

THE MEANING(S) IN LAW AND LANGUAGE

1 INTRODUCTION: THE PROBLEM OF LANGUAGE IN (AND FOR) LAW

The power of the word can be immense. “And God said, ‘Let there be light,’ and there was light” (Genesis 1:3). As the Old Testament tells us and Eco reminds us, it was through an act of speech that the Creation itself arose, and it was by naming them that God created things and gave them their ontological status (Eco 1999: 22). It is much the same in law, a discipline deeply concerned with the performativity of language (see e.g. Dunn 2003: 498–505). Imagine a judge handing down a ruling, or rejecting an appeal – the performative utterance creates the result it describes. Similarly, a guilty verdict of the jury renders a defendant guilty, finally and often fatally dispensing with the presumption of innocence shielding him or her from the retributive justice of the state. Thus, while in some instances legal provisions may still be (questionably) discounted as “just words” (see Hershkoff 2010: 1522–1527), they often rather evoke the imagery of the execution apparatus in Kafka’s fictional penal colony, performing the punishment by etching onto the body of the condemned the words of the commandment he had ostensibly violated (Kafka 2007: 39).

Words are important, and false or misused terminology used in law may be dangerous in its consequences. These may be the result of an innocent mistake in the drafting or translation of legislative texts, such as mistranslating *sour cherries* into the German *Süsskirschen* (sweet cherries).¹ They may betray a lack of appreciation of the terminology employed or its cultural context, such as the term *infanticide*, which may not only pose problems in translation, for instance into the apparent Slovenian equivalent *detomor* with its narrower statutory definition (Accetto 2009: 285), but also if it is used from a monolingual and monocultural perspective in a multicultural context: one author examines a Californian case involving a Latina defendant² where her motives would be much better appreciated if the Spanish concepts of *familia*, *verguenza* and *respeto* had been fully understood (Montoya 1994: 149–150). Or they can even be the result of intentional twisting of the language to create – no matter the honesty of the intention – an erroneous truth, such as in the case of a mental retard pressed into falsely confessing to several murders through police interrogations whose records betrayed severe manipulation of the interrogation and the tapes (Shuy 2005: 159–164).

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1 Dealt with by the European Court of Justice in case C-64/95, *Konservenfabrik Lubella*, [1996] ECR I-5105.

2 *People v. Chavez*, 77 Cal. App. 2d 621 (1947).

All these examples underscore a more general problem of language in – and for – law. Law strives to provide a just and equitable ordering of the (legally relevant) behaviour of its addressees, expressed in the constitutional principle of the rule of law (or the kin notion of *Rechtsstaat*), which in turn requires the setting up of a clear and predictable substantive and procedural legal framework ensuring fair and equal treatment (see e.g. Pavčnik 2011: 74–82). In modern theory (see Fallon 1997: 8–9), the realization of the rule of law requires the following criteria of the legal order to be fulfilled: comprehensibility (that addressees understand and are able to comply with commands of the law), effectiveness (that law actually does govern the social relations), stability (that addressees may rely on the developed legal system), absoluteness (that no one is exempt from or beyond the reach of the law) and impartiality (that courts should provide fair and effective justice). And yet, while language is inextricably linked to law, which is expressed in linguistic terms as much as the latter influence its interpretation (Kramer 2012: 133), language is often vague³ and by its nature an “imprecise, imperfect and ambiguous instrument” (Tremblay 2006: 113). Is it then truly the vehicle to achieve the desired qualities of the comprehensibility, stability and impartiality of the legal order, i.e. is language indeed the appropriate tool for the task set to it by the law?

Before I proceed, a short disclaimer is in order: I approach the issue as a lawyer not versed in the theories of linguistics or semiotics, notwithstanding the fact that the latter has already given rise to a dedicated subfield on law and semiotics, exploring the mobility and meaning of terms employed in the specialized legal context (see the brief overview in Wagner 2010). Nevertheless, I hope that a view from a lawyer’s perspective and the pertinent examples from the world of legal practice might still be a useful addition to a discussion on the feats and pits of the relationship between law and language in this dedicated volume. On that assumption, I turn to the evaluation of law’s quest for clarity, meaning and interpretative constraint.

2 LAW AND THE SEARCH FOR CLARITY

The task is long known and pursued. The striving for the clarity of legal concepts was central to Roman law (Watson 2008: 40). In France, a decree of 1539, passed to replace Latin with French in legal and administrative texts, required that all such texts be written so clearly “as to leave no space for ambiguity or uncertainty or the need for interpretation” (see the original provision in French in Charnock 2006: 66). A longstanding concern engaging authors such as Montesquieu (Champeil-Desplats 2006: 35), clarity became recognized as a constitutional principle under French law by a decision of the *Conseil constitutionnel*⁴ (see Xavier 2006: 192–193).

3 That claim has become self-evident to the extent that modern research today seems to focus on the question why language is vague (Lipman 2009), why it sometimes should be vague (van Deemter 2009) or how to deal with its vagueness when placed in context (Kyburg/Morreau 2000).

4 *Décision* No. 2001-455 DC of 12 January 2002, para. 9, holding that a principle of clarity is enshrined in Article 34 of the French Constitution, generally regulating statutory acts.

Accuracy, clarity and accessibility are also pronounced in the modern-day style guides prepared by the legal or linguistic government services (e.g. European Commission 2011: 1; Služba Vlade RS za zakonodajo 2008: 5; also cf. The Law Commission/The Scottish Law Commission 1969: 3), which aim to offer guidance on drafting of legislative texts and increasingly wish to do away with imprecise, ambiguous terminology. Let me give just two examples: one lexical, the other stylistic. In English, the word *shall* has come under siege as a term traditionally favoured in legal texts but often misused and redundant, meaning anything from *is* and *will* to *must* (or *must not*), *may* (mostly as *may not*) or *should* (on this see Williams 2006).⁵ In Slovenia, a similar debate concerns the conjunction *oziroma*, used variably to mean *or*, *and* (or the logically unnecessary *and/or*) or *respectively*; as stated in the drafting guidelines of the government's Office of Legislation (Služba Vlade RS za zakonodajo 2008: 84–85):

Attention must always be given to the right meaning; thus the word “and” is always used with a cumulative [conjunctive] connotation and the word “or” with an alternative [exclusively disjunctive] one. The meaning of the word [*oziroma*] is too indeterminate and is thus as a rule not to be used in regulatory texts.

That said, the drafting guidelines themselves demonstrate that no rule is without exceptions, using the word *oziroma* no fewer than 311 times.

The other example concerns the use of metaphors. The drafting guidelines state they should be excluded from all legislation, along with euphemisms, emotive, subjective or exaggerated terms (Služba Vlade RS za zakonodajo 2008: 62). Of course, this may partly be a question of definition, as metaphors have become so pervasive in our everyday lives that they may not be avoided (Lakoff/Johnson 1981: 3). In fact, research has shown that the use of metaphors in legal text has increased and that they may serve a useful purpose as legal ideals or cognitive tools, often emerging in general clauses of normative texts (even straightforward legal terms such as *persona giuridica* (“legal person”) or *frutti civili* (“civil fruits”) in the Italian Civil Code), metaphors because applying them in practice requires access to “extra-legislative knowledge, cultural issues, and contextual parameters” (Morra/Rossi/Bazzanella 2006: 145–147 and 150).

Whatever the quibble on the details, the inevitable conclusion is that absolute clarity of a legal rule is impossible to achieve as, dependent on its open textual expression, it is “condemned to a certain degree of indefiniteness” (Tremblay 2006: 113). Words have a

5 While dealt with extensively in the English style guide, it fares a little better in EU law where it remains a staple choice for some intended meanings (European Commission 2011: 35–37). In the consolidated version of the EU founding treaties, for instance, *shall* is used over 2500 times, compared with only 83 instances of *will* and 41 instances of *must*. (Interestingly, one of the many amendments in the Treaty of Lisbon was an explicit change of the word *must* in the provision of then Article 262 EC (“The [Economic and Social] Committee must be consulted by the Council or by the Commission where this Treaty so provides.”) into *shall* in the new Article 304 TFEU (“The Committee shall be consulted by the European Parliament, by the Council or by the Commission where the Treaties so provide.”))

variety of meanings and a choice will inevitably have to be made among them, usually with reference to their context (McLeod 2011: 231), going beyond a simple quote of a legal provision to discover its meaning (Radin 1930: 864). As put in an English case from 1826, the true meaning of a provision must be unlocked:⁶

The key to the opening of every law is the reason and spirit of the law – it is the “animus imponentis”, the intention of the law-maker, expressed in the law itself taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed [...] detached from its context in the statute: it is to be viewed in connexion with its whole context [...].

3 LANGUAGE AND THE SEARCH FOR MEANING

Accordingly, it has become recognized that at least some interpretation of legal texts will always be required, in particular when applying a general legal act to a concrete legal case (Pavčnik 2011: 363). To this purpose, legal theory and practice have developed a number of approaches to – or methods of – statutory interpretation: the ordinary (plain, literal) linguistic or textual meaning, the teleological reading, the systematic, historical or logical interpretation, various arguments, rules and presumptions (related to issues such as application of analogies, fairness and prevention of injustice) and a number of more specific canons of interpretation largely developed by the courts themselves.

In principle, pursuant to the objective of following the enacted will of the legislature, one could assume that a clearly expressed plain or literal meaning should be preferred. The legal text “is the origin and the *linguistic framework* within which the interpreter may operate [...] staying *within the boundaries of the possibilities offered by the text*” (Pavčnik 2011: 367, emphasis in the original). Per Pavčnik, presumably echoing the position of many of the civil law systems, departure from this rule is only possible in the event of a legal void or significant textual laxity, notably in the use of legal principles (Pavčnik 2011: 367).

However, the importance of the plain meaning has also taken hold, for a time at least, in English law, perhaps trying to reconcile the accentuated role of the courts in a common law system with the notion of parliamentary sovereignty. After the initial approach of the “mischief rule” in *Heydon’s Case*⁷ (whereunder courts must ascertain what mischief missing in common law did the enactment seek to address and with what remedy), tempered by the “golden rule” expressed in *River Wear Commissioners v. Adamson*⁸ (whereunder the words are to be given their ordinary meaning unless the resulting meaning is unreasonably inconsistent, absurd or inconvenient and can be avoided with another plausible interpretation), the late 19th century saw the rise of the

6 *Brett v. Brett*, (1826) 3 Add. 210, at 216.

7 *Heydon’s Case*, (1584) 3 Co.Rep. 7a.

8 *River Wear Commissioners v. Adamson*, (1877) 2 App. Cas. 743.

“literal rule” (see on this The Law Commission/The Scottish Law Commission 1969: 14–17). Judges questioned whether absurdity could ever be strong enough to override the plain words of the legislature,⁹ found that even manifest absurdity should not lead courts to question the clear meaning of the enactment of the legislature¹⁰ and that in the face of an unambiguous plain meaning courts should not be concerned with the question of whether the policy thus expressed was wise or unwise, just or unjust, beneficial or mischievous.¹¹ A similar approach was taken in the United States – a Supreme Court decision in the 1917 *Caminetti* case¹² stated that “[w]here the language [was] plain and admit[ted] of no more than one meaning the duty of interpretation [did] not arise and the rules which are to aid doubtful meanings need[ed] no discussion”.

And yet, such rules of construction and especially the literal rule often fail in practice. How far should we negate the reason of absurdity? Should we, for instance, take the statutory provision granting a company which is supplying water the right to lay mains through other people’s land as meaning that this right cannot be exercised before water is supplied,¹³ or an act providing for repeals of enactments “specified in Schedule 4 to this Act” at its word even if the schedule in question (titled Repeals) ended up being numbered as Schedule 3 (McLeod 2011: 268 and 246)? And how often is it even possible to take words at their “plain” meaning without looking beyond the text at its context? One is reminded of the 1826 *Brett v. Brett* case quoted above, and the point was perhaps even more clearly made in a House of Lords case in 1957:¹⁴

My Lords, the contention of the Attorney-General was, in the first place, met by the bald general proposition that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support that proposition. I wish at the outset to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use “context” in its widest sense [...].

Similarly, in a decision of the US Supreme Court adopted one year after its pronouncement on the “plain meaning” in *Caminetti*, Justice Holmes wrote that “[a]

9 *Hill v. East and West India Dock Co.*, (1884) 9 App. Cas. 448, at 464–465.

10 *R. v. The Judge of the City of London Court*, [1892] 1 Q.B. 273 (C.A.), at 290.

11 *Vuchet & Sons Ltd. v. London Society of Compositors*, [1913] A.C. 107, at 121–122.

12 *Caminetti v. United States*, 242 U.S. 471 (1917), at 485.

13 *Jones v. Conway & Colwyn Bay Joint Water Supply Board*, [1893] 2 Ch 603, where the court held it would be absurd to require that water was supplied before the mains were laid.

14 *Attorney General v. Prince Ernest of Hanover*, [1957] A.C. 436, at 460–461.

word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used".¹⁵

This does not mean, however, that words – and the norms they deliver – should be taken as completely indeterminate, leaving the final decision in a given case to the unbridled disposition of the judge or political pressures, as once forcefully asserted by the Critical Legal Studies movement (see e.g. Tushnet 1981: 1206–1215) but significantly debunked by research (see e.g. McCormick 1999: 418). A statute is “neither an [emotionally charged] literary text nor a divine revelation [...] of infallible wisdom” (Radin 1930: 868), and will need to be interpreted in accordance with the best and most appropriate methodological approach.

4 LEGISLATIVE PURPOSE AND THE SEARCH FOR THE CORRECT INTERPRETATION

But which methodological approach is best or most appropriate? The question is particularly important when different approaches seem to lead in different directions and when any choice of the court to follow one and not another smacks of policy choice rather than mere adjudication. The expert report on statutory interpretation in the UK (The Law Commission/The Scottish Law Commission 1969: 1) was commissioned precisely on the point that

rules of statutory interpretation, although individually reasonably clear, are often difficult to apply, particularly where they appear to conflict with one another and when their hierarchy of importance is not clearly established. The difficulty which faces the courts may be enhanced by present limitations on the means, other than reference to the actual text of the statute, for ascertaining the intention of the legislature.

These words already signal a shift from the text to the intent, from the literal meaning of an enactment to its purposive interpretation, a point taken up by the report in its concluding remarks to the effect that “[t]he meaning of a provision in a legislative instrument is the meaning which it bears in the light of its intended context” and recommendation that the importance of legislative purpose be emphasized in the interpretation of any provision (The Law Commission/The Scottish Law Commission 1969: 48–49).

Continental legal theory and practice has come to the same position: when arguments of interpretation collide and multiple textually admissible meanings are possible, the solution most in line with the purpose of the rule should be preferred (Pavčnik 2011: 368). Purposive interpretation has indeed become ever more popular among national courts (see e.g. McLeod 2011: 239–241), just as any scholar of EU law may witness the zeal with which it is embraced by the European Court of Justice.

¹⁵ *Towne v. Eisner*, 245 U.S. 418 (1918), at 425.

Nevertheless, many issues remain. To linger in the recent past, in a 1947 address the approach of the English courts, still somewhat caught in the clutches of the literal rule, was criticized by Felix Frankfurter, then a sitting justice on the US Supreme Court (Frankfurter 1947: 540–541):

How then does the purpose which a statute expresses reveal itself, particularly when the path of purpose is not straight and narrow? The English courts say: look at the statute and look at nothing else. [...]

These current English rules of construction are simple. They are too simple. If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms which exist in their environment. One wonders whether English judges are confined psychologically as they purport to be legally. The judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in the context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions?

The approach of a given court may be too narrow; but sometimes the court may be frustrated in its ambition to reach the “proper” reading of the case even if it acknowledges all the relevant guidelines. In this, the US courts have traditionally fared little better than their English counterparts – a few years after Frankfurter’s remarks, legal theorist Llewellyn wrote critically on the use of canons of construction and listed 28 examples of legal issues on which there were entirely opposing canons of construction stemming from previous judicial decisions, requiring adept manoeuvring by later courts to adopt consistent and sustainable decisions (Llewellyn 1950: 401–406).¹⁶

Many issues remain unresolved to this very day, as for instance evidenced in the discrepancy between the sitting members of the US Supreme Court on the issue of legislative history. Today’s paragon of the Court’s conservative side, Justice Scalia showed his hand in the first year of appointment, in his concurring opinion in the *Cardoza-Fonseca* case.¹⁷ In its decision, the Court held that deportation of an asylum seeker was precluded under the relevant statute not only where there was “clear probability” of persecution in the country of origin but also where there was “good reason” to fear it, looking into legislative history to justify this possible reading of the statute. Justice

16 To give but three examples: that there is no leeway for construction where design is clearly stated, but that courts should inquire into real rather than ostensible purpose; that words and phrases used in an enactment with a previous judicial construction should be understood according to that construction but not if the statute clearly requires them to have a different meaning; or that words should be interpreted according to the proper grammatical effect, but that rules of grammar should be disregarded where purpose would be defeated (Llewellyn 1950: 402–404).

17 *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

Scalia filed a concurring opinion stating that, while he agreed as to the result of the case, the stated preference for legislative intent contrary to the enactment's language was "an ill-advised deviation from the venerable principle that, if the language of a statute is clear, that language must be given effect – at least in the absence of a patent absurdity",¹⁸ adopting a position that was labelled "the new textualism" (Eskridge 1990: 623). Writing but a few years later and not long before taking his own seat on the Court, Stephen Breyer defended the opposite position, publishing a vocal defence of using legislative history in fulfilling the "law-declaring function" of appellate courts (Breyer 1992: 847 ff.).

In any event, while commentators often seek to promote grand theories on how to tackle statutory interpretation, it has been argued that the courts' approach to it is largely eclectic, and that this is a good approach (Eskridge/Frickey 1990: 321–322). Indeed, all the discussion ultimately falls on the shoulders of the courts having to adjudicate concrete cases and controversies, and it is to examples of such judicial tasks that I turn in the last section.

5 THE COURTS AND THE SEARCH FOR THE RIGHT ANSWERS

The jurisprudence of the courts has offered a number of examples translating the theoretical queries discussed above into the everyday judicial reality, and I offer a few that illustrate the points both in the municipal and comparative context.

Often, the quandary may be posed by the open-ended meaning of a single word, no matter how straightforward it may appear. Elsewhere, I have outlined the famous legal debate and judicial footwork in trying to define the (boundaries of the) word *vehicle* (Accetto 2005: 18), a question amusingly – but seriously – even posed with regard to cows¹⁹ and horses.²⁰ For another example, consider the word *building*. The traditional view of the common law courts was that it was ordinarily to be understood as "an enclosure of brick or stonework covered in by a roof"²¹ or (albeit in an Australian case) at least as "a structure with a roof and a support for that roof".²² This position had to be reconsidered in a recent British case involving a Hindu who wanted to be cremated according to Hindu customs requiring sunlight to fall on the body being cremated, while legislation in place only allowed for cremation to occur within a building. Examining evidence of the types of structures that would suit the applicant's religious beliefs, the Court of Appeal found that such structures would be buildings within the meaning of

18 *Ibid.*, at 452.

19 *Major v. Wedding*, [2003] WL 22931354 (Ohio App. 11 Dist.) (whether a cow responsible for a traffic accident is an uninsured motor vehicle for the purposes of an insurance claim).

20 In cases where intoxicated riders were cited for operating a non-motorized vehicle while under the influence.

21 *Moir v. Williams*, [1892] 1 Q.B. 264, at 270.

22 *Hilderbrandt v. Stephen*, [1964] NSW 740, at 742.

the relevant act.²³ Along similar lines, the Slovenian Constitutional Court was once requested to adjudicate on the meaning of the term *family house* (*(eno)družinska hiša*) with regard to an allegedly unlawful local ordinance that excluded from the purview of the term the construction of a new house with two separate apartments.²⁴

Several issues are also posed by the modalities of contract formation and delimitation between distinct but similar legal institutes. The Romans were already concerned, for instance, with distinguishing between sales and hires in those transactions that were somewhere between the two (Watson 2008: 40), and the question is still relevant today. What is the meaning of an *offer of sale*? In an English case,²⁵ a shopkeeper was found innocent of the charge of having violated a provision of the law that among other things prohibited the “offer for sale” of a flick knife which the shopkeeper displayed in his shopping window next to a piece of paper with the listed price. The court found that, while a layman might understand this as an offer of sale, it was “perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat”,²⁶ thus excluded from the scope of the act as it then stood. Similar issues also arise in Slovenia (where Art. 23 of the Code of Obligations provides that the display of goods labelled with a price shall be deemed an offer of sale unless circumstances or custom dictate otherwise), with the Supreme Court ruling in one such dispute that a promotional booklet issued by one of the contractual parties was not an offer but merely an invitation to treat.²⁷ There are numerous types of the same queries, straddling considerations of substance and terminology, to be found throughout the life of the contractual relation from its initiation to completion (is late delivery a breach of warranty? (see discussion of a hypothetical case in Sinclair 1985: 401–405)) or even beyond it (does the term *debris* in an insurance policy covering *removal of debris* extend to the removal of oil spilt from a shipwrecked tanker?²⁸).

The last examples show that courts will often (have to) depart from or ignore the ordinary meaning of words and apply the legally relevant technical meanings of a given term, often to be interpreted in light of a statutory provision. Thus, for instance, in an English case²⁹ the court had to rule on whether a piece of broken glass picked up by the defendant from his just broken door panel was an *offensive weapon* within the meaning of a statutory definition of “any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon”, holding that it was not because it was not made or adapted for such a use (see this and further examples in McLeod 2011: 250–252). In Slovenian law, the courts

23 *R (Ghai) v. Newcastle City Council*, [2010] EWCA Civ 59, paras 32–39.

24 Decision U-I-368/06 of 15 February 2007. As the ordinance was repealed while the case was pending, the Court ultimately did not need to adopt a decision on it.

25 *Fisher v. Bell*, [1961] 1 Q.B. 394.

26 *Ibid.*, at 399.

27 Decision II Ips 737/2009 of 17 June 2010.

28 *King v. Brandywine Reinsurance*, [2004] EWHC 1033 (holding, after finding that the term holds no such established technical (trade) meaning in relevant maritime law, that it does not).

29 *Wood v. Commissioner of Police for the Metropolis*, [1986] 2 All ER 570.

sometimes have to rule on whether a particular dog is a *dangerous object* within the meaning of the Code of Obligations incurring the strict liability of the dog's handler (as the holder of the "dangerous object") for damage caused by the dog.³⁰

Of course, the meaning to be attributed can also change with time. McLeod lists an example concerning the term *family* in the context of security of tenure for members of a deceased tenant's family (McLeod 2011: 285–286). In 1950, a proposition that extramarital partners could be considered a family was still met with mockery:³¹ "To say of two people masquerading [...] as husband and wife (there being no children to complicate the picture) that they were members of the same family seems to be an abuse of the English language." In 1953, albeit in a case involving children,³² the decision was inverse, and then in a 1975 case³³ an extramarital partner of forty years, having taken her partner's family name but never married him and continuing to live in their shared apartment for 12 years after his death until being sued by the owner, was deemed to be a member of his family, even if that meant contravening the original meaning of the term in the 1920 enactment and at the time of the tenant's death in 1961, one of the judges stating that it would be "unduly legalistic to allow [such a] consideration to defeat the appellant's claim"³⁴ (see the discussion in Perell 1998: 78–79). To add a somewhat similar decision of the Slovenian Constitutional Court, in a 1998 decision³⁵ it had to review the constitutionality of a provision of rules on the leasing of non-profit housing whereunder a *young family* was defined as a family with at least one child in which neither of the parents was older than 35 years. The applicant, a single mother, claimed that this provision was unconstitutional inasmuch as the authorities only applied it to "complete" families with both parents; the Court found that such an interpretation of the provision was indeed unconstitutional but that it was also possible to interpret the provision in a constitutionally permissible way of entailing all other legally recognized family forms.³⁶

Finally, while I have already explored a number of examples arising from the multilingual reality of EU legislation (Accetto 2009), it bears reiterating that the same and sometimes further complicated challenges are posed by the cross-border element requiring translation. To add another example (taken from Blomquist 2006: 311–314), in a request for extradition of a Chilean national from Sweden to Argentina, written in

30 See e.g. Judgment II Cp 911/2010 of 12 May 2010 (holding that a dog tied to a leash in a residential building is not as such a dangerous object); and Judgment I Cp 2093/2009 of 9 September 2009 (holding that the dog at issue was not a dangerous object because the defendant exercised due care in control of the dog).

31 *Gammans v. Ekins*, [1950] 2 K.B. 328, at 331.

32 *Hawes v. Evendon*, [1953] 1 WLR 1169.

33 *Dyson Holdings Ltd v. Fox*, [1975] All ER 1031.

34 *Ibid.*, at 1036. Of course, in many respects the debate on the meaning of the term *family* continues, for instance witness the many debates around the world on the term *marriage* in relation to same sex relationships.

35 Decision U-I-71/98 of 28 May 1998.

36 *Ibid.*, paras 18–20.

Spanish, the ground was an order on the deprivation of freedom and the term used was *détencion*. In ruling on the request, the Supreme Court of Sweden³⁷ had to determine whether the detention in question corresponded to the Swedish *gripas* (being caught in the act and taken to the police station for questioning), *anhållas* (being taken into custody for further questioning) or *häktning* (being detained in custody pending trial), as only the last could, under Swedish law, be a legal ground for extradition (Blomquist 2006: 312–313).

6 CONCLUSION: THE NEVER-ENDING STRUGGLE AGAINST OPEN-ENDEDNESS

The discussion above highlighted a number of theoretical approaches and practical difficulties in meeting the challenge of providing clear, accessible legislation enabling fair and equitable administration of justice in concrete cases. But does it help in answering the question I posed at the outset? Is the open-ended language the proper tool to achieve the objectives set to it by the requirements of the rule of law?

I admit that the question was posed rhetorically and destined to be moot from the outset. After all, what is the alternative? I am reminded of Frankfurter quoting from J. W. Allen's essay on Jeremy Bentham (see Frankfurter 1947: 546):

Exactness in the use of words is the basis of all serious thinking. You will get nowhere without it. Words are clumsy tools, and it is very easy to cut one's fingers with them, and they need the closest attention in handling; but they are the only tools we have, and imagination itself cannot work without them. You must master the use of them, or you will wander forever guessing at the mercy of mere impulse and unrecognized assumptions and arbitrary associations, carried away with every wind of doctrine.

Is it a challenge the law can meet? Often yes, always no. And when it fails, we should work to make it right. Who knows, sometimes a mistake might even lead us to something better – it may be interesting to note that one of the cases at the very beginning of the major shift of the European Court of Justice to start recognizing fundamental rights as part of the unwritten general rules of EU law, the *Stauder* case,³⁸ originated in a linguistic mistake. The claimant brought the original case because he objected to having to disclose his full name if he wanted to acquire butter at a subsidized price for the welfare recipient as contrary to his constitutional right of privacy – and the reason the problem occurred in Germany was that the German version of the Community decision in question erroneously kept the text of the provision as originally drafted, while the French and Italian versions correctly included the text as amended in the legislative process and accordingly no longer required identification of the recipient by name (see

37 Decision No. Ö 2296-00, NJA 2000: C 39.

38 Case 29/69, *Stauder v. Ulm*, [1969] ECR 419.

Brown 1981: 322–327). The Court of Justice held that the French and Italian versions should prevail (the Dutch version was also partly erroneous), but “in passing” also recognized fundamental rights as constitutional principles of EU law. While such a shift in the jurisprudence of the Court of Justice was bound to happen regardless, it is nevertheless remarkable that, rather than simply leading to continued headaches over the imperfections of language and human fallibility, a pure linguistic mistake here led the way to an important and universally applauded development of a legal system.

Thus, what seems to be required of us, and especially of our legislatures and the courts, is to do our best to master the art of divining the meaning of legally relevant terms while simultaneously juggling several different theoretical approaches to – and practical canons of – statutory interpretation, all the while shooing away improper extra-legal considerations and keeping our fingers crossed that some mistaken, unintended or unanticipated meaning of our legal pronouncements will not imaginatively stab us in the back. Or to make the most of it when it does.

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Abstract

THE MEANING(S) IN LAW AND LANGUAGE

The paper revisits the delicate relation between law and language, with language inevitable serving as the vehicle of legal deliberations and pronouncements, and in particular their seemingly irreconcilable qualities: while law is predicated on the concept of the rule of law (or *Rechtsstaat*) which in turn calls for a clear and predictable system of norms ensuring equal treatment, language is often indeterminate or ambiguous, the meaning of words unclear or uncertain. Is language even properly equipped to perform the role asked of it by law? This question is addressed by outlining and analysing the path traversed from the open-ended vagueness of linguistic terms to the uncompromising confines of their legal interpretation, both in the course of adopting legislation and in particular in the course of adopting judicial pronouncements on the meaning of linguistic terms employed.

Keywords: law, language, legal interpretation, judicial review, comparative law.

Povzetek

POMEN(I) V PRAVU IN JEZIKU

Razprava se posveča občutljivemu razmerju med pravom in jezikom, v katerem jezik služi kot neizogibno orodje pravnih razprav in odločitev, ter še posebej njunim na videz nezdržljivim značilnostim: medtem ko pravo temelji na konceptu vladavine prava oziroma načela pravne države (*Rechtsstaat*), ki zahteva jasen in predvidljiv sistem norm za zagotavljanje enake obravnave, je jezik pogosto nedoločen ali nejasen. Je jezik sploh ustrezno opremljen za izvajanje vloge, ki mu jo namenja pravo? To vprašanje razprava obravnava z orisom in analizo poti od odprte nejasnosti

jezikovnih izrazov do brezkompromisne zamejitve njihove pravne razlage, tako v postopku sprejemanja zakonodaje kot v postopku sprejemanja sodnih odločitev o pomenu uporabljenih izrazov.

Ključne besede: pravo, jezik, pravna razlaga, sodna presoja, primerjalno pravo.