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LITERAL INTERPRETATION OF CONSTITUTIONAL TEXTS*

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Abstract

Despite the widespread assumption that literal interpretation is problem-free, establishing what it actually consists of is an extremely complex undertaking. Issues such as the relevance of context and intentions have led to reject its importance in general, and particularly in the legal domain. In the case of constitutional interpretation, which involves the interpretation of a text drawn up in the distant past, the very possibility of speaking of a literal reading would seem questionable. In this article, I will provide a reconstruction of literal interpretation that, whilst attaching some importance to intentions and the passage of time, leaves room for the fact that individuals' beliefs change and that there are often a number of possible semantic alternatives available.

Keywords: literal interpretation; constitution; intentions; evolutive interpretation; new theories of reference; semantic flexibility.

LA INTERPRETACIÓ LITERAL DELS TEXTOS CONSTITUCIONALS

Resum

Tot i l'assumpció generalitzada del caràcter no problemàtic de la interpretació literal, determinar en què consisteix resulta de gran complexitat. Aspectes com la incidència del context i de les intencions han portat a rebutjar-ne la rellevància en general, i en el context jurídic en particular. En el cas de la interpretació constitucional, en què s'interpreta un text elaborat en un passat distant, inclús la possibilitat de parlar d'una lectura literal del text constitucional sembla qüestionable. Aquí oferiré una reconstrucció de la interpretació literal que, tot i conferir un pes a les intencions i al transcurs del temps, permeti donar cabuda al fet que les creences dels individus són canviants i que sovint hi ha diverses alternatives semàntiques disponibles.

Paraules clau: interpretació literal; constitució; intencions; interpretació evolutiva; noves teories de la referència; flexibilitat semàntica.

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Contents

1 Introduction

References to *literal interpretation* and to similar expressions, such as *literal meaning* or *literal wording*, are frequent in the legal field. Judges and lawyers alike include it in their reasonings and arguments. And it is no wonder that legal theorists give it an essential role when it comes to making important distinctions, such as interpretation and creation, or interpretation and analogy, making use of notions such as *possible literal meaning*. Its importance in interpreting and applying the law is thus unquestionable. Nevertheless, its use raises numerous questions, including the following: What does it actually consist of? What is its relationship with other interpretative methods? Are there any significant differences between legislative and constitutional interpretation when it comes to literal interpretation? Does it make sense to invoke it in constitutional law-related matters? In this article, I will briefly analyse these questions to provide an account of the complex theoretical discussion that has, in different fields, with different terminologies and with different scopes, been taking place around literal interpretation. Before doing so, however, I shall define the object of my analysis. When one thinks of literal interpretation from a constitutional standpoint, it is frequent to associate it with invocations of literality on the part of constitutional courts. The object of my analysis in this article is, however, both broader and more limited. Firstly, I shall not focus my attention *exclusively* on the interpretative activities performed by constitutional courts, but rather on the interpretation of constitutions in general, which may be carried out by different agents with different effects. Secondly, for many people, the term *constitutional interpretation* encompasses all constitution-related interpretation and not only that associated with the constitutional text itself: for example, the interpretation by ordinary courts of legal texts that may conflict with the constitution, or the interpretation of the rulings of constitutional courts by legal practitioners. On this occasion, I shall restrict myself to considerations regarding the constitutional text itself. Lastly, it is important to note that, in this article, I assume that the interpretation of texts occurs not only in hard cases. In this, I differ from those who regard the non-problematic intuitive grasping of meanings as not constituting genuine interpretations.[1]

2 What does literal interpretation consist of and what is its relationship with other interpretative methods?

As noted above, many individuals interpret legal provisions and mention literal interpretation, and they make use of it to refer to both the process and the outcome of their interpretations. References to this interpretative method frequently entail the assumption that it is non-problematic. Nevertheless, establishing what it actually consists of is no easy task.[2] Other expressions may be used, such as the inherent meaning of words, the clear, immediate or strict meaning, non-corrective (or sometimes restrictive) interpretation, *a contrario sensu* interpretation, amongst others. However, these other expressions are either not particularly useful (which is the inherent meaning of a word?) or incomplete (non-corrective interpretation with regard to… what?) for the purposes of establishing what is the norm expressed by a provision or what is the meaning of a term that is part of a legal text.[3]

1 Indeed, those holding this position may argue that, strictly, one cannot speak of *literal interpretation*, since we resort to literality in situations that do not, in principle, give rise to doubts. Nevertheless, as we shall see, given that the determination of literal meaning is problematic, and that, in the legal field, different uses often coexist and other interpretative methods are taken into account, it is not easy to find undisputed cases of literal interpretation. Furthermore, a viewpoint such as the above would not make sense of interpretative discourses and controversies, since it places literal interpretation on a different level to other interpretative methods such as the legislator's intent. With regard to these distinctions, and others no less important in relation to the term *interpretation*, see Lifante (2015).

2 See Iturralde Sesma (2014), Mazzarese (2000), Poggi (2007) and Ramírez-Ludeña (2018a). It is particularly interesting to note that, even though, in the legal domain, literal interpretation is associated with what is immediate and non-problematic, in philosophy of language what is literal is often contrasted with what is communicated, being questioned our accesibility to literal meaning. With regard to this latter matter, see Mosegaard Hansen (2008).

3 These elements are also very different from one another. For example, clarity is gradual and seems to be subjective in nature, meaning that, in some cases, there may be doubts and disagreements with regard to whether the meaning of a text is sufficiently clear for the purposes of determining its literal interpretation. Furthermore, as we shall see, what appears clear is often not what may be regarded as the literal meaning, but rather what is pragmatically communicated. References to the inherent meaning of words, on the other hand, do not seem to have this gradual and subjective character. In fact, invoking the inherent meaning of words does not seem to be particularly clarifying. Lastly, some of the considerations set forth in the text appear to be constitutive (e.g. when inherent meaning is invoked), and others epistemic (e.g. when clear meaning is invoked).

Whatever the case, it is reasonable to assume that, as an activity, literal interpretation consists in searching for the literal meaning that, once determined, is the outcome thereof, and that our linguistic uses are of importance in establishing it. However, one initial obstacle that needs to be tackled arises from the existence of different uses. In this regard, it is not easy to identify which is the relevant use to determine the literal meaning of terms. This is particularly problematic in the legal domain, in which uses on the part of the community and technical-legal uses coexist, and in which there are also redefinitions of everyday terms, be this by the legislator (and not always consistently throughout legislation), or by jurists, not infrequently with different redefinitions by different authors or even by the same author. If one assumes that everyday use is important, then problems multiply: does one need to look for the definition in the dictionary, when the dictionary always contains a number of definitions, which may also be problematic? In short, how should we reconstruct linguistic practices? And, if some time has elapsed since the passing of the legislation, which edition of the dictionary or which point in time of practice is relevant? It is therefore necessary to examine the impact of context, in its different manifestations.

2.1 Literal interpretation vs context of utterance

Given that different uses that give rise to doubts coexist, it is common to emphasise how, to identify the literal meaning of terms, one needs to take into account the sentence in which they appear. It is difficult to argue against the idea that the meaning of a provision depends not only on the meaning of the words that make it up, but also that words only have meaning within the context of a given sentence. Literal meaning is thus the meaning determined by the semantic and syntactic rules of a language.[4] Nevertheless, taking context in the above sense into account fails to resolve many of the issues that tend to be raised in and outside of the legal sphere. Which other contextual elements are relevant, when they are, and whether they are compatible with the existence of literal meaning are all much more controversial issues. Indeed, it is not uncommon that the irrelevance of literality is emphasized precisely because it is deemed to ignore other contextual factors.[5]

One can begin to appreciate the problem by taking indexicals into account.[6] *I* varies its reference depending upon context. It seems then that sentences in which it appears only have a precise meaning when they are uttered in a context. And that this is so may be regarded as problematic if we invoke literality alone. Despite this, it has been tried to account for phenomena such as this within semantics, pointing out that there are features of the context that are relevant *because* and *insofar as* meaning so establishes. Thus, the content of a sentence in which indexicals appears is fixed in a given context thanks to linguistic rules.[7]

However, context seems to be relevant not only in these cases, for which widely-accepted solutions have been posited, and which have no notable impact upon law. The so-called *contextualists* focus on the communicative process and stress the key role played by extralinguistic elements contributed by context. For example, imagine that, during a lockdown decreed by the authorities for health reasons, I receive a phone call from a relative in Argentina asking me, "how're things?", and I reply, "it's raining and I've got two little girls that haven't been able to get out of the house yet". When I say that it's raining, I mean it's doing so in Barcelona. I also mean that I have two and only two daughters, and that they haven't left the house that day due to the rain, and not that they have never left it. However, it would appear that this depends on numerous elements that cannot be regarded as strictly semantic. Furthermore, with my words, I convey, or it is implied, that the situation is

4 So, even though discussions around literal meaning are sometimes focused on words, this does not mean that those invoking literal interpretation are committed to the implausible thesis that the meaning of these words has nothing to do with their role in the sentence.

5 For example, in Anglo-American literature, literalism and textualism are often distinguished to indicate that the former, which ignores the context, is completely implausible.

6 Oddly enough, initially, indexicals caused no problems to analytic philosophers, who were concerned with formal languages and who deemed natural languages defective. It was when it was understood that theorising needed to have as its object ordinary language that they paid attention to indexicals, as well as, increasingly, to language's relationship with context in general, to the point of talking about a *contextual turn*. In this regard, see Conrad-Petrus (2017).

7 These days, Kaplans' model is fairly well accepted. According to Kaplan, the contextual dependence of indexicals is semantic: even if the meaning of *I* is insufficient with regard to truth, its meaning identifies a feature of the context represented by a parameter, the speaker, that makes a specific contribution to the truth conditions of utterances in which it appears. So, once we have identified the elements that are relevant for determining the meaning and once the contextual parameters required by these elements have been taken into account, it is possible for us to work out the truth conditions associated with the utterance in question. See, in this regard, Orlando (2016, pp. 130 and 131).

difficult, since, in addition to being under lockdown, with work to do and schools closed, it is raining, what means that my children cannot go out for a short stroll.[8] The enormous impact of context can be appreciated by giving some additional examples. Imagine that my daughter says, "there's milk in the dining room". This would seem to express something different if said within a context in which I am looking for a carton of milk for breakfast or if said whilst we are cleaning, after her sister has spilt a glass of milk onto the dining room floor. In fact, for cleaning purposes, the existence of a carton of milk on the dining room table does not appear to affect the truth conditions or the truth of what she is saying.[9] Such cases lead contextualists to argue that there are elements which are relevant for the truth conditions that are reflected neither in the subsentence components nor in the syntactic structure of the sentence, but are instead directly contributed by the context in which the utterance is made, by means of a free enrichment or other modulation processes. Context can play a role in identifying the truth conditions of an utterance, without being determined by the conventional meanings of terms or the syntactic structure of the sentence used.[10] Context would affect not only the speakers' meaning in a specific communicative act, but also the literal meaning of the proposition expressed. And this is of great importance to the very possibility of making reference to literal meaning and to the very distinction between semantics and pragmatics.[11]

The progressive relevance of context is made clear not only by the fact that it is held that more and more terms and expressions, and even all of them, are affected by context, but also by the role that is assigned to literal meaning when context seems to have an impact: from playing some kind of role (such as being some kind of starting point or limit) to being, for some, completely irrelevant or even to the rejection of its very existence. In any case, these days it is not uncommon to assume that taking into account the meaning of each word and the syntactic rules *underdetermines* the meaning of sentence. In the legal field, the contrast between literal interpretation and context, in the sense indicated above, has been shown through the analysis of other interpretative methods such as teleological and systematic interpretation. It is understood that they constitute mechanisms for modulating literal meaning in cases that give rise to problems leading to incomplete, vague, inappropriate, if not absurd, readings of legislation. Moreover, the priority or role (if indeed it is held to have one) of literal interpretation in the interpretation and application of the law is contested.[12]

2.2 Literal interpretation vs. intentions

The most widespread debate around context in legal philosophy does not focus on contextual elements in the sense discussed in the preceding section. Sophisticated versions of those who highlight the importance of texts, particularly at a constitutional level, tend to take into consideration that references to literal meaning need to deal with words and expressions within a given context, a viewpoint that incorporates considerations related to the purpose of those texts and to the way in which they have been drawn up, which take into account other parts of the legislation. By way of contrast, the discussions in the legal domain that have most clearly reflected the debate that has taken place in philosophy of language around the importance of context have

8 What is implied, and the effects that one intends to achieve with what is implied, appears to be easily distinguishable from what is said in a given context. Nonetheless, the relationship between the different elements is complex, something that is evident because, for example, it is sometimes plausible to understand that we only simulate expressing/asserting something to imply something else**.** This would be the case if, at a party, I said, "the girls are tired out", to convey that it is time to leave.

9 These examples can easily be expanded upon. Imagine that, in reply to my question as to where the milk is, my daughter replies "on my bedside table". When she refers to *her* bedside table, she appears to express something different to what would be expressed in other contexts by using this possessive, given that she has not paid for it, cannot prevent her sister from using it, etc.

10 (Orlando, 2016, p. 131ff.). Whether they are some, a large part or all the terms depends upon how radical is the form of contextualism that is held. Some authors attempted to account for phenomena that regarded as isolated or intermittent, such as anaphora, metaphor or presupposition. By way of contrast, to give just a couple of examples, Recanati does not accept that there are literal meanings independent of context, by rather *semantic potentials*. Searle, for his part, invokes a *background* of shared assumptions, which do not and cannot form part of the semantic content of utterances. He may be regarded as a radical contextualist, even if he does not deem literal meaning irrelevant. This is so, as Poggi notes, given that the list of our assumptions is always open and, given that, to explain our assumptions, we have to use utterances that in turn only make sense with regard to other sets of assumptions, and so on (Poggi, 2007, p. 628).

11 For an interesting review on how the impact of context affects the distinction between semantics and pragmatics, see Bianchi (2004), Escandell Vidal (1993) and Ezcurdia (2017).

12 Nevertheless, invoking the purpose behind the legislation (sometimes associated with intentions, which shall be analysed in the next section) or the contents of other parts of the law, is not itself problem-free and can lead to different solutions.

been those associated with the role of intentions in legal interpretation.[13] Whilst it used to be commonplace to contrast the objective meaning of legal texts with the meaning communicated by a speaker in a specific context, with the passing of time the discussion has moved on to reflecting on whether the meaning of legal texts can be analyzed without taking into account the fact that texts are produced by agents who intend to communicate something.[14] Although it does not appear particularly problematic to assume that sentences have a meaning that depends upon the fact that they are intentionally used, it is much more controversial to hold that these intentions are central. Indeed, a viewpoint such as this gives rise to a number of questions, such as: How is it possible to establish obligations, such as the obligation to wear a facemask by using some words, if they do not already have a certain meaning, which is not created by the person introducing the legislation at a given time? In addition to this, there are numerous difficulties, particular of the legal domain, such as whether it makes sense to invoke the intentions of groups, especially with regard to legislative practices, which involve negotiations, agents without a comprehensive knowledge of texts, etc. If it makes sense to invoke intentions, which group would be relevant? Aspects such as the persistence of texts and its repeated application are additional drawbacks for adopting, without further argumentation, approaches that reconstruct ordinary communication for the legal domain.[15]

Whatever the case, if we focus our attention on the characterisations of literal interpretation and of those who appeal to legislative intent, in their most plausible versions, differences between the two positions seem to be only of emphasis. Those who invoke the text by advocating an interpretation in a given context take into account that the text has been introduced by agents who wish to create plausible legislation. And those invoking the legislature's intent understand that the latter makes use of certain texts that have a conventional meaning. Furthermore, as there are often many different relevant materials, with different readings and thus difficulties for accurately establishing the intent, resorting to intentions often leads to taking into account what the legislator plausibly wanted to transmit. Indeed, aside from a difference in terms of emphasis, differences between the two positions lie mainly in which materials are to be taken into account for achieving a plausible reading of the legislation: materials that are or are not related to the relevant legislative history.[16]

In constitutional law, intentionalist positions are often called *originalist*, since they emphasise the relevance of the intentions of those who created the constitution.[17] Nevertheless, it is important to note that this label has been repeatedly used to refer not only to intentionalists, but also to those holding any position that gives priority to any aspect of the constitution associated with the time in which it was approved. So, it also includes supporters of a literal interpretation of the text who take into account its meaning at the time it was approved. In fact, even those who argue for certain legal constructions and the typical reasoning of common law to adapt the constitution to new times could also be regarded as originalists, inasmuch they give some relevance to the meaning of the text when it was created and/or the intentions of those who created it.[18]

13 Generally speaking, context, in the sense previously outlined, can be regarded as relevant *for the very purpose* of establishing the intentions of the speaker, thus the connection between the two discussions is obvious.

14 This has given rise, in the field of legal interpretation, to numerous discussions between intentionalists and textualists. The debate, especially with regard to constitutional matters, is no longer between literalists and contextualists, but rather between those who stress conventional meaning and those who, in constrast, highlight the intent of those who introduced the text. In this article, I shall use the expressions *textualism* and *literal interpretation* without distinction.

15 Thus, it is important to bear in mind that, if literal meaning is problematic, invoking the legislator's intent is no less controversial. With regard to the problems associated with intentions in general, questioning the identification of speakers' intentions and the communicated sense, see García Negroni et al. (2013), and, with regard to the problems of invoking legislative intent, see, for example, Hurd (1990) and Poggi (2020).

16 In these discussions, it is commonplace not to distinguish metaphysical questions from other questions, that are not metaphysical but causal (what causally determines that a given text is passed or that a group has a given intent) or epistemic (how we identify the intent or the literal interpretation). So disagreements with those who emphasise the relevance of texts are sometimes only apparent.

17 For an analysis of the main originalist arguments, including the well-known debate between Dworkin and Scalia, see Kavanagh (2002).

18 Debate with and between originalists is extremely abundant and complex, to the point that, although it was initially held that they supported a conservative viewpoint, today many assume that it is perfectly compatible with giving a role to the intentions of those who approved the constitution and with the acknowledgement of evolution in its interpretation, as I have indicated in the main text. There are even arguments that emphasize the need to dispense with the label, on the basis that it is a position indistinguishable from the others: in one sense, all authors are originalists and it has become a trivial (albeit right) position. On these issues, see Solow-Friedman (2013) and Eyer (2019).

2.3 Literal vs. evolutive interpretation

The position of originalists, who emphasize the importance of the text, taking into account the time when it was approved, tends to be contrasted with that of those who argue that the constitution is a living tree and support evolutive interpretation. Once again, the position of supporters of literal interpretation appears to be threatened by those emphasising the context in which the constitution in question is applied, in contrast to considerations regarding the time of its approval. Originalism does not necessarily reject that legal systems change as a result of the passing of time. However, what supporters of evolutive interpretation regard as the best way of viewing things in new contexts, originalists regard as a mistaken interpretation that is becoming consolidated.[19] Whatever the case, and aside from normative considerations that I will address later on in this article, it is important to note that supporters of evolutive interpretation are affected by the same problems that I have highlighted with regard to literal interpretation; however, instead of holding that the context to be considered is the one existing at the time of adopting the text, they advocate for the relevance of the current context.[20]

3 Literal interpretation, descriptive conventionalism and inflexibility

The above discussion, set forth in a simplified manner, makes it clear that literal interpretation is not so radically different from other approaches that stress different contextual aspects. Moreover, the use of other interpretative methods is also problematic. It is particularly noteworthy that, in a great amount of the literature in legal philosophy, when literal interpretation is put into question and elements such as the legislator's intent or evolution are highlighted, such arguments are based on assumptions that are questionable: it is assumed that, in the sense indicated below, meaning is conventional and was fixed once and for all.

Let me begin with the issue of the conventional nature of language. According to an intuitive conception that is widespread in and outside the legal field, we associate words with descriptions and we refer to objects that have the properties included in our descriptions. For example, we *decide* or *accept* that the term *marriage* has a specific meaning, and this entails dividing the world into two: those entities that do and those that do not constitute marriage, depending upon whether they meet the relevant conditions. Terms refer to objects that meet the conditions we deem relevant, and we are competent in the use of a term to the extent that we know the descriptions that make up its meaning. This viewpoint is intuitive because it appears to reflect how we learn and how we teach to use words, and provides a clear explanation of why terms refer to certain objects and not others: objects have certain properties that are important to us, and which we have included as part of the term's meaning. In the legal domain, it is especially plausible to understand that we decide to regulate different situations in specific ways, what entails deciding that certain situations with certain characteristics are associated with certain legal consequences. However, this viewpoint has been subject to great criticism from supporters of new theories of reference, which have presented an alternative model.[21]

Although they stress different aspects, it can be argued that supporters of theories of reference share a negative thesis, consisting in the fact that individuals do *not* need, in order to refer, to associate terms with a set of defined descriptions that unequivocally identify and determine reference. For them, not only individuals, but also the community as a whole often deal with poor and/or mistaken descriptions. Yet, despite this, they are able to refer. This does not appear to be especially controversial if we consider what happens with proper names like *Cleo*: people are capable to refer to Cleo, despite they just know descriptions such as "Diego's daughter", that do not select a particular individual, and could lead to a mistaken reference (e.g. if babies were swapped in hospital after they were born). In this regard, although it is hard to deny that we associate certain descriptions, positive and negative connotations and other elements with terms, they do not explain how we refer, and what we refer to.

19 With regard to evolutive interpretation, see Stevens (2017).

20 Nevertheless, it is not uncommon for supporters of evolutive interpretation to reject the relevance of current practices and stress, by way of contrast, the importance of the best reconstruction of the phenomenon in question (which tends to be the current viewpoint of those supporting this interpretation, even if it is not shared by the majority).

21 On the conventional nature of legal language and new theories of reference, which I shall outline below, see Ramírez-Ludeña (2015).

However, if not because of descriptions, how can we refer to objects that are often remote in time and space? According to this alternative viewpoint, this is explained by the fact that an initial act of reference-fixing establishes that we shall call a given object by a given name. From then on, individuals are capable to use the term inasmuch as they form part of a chain of communication, borrowing the term from other individuals, and these from others, all the way back to the specific individuals present at the initial act of reference-fixing. According to these theories of reference, individuals refer to an object by their objective position in the chain of communication, without there being a need for descriptions to select the object. Now, individuals' intention to refer to the same object is important here: if anyone hears someone else talking about my daughter Cleo, and decides to use the name for her dog, she is not part of the chain but instead (under normal circumstances, at least) create a new chain of communication, referring to a different object. More complicated than the case of proper names like *Cleo* is explaining how general terms fit in this new model. Following Putnam's classic example, imagine that the term *water* was introduced by indicating specific samples of the substance in a lake. These initial samples are regarded as paradigmatic instances and, from then on, other examples are classified based on their similarity with the paradigmatic cases. According to advocates of new theories of reference, what makes a sample water, and what makes the application of the term *water* correct, may perhaps not be accessible to subjects. In fact, having the molecular structure H_2O is what makes something to be water, and thus determines the domain of application of the term *water*, but the discovery of the molecular structure of water took place well after the commonplace use of the term. We were nonetheless capable of talking of water and were regarded as competent speakers, despite our lack of information on its atomic structure.

It is often assumed that the conception outlined above is committed to essentialism, in that it postulates the existence of shared underlying natures that are not immediately accessible or observable, and which can only be discovered through research and theoretical reflection. Nevertheless, commitment to essentialism is not a constituent element of this position. Some examples are treated as paradigms, and other instances are classified as members of the same class by virtue of their similarity to the paradigms. However, this similarity may be related to functions or superficial aspects. So, the model does not require that the determinant element be the essence. The criteria of similarity that are, in the end, important, depend upon complex factors that are not semantic in nature. This new model leaves the door open for these criteria to be associated with elements of which the individuals are unaware and that could transcend the entire community. In any case, this position is compatible with the fact that different chains of communication may arise around the same term, or that, given the use made of terms by speakers, a chain of communication that was anchored in certain objects may vary, changing also the reference. This may mean that there are some periods in which reference is undetermined, but instead of being an argument against the characterisation provided, this fact seems to confirm that the reconstruction outlined here is plausible.[22]

The aforementioned model allows us to reconstruct many of the arguments taking place in constitutional law, such as that regarding the term *marriage* and the nature of the institution. This does not imply that all disputes are semantic in nature, but it does imply that many are about the content of certain terms and may be appropriately characterised taking into account new theories of reference. Now, according to this model, account is taken of the intentions of participants in legal practice in referring to a phenomenon, without the descriptions of the creators of legal texts being determinant. In other words, the version I propose entails keeping intentions as important: those who introduce the legislation need to have the intent of referring to the same phenomenon. But the key point is that this does not mean that their descriptions or those of the community determine reference. In any case, put this way, this new conception appears committed to the fact that, once a chain of communication has become consolidated, meaning is fixed once and for all. However, this assumption may also be called into question if one notices the *flexible* nature of our use of numerous terms.

It seems hard to deny that the meaning of a word determines its domain of application: that is, to what it should be applied and not. However, this has often been interpreted in a robust way. It has been deemed that, every time a term is introduced, and it is assigned or it acquires a meaning, the domain of application remains fixed. In other words, that the inclusion of any past, present or future object within the scope of the term is fixed.[23]

22 Emphasising these points, see Martí and Ramírez-Ludeña (2016).

23 This does not mean that it is generally denied that there are cases that raise doubts. But, in general, it is understood that, when a response is provided in cases of vagueness, a change in meaning arises, something that recognising flexibility will lead us to question.

This robust reading can be questioned using the following mental experiment:[24] suppose that Olympia is a member of a community that inhabits an isolated island in which the class of birds is the same as that of flying objects. In this community people use the word *bird* to refer to such objects, and hold beliefs such as "only birds can fly" and "birds are living beings", which are true of the birds in the island. One day, Olympia sees an airplane for the first time and unhesitatingly classifies it as a bird. When she later sees it landing, she forms the belief that not all birds are living beings. Despite the initial lack of clarity, arising from the fact the community associated different beliefs with the term, the time comes when all of them deem that *bird* refers to things that fly and that some of the beliefs they previously held regarding birds (e.g., that they were all living beings) were incorrect. Then let us suppose that, instead, Olympia had initially seen airplanes on the ground, without realising they could fly. She might well then have classified them as *not-birds*. Then, having seen them take off, she would have reached the conclusion that not everything that flies is a bird. Assuming that this other practice spreads throughout the community, they would again think that they had always used *bird* to refer to birds and they would also recognise that some of their previous beliefs (e.g., that only birds could fly) were mistaken. In neither of these two scenarios do the members of the community regard themselves as having changed the meaning of *bird*, but they assume that their current use arises *naturally* from their previous use.

This shows that the inclusion of airplanes within the scope of *bird* does not appear to be fixed from the start, what challenges the robust version of the principle, according to which meaning determines the domain of application once and for all. Certain unintentional events, such as how they encountered planes for the first time, had a decisive impact upon altering the community's beliefs. So, it also appears to be wrong to talk of a change in meaning, since the two options (either including or excluding airplanes) are regarded as consistent with the way in which the term had previously been used by the community.[25] This would suggest that the semantics of some terms are *flexible* in the sense that, at a given time, when it comes to the matter of whether to include an object within the scope of a term, there may be more than one available course of action that seems compatible with the term's meaning, more than one course of action that is a continuation of the previous use. In any case, one interesting aspect of flexible terms is that, once a use is consolidated, it seems to become *expansive* with regard to the past and we tend to look back as if this form of application had always been the only correct one.

Whether the semantics of a term is flexible or not depends on many things, including speakers' intentions and interests, and what may be at stake in keeping its scope fixed. Furthermore, accepting semantic flexibility leads us to the question of what makes the history of use of a flexible term go in one direction or another. A wide range of factors may have an impact: economic considerations, social pressure and moral issues, amongst others.[26]

One case in which this is relevant is the dispute around same-sex marriages. The discussion amongst supporters of same-sex marriage has followed two different lines. Firstly, there are those who, accepting that traditional marriage entailed the union of a man and a woman, state that the traditional institution of marriage needs to be laid to rest. They regard the acceptance of same-sex marriage as the start of a new institution, proposing that we continue using an old word but with a new meaning. Secondly, Adèle Mercier, who acted as an expert witness in the Canadian courts in support of homosexual couples fighting for the right to marry, used a semantic argument according to which the defining features of *marriage* (a commitment to a shared life together, respect, trust, etc.) are present in both heterosexual unions and those between same sex couples, such that marriage between two people of the same sex had always been included within the scope of *marriage*.[27] Both positions assume a robust version of the principle according to which meaning determines reference or, in other words, assume that the term is inflexible. Another way of looking at the issue is, however, to regard

24 With regard to this example, inspired by that of Mark Wilson, see Martí and Ramírez-Ludeña (2021).

25 For other examples, less imaginary than that of birds, such as the inclusion of e-sports as an Olympic sport, see Martí and Ramírez-Ludeña (2021).

26 As we note in Martí and Ramírez-Ludeña (2021) another important semantic distinction, different to the above, has to do with the acceptability of the coexistence of different uses of a term, which roughly divide the same domain of application in different ways. In those cases in which two or more uses coexist, these uses intuitively correspond to different meanings. However, there are cases in which the coexistence of different uses is not accepted as legitimate by the speech community and is not regarded as permissible from a semantic standpoint. When the coexistence of different uses is accepted, the term is *tolerant*. When such a coexistence is not accepted the semantics of the term is *strict*.

27 Mercier, 2007. On the different positions, see Ramírez-Ludeña (2018b) and Martí and Ramírez-Ludeña (2021).

marriage as a term with flexible semantics: when it came to considering the issue of same-sex unions, there were two possibilities consistent with the meaning of the term. According to one, the application of *marriage* to same-sex unions was accepted. According to the other, marriage was limited to unions between a man and a woman. Moral considerations, social pressure and, in many countries, decisions by the legislature and the courts have lead to the inclusion of same-sex unions as marriages.[28]

Bearing in mind that our descriptions are not always determinant and that some terms are flexible allows us to reach further important conclusions that make clear the importance of our contingent practices in the use of terms: a) terms do not all operate in the same way (some operate in the way indicated by advocates of new theories of reference, whilst others do not; some are flexible, some less so, and other not at all), and b) a term that, at a given moment in time, operates in a given way may later operate in another way, depending upon how it is used in the community in question. Thus, reflexions over interpretation tend to assume not only that meaning is conventional in the aforementioned sense, and that it is fixed once and for all, but also that there is uniformity in the way in which terms operate. If, however, we assume that literal interpretation is related to our linguistic uses, and that it is compatible with the acceptance of external factors (physical, historic and social) that are not fully grasped and controlled by users, as argued by supporters of new theories of reference, and with the fact that terms sometimes operate in a flexible way, then there are no obstacles to accounting for our constitutional practices of interpretation. Moreover, the intentions of those who created the constitution to refer to specific phenomenon would be preserved, and the passing of time would also be taken into account.[29]

4 Literal interpretation in the constitutional domain: literal interpretation vs. value-based issues

In the preceding sections, I have attempted to outline a plausible version of literal interpretation that, in a relevant sense, acknowledges that texts are the outcome of intentional acts and that their contents can be determined over the course of time. Nevertheless, it could be argued that setting out and attempting to resolve the issue by appealing to purely linguistic considerations is simply nonsense, on the basis that law depends on value-based considerations and not on the ascertaining of meanings. This criticism can be understood in different ways.

Firstly, one could highlight how important debates around law, especially those concerning constitutional matters, deal with highly abstract terms with a significant value-based component.[30] According to this line of criticism, this means that, particularly when dealing with the most controversial cases, literal interpretation is completely irrelevant. However, in the approach proposed in this article, the fact that we are dealing with abstract and value-based terms does not pose a problem. In fact, in the version of new theories of reference presented here, the discussion around the relevant similarities with regard to paradigmatic cases helps to account for many of the discussions taking place in the constitutional domain around the meaning of terms such as *equality* and *dignity*. Put differently, rejecting that many terms operate as conventionalists sustain allows us to explain what our terms refer to without assuming that the criteria of application are fixed in advance and are transparent.[31]

Secondly, it could be argued that the value-based character of law *in general* does make literal interpretation the wrong method in this field. To deal with this point, we should note the ambiguity of the argument and

28 At the same time, it appears clear that different uses, one classifying a union as a marriage and another classifying it as a *not-marriage*, cannot officially coexist within the same community. That is why our use of *marriage* is, furthermore, *strict*. In any case, bearing in mind the distinction between flexibility and tolerance, which, while present in literature, is not emphasised sufficiently, helps us to understand how terms operate and realise that its strict nature must not lead us into thinking that its use is inflexible.

29 Stevens (2017) suggests an idea similar to that advocated by this article, as he argues that there are no sematic obstacles to having a conception that takes account of evolution. Moreover, he does so in a considerably different way, as he draws parallels with fairy tales, which have meanings that change depending upon the context.

30 This does not imply that only constitutional terms, and that every constitutional term, are like this, but rather that those are prominent features of terms that lie at the heart of the interpretative debate around constitutional matters, and therefore that it is reasonable to take them into account.

31 This criticism of the abstract and value-based nature tends to be linked with the need for deliberation in matters of constitutional law. Nevertheless, I believe that the difference with what happens in the legislative field is merely one of degree and that the need to deliberate is no obstacle to making reference to literal interpretation, as it is not when invoking intentions or evolution.

distinguish between different levels of analysis with regard to literal interpretation. Leaving aside descriptive theses regarding the use of this method in a given legal system,[32] one could posit normative theories on how a text should be interpreted,[33] as well as theses that we could call *conceptual* with regard to what is the *legally* correct interpretation of a given text. I call these *conceptual* because, even though they may contain descriptive and normative elements, they are directly associated with a specific viewpoint on what counts as law. For example, although expressed in a simplified way, one could point out that resorting to literal interpretation is the right thing to do because law aims to motivate our behaviour, and this is why it is expressed to a large degree in ordinary language. In other words, the incidence of literal meaning would be established by a given conceptual position with regard to law. Alternatively, one could argue (in Dworkin's line) that it is right to use it if it is supported by the best version of the values at play in the legal domain; so, it could be held that literal interpretation has a role, when it has one, insofar as it is justified. It could also be held, in *Guastinian* terms, that legal provisions express a plurality of norms in light of the different interpretative methods relevant in the legal practice, from which the judge chooses. This entails the acceptance of an important methodological issue: that the degree to which literal meaning is important, and the considerations that make it relevant, depend upon the general position about law which one holds, a position that can be highly complex.[34]

If one looks at the debate around constitutional interpretation, it does not often focus on disentangling what literal interpretation actually is, but instead refers to arguments in favour and against adopting it, based (fundamentally) on value-based considerations, for example, in the pronouncements of the Spain's Constitutional Court or of the US Supreme Court on same-sex marriages.[35] As can be seen from these decisions and the arguments arising from them, resorting to literal interpretation tends to be associated with values such as predictability, formal equality, non-retroactivity, limitations on arbitrariness and even respect for the legislator's intent and for sovereignty, in the sense that are deemed relevant.[36] Some of these value-based considerations stress specifically constitutional aspects (the existence of a power or of a constituent moment, or its key role in current societies, to give jut some examples),[37] whilst others do not draw an important distinction between legislative and constitutional interpretation. Also, even though they are somewhat connected, this discussion on the justification for the correct interpretative method is different from issues (of constitutional design) associated with who has the last word when it comes to interpreting the constitution, if control has to be concentrated or not, with effects that may be *erga omnes* or limited to the parties in question, if control is previous or posterior, or how rigid a constitution should be.[38]

This article will not analyze the different arguments advocated from a value-based standpoint. Nevertheless, it is important to note that, if the version of literal interpretation outlined herein is plausible, there are criticisms that cannot be raised, for example, that textualism does not account for changes in people's beliefs. However, it should also be noted that some aspects that tend to be regarded as positive in literal interpretation need to be,

32 For example, it can be argued that the Spain's Constitutional Court not only resorts to literal interpretation, but also takes into account axiological considerations, for example in its rulings STC 54/2008, of 14 April, FJ 4; 199/2013, of 5 December, FJ 13; 29/2014, of 24 February, FJ 3, and 185/2014, of 6 November, FJ 5. And this entails a description (which may be true or false – in this case, true) of what this body actually does.

33 Associated, for example, with the fact that it is desirable to adopt a literal interpretation, as this is the method that best preserves the requirements related to the principle of legality.

34 With regard to this methodological issue, see Martí and Ramírez-Ludeña (2020). Although not examined in this article, this has a clear impact upon judicial motivation and on the training and selection of judges, in that they cannot refer to literal interpretation as if they were only stating something obvious, but rather should provide arguments in favour of the version they support and in favour of using this method in this reading rather than others, something that is associated with the general view about law that is being argued for or assumed. With regard to the training and selection of judges in legal theory, see Ramírez-Ludeña (2014).

35 See STC 198/2012 and the ruling of the US Supreme Court in Obergefell v. Hodges, 576 US 644 (2015), which provide different readings of the interpretative methods outlined in the article, based on value-based considerations.

36 On the other hand, positions based on intentions tend to focus on a given view of democracy and the separation of powers, which is presented against another view of democracy held by supporters of evolutive interpretation, as a mechanism by means of which the dead should not govern those who are alive. This is obviously a highly summarised and exceedingly simplified presentation of the debate.

37 These issues often appear associated with others, such as the object of regulation of constitutions (basic institutional design and fundamental rights) and the continued existence over time of constitutional texts. However, these features are not only, and not always, present in the constitutional domain.

38 Even though, as noted, connections are often established. For example, when it is emphasized that, given the relevance of evolutive interpretation, the legislator has to have the last word on certain constitutional matters. On this topic, see Kavanagh (2015).

at the very least, qualified: to give but one example, with regard to highly abstract terms, it is not plausible to argue that the adoption of a literal interpretation in the sense proposed in this paper increases predictability.[39]

5 Some final considerations

References to literal interpretation are frequent, and it is regarded as being unproblematic, in the sense that it is supposed to allow us to determine the meaning of a text without becoming involved in value-based considerations. This supposition is due not only to ideological considerations associated with the separation of powers and the role of judges, but also to the assumption of some kind of descriptivist conventionalism, according to which meaning raises no problems.

We have seen that there are many versions of and difficulties in characterising literal interpretation and that, in any case, their impact on constitutional interpretation is dependent on the theory of interpretation and the theory of law that is advocated or assumed to be the correct one. I have already noted that literal interpretation can be understood as focusing on a plausible version of the constitutional text at the time it was adopted, but assuming that the authors of the text may be understood as intending to refer to a phenomenon, without this meaning that the descriptions of that moment in time are decisive. This depends on whether it makes sense to assume that the text forms part of a chain that stretches back to the phenomenon in question, given that those who adopted the text integrated the linguistic practice.[40] And it leaves room not only for intentions in a significant way,[41] but also for theorisation and changes in our beliefs. Furthermore, taking into account that we use some terms in a flexible way allows us to reconstruct what happens in certain cases, in which changes in reference can be acknowledged without there being a break with previous meaning.

So, it might be thought that, at least in cases of highly abstract value-based terms, which are those which are central in constitutional interpretation, anything goes, and that literal interpretation does not constitute any limit to the judicial activity. Following this line of argument, it could be stressed that, on the contrary, it serves as a pretext for judges adopt and impose their views on controversial issues. Nevertheless, in the version outlined in this article, the way in which the text has been drawn up and its literal meaning is important, as certain options are eliminated and the room for deliberation is therefore restricted. For example, the fact that a constitution refers to the institution of marriage and sets forth some elements as determinants is relevant and entails a different kind of deliberation from that which occurs in legal systems in which no constitutional reference is made to marriage and where principles such as equality and freedom are invoked. Bearing in mind the alternative ways in which the legislation could have been drawn up provides a guide for the complex deliberation often required in these fields.[42]

In addition, two further considerations are worth highlighting: 1. Whether terms and expressions operate or not in accordance with what I have stated with regard to theories of reference and are flexible or not is dependent upon the practice in question, what implies that one cannot assume that *all* terms *always* work in the same way. 2. Arguments contrary to this version of literal interpretation emphasizing that meanings would not be transparent to speakers are not conclusive, in that they contrast literal meaning with idealised versions of the other two methods (intentions and evolution). In this regard, we have already seen that emphasis on intentions also fail to provide us with a conclusive response, and so it can also be held that it allows judges

39 It might be pointed out that, if jurists put forward value-based arguments, then my argument in this section is incorrect: the impact of literal interpretation does not depend upon the concept of law that is assumed, but rather on value-based considerations, such that a particular, Dworkin-style view of law would be correct. Nevertheless, I do not believe that this is the case. When difficult cases are raised, the different theories account for the use of normative arguments in different ways (incorporation of moral deliberation, judicial discretion, etc.), without this inevitably leading to Dworkin's interpretivism.

40 Or also, depending upon the case, that a new, eminently legal chain of communication has arisen. Disagreements on whether one thing or the other has ocurred may arise, and also doubts with regard to which is the relevant chain of communication. These doubts can be explained by resorting to the idea of chains of communication, which are dependent upon practice and which may vary over time. Whether they do or do not give rise to indeterminacy depends on the particular view of law that is held, as previously noted.

41 Indeed, it is not implausible to assume that those who approved the text took into account this reading of the legal text, precisely because they understood that it would be taken into account by its interpreters.

42 This means that, even in the case of provisions on difficult matters with a clearly controversial and profound moral component, deliberation is to some degree restricted. On this point, see Ramírez-Ludeña (2015, Chapter 5).

to impose their views. Indeed, the problems related to intentions are, if we bear in mind what happens in practice, immense: those involved in the creation of norms can manipulate what is put on record during the law-making process so that it may later be invoked despite having less legitimacy than the normative text itself. Far greater efforts are made by lawyers and judges to emphasise isolated aspects of the law-making process to support an interpretative position, appealing to texts that are already problematic, and which are merely indicative of something like intent, which also raises numerous problems. Furthermore, this provides no proper incentive to draft legislation better, amongst many other issues. And, with regard to evolutive interpretation, the determination of the relevant social beliefs is by no means problem-free, particularly in plural contexts such as today's. What's more, this approach tends to be used in reality to defend a specific viewpoint (that which is deemed to be the best) of the phenomenon.

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