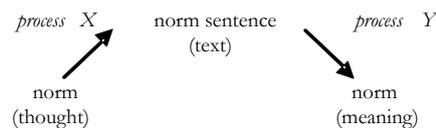


Linguistic Objectivity in Norm Sentences: Alternatives in Literal Meaning without Alternatives to Literal Meaning*

David Duarte

1: Legal reception of natural language rules

1.1: (*Language circuit of norms*). Among the variety of uses of language in a legal order (texts of contracts, wording in adjudication, etc.), norm sentences are the use made in the process of enacting norms: they are, therefore, the linguistic texture of these general deontic contents, by which a normative authority makes them cognizable (and part of the set that a legal order is), usually in a written text created with the natural language adopted¹. Even though the connection between norms and norm sentences is scientifically relevant on many issues (for instance, in problems such as norm individuation or the ontological nature of norms), its relevancy, for the present purposes, is on the fact that it allows to show that the process of creating a norm sentence and the process of discovering its meaning are operations (in a sequence) with linguistic opposite directions².



As the above scheme tries to make clear, those processes are: (i) process X, the conversion of a regulation idea (an hypothesis with a consequence under a specific deontic mode: a norm) into the text that expresses it, made through a structured composition of words of a natural language, and (ii)

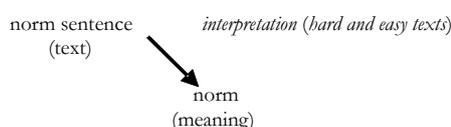
* In Neil MacCormick's *Legal Reasoning and Legal Theory* (Oxford, 1978, pp. 203 and ff.) there are evident concerns on what literal meaning is, on its alleged uncontestability, and on what its alternatives could be: the present paper works on this, naturally with distinct results, but under a frame that, as it is possible to imagine (in *Rhetoric and the Rule of Law*, Oxford, 2005, pp. 7 and ff.), Neil MacCormick probably would not disregard, at least completely.

¹ On other forms of expressing norms (not considered here), for instance, Riccardo Guastini, *Fragments of a Theory of Legal Sources*, in *Ratio Juris*, 1996, vol. 9, pp. 364 e ff., and always, Alf Ross, *On Law and Justice*, London, 1958, pp. 91 and ff. Regarding the underlying concept of norm (a *general deontic content*), after all not distinct from, Neil MacCormick, *Rhetoric and the Rule Of Law*, cit, p. 24, or, Riccardo Guastini, *Norma: Una Noción Controvertida*, in *Distinguiendo*, Barcelona, 1999, pp. 92 and ff.

² On the connection between norm sentences and norms in those problems, for instance, Pablo Navarro, *Enunciados Jurídicos y Proposiciones Normativas*, in *Isonomía*, 2000, n.º 12, pp. 121 and ff.; Carlos Alchourrón and Eugenio Bulygin, *Sobre la Existencia de las Normas Jurídicas*, Ciudad de México, 1997, pp. 15 and ff.; Aulis Aarnio, *The Rational as Reasonable*, Dordrecht, 1987, pp. 28 and ff.

process Y, the operation by which that text is converted, with the knowledge of the language used, into an intellectual content, specifically the linguistic meaning of the sentence (the norm). Relying both processes on the same code (the natural language), their linguistic opposition and their order appears to be clear: they are inverse applications of that code (code \leftrightarrow decode), and the development of process Y depends on the previous realization of process X. And this leads to the following point: it seems that it is not possible to analyze how process Y should or could be done without understanding the conditions present in the activity described as process X.

1.2: (*Process Y as what is meant by interpretation*). It is commonly recognized that legal interpretation is a polysemic scientific concept. Using a known categorization, it might be understood in four ways: (i) only as the activity, (ii) only as the product that activity, (iii) as the sum of that activity with the subsequent activity of norm application, and (iv) as the product of these two activities³. However, it seems that the last three meanings are technically inappropriate (as it is a conventional issue, this means they are less useful or not useful at all): meaning (iii) and meaning (iv) because their lack of analyticity, mixing different methodological operations (qualification of facts or resolution of normative conflicts, for instance), and meaning (ii) because it leads to an inoperative synonymy between interpretation (in the present context) and the concept of norm itself⁴. In this scenario, interpretation is (or has to be) reduced to its narrowest meaning (more technically operative): the activity of defining the meaning of a norm sentence, which is equivalent to what is represented, connecting with the 1.1: previous scheme, by process Y⁵. At the same time, seen as a process of decoding structured compositions of words resulting from an opposite process, interpretation is a common activity needed in every norm sentence. It could be more or less technical or more or less intuitive, depending on the linguistic configuration of a norm sentence (its grade of difficulty), but with hard or easy texts it is in every case a *process towards meaning*: after all, under these premises, all norms are inoperative before interpretation⁶.



³ Giovanni Tarello, *Philosophical Analysis and the Theory of Legal Interpretation*, in *Law and Language*, Liverpool, 1997, pp. 69 and ff.

⁴ Meaning (iv) leads also to another useless synonymy: between *interpretation* and *adjudication*. An analytical approach with a wide conception of *interpretation* in, Juan Pablo Alonso, *Interpretación de las Normas y Derecho Penal*, Buenos Aires, 2004, pp. 4 and ff.

⁵ Which means, therefore, that there should be no connection between *interpretation* and any other analytically distinct step of problem solving. Accordingly, for instance, Bartosz Brożek, *Rationality and Discourse*, Warszawa, 2007, pp. 261 and ff.; Daniel Mendonca, *Las Claves del Derecho*, Barcelona, 2000, pp. 152 and ff.

⁶ Even though its conventional nature, this questions the distinction between *interpretation* and *understanding*. Also critical, Pierluigi Chiassoni, *On the Wrong Track: Andrei Marmor on Legal Positivism, Interpretation, and Easy Cases*, in *Ratio Juris*, vol. 21, 2008, pp. 256 and ff.

1.3: (*Process X as a regulated process*). Even though it is not commonly taken into account, the mentioned process X is not a free operation or, with the same meaning here, it is not a legal use of language exempted of regulation. This happens because the legal order (in fact, all known legal orders) adopts an official natural language (or more than one) and, through the norm of the set that makes that adoption ($LN_1 = \textit{language norm}_1: \textit{official acts} \rightarrow \textit{in language Z}$), as binding as any other, subordinates the construction of norm sentences to the rules that are inherent to (or associated with) the adopted language⁷. If this allows to say that process X is legally regulated by natural language rules, as it is claimed here, it lifts the veil to another point: accepting that natural language rules are an autonomous set with an independent pedigree, their integration by LN_1 is a *formal reception*, in other words, a reception that allows the received set to maintain its own normative production and its specific evolution. Accordingly, even as a part of the legal order, natural language rules keep their autonomy and their content is what it is in the moment when they are legally applicable⁸.

(i) With LN_1 (*language norm*₁: *official acts* \rightarrow *in language Z*), the legal order establishes that all norm sentences (NS_1 to NS_n) have to be composed under the rules of the natural language adopted (*Zrules*: $Zrule_1, Zrule_2$, etc.);

(ii) As *Zrules* are an autonomous set with an independent pedigree, LN_1 also implies that they are applicable (in the legal order) with their developing content: if $Zrule_2$ changes, it is legally applicable as $Zrule_2$ with its new content⁹.

These natural language rules are, naturally, syntactical rules, establishing allowed sequences of words and phrase structures, and semantic rules, associating expressions of the given language with their meanings through their use in the community of speakers¹⁰. Obviously, for normative authorities enacting norm sentences, natural language rules ought to be observed, not only because of the mentioned LN_1 of the legal order, which is already decisive, but also because that is the only way norm sentences can reach their communicative goal (*Zrules* as the *code* between normative authorities and norm addressees). It is important to notice that, although natural language rules have their own processes of modification, they can also be (atomistically) changed inside the legal order by legal norms: that is what happens, for instance, with definition norms, establishing different meanings or deparating those coming from semantic *Zrules*¹¹. As these legal norms on language are as well rules on the

⁷ For instance, Santiago Nino, *Introducción al Análisis del Derecho*, Barcelona, 11^a ed., 2003, p. 247, and with cases in an environment of more than one natural language, Timothy Endicott, *The One True Interpretation*, in *Análisis e Diritto*, 2005, pp. 127 and ff.

⁸ On the relation between a legal order and other orders (legal or not), e.g., François Ost and Michel van de Kerchove, *Le Système Juridique entre Ordre et Désordre*, Paris, 1988, pp. 158 and ff.

⁹ This stresses the fact that normative authorities, on one side, and legal interpreters, on another, are legally subordinated to that evolution. One consequence is particularly relevant: because it is a formal reception, the word-world meaning relation is always the one applicable in the moment that language is used (if $A \rightarrow B$ when the norm sentence was enacted becomes now $A \rightarrow B_1$, then the natural language rule (semantic *Zrule* on A received by LN_1) orders $A \rightarrow B_1$, forbidding the meaning B. Naturally, this is an argument against all varieties of *non-actual interpretation*.

¹⁰ David Lewis, *Languages and Language*, in *The Philosophy of Language*, 4^a ed., New York, 2001, pp. 562 e ff. Also, Enrico Pattaro, *Lenguaje y Comportamiento*, in *Análisis y Derecho*, Ciudad de Mexico, 2004, p. 327.

¹¹ Another example is given by norms that define precise features of the use of language within process X (for instance, secondary norms defining the use of punctuation, style of redaction, or similar). On definition norms, although in a similar line of constitutive rules, Carlos Alchourrón and Eugenio Bulygin, *Definiciones y Normas*, in *Análisis Lógico y*

use of language in the legal order, language rules regulating operation X turn out to be the sum of natural language rules (legally unmodified) with all norms on language enacted in the legal set.

2: Norm sentences as speech acts

2.1: (*Ordinary conversations and norm sentences*). The following dialog between Mr. M and the Officer in duty at the customs room of a foreign airport illustrates an extreme case of failure in a communication process, under the inherent goal of a successful exchange of information.

(i) Officer: *You, sir, please, brandy... whiskey... cigarettes... ?*

(ii) Mr. M: *No, no, thanks. Just a coffee.*

Two reasons justify the failure visible in the answer: (i) the high level of context dependence of the utterance of the Officer in duty, and (ii) the disregard of context information by Mr. M, preventing his understanding of what was meant by the Officer. Although the failure is quite inexplicable, it would have never happened with the same reasons if the situation was as follows (in spite of so many others that could lead to the same result).

(i) Is given a paper to Mr. M, before landing, where, with a reference to its belonging statute of the legal order, it is written: *at the airport customs room passengers arriving from foreign countries declare transported brandy, whiskey, and cigarettes.*

And the failure would have never happened with the same reasons, because norm sentences are a kind of speech act, in contraposition to what happens in ordinary conversations, whose features prevent the opportunity of their occurrence: (i) norm sentences are a closed unilateral speech act, without chance for a linguistic reply, (ii) norm sentences have an indeterminate speaker and indeterminate hearers (readers, here), (iii) they do not have a conversational context, because there is a context of utterance separated from the contexts of interpretation, (iv) those contexts are irrelevant to the illocutionary value of the speech act, (v) they are almost irrelevant to meaning, and, even if not significant in Mr. M previous situations, (vi) implied content is, at best, only of semantic nature and, therefore, only residually pertinent¹².

Derecho, Madrid, 1991, pp. 431 and ff. However, if legal norms on language are norms of the legal order as any others, this raises the question for the normative basis to disregard them (as in, Michael Moore, *A Natural Law Theory of Interpretation*, in *Southern California Law Review*, 1985, vol. 58, p. 331). And the question is: under what normative criterion is a norm defining what one should understand for *book* in the legal order irrelevant and one defining VAT tax on the sale of *books* is not.

¹² Set of features of norm sentences that explain their specificity, defining a kind of speech act where knowledge of language (grammar and lexicon) is decisive to communication and pragmatic contributions have low significance.

2.2: (*Closed unilateral speech act*). If in ordinary conversations the use of language may incorporate the chance for a linguistic reply from the hearer, in the speech act that norm sentences are the use of language is restricted to a no way back communicative connection between speaker and reader¹³. As any experience with the legal order shows, a norm sentence does not request an answer from its addressees: it demands human behaviors that, even if communicative, are not oriented towards the normative authority. This feature implies that norm sentences just aim a successful reception of information (as a non-cooperative form of communication) and not a successful exchange of information¹⁴.

- (i) This is visible, of course, in Mr. M previous situations: when reading the norm sentence in the plane, whether he later asks for *a coffee* or says that he does *not transport brandy, whiskey, and cigarettes*, there is never the chance to reply to the normative authority;
- (ii) It is also evident that in Mr. M previous situations the instances of speech have distinct aims: in the first one a successful exchange of information (completely failed in the example given), and a successful reception of information in the second (also possible to fail for language reasons).

2.3: (*Indetermination of speaker and reader*). Differently from what happens in ordinary conversations, norm sentences are a kind of speech act where the connection speaker → hearer (reader) is played in both sides by indeterminate actors. From the reader's point of view, this is intuitively understandable: norm sentences are utterances made to all the addressees of the legal order (previously unknown) and, even more specifically, they contain norms, by definition deontic contents with indeterminate addressees. In norm sentences, thus, there is no previous knowledge of who might the reader be. The significant point of this, here, is that from this indeterminacy follows, at least, the necessary removal of all expressions that connect addressees with context: for instance, spatial and personal deixis are, of course, not viable in norm sentences¹⁵.

- (i) In those hypothetical situations lived by Mr. M, the difference stressed now is on the Officer's *you* (personal deixis) and the segment *passengers arriving from foreign countries* in the norm sentence;
- (ii) Therefore, indetermination of readers is a relevant constraint for norm sentences as speech acts: the subjective domain of a norm, under the consequence of absurdity, is indefinable on the basis of context information.

Even though it is possible to connect a norm sentence with the person or group of persons that at a certain time occupy the body that the normative authority is, now from the speaker's point of view (normative authorities), the fact is that the speaker is, precisely, the normative authority and not that person or group of persons. If, in an extreme example, those persons change within process X, the replacement would not modify, obviously, the authorship of the utterance: the speaker would always

¹³ For instance, Gérard Cornu, *Linguistique Juridique*, 2^a ed., Paris, 2000, pp. 267 and ff.

¹⁴ Andrei Marmor, *The Pragmatics of Legal Language*, in *Ratio Juris*, 2008, vol. 21, p. 438.

¹⁵ On these cases of deixis, for instance, John Saeed, *Semantics*, 2^a ed., Oxford, 2003, pp. 182 and ff. Also, Fernanda Fonseca, *Deixis e Pragmática Linguística*, in *Introdução à Linguística Geral e Portuguesa*, 2^a ed., Lisboa, 2005, pp. 437 and ff.

be the normative authority (as it is in normal replacements before and after that process). The speaker of a norm sentence is, thus, an institutional speaker, legally identified as the author of the speech act and, furthermore, legally identified as a different person (and a different speaker) from the physical persons that actually created the norm sentence. And an institutional speaker is, by definition, indeterminate, not because there is no possible knowledge of who it might be (on the contrary), but, otherwise, because it is independent from the person or group of persons that physically spoke in its name¹⁶. This particular indeterminacy of the speaker in norm sentences is also a contribution for a specific feature of norm sentences as speech acts: the adoption of a type of discourse, specifically a written formal standard of the natural language, unmarked by any social, geographical or similar variations, which has to be used in order to dissolve material speakers within the formal speaker and to confer the grade of solemnity inherent to the *status* of the normative authority¹⁷.

(i) In those hypothetical situations, the difference stressed now would be visible with the absurd change of utterances: for instance, Mr. M, before landing, reads the norm sentence *at the airport customs room, brandy...whiskey...cigarettes...?*

2.4: (*Context in norm sentences*). Also differently from ordinary conversations, where speaker and hearer share space and time, in norm sentences two different ideas of context have to be taken into account: the context of the utterance ($context_1 = context\ of\ speaker$), and the contexts of interpretation ($contexts_n = contexts\ of\ readers$). The first is the context surrounding the enactment of the norm sentence, more or less the empirical world that exists in the moment of process X, specifically in the subject considered in the norm expressed. The second is, rigorously, a set of contexts, composed by all situations of life where the norm sentence reaches an addressee or, more broadly, by all situations where it has to be interpreted. Beyond demonstrating the inexistence of a conversational context, this allows to see that only $context_1$ is known when the utterance is made: $contexts_n$ are unpredictable and, therefore, they cannot be taken into account by the normative authority in the norm sentence. Multi-contextuality of norm sentences, thus, intensely decreases *context* contributions to interpretation: only $context_1$ gives information and $context_1$ information seems to be not very valuable for interpretation purposes¹⁸.

(i) In the first Mr. M situation there was a conversational context: speaker and hearer (and question and answer, consequently) shared a context defined by space and time; this defined context gives information and gives accuracy and assurance on what this information is (all that was disregarded by Mr. M);

¹⁶ Apparently disregarding this, Andrei Marmor, *The Pragmatics of Legal Language*, cit., p. 435.

¹⁷ On the type of discourse of statutes, Neil MacCormick, *Rhetoric and the Rule of Law*, cit., p. 126, and Santiago Nino, *Introducción al Análisis del Derecho*, cit., p. 247.

¹⁸ Speaking of a conversational context, with and among legislators and other political agents, as if there were no differences between, on one side, their utterances and the norm sentence as distinct speech acts (with distinct contexts and only the second as the one in question) and, on another, the norm sentence when is *spoken* and when is *read*, Andrei Marmor, *Pragmatics of Legal Language*, cit., p. 435. It is important to notice, however, that the distinction made in the text has nothing to do with the difference between narrow context (who speaks, when and where) and wide context (all the rest), as in, François Recanatí, *Literal Meaning*, Cambridge, 2004, p. 56. It is based on space and time disfunctionality.

(ii) The claimed multi-contextuality of the norm sentence, where there is no conversational context, raises the following question: if only *context*₁ can be taken into account in process X, is there more contextual information usable in process Y than that ?

2.5: (*Irrelevancy of contexts to illocutionary value of the speech act*). As implied in the description of process X, norm sentences are a use of language strictly made to express the exercise of a power conferring norm or, in other words, to express the exercise of norms that only enable the creation of deontic contents: thus, norm sentences, by definition, only communicate allowed, forbidden or mandatory consequences¹⁹. As an expression of the exercise of a competence norm, known as that among the community of speakers (under a general knowledge similar to the one that exists towards language itself), this kind of speech act does not depend on anything else to define its illocutionary value: the mere exteriorization of its quality of norm sentence (provided by its identification as a written speech that belongs to a statute) immediately identifies it as a speech act with a directive force (and, possibly, a commissive one), being self-evident that the speaker would never intend to express emotions or assert anything²⁰. If these considerations proceed, consequently one has to admit that contexts do not play any role in the definition of the illocutionary value of norm sentences: the empirical world surrounding the utterance (*context*₁), and the unknown situations of interpretation (*contexts*_n), separately or jointly, do not contribute to the definition of something that is already acquired by readers, here, what is the speaker doing with words.

- (i) If the paper given to Mr. M before landing only had the sentence *at the airport customs room passengers arriving from foreign countries declare transported brandy, whiskey, and cigarettes*, one may claim that the illocutionary value was doubtful: nothing removes the possibility of a narrative on something that commonly happens in that airport;
- (ii) If the paper given to Mr. M before landing has a reference on the belonging statute, presenting the text *at the airport customs room passengers arriving from foreign countries declare transported brandy, whiskey, and cigarettes* as a norm sentence, Mr. M. would identify the speech (under normal circumstances) as an order to obey some minutes after;
- (iii) In order to know that the normative authority commanded that *brandy, whiskey, and cigarettes have to be declared*, Mr. M is clearly not dependent on the facts of the world that surrounded the enactment of the norm sentence (*context*₁), or on the facts that are happening on the plane while he reads the paper (*context*₂);
- (iv) Probably, the reason why he knows that it is a command even explains why that deontic content (specifically the expression of the deontic mode) is written without a verbal mark of a norm: *passengers declare transported* is usable instead of *passengers ought to declare transported* because illocutionary force is already acquired by Mr. M.

2.6: (*Almost irrelevancy of contexts to meaning*). As a multi-contextual type of speech act, and differently from ordinary conversations, meaning in norm sentences is barely dependent on context, what is specially visible with contexts of interpretation (*contexts*_n). Given the unpredictable situations in which the norm sentence is going to be interpreted, each one of these unknown future speech circumstances

¹⁹ Neil MacCormick, *Powers and Power-Confering Norms*, in *Normativity and Norms*, Oxford, 1998, p. 495.

²⁰ In the same way, Paul Amselek, *Philosophy of Law and Theory of Speech Acts*, in *Ratio Juris*, 1988, vol. 1, p. 195.

cannot provide information on what is meant by the norm sentence²¹. Regarding these contexts of interpretation, it appears that multi-contextuality dissolves context contribution and becomes only a relevant factor at the semantic level of the potential border-line cases challenging word extension: hence, here, *contexts_n* only provide cases of open texture.

- (i) With the norm sentence *at the airport customs room passengers arriving from foreign countries declare transported brandy, whiskey, and cigarettes*, multi-contextuality, from the reader's point of view, dissolves context (plural and unknown);
- (ii) It is possible to conceive, nevertheless, that context may interfere with meaning if it raises doubts on the semantic extension of words: it is the case of a passenger transporting, for instance, a *beverage very similar to whiskey*.

Space and time distances between speaker and readers also decrease the contribution that the context of utterance (*context₁*) may offer to meaning. Since in the moment of enactment only the world surrounding the norm sentence is shared between the normative authority and the addressees, context information is not more than knowledge concerning that world. And in order for readers to define meaning in norm sentences, it seems quite doubtful what the effective contribution provided by that knowledge may be. It may suggest possible explanations, reasons, or finalities beneath the utterance, but all these, as possibilities, seem to be excessively fragile in order to be significant²².

- (i) In the norm sentence *at airport customs room passengers arriving from foreign countries declare transported brandy, whiskey, and cigarettes*, the context of utterance is the world existent in the moment of enactment: readers do not share anything else;
- (ii) When Mr. M is reading the sentence in the plane (or later, of course), it seems that his (fictionally medium) knowledge of the world on *goods declaration at airports* in the moment of enactment does not help him at all.

2.7: (*Residual pertinence of implied content*). Also differently from what happens in ordinary conversations, in norm sentences implied content is intensely limited: the indeterminacy of addressees and the inexistence of a conversational context in this kind of speech act do not allow otherwise. By implied content it is meant the instances of speech where the content asserted by an expression, because some further information is implicated, does not necessarily exhaust what has been said²³. Briefly speaking, three types of implied content have to be considered: (i) presuppositions, describing contents, already known by hearers or that they would assume without objection, that have to be taken for certain in order for the sentence keep its sense, (ii) conversational implicatures, related to contents that the hearer is able to infer under the speech situation and on the basis of a cooperative behavior, and (iii) con-

²¹ Under the penalty of no meaning before each reader. Differently, e.g., Damiano Canale and Giovanni Tuzet, *On Legal Inferentialism. Toward a Pragmatics of Semantic Content in Legal Interpretation ?*, in *Ratio Juris*, 2007, vol. 20, pp. 37 and ff.

²² This implies, of course, further explanations, but, realistically, they would request another paper.

²³ Andrei Marmor, *The Pragmatics of Legal Language*, cit., p. 430. Generally, François Recanati, *Literal Meaning*, cit., pp. 68 and ff.

ventional implicatures, referencing cases where the implicature follows from the meaning of the relevant words used without dependence of context or a communicative effort from the hearer²⁴.

- (i) In a presupposition, there is a sentence, for instance *Mr. M's wife is waiting for him at the airport*, with implied content, here that *Mr. M is married*; in the sentence this is not said and, if it is negated, the sentence would not make sense;
- (ii) In a conversational implicature, there is a sentence, for instance Mr. M is questioned if he *will [you] take a cab*, and he answers that *his [my] wife is waiting for him [me]*; in the answer he did not say whether he would take a cab or not, but it is implied that he would not because his wife has other transportation alternative;
- (iii) In a conventional implicature, there is a sentence, for instance *Mr. M moved from Oporto to Milan*, that allows to take out strictly within the meaning of the sentence the implied content that *he lived in Oporto*;

As these examples suggest, implied content can only play a residual role in norm sentences. Under the claimed inexistence of a conversational context, conversational implicatures cannot obviously be used, and presuppositions are only viable when they can pass the indeterminate addressees border that is inherent to norm sentences, requiring, as it seems, that only contents that are true and generally known can be implied. Differently, conventional implicatures seem to fit in the speech act that norm sentences are: no reason justifies the exclusion of content merely implied in literal meaning²⁵.

3: Meaning in norm sentences: certainty and uncertainty

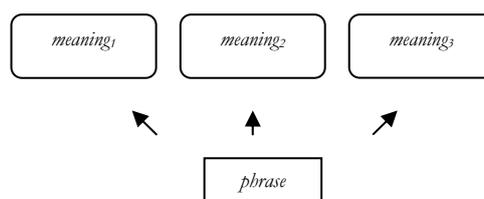
3.1: (*Approaching certainty and uncertainty in norm sentences*). With the previous considerations, two consequent points for the analysis of certainty and uncertainty in norm sentences can be settled. First, because interpretation regards exclusively the linguistic configuration of norms, it is just what concerns language that can cause certain or uncertain results (other sources of methodological uncertainty, like resolution of normative conflicts, are displaced). Second, as norm sentences are a type of speech act where pragmatic aspects of language are clearly secondary, interpretation is essentially a matter of semantics and uncertainty as to be evaluated at this level (other contributions are merely residual). In order to understand the following considerations, two other points have to be anticipated. First, because a norm is the meaning of a norm sentence, the alternatives of meaning provided by a legal text are alternatives of possible norms comprehended in it: each alternative of meaning is, thus, a potential norm covered by the norm sentence. Second, because the scientific goal of legal interpretation is objectivity, between certainty and uncertainty the first has to be seen as the methodological regularity

²⁴ On these, e.g., Jennifer Saul, *Speaker Meaning, What is Said, and What is Implicated*, in *Nous*, 2002, vol. 36, pp. 228 and ff.; John Saeed, *Semantics*, cit., pp. 101 and ff.; Carlos Gouveia, *Pragmática*, in *Introdução à Linguística Geral e Portuguesa*, 2ª ed., Lisboa, 2005, pp. 403 and ff.

²⁵ In the same way, Andrei Marmor, *What Does the Law Say? Semantics and Pragmatics in Statutory Language*, in *Análise e Direito*, 2007, p. 139.

and the second as the *theoretical problem* (it is uncertainty that refrains the achievement of that goal): therefore, semantic uncertainty has to appear as the core subject of interpretation²⁶.

3.2: (*Syntactical uncertainty*). The first type of language uncertainty is the one coming from the way words are organized in the sentence (phrase), creating doubts about its meaning: here, uncertainty is not in the meaning of the words used, but, otherwise, appears as a result of the specific composition of words in the utterance²⁷. Borrowing a known example, there is a syntactical uncertainty in the norm sentence *passengers are only allowed to carry on board a briefcase, a coat or an umbrella*, where the phrase structure is doubtful about what *passengers are allowed to carry on board*. This doubt creates three alternatives of meaning: (i) *meaning₁*, they may carry a *briefcase* and choose between a *coat* and an *umbrella*, (ii) *meaning₂*, they may choose between carrying a *briefcase* and a *coat* or only an *umbrella*, and even (iii) *meaning₃*, they can carry a *coat* and choose between a *briefcase* and an *umbrella*²⁸. The following scheme tries to illustrate the relation between the phrase and its alternatives of meaning.



Analyzing this linguistic uncertainty, two points must be taken into account: (i) alternatives of meaning are the alternatives allowed by the semantic field of the norm sentence, and (ii) those alternatives are defined. The first describes that each alternative of meaning is covered by the linguistic extension of the norm sentence: in the present case, as seen, there is text to support *meaning₁*, *meaning₂*, and *meaning₃* as alternatives semantically included. The second shows that in this uncertainty there is a linguistic frame representing a real border for certainty: no more linguistic alternatives are present beyond those allowed by the norm sentence. Within the present example, even though uncertainty, it is certain that the norm sentence does not support passengers to carry on board *a briefcase, a coat and an umbrella* or, even more evidently, objects such as *cars* or *dogs*. As alternatives of meaning are alternatives of norms expressed by the norm sentence, as said, this syntactical uncertainty presents three possible norms.

(i): If in the norm sentence *passengers are only allowed to carry on board a briefcase, a coat or an umbrella*, *on board* = a, deontic mode = P (*permission*), *briefcase* = b, *coat* = c, and *umbrella* = d, then three possible norms are in its semantic field: $N_1 = a P b \wedge (c \vee d)$, $N_2 = a P (b \wedge c) \vee d$, and $N_3 = a P c \wedge (b \vee d)$;

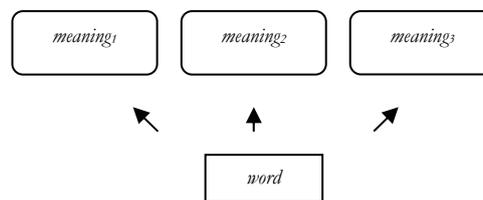
²⁶ On other consequences of objectivity beyond scientificity, such as expectations or justice, Paolo Comanducci, *Aarnio and the Problem of Legal Certainty*, in *Rechtstheorie*, 1995, vol. 26, pp. 28 and 29.

²⁷ Santiago Nino, *Introducción al Análisis del Derecho*, cit., pp. 261 and ff.; Alf Ross, *On Law and Justice*, cit., pp. 122 and ff.

²⁸ The example in, Santiago Nino, *Introducción al Análisis del Derecho*, cit., p. 262.

(ii) These three norms are defined and no more are covered by the norm sentence: under *passengers are only allowed to carry on board a briefcase, a coat or an umbrella*, its semantic field does not cover (with $e = \text{cars}$, and $f = \text{dogs}$): $N_4 = a P b \wedge c$ $\wedge d$, and, obviously, $N_5 = a P b \wedge c \wedge e$, and $N_6 = a P b \wedge c \vee f$; it is certain, thus, that $NS = N_1 \vee N_2 \vee N_3$.

3.3: (*Lexical uncertainty: polysemy*). Differently from syntactical, polysemy is a lexical type of uncertainty, specifically related, thus, with the meaning of a word. Here, uncertainty comes from the fact that the word has different meanings, creating the doubt about which is, among all meanings of the word, the one the norm sentence uses²⁹. Even though it is not a very relevant type of uncertainty, because the doubt produced by polysemy is almost always clarified by the co-text of the norm sentence (other norm sentences using the same word), it is, nevertheless, a type of uncertainty. And, as the previous one, it also creates alternatives of meaning. Using an example, there is polysemic uncertainty in the norm sentence *entrance is forbidden to persons with moles*, where the word *mole* (with more than one meaning) raises doubts about to whom *is the entrance forbidden*. Here, disregarding other meanings, for the sake of simplicity, the alternatives may be: (i) *meaning₁*, persons with *the animal mole*, (ii) *meaning₂*, persons with the *skin marks called moles*, and (iii) *meaning₃*, persons with *records from the Mole label*. The following scheme tries to illustrate the relation between the word and its alternatives of meaning.

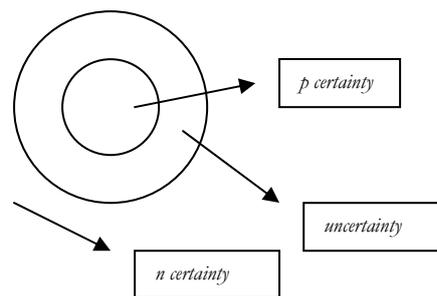


Despite the mentioned minor significance of polysemy as a source of legal uncertainty, the same equivalence between alternatives of meaning and a margin of possible norms covered by the norm sentence is present. In the same way, and disregarding again for the same reason other meanings of the word *mole*, the semantic field of the norm sentence allows three norms, all of them equally covered by the text ($N_1 = \text{meaning}_1$, $N_2 = \text{meaning}_2$, and $N_3 = \text{meaning}_3$), what seems clear when, on a norm individuation basis, only this text is in evaluation (other norm sentences may show what is the effective meaning). As in the previous type of uncertainty, there is also here a frame for uncertainty (and its variation) directly conferred by the norm sentence: the alternatives of meaning given by the word have a border from which no other alternatives can be assigned to the text. It is a matter of linguistic certainty provided by the text, therefore, that the norm sentence, in the present example, does not support, for instance, N_4 or N_5 .

²⁹ For instance, Ana Wierzbicka, *Semantics: Primes and Universals*, Oxford, 1996, pp. 242 and ff.; John Lyons, *Language and Linguistics*, 2^a ed., Cambridge, 1984, pp. 146 and ff.

- (i) If in the norm sentence *entrance is forbidden to persons with moles*, the word *mole* can be read as $c_1 = \text{the animal mole}$, $c_2 = \text{skin marks called moles}$ or $c_3 = \text{records from the Mole label}$, then one of three norms is covered by the text (with $a = \text{entrance}$, deontic mode = Pr [*prohibition*], and $b = \text{persons}$): $N_1 = a \text{ Pr } bc_1$, $N_2 = a \text{ Pr } bc_2$, and $N_3 = a \text{ Pr } bc_3$;
- (ii) These three norms are defined and no other norms are linguistically covered by the norm sentence: under *entrance is forbidden to persons with moles*, its semantic field does not cover (with $c_4 = \text{other skin marks}$, and $c_5 = \text{other animals}$): $N_4 = a \text{ P } bc_4$, or $N_5 = a \text{ P } bc_5$; it is certain, thus, that $NS = N_1 \vee N_2 \vee N_3$.

3.4: (*Lexical uncertainty: vagueness*). Vagueness, as polysemy, is also a type of uncertainty related to the meaning of a word. However, if polysemy characterizes a word with more than one meaning, vagueness stands for a word with unclear denotation borders: in vagueness, the meaning of the word is undefined in what regards its extension³⁰. As a consequence, a vague word always presents a structure of three areas: (i) the area of positive certainty, without doubts about the facts covered by the word, (ii) the area of negative certainty, without doubts about facts not covered by the word, and (iii) the area of uncertainty, where it is doubtful whether the word is or is not applicable. Using another example, there is a vagueness uncertainty in the norm sentence *near primary and secondary schools ambulatory sale of food and beverages is forbidden*, where the word *near* creates doubts about until where is the *sale of food and beverages forbidden*. Even though the structure of vagueness is rather different from the one of polysemy, it is also possible to see that the vague word gives, as well, alternatives of meaning. Simplifying, if under the present example distance under 1 km is *near* (positive certainty) and above 5 km is not *near* anymore (negative certainty), the alternatives are all the ones measurable until the border of negative certainty: with a fictional measure, from *meaning₁* under 1.0 km, finishing in *meaning₄₁*, under 5.0 km. The following scheme tries to illustrate areas of vagueness, identifying the space with alternatives: from the space of the smaller circle until the external border of uncertainty.



Thus, a norm sentence with a vague word gives a linguistic spectrum for a significant number of norms, equivalent to all alternatives of meaning under its semantic field. Accordingly, the norm sentence covers (as alternatives of meaning) the norm with the positive certainty domain and all that in-

³⁰ For instance, Ronald Sainsbury, *Concepts Without Boundaries*, in *Vagueness: a Reader*, London, 1996, pp. 251 and ff.; Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, in *California Law Review*, 1994, n.º 82, pp. 509 and ff.

clude progressive alternative slices of the uncertainty area into the positive certainty one. With the present example, there is N_1 (*sale forbidden under 1 km*), N_2 (*sale forbidden under 1.1 km*), N_3 (*sale forbidden under 1.2 km*), and so on, until N_{41} (*sale forbidden under 5.0 km*). However, although vagueness can enfold a huge number of norms, there is no doubt that they are always linguistically limited: the border of uncertainty marks a line from which no more alternatives of meaning are suitable, following from this that the norm sentence, as also seen in the previous types of linguistic uncertainty, has a defined margin bounding what is and what is not a possible norm under its text. It is possible to say, hence, that vagueness, in its own way, also confers linguistic certainty.

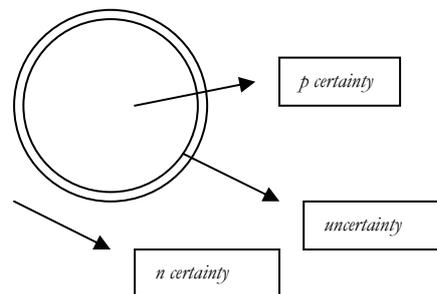
- (i) If in *near primary and secondary schools ambulatory sale of food and beverages is forbidden*, the word *near* can be read as $a_1 = \text{under } 1 \text{ km}$, $a_2 = \text{under } 1.1 \text{ km}$, $a_3 = \text{under } 1.2 \text{ km}$, finishing in $a_{41} = \text{under } 5.0 \text{ km}$; then, forty one norms are covered by the text (with $b = \text{primary schools}$, $c = \text{secondary schools}$, deontic mode = Pr [prohibition], $d = \text{sale of food}$, and $e = \text{sale of beverages}$): $N_1 = a_1 \wedge b \wedge c \text{ Pr } d \wedge e$, $N_2 = a_2 \wedge b \wedge c \text{ Pr } d \wedge e$, $N_3 = a_3 \wedge b \wedge c \text{ Pr } d \wedge e$, until $N_{41} = a_{41} \wedge b \wedge c \text{ Pr } d \wedge e$;
- (ii) These forty one norms are defined and no other norms are covered: under *near primary and secondary schools ambulatory sale of food and beverages is forbidden*, its semantic field does not cover (with $a_{42} = \text{under } 5.1 \text{ km}$, and $a_{43} = \text{under } 5.2 \text{ km}$): $N_{42} = a_{42} \wedge b \wedge c \text{ Pr } d \wedge e$, or $N_{43} = a_{43} \wedge b \wedge c \text{ Pr } d \wedge e$; it is certain, thus, that $NS = N_1 \vee N_2 \vee N_3 \vee \dots \vee N_{41}$.

3.5: (*Lexical uncertainty: open texture*). If polysemy and vagueness reflect types of uncertainty related to specific words that are identifiable as belonging to each one of them, open texture is a feature that characterizes all remaining words (unless specified categories as natural kinds): it shows a constant doubt on the word applicability or, in another way, it shows that words are generally subject to the potential appearance of border-line cases³¹. As an uncertainty related to extension, open texture is structurally similar to vagueness, despite the fact that it has, differently, a small area of uncertainty, strictly representing that potential appearance of *world* only doubtfully covered by the word. Borrowing a known example, there is an open texture uncertainty in the norm sentence *vehicles are not allowed in the park*, specifically, for the present purposes, on the word *vehicles*³². Similarly to all previous types of uncertainty, open texture also confers alternatives of meaning, here about what *is not allowed in the park* in terms of *vehicles*. However, because the fringe of uncertainty represents the potential appearance of doubts on the extension of the word, it is not possible to make an abstract complete index of all alternatives of meaning provided by the word. Rigorously, only two alternatives of meaning are presentable: (i) *meaning*₁, representing the core of the word, concerning vehicles that are surely vehicles (*core vehicles*, like a *car*), and (ii) *meaning*₂, representing the abstract possibility of other meanings, comprehending all cases where there is an object that might be (or not) qualified as a vehicle (*border-line ve-*

³¹ On open texture, e.g., Frederick Schauer, *A Critical Guide to Vehicles in the Park*, in *New York Law Review*, 2008, vol. 83, pp. 1109 and ff.; Csaba Varga, *Lectures on the Paradigms of the Legal Thinking*, Budapest, 1999, pp. 182 and ff. On natural kinds, Dennis Patterson, *Dworkin on the Semantics of Legal Concepts and Political Concepts*, in *Oxford Journal of Legal Studies*, 2006, vol. 26, pp. 549 and ff.; Hilary Putnam, *Meaning and Reference*, in *Meaning and Reference*, Oxford, 1993, pp. 152 and ff.

³² The example is, of course, in, Herbert Hart, *The Concept of Law*, 2^a ed., Oxford, p. 123.

bicles, a *motorized toy car*, for instance). It is important to notice that, although this *meaning*₂ only obtains *meaning* in a concrete case, in open texture there is also a border signaling the end of alternatives, expressing that they are abstractly limited even though concrete hypotheses of meaning are unlimited. The following scheme tries to illustrate areas of open texture, identifying the space for alternatives: a circle with the positive certainty area (*meaning*₁) and the fringe of uncertainty, representing the potential appearance of border-line cases (*meaning*₂).



The binary scenario of two alternatives of meaning in open texture seems to be justified because, rigorously, the choice will always be between: (i) the core meaning of the word, and (ii) this meaning extended to cover the border-line case. Therefore, this would allow to say that, facing a concrete case, there are two possible norms in the semantic field of the norm sentence (only on the word *vehicles*): N_1 , the norm that forbids *core vehicles* to enter into the park, and (ii) N_2 , the norm that forbids *core vehicles* and the *border-line vehicle* in question to enter into the park. In terms of the variation inside uncertainty, it seems that alternatives of meaning end here: the specific case will always lead to a choice between N_1 and N_2 and the border of uncertainty removes any other alternatives.

(i) Within the norm sentence *vehicles are not allowed in the park*, the word *vehicles* (= b) has a core that could be identified as *core vehicles* = b_1 ; this is needed, because other unknown (and known) objects outside the core could also be qualified as *vehicles*; hence, the word has a fringe of uncertain meaning that represents all those potential *border-line vehicles* = b_{2n} ; thus, with $a = \text{in the park}$, deontic mode = Pr [prohibition], norms abstractly covered by the norm sentence could only be described as: $N_1 = a \text{ Pr } b_1$, and $N_2 = a \text{ Pr } b_1 \wedge b_{2n}$ (meaning incorporates a *border-line vehicle* [N_2] or not [N_1]);

(ii) Therefore, this limited abstract configuration of the norms expressed by the norm sentence *vehicles are not allowed in the park* represent specifically the norms applicable when, concretely, there is a case with a specific *border-line vehicle*; if the case is a *motorized toy car*, the solution is given by a choice between N_1 and N_2 . Obviously, and this is significant for the analysis of alternatives, *vehicles are not allowed in the park* does not allow any other norms (with $c = \text{memorial truck}$): there is no doubt that N_3 ($a \text{ Pr } c$) is not in the semantic field of the norm sentence.

3.6: (*Uncertainty margins as certainty*). As seen, it is a common feature to all linguistic categories providing uncertainty in norm sentences the presence of alternatives of meaning (even with some specificities in

open texture). However, in all of them there are borders defining the *uncertainty spectrum*, identifying the beginning and the end of those alternatives. So, even though each one of them expresses the linguistic uncertainty present, it seems correct to observe that their sum is, rigorously, a matter of certainty: all alternatives and their borders lead to a definition of the normative possibilities of a norm sentence, conferring an unsurpassable interpretation frame³³.

3.7: (*The alleged two literal meanings*). If linguistic certainty means no alternatives of meaning, this is the right context to analyze the *two literal meanings problem* - the possibility of more than one literal meaning in a norm sentence -, recently revisited after a rejection of a plaintiff, by the Dutch Supreme Court, under the argument that one literal reading was better than another (regarding a norm sentence of the national civil code, now derogated)³⁴.

- (i) The norm sentence was *a man can only be married with a woman, a woman can only be married with a man*; the first (alleged) literal meaning was that *one man can only be married with one woman*, forbidding polygamy; the second (alleged) literal meaning was that *men can only be married with women*, forbidding same sex marriage;
- (ii) As it is told, the Dutch Supreme Court rejected a plaintiff based on the first interpretation (claimed as the explicit meaning of the norm sentence, able to allow same sex marriage), under the argument that, even though the sentence had something on polygamy, it was self-evident that the main meaning was forbidding same sex marriage.

Somehow, the *two literal meanings problem* seems to be as a misunderstanding between: (i) alternatives of meaning, and (ii) meaning components. In what strictly matters sentences, the first comprehends all previous types of linguistic uncertainty, where the text allows more than one meaning and the norm expressed is one of them. The second, roughly speaking, references linguistic formulations, without uncertainty (disregarding open texture, as always), where the words cover an amount of world that, despite its divisibility, is entirely in it³⁵.

- (i) This difference can be exemplified with the following norm sentences: NS₁, *the right to vote is allowed to mature persons*, and NS₂, *the right to vote is allowed to persons with eighteen years old and more*; in the first, there is a linguistic uncertainty, related to the vagueness of the word *mature*; in the second, there is no linguistic uncertainty, but there are different components in the meaning of the sentence: persons with 18, persons with 19, persons 20, etc.;
- (ii) In the first norm sentence, the meaning sequence is: NS₁ → N₁ ∨ N₂ ∨ N₃ ... N_n; all these norms are alternatives of meaning: in order to decide who can vote it is necessary to choose between N₁ (where *mature persons* are those with the properties *a*, *b*, and *c*), N₂ (where *mature persons* are those with the properties *b*, *c* and *d*), and so on, becoming clear that these alternatives are incompatible;

³³ Mathias Klatt, *Semantic Normativity and the Objectivity of Legal Argumentation*, in *Archiv für Rechts- und Sozialphilosophie*, 2004, vol. 90, pp. 62 and ff.

³⁴ As it is related by, Carel Smith, *Some Varieties of Linguistic Argumentation*, in *Ratio Juris*, 2008, vol. 21, pp. 511 and ff., who often speaks about two «to the letter» interpretations.

³⁵ Of course, there is always the second in the first, but that is not the present issue: one thing is to list incompatible meanings of a norm sentence, another, totally different, is to list the primitive elements compounding meaning itself. On meaning components, John Saeed, *Semantics*, cit., pp. 247 and ff.

(iii) In the second norm sentence, the meaning sequence is: $NS_2 \rightarrow N$; this norm sentence leads to a single norm because all the amount of world covered, even if divisible, belongs to what is denoted by the text: in order to decide on who can vote there is no choice to be made; N comprehends all parts, that, for this reason, cannot be qualified as alternatives ($N = 18 \wedge 19 \wedge 20 \wedge \dots \wedge n$);

(iv) All this do not exclude that in $NS_1 \rightarrow N_1 \vee N_2 \vee N_3 \dots N_n$ each alternative of meaning has its own meaning components, where there might be the same diversity; it is this, somehow, that can be represented with each divisible part in each alternative coming from the word *mature persons*: properties a , b , and c , in one case, may lead to a set of meaning components, and properties b , c and d may lead to other different set of meaning components;

(v) Even though these examples are purposely easier than the Dutch case, the underlying problem is the same: *a man can only be married with a woman, a woman can only be married with a man* is linguistically certain and the *problem* is on considering all meaning components; thus, the sequence is $NS \rightarrow N$, where *one man can only be married with one woman* and *men can only be married with women* are just components; it is a case of $NS \rightarrow N (a \wedge b)$ and not of $NS \rightarrow N_1 \vee N_2$ ³⁶.

4: Outputs of norm sentences: defining and choosing norms

4.1: (*Certain and uncertain outputs*). Preceding considerations pointed that, in terms of their meaning, norm sentences can produce two different outputs (disregarding now open texture): (i) a certain output, and (ii) an uncertain output. In the first, the norm is definable in an objective way, leading to a precise comprehension of its content. In the second, the norm sentence allows different norms and, thus, two phases have to be considered: (i) while presenting the meaning of the norm sentence, there is no other way than to enunciate its alternatives of meaning, as seen before, and (ii) when it comes to reach a solution on the problem of what is the norm in the norm sentence, a choice has to be made³⁷.

(i) The norm sentence *at the airport customs room passengers arriving from foreign countries declare transported brandy, whiskey, and cigarettes* produces a certain output: there are no language uncertainties and, disregarding border-line cases for the relevant words in the phrase, the scheme is: $NS \rightarrow N$;

(ii) The norm sentence *entrance is forbidden to persons with moles* produces an uncertain output, caused by the polysemy of the word *mole*; therefore, when presenting the norm in the norm sentence, all alternatives have to be shown; the scheme is, thus: $NS \rightarrow N_1 \vee N_2 \vee N_3$;

(iii) Giving an uncertain output, the norm sentence *entrance is forbidden to persons with moles* requires that a choice has to be made in order to define what the norm expressed by the text is: for instance, $NS \rightarrow N_1 = a \text{ Pr } bc_1 = \textit{entrance is forbidden to persons carrying animals called moles}$;

³⁶ However, in this Dutch case, the problem could also be a norm individuation one (e.g., Torben Spaak, *Norms that Confer Competence*, in *Ratio Juris*, 2003, vol. 16, pp. 97 and ff.): if, depending on how natural language is used in process X , a unity of text (in a statute) does not necessarily express a complete norm (when an element of its structure is written in another text) or only a complete norm (when there are in it more than one), then the case could be seen as a matter of norm individuation in this second category. With a narrow criterion of norm individuation (as in, Joseph Raz, *The Concept of a Legal System*, 2^a ed., Oxford, 1980, pp. 70 and ff.), as it seems right, two norms would be recognized: *males can only marry females* and *marriage is a contract between two persons*, leading to a different scheme: $NS \rightarrow N_1 \wedge N_2$ instead of $NS \rightarrow N (a \wedge b)$. Nevertheless, a case of $NS \rightarrow N_1 \vee N_2$ seems to be excluded.

³⁷ Markku Helin, *Sobre la Semántica de las Oraciones Interpretativas en la Dogmática Jurídica*, in *La Normatividad del Derecho*, Barcelona, 1997, p. 200; Ilkka Niiniluoto, *Norms Propositions Defended*, in *Ratio Juris*, 1991, vol. 4, p.370.

(iv) The same two steps can be seen in syntactical uncertainty; with the norm sentence *passengers are only allowed to carry on board a briefcase, a coat or an umbrella*, there are alternatives: $NS \rightarrow N_1 \vee N_2 \vee N_3$; when defining what is the norm expressed, a choice has to be made: for instance, $NS \rightarrow N_1 = a \text{ P } b \wedge (c \vee d) = \textit{passengers are only allowed to carry on board a briefcase and choose between a coat or an umbrella}$;

(v) And also in vagueness; with the norm sentence *near primary and secondary schools ambulatory sale of food and beverages is forbidden*, there are alternatives: $NS \rightarrow N_1 \vee N_2 \vee \dots \vee N_{41}$; when defining what is the norm expressed, a choice has to be made: for instance, $NS \rightarrow N_{21} = a_{21} \wedge b \wedge c \text{ Pr } d \wedge e = \textit{under 2.0 km distance from primary and secondary schools ambulatory sale of food and beverages is forbidden}$.

Although this may illustrate the outputs produced by norm sentences, it has to deal, of course, with open texture. And the contribution coming from this type of linguistic uncertainty, here, is that unpredictability of border-line cases makes any definition of a norm a mere provisional interpretative result: open texture implies that, whether with certain or uncertain outputs from norm sentences, any definition of meaning is limited to be a *prima facie* interpretation³⁸.

(i) In the scheme $NS \rightarrow N_1 \vee N_2$, provided by a norm sentence with open texture (although all have more than one), here N_2 represents open texture, present, as said, in all norm sentences outputs;

(ii) Thus, in other cases of uncertainty, there is also another alternative (multiplied by all relevant words of the sentence), representing open texture: for instance, $NS \rightarrow (N_1 \vee N_2 \vee N_3) \vee N_4 \times$ all relevant words.

4.2: (*Choosing a norm among alternatives of meaning*). The interpretative operation of choosing a norm among different alternatives of meaning is not, obviously, arbitrary. The usually called interpretation criteria (for instance, systematic or teleological) are, rigorously, norms of the legal order on interpretation (by statute or *consuetudo*, as it happens in all legal orders) that work exactly (and just only) among those alternatives (their legal hypothesis only foresees linguistic uncertainty)³⁹. These norms with criteria of interpretation remove alternatives which are contrary to their legal consequences and, in the opposite direction, select alternatives that satisfy them. However, because these norms on interpretation depend on circumstantial conditions (like the existence of other norm sentences with the same word, for instance), their applicability can lead to one of two results: (i) they choose only one alternative of meaning, or (ii) they do not choose any or choose more than one⁴⁰. In the first situation, it is possible to say that the (*prima facie*) completeness of interpretation is achieved. In the second, obviously, the task of choosing a norm remains unfinished.

³⁸ Strictly on the linguistic level (on the multiplication that follows from open texture, Genaro Carrió, *Lenguaje, Interpretación y Desacuerdos en el Terreno del Derecho*, in *Notas sobre Derecho y Lenguaje*, 4^a ed., Buenos Aires, 1994, pp. 69 and ff): this *prima facie* character of interpretation has nothing to do, of course, with the common *prima facie* character of norms in their applicability to facts (Martin Borowski, *Grundrechte Als Prinzipien*, Baden-Baden, 1998, p. 73).

³⁹ Because, if not, they would be contradictory with LN_1 and the natural language rules (essentially semantic *Zrules*) received by it. On these norms, commonly understood as arguments or strategies, e.g., Neil MacCormick, *Rhetoric and the Rule of Law*, cit., pp. 126 and ff.; Torben Spaak, *Relativism in Legal Thinking: Stanley Fish and the Concept of an Interpretative Community*, in *Ratio Juris*, vol. 21, 2008, p. 159.

⁴⁰ Jerzy Wróblewski, *Contemporary Models of the Legal Science*, Łódź, 1989, p. 24.

- (i) It has been seen that with the norm sentence *near primary and secondary schools ambulatory sale of food and beverages is forbidden*, and as a consequence of the vagueness of the word *near*, there are alternatives: $NS \rightarrow N_1 \vee N_2 \vee \dots \vee N_{41}$;
- (ii) If in the same legal order there is a norm with a criterion of interpretation [*among alternatives of meaning*] *norm sentences have to be interpreted in order to reach coherence*, other connected norm sentences could interfere with $N_1 \vee N_2 \vee \dots \vee N_{41}$;
- (iii) That would be the case with the norm sentence *all primary and secondary schools have a 2 km radius of protection where sale of cigarettes is forbidden*, suggesting that the reasonable space to be protected is a circle of 2 km;
- (iv) In this case, the norm with the criterion of interpretation, through the contribution of the norm sentence materially connected, could lead to the choice, closing alternatives: $NS \rightarrow N_{11}$;
- (v) That would also be the case with the norm sentence *next to primary and secondary schools restaurants and bars are not allowed to sell alcoholic beverages*, suggesting that the reasonable space to protect is *very near*;
- (vi) However, differently from the previous case, here the norm with a criterion of interpretation, through the contribution of the norm sentence materially connected, could only lead to reduce alternatives: $NS \rightarrow N_1 \vee N_2 \vee \dots \vee N_{11}$;
- (iv) A similar result (an unfinished one) would happen if no connected norm sentence existed in the legal order and, consequently, the norm with the coherence criterion would not be applicable: here, all alternatives would remain open.

When the legal norms with criteria of interpretation are inapplicable or inconclusive if applicable and from them do not follow a defined norm, interpretation continues not to be an arbitrary process. It is difficult to imagine that the remaining alternatives of meaning are completely neutral in relation to the norms that are principles in the legal order: in a way or another, each one of the remaining alternatives is (or could be) in favor or against the direction pointed by the *optimierungsgebote* of those principles⁴¹. Under this connection established between the remaining alternatives and the principle norms of the legal order, the choice is naturally made through their collision and an ordinary balance is able to provide the solution. Of course, all objections commonly made regarding the subjectivity of balancing are applicable here, considering that there is no difference between a balance oriented to solve a conflict of norms and a balance between principles oriented to select one among different meanings of a norm sentence⁴². Those objections are, however, uninteresting: balances are an unavoidable and irreplaceable tool for the resolution of all normative situations where, without norms of conflicts, there are norms with incompatible consequences⁴³. Even though here the scenario only comprehends (incompatible) possible norms under a norm sentence (alternatives of meaning), that inevitability and that irreplaceability are present as well.

⁴¹ On this effect, Robert Alexy, *Theorie der Grundrechte*, Frankfurt am Main, 1986, pp. 75 and ff.; Virgilio Afonso da Silva, *Direitos Fundamentais*, São Paulo, 2009, pp. 46 and 47. Using principles as an argument, Neil MacCormick, *Rhetoric and the Rule of Law*, cit., p. 130.

⁴² Common objections, such as the inexistence of rational standards, in, Jürgen Habermas, *Between Facts and Norms*, Cambridge, 1996, pp. 259 and ff.

⁴³ Carlos Bernal Pulido, *Estructura y Límites de la Ponderación*, in Doxa, 2003, n.º 26, p. 226; David Duarte, *Rebutting Defeasibility as Operative Normative Defeasibility*, in Liber Amicorum de José de Sousa Brito, Coimbra, 2009, pp. 164 and ff.

- (i) After the norm with a criterion of interpretation, three situations regarding *near primary and secondary schools ambulatory sale of food and beverages is forbidden* follow: first, $NS \rightarrow N_{11}$ in the case of conclusiveness, second, $NS \rightarrow N_1 \vee N_2 \vee \dots \vee N_{11}$, in the case of partial conclusiveness, and $NS \rightarrow N_1 \vee N_2 \vee \dots \vee N_{41}$ without conclusiveness; in the first, the (*prima facie*) completeness of interpretation is achieved; in the second and in the third, a choice still has to be done;
- (ii) The norm sentence is not neutral under the principles of the legal order: the norm expressed is a limitation of the principle norm establishing freedom of enterprise in order to protect public health (in juvenile population), which is a public good *most certainly* protected by a constitutional principle norm of the legal order;
- (iii) Thus, remaining alternatives of meaning, $N_1 \vee N_2 \vee \dots \vee N_{11}$ or $N_1 \vee N_2 \vee \dots \vee N_{41}$, reflect a collision between those principle norms: principle norm of freedom of enterprise (PN_1) and principle norm for protection of public health (PN_2); clearly, PN_1 pushes *near* to N_1 and PN_2 pushes *near* to N_{11} in the second case and to N_{41} in the third;
- (iv) As it happens in all balances, the law of collision (*kollisionsgesetz*) would point to a solution, certainly the one that justifies the level of restriction (from N_1 to N_{11} , in one case, and from N_1 to N_{41} in the other) with the proportional satisfaction of the conflicting principle; consequently, the result would be what is the norm in NS.

5: On misunderstanding interpretation and normative defeasibility

5.1: (*The difference*). As categories of legal thought, interpretation and normative defeasibility seem to be incapable of raising any kind of misunderstanding: interpretation strictly connects a norm sentence with the norm in it, while normative defeasibility, as the consequence of a normative conflict solved by a norm of conflicts or a balance, expresses the inapplicability of a norm by another one. Accordingly, interpretation is a matter of one norm (in its relation with a text), while normative defeasibility, as it presupposes a conflict of norms, is a matter of more than one norm (where norm sentences do not play any role)⁴⁴.

- (i) It is a matter of interpretation the definition of the norm expressed by the norm sentence *near primary and secondary schools ambulatory sale of food and beverages is forbidden*; even though the text offers alternatives ($NS \rightarrow N_1 \vee N_2 \vee \dots \vee N_{41}$); in this matter everything is confined to the connection $NS \rightarrow N$ (what norm is expressed);
- (ii) It is a matter of normative defeasibility the inapplicability that the norm in *near private primary and secondary schools ambulatory sale of food and beverages is allowed* causes in the norm mentioned in (i); here, the problem regards a conflict between norms, and, under the norm *lex specialis derogat legi generalis*, the second norm defeats the first.

5.2: (*The misunderstanding*). Whether caused by the ambiguity of what interpretation is or by any other reason, these categories of legal thought sometimes appear overlapped, particularly by placing in the interpretation domain problems that, rigorously, do not have to do with the connection between a norm sentence and its meaning⁴⁵. In some way, this confusion appears with norm sentences whose

⁴⁴ On the distinction and on the confusion, Bartosz Brożek, *Defeasibility of Legal Reasoning*, Krakow, 2004, p. 39, and Juan Carlos Bayón, *Why is Legal Reasoning Defeasible ?*, in *Diritti & Questioni Pubbliche*, 2002, n.° 2, pp. 10 and ff.

⁴⁵ It seems to be the case in, Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, in *Oxford Journal of Legal Studies*, 2009, vol. 29, pp 6 and ff.

literal meaning leads to a solution that good sense would advise to avoid, creating a search at the level of language for something that is a matter (or could only be) of relations between norms⁴⁶.

(i) In the norm sentence *vehicles are not allowed in the park*, there is a norm that, disregarding open texture, gives a certain output: the word *vehicles* has a core by which *core vehicles* are, without doubt, forbidden to enter into the park (without any kind of distinctions and in all possible situations);

(ii) If an ambulance has to enter in the park, there is no doubt that an ambulance is a *core vehicle*; consequently, under that norm, its entrance in the park is forbidden; however, the uncomfortable solution provided for the case where someone needs an ambulance inside the park seems not to be a problem of language related with the word *vehicle*;

(iii) It is, on the contrary, a problem on the need of another norm that defeats that one, avoiding its consequence; and a problem that starts, somehow, on the fact that the ambulance example (or the police car one, as well) presents *vehicles are not allowed in the park* as the text of a norm in a legal order without other norms;

(iv) Obviously, there is here a distortion: the norm in *vehicles are not allowed in the park* belongs to a legal order where, most certainly, there are other norms and, probably, there is one establishing something like *emergency vehicles are allowed to disregard norms about vehicle circulation*;

(v) Avoidance of the *vehicles are not allowed in the park* consequence for an ambulance (in the normal circumstances of a legal order), would never be in language, which means that framing the problem without considering normative defeasibility is, somehow, blaming language for something that is not its fault.

5.3: (*Principles changed everything*). Even though this effect of inapplicability caused by defeater norms may also come from norms that are principles and, accordingly, considering the wider applicability their specific legal hypothesis provide, that effect may be caused more often than it is commonly expected when thinking only about rules, the fact is that nothing denies the (almost only theoretical) possibility of a normative situation in a legal order where there is no defeater norm⁴⁷. But, in this case, this necessarily means that the uncomfortable solution provided by the norm is still in the space of discretion conferred by material superior norms that frame process X⁴⁸. And, if this is true, it is not a problem of language, again, but a common problem of political accountability of the normative authority. However, if, all things considered, it is not, there are always Neil McCormick's words: «it has to be recognized that behind what are often described somewhat disapprovingly as “formalistic” or “legalistic” approaches to interpretation there do lie evaluative reasons of a highly respectable kind»⁴⁹.

⁴⁶ Signaling these cases, Frederick Schauer, *Critical Guide to the Vehicles in the Park*, cit., p. 1118.

⁴⁷ On the structure of the legal hypothesis of principles, giving an answer for their larger ability to be in conflicts of norms, Manuel Atienza and Juan Manero, *Las Piezas del Derecho*, 2ª ed., Barcelona, 2007, pp. 44 and ff.; David Duarte, *Rebutting Defeasibility as Operative Normative Defeasibility*, cit., p. 165.

⁴⁸ With constitutions full of principles, a scenario with no defeater norms most certainly means that an undefeated norm is a result of a legitimate balance made within process X, despite, of course, the possibility of *uncomfortable results*.

⁴⁹ Neil MacCormick, *Rhetoric and the Rule of Law*, cit., p. 127.