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On Whales and Fish. Two models of interpretation.

Genoveva Martí (ICREA and University of Barcelona)
Lorena Ramírez-Ludeña (Pompeu Fabra University, Barcelona)

0.- Introduction

Maurice v. Judd, a case tried by jury in 1818, concerns the demand of fees by fish oil inspector James Maurice for the inspection of some barrels of whale oil. Although the defence and several experts argued that whale oil is not fish oil, simply because whales are not fish, the jury sided with the inspector in a verdict that to most was shocking, back then as much as nowadays. Historians, philosophers and lawyers have discussed the case. Some (Phillips 2014, Asgeirsson 2016) have argued that the jury's verdict should not be puzzling at all once the case is properly analysed whereas others have considered that the case raises interesting questions (Burnett 2007, Sainsbury 2014). At any rate, Maurice v. Judd has generated a good deal of discussion lately. We think that there are good reasons for the attention the case has received, for there is a tension in the way the case and the verdict is perceived: both the conclusion that the jury were right *tout court* and the conclusion that they were wrong *tout court* are not satisfactory.

Our purpose in this paper is not to solve the tension, proposing an argument that yields a definite answer to the question as to whether the verdict was right or wrong. We think the tension is genuine and our purpose is to explain why. We will argue that in analysing Maurice v. Judd we oscillate between two models of interpretation, two frameworks that have important similarities and dissimilarities to the case. Those similarities and dissimilarities hinge on modes of use of words and they will help us explain the tension, for both models have a claim at being adequate as ways of interpreting the case[1].

In the next section we review some of the highlights. We then introduce the two models of interpretation, appealing to cases that have generated disagreements among legal experts and we discuss their application to the Maurice v. Judd case. The relevance of the two models depends on a distinction in the mode of operation of words that should be carefully separated from other semantic phenomena. We undertake this task in section 3. In section 4 we examine the sources of the tension and we assess the prospects for its resolution. In section 5 we explain how our interpretation of the tension that arises in the Maurice v. Judd case differs from others, and in particular from Sainsbury's interpretation. Section 6 sums up our conclusions and distinguishes our position and our purposes from other ways of addressing this discussion in legal theory.

[1] By making reference to two *models*, we are not assuming any strong connotation about the nature of the task of legal interpretation. As stated, these are just two frameworks that are useful to understand the tension raised by the case.

1.- The case

On December 30th and 31st 1818 the case of Maurice v. Judd was tried by jury in the Mayor's Court of New York City. The previous summer fish oil inspector James Maurice had demanded payment of fees from Samuel Judd for inspecting and branding three casks of whale oil. The oil merchant Samuel Judd had refused to pay "protesting that the oil was not 'fish oil' but 'whale oil' and that whales were not, in fact, fish" (Burnett 2007, 4).

Judd and several expert witnesses, including the distinguished naturalist Samuel Latham Mitchill, argued that whales are not fish and hence that whale oil should be exempt from the application of fish oil fees. And the Hon. Richard Riker before the jury's deliberation "crafted a parting instruction very favourable to Samuel Judd explaining that *either* a finding that whales were not fish *or* a finding that whale oil was not fish oil *necessitated* an acquittal" (Burnett 2007, 178). In spite of all this, the jury, after 15 minutes of deliberation, sided with Maurice. As reported the following day (January 1st 1819) in *The New York Gazette*:

> The great trial between Mr. Maurice inspector of oil, and a gentleman who bought three barrels of *whale* oil without inspection was brought to a close last evening . . . The Jury found a verdict for Mr. Maurice, having decided that a *whale* is a *fish* and whale oil fish oil. (cited by Burnett 2007, 178).

As Sainsbury points out nowadays "we think the jury gave the wrong verdict" (2014, 5). But the verdict was very controversial even in 1818, and it caused a backlash in the press. According to Burnett, the news was received with derision in the United Kingdom. Samuel Judd appealed the decision about a month later, and the statute was eventually changed to exempt whale oil from fish oil fees.[2]

Now, the impression that the jury's verdict was wrong is easy enough to justify, after all whales are not fish, as the expert naturalist Mitchill certified at the trial. On the other hand, as Sainsbury (2014) points out, there was at the time a well-established use of 'fish' in the community according to which fish were creatures of the sea, animals that spend most of their lives in the ocean.[3] That was the use accepted by the members of the jury, who did not question that whales are mammals. From this perspective, the members of the jury were using the word 'fish' with a meaning that differs from its present meaning. If we take this perspective, there is no reason why the jury's ruling that whales are creatures of the sea, and thus *fish*, should strike us as wrong.

2.- Models of interpretation: 'dead' and 'fruit'

Throughout hi¡-plied the word 'dead' in different ways. When we think about some cases in which it was said that someone was dead in the past, we conclude, without hesitation, that people were wrong. And we reach that conclusion because, as Michael Moore has pointed out

[2] It is worth pointing out that Judd still had to pay. The Hon. Richard Riker, when reconvening the court argued that if the statute had to be changed, "the previous language of the statute did reach *whale* oil; otherwise, why did it need to be *changed* so as not to include it?" (Burnett 2007, 179).

[3] Needless to say, crustaceans and bivalves, for instance, were never considered fish, even though they are also creatures of the sea. The important point is that the animals that were classified as fish were so classified on the basis of natural habitat and because of their superficial similarity to a paradigmatic fish.

> Both we and they [our ancestors] intended to refer to the thing, the naturally occurring kind of event, that death is. If they knew what we know about revivability of persons submerged in cold water, they would also say that such persons are not dead. They would say this because they, like we, intended to refer to a thing whose nature is partially known; and they, like we, would change the conventional indicators of when someone is dead whenever a better scientific theory comes along that demands that we do so. (Moore 1985, 297-298)[4]

It is not so distant the time when patients in temporary cardiac arrest or people with severe cases of catalepsy that would have revived spontaneously or could have been revived using techniques already available at the time, were often pronounced dead and promptly buried. Such pronouncements were wrong, and those who made them were making a mistake even if their application of the term 'dead' was guided by the conception of death that was common currency at the time. Some erroneous applications of the word 'dead' were surely *considered* acceptable, but 'dead' meant, then and now, dead, and there was no layman meaning of the word 'dead', no common usage on which, in the circumstances described, "this person is dead" is or was true.[5]

The model of use of 'dead' does not contemplate present or past different legitimate uses, precisely because the fundamental, and unique, intention by speakers was always to refer to the real phenomenon of death, the irreversible cessation of vital functions (as described, for instance, in the *Uniform Determination of Death Act*) and it is that fundamental intention that accounts for the stability of meaning throughout new discoveries and changes of theory.[6] That fundamental intention is guided by our interests: we do not want to be pronounced dead, and subsequently buried or cremated, unless we are really dead. High stakes are involved in getting the application of 'dead' right.

It is tempting to conclude that the verdict in the Maurice v. Judd case strikes us as wrong because the jury "used the word 'fish' for things to which the word did not apply" (Sainsbury 2014, 3). This would be the same reason we would regard as mistaken a verdict in which a revivable person was pronounced dead. The erroneous past uses of 'dead', no matter how well established the practice might have been, were always erroneous and if we interpret the Maurice v. Judd case on the model of 'dead', it seems right to conclude that the jury were simply wrong; colloquial, commercial, or culinary uses of 'fish' that included whales were as out of line as uses of 'dead' applied to revivable persons.

But there is another reasonable way of interpreting the case. In Nix v. Hedden the US Supreme Court (149 US 304, 1893) resolved a dispute about whether a regulation that makes reference to vegetables should be applied to tomatoes.[7] Hedden had collected duties on tomatoes that tomato

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[4] It may seem that Moore's point depends on a counterfactual claim as to what our ancestors would have done were they to know what we know nowadays, and it is tempting to point out that there is no way to tell what people would or would not do as regards the continued application of a term. But in fact, Moore's point does not depend on a counterfactual. We know well what our ancestors actually did: they did change the conventional indicators of when someone is dead when a better scientific theory came along.

[5] Of course, the fact that people, including judges and doctors, were sometimes wrong, does not mean they were legally or morally responsible. They were blameless because at the time they simply didn't have the requisite knowledge. See Moore 1985, 324-5.

[6] Surely there are other uses of the word 'dead' ('dead battery', 'dead marriage', 'dead color'); but those are, excuse the pun, dead metaphors. The point is that no other use of 'dead' that cuts the same domain in different ways is, or has ever been, correct.

[7] See https://supreme.justia.com/cases/federal/us/149/304/. The regulation can be found in https://fraser.stlouisfed.org/title/5892.

merchants, arguing that tomatoes are duty-free fruits, were seeking to recover. The Supreme Court found in favour of Hedden. Everybody agreed that the botanical classification of tomatoes as fruits was correct. Nevertheless, there was a consolidated colloquial and culinary use of words that excluded tomatoes from the category of fruits. In the opinion written by Justice Gray:

> Botanically speaking, tomatoes are the fruit of a vine just as 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. (cited by Phillips 2014, 381)

The Nix v. Hedden ruling does not strike us as mistaken, for it appealed to a use common in 1893 and still well established today: tomatoes are not found among fruit bins in grocery stores, and they surely do not appear under the category 'fruits' in self-pay cash registers. We do not regard the decision to so classify tomatoes as wrong (back in 1893, and nowadays), even though we do know that tomatoes are, botanically speaking, fruits. Ask a botanist: "do you put fruit in your salad?" and she will not answer "yes" because she puts tomatoes. She will very well know that you are inquiring about oranges, apples, berries and the like.[8] The model of use of 'fruit' is very much unlike that of 'dead' as we accept as legitimate usages that divide roughly the same domain of application in different ways. In the case of 'fruit' there is also one use of the term in which the fundamental intention by speakers is to refer to things that share a nature as characterized by botanical science. But that does not preclude the legitimacy of another usage of 'fruit' that is not guided by that fundamental intention, namely, the culinary use of 'fruit'.[9]

If the verdict in the Maurice v. Judd case is interpreted on the Nix v. Hedden model, we should accept that, at the time, in the common language of the people, 'fish' applied to creatures of the sea, including whales[10] and, as Phillips points out, the issue for the jury is "to ascertain which usage of 'fish' is germane to the statute's intended meaning" (Phillips 2014, 380). All the jury did was to acknowledge that intended meaning.

Given that the Linnaeus classification of 1758 was far from having consolidated in common usage the exclusion of whales from the domain of application of 'fish' it is not surprising that the jury opted for the common and consolidated usage rather than opting for the zoological use.[11] That is in fact the way in which Maurice's lawyers argued: they did not deny the zoological facts but they

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[8] It is no surprise then that in some languages there are different words for the different uses. In Greek, for instance, the culinary word for fruits, "φρούτο", is distinguished from the botanical "καρπός" (thanks to Yannis Stefanou for pointing this out to us).

[9] This means that superficial similarities and similarity of function can also guide classification. As Khalidi (2013, 116 and ff) points out, things of a kind share "important properties, where these are ones that are projectible, enter into new generalizations, are explanatorily fertile, and generate novel predictions, among other features" but "(…) importance is relative to the ends that one intends to accomplish with the classification in question". Of course, we might wonder what makes it the case that a word operates semantically like 'dead' or rather like 'fruit'. Certainly the collective intentions of the speakers' community play a crucial role, and those are informed and affected by many meta-semantic factors; factors that do influence what the meaning of a term turns out to be, but are not themselves constitutive of the meaning, such as, for instance, interests in certain commercial transactions.

[10] But see footnote 3 for clarification.

[11] Stephen Schwartz (2013) points out that John Stuart Mill and Herman Melville, for instance, in spite of their acknowledging that whales physiologically are not fish, recognize a legitimate way of classifying them as fish. We read in Moby Dick, published in 1851: ". . . I take the good old fashioned ground that the whale is a fish […] a spouting fish with a horizontal tail." (Melville 1961, Chapter 32 'Cetology': 140).

appealed to the existence of a well-established usage of 'fish'. In fact, the classification of marine mammals as fish had a long history and not just among laypeople. In spite of Aristotle's distinction of cetaceans from fish, all throughout the Renaissance and up to 1758 taxonomers continued to classify cetaceans among fish on the basis of habitat. The nascent use of 'fish' took time to permeate customary use, although it eventually pushed the application of the word towards the exclusion of marine mammals, in part because of the recognition that Linnaeus provided taxonomy with a solid and systematic foundation.[12]

From this perspective, the jury made no mistake. Yet, as Sainsbury points out, and we think he is right, this is not how the verdict strikes us today.[13]

To sum up, in the case of death, there has always been only one legitimate use of the term 'dead' because it has always been the speakers' intention to refer to the irreversible phenomenon that is really death. And we have changed our criteria of application of the term as we have found out more and more about the nature of the phenomenon. In contrast, in Nix v. Hedden those handing down the verdict had all the botanical information in their possession. Yet, they did not feel compelled to classify tomatoes as fruits, abandoning the culinary use of words, a use that we ourselves do not feel compelled to abandon either. In other words, while our use of 'dead' is *strict*, our use of 'fruit' is *tolerant*.

It is tempting to interpret Maurice v. Judd exclusively according to one of the two models. If interpreted as death cases, the verdict is wrong; if interpreted on the model of Nix v. Hedden the verdict is right. The tension arises from the fact that the two models give opposite answers, but they both have a partial claim to providing the right interpretation. In fact, we claim that both are needed to understand the issues that the Maurice v. Judd ruling raises.

3.- Tolerance v. Flexibility

It is important to distinguish *tolerance* from *flexibility*, another semantic phenomenon that might be useful to understand the tension raised by the case.

Moore contends that the meaning of 'dead' has not changed even though we have adjusted the indicators of death as we have discovered more and more about the phenomenon. And we are indeed still in the process of making adjustments, as should be expected, given that recent medical advances show that there is still so much to learn about the nature of death. The emergence and use of the expression 'brain dead' is witness to the difficulty in adjusting the indicators. The application of the term 'brain dead' does not reflect that we are any less strict in our intention to refer to the real

[12] It did not help that prior to 1758 taxonomers, Linnaeus included, distinguished fish from *quadrupeds*, which probably made it difficult to accept that cetaceans, and bats, were to be in the same zoological class as cows, lions and other, more stereotypical, mammals.

[13] Phillips (2014) suggests also another interpretation on which the verdict turns out to be wrong. He argues that there was a *commercial use* of 'fish oil' and 'whale oil' that distinguished sharply both substances, "as different as molasses and sugar" (Phillips 2014, 380, citing Burnett 2007, 147-8). Thus the jury's decision was wrong in that they failed to recognize that the relevant use-community were the merchants, not the general public; after all this was a commercial dispute. In Phillips' view, pace Sainsbury, the case does not raise any semantic or meta-semantic issues; it concerned the intended meaning of the phrase 'fish oil' as employed in the statute and its resolution required carefully drafted statutes, not carefully crafted meta-semantic principles. Even if this is another plausible interpretation of the dialectic in the case, in our view it doesn't quite explain the tension and why the ruling strikes us as wrong. This is not to deny that disagreements about which uses of words should be relevant in a legal dispute can be extremely important. As Plunkett and Sundell (2013) have pointed out many important disputes are in fact metalinguistic.

phenomenon. On the contrary, what it reflects, rather, is that we are advancing in the process of determining, as Moore puts it (1985), "the conventional indicators of when someone is dead".[14]

There are other terms whose usage is as strict as the usage of 'dead', many of them with an important moral component: our use of 'human being' is also strict in that we do not regard as acceptable any past or present use of 'human being' that excludes, for instance, members of some races, no matter which beliefs speakers associate or associated with the term.

It may be objected that the possible future emergence of artificial beings that may qualify as humans puts a strain on the claim of strictness of application, as it seems it is not determined once and for all whether artificial intelligent beings should or should not count as humans. But this is a different issue that cuts orthogonally the question of strictness. Terms such as 'human being' may be *flexible*, in the sense that some changes in the domain of application are taken to be possible while being consistent with past usage and what is intuitively the same meaning.[15]

The claim that the meaning of a term determines its extension is usually taken for granted in semantics, and for a good reason since it is very plausible to assume that what a term means determines what it should or should not be applied to.[16] But this plausible claim has often been taken to entail the radical conclusion that once a term acquires a meaning its extension is completely determined, namely, any object or any sample at any time is definitely either on the extension of the term or not.[17] Against that radical conclusion, Jackman (1999) proposes a thought experiment, based on a story by Wilson (1982). Jackman considers an isolated community ("the Druids") that inhabit an island in which the class of birds and the class of flying things are coextensive. Members of that community use the term 'ave' to refer to things in these coextensive classes, and they have beliefs that they would express by saying 'only aves can fly' and 'aves are living beings'. When one of the Druids sees planes in the sky, she classifies them, quite naturally, as aves. When she sees a plane landing she forms the belief that not all aves are living beings. The practice to apply 'ave' to planes is subsequently established in the Druid community. But suppose that our Druid had initially seen planes on the ground. She might have classified them, also naturally, as non-aves. And had she afterwards seen them taking off, she would have concluded that not all things that fly are aves. In this case the Druid community would not have applied the term 'ave' to planes. In both cases, Druids would not see themselves as having changed what they meant by 'ave'.

Observe that the way in which airplanes are first encountered has an influence on the adjustment of beliefs by the Druids. The moral of this story is that it is not determined once and for all whether airplanes are or are not under the extension of 'ave'. This is a puzzle for the radical interpretation of the claim that meaning determines extension.[18]

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[14] For an in depth discussion of the dispute surrounding the indicators of 'death', see Francesca Poggi (2013).

[15] For a discussion, see Martí – Ramírez-Ludeña (2018).

[16] For instance, Hilary Putnam (1973) discusses what he characterizes as two "unchallenged assumptions" of the theory of meaning (p. 699): (i) that meanings are entirely within the cognitive grasp of competent speakers; or in other words, that meanings "are in the head"; (ii) that meaning determines extension. Although Putnam rejects (i) he does not contest (ii). For Putnam, meanings are partly constituted by objective factors that are external to the mind. For instance, part of what determines the extension of 'water' is the molecular composition of the liquid and this was so even before the molecular composition was known.

[17] And if it is indeterminate whether a term applies to something it will always be indeterminate.

[18] Wilson's 'ave' case is fictional. But there are other real life cases that seem to go in the same direction. David Plunkett and Timothy Sundell (2014) have recently discussed the application of the term 'athlete' to horses. We think it is important to stress that flexibility should not be reduced to other phenomena. It may be tempting to argue that

Semantic flexibility has been acknowledged by other authors. Joseph LaPorte (2004) argues that pre-scientific uses of terms are open-textured, and that "[e]mpirical exploration uncovers many plausible candidates" (LaPorte 2004: 3) for the application of a term. Henry Jackman (1999) argues that there are alternative *equilibria*, alternative possibilities of extension of the domain of application of a term, consistent with past practice: "A practice can evolve as its characterization of a term's meaning is made more determinate, but it need not actually be viewed as changing unless it settles on an equilibrium that was not a member of the set originally accessible to it. As long as the practice remains the same, so does the meaning of the term tied to it" (Jackman 1999: 160-1).

Jackman, moreover, endorses the view that past applications of a flexible term to a certain object are in fact wrong if the future history of the use of the term does not include that object under its extension. This is a bold claim that is not necessitated by the view that some terms have a flexible semantics. Nevertheless, Jackman's approach may be useful to explain why we judge as wrong applications of terms by our ancestors: when an alternative history of usage is consolidated in a community, we look at the past as if that form of use of the term had been the only possibly correct one.

Flexibility is a time sensitive property. Terms that have a variety of alternative equilibria get progressively precisified in a process that results in less flexibility. It is also a matter of degree, since for some terms there may be a good number of different equilibria compatible with continuity of meaning, whereas for others there may be just a few. Some terms may simply be inflexible, and their domain of application be fixed once and for all.[19]

If we admit semantic flexibility, the question arises as to what makes the history of the use of a flexible term go the way it goes. In our view, a variety of factors do have an influence. Social factors (including financial considerations), moral considerations, the authority of some speakers to move others to use words in a certain way, all may play a role. All those non-semantic factors also influence whether the semantics of a term is flexible or inflexible. Among those factors, we should also include the intentions and interests of speakers, and what is at stake in keeping the extension fixed.

Tolerance does not go hand in hand with flexibility. That a term is flexible does not mean that it is tolerant (or non-strict), since as in the case of 'human being' the flexibility of the term does not entail that the cohabitation in the speakers' community of more than one use or practice of use of the term is accepted. The semantics of 'fruit' is tolerant, in that the scientific and the culinary use cohabitate in the linguistic community. Yet one of its uses, the botanical one, is arguably inflexible.

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extensions of the domain of application (such as the possible extension of 'athlete' to horses) respond to metaphorical uses. But the 'ave' case shows that in the decision to apply, or not to apply, 'ave' to planes, there is no metaphorical intent on the part of the Druids. The 'ave' case also shows that flexibility should not be confused with vagueness. Although the extension of a vague term can be precisified, the changes in extension that characterize flexibility do not occur only in terms that have diffuse boundaries, like vague terms do. 'Ave', as used by the Druids before encountering airplanes, has no borderline cases. Moreover, in neither of the two scenarios contemplated in the story there is indecision or indeterminacy as regards the application of the term. So, no potential vagueness is associated with the term either. It may be argued that vague terms are intrinsically flexible, but the phenomenon of flexibility encompasses also non-vague terms.

[19] It may be argued that inflexibility is important for science, since it helps explain why certain past applications of scientific terms are wrong in spite of radical changes in the theory.

4.- The source of the tension in Maurice v. Judd

In 1818, the scientific use of 'fish', a usage that excluded whales, was already becoming solidly established, as the testimony of Mitchill and other experts attests. But there was a concomitant use of 'fish', vernacular, culinary, commercial, that classified whales as fish, whales being creatures of the sea. On this concomitant use, those where creatures that human beings used as exploitable resources, like other commodities. The jury in the Maurice v. Judd case clearly relied on this usage. Since "the meaning of a word in a community is determined by how it is used in that community" (Sainsbury 2014: 2), the inclination to treat that use of 'fish' on a par with the culinary use of 'fruit' is strong: the vernacular use of 'fish' used to include whales for the same kinds of reasons that the culinary use of 'fruit' does not include tomatoes, and no error should be attributed to a jury that simply reflected that fact.

Sure enough, the vernacular use of 'fish' nowadays does not include whales for most people.[20] There is still in our linguistic communities a vernacular use of 'fish', a usage associated with the conception of fish as a resource for human nutrition and a commodity for commerce; but that use has tended to fall more in line with the scientific usage that excludes cetaceans from the category. And, in consonance with the scientific usage, it has become more and more inflexible.[21]

But this evolution towards a unique use that is inflexible is not sufficient to explain the tension that pulls in different directions in evaluating the jury's verdict. For imagine that the culinary use of 'fruit' that excludes tomatoes from the category was in the future abandoned. This might happen for all kinds of reasons, either because of a desire to align the vernacular practice to the scientific usage, or simply because famous chefs decided to extol the virtues of tomatoes as a fruit to be used in pies and cakes, ice creams and fruit salads.[22] It is hard to imagine that under such conditions Nix v. Hedden would produce the kind of dilemma, and the amount of critical literature, that Maurice v. Judd has produced because, in the case envisaged, the culinary use of 'fruit' simply falls into disuse and this does not mean that the semantics of 'fruit' becomes strict, as the historical culinary usage of 'fruit' need not be considered illegitimate.

In our view, the reason for the tension is that even if we partially acknowledge the adequacy of the Nix v. Hedden model in interpreting Maurice v. Judd, the mode of application of 'fish' has become closer to the strict, non-tolerant, mode of application of 'dead', and we find ourselves remiss to accept that it was legitimate at any point in the past, to contemplate a use of 'fish' that applied to whales.

Undoubtedly what cemented the exclusion of cetaceans from the extension of 'fish' had a lot to do with the fact that the Linnaeus classification on the basis of anatomy proved to be more taxonomically valuable than the classification on the basis of habitat. But what has cemented that form of classification for the ordinary speaker, making it dominant and eventually banishing from ordinary usage the application of 'fish' to whales, we contend, is not just Linnaeus' prestige and the scientific value of his taxonomy. Other interests and concerns have been important contributors: in 1819, the pressure to change the statute and remove whales from the category of fish came from commercial interests in the New York area (Burnett 2007). More recently, the acknowledgement of

[20] It is likely that in many countries where whale meat was until recently (or is still) consumed, the social pressure against classifying whales as fish is not as strong as it is in the US and most of Western Europe.

[21] In any case, it seems to be inaccurate to consider that now the scientific use is prevalent. In fact, it may be said that neither 'whale' nor 'fish' are really scientific terms. Dolphins do not form any significant subgroup of the order *Cetacea*, but are included under the suborder *Thoothed Whales*. And the category *fish* is also suspicious: even if in the definition of 'fish' we appeal to technical matters such as cold-bloodedness and the possession of gills, this is just a quasi-scientific rationalization of an intuition, and not the report of a scientific usage. Nowadays taxonomers sustain that the category *fish* is really a paraphyletic collection of taxa. In this regard, see Dupré 1999.

[22] Observe that those are factors not intrinsic to the semantics of the term.

the danger posed by the whaling industry and the impact of the documentaries and movies about whales and dolphins, depicting how they communicate, how they interact socially and how they take care of their offspring, have made them closer to us and have made the application of 'fish' to cetaceans not only fall into disuse but, for large segments of the population, unacceptable. Our use of 'fish' is connected to the many ways in which we treat these creatures, as food and resources, and for many of us classifying cetaceans as commodities to exploit is not just an error, but morally wrong.

John Dupré considers the hypothesis that the reason whales are not classified as fish "might be a moral one ... our sense of appropriate treatment of cetaceans is greatly influenced by the conviction that whales are not fish" (1999, 468). Ultimately Dupré discards the idea and emphasizes the "response to greater scientific knowledge of the nature of whales". Our perspective, however, is closer to Burnett's in acknowledging the influence of other (non-scientific) factors. As Burnett points out, eventually, after the Maurice v. Judd verdict was handed, "whales ceased to count as fish because of the behind-the-scenes legislative lobbying by a clique of oil merchants and chandlers" (Burnett 2007, 214). In our view, there are other interests having to do with the arousal of certain social consciousness as regards the use of, at least certain animals, as commodities: if it is wrong to hunt and exploit whales now it was back then too, hence wrong to put them into a class of creatures that, by default presumption, it is permissible to hunt, eat and exploit. And so, we tend to judge the past practice of using 'fish' to include cetaceans to be exactly as erroneous as the practice of applying 'dead' to cataleptic people, no matter how acceptable the application of 'dead' in those cases seemed to be at the time.[23] This explains the conflicting reactions to the Maurice v. Judd case, for we cannot square our acknowledgement of the past acceptance of the application of 'fish' to cetaceans with the dictate that such application is and was always wrong. There is a tension. We can explain it, but we should resist the temptation to expect that mere semantic considerations will resolve it.

5.- Disagreements and the meaning of 'fish'

Even though we agree with Sainsbury (2014) as regards the puzzlement that the Maurice v. Judd case generates, our explanation of the source of the conflict is entirely different. A lot of the recent discussion of that case has been framed in terms that derive from Sainsbury's presentation, so it is important to clarify how different our position is.

Sainsbury presents the tension in the assessment of the jury's verdict in the form of a dilemma as regards the meaning of 'fish': if 'fish' meant back then the same it means nowadays, then it should be entirely clear to us that the jury were wrong, for roughly the same reason that we do not hesitate in stating that doctors that declared dead a person in a reversible condition were perhaps blameless but wrong. On the other hand, if the jury were relying on a different meaning of 'fish', as it seems they were, given that there was well-established usage of 'fish' that included whales, we should not hesitate in considering the verdict right, and no disagreement with the jury's verdict would be substantial or genuine. Neither conclusion is satisfactory. The tension, as Sainsbury sees it, hinges on whether the meaning of 'fish' has changed or not. Subsequently the discussion of the Maurice v. Judd case has often been framed on the basis of the alleged difference or sameness of meaning of the term 'fish', which has in turn led to a discussion about whether a disagreement with the jury's verdict or among scientists is substantial or merely terminological. This is unfortunate for, interesting as the discussion of these issues is, it may have obscured some aspects of the case that

[23] Of course moral or social considerations are not enough by themselves to influence semantics. Vegetarians would not succeed in excluding salmon from the category of fish. To take salmon out of that category would do taxonomic violence of an extreme sort whereas, post-Linnaeus, there was no taxonomic problem in declaring whales non-fish, and this was largely done before the save-the-whales movement ever existed.

are relevant for its interpretation. In our view, the tension arises no matter what: it arises even if we accept that the vernacular use of 'fish' has remained constant.

As we have argued, there is a vernacular use of 'fish' whose application is tied to criteria connected with human consumption and exploitation. True, that use of 'fish' has tended to converge with the taxonomical use, but the vernacular use is still intimately tied to those criteria. In 1818 whales were under the extension of that usage of 'fish' (because they were considered resources and commodities). Nowadays they are not. Sainsbury assumes that this constitutes a change in meaning. But this needs to be qualified, fort is not clear at all that there has been a change in the vernacular meaning of 'fish'.

John Perry makes a relevant point, reflecting on the term 'endangered species'. Some species that were under the extension of the term years ago are not now, and vice versa, but the meaning of 'endangered species' has clearly not changed, nor have the conditions that a species has to satisfy in order to be in the extension of the expression (Perry 2011).[24] In the case of the vernacular use of 'fish', the conditions of use, exploitation and consumption associated with the word have remained constant, while cetaceans have been removed from the extension. Of course, the case is more complicated than the case of 'endangered'. For in the case of 'endangered' there are relatively precise guidelines that allow to quantify the degree to which a species is endangered, and moreover, it is clear also that those conditions are time relative. In the case of 'fish', the pressure of deference to scientific classifications, but also a host of moral and economic factors as well as social habits and customs, have figured in the eventual exclusion of cetaceans from the category.

All this means that the issues surrounding the usage of 'fish', and in consequence, our reaction to the verdict in the Maurice v. Judd case, resist a clear and easy assessment, and the decisions as regards the application of the term to a species reveal strains that are not present in cases were the criteria of application rest on a solid agreement. This just goes to show that there are political, moral and financial forces whose impact is difficult to capture and articulate. But their impact affects all social institutions, no less the language we speak.

6.- Final Remarks

In the previous sections we have argued that, by taking into consideration two models of interpretation and the phenomenon of tolerance (which we have distinguished from flexibility), the tension raised by Maurice v. Judd can be explained, and in doing so, we have assumed that semantic and meta-semantic considerations are relevant in the analysis of legal disputes. As regards its application to whales, the usage of 'fish' has become stricter (denying the legitimacy of the cohabitation of uses that encompass cetaceans), progressively aligning with the scientific use of 'fish', which is inflexible and projects towards the past the inadequacy of classifying whales as fish.[25]

The assumption that the semantic properties of 'fish' are relevant in the clarification of this dispute has been contested by legal theorists. Some authors have argued that what is at stake in Maurice v. Judd is not about semantics, but about how much legal content is determined by linguistic features of legal communication. On the one hand, many authors try to elucidate how, and to what extent,

[24] Our point here has nothing to do with whether whales are or are not endangered.

[25] This has been a process, and as with any process, the dividing lines between tolerance and strictness have not always been clear. This doesn't mean that the term can be both definitely strict and definitely tolerant at the same time nor that the properties themselves are gradual. It simply means that there are grey areas.

legal texts are determined by pragmatic features of communication (see, for example, Marmor 2014, as well as Bianchi 2016 and Morra 2016, for a discussion of Marmor's ideas). On the other hand, authors such as Greenberg (2011) consider that there is always a gap between the content communicated by an act of legislation and the legal impact it has on our legal obligations. Whereas the first group has confidence in the relevance of philosophy of language and pragmatics in order to determine the content of the law, the second argues that moral and other normative considerations determine what difference to our obligations the enactment of a statute makes. Precisely because they understand that the legal content is the communicative content, some authors belonging to the former group have also argued that we can learn about language by looking at the law (Soames 2012) something rejected by the latter group (Greenberg 2011).

Both positions have been also defended in the discussion of the Maurice v. Judd case. For example, Jaszczolt (2017) has analysed the relevance of context and pragmatically derived interpretations for the resolution of the case. Asgeirsson (2016), in contrast, points out that various kinds of legal content (such as common law or the intended application of 'fish oil') interact to determine the legal result of the case. And he adds that taking the decision to have been incorrect is not inconsistent with the idea that the meaning of a word in a community is determined by how it is used in that community. In this sense, legal content is neither identical, nor constituted by, the communicative content of the statute but depends on which considerations (among many) prevail to provide an answer to the case.

Those debates often fail to distinguish clearly the explanation of the tension that arises in the Maurice v. Judd case, from the discussion as to whether the jury's verdict was right or wrong. In this paper, we have definitely focused on the former issue, leaving entirely aside the latter discussion. We have emphasized the relevance of the two models of interpretation in order to understand the tension that arises in the case. The value of our discussion may be questioned; it may be even questioned whether it is possible to separate the explanation of the tension from the adjudication as regards the correctness of the jury's verdict. On the contrary, we think that our discussion in this paper shows that the Maurice v. Judd case raises an important issue, and that the tension that it generates will not be resolved by simply adjudicating whether the verdict is right or wrong on the basis of some theory.

In our view, both in and out of the legal context, a host of different (non-semantic) considerations have an impact as regards which linguistic practice has to be considered relevant in the adjudication of disputes. Which of those considerations should be taken into account in different cases is the next important issue to address. As we have argued (Martí – Ramírez-Ludeña 2016), different theories of law have different conceptions of the nature of the relevant considerations, and the dispute between Dworkinians and Hartians can be seen from this perspective as a dispute over this issue. For a Hartian the considerations have a conventional character and for a Dworkinian they always depend ultimately on moral factors. In this regard, we neither want to commit ourselves to the relevance of normative considerations, as Greenberg does, nor to the communicative-content theory. We have not tried to fall on either side of the equation in this regard. But what our discussion shows is that, although this particular dispute is not one whose *resolution* is within the domain semantics, semantic and meta-semantic considerations are essential to *understand* the tension raised by the case.[26]

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