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Analysing Discursive Practices in Legal Research: How a Single Remark Implies a Paradigm

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1. Introduction

When we look up a definition of *method*, we find in for example the Cambridge dictionary: 'a particular way of doing something'. The important element here is *particular*, defined in this dictionary as: 'this and not any other'. This underlines that methodically accomplishing something is a choice of alternatives, and that this choice as well as the alternatives can be characterised in general terms. If we *methodically* conduct legal research, we act to some extent systematically; we could have gone about it in a different way. If a method has practicable alternatives, one should anticipate a discussion about the intrinsic value of the adopted method compared with its alternatives, about its assumptions and implications.

A preliminary step in anticipating this discussion is to expressly state one's methodical choices. This is a reasonable requirement, but not an easy one to meet. It presupposes that we are aware that we act methodically; that we know that we could have gone about it in a different way that also makes sense in the eyes of a relevant forum; that we identify that a different choice may have different implications. But, we are not always aware of this.

Conducting legal research is often a complex undertaking, an interlacement of various acts in various stages on various levels. Often one applies a method without consciously selecting it from its practicable alternatives. A single remark in a research report may imply a methodical choice. As a result, a remark in one place may very well turn out to be inconsistent with another remark because the remarks imply different methodical choices that are incompatible. The implications of such inconsistency can be significant with respect to the legal doctrine.

In this paper I look at types of acts that appear frequently in legal scholarly research: the analysis of practices of legal practitioners who discuss the meaning of legal terms and phrases. Analysing such practices inevitably implies a methodical choice, because analysing debates about meaning implies adopting a theory of meaning. There are fundamentally different views on linguistic meaning, grounded on different paradigmatic assumptions which imply different ways of discussing meaning.

Almost all legal scholars perform analyses of discursive practices. They analyse the way parties in a procedure interpret sources of law, the way judges evaluate parties' positions, the way legal analysts analyse judicial opinions, and so on, in complex intertextual relations. Sometimes these analyses are substantial and elaborate, but often they are just elements in the course of a comprehensive study. Therefore, a lack of methodical awareness can easily result in inconsistencies, hopping from one method to another while the methods rely on incompatible assumptions.

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To show how conceptualising verbal meaning implies methodical choices that have theoretically relevant implications in legal scholarly research, three examples are considered that force the legal scholar to choose between alternative theories of meaning because he or she is confronted with a practice that seems to contain an inconsistency in modelling verbal meaning. This inevitably forces the scholar to take a position concerning which of the incompatible models he or she adopts. I reflect on the implications of the scholar following different options. This method helps to illustrate the relations of such a methodical choice to the concept of the Rule of Law, the separation of powers doctrine and the institutional position of the judge.[1]

The three examples refer to three important practices.

1. Legal experts and authorities need to take views on issues of *classification*. They have to determine whether an event, state of affairs or object is correctly classified as an A. But, when a practitioner is classifying, what is he or she actually doing? Is he or she *detecting* a relation or *establishing* a relation? Is this a relation between terms, between concepts or between real phenomena? Competing theories provide different, incompatible answers to these questions. My example shows elements of two such incompatible answers. A legal scholar who analyses such practice needs to take a view.
2. Legal experts and authorities need to take views on issues of *facts*: did this event actually happen or was this state of affairs indeed the case? But what is a fact? Is it a specific type of linguistic expression with a certain quality, or is it an event or state of affairs in reality? Can a fact be untrue? Can a fact be unknown? Authoritative legal resources provide inconsistent answers, and therefore every legal scholar who analyses discursive practices concerning issues of facts that reflect these inconsistencies has to take a view.
3. Legal experts and authorities need to take views on issues of *interpretation of legal sources*: what is the meaning of a normative expression? But, when someone is interpreting, what is he or she actually doing? Is there a meaning that can be 'found', or does interpretation imply the construction of meaning? The ongoing theoretical debate on legal interpretation indicates that again there is no definite answer. Reference to what is called grammatical interpretation in particular implies inconsistencies. So the legal scholar who analyses discourse in which such reference is made has to take a view.

In all three examples it can be shown that taking a view implies choosing a specific theory of meaning (semantic theory), and it can be shown that adopting a specific semantic theory relates to legal theoretical issues.

2. What is a tomato?

On 4 February 1887, an action was brought against the collector of the port of New York. The collector assessed tomatoes imported by the plaintiff under a section of the Tariff Act that imposes a 10% duty on 'vegetables in their natural state' but the plaintiffs contended that they came within the clause in the free list of the same act, 'Fruits, green, ripe, or dried, not specially enumerated or provided for in this act'. So, is a tomato vegetable or fruit (*Nix v Hedden*, 149 US 304 (1893))? Mr. Justice Gray, delivering the opinion of the Court, stated: 'The single question in this case is whether tomatoes, considered as provisions, are to be classed as "vegetables" or as "fruit" within the meaning of the Tariff Act of 1883.'[2]

This opening statement of Mr. Justice Gray illustrates that methodical reflection is sometimes not the centre of attention of legal practitioners (unless I underrate Gray's rhetorical capacities and he deliberately presents the issue in this naive way to play to his audience). His wording suggests that we deal with a relatively simple, clear, straightforward issue. Nothing could be further from the truth. The question as

1 When discussing the relation between methodic choices that relate to semantic theories of meaning and the Rule of Law, the relation between this concept of the Rule of Law and issues of interpretation and issues concerning the relation between judge and legislator are understood as they are constructed in J. Waldron, 'The Concept and the Rule of Law', (2008) 43 *Georgia Law Review*, pp. 3-61, although that does not necessarily imply agreement with his evaluation. A rather straightforward relation is assumed between Waldron's conceptualisation of the Rule of Law on the one hand and the doctrine of trias politica and related doctrines, in particular the *sens clair* doctrine, (see note 18, infra) on the other hand.

2 Full text at <https://supreme.justia.com/cases/federal/us/149/304/case.html> (last visited 24 November 2017).

formulated contains a methodical tension. Do we solve this issue of classification by looking at the physical world of markets and vegetable shops ('tomatoes, considered as provisions') or by looking at discourse (analysing 'vegetables' and 'fruit' within the meaning of the Tariff Act)?

Mr. Justice Gray instructs the Court and the legal community to consider tomatoes as 'provisions'. This instruction cannot be well understood as an instruction to consider *tomato* as a name for the concept TOMATO with, as an obligatory starting point, that part of its meaning is that {if TOMATO (x) then PROVISION (x)}. Such instruction cannot contribute to solving the problem whether TOMATOES are FRUIT or VEGETABLES because many kinds of FRUIT as well as many kinds of VEGETABLES are a subset of PROVISIONS. So, it is better understood to be an instruction that looks at considering objects in a physical world. These objects can be encountered in different real life situations. Parties and the legal community are instructed to encounter them as they appear in a greengrocers or in our kitchen, as an ingredient for food, as a provision. Mr. Justice Gray instructs tomatoes to be investigated as physical objects in a social context, observing how people deal with them, including how those people model their discourse.

But immediately after this instruction to look at the physical world, Gray continues his sentence with the instruction to investigate 'vegetables' and 'fruit', not coincidentally placed within quotation marks, as terms in a discourse, the text of the law. Here Gray looks at lexical elements, appellatives, as he instructs them to be approached in terms of the Tariff Act. There is a methodical tension between these two instructions because they point to two different theoretical frameworks that focus on the concept of CONCEPT.[3]

This methodical tension relates to linguistic theories of meaning. It suggests a choice between alternative, partially incompatible semantic theories.[4] The Court's discourse shows traces of two extreme opposites: a *formal semantic theory* or a *cognitive linguistic prototype theory*. Do we analyse the meaning of a term as a reference to a set of features, a node in a conceptual network, and do we therefore consider issues of classification in principle as an analytical exercise?[5] Or do we consider a term a trigger for a dynamic and relatively open process of matching prototypes with perceptions, and are our analyses predominantly based on what we observe that members of a relevant community seem to do when using the term, inferring from this a more or less shared mental 'concept'?[6] I will explain these options and show that the Court practises the latter but suggests in its formulations affinity with the former.

The casualness of Mr. Justice Gray's single question is also misleading. Why is this the one and only question, passing over the question of whether harbour authorities are authorised to decide issues of classification, which would limit the task of the Court to performing some test of reasonableness? In other words, why is the issue formulated as purely a semantic issue instead of, at least partially, as an issue concerning authority and the scope of competencies? This again is a methodical choice of Gray, grounded on a specific view of semantics, and a scholar needs to decide whether he or she goes along with this choice.

In the light of the instruction to look at real world practices, it makes sense to adopt a cognitive linguistic prototype theory. This brief sketch cannot go into technical details, but can merely emphasise what is specific about this theoretical framework. In this framework, the meaning of a linguistic term is seen as a mental instruction. It triggers prototypes as well as a process to compare a phenomenon in a specific context with these prototypes. Such prototypes are contextualised, associated with experiences in specific situations.[7]

3 Sticking to the Cambridge dictionary, a *concept* is defined, circularly, as a principle or idea. Theories about what a *concept* is are numerous, varying from considering it a mental state to an abstract object opposed to mental states. Theories about the 'meaning of concepts' (if such a phrase makes sense) mirror the linguistic semantic theories. An interesting exposé that discusses several approaches, though biased towards the cognitive view on the concept of concept, is S. Carey, *The Origin of Concepts* (2011).

4 An overview and a discussion of interrelations of theories can be found in L. Hogeweg, *Word in Process: On the interpretation, acquisition, and production of words* (2009).

5 Rigid versions of this formal semantic feature theory are outdated, due to empirical and analytical evidence that renders them untenable. Computational linguistics triggered all kinds of proposals to moderate this rigid idea, categorising features as more or less mandatory and more or less salient, even incorporating prototype based ideas within feature theories. See E.E. Smith & D.L. Medin, *Categories and concepts* (1981) and, in particular, see H. Kamp & U. Reyle, *From Discourse to Logic: Introduction to Modeltheoretic Semantics of Natural Language, formal logic and discourse representation theory* (1993).

6 An important representative of this theoretical approach, positioning it in a broad cognitive framework, is George Lakoff in G. Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* (1993). See P.J. van den Hoven, 'Peircean Semiotics and Text Linguistic Models', (2010) 3 *Chinese Semiotic Studies*, pp. 210-227 for the relation of this view to Peircean semiotics.

7 A detailed model of such process and the development of prototype based lexical concepts are discussed in Van den Hoven, supra note 6.

Gray's instruction does not make sense when it only concerns the term *tomato(es)*, but should concern the terms *tomato(es)*, *fruit* and *vegetables* in relation to each other. If one wants to investigate whether TOMATOES are FRUIT or VEGETABLES, one needs to investigate how people in a relevant community tend to use these terms when in the greengrocers, or when preparing meals in the kitchen. This way one can probably discover the heuristic working of the mental concepts that the terms activate. If one adopts this method that follows from the theoretical framework, the first observation would almost certainly be that we have prototypical FRUITS, prototypical VEGETABLES, and that TOMATOES are not one of these, and therefore there may be some hesitation in establishing the interrelations of the terms. But, contextualising all three concepts in the context of buying ingredients for a meal and preparing and enjoying a meal, considering them as provisions, one may come to the conclusion that TOMATOES fit in with VEGETABLES better than with FRUIT.

If we look at the investigations that the Court reports, it seems to adopt this cognitive linguistic prototype theory. The second sentence opens with the typical phrase 'in the common language of the people'. It seems to announce that it is performing, informally, the kinds of tests that we have just described and, looking at the outcome, I think it did. But the discourse it produces to account for its investigations shows theoretical confusion.

> Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.

The Court's formulations, starting with 'all these are …', suggest a frame that fits much better in a formal semantic theory. This theory departs from the idea that these types of lexical terms denote a set and that the meaning is determined by semantic features that are names of sets of which this set is a subset. In a simple notation this idea can be formulated in structures like the following:[8]

> {if TOMATO (x) then THING GROWN IN KITCHEN GARDENS (x)}
> {if TOMATO (x) then USUALLY SERVED AT DINNER IN, WITH, OR AFTER THE SOUP, FISH, OR MEATS WHICH CONSTITUTE THE PRINCIPAL PART OF THE REPAST (x)}
> {if TOMATO (x) then NOT SERVED AS DESSERT (x)}
> {if THING GROWN IN KITCHEN GARDENS (x) & USUALLY SERVED AT DINNER IN, WITH, OR AFTER THE SOUP, FISH, OR MEATS WHICH CONSTITUTE THE PRINCIPAL PART OF THE REPAST (x) & NOT SERVED AS DESSERT (x) then VEGETABLE (x)}

The half-heartedness of the Court is visible in the second sentence. If we take its opening words as the context of a cognitive semantic theory, they fit, but the second part of the sentences is to some extent irrelevant, and it fits much better in a formal semantic framework. If we take its opening in the context of a formal semantic framework, the Court begs the question: 'these [a summing up including tomatoes] are vegetables (…)'; that is exactly the point which needs to be proved.

Because Mr. Justice Gray's instructions are incompatible, and because in the end the Court follows the first instruction, guiding it to adopt a cognitive prototype theory, the Court simply neglects the second instruction to analyse the terms *fruit* and *vegetable* within the meaning of the Tariff Act (which makes sense because such analysis cannot solve the problem).

The Court's formulation reveals the methodical obscurity, but also symbolises the Court's preferred ideologically determined self-image: finally its formulations fit into the format of an analytical test of features of TOMATO against features of FRUIT and features of VEGETABLE, leading to a logically inevitable and a priori already determined outcome. At least in formal reports, courts, not surprisingly, adhere to a self-image of an institution that 'finds' the facts and decides the issue according to the law as enacted by the legislator.

8 A slightly more elaborate analysis can be found in P.J. van den Hoven, 'De rechtstheoretische dimensie van een tomaat', in P.W. Brouwer et al. (eds.), *Drie dimensies van het recht* (1999), pp. 185-196 (in Dutch).

A formal semantic framework is ideologically attractive for legal authorities that are confronted with issues of classification. If, in principle, a lexical system of terms can be fully analysed in a formal semantic system of concepts, classification is an analytical act of feature checking and logic that is independent from the one who performs the act. Therefore the outcome of a careful analysis can be considered objectively correct; the Rule of Law is clear and the issue is decided by the Rule of Law. We can understand that if the Court wants to express symbolically its devotion to a strict version of a separation of powers doctrine, it may adopt, at least as a rhetorical presentational device, a formal semantic vocabulary.[9]

This last point connects to the comments attached to Mr. Justice Gray's seemingly simple question. A cognitive linguistic prototype theory explains that this classification issue is problematic (unless the legislator has decided it in advance in the Tariff Act, which is obviously not the case). The theory suggests performing an empirical routine as described above, investigating the actual use by means of observations. This may end up in confirming the intuition that indeed this case is not clear. If that is the outcome and still the issue has to be decided, this means that the act of classifying, here and perhaps in many situations, is not *detecting* a relation between concepts but *deciding* or even *establishing* a relation between terms, an act that involves declarative authority. In that case the main issue is not whether tomatoes *are* fruit or vegetables, but who has the authority to *declare* how they will be classified.[10] If, however, the Court adopts the fiction of a formal semantic theory, based on the idea of semantic features that determine the concepts TOMATOES, FRUIT, VEGETABLES, BOTANIC OBJECTS, PROVISIONS, the basic picture is that of an, in principle, analytically decidable issue, although in this particular case the lexical system may show some shortages.

The scholar, analysing these discursive practices, will try to clean up the problems first – as was attempted here in an inevitably sketchy way – but then will have to take a position, on all the sub issues revealed above. Adopting the one or the other semantic theory on lexical meaning is closely related to taking a position on some of the major issues concerning the Rule of Law and separation of powers doctrine. Methods to discuss issues of classification differ between the semantic theories, including the role of the institution that practises these methods.

3. What is a legal fact?

Wigmore, in *A students' textbook of the law of evidence*, teaches that a *fact* is 'any act or condition of things, assumed (for the moment) as happening or existing'.[11] This is a marked view that raises several questions. If we are talking about 'something' as a fact, but that 'something' is not necessarily some real event or situation that really took place, what is it that we are talking about? It is clear that we must be talking about some mental category, an idea. According to Wigmore, an assumption can, for the time being, create a fact. Does this imply that something can be a fact for you but not for me, because you assume it to exist and I do not, and if so, how do we continue our discussion in this situation? Is a fact a mental image plus an assumption of the most powerful party in the discussion that this image corresponds to some real act or condition of things? If so, can an authority *declare* a fact? And can a fact lose its status as a fact? A posteriori, can a fact be an act or condition of things that did not exist or happen? Or did it by definition happen or exist

9 Empirical evidence that the judiciary strongly prefers to symbolise this position in its discursive practices is abundant, in common law systems and a fortiori in civil law systems. See D. Mazzi, 'The construction of argumentation in judicial texts: Combining a genre and a corpus perspective', (2007) 21 *Argumentation*, pp. 21-38, and P.J. van den Hoven, 'The Unchangeable Judicial Formats', (2011) 25 *Argumentation*, pp. 499-511. P.J. van den Hoven, 'The rubber bands are broken; opening the "punctualized" European administration of justice', (2011) *Tilburg Papers in Culture Studies, Paper 14,* <https://www.tilburguniversity.edu/research/institutes-and-research-groups/babylon/tpcs/download-tpcs-paper-14.pdf.htm> (last visited 24 November 2017) is an essay on the social-cultural background of this preference. P.J. van den Hoven, 'The Judge On Facebook; Neglecting A Persistent Ritual?', (2015) 7 *International Journal For Court Administration*, no. 1, <http://doi.org/10.18352/ijca.147>, pp. 18-26 discusses implications of this preference for the relations between the judiciary and social media.

10 According to J.R. Searle, *Expression and Meaning* (1979), this speech act has to be classified as a declaration instead of as an assertion. This translation of the issue in terms of speech act theory offers another view on the methodic choice that the legal scholar has to make here. See for a thorough examination of the issue as to whether an expression is a declaration or an assertion, M. Sbisa & P. Fabbri, 'Models(?) for a pragmatic analysis', (1980) 4 *Journal of Pragmatics*, pp. 301-319, and for an analysis of this issue in the framework of Kelsen's theory of norms, see P.J. van den Hoven, 'Kelsen's general theory of norms: some semiotic remarks', (1988) 1 *International Journal for the Semiotics of Law*, pp. 297-323.

11 Quoted extensively in *Black's Law Dictionary* (see below).

as long as it is a fact, and is it, from the moment when the assumption is withdrawn, no longer a fact? But what is the meaning of the expression 'X is a fact' then?

Black's Law Dictionary[12] tries to avoid some of these questions by providing two definitions, but this obviously only increases confusion. The first definition states that a *fact* is 'something that actually exists; an aspect of reality'. The second one states that a fact is 'an actual or alleged event or circumstance as distinguished from its legal effect, consequence, or interpretation'. This second definition is an attempt to distinguish *fact* from *opinion*. It does not need a lot of reflection to see that these two definitions are incompatible and that, because the second definition allows a fact to be something alleged but potentially not actually happening or existing, all questions attached to Wigmore's definition apply.

A statement in the *Oxford Dictionary of Law*[13] is incompatible with Wigmore and *Black's Law Dictionary*, defining *fact* as 'an event or state of affairs known to have happened or existed'. This means that something that has actually happened or did exist is not a fact unless it is known, but something alleged can be a fact or not, dependent on what is really the case. So, if we draw the set of things that have actually happened or existed and the set of alleged knowledge, then facts are the intersection, the objects of true knowledge only.

If we investigate the meaning of *fact* in relation to the term *evidence*, things get worse. The magisterial *Corpus Juris Secundum* defines evidence as 'the means from which an inference may logically be drawn as to the existence of a fact. (…) It signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point at issue'. This is a formulation that is already found in 1829 in the *Commentaries on the Laws of England*.[14] We learn from it that a *fact* is something that exists or not, and, when existing, can be true or not true. There is quite some work to do before one has constructed a (necessarily cognitive conceptual) system that can account for this definition.

All complications seem combined in the definition in the Farlex free dictionary: 'an actual thing or happening, which must be proved at trial by presentation of evidence and which is evaluated by the finder of fact (a jury in a jury trial, or by the judge if he/she sits without a jury)'.[15]

Legal scholars encounter the term *fact* time and again in discursive practices that they need to analyse. Even in legal sources that are supposed to define this basic term, methodical reflection is clearly not always the centre of attention. In the discourse of legal practitioners who use the term it will not be any better. This confusion is to some extent understandable because determining the meaning of the term *fact* requires taking a position on fundamental issues that not only keep legal theorists busy, but also reflect the undeniable tension between legal practice and its dominant ideology, the tension between what legal experts do and what they themselves and the society in which they operate ideologically want them to do. Do we 'find' facts, or do we construe facts, declare something to be a fact? Is a fact a 'true' factual expression and is truth a quality that an authority can attach to an expression that has been defended successfully in a discussion? Even in the simple term *fact*, the fundamental discussions regarding the Rule of Law and the separation of powers doctrine are reflected.[16]

Let us try to clean up a bit, without even attempting to formulate any proposal. In legal discursive practices we encounter expressions that assert that an event took place or a state of affairs existed at a determined time and place and expressions that deny this. Further, we can imagine worlds in which a particular event took place or the state of affairs existed and worlds in which this was not the case. And finally, we believe that, independent of our knowledge about it and not influenced by anyone alleging or denying it, in our reality an event took place or the state of affairs existed or not. In this context, the terms *fact*, *evidence*, *proof*, *true*, *false*, *correct*, *incorrect*, *alleged*, need to be defined and used in a consistent way. That is obviously not the case with the definitions cited above. Why? Because on the one hand we know that in legal discussions a fact is the conceptual content of a descriptive expression that according to a procedure is declared to be a true expression. On the other hand, ideology inspires us to believe that – except for incidental mistakes – the conceptual content of such expressions refers to something that indeed exists in

12 *Black's Law Dictionary* (1999).
13 E.A. Martin & J. Law (eds.), *A Dictionary of Law (Oxford Dictionary of Law)* (2006).
14 W. Blackstone et al., *Commentaries on the Laws of England* (1829).
15 <http://legal-dictionary.thefreedictionary.com/fact> (last visited 24 November 2017).
16 See for some of these discussions E.T. Feteris et al. (eds.), *Legal Argumentation and the Rule of Law* (2016).

reality. An analysis of the incompatibilities within and between the definitions reveals this tension between the influence of actual practice and ideology, the same tension that we observed in Section 2.

As a result, any methodic analysis which a scholar makes of these discursive practices implies in the end choices that reflect his or her own view on this tension. My own formulations in this section illustrate this last point. Even though I tried to exercise optimal restraint in expressing my views on fundamental issues concerning the Rule of Law and the separation of powers doctrine, this is virtually impossible.[17]

4. What is grammatical interpretation?

Participants in a legal discussion often use *linguistics arguments* to support their claims about the meaning of an expression from a source of law. With a linguistic argument they claim to show that the proposed meaning is based on what is called *grammatical interpretation*. They claim that the meaning that they attach to a text is constructed exclusively by interpreting words in accordance with the way they are used in ordinary or technical language and by attaching meaning to the combination of these lexical elements merely following grammatical conventions. They claim that if the formulations in the source of law are carefully formulated and sufficiently specific, this constructed meaning can be called a *sens clair*, referring to the legal *sens clair* doctrine.[18]

The linguistic argument becomes intriguing when we try to articulate which standpoint is or can be justified by this argument, against the critical doubt of whom? Although this third example is slightly more complicated than the examples in Section 2 and 3, the point to make is identical: whatever remark a scholar makes about the function of a linguistic argument employed by a judge, such remark inevitably implies taking a position in fundamental discussions about the meaning of the Rule of Law, the separation of powers doctrine and the role of the judiciary.

The point is that the concept of a linguistic *argument* seems internally confusing. The linguistic argument says that a meaning attached to an expression results from grammatical interpretation only. The idea underlying the conception of grammatical interpretation, distinct from other forms of interpretation, is that if all participants in a situation are users of the same linguistic code and if they all apply this method, they will share the same meaning, unless the text suffers from lack of clarity, lack of specificity, errors or omissions. By implication, in the case of a linguistically clear text, parties cannot disagree about the 'grammatical' meaning of a text. By implication, if in the case of a linguistically clear text someone disagrees about the meaning attached by the judge to the expression, this has to be because he or she applies other interpretation methods than mere grammatical interpretation, creating a need to generate other arguments than linguistic arguments to justify a prosed meaning: systematic arguments, teleological-evaluative arguments or transcategorial arguments. He or she applies other methods because the grammatical method does not result in an acceptable meaning. The linguistic argument, therefore, cannot be an argument that answers the doubt of an opponent. However, it is still frequently presented as an 'argument' in the sense of a discourse element that is formulated and presented as if it is a justification of a standpoint, perhaps preceded by 'Expression A means a because' or followed by 'therefore expression A means a'.

Legal theory does not provide a generally accepted view on the status of the linguistic argument as a move in a reasonable discussion about a proposed meaning.[19] Therefore, a legal scholar has to take a view on the justifying force of such arguments, in particular when such 'argument' is employed by the authorised decision-maker, namely the judge. I distinguish two extreme positions.

A scholar can analyse the discursive act of a judge who calls upon a linguistic argument as a (strong or weak, valid or invalid) justifying argument, in which case the scholar needs to specify exactly what the claim is that the argument justifies, and against which real or abstract opponent. Or the scholar can analyse this

17 My decision to use the term *declare* in the phrase 'a descriptive expression (…) is declared to be a true expression' reflects a methodic choice and illustrates in this way the topic of my paper. See note 10, supra.

18 See K. Clauss, 'Die Sens-Clair-Doctrine als Grenze und Werkzeug', (1971) 14 *Logique & Analyse*, pp. 251-255.

19 See for example A. Grabowski, 'Clara non sunt interpretanda vs. omnia sunt interpretanda. A never-ending controversy in Polish legal theory?', (2015) 27 *Revus. Journal for Constitutional Theory and Philosophy of Law*, pp. 67-97, about the ongoing Polish discussion, and the discussion in E.T. Feteris et al. (eds.), *Argumentation and the application of legal rules* (2009).

judicial discursive act as a mere rhetorical point of departure, organising the judicial explanation probably in an clear way, but without any justifying potential. Such methodic choice implies a position on major issues concerning the Rule of Law, the separation of powers doctrine and the role of the judge. To indicate the relation between the methodic approach of linguistic arguments and these major issues, I briefly reflect on what each position implies for the acceptance of the idea of a *sens clair* and therefore for the view on linguistic meaning.

To be in a position to consider the linguistic argument to be a (strong or weak, valid or invalid) justifying argument, a scholar has to accept that an interpretation process that is based exclusively on what the words themselves mean (grammatical interpretation) normally ends in a clear meaning. Regardless of the question whether other arguments are a reason to abandon this *sens clair*, at least it should be there as a result of this interpretation method. If a scholar *rejects* this possibility of establishing a clear meaning on the basis of the linguistic signs only, a theoretical distinction between the linguistic argument and other argument types does not hold. We saw in our reflection on issues of qualification that rejection of the assumptions underlying a *sens clair* doctrine is certainly an arguable option. Many linguistic theories support the idea that every act of attaching meaning to a language sign considers the genre (systematic interpretation), the communicative, social and institutional goals assigned to the sender (teleological interpretation), and responds constructively to cooperative routines by searching for a possible meaning that does not imply violation of a cooperation principle (transcategorial interpretation). According to such theories, meaning is never encoded in the sign as such. Therefore presenting a linguistic 'argument' in a discussion is never analysed as justifying a move against an opponent who doubts the acceptability of an attached meaning, but always as a rhetorical presentational device that should be evaluated as representing a point of departure grounded on what the interpreting judge guesses to be a meaning that many readers, without too much information beyond the text, would attach to the expression in the prototypical context that they most presumably assign to the expression.

A scholar who does adopt the model grounded on the *sens clair* doctrine can analytically accept the linguistic argument as a category (it should be remembered that, for the sake of clarity, I only discuss two extreme positions). Analysing this option leads to a somewhat surprising conclusion. If we consider the reasoning of the judge as a move in his or her discussion with the parties only, at least some of the parties being antagonistic towards the meaning that the judge claims to be the correct one, this scholar ends up with a situation in which he or she needs to consider the linguistic argument as a mere rhetorical presentational device too, though for very different reasons. This implies that if this scholar still wants to model the linguistic 'argument' as a real argument, he or she needs to remodel the position of the judge, the judge not being the protagonist with the parties as antagonists, but having a more abstract role in a more abstract discussion.

It has to be a mere presentational device because the model adopted implies that it cannot be a relevant argument to justify the writer's position against the reasonable doubt of an opponent. This is trivial because there will be no opponent who contests the attached meaning – assuming that the formulation is adequate. The *sens clair* doctrine implies that all opponents will construct the same meaning – assuming that the formulation is adequate. If there is a difference of opinion about the meaning of this expression, the doctrine determines that this has to be because its formulation is not adequate – in which case the reading is not based on language alone – or because the difference of opinion results from the fact that the opponent applies other interpretation methods, in which case the discussion is about these other methods.

To sum up. A reference to a linguistic meaning as an argument for the applicability or non-applicability of a legal rule is either conceptually impossible, or superfluous, or a fallacy. It has to be understood as a point of departure to present a report of a process of interpretation, a rhetorical device. This is a highly feasible point of departure because it fits perfectly in an ideology of the judge merely applying the law when this *sens clair fiction* (as it should be called now) is accepted as the valid meaning, and it helps to organise the discourse when it is strategically amended (for example by a Supreme Court with the explicit intention to indicate a change). Because the analysis departs from distinguishing merely two extreme positions, one could consider this summary an artefact of my simplification. In that case one adopts a more complicated

theory that provides for a more elaborate version of a *sens clair* doctrine; it needs to account for a prima facie meaning that can be said to be based on an interpretation that neglects certain determined categories of contextual information (the 'linguistic meaning') that is nevertheless defeasible as linguistic meaning because its sources can result in different proposals. It fully depends on the character of the sources used and the sources excluded as to what such a position implies about the scholar's position on issues concerning the Rule of Law and the separation of powers doctrine.

5. Conclusion

I have shown how even a single remark in a research report about a legal discursive practice, in particular about processes of meaning construction, inevitably implies a methodic choice because it assumes the adoption of a semantic theory that has alternatives. This means that the conclusions of the research are relative to the methodic choice and could therefore have been (slightly) different if a different choice had been made.

Even more important is that this methodic choice can and will often be a commitment to a legal theoretical paradigm, implying a positioning towards fundamental and far-reaching theoretical issues. I have shown how a scholar's methodic choices when analysing legal discursive practices imply a position about issues concerning the conceptualisation of the Rule of Law and the separation of powers doctrine, and about the role of the judge. Therefore, because of its relation to these central issues, it is important to maintain consistency in one's 'linguistic' choices in the course of a study.