Robert Brandom, *Making it Explicit. Reasoning, Representing and Discursive Commitment*, Cambridge, Harvard University Press, 1994.

36 Stališče, da ima pomen več razsežnosti ali plasti, je široko sprejeto v filozofiji jezika. Glej npr. Mary Hesse, *Revolutions and Reconstructions in the Philosophy of Science*, Brighton, Harvester Press, 1980, 113, in Hilary Putnam, *Mind, Language and Reality. Philosophical Papers. Vol. II*, Cambridge, Cambridge University Press, 1975, 246, 268–269. Vendar v tem prispevku sledim zlasti shemi, ki jo je predstavila Ruth Kempson, *Semantic Theory*, Cambridge, Cambridge University Press, 1977, 11 in nasl.

je *postopno oblikovanje* pomena, tj. vključuje pomen, ki ni proizveden »hipoma in v celoti«, temveč v zapletenem postopku, ki zajema več korakov.[37]

V tem delu se bomo ukvarjali s prvo od omenjenih značilnosti, v naslednjem z drugo in v zadnjem delu s tretjo značilnostjo. Zdaj pa je čas, da razločimo (še) tri plasti pomena: pomen *v širšem smislu*, pomen *v ožjem smislu* in pomen *v šibkem smislu*.

Na prvi ravni je *pomen v širšem smislu*, kot lahko temu rečemo. To je splošni pomen razlaganega stavka (saj, kot smo povedali, celotnega pomena pred razlaganjem ni), ki ga vidimo kot orodje, s katerim sporočamo nekaj določnega. Na tej ravni je treba torej pomen razumeti kot *samostojno vsoto sporočanja*, ki jo lahko z razlaganjem izpeljemo iz stavka.[38] S to opredelitvijo se nanašam na *vse, kar je bilo preneseno s sporočilom, vsebovanim v stavku*. Pri tem je pomembno, da opazimo, da na tej, zelo splošni ravni *pomen* nekega stavka (v smislu celotnega sporočila, ki ga stavek izraža) vključuje tudi *funkcijo*.

Na drugi ravni je *pomen v ožjem smislu*. To je *predmet stavka*, njegova semantična vsebina, ki je izpeljana z razlaganjem, pri čemer postavimo v oklepaje pragmatično prvino, povezano s funkcijo. Kot smo že povedali, je nujno na tej ravni jasno ločiti pomen in funkcijo. Prav tukaj, skratka, morata biti ti dve prvini razdruženi: pomen v ožjem smislu (kot *predmet*) mora biti obravnavan neodvisno od funkcije, čeprav v nekem smislu z njo tudi povezano.

Tretjo raven predstavlja pomen v *šibkem smislu*. To je pomen posameznih besed in predstav, ki jih te nakazujejo. Te besede in predstave nam skozi razlagalno dejavnost pomagajo proizvesti celotni pomen (morda enega od več možnih pomenov) stavka (v našem primeru: pravnega stavka). Ta, tretja raven pomena; je označena za »šibko« zato, ker je v celoti jasno, da pomen posameznih besed, preden se začne razlagalni postopek, ne izraža celotnega sporočila. Vendar to ne pomeni, da posamezni izrazi, ki so del nekega stavka, nimajo nikakršnega pomena. Kot bomo videli, imajo ti izrazi *osnovne običajne pomene,* kot izhajajo iz jezikovnih običajev, ki jih je privzel zadevni jezik in so v skladu s tem vključeni v slovarje. Ti *šibki pomeni* predstavljajo skupno jezikovno ozadje usposobljenih govorcev nekega naravnega jezika (in tehniziranega jezika, kakršen je pravni jezik). Brez tega skupnega ozadja si težko predstavljamo, kako govorci nekega jezika drug drugega razumejo in se skupaj sporazumevajo. Brez tega bi bilo sporazumevanje vedno »skok v temo«.

V našem primeru ima beseda »vozilo« iz odloka šibek osnovni pomen, ki bolj ali manj ustreza temu, kar lahko v slovarju najdemo pod vnosom, ki se nanaša na to besedo. Skratka, kar bi našli, je neke vrste osnovna opredelitev, ki

37 Med drugimi se s tem stališčem strinja Mauro Barberis, Il sacro testo. L'interpretazizne giuridica fra ermeneutica e pragmatica, *Ars interpretandi* (1999), 282–289.

38 Glej Giovanni Tarello, *Diritto, enunciati, usi: studi di teoria e metateoria del diritto,* Bologna, Il Mulino, 1974, 146.

gre nekako takole: »vozilo je predmet s kolesi in na lastni pogon, z njim lahko prevažamo ljudi ali stvari«. Po možnosti bi ob tem našli tudi kakšno podobo, ki predstavlja tovrstne predmete (na primer sliko avtomobila).

Pomembno je poudariti, da so besede, ki so najbolj zanimive za pravno razlaganje, (iz)oblikovane kot *splošni opisni izrazi*.[39] »Vozilo« je ena od takšnih besed, vendar lahko enako rečemo tudi za bolj zapletene sestave, kot je besedna zveza »državno premoženje«, ali tiste, ki terjajo vrednostno oceno, kot je »spodobnost v običajnem smislu«. Pomembno je pojasniti še, da splošni opisni izrazi nakazujejo *vrsto* ali (zbirne) *pojme* in imajo zato razpon, ki obsega več kot le en sam predmet.

8 SMISEL IN NANOSNIK

Pri pomenu v šibkem smislu bom torej razlikoval dve razsežnosti, *smisel* in *nanosnik*. Kot je bilo že rečeno, bom na ta način vpeljal *vključevalni* pojem[40] pomena posameznih besed, ki ima *dvojno* naravo. Kot sem rekel, gre za pojmovanje, ki razlikuje med dvema *samostojnima* prvinama te plasti pomena (čeprav obstaja med njima razmerje vzajemnega vplivanja), ki ju bomo zelo na kratko in shematično analizirali v nadaljevanju. Ti prvini sta: (i) *smisel*, ki zadeva *znotraj-jezikovno razsežnost* pomena in s tem povezane veščine in sposobnosti (zmožnost razumeti in govoriti kak jezik), ter (ii) *nanosnik*, ki zadeva *razmerje med jezikom in stvarnostjo* ter s tem povezane veščine in sposobnosti glede povezovanja med jezikom in svetom (v primeru, kjer je nanosnik izražen v splošnih oznakah, tj. oznakah po skupini, po vrsti in podobno).

Za nauk o pravnem razlaganju je izredno pomembno, da sprejmemo vključevalni pristop k nauku o pomenu. Takšen pristop nam po eni strani omogoča (v mejah, v katerih priznava – delno – samostojnost razsežnosti smisla), da v semantičnem ključu rekonstruiramo zapletene razlagalne posege, ki jih izvajajo pravniki, kadar se ukvarjajo z zakonodajalčevimi izrazi, raziskujejo njihove sistemske povezave z drugimi izrazi v zakonskem jeziku in gradijo zapleteno mrežo pravnih pojmov. Po drugi strani pa nam omenjeni pristop omogoča tudi (v mejah, v katerih je razsežnost nanosnika vključena v pomen), da se izognemo vsakršnemu prelomu med tem »notranjim« delom pravnikov in zvezo s konkretnimi primeri (ali natančneje: z nanašanjem na predmete in dogodke, ki ponazarjajo konkretne primere). Poleg tega nam privzetje vključevalnega pojmovanja pomena omogoči, da pridemo do pomembnih ugotovitev glede nauka o razlaganju, ki pa jih lahko tukaj zaradi pomanjkanja prostora le omenimo. Takšno pojmovanje pomena nam dejansko omogoča prepoznati, prvič, da ni

39 Glej Tarello 1974 (op. 38), 223.

40 V zvezi z naukom o pomenu uporablja besedo »vključevalni« Hesse 1980 (op. 36), 113.

nikakršne jasne ločnice med »znanstvenim razlaganjem« (izvajajo ga pravniki) in »praktičnim razlaganjem« (tega izvajajo sodniki), temveč (če sploh kaj) obstaja med njima v osnovi močna homogenost; drugič, omogoča nam, da se izognemo močnemu pojmovnemu prelomu med razlaganjem in uporabljanjem prava – ti dejavnosti je namreč mogoče videti kot dva koraka enega postopka, vsaj če ga rekonstruiramo po semantičnem ključu.

Uporabno izhodišče za bolj jasno razumevanje razlikovanja med tema razsežnostma pomena je, da si poskusimo zamisliti dve različni vrsti možnih vprašanj, ki jih lahko tudi na ravni običajnega jezika zastavimo glede pomena neke besede ali pojma, ki ga beseda nakazuje. Intuitivno ni težko ugotoviti, da sta to dve različni vprašanji, ki porajata dve različni vrsti problemov.

Prvo vprašanje zadeva prav *smisel* besede ali pojma. Oblikovati ga je mogoče takole: »*Kaj* beseda ali pojem *pomeni*?«

Drugo vprašanje, drugače, zadeva *nanosnik* besede ali pojma. Oblikujemo ga lahko na sledeči način: »*Na kaj se* beseda ali pojem *nanaša*?«

Začel bom s kratko analizo *smisla*. V skladu s *pragmatičnim in dinamičnim* pogledom na jezik kot orodje sporazumevanja – in z videnjem pomena kot *proizvoda razlaganja* – moje raziskovanje *smisla* za osnovni tematski sklop ne bo vzelo vprašanja »Kaj je tvarina, ki ji pravimo *smisel?*« – morda posredujoč med mislijo in resničnostjo, torej med jezikom in predmeti (pri tradicionalnem, *statičnem* pogledu na pomen in razlaganje); temveč vprašanje »Kaj pomeni razumeti smisel neke besede ali pojma?«.

»Razumeti smisel jezikovnih tvarin« pa pomeni, da moramo izkazati posebno *sposobnost* tako na ravni fran. *langue* (naravni jezik, ki se trenutno govori v tej skupnosti) kot na ravni fran. *langage*. Poskusimo zdaj ti dve ravni nekoliko bolj jasno razmejiti.

»Razumeti smisel« na ravni fran. *langue* pomeni, da izkažemo zmožnost pravilno uporabljati besede jezika, ob predpostavki, seveda, da je njihov pomen znan iz zornega kota pojmov (v tem jeziku), ki jih te besede sooznačujejo. To pomeni torej, da smo zmožni pravilno izvesti ustrezne *zamenjave* besed, katerih pomen ni znan, z vstavljanjem *sopomenk* z znanim pomenom. Pomislimo na primer na tujca, ki ne razume stavka »Mario je samski«, ker ne pozna pomena besede »samski« v tem fran. *langue*. Tukaj pojasnitev smisla pomeni torej zamenjavo te besede ali rekla z njeno oziroma njegovo *sopomenko* (»neporočen«), katere smisel je sicer poznan.

»Razumeti smisel« na ravni fran. *langage* pomeni zmožnost, da osvojimo in/ali proizvedemo celo vrsto domnev glede značilnosti oziroma lastnosti predmetov, ki so zajeti s pomenskim obsegom določenih splošnih izrazov. Gre za domneve, ki nastanejo s posredovanjem različnih vrst *opredelitev* teh splošnih izrazov. Te domneve lahko zadevajo (i) *začetni korak* razlaganja in predstavljajo

trdno pojmovno osnovo (pojme, ustaljene vzorce), na kateri temeljijo izrazi, ki jih opredeljujemo; (ii) *zaključni korak* razlaganja, kjer pomagajo določiti *celotne pojme*, ki jih sami izrazi sooznačujejo. Očitno je, da pravno razlaganje zanima druga od teh ravni.

Vrnimo se k našemu priljubljenemu primeru odloka o »vozilih«. Vprašajmo se, kateri so osnovni pogoji, da opredelimo »policista-razlagalca« kot jezikovno sposobnega člana njegove pravne skupnosti. Tukaj bo zadostovalo, če se omejimo na drugo vrsto pogojev, torej tistih, ki zadevajo raven pravnega jezika. Policist se bo pokazal za jezikovno sposobnega člana pravne skupnosti, v kolikor bo, prvič, zmožen najti *trdno pojmovno osnovo* pojma vozilo (tako se bo na primer zanašal na prej omenjeno domnevo, da je »vozilo sredstvo za prevažanje ljudi in stvari, zlasti če je mehanično in ga upravlja človek«); drugič (glede možnega konkretnega primera »otroškega avtomobila«), če bo zmožen znotraj pomenskega obsega pojma »vozilo« določiti ustrezne koordinate (koordinate, ki jih bo med drugim izsledil na podlagi domneve, da je »vozilo mehanično sredstvo za prevoz, ki lahko ustvarja hrup in povzroči škodo stvarem ali ljudem«) in tako postaviti celotni smisel tega pojma. Tako pripisani smisel bi očitno utemeljil njegovo odločitev, da lahko »otroški avtomobil« vstopi v občinski park.

Pomaknimo se zdaj naprej k *nanosniku*. V zvezi z nanosnikom hoče naslovnik sporočila vedeti naslednje: »*Kateri predmet* je ta, o katerem oseba, ki prenaša sporočilo, *govori*?« Ta pojem označuje torej predmete, ki v nekem smislu obstajajo v resničnosti in na katere se nanašajo naše besede.

Tudi za pojem nanosnik bomo uporabili dinamični in pragmatično usmerjen pristop k pomenu in razlaganju, ki ga že vseskozi uporabljamo v tem prispevku. V tem smislu problem nastavitve nanosnika splošnim izrazom ni več povezan z vprašanjem, »kaj je nanosnik«, temveč z vprašanjem, »kako se nanosnik pridobi in/ali pripiše«. V tem okviru moramo najprej pojasniti, da je mogoče dejavnost iskanja nanosnika razdeliti v tri različne korake, ki jih bomo zdaj preučili.

Prvi korak tega postopka je *opredeljevanje ali prepoznavanje paradigmatičnih primerov*. Ta korak zadeva prepoznavanje *paradigmatične vrednosti* nekaterih konkretnih primerov iz skupine, ki jo sooznačuje vpleteni splošni izraz. Gre za prepoznavanje tega, da nekateri posamični »vzorčni« predmeti brez dvoma sodijo na polje nanašanja tega izraza. V našem primeru so »avtomobili« gotovo *paradigmatični primeri* pojma »vozilo«, ki jih kot takšne prepozna jezikovno usposobljen član pravne skupnosti (policist-razlagalec).

Drugi korak je *prepoznavanje vrste predmetov, ki jih izraz označuje*. Pri tem koraku se ukvarjamo z ugotavljanjem *možnega* pomenskega obsega izraza. Gre torej za to, da določimo *možno* množico predmetov, v zvezi s katero je mogoče izraz uporabiti. Pomembno je natančneje pojasniti, da pri kontekstualističnem pojmovanju polje nanašanja (tj. pomenski obseg izraza) ni obravnavano kot *bistveno (samo po sebi) povezano* z rabo tega izraza, temveč je v zvezi s pose-

ganjem številnih spremenljivk dojemljivo za rekonstrukcijo na različne načine (kontekst je »neizčrpen«).[41] Te spremenljivke so pri pravnih izrazih po eni strani povezane predvsem s splošnim potekom razlaganja določila, katerega del so ti izrazi (gre za celoten sklop »besedilnih« in »zunaj-besedilnih« prvin, ki služijo usmerjanju razlaganja, kot so namen določila, načela, ki ga podpirajo, in tako naprej), in po drugi strani s potrebami uporabljanja v zvezi z značilnostmi konkretnih primerov oziroma vzorčnega primera, ki ga določilo ureja.

Kaj pravzaprav pomeni postaviti – možni – pomenski obseg splošnega izraza? Ta poseg je sestavljen iz *širjenja obsega* semantičnega področja nekega izraza. To širjenje se odvija skozi postopek, ki teče od – v tistem trenutku – *jasnih primerov*, glede katerih ni nobenega dvoma, da pripadajo tej množici (*paradigmatični primeri*), do *dvomljivih primerov*, katerih pripadnost tej množici, je bolj negotova. Pozitivni izid tega postopka je odvisen od *stopnje podobnosti* (če sploh obstaja), ki jo najdemo med dvema vrstama primerov. Seveda mora biti pri tem ocenjena tudi *pomembnost* podobnosti za zadevne primere (ta pa je odvisna od izida, ki ga želimo doseči s postopkom razlaganja in uporabljanja).

Tretji korak je *prepoznavanje enega samega predmeta znotraj pomenskega obsega nekega pojma*. Iz zornega kota logike gre za *končni korak* postopka pripisovanja nanosnika. To pomeni, da v posameznem konkretnem predmetu prepoznamo ali drugače odkrijemo pripadnost množici (skladno z vsemi nameni in cilji), ki jo sooznačuje izraz. *Pozitivni* ali *negativni* izid tega posega (prepoznavanja) je odvisen od tega, kako ovrednotimo podobnosti med posameznim konkretnim predmetom in navadnimi člani množice (seveda na osnovi predhodnega izbora tistih podobnosti, ki jih štejemo za *pomembne*).

Če korak prepoznavanja nanosnika postavimo v okvir pravnega razlaganja, ugotovimo, da ta posebej zadeva *trenutek uporabljanja* prava. Gre za korak, pri katerem sodnik v okviru razlaganja uporabi splošno normo na konkretnem primeru.

9 POSTOPNO OBLIKOVANJE POMENA

Kot sem že omenil, gre pri tretji značilnosti pragmatično usmerjenega nauka o pomenu za stališče, po katerem je pripisovanje pomena nekemu stavku (oziroma natančneje, v primeru, ki nas najbolj zanima: neki pravni določbi) *postopek, ki ima več korakov*. V tem postopku se v stiku s konkretnimi ali vzorčnimi primeri postopno razčleni semantični okvir določbe, dokler skozi izjavno dejanje ni proizveden celotni pomen.

41 Charles Travis je mnogokrat podčrtal to zelo pomembno značilnost konteksta. Glej npr. Charles Travis, Pragmatics, v Bob Hale and Crispin Wright (ur.), *A Companion to the Philosophy of Language*, Oxford, Blackwell, 1998 (prva izdaja 1997), 87–102.

Koristno je, če te različne korake povežemo z dvema velikima razsežnostma, *običajno razsežnostjo* (*razsežnost običajnega pomena*) in *kontekstualno razsežnostjo* (*razsežnost kontekstualnega pomena*).[42] Njuna prisotnost nam omogoči, da pridemo do izida, ki je za nas pomemben: pojmovne ločitve prvin *odkrivanja* (*običajna razsežnost*) in *ustvarjanja* (*kontekstualna razsežnost*) pri pravnem razlaganju. Na ta način lahko pojasnimo misel, ki se zdi intuitivno prepričljiva, in sicer da posebnost razlaganja tiči v »mešanici odkrivanja in ustvarjanja«; na ta način se izognemo tudi protislovnim zatrjevanjem, do katerih bi drugače prišli, če bi trdili, da sta odkrivanje in ustvarjanje dejavnosti, ki se odvijeta istočasno, v istem koraku.

Kot smo rekli, *dinamični* pogled na pomen vključuje misel, da je pomen nekaj, kar se *oblikuje postopoma*. To pomeni, da se oblikuje po stopnjah, ko gre skozi različne korake (in torej skozi postopno razčlenjevanje semantične vsebine zadevnega določila) in ne »hipoma in v celoti« (pa naj gre za odkrivanje ali ustvarjanje). Kot vemo, lahko pri tem razločimo dva koraka (naknadno ju bomo razstavili na več »pol-korakov«), ki ju moramo oba obravnavati kot *nujni* postaji pri postavljanju celovitega pomena nekega stavka.

V tem postopku, razdeljenem na več korakov, je običajni pomen (posameznih izrazov) na začetku dejavnosti pripisovanja pomena nekemu določilu in sestavlja deljeno začetno osnovo (»skupno semantično ozadje« – na primer pojmov in paradigmatičnih primerov – v katero sporočevalci in naslovniki sporočila v tistem trenutku ne dvomijo), medtem ko je kontekstualni pomen v *drugem koraku postopka*, ki teče v smeri cilja vzpostaviti polno razčlenjeni pomen. To pa dosežemo, kadarkoli pride do konkretne sporočilne izmenjave.

Vendar ostaja dejstvo, da je pri pravnem razlaganju končni trenutek celotne postavitve pomena nekega določila šele njegova dokončna semantična razčlenitev (zelo pogosto ena od številnih možnih) znotraj številnih kontekstov sprejema, v katere je vsakokrat umeščeno normativno sporočilo, ki ga izraža samo določilo.

V popolnoma razdelanem *dinamičnem* pogledu na pomen ni dovolj, da ločimo med razsežnostma običajnega in kontekstualnega pomena. Treba je razločiti tudi številne drobne korake v postopku postopnega oblikovanja pomena, ki so bodisi izključno del prve bodisi izključno del druge razsežnosti. Samo če upoštevamo vse podrobnosti teh številnih korakov, lahko dobimo jasnejšo predstavo o tem, kako konkretno poteka postopek pripisovanja pomena pravnim določbam. Na žalost tukaj zaradi pomanjkanja prostora ne morem podrobneje preučiti te izoblikovanosti razlagalne dejavnosti v korakih, temveč lahko vse skupaj le na kratko omenim.

42 Pomembno je poudariti, da iz dinamičnega zornega kota ni nikakršega nasprotja med tema razsežnostma. O tem stališču glej Kempson 1977 (op. 36), 5.

Razmislimo najprej o *pripisovanju smisla*. Zelo shematično rečeno ta poteka v dveh korakih. Prvi, ki pripada običajni razsežnosti, zadeva ugotavljanje prisotnosti določenega pojma (skupne semantične osnove, ki lahko pripelje do različnih celotno oblikovanih smislov tega pojma). Drugi korak pa pripada kontekstualni razsežnosti in zadeva postavitev celotno oblikovanega pojma.

Razmislimo zdaj še o *pripisovanju nanosnika*. Če povzamemo, lahko rečemo, da ta poteka v treh korakih. Prvi zadeva opredeljevanje paradigmatičnih primerov in pripada običajni razsežnosti. Drugi zadeva postavitev možnega pomenskega obsega pojma in pripada kontekstualni razsežnosti, tako kot tretji, pri katerem gre za prepoznavanje umeščenosti posameznega predmeta znotraj pomenskega obsega tega pojma.

Iz angleškega izvirnika prevedel
Tilen Štajnpihler.[43]

43 Poleg urednika so mi svojo pomoč in nasvete pri prevajanju nudili Vesna Božič, Ciril Keršmanc, Aleš Novak in Katja Škrubej. Vsem se prav lepo zahvaljujem. Pri delu sem si prizadeval uporabljati slovensko pravno izrazoslovje, vendar sem se na redkih mestih kljub temu odločil za uporabo tujk. Prevajanje namreč razumem kot posredovanje sporočila, ki ga je bralcu namenil nekdo drug. Svojo nalogo (kot prevajalec) tako dojemam v prvi vrsti kot skrb za to, da bo bralec brez večjih težav ustrezno razumel, kar mu je hotel povedati sam avtor besedila. Zato sem mestoma bolj zadržan glede slovenskih izrazov, ki sicer pomensko popolnoma ustrezajo izvirniku, vendar jih širši krog bralcev (še) ni popolnoma sprejel.
Pri prevajanju izraza angl. *theory* namesto običajne oznake »teorija« uporabljam izraza *nauk* in *pravoznanstvo*. Izraza »koncept« (angl. *concept*) in »koncepcijo« (angl. *conception*) sem nadomestil s *pojmom* in *pojmovanjem*. V tem okviru je besedna zveza *v svojem bistvu sporni pojmi* prevod za angl. *essentially contested concepts*. Angl. *internalistic* in angl. *externalistic conceptions* sem prevajal kot *notranja* in *zunanja pojmovanja*, *izrazno pojmovanje norm* pa je prevod za angl. *expressive conception of norms*. Za osrednji pojem prispevka – angl. *context* in njegove izpeljanke (na primer angl. *contextualism*) nisem uspel najti izraza, ki bi bil ustrezen na vseh mestih v besedilu (na primer »sobesedlilo«, »okoliščine«), zato sem se odločil za enotno uporabo tujke *kontekst*. Tako sta angl. *distal* in angl. *proximal context* postala *obrobni* in *osrednji kontekst*. Angl. *background context,* angl. *conception* ali angl. *assumption* so *kontekst, pojmovanje* ali *predpostavka »v ozadnju«*. Pri izrazu angl. *semantics* (in izpeljankah) sem namesto slovenskega izraza »pomenoslovje« uporabil pogosteje uporabljeni izraz *semantika*. S tem sem hotel olajšati razumevanje besedila, zlasti pri posameznih izpeljankah tega izraza, ki se v prispevku pojavljajo v zelo različnih pomenskih odtenkih (glej tudi uvodno pojasnilo opombe). *Smisel* in *nanosnik* sta prevoda pojmov angl. *sense* in angl. *reference*; slednjo v literaturi v slovenskem jeziku zasledimo tudi kot *referenco* (glej na primer Igor Ž. Žagar, *Od performativa do govornih dejanj*, Ljubljana, Pedagoški inštitut, 2009). Angl. *reference point,* angl. *field of reference* in angl. *semantic reference model* so postali *točka nanašanja, mesto* oziroma *polje nanašanja* ter *semantični okvir nanašanja*. Angl. *extension* sem prevajal kot *pomenski obseg*, angl. *speech act* kot *govorno dejanje*. Pri besedni zvezi angl. *internal point of view* v zvezi s Hartovim pravnim naukom sem namesto »notranji vidik (pravil)« (ta oznaka se pojavlja v slov. prevodu Hartovega temeljnega dela, *Koncept prava*, Ljubljana, ŠOU, 1994, ki ga je prevedla Jelka Kernev Štrajn) izbral besedno zvezo *pogled od znotraj*. Po moji oceni ta oznaka ustrezneje predstavi Hartovo misel, s katero je hotel poudariti »položaj« oziroma »zorni kot« osebe, ki motri pravila. *Obrobni (zasenčeni) del* je prevod besedne zveze angl.

Predstavitev avtorja

Vittorio Villa je redni profesor za filozofijo prava na Univerzi v Palermu. Tako v Palermu kot v Agrigentu poučuje tudi pravno metodologijo. Kot gostujoči profesor je predaval na Univerzi v Edinburgu. Je avtor številnih razprav v italijanščini, francoščini, kastiljščini in angleščini. Objavil je nekaj knjig. V kastiljščino bo v kratkem prevedena knjiga o konstruktivizmu in pravnih naukih: Costruttivismo e teorie del diritto *(Giappichelli, 1999). V portugalščino se prevaja njegovo delo o pravnem pozitivizmu:* Il positivismo giuridico. Metodi, teorie e giudizi di valore *(Giappichelli, 2004*). *Pisal je še o zgodovini analitične filozofije prava* – Storia della filosofia del diritto analitica *(Il Mulino, 2003), pa o pravnem vedenju in pojmu postavljenega prava* – Conoscenza giuridica e concetto di diritto positivo *(Giappichelli, 1993) ter o modelih in analogijah med pravoslovnjem in naravoslovjem* – Teorie della scienza giuridica e teorie delle scienze naturali *(Giuffrè, 1984). Kot član uredništva sodeluje pri odlični reviji* Ragion Pratica, *posvečeni normativni etiki in filozofiji prava.*

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penumbrae area. Pri prevajanju oznake angl. *legal reasoning* sem se odločil za (zdaj že) uveljavljeno *pravno razlogovanje*. Za angl. *legal sentence* uporabljam *pravni stavek*, pri prevajanju izraza angl. *(legal) disposition* pa sem izbral izraz *(pravna) določba* oziroma *določilo*. Oznaka *pravna norma*, ki jo razumem kot nadpomenko za pravna pravila in pravna načela, stoji na mestu izraza angl. *legal norm*, medtem ko je *pravno pravilo* prevod za angl. *legal rule*. Pri tem se mi zdi smiselno opozoriti še, da nekateri v zvezi iskanjem krovnega izraza za pravna pravila in pravna načela govorijo tudi o *pravnem vodilu* (primeroma glej razpravljanje v Matej Acceto, *Vloga pravnih načel v pravni teoriji in praksi*, Zbornik znanstvenih razprav (2005) LXV, opomba 3). Pri izrazu angl. *constitutionalization*, ki se prevaja tudi kot »poustavljanje« (tako na primer Andrej Kristan pri prevajanju članka Manuela Atienze, *Argumentiranje in ustava*, Revus (2009) 9), sem ohranil tujko *konstitucionalizacija*. Osnovni razlog za ohranitev tujke je tudi v tem primeru lažje razumevanje besedila (glej uvodno pojasnilo opombe). Pri prevajanju angl. *codification* (*codified law*) pa sem namesto ustaljene oznake »kodifikacija« uporabil izraze *uzakonjanje, uzakonitev, uzakonjeno pravo*. *Prekomerno razlaganje ustave*, ki se pojavlja tudi kot »čezrazlaganje ustave« (tako že omenjeni Kristanov prevod Atienze v Revusu (2009) 9), pa je prevod za besedno zvezo angl. *overinterpreting the constitution*. Mislim, da med omenjenima besednima zvezama v slovenščini ni bistvene razlike. Tako »prekomerno razlaganje« kot »čezrazlaganje« sta v nevarnosti, da v določenem sobesedilu (neupravičeno) dobita slabšalni prizvok. V tem primeru sem izbral »prekomerno razlaganje«, saj se mi zdi kombinacija pridevnika (»prekomerno«) in samostalnika (»razlaganje«) sama zase bolj ustaljena in razumljiva kot nova beseda (»čezrazlaganje«), ki skuša oboje združiti. *Razlagalna izbira po prostem preudarku* se mi je zdela ustrezna oznaka za angl. *discretionay interpretative choice*. Za prevajanje večpomenskega pridevnika angl. *prejudicial* sem v danem sobesedilu izbral izraz *predhodni*. Namesto izraza »komunikacija« (za prevod angl. *communication*) sem se odločil za *sporazumevanje* oziroma *sporočanje* (odvisno od sobesedila), ki ju v tem prispevku obravnavam kot medsebojno zamenjiva. Pridevniki *poročevalni*, *predpisovalni*, *ocenjevalni* in *želelni* pa nadomeščajo tujke »informativni« (angl. *informative),* »normativni« (angl. *normative/perscriptive*), »evalvativni« (angl. *evaluative*), »optativni« (angl. *optative*). V danem sobesedilu se mi je zdelo primerno običajno uporabljeni pridevnik »moderen« (angl. *modern*) nadomestiti s pridevnikom *novoveški*.

Predstavitev prevajalca

Tilen Štajnpihler je mladi raziskovalec na katedri za teorijo in sociologijo prava Pravne fakultete Univerze v Ljubljani.

Vittorio Villa

A Pragmatically Oriented Theory of Legal Interpretation

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[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[2] and MacCormick's theory[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[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 *objectivistic* 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

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

2 See Ronald Dworkin, *Law's Empire*, London, Fontana Press, 1986; Ital. translation *L'impero del diritto*, Milano, Il Saggiatore, 1989.

3 See Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1978; Ital. translation *Ragionamento giuridico e teoria del diritto*, Torino, Giappichelli, 2001.

4 Francesco Viola and Giuseppe Zaccaria, *Diritto e interpretazione. Lineamenti di teoria ermeneutica del diritto*, Bari, Laterza, 1999, v.

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 followers*[5], many of whom adopt the internal point of view[6] (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 dispositions[8].

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

5 See on this my book Vittorio Villa, *Il positivismo giuridico. Metodi, teorie e giudizi di valore*, Torino, Giappichelli, 2004, 79–82, 146–152, 196–197.

6 This famous notion has been of course introduced by Herbert L. A. Hart, *The Concept of Law* (1961), Second Edition with a Postscript, Oxford, Clarendon Press, 1994; it. transl. *Il concetto di diritto*, Torino, Einaudi, 2002, pp. 67–70, 105–108.

7 See, for this dynamic theory of legal validity, Luigi Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Bari, Laterza, 1989, 97, 348–349, 476, 916.

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[9]. 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*

9 Riccardo Guastini, La "costituzionalizzazione" dell'ordinamento italiano, *Ragion Pratica* (1998) 11, 185–206.

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.

10 Riccardo Guastini, *Nuovi studi sull'interpretazione*, Roma, Aracne, 2008, 170–173.

11 Pierluigi Chiassoni, Codici interpretativi. Progetto di voce per un "vademecum" giuridico, *Analisi e diritto* 2002-2003, 60–62 (*www.giuri.unige.it/intro/dipist/digita/filo/testi/*).

12 Walter B. Gallie, Essentially Contested Concepts, *Proceedings of the Aristotelian Society* LVI (1955-56), 167–198.

13 See again my book Villa 2004 (n.5), 12–20.

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[14].

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[15], 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

14 On the notion of "internal relation", see Gordon P. Baker and Peter M. S. Hacker, *Language, Sense and Nonsense. A Critical Investigation into Modern Theories of Language*, Oxford, Blackwell, 1984, 94–115.

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"[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[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[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

16 Pierluigi Chiassoni, *Tecnica dell'interpretazione giuridica*, Bologna, Il Mulino 2007, 50.

17 See, for instance, Andrei Marmor, *Interpretation and Legal Theory*, Oxford, Clarendon Press, 1992, 12.

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*[19], 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[20].

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.

20 On the opposition between *ordinary language philosophy* and *ideal language philosophy* see Richard Rorty, Metaphilosophical Difficulties of Linguistic Philosophy. Introduction, in Richard Rorty (Ed.), *The Linguistic Turn. Recent Essays in Philosophical Method*, Chicago, London, The University of Chicago Press, 1967, 7–9, 15–24; Peter F. Strawson, Construction and Analysis, in Alfred J. Ayer and others (Eds.), *The Revolution in Philosophy*, London, MacMillan, 1957, 101–104.

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 storic*a 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

21 With reference to this theory, see François Recenati, *Literal Meaning*, Cambridge, Cambridge University Press, 2004, 3–4.

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*[22]. 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*[23]. 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

22 For a good analysis of *radical contextualism*, see Claudia Bianchi, *La dipendenza contestuale. Per una teoria pragmatica del significato*, Napoli, ESI, 2001, 118–119, 282–283, 304–355. An important example of a radical contextualist position is represented by Ronald Langacker, *Foundations of Cognitive Grammar,* Stanford, Stanford University Press, 1987 (Vol. I) & 1991 (Vol. II).

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*[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"[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

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.

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

26 Ronald Dworkin, *A Matter of Principle*, Cambridge Mass., Harvard University Press, 1985, 146–147.

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)[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*[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[29]. The same content of meaning can be *modulated pragmatically*

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

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.

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

30 For this conception, see, for instance, Eugenio Bulygin, Norms and Logic. Kelsen and Weinberger on the Ontology of Norms, *Law and Philosophy* 4 (1985) 2, 146–148.

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[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 locution "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[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

32 For a well known analysis of the *background context*, see John Searle, *Expression and Meaning. Studies in the Theory of Speech*, Cambridge, Cambridge University Press, 1979, 117–131, and John Searle, The Background of Meaning, in ed. by John Searle, Ferenc Kiefer and Manfred Bierwisch (Eds.), *Speech Act Theory and Pragmatics*, Dordrecht, Springer, 1980, 221–232.

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*[34]. 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[35].

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

34 Michael Dummett highlights very well this thesis. See Michael Dummett, What is a Theory of Meaning? (II), in Gareth Evans and John McDowell (Eds.), *Truth and Meaning. Essays in Semantics*, Oxford, Clarendon Press, 1976, 69–72. See also Paul Grice, *Studies in the Ways of Words*, Harvard, Harvard University Press, 1989, 25 ff.

35 For a quite recent pragmatic approach, of a general character, to philosophy of language, see Robert Brandom, *Making it Explicit. Reasoning, Representing and Discursive Commitment*, Cambridge, Harvard University Press, 1994.

conceptions of legal interpretation, between "discovering" and "creating", a dichotomy that none of the three conceptions examined in the previous chapter 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 creation 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 features 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[36]; 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[37].

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 distinguish 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 communication* that is inferable through interpretation from the sentence[38]. With this definition I make reference to *everything that is communicated in the message contained 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 philosophy of language. See, for instance, Mary Hesse, *Revolutions and Reconstructions in the Philosophy of Science*, Brighton, Harvester Press, 1980, 113, and Hilary Putnam, *Mind, Language and Reality. Philosophical Papers. Vol. II*, Cambridge, Cambridge University Press, 1975, 246, 268–269. In this essay, however, I follow particularly the scheme presented by Ruth Kempson, *Semantic Theory*, Cambridge, Cambridge University Press, 1977, 11 ff.

37 Mauro Barberis, among others, agrees with this thesis. See Mauro Barberis, Il sacro testo. L'interpretazizne giuridica fra ermeneutica e pragmatica, *Ars interpretandi* 1999, 282–289.

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*[39]. "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[40], 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 contextualistic 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"[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 *extensional broadening* of the semantic area of the term, a broadening that unfolds through a process that moves from the *cases* recognized at that time as *clear*, regarding which there is no doubt about their belonging to the class (the *paradigmatic cases*), to the *doubtful cases*, whose belonging is more uncertain. The positive result of this process depends on the *degree of similarity*, if any, that is found between the two series of cases; and the *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 *identification of a single object that is part of the sphere of extension of the notion*. It is the *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, *positive* or *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 *important*.

The phase of identification of reference, if it is set in the sphere of legal interpretation, particularly concerns the *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.

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 *a process in several phases*, during which the semantic framework of the

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.), *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*[42], 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.

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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). His* book on constructivism and legal theories—*Costruttivismo e teorie del diritto* (Giappichelli, 1999)—will soon have its Spanish translation, whereas his work on legal positivism—*Il positivismo giuridico. Metodi, teorie e giudizi di valore (*Giappichelli, *2004)*—is actually being translated in Portuguese.

Synopsis

Vittorio Villa

A Pragmatically Oriented Theory of Legal Interpretation

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

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 once and for all, 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 interpret of the text who (besides the author of the same text) necessarily contributes to the final definition of its meaning.

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