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Abstract: It is argued that there is a close connection between Wittgenstein's Use Theory of Meaning (UT) and Legal Realism (LR). Therefore, if you accept one, you can hardly avoid accepting the other, on pain of inconsistency. The alternatives to UT do not appear appealing. Objective theories are committed to semantic essentialism, the view that words have fixed, eternal, and – what is worse, language-independent meanings. Words do have meanings, but they can be neither objective entities, like in Plato (360 B.C.E) and Frege (1892), nor subjective mental states, meaning--intentions. It is not our intentions that give meanings to words, but rather it is the way other people use words that shape our intentions – if we are rational. It is further argued that UT does not turn semantics into a branch of sociolinguistics. Likewise, if one rejects all juridico-semantic fictions, one has to admit that LR might be a viable option, after all.

Keywords: use theory of meaning; legal realism; semantic.

1 What does the title mean?

The question about the connection between Wittgenstein's Use Theory of Meaning (UT) and Legal Realism (LR) may sound outlandish, but it is worth asking because there are many people who happily endorse UT, but adamantly reject LR. I used to be one of them.

A brief characterization of the two doctrines is in order to avoid misunderstandings. UT is the view that the meaning of an expression is simply the way people use it. And that's the end of it; there is no separate entity – abstract, concrete or otherwise

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– above this social fact. Thus, to say that a word has a certain meaning is only to say that people (the members of a linguistic community) use it in a certain way. No further metaphysical constructions are needed.

Likewise, LR is the view that the law consists of those norms that courts in fact enforce. The law is not a self-evident logical system in which all individual laws have been derived from some few self-evident principles, perhaps from the numinous Basic Norm. Of course, such an abstract system can be developed to *describe* the law of a country, but it is one thing to describe something and another to be it. Nor is there any need to postulate any other special abstract legal entities.

Both UT and LR can therefore be seen as expressions of the same anti--metaphysical conviction that entities are not to be multiplied beyond necessity (*entia non sunt multiplicanda praeter necessitatem*) as the proto-empiricist William Ockham (1995) is said to have put it. My thesis is that UT and LR belong to the same package and, therefore, on pain of inconsistency, one cannot take one and leave the other.

2 Ut and its alternatives

Why should anyone adopt UT in the first place? The main reason is that its competitors lack both credibility and usability. To be sure, philosophers have developed many very sophisticated theories of meaning, but it is hard to imagine that a lawyer or even a legal theorist could apply those abstruse theories to legal problems. Even if somebody chose to embrace them, the prospects of finding enthusiastic audience are bleak, to put it mildly. Therefore, I will concentrate on the less technical and more easily applicable theories, namely, UT and its rivals. These theories of meaning – and all those that can be applied to legal theory by any stretch of the imagination – can be divided into three groups: objective, subjective, and social or intersubjective theories.

Objective theories hold that the meaning of a word is an abstract entity, that is, an object that exists outside time and space – outside this world of ours. On this theory, the meaning of the word "dog" is distinct both from the word itself (consisting of the letters D, O and G, or their acoustic counterparts) and from the thing to which the word refers (the barking animal in the backyard). Plato's (360 B.C.E) theory of ideas is the classical version of this doctrine. Gottlob Frege's (1892) semantics is an impressive and refined modern version of it (FREGE, 1892; 1918).

Subjective theories hold that the meaning of a word is the same thing as the intention of the speaker: a word means whatever his user intends it to mean. This theory is beset with obvious difficulties. For if it were true, there could be no (mono-lingual) dictionaries, or at least they would have to be much bulkier than the ones we now have because they would have to contain every speaker's every idiosyncratic meaning, including the ones the speakers themselves later regard as erroneous.¹

¹ The soulmates of the subjective theorists, proponents of descriptive grammar, will be dealt with in the concluding section. They presuppose that native speakers cannot make mistakes.

Social theories, of which UT is one, accept the grain of truth contained in subjective theories. the idea that the intentions of language users (in the plural!) are important, but it significantly adds that those intentions are not matters of individual caprice. For instance, the word "dog" does not refer to a dog because I intend or decide so. My intention is impotent if it goes against the grain of common usage. So, if I use in England the word "sag" (which I intend to be a common noun and not a proper name) to refer to a dog, my audience will not probably understand me, no matter how intensively I intend it to name a dog. Because I know all that, I use the word "dog" when I want to speak about a dog, since I believe that everybody else uses the word in this way. Thus, it is not my intention that gives a word its meaning, but (almost) the other way round: it is the meaning that shapes my intention; it is my beliefs about the way other people use words that determine my meaning-intention and my choice of words. But if I happen to be in Iran and want to speak about a dog, then "sag" is a good choice.

Moreover, even if my meaning-intentions alone determined the meaning of the words I use, I would still have to take into account how *other people* use words in forming my meaning-intention, if I want to be understood by others. This is the simple fact that subjectivists tend to forget, whereas it is the very cornerstone of UT and of any intersubjective or social theory of meaning.²

3 Semantic Essentialism – The target of UT

According to Plato (360 B.C.E), there is, corresponding to the words that we use, another world of ideas that are the meanings of our words:

Whenever a number of individuals have a common name, we assume them to have also a corresponding idea or form. [...] [T]here are beds and tables in the world[.] [...] But there are only two ideas or forms of them – one the idea of the bed, the other of a table.

So, to understand what a word means, it is necessary to "grasp" the corresponding abstract idea. Merely seeing the physical object to which the word refers is not enough. "The many [individual things in this world] are seen but not known, and the ideas are known but not seen" (PLATO, 360 B.C.E).

Aristotle (350 B.C.E) had doubts about Plato's doctrine, especially about the manner of existence of the ideas, but he never doubted the existence of the ideas themselves. For him, the ideas did exist but they did not exist in a separate world but in this very world, in things as their forms. Consequently, like Plato (360 B.C.E), he believed that things have essences, but unlike Plato (360 B.C.E), he placed those

² There are many theories that do not fit into this classification. Bertrand Russell's attempt at constructing semantics without abstract meanings (RUSSELL, 1918) could be classified as a non-ideal objective theory. Its central tenets are that the meaning of a word is the object it refers to and that the object itself is a constituent of the meaning of a sentence uttered about that object.

essences in this world. In short, he never gave up Plato's ideas, but just renamed them "forms" and stationed them in the real world.

The core tenet of the traditional objective theories of meaning could be called *semantic essentialism:*

SE: Words have fixed, eternal, language-independent meanings.

Fixed means that the meanings are clear and determinate. Although they are clear and determinate in themselves, they are not always clear and determinate *for us*. Yet they are always capable of being clarified and determined – and that's precisely what Socrates and his friends did in Plato's (360 B.C.E) dialogues.

Eternal means unchanging in time. Although our knowledge of the essences of things may develop, the essences themselves do not change. They have always been and will always be the same.

Language-independence means that all languages have the same basic semantic building blocks. Maybe not all languages *use* all of them, but the ones they use certainly belong to the basic set of meanings of a universal language. Many philosophers have taken it for granted that there is such an universal language of thought, that is, a language that is used to form the very thoughts that are later expressed by means of ordinary spoken language. Aristotle (350 B.C.E) clearly believed in it:

Spoken words are the symbols of mental experience and written words are the symbols of spoken words. Just as all men have not the same writing, so all men have not the same speech sounds, but the mental experiences, which these directly symbolize, are the same for all, as also are those things of which our experiences are the images.

Augustine of Hippo (417 A.C.) followed suit and says:

For the thought that is formed by the thing which we know, is the word which we speak in the heart: which word is neither Greek nor Latin, nor of any other tongue. But when it is needful to convey this to the knowledge of those to whom we speak, then some sign is assumed whereby to signify it.

What is surprising is that, in the 14th century, William of Ockham (1995), the radical medieval anti-essentialist, also expressed his belief in the language of thought:

(1) All those who treat logic try to show that arguments are put together out of propositions and propositions out of terms. Thus, a term is nothing else but a proximate part of a proposition. [...] (2) But although every term is part of a proposition, or can be, nevertheless not all terms are of the same kind. [...] (3) [J]ust as [...] there are three kinds of language, namely written, spoken and conceived, <the last> having being only in the intellect, so <to> there are three kinds of term, namely written, spoken and conceived [*scriptus, prolatus et conceptus*]. (4) A written term is a part of a proposition written down on some physical object, which <proposition> is seen by the bodily eye, or can be <so> seen. (5) A spoken term is a part of a proposition spoken by the mouth and apt to be heard by the bodily ear. (6) A conceived term is an intention or passion

of the soul naturally signifying or cosignifying something <and> apt to be part of a mental proposition and to [stand] for the same thing <that it signifies>. Thus, these conceived terms and the propositions put together out of them are the 'mental words' that Blessed Augustine, in De trinitate XV [10], says belong to no language because they abide only in the mind and cannot be uttered outwardly, although utterances are pronounced outwardly as signs subordinated to them.

It seems that it would have been too radical even for Ockham (1995) to doubt the existence of the language of thought that had the support of such authorities as Aristotle and Augustine on its side.

It is difficult to believe in the existence of a universal language of thought. For example, the English noun *compromise* and the Portuguese noun *compromisso* have a common Latin origin, but nowadays they have entirely different meanings – or uses. The Portuguese *compromisso* is not a compromise, but a commitment. Yet the corresponding verbs *to compromise* and *comprometer* have one use in common: to put something in danger. Which language is right? What are the words of the universal language of thought for these things? Specious questions like these vanish into thin air as soon as one adopts UT: languages just are different and their speakers use words differently, and there is no universal language that could serve as the semantic rock-bottom for other languages.³

SE had enormous institutional support in the Middle Ages. Every educated person – priest, doctor, and lawyer – had to go through a long course of general studies during which he was taught, among other things, the basics of the scientific method which contained Aristotelian logic and philosophy. Many books on the methodology of philosophy still speak as if SE were true, and the preferred method of introducing philosophy to students often is to read Plato's (360 B.C.E) dialogues and to get to know how Socrates and his friends tried to find the correct definitions of some interesting concepts. American law schools also teach the Socratic Method as the fundamental method used by a lawyer.

4 Semantic Essentialism under fire: Wittgenstein

It would not be true to say that nobody doubted SE before Wittgenstein (1973) because, e.g., Blaise Pascal (1909) expressed serious doubts about the definability of all words and the existence of basic semantic building-blocks (PASCAL, 1909). But SE was long a tacit presupposition not only of philosophy but also of many sciences that borrowed their methodology from it.

Ludwig Wittgenstein (1973) changed all that by rejecting essentialism once and for all. Wittgenstein (1973) did so both in his metaphysics and in his epistemology (WITTGENSTEIN, 1975). Also his theory of meaning amounts to the negative

³ A subtler version of the doctrine can be found in Frege (1892). He is ready to admit that our everyday language is far from perfect but there is – or ought to be – an ideal language of science without the shortcomings of natural language.

thesis that there are no such meanings (semantic building-blocks) that SE presupposed, and to the positive thesis that words still have "meanings" which consist only in the way that people *use* these words (WITTGENSTEIN, 1973, p. 43). These doctrines he expressed by his famous aphorisms "The meaning of a word is its use in language" and "Don't look for the meaning, look for the use"^{4 5} (WITTGENSTEIN, 1973, p. 43).

It is important to notice that the adage "meaning is use" does not mean that just any use creates a new meaning. To the contrary, it means that a speaker must adjust his meaning (or meaning-intention) to the prevalent usage. The word "dog" does not refer to a dog because I intend so but because that is how the word is used by everybody else. It would be irrational of me not to accommodate my usage to that of the others, because language is a social art. There may be semantic solipsists who may give their words any idiosyncratic meaning that occurs to them, but they do not do so for long, for sooner rather than later they get what they deserve: their communicative intentions fail because other people do not understand them.⁶

5 Must we reject SE?

It could be argued that SE is a harmless old theory and that there is no point in fighting against it. I do not quite agree because there are several things that we cannot understand if we stick to SE: 1. historical change, 2. differences between languages, and 3. the nature of interpretation.

1. Linguistic change is an undeniable fact, but hardly explainable by SE. An etymological dictionary attests the fact of historical change. The noun "mine" is a good example of how the meaning can develop (and there are, of course, many other ways in which the meanings of words shift and drift). (a) Originally, "mine" was used to mean a hole dug in the ground from which coal, ores, or other substances were extracted. (b) Later, it came to mean a tunnel dug under enemy fortifications and filled with explosives. (c) And finally it came to mean any explosive device (whether on land or at sea) intended to harm an enemy when it goes off when people or vehicles or vessels go over or near it. The meaning of the word has clearly changed, even "developed", but Platonic ideas do not change.

⁴ Probably apocryphal.

⁵ German lawyer Erich Danz (1912) had expressed many Wittgensteinian ideas in § 4 of his work. Here are some examples: "[D]ie Worte [haben] keinen bestimmten Sinn, keine bestimmte Bedeutung..." – "Unter der Bedeutung eines gesprochenen Wortes versteht man die Vorstellung, welche die Mitglieder derselben Sprachgemeinschaft ... zu einer gewissen Zeit mit einem Lautgebilde verbinden." – "[D]er Einzelne [kann] die Bedeutung der Worte nicht ändern..." – "Die Worte wechseln mit der Zeit ihre Bedeutung; es entstehen ganz neue Worte." Probably Danz was not the first to entertain these commonsensical thoughts.

⁶ Incidentally, "meaning is usage" would be a better expression for LW's idea, because usage means, according to Collins's dictionary, "the way in which a word is actually used in a language".

- 2. The word "mine" can also be used to show the difference between the ways individual languages chop the world. Not all languages make the same distinctions. In Finnish mine_(i) is *kaivos*, mine_(iii) is *miina*, and there is no word for mine_(ii) at all. Also the German language has special words for mine_(i) and mine_(iii), *Bergwerk* and *Mine*, but no word for mine_(ii), but the German word "Mine" can also mean something its English counterpart cannot: the lead of a pencil or the refill of a ballpoint pen. One cannot help wondering which of these various "mines" have their prototypes in Plato's heaven.
- 3. The most fatal difficulty of SE has to do with interpretation. According to SE, to interpret an expression is to connect the expression with its abstract meaning, its ideal counterpart in Plato's heaven. The problem with this theory is, of course, that there are no such ideas. Nobody has ever been able to show a single Platonic idea. What philosophers have been able to produce are just words. It is undeniable that a dictionary tells us what a word means, but it does not do so by revealing a Platonic idea. It just replaces the unclear expression by a clear one. For example, if I come across the word "minke" and do not know what it means, my dictionary tells me that it is a species of whale, *Baleanoptera acutostrata*. The dictionary does not connect the word "minke" with an eternal Platonic prototype, but replaces the unknown word "minke" by the known expression "whale". A dictionary operates *within* language and not between language and the Platonic heaven.

Needless to say, UT has no problems whatsoever with these three problems that beset SE. 1. Historical change is easy to explain. The meanings of words change, because people start to use them differently. 2. Differences between languages are not a problem, either. It is obvious that people in different countries speak differently, but if we are not looking for language-independent Platonic meanings, there is no real problem to solve. 3. Understanding the nature of interpretation is no problem, either, if interpretation is just what Wittgenstein (1973) said it is: the replacement of one expression by another. There is no such thing as the conclusive interpretation because interpretation is always a contextual task; an explanation that makes a difficult passage in Plato (360 B.C.E) understandable to one person does not necessarily make it understandable to another.

6 From Wittgenstein to Holmes

Legal realism is a theory about the nature of law. In its most plausible and least cynical form, it holds that the law consists of judicial decisions given in the interest of the whole society. It rejects any doctrine that sees the law as a rational system in which legal rules are deduced from principles of ethics, theology or other alleged self-evident axioms. Instead, the law is, as the early exponent of the theory Oliver

Wendell Holmes put it, "what is decided by the courts of Massachusetts or England" (HOLMES, 1897, p. 460). The claim that a person has a "legal duty" to do something is, according to Holmes, only "a prophecy that if he does [not do it], he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment" (HOLMES, 1897, p. 461).

For instance, the venerable principle of contract law *pacta sunt servanda* is, for Holmes, not a truth of reason (as it was for earlier natural law theorists) but "a prediction that you must pay damages if you do not keep [the contract] – and nothing else" (HOLMES, 1897, p. 462).

But what does Holmes (1897) really mean when he says that the law is a prediction of what the courts will do? Is he giving an old-fashioned definition that reveals the essence of the law? Or is he just putting forward a practical criterion for testing whether a given norm is valid – i.e., belongs to the law? The latter seems to have been his purpose.

An analogous question can be asked of Wittgenstein (1973). When he said, "meaning is use", did he intend to reveal the essence of meaning? Or did he intend only try to show how *particular* questions about the meaning of an expression are to be answered? Again, the latter alternative is the more credible. His famous aphorism, "Don't look for the meaning, look for the use" nicely epitomizes his particularistic approach. It does not answer the question "What is meaning in general?" but rather "What is the meaning of this expression?".

7 Summary of the argument and an analogy

I have been defending the thesis that UT and LR are closely connected. If they are connected, one just cannot take one of them and leave the other. Therefore, one should be careful in choosing one's theory of meaning. Every lawyer has some tacit theory of meaning, and since unconscious semantics tend to be bad semantics, the choice should be made in a reasonable, conscious way.

There are three main options: objective, subjective and use theories of meaning (plus some very technical ones that can be ignored). Summaries:

- OT: The meaning of a word is the abstract idea that it expresses.
- ST: A word means whatever is user intends it to mean.
- UT: A word means what a linguistic community customarily uses it to mean.

OT lacks credibility. Who has ever seen the meaning of a word, a Platonic idea? How can a dispute about the right meaning of a word ever be solved, if all disputants appeal to their own intuition? ST is impossible as well. My intentions do not change the way other people speak. It leads to semantic solipsism in which anything goes, because every individual is right. Therefore, it is incapable of criticizing the way people use words. UT avoids these difficulties. It is a down-to-earth theory, but adopting

it has a price: it is hard to avoid adopting LR as well – if inconsistency, for both UT and LR are applications of the general principle of pragmatism.

LR has been criticized for giving absurd results as a guide for a judge's action. If a judge is pondering the right solution in the case before him or her, then the theory will say that any decision the judge makes is right! This objection is not fair. To be understandable and predictable, a judge must take into account the existing statutes, precedents and other legal materials. If every judge acted in a wanton manner, decisions couldn't be predicted at all. The right decision is not the one that a *particular* judge happens to make but the one that all or most or all reasonable judges would make. O. W. Holmes (1897) didn't say that the law is what a single judge happens to decide (due to, say, his or her indigestion or marital problems). He said that the law is "what is decided by the courts of Massachusetts or England".

LR has also been criticized on the ground that all normativity of law is lost if we adopt LR, because it makes legal science a branch of sociology.

Answer: Does UT make philosophy (or any other science using UT) a branch of linguistics? No. The very idea of having to stick to OT and SE for fear of "losing normativity" is strange. Just consider the following analogy.

Past lexicographers were not interested in how the "mob" speaks. They looked for their material (examples of correct usage) in the works of recognized authors. Only Caesar and Cicero were good enough for the most austere of compilers of Latin dictionaries. It was a time of authoritarianism in both theory and practice.

In the 20th century, the rejection of this "normative" approach lead to the opposite "descriptive" view in linguistics: in making grammars and dictionaries, we must not give norms but only describe. All native users of a language are equal, even infallible. "A native speaker cannot make a mistake" was the tacit presupposition of much of mid-20th century linguistics (GARNER, 2009, p. xxxvii-lix).

However, in practice, these descriptivists did not shrink from authoritatively declaring some of the utterances of the noble natives as ungrammatical and prefixing them with an asterisk, almost as a sign of non-Aryan pedigree. As natives themselves, they could rely on their own infallible linguistic intuition in criticizing other natives' intuitions. The people whose intuitions and utterances were rejected were not consulted. In short, this was a period of equality in theory but authoritarianism in practice.

In compiling a dictionary or a grammar, one cannot describe *everything*. Somebody decides what utterances will be included in the corpus, the collection of real life examples, usually a very large one, on which the book will be based. Downright errors are automatically excluded. Very probably the method of reflective equilibrium is at work here. Theory and intuitions are brought into an equilibrium. Theory delimits the choice of intuitions, but intuitions also crystallize and force changes in the theory.

The normativity of grammar or dictionary is not lost in using a corpus. 1. Not everything is accepted into the corpus. 2. Very little comes out of the corpus to a single grammar or dictionary. 3. No corpus is totally free from contradictions. 4. The

resulting grammar represents a trade-off between the incompatible ideals of width of coverage and simplicity of exposition.

Similarly, the normativity of law is not lost if it has been systematized by a legal scholar, who acts just like a corpus linguist. He may think that he is moving in Plato's heaven but in reality he is trying to 1. select relevant items for closer scrutiny, 2. form general concepts (not necessarily used in the corpus), and 3. formulate general principles using the concepts mentioned in 4. If the corpus consists of normative material (as it does in legal science but not in linguistics), then why couldn't its systematization be normative?

In fact, there seem to be a double normativity in legal systematizations. First, the material systematized is itself normative. Second, since not everything in a corpus can be present in the systematization, the worst and most untypical elements will be the first to be dropped. What remains are the "healthy" and "exemplary" parts which will serve as models – consequently in a normative function.

LR can be seen as an agent in the continuing process of the disenchantment (*Entzauberung*) of legal theory. For Weber, the traditional world remained "a great enchanted garden". The same holds true of the classical jurisprudential world with its mythical entities. Why should LR be rejected off-hand?

A TEORIA DO USO DO SIGNIFICADO OCASIONA REALISMO LEGAL?

Resumo: Discute-se que há uma conexão próxima entre a Teoria do Uso do Significado (TU) de Wittgenstein, e o Realismo Legal (RL). A partir de então, se você aceita uma delas, dificilmente evitará aceitar a outra, sob pena de inconsistência. As alternativas da TU não parecem ser atraentes. Teorias objetivas são comprometidas com a essencialidade da semântica, no ponto de vista de que as palavras foram fixadas eternamente, e, ainda pior, a linguagem possui significados independentes. As palavras possuem significados sim, mas elas não podem ser entidades objetivas, como em Platão e em Frege (1892), como também não podem ser estados mentais subjetivos, ou seja, significados de acordo com as intenções. Não é a nosso intento dar significado às palavras, pelo contrário, é a forma que as pessoas usam as palavras que dão forma às nossas intenções – se formos racionais. Do mesmo modo, se alguém rejeita todas as ficções semântico-jurídicas, temos que admitir que o RL talvez seja uma opção viável, no fim das contas.

Palavras-chave: teoria do uso do significado; realismo legal; semântica.

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