

When *may* means *must*: deontic modality in English statute construction

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1. Introduction

As well as rules which forbid certain actions or impose certain duties, all modern legal systems include power-conferring rules, which grant rights without imposing norms of behaviour. The distinction between obligations and rights is commonly expressed in statutory language, as in ordinary speech, through the use of modal verbs. In English statutes, *shall* is normally used to impose an obligation, while *may* is generally used to confer a discretionary or enabling power. This use is illustrated uncontroversially, for example in “A local authority **may** within their district [...] construct a public sewer [...]” (*Public Health Act 1936* s15[1]) [my emphasis]¹

The modal verb is here seen as conferring a right, rather than as imposing an obligation. The question occasionally arises as to whether in particular circumstances the holder of the power, in this case the local authority, could be legally obliged to act under the relevant statute, and if so whether and in what sense enabling expressions like *may* could then be said to impose a duty. Various courts have held that in certain circumstances there may indeed be an obligation to exercise a statutory discretion. In such cases, the statutory *may* is said to have a coercive meaning similar to *must*. Surprisingly, this is the first sense given under ‘may’ in *Stroud’s Judicial Dictionary* (Stroud: 1986). This reference book gives as synonyms various other legal expressions normally used to grant a discretionary power, including ‘it shall be lawful’, and ‘shall hereby have power’. Where *shall* occurs in such contexts, it does not have the effect of creating a new legal obligation or duty, but functions as part of an enabling expression to create a new legal power.

Linguists commonly accept that expressions literally signifying permission can be used to imply an obligation. However, they would be reluctant to accept the more radical claim implicit in the relevant judgments, that, under certain conditions, *may* can be understood, in its literal meaning, as including not just a permissive but also a coercive sense. This conclusion is reached through different forms of legal analysis, illustrated here in *Julius* 1880, *Re Shuter* (2) 1959 and *Anns* 1977.

2. Judicial analysis

2.1. *Julius v Oxford* (Bishop)²

The leading English case for the proposition that the literal meaning of the legal *may* includes not just the permissive, but also the coercive sense is *Julius v Oxford* (Bishop) 1880, in which numerous precedents are cited. The authority is seen to derive from *Alderman Backwell’s case*, decided as long ago as 1683, by Lord Keeper North in the Court of Chancery.

Backwell’s case depended on the interpretation of the *Bankrupts Act* 1571, which enacted (ch7, s2) that where complaints were made in writing against “a person being bankrupt”, the Lord Keeper “shall have full power and authority” to grant a “commission of bankruptcy”. When the Exchequer was closed in 1676, Alderman Backwell’s creditors were obliged to petition for a declaration of bankruptcy. As the expression used in the statute was only empowering, and did not impose an obligatory duty, the Lord Keeper was able to delay matters for seven years (apparently with the complicity of the government), before finally declaring that:

[T]hough the words in the Act of Parliament were, that the Chancellor ‘may grant a Commission of Bankrupt’ [sic], yet that ‘may’ was in effect ‘must’, and it had been so resolved by all the judges. And the granting of a commission was not a matter of discretion; but that he was bound to do it. (*Alderman Backwell’s case* 1683, per North LK, as cited by Lord Blackburn in *Julius* 1880)³

Later courts were quick to make use of the new, wide interpretation, in order to reach a just result in appropriate cases.

A rule of construction⁴ was established in *Reg v Tithe Commissioners* 1852. This case concerned the interpretation of the *Tithe Act* 1842, which empowered commissioners to confirm agreements for commutation of tithe in particular circumstances. It was held that, although the statute purported to confer a power, the Commissioners were bound, where the conditions were met, to accept the relevant agreements. It was stated as a rule of law that:

The words undoubtedly are only empowering but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissive or enabling may have a compulsory force where the thing to be done is for the public benefit or the advancement of public justice (*Reg. v Tithe Commissioners* 1849, *per* Coleridge J).

The coercive interpretation is here considered as axiomatic.

This rule of construction was reconsidered in *Julius v Oxford (Bishop)* 1880. Here, Dr Frederic Julius accused his local rector of “unauthorised deviations from the ritual of the Church, and the use of unauthorised vestments”. The bishop declined to act on this complaint as, in his view, legal proceedings would tend to “cover all persons concerned in them with ridicule, and [to] bring the Church itself into some contempt”. Dr Julius, however, considered that under the *Church Discipline Act* 1879, the Bishop was under a duty to issue a commission. The relevant section of the Act reads:

In every case of any clerk in holy orders in the United Church of England and Ireland who may be charged with any offence against the laws Ecclesiastical [...], **it shall be lawful** for the Bishop of the Diocese within which the offence is alleged or reported to have been committed, on the application of the party complaining thereof, or **if he shall think fit** of his own pure motion, to issue a commission to five persons [...] for the purpose of making inquiry as to the grounds of such charge or report. (*Church Discipline Act* 1879 s3) [my emphasis]

The expression ‘it shall be lawful’ appears to grant a right, rather than to impose an obligation. However, as this was a public statute, and the “thing to be done” was for the public benefit, the Court of Queen’s Bench followed the rule given by Coleridge J in *Reg. v Tithe Commissioners*, the judges agreeing unanimously that the expression should be understood in this context as imposing an obligation. Coleridge J’s rule was presented as an “established canon of construction”, according to which such words as ‘it shall be lawful’, in statutes of the relevant class, had a “settled meaning”, imposing on the holder of the discretion a duty to exercise it.

However, when the case reached the House of Lords, this decision was reversed, again unanimously. In a series of concurring judgments, their Lordships took the opportunity to clarify the law. They agreed, first, that, although *may* did not itself occur in the Statute, the expression ‘it shall be lawful’ should indeed be taken as equivalent: “it is not inaccurate to say that the words conferring a power are equivalent to ‘may’” (*Julius v Oxford (Bishop)* 1880, *per* Lord Blackburn.)

However, they also considered that the rule applied by the Queen’s Bench was wrongly formulated. In the opinion of the Lord Chancellor, the relevant precedents showed only that:

[...] where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised” (*Julius v Oxford (Bishop)* 1880, *per* Earl Cairns LC).

Lord Blackburn pointed out that the precedents all concerned applications made by those whose private rights required the exercise of a legal power: “The enabling words are construed as compulsory whenever the object of the power is to effect a legal right”.

This new formulation of the rule seems more restrictive than the earlier version; the coercive interpretation is no longer considered as “axiomatic”, but is instead allowed only when the power granted is for the benefit of a specific person, or class of people expressly designated (“persons specifically pointed out”), and who have the right to demand the exercise of the discretion (“who were entitled to call for it”). In the result, it was held that, in this particular case, the Bishop was under no legal obligation to proceed with the enquiry. However, the judgments confirm that, in appropriate contexts, language purporting to confer a discretion can be read as imposing a duty. In such cases *may* will be given a coercive interpretation, equivalent to *must*:

Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. (*Julius v Oxford (Bishop)* 1880, *per* Lord Blackburn.)

A similar conclusion is reached through a different form of legal reasoning in *Re Shuter* (2) 1959. The reasoning in this case was based on the established rules of statute construction, which involve (defeasible) presumptions.

2.2. *Re Shuter* (2)

Re Shuter concerned the interpretation of the *Fugitive Offenders Act* 1881, dealing with the extradition of prisoners to British colonies. Section 7 of this act provided that:

If a fugitive committed to prison under the Act has not been taken out of the Jurisdiction within one month after committal, a superior court, on application by the fugitive, after due notice, **may**, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody. (*Fugitive Offenders Act* 1881 s7) [my emphasis]

Shuter had been apprehended and detained in England. He was wanted in Kenya, where he was alleged to have committed various offences. As one of the police officers involved was on leave until 16 August 1959, the magistrate arranged for an escort back to Kenya on that day, knowing that the maximum period of one month would be exceeded (by just one day). As Shuter had not been taken out of the jurisdiction within one month, he petitioned to be discharged.

The question to be decided was whether *may*, in s7 of the Act, should be construed as permissive or obligatory. The Chief Justice examined the different possible readings. He first considered the assumption that the word was intended as permissive, and that it simply gave the judge the right to make the order. If that discretionary reading was adopted, there would then be two possible interpretations of the text. First, the words ‘unless sufficient cause is shown to the contrary’ may also be understood as discretionary, that is as allowing the judge a supplementary power. However, the words would then be redundant. In the judge’s words: “if the discretion is completely at large and ‘may’ means ‘may’, then it would be quite unnecessary to have the words ‘unless sufficient cause is shown to the contrary’”. (*Re Shuter* (2) 1959, *per* Parker CJ.)

Alternatively, the words ‘unless sufficient cause [...]’ may be taken as limiting the judge’s discretion so that, if there is sufficient cause, then he no longer has the right to discharge the prisoner: “[A]nything may be taken into consideration, save only that, if sufficient cause is shown to the contrary, then the discretion is cut down to that extent.” However, this leads to a contradiction: “It is a case where what is sufficient cause in any particular case may well depend on opinion and discretion.” As neither of these alternative interpretations was acceptable, Parker CJ concluded that, in this section of the Act, the word *may* could not be interpreted as discretionary.

Having rejected the discretionary reading, Parker CJ went on to consider the coercive interpretation, noting that if *may* is interpreted as imposing an obligation, then the judicial discretion will be restricted to the interpretation of the expression ‘sufficient cause’. On that interpretation, the judge would be under a duty to order the release of the prisoner (unless sufficient cause was indeed shown to the contrary). In the opinion of the Chief Justice, this was the correct reading:

It seems to me that in ordinary language, s7 is saying that there is no jurisdiction for holding a man beyond one month unless sufficient cause is shown [...]. The natural meaning is ‘shall, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody’” (*Re Shuter* (2) 1959, *per* Parker CJ).

In the result, however, Parker CJ chose to exercise his discretion in refusing to order the discharge, holding that in this case there was indeed “sufficient cause to the contrary”.

The coercive interpretation of *may*, in s7 of the *Fugitive Offenders Act* 1881, should be compared with the later, permissive, interpretation of the same word in s6 of the same statute, in *R v Brixton Prison (Governor) ex parte Enohoro* 1963. Section 6 reads as follows:

Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of habeas corpus or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in that case, 1) [...] a Secretary of State [...] **may**, if he thinks it just, by warrant under his hand order that fugitive to

be returned to the part of Her Majesty's dominion from which he is a fugitive. (*Fugitive Offenders Act 1881*, s6) [my emphasis]

Chief Enohoro was wanted in Nigeria. Although the Home Secretary thought it just to order his return to that country, he delayed ordering the extradition in order to give the House of Commons an opportunity to express a view. It was submitted that the Home Secretary had thus (illegally) surrendered his statutory discretion to a third party. This argument depended on the presumption according to which words used within a single statute should be interpreted as far as possible in the same way on each occurrence. It had been established in 1959 (in *Re Shuter*, above), that *may* was to be understood in s7 as coercive. The word should therefore be interpreted in the same way in s6. Following this interpretation, the Home Secretary should be considered as obliged to order the extradition, once he had decided it was just to do so. In not doing so immediately, he had failed to comply with the Act. The judge should therefore order the release of the prisoner.

Enohoro was heard by Parker CJ, the same judge as in *Re Shuter (2)*. He accepted that the word should normally be interpreted in the same way in the different parts of the statute. However, he held that the presumption did not apply in this particular case, as two different uses could be distinguished. In s7, the legislative intention was to preserve the liberty of the subject by preventing detention for an unduly long period; whereas in s6, the intention was to safeguard the rights of the prisoner by preventing an order from being given for his return until fifteen days had passed. This safeguard would be ineffective if the order was considered mandatory at the end of this period of reflection. The judge was therefore entitled to hold that the word *may* did not have the same meaning in s6 as in s7 of the statute:

For my part, I am quite satisfied that that argument ultimately depends on whether it is right to treat the word 'may' in s6 as mandatory [...] I am quite satisfied that in s6 it cannot be read in that sense. Section 7, as I have already said, is dealing with the liberty of the subject, and the prevention of his being detained for an unduly long period. After thirty days he must be discharged unless sufficient cause is shown. Section 6 on the other hand, so far as time is concerned, is not saying that something must happen after a certain time, but is saying that something shall not happen before a certain time has expired [...] and, for my part, I can see no reason for giving 'may' a mandatory reading in that connexion. *R v Brixton Prison (Governor) ex parte Enohoro 1963 per Parker CJ.*

Parker CJ therefore held that the Home Secretary was not obliged to order the extradition immediately, and that the fact that he delayed giving the order could not therefore justify the release of the prisoner. As has been seen, different reasoning was adopted in *Julius* and in *Re Shuter* to justify the coercive reading of discretionary language. A third approach, derived from common law rules, is taken in *Anns v Merton LBC 1977*.⁵

2.3 . Anns v Merton LBC

Following the precedent established in the leading case of *Donoghue v Stevenson 1934*, the English courts are entitled, under the common law, to find a "duty of care" even in the absence of statutory or contractual obligations, and to declare liability in negligence where damage is caused by a failure to respect that duty. The courts have found a duty of care in an ever wider range of situations. The extent to which this common law duty can be found in addition to, or in parallel with, statutory powers was discussed extensively in *Anns v Merton London Borough Council 1977*. The facts were as follows.

According to the *Public Health Act 1936*, a local council had the power to inspect the foundations of building projects before allowing completion. Merton LBC did not carry out a proper inspection of a project involving the construction of a number of maisonettes, and failed to notice that the foundations were too shallow. The lease-holders suffered substantial loss when their maisonettes started to subside, and demanded compensation. When the case reached the Lords, the Council's defence was that, under the terms of the Act, there was no obligation to carry out an inspection at all.

The statute stated in s61(1): "Every local authority **may**, and if required by the Minister, **shall** make bylaws for regulating [...] the construction of buildings", and in s61(2): "bylaws made under the section **may** include provisions as to the giving of notices, the deposit of plans and the inspection of work". [my emphasis]

The House of Lords had to decide whether, in spite of the explicit distinction between *may* and *shall* in s61(1), the defendant council was under a duty of care to the plaintiffs. The principal judgment was given by Lord Wilberforce, who held that, as the damage was foreseeable, there was a prima facie duty of care. He pointed out that the public authorities "must, and in fact do, make their discretionary decisions responsibly

and for reasons which accord with the statutory purpose”. They were therefore “under a duty to give proper consideration to the question whether they should inspect or not”.

Lord Wilberforce seems to have considered that the greater the statutory discretion allowed, the greater the common law responsibility: “It can safely be said that the more ‘operational’ a power or duty may be, the easier it is to superimpose upon it a common law duty of care”. He therefore concluded that, although the statutory language conferred a power, and not a duty, the local authority was nevertheless liable under the common law rules: “If they do not exercise their discretion in this way they can be challenged in the courts.”

The *Anns* decision has since been overruled, and can no longer be seen as an authoritative statement of the English law. In *Murphy v Brentwood* 1990, Lord Bridge complained that the *Anns* judgment seemed to impose stricter obligations on the local council than on the negligent builders:

He [Lord Wilberforce] cannot, I think, have meant that the statutory obligation to build in conformity with the bylaws by itself gives rise to obligations in the nature of transmissible warranties of quality. If he did mean that, I must respectfully disagree. I find it impossible to suppose that anything less than clear express language such as is used in s1 of the 1972 Act would suffice to impose such a statutory obligation.” (*Murphy v Brentwood* 1990 HL, *per* Lord Bridge)

However, the interpretation of the statutory *may* as compatible with an obligation derived from the common law duty of care, as suggested in *Anns*, does not appear to have been definitively rejected.

3. Linguistic issues

In comparison with ordinary usage, legal adjudication may seem specialised and artificial. The legal approach to the interpretation of statutory terms may, therefore, appear at first sight to be irrelevant to the objectives of linguistics. However, the law remains an important repository of significant examples of authentic language use, often involving explicit references to the interpretative process. These should not be ignored.

Further, although both the law and the rules for its interpretation have developed empirically, as cases have arisen, the resulting analysis is both coherent and systematic. As it is not presented as a general semantic theory, the legal account entails no claim regarding the correct approach to be adopted in other linguistic fields. However, precisely because it does not correspond to traditional semantic analysis, legal interpretation often raises questions of interest to linguists. The legal approach to deontic modality in particular raises issues relevant both to the problem of performativity and to the ongoing debate between the “literalists” and the “contextualists”.

3.1 .

When a judge interprets *may* as imposing an obligation he does not (usually) see himself as simply substituting one word for another in an attempt to correct what he considers to be a mistake on the part of the legislature. On the contrary, he claims to be applying the law in its literal interpretation, as intended by Parliament. However, if the legislative draftsman really intended to impose an obligation, then his apparent preference for *may*, in place of *shall*, requires explanation. One possible explanation depends on a specialised, performative reading of the legal *shall*.

Legislation may be considered as essentially performative in nature, to be analysed, not as a simple (constative) statement of the law, but rather as a set of speech acts (commands) which have the effect of creating new norms and rules of behaviour.⁶ Clearly, in English statutes, the modal verb *shall*, used felicitously to create a new duty or obligation, does not simply indicate what will happen. Nor (in spite of the presumption against retrospective application) should it be understood as a prediction of what the law will be in the future. It is better analysed in this context, if not as an explicit performative verb, at least as a kind of performative marker.⁷

This use of *shall* is confirmed in numerous examples, often involving explicit commands or instructions to the judge, rather than to the general public. Many statutes use the word to ensure that words are interpreted in a certain way, as in the *Theft Act 1968*, s1(1): “[...] ‘thief’ and ‘steal’ **shall** be construed accordingly”. The judge may be directed to find particular articles obscene, as in the *Obscene Publications Act 1959*, s1: “an article **shall** be deemed to be obscene if [...]”. Or he may be obliged to reach a particular verdict, as in the *Offences Against the Person Act 1861*, s16): “A person who without lawful excuse makes to another a threat [...]

shall be guilty of an offence [...]" [my emphasis]

The performative function explains the occurrence of *shall* in negative contexts, where it is often used in preference to ‘may not’, normally considered to be logically equivalent and more natural. A particularly celebrated example is found in the First Amendment to the United States Constitution: "Congress **shall** make no law [...]" [my emphasis]. In such contexts, *shall* does not simply denote the absence of a right but is used performatively to impose a legal interdiction. The performative view may also explain the common use of *shall* as part of permissive expressions like "it shall be lawful"; in such cases the modal verb may be taken to mark a (performative) change in the law.⁸

According to the linguistic theory of speech acts (Austin: 1962), performative utterances may be inappropriate or infelicitous, but they cannot be considered false. Indeed, explicit performatives are said to be self-verifying, in the sense that, once the verb ‘to promise’, for example, has been used performatively, it cannot be denied that a promise has been made (even though it may have been insincere). In the same way, once a positive duty has been created through the use of the statutory *shall*, that duty must inevitably arise in the circumstances defined in the Act.⁹

The quality of inevitability associated with the legal *shall* helps to explain why the legislator often prefers to use a permissive expression when the intention is to create a legal duty in circumstances which cannot be exhaustively defined, or which may not occur. It may be observed that *shall* does not usually occur in contexts where it is necessary to specify exceptions to a rule.¹⁰ In *Anns*, Lord Wilberforce explained why what he considered to be an obligation was expressed, in the *Public Health Act* 1936, “in terms of functions and powers rather than in terms of positive duty”. In his view, because it was necessary to “strike a balance between the claims of efficiency and thrift”, it was neither feasible nor desirable to limit the circumstances in which there would be a duty to exercise the statutory discretion. The legislator therefore preferred *may* to *shall*. Similarly, in one of the examples given by Lord Blackburn in *Julius*, a judge “must” pass sentence in case of a guilty verdict. Yet, as the accused is presumed to be innocent until proven guilty, such a verdict cannot be considered as inevitable. The legal obligation is therefore presented merely as a judicial power.

The performative account of the legal *shall* thus accounts for the fact that even where the intention is to impose an obligation or duty, the legislator may still prefer to use *may*. It also explains why it seems impossible to interpret *shall* as *may*, as would be predicted if the legal concept of obligation was simply assumed to be vague enough to tolerate the substitution of one word for another.

A second linguistic issue raised by the legal analysis of *may* concerns the nature of literal meaning.

3.2 . interpretation and contextualism

It is common in ordinary language for an obligatory meaning to be ascribed to permissive expressions. Such uses are normally explained through pragmatic inference. Everyday examples often involve the modal verb *can*, as in ‘You can just stop doing that’, intended as an order or an instruction. Similarly, what is presented literally as a choice may be understood as an obligation if it is clear that it is the only possibility. This reading is illustrated in ‘Tell her she can take a taxi’, in the context of a mother-in-law’s telephoned request for a lift from the station at an inconvenient time. The contextual understanding may also be based on non linguistic inference, based for example on ethics, as is implicit in the French saying *noblesse oblige*. According to this principle, if you have the means to help others, then there is a moral obligation to do so.¹¹

It is tempting to suppose that the various legal interpretations of the statutory *may* can be accounted for in a similar way. In *Anns* 1977, the power conferred by statute was said to imply a responsibility, and thus, by inference, to impose a common law duty. In *Re Shuter (2)* 1959, the permissive reading was seen to lead either to redundancy or to contradiction; it was therefore more coherent to prefer the coercive interpretation. On first impression, such reasoning may be thought to correspond to a simple application of Gricean conversational maxims. However, this pragmatic approach does not correspond to the legal view. On the contrary, English judges are expected to adhere as far as possible to “the grammatical and ordinary sense of the words” (*per* Lord Wensleydale in *Grey v Pearson* 1857). In exceptional cases, they may invoke a “Golden Rule”, which allows courts to avoid inconsistent, absurd, or (quaintly) inconvenient results, by interpreting words, not with their “ordinary signification”, but by “putting on them some other signification, which, though less proper, is one which the court thinks the words will bear” (*per* Lord Blackburn in *River Wear Commissioners v Anderson* 1877).

There are several reasons for this “literal” approach to judicial interpretation. First, the (speaker’s) inten-

tional meaning is necessarily subjective and thus in principle unverifiable. Second, pragmatic interpretation is context dependent, the same expression being understood in different ways on different occasions. Such a flexible approach to statute construction would be judicially unacceptable. Indeed, if the content of the rule were allowed to vary according to particular circumstances, the judges would find themselves adjudicating on a case-by-case basis. They could then no longer be said to be following a rule at all.

For these reasons, where no alternative meaning is available, the “literal meaning” is given precedence, even where there is a clear conflict between what was said and what appears to have been meant. This is the essence of what is known as the “literal rule”. According to this rule, although the judges are supposed, in principle, to be giving effect to the intention of the legislator, their interpretation must depend, in practice, on the words used, taken in their “ordinary and natural sense”, rather than on any more pragmatic understanding. As was stated by Tindall CJ in the *Sussex Peerage case* 1844: “The words alone do, in such a case, best declare the intention of the lawgiver.” English judges are therefore reluctant to take the meaning of *may*, and other judicial power-conferring expressions, to be contextually implied.

In *Re Shuter (2)* 1959, for example, Parker CJ was careful to say, not that Parliament meant to impose an obligation (notwithstanding the use of *may* in the statute), but rather that the natural and ordinary meaning of the text under analysis corresponded to *shall*.

The approach taken in *Julius* 1880 is particularly intriguing. The claim here was that, that according to precedent, words conferring a power could be understood as saying that the power must be exercised. The enabling words in the statute could therefore be construed as compulsory. In that case, the judges seem to have presented the coercive sense of *may* as part of its literal meaning. It may be possible to accomplish this simply by adding this meaning to the restricted number of fundamental senses available in appropriate contexts. Such a solution need not be considered theoretically impossible, as there is in any case no general agreement among linguists on how many basic senses should be distinguished. However, not only does such a polysemic approach appear methodologically unsound, it is incompatible with the judges’ refusal to consider the term as ambiguous at all.

In his judgment in *Julius*, the Lord Chancellor declared, contrary to the suggestion made in the lower courts, that power-conferring expressions equivalent to *may* should not be considered ambiguous: “The words ‘it shall be lawful’ are not equivocal. They are plain and unambiguous” (*Julius v Oxford (Bishop)* 1880, per Earl Cairns LC). Similarly, for Lord Blackburn: “I do not think that the words ‘it shall be lawful’ are in themselves ambiguous at all.”

In order to follow the literal rule, and to avoid interpreting words differently in different cases, English judges seem to assume that the “ordinary” or “natural” sense of statutory terms can be clearly established. They speak in this context of the “true and correct” meaning. However, as all meaning depends as least to some extent on contextual features, the idea of a definitive, fixed meaning appears impossible in principle. Even on the most basic, lexical level, it is commonly observed that words have different senses according to context of use. The word ‘operation’, for example, is understood differently in mathematical, military or surgical contexts. Although these meanings may be derived by analogy from a more general sense, they each appear to be treated as primary within the relevant speech community.

It is therefore clear that the so-called “literal rule” cannot itself be taken literally. In this context, the judges speak (oxymoronically) of the “literal meaning in context” and are traditionally willing to include the context of “the whole of the statute”. In order to preserve the appearance of objective adjudication, they have adopted a wide definition of the concept of literal meaning, and applied the rule in different ways in different fields of law. In statute construction, since *Pepper v Hart* 1993, it has been acceptable to go beyond the text itself, in order to take account of external evidence in the form of parliamentary debates where necessary to ascertain the legislative intention. In contract law, and in the interpretation of wills, there is ongoing debate concerning the extent to which the “surrounding circumstances” may be admissible as an aid to interpretation where the sense appears ambiguous.¹²

Bennion (1993: 2), a distinguished legislative draftsman, supposes that English judges will normally follow the literal rule; yet he refuses to consider this incompatible with contextual understanding. He prefers what he calls the “informed interpretation rule”, according to which “the interpreter is to infer that the legislator, when settling the wording of an enactment, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result)”.

In the most recent judicial pronouncement on the subject at the time of writing, Lord Hoffmann, in *Kirin-Amgen v Hoechst Marion Roussel* 2005, went so far as to express doubt as to whether the literal rule was ever strictly observed, allowing only that such principles “used to be applied in legal interpretation (at any rate in

theory)". *Kirin*, an intellectual property case, was concerned with the wording of a patent. A purely literal interpretation, remorselessly applied, would have unintended consequences, leading to a lack of protection for the invention. Lord Hoffmann relied on a European protocol to justify a more purposive construction, holding that the court should be entitled to take account, not just of the literal meaning, but also of what would be understood in the particular context by someone skilled in the art. This implied that meaning should be considered as being:

[...] highly sensitive to the context of and background to the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience (*Kirin-Amgen Inc v Hoechst Marion Roussel* HL 2004, *per* Lord Hoffmann)

Lord Hoffmann here rejects the traditional literal approach, now considered as a historical, legal fiction. However, he is careful not to base his interpretation on an unverifiable, intentional meaning. Instead, the semantics is relativised to a specific speech community, in this case a community of scientists. Clearly, this approach cannot be applied directly in the field of statute construction, as statutes are in principle addressed to the entire population (within the jurisdiction); it does, however, imply that legal understanding should take account of shared knowledge in the relevant circumstances.¹³

This approach to legal interpretation appears to correspond in practice, not to a purely literal meaning, but rather to the contextualist definition of "what is said". On the contextualist account, as proposed by philosophers of language, there is no pre-existing, literal meaning available as a basis for consensual understanding. Instead, the semantic meaning depends on the relevant background features. The semantic and pragmatic levels of meaning are no longer clearly separable.

This approach to semantics was not developed as a theory of modality in particular, but applies rather to sentence meaning in general. It derives from the work of for example Waismann (1951) on open texture, Putnam (1975) on stereotypical meaning, or Searle (1979) on literal meaning, all of whom deny the existence of a fixed, literal meaning, independent of background assumptions. In his extended discussion of the contextualist debate, Recanati (2004: 146 *et seq*) speaks, not of a specific, literal meaning, but rather of "semantic potential" within the theory of what he calls "Meaning Eliminativism".

Although, by convention, English judges still claim to be basing their interpretation on "literal meaning", it seems that they have always taken account of at least some elements of the context when determining "what is said". Indeed, certain common yet strangely obscure legal turns of phrase, like "the meaning is wide enough to include [...]", or "[...] is within the terms of the statute", seem to assume a wide, contextualist view. The claim made in *Julius* 1880, for example, is precisely that the meaning of the deontic *may* is broad enough to include the coercive sense. In a striking parallel with the term used by Recanati (2004), Lord Selbourne, one of the judges in *Julius*, described the power-conferring expressions used in the *Church Discipline Act 1879*, as "potential", declaring them to be the same "whether there is or is not a duty or obligation to use the powers which they confer."

4. Conclusion: occasion-sensitivity and open texture

The apparent rejection of literal or acontextual meaning as a basis for semantic understanding may seem at first sight implausible. This philosophical view of meaning may be expected to raise formidable theoretical difficulties. However, it also has the advantage of avoiding equally serious problems associated with the more conventional literalist view. It is well known, for example, that attempts to derive conversational meanings from a basic literal sense, through the machinery of Gricean implicature, often appear counter-intuitive in cases where speakers fail to notice linguistic ambiguities and are apparently unaware of literal incoherence (Travis 1991).¹⁴

A particularly strong version of the contextualist theory is found in Travis (1989), who shows that the semantics of ordinary expressions must be established not just by reference to the surrounding context, but also to shared knowledge of the underlying purpose of the discourse. He thus introduces the notion of occasion-sensitivity into the consensual understanding of "what is said", going so far as to treat basic truth-values as dependent on the discursive context. To take a single, particularly mundane, example, the sentence 'There is milk in the fridge' would be true where there is an unopened carton of milk in the fridge, and the interlocutor intends to prepare cornflakes for breakfast; but false if there is just a puddle of milk on the bottom shelf. On

the other hand, where a wife is reproaching her husband with not having cleaned the fridge properly, the opposite will be the case, as in this context a carton of milk will no longer count as milk. Neither interpretation involves any reference to a putative “literal meaning”, presumably involving a fridge full of nothing but “wall-to-wall” milk.

Yet the occasion-sensitive meaning is still considered to be part of the semantics of the utterance. Although this consensual (non literal) understanding of “what is said” depends to some extent on the context, it is still to be distinguished from more pragmatic, implicit meanings, which depend on specific intentions, and which might here involve invitations to prepare breakfast, instructions to buy more milk, or orders to clean the fridge properly. The fact that similar examples can be multiplied indefinitely means that it is necessary to reject the simplistic assumption according to which meaning is either literal or pragmatic. The contextualist view does not imply a rejection of semantics in favour of pragmatic inference. Instead, the two levels are seen as interdependent.

On this view of semantics, there is no requirement to explain any particular use by reference to a supposedly more basic sense. Indeed, no sense is considered more basic than another, since, in appropriate contexts, the relevant meanings should all appear equally natural. This consensual approach corresponds well to the legal analysis of power-conferring expressions. Neither in *Julius*, nor in *Re Shuter (2)* is there any attempt to derive the coercive meaning of *may* from a more basic, permissive sense. The reasoning in *Anns* was based on non linguistic inference; based on the common law.

The contextualist approach has the further advantage of being compatible with Hart’s (1961) less radical theory of open texture, widely accepted by legal philosophers as an account of the semantics of legal rules.

According to the theory of open texture, all substantive terms are subject to a “penumbra of uncertainty”,¹⁵ illustrated through the different possible interpretations of the invented rule, “No vehicles in the park”. Hart (1961: 126) gives the example of a motor car as an uncontroversial example of a “vehicle”, and “bicycles, airplanes, roller skates” as less clear cases subsisting in the penumbra of the general term. The question as to whether the penumbral meanings should be considered as literal or pragmatic is not addressed.

Hart’s account of legal interpretation recalls the linguistic theory of prototypes (Rosch 1983). Applied to the semantics of the statutory *may*, this approach would involve taking the core meaning of the modal verb as permissive and the coercive sense as peripheral, that is as part of the penumbra of uncertainty. Again, the coercive meaning need not be derived from a core discretionary sense, any more than a peripheral penguin would have to be derived from a prototypical robin before it could be said to count as a bird.

Although Hart assumes that judges will normally apply the law unproblematically, following the literal rule, he admits that they will inevitably be required to exercise their discretion in “hard cases”, where the legislative meaning is less clear. He is, however, reluctant to accept the level of indeterminacy implicit in the overtly pragmatic approach of the American “legal realists”. He considers such arguments for rule-scepticism as “incoherent” (1961: 136), and points out (1961: 126) that “[t]here will indeed be plain cases, constantly recurring in similar contexts, to which general expressions are clearly applicable”. On the other hand, he is forced to admit (1961: 126) that these plain cases, “where the general terms seem to need no interpretation”, are simply the most familiar ones, “where there is general agreement in judgments as to the application of the classifying terms”.

For a contextualist linguist, the fact that a context is familiar does not mean that it no longer has any semantic role to play in consensual understanding. On the contrary, even Hart’s “plain cases” are seen, from this point of view, to depend on general, background assumptions regarding the meaning of “what is said”.

Hart’s theoretical account of the semantics of legal rules thus appears to correspond to the judicial account of interpretative reasoning as presented in individual judgments. In spite of persistent claims on the part of judges to be following a literal rule of interpretation, it is apparent that the judicial concept of meaning is in fact fundamentally contextualist. The availability of a coercive interpretation of *may* (and other permissive expressions), as observed in the legal context, further suggests a possible extension of the contextualist theory into the field of modality. English judicial practice may thus be considered as providing empirical support for the contextualist view.

Notes

1. English statutes are divided into sections, here section 15. By convention, subsections are given in brackets, here subsection (1). Where necessary, further subdivisions are given in separate parentheses. They are published by Her Majesty’s Stationery Office (HMSO): London, and collected in *Halsbury’s Statutes*, or in *Halsbury’s Laws of England*

(4th edition 1973), London: Butterworth, 52 volumes, with cumulative supplements.

2. Cases are identified using the names of the parties and the year of publication (between square brackets). This usually, though not invariably, corresponds to the date of judgment. References also include the Appeal case number (AC) or details of the published report. A convenient source is the *All England Reports* (Butterworths: London) (All ER). The volume number is given where necessary to the left of the name of the publication, with the page number to the right. Early cases (1220 to 1865) may be found in the *English Reports* (Edinburgh: Green, 1932, 180 volumes). These references give the date of judgment (between round brackets) and the (abbreviated) name of the editor of the original publication. Cases from 1997 onwards are available on <www.bailli.org>.

3. Even older precedents are cited in the notes to *Backwell* as authority for the proposition that “[w]henver a statute directs the doing of a thing for the sake of justice or the public good, the word **may** is the same as **shall**”. [my emphasis]

4. The legal term for ‘interpretation’ is derived from the verb ‘to construe’.

5. English law is made up of a combination of common law rules, decided by the judges, and statutes passed by Parliament in the form of legislation. Although Parliamentary legislation takes precedence, the common law rules remain valid unless and until they are either overruled by the judges themselves, or overtaken (that is expressly contradicted) by statute.

6. This positivist analysis of the law in terms of general commands was proposed by J. Austin (1832)

7. The performative analysis of the legislative *shall* is discussed in Garzone (2001). As this performative function does not normally appear in ordinary language, and other meanings are possible even in the legal context, it has been suggested that, in the interest of clarity, the word should no longer be used in statutes, and that it should be replaced for example by *must*. On this question, see Williams (this volume).

8. There is a sense in which *may* could also be said to have a performative function, insofar as it is also used to create new legal rules. But, precisely because no command or obligation is involved, the nature of the speech act is less clear. On the relation between performativity and normativity in judicial discourse, see Charnock (forthcoming).

9. It should, however, be noted that in the section on “Can saying make it so?”, Austin (1962: 7-11), appears reluctant to consider illocutionary acts as changing states of affairs in the external world, or as creating (non-linguistic) obligations. Austin’s performative utterances are simply acts or events, in contrast to the “social acts” discussed by Reinach (1913), whose ontological universe included such things as “promisings”. On this point, see Laugier (2004).

10. Apart from formulaic phrases like “unless a contrary intention shall appear”, commonly found in meanings clauses, the use of ‘shall’ with ‘unless’ is rare in statutory language. However, this collocation does occur, for example in the *Wills Act 1838* s18(4)(b): “[A]ny other disposition in the will **shall** take effect also, **unless** it appears from the will that the testator intended the disposition to be revoked by the marriage.” [my emphasis] The fact that it is much easier to find examples where ‘shall not’ occurs with ‘unless’ is no doubt due to the strong collocation of ‘unless’ with ‘not’ rather than with *shall*.

11. In certain precisely defined circumstances, French law imposes not just a moral but also a legal obligation on a person to do what he can to help others; penalties may be imposed for “*non-assistance à personne en danger*”.

12. See Charnock (2006) on literal interpretation and the treatment of ambiguity in legal adjudication.

13. The same judge had already proposed a significant loosening of the literal rule in the field of contract in *Mannai Investment v Eagle Star Life Assurance* 1997, and in *Investors Compensation Scheme v West Bromwich Building Society*.

14. The proposed rejection of literal meaning brings out a point of disagreement between Grice and Austin. Grice’s (1989) theory of conversational implicature presupposes the existence of a literal meaning to which the machinery of implicature may be applied. Indeed, a particular understanding cannot be said to be pragmatically derived unless the relevant words correspond literally to something else. Austin (1962), on the other hand, considered contextual use itself as constitutive of meaning. On this question, see Travis (1991).

15. Hart’s use of the term ‘penumbra’ may have been taken from Russell (1923), where the word is used in relation to “vagueness”.

References

- Austin, John 1995 *The Province of Jurisprudence determined*. (Rumble, ed.) Cambridge: Cambridge University Press. Original edition 1832.
- Austin, John L. 1962 *How to Do Things With Words*. Oxford: Oxford University Press.
- Bennion, Francis 1993 Hansard – help or hindrance? A Draftsman’s View of *Pepper v Hart*. *Statute Law Review* (Winter), 1–21.
- Charnock, Ross 2006 Forms and functions of ambiguity in English common law adjudication”. In Gotti, M -- Flowerdew, J (eds.) *Studies in Specialized Discourse*. Berne: Peter Lang. 239-261. (Linguistic Insights 41.)
- forthcoming. Overruling as a speech act: performativity and normative discourse. *Journal of Pragmatics* (special issue on “Speech acts in legal language”).
- Garzone, Giuliana 2001 Deontic modality and performativity in English legal texts. In Gotti, M., and M. Dossena (eds.)

- Modality in specialised texts*, Bern: Peter Lang, 153-173.
- Grice, H. Paul 1989 *Studies in the Way of Words*. (Collected Papers). Cambridge, Mass: Harvard University Press.
- Hart, Herbert L.A. 1994 *The Concept of Law*. 2nd ed. Oxford: Clarendon. Original edition 1961.
- Laugier, Sandra 2004 Performativité, normativité et droit. *Archives de Philosophie* 67: 505–524.
- Putnam, Hilary 1975 *Mind, Language and Reality*. Cambridge: Cambridge University Press.
- Recanati, François 2004 *Literal Meaning*. Cambridge: Cambridge University Press.
- Reinach, Adolf 1913 *Die apriorischen Grundlagen des bürgerlichen Rechts*. [English translation in Crosby, J.F., (ed.) *Aletheia*, 1983, 1–142.]
- Rosch, Eleanor. 1983 Prototype classification and logical classification – the two systems. In *New Trends in Cognitive Representation: Challenges to Piaget's Theory*, Ellin K. Scholnick (ed.), 111–144. Hillsdale NJ: Erlbaum.
- Russell, Bertrand** 1923 *Vagueness*. In *The Collected Papers of Bertrand Russell*, Vol. 9:147–154. London: Routledge [1992].
- Searle, John R. 1979 *Literal meaning*, In *Expression and meaning*. Cambridge: Cambridge University Press.
- Stroud, Frederick 1986 *Stroud's Judicial Dictionary of Words and Phrases*. (5th edition). James, John, S. (ed.). London : Sweet and Maxwell, 5 vols.
- Travis, Charles 1989 *The Uses of Sense: Wittgenstein's Philosophy of Language*. Oxford: Clarendon.
- 1991 *Annals of analysis*. *Mind* 100: 237-264.
- Waismann, Friedrich 1951 *Verifiability*. In *Logic and Language* (1st series), Anthony Flew (ed.), 119–112. : Blackwell.

Cases cited

- Anns and others v Merton Borough Council* [1977] AC 728
- Alderman Backwell's case* (1683) 1 Vern 152
- Grey v Pearson* [1857] All ER 21
- Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896
- Julius v Oxford (Bishop)* [1880] 5 AC 214
- Kirin-Amgen Inc v Hoechst Marion Roussel* [2005] 1 All ER 667
- Mannai Investment v Eagle Star Life Assurance* [1997] AC 749
- Murphy v Brentwood District Council* [1990] 2 All ER 908
- Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42
- R v Brixton Prison (Governor) ex parte Enohoro* [1963] 2 All ER 477
- Reg v Tithe Commissioners* (1852) 14 QB 459
- River Wear Commissioners v Anderson* [1877] All ER 1
- Re Shuter (2)* [1959] 3 All ER 481
- Sussex Peerage case* (1844) 8 ER 1034.

Statutes

- Bankrupts Act* 1571
- Church Discipline Act* 1879
- Fugitive Offenders Act* 1881
- Obscene Publications Act* 1959
- Offences Against the Person Act* 1861
- Public Health Act* 1936
- Tithe Act* 1842
- Theft Act* 1968
- Wills Act* 1838