THAT OBSCURE OBJECT OF DESIRING LITERAL MEANING

A CRITIQUE TO "MODERATE" LEGAL COGNITIVISM

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ABSTRACT

The main idea of *The Making of Constitutional Democracy: From Creation to Application of Law* (2021) is that democracy and constitutionalism rely on the distinction between "law-creation" and "law-application". This distinction – according to Paolo Sandro – would be not only crucial for the legitimacy of constitutional democracy but also a necessary condition within its conceptual structure. This brief article is organized in two parts. In the first part I show that, whilst the aforementioned distinction can be understood and assumed in diverse forms, Sandro adopts *one* of its diverse possibilities of understanding, which corresponds to a cognitivist perspective of legal communication. And in the second part I seek to show that, in order to maintain the connection between constitutional democracy and the aforementioned distinction, there are two important reasons why it is unnecessary to adopt the "moderate cognitivism" assumed by Sandro: a) because it can be criticized for some important flaws; b) because there are other theories – even within the moderate positions about determinacy in law – capable of achieving the same objectives without those defects.

KEYWORDS

cognitivism, objectivism, legal interpretation, constitutional democracy, law-application

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That Obscure Object of Desiring Literal Meaning. A Critique to "Moderate" Legal Cognitivism

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1. *Introduction*

Paolo Sandro's *The Making of Constitutional Democracy: From Creation to Application of Law* is, in my opinion, an essential reference book that is quite enlightening and enriching, abundant in profound discussions of interest to legal and political philosophers as well as to public law scholars. Its main idea is the "two-fold dependence" of constitutional democracy on the distinction between the creation and application of the law, given that «both democracy and constitutionalism, taken individually, rely on the distinction being possible»[1]. This distinction, in Sandro's approach, «is constitutive of the legitimacy of our constitutional democracies»[2], and this constitutive relationship applies «not only to the doctrine of constitutionalism but also to democracy as the ideal of self-rule of the people»[3]. Moreover, according to Sandro, the distinction is not just «crucial for the legitimacy of constitutional democracy, but it also clarifies the structure of our existing constitutional systems»[4].

Sandro understands this distinction between law-creation and law-application, considering "law-application" as the very possibility that judges (and other law-applying organs) could apply to particular cases the general rules previously created by another institution of the same legal order (for instance, the democratic legislator in civil law systems). As the author says, if there is no possibility of *applying* a legal rule created by a different institution at a previous moment in time, «then our current constitutional-democratic frameworks are effectively empty vessels»[5]: if democracy is always based, in one way or another, on the idea of "self-determination", "self-rule" or "self-government", then it is necessary that the law produced «*by* the people, *of* the people, *for* the people» could be applied to individual cases[6]. Sandro holds this idea as a conceptual necessity: «democracy actually demands that the relevant rule created by the people, either directly or through their representatives, is the rule that is applied in the given individual case by the rule-user»[7].

According to Sandro, this requirement is incompatible with the thesis that the law «is always (or even only mostly) indeterminate – as realists and critical legal scholars affirm», for the law produced *by* the people could not be applied to individual cases, and the decisions

[1] SANDRO 2021, 12.

[2] SANDRO 2021, 71. Sandro adds that if we deny this distinction, modern constitutional democracies would be delegitimized, "perhaps fatally" (SANDRO 2021, 17).

[3] SANDRO 2021, 71.

[4] SANDRO 2021, 43.

[5] SANDRO 2021, 2.

[6] SANDRO 2021, 76.

[7] SANDRO 2021, 77. «My claim here then is conceptual and not normative: it does not make any sense to understand law, at the most general level, as the enterprise of subjecting human conduct to the guidance of rules, if we at the same time deny the possibility of distinguishing between the activities of law-creation and law-application» (SANDRO 2021, 212).

reached by judges would «always be the product of their creative, jurisgenerative, activity»[8]. As a result, and as relevant judges are not democratically elected, Sandro claims that «there cannot be self-rule, nor "shared control" over law-making» in those conditions[9]: «what would the point be in electing representatives to make laws, if then what courts decide in individual cases is not, to a significant extent, determined by those laws?»[10]. This would not only put at risk the legitimacy of adjudication[11] but also the very conduct-guiding function of law[12]. And it is in this precise context that the author concludes that «democracy does not hold unless there is the possibility of distinguishing between the activities of law-creation and law-application»[13].

2. *The distinction between law-creation and law-application: the cognitivist gaze*

The first point that I want to make is quite obvious: Sandro's main thesis is that constitutional democracies rely on the distinction between law-creation and law-application[14], but this distinction – without any further additions – could be understood *and assumed* in diverse ways, even by some legal realists. In fact, if «rule-scepticism represents the lowest common denominator of realisms» (as Sandro claims)[15], we can take as an example the work of Riccardo Guastini – one of «two of the most prominent moderate legal realists in the literature»[16] discussed in the book[17] – and we will find that, even though he defends some version of rule-scepticism[18], he nevertheless expressly draws a distinction between law-creation and law-application.

Indeed, in several of his works, Guastini considers that one thing is to formulate a legal provision (*law-creation*), and another thing is to ascribe meaning to it, that is, to use it as an object for interpretation (this amounts to *law-application*: to apply a legal provision)[19]. Also, for Guastini, one thing is to produce a norm through the legal interpretation of a given legal provision (*norm-creation*), and another thing is to use it as a premise in deductive legal reasoning whose conclusion is an individual and specific precept (this amounts to *norm-application*)[20].

As we can see with this example, it seems evident that even a legal realist can defend some form of rule-scepticism while maintaining the distinction between "creation of law" and "application of law" (or at least a version of it). Besides, for a legal realist like Guastini, it is perfectly possible to "apply" a legal provision «created by a different institution at a previous moment in time»: that would mean, again, to use that provision to ascribe some meaning to it, i.e., to use it as an object for interpretation.

[8] SANDRO 2021, 76. «[I]f law is always indeterminate, then legal norms cannot be applied – but would always be created instead by courts in reaching a decision on any particular case» (SANDRO 2021, 72).

[9] SANDRO 2021, 76.

[10] SANDRO 2021, 2. See also SANDRO 2021, 208.

[11] SANDRO 2021, 77 and 101.

[12] «[I]f law is a practice that is always (or even just mostly) indeterminate [...] it is unclear how law can have any action guiding function (or capacity) at all» (SANDRO 2021, 2). See also SANDRO 2021, 212.

[13] SANDRO 2021, 76.

[14] Sandro claims that «when legal theorists have examined (rather than assumed) the distinction between creation and application of law, *most of them* have undermined it or dismissed it altogether as untenable» (SANDRO 2021, 1 – italics added). However, I think the truth of this assertion depends on the specific legal culture taken as a reference; for instance, this will not be true in legal cultures dominated by formalism.

[15] SANDRO 2021, 91.

[16] SANDRO 2021, 13.

[17] SANDRO 2021, 99-101 and 108-110.

[18] See e.g. GUASTINI 2011b.

[19] GUASTINI 2011a, 254.

[20] GUASTINI 2011a, 254. This author presupposes the distinction between provisions and norms and, in turn, the distinction between two types of norms: rules and principles (GUASTINI 2011a, 254).

Of course, it is also certain that Sandro would not agree with the former explanation for he does not consider "law-application" as an activity of *interpreting provisions* but rather as an activity of *using those provisions* to decide concrete cases. However, at this point it seems clear that the distinction between "law-creation" and "law-application" depends, in turn, on the concept of "application of law" and, ultimately, on the concept of "law" that we are assuming. In other words, the diverse ways in which the aforementioned distinction can be stipulated are *conditioned* by our legal conceptions when answering the questions «What kind of activity is applying the law?» and, ultimately, «What kind of entity (or set of entities) is the law?»[21].

The above said is pretty obvious, and Sandro accepts it[22]. Indeed, based on a specific conception of law defended in his book, he adopts «the corresponding theory of legal meaning and interpretation»[23]: a theory that – in his view – respects the requirements of "action-guidance" and "collective autonomy" in which «modern constitutional democracies are premised»[24]. Thus, Sandro assumes "semantic minimalism" as a theory of legal meaning[25].

In line with this theory, the author argues that the meaning of legal utterances in a vast number of cases could be clearly understood because it is fully determined by lexical content and syntactic structure, i.e., by the meaning of its parts and by their mode of composition[26]. Therefore, it would be possible to identify an "a-contextual" level of meaning in legal communication «that is essentially conventional (what legal interpreters already call "literal" meaning), and as such pre-exists the (pragmatic) interpretation by courts»[27]. Based on this idea, Sandro defends a sense of "applying a rule" which, in his words, is "objectively determinate" and «allows for the existence of clear cases of linguistic meaning»[28]. Consequently, he subscribes to the idea that in "core" or "easy" cases «the correct application of a term to a new instance is something we *discover* rather than *invent*»[29].

On these grounds, it is clear that the main thesis of Sandro's book is the dependence of constitutional democracy on the distinction between "law-creation" and "law-application" *from a cognitivist point of view*. Or, even more specifically, the main thesis is the dependence of constitutional democracy on the possibility of law-application under a *cognitivist* theory of meaning in legal communication: a theory that presupposes the existence of a univocal and knowable meaning incorporated in the legal provisions in the majority of cases. This objective meaning would pre-exist legal interpretation and would provide the conditions for the correctness of legal reasoning in general[30]. And this is precisely what allows Sandro to advocate "the basic idea" that «democratically-elected legislatures make the law, and judges (among other officials) apply it»[31].

[21] This question is formulated in GUASTINI 2015, 45 (in a diverse but related context).

[22] «[T]he central claims about legal meaning and legal interpretation I put forward [...] are neither descriptive nor normative, but rather conceptual. In this regard, I agree with Ramírez Ludeña that "The position one takes up on legal interpretation is connected with which conception of law in general is understood to be most plausible"» (SANDRO 2021, 171).

[23] SANDRO 2021, 172.

[24] SANDRO 2021, 170 and 169.

[25] As the same author explains it, «semantic minimalism» is «a theory of (truth-evaluable) meaning that reduces the scope for pragmatic enrichment» (SANDRO 2021, 6). See SANDRO 2021, 202, for a concise list of the four main claims of semantic minimalism. *Cf.* MORESO 2023 (also commenting on Sandro's book), for certain objections to semantic minimalism in legal communication.

[26] SANDRO 2021, 202.

[27] SANDRO 2021, 6.

[28] SANDRO 2021, 248.

[29] Jussi Haukioja, cited in SANDRO 2021, 259.

[30] SANDRO 2021, 112.

[31] SANDRO 2021, 2. This does not imply that «legislatures always (and only) create the law and courts always (and only) apply the law» (SANDRO 2021, 213).

Having identified the main thesis of the book with more precision, I will move on to my second point.

3. *"Moderate" cognitivism: is it necessary?*

It seems that Sandro embraces a cognitivist theory of legal communication because, in his view, the possibility of law-application can only be explained by two different ontological outlooks and resulting epistemological theories: «a moderate cognitivism adopted by most modern legal positivists (following Hart)» or «a radical rule-sceptic position»[32]. These two alternatives are presented in the book as a dichotomy, since Sandro – rejecting the viability of the so-called "moderate scepticism"[33] – does not see a third possibility. So, avoiding what he calls the "indeterminacy threat" implied in the radical rule-scepticism[34], Sandro opts for what then appears to be the only viable way to explain the concept of "law-application": a "moderate" cognitivist theory.

This expression ("moderate cognitivism") is used in many parts of the book[35] to refer to the "mixed theories" or "vigil theories" originally described by H.L.A. Hart, i.e., those intermediate positions about the determinacy of law (between "the Noble Dream" of radical formalism, and the "Nightmare" of radical scepticism)[36]. In this context, Sandro considers that there are good philosophical reasons to uphold some version of a "moderate determinacy thesis" in language, according to which there is a middle ground, a "meaning determinism" that would allow linguistic determinacy to be retained in core cases or easy cases[37]; also, he expressly declares that «only a mixed theory of legal interpretation, as resulting from an adequate theory of meaning in legal communication» seems capable of respecting the requirements of action-guidance and collective autonomy that, in his view, define constitutional democracies[38].

But is it necessary to adopt the specific cognitivism assumed by Sandro in order to allow the distinction between "law-creation" and "law-application" and, therefore, the possibility of law-application within the model of constitutional democracy? I will try to show that the answer is negative, for two important reasons. On the one hand, this "moderate cognitivism" sustained by Sandro can be criticized due to some important flaws. On the other hand, there are other theories (even within the moderate positions about determinacy in law) capable of achieving the same objectives without those defects. Let us see.

3.1. *The flaws of Sandro's "moderate" cognitivism*

As we have seen, Sandro defends that, in the vast majority of cases, there is a level of meaning in legal texts that *pre-exists* the pragmatic interpretation (again, something that is *discovered* rather than *invented*)[39]. In these cases, the author sustains that the meaning of legal utterances

[32] SANDRO 2021, 13.

[33] SANDRO 2021, 108-110. Regarding Guastini's "moderate scepticism", it is interesting to note that other authors have also dismissed it on the basis of quite different conclusions: either by arguing that the most recent versions of that "scepticism" *à la génoise* have become indistinguishable from the mixed theory (BARBERIS 2000, 33-35) or by arguing that, despite his attempts, Guastini continues to be «a sophisticated defender of the Nightmare» (RAMÍREZ LUDEÑA 2012, 114).

[34] In this respect, José Luis Martí has also tried to show that radical scepticism is logically or conceptually incompatible (or at least pragmatically inconsistent) with the implementation of any liberal vision of the State and with any theory of democracy (MARTÍ 2002, 279).

[35] See e.g. SANDRO 2021, 13 and 112.

[36] HART 1977.

[37] SANDRO 2021, 259.

[38] SANDRO 2021, 172.

[39] This claim is central in Sandro's work, as he points out that «if (knowledge of) the meaning of a legislative

can be simply "understood" because it is fully determined by lexical content and syntactic structure; and this would allow us to know what the law prescribes or establishes «before a necessarily inferential process of interpretation»[40].

This author's ideas lend themselves to a certain ambiguity. Sometimes it seems that Sandro denies the *necessity* of interpretation in the "vast" majority of cases[41]: the mere "understanding" of legal provisions would be sufficient[42]. If this is so, this claim would be very similar (or no different) to the cognitivist conception reflected in the "*in claris non fit interpretatio*" methodological directive, as it was assumed by the Exegetical School in the nineteenth century[43] (reminiscent of the legal doctrines of the Enlightenment)[44]. However, at other times in his work, Sandro does not seem to deny the necessity of interpretation; rather, his ideas are expressly oriented towards a «*preference* for literal or sentence meaning in legal interpretation» as a conceptual necessity[45].

Let us take the first possibility of reconstruction. It is not convincing at all that in "clear" or "easy" cases there would be no need for legal interpretation. The notion of "easy case" does not dismiss interpretation: on the contrary, it presupposes it[46]. To establish that a certain case is an "easy case" (i.e., to confirm that the case falls into the "core of certainty" of a legal norm), it is previously necessary to carry out an interpretative activity. This is so because – as Giorgio Pino correctly notes – a case is "clear" precisely *in the light* of a norm, *concerning* a norm, and the norm is the product of an interpretation[47]. And even when the meaning of a legal text is considered fully determined by its parts and by the mode of its composition, this consideration is nothing but the product of a specific interpretive activity: the result of *literal interpretation* (understood in the sense of an *a-contextual* interpretation)[48].

Regarding this first possibility of reconstruction, the "moderate" cognitivism defended by Sandro would have the major flaw of offering a picture of legal phenomena that neglects the institutional and interpretative dimension of the law, i.e., the circumstance that even in easy or clear cases «the law does not apply by itself to its addressees»[49]: in legal communication, there is an inevitable intermediation of the law-applying organs and interpreters in general[50]. And specifically regarding law-application processes, the competent organs must (cannot help but) attribute meanings to legal provisions, either by interpreting them or by using preceding interpretations (with the possible help of the interpretative discourses that circulate in the general legal culture)[51].

But let us move on to the second – and maybe more accurate – possibility of reconstructing Sandro's ideas: the conceptual necessity of *preferring* literal meaning within legal interpretation[52].

utterance does not pre-exist, it simply cannot be *applied*» (SANDRO 2021, 4).

[40] SANDRO 2021, 184. See also SANDRO 2021, 201: «If law is the enterprise of guiding conduct through rules, the communication of such rules must generally suffice for law's addressees [...] to understand what is required of them».

[41] In SANDRO 2021, 246-247, the author asks (in a critical way): «if between every rule and its application to a particular case there is a gap to be filled by such interpretive activity [...] what does it mean to follow a rule?».

[42] Sandro refers to an «intuitive juxtaposition of "understanding" and "interpreting" as different activities» (SANDRO 2021, 246) and, indeed, he uses this juxtaposition to communicate his ideas (SANDRO 2021, 209).

[43] See CHIASSONI 2009, 255 ss.

[44] In this context, it should be noted that Sandro links what he calls an "intuitive" juxtaposition between "understanding" and "interpreting" with the maxim *interpretatio cessat in claris* (SANDRO 2021, 246). In addition, the author does not hide his positive assessment of the "lessons" of the European Legal Enlightenment (see SANDRO 2021, 9 and 200).

[45] SANDRO 2021, 201 (italics added).

[46] GUASTINI 2011a, 427, nt. 62; PINO 2021, 98.

[47] PINO 2021, 98.

[48] GUASTINI 2011a, 96.

[49] PINO 2020, 391.

[50] PINO 2020, 395.

[51] PINO 2020, 391.

[52] Despite what the term "preference" may suggest, I assume that Sandro uses it within a theoretical discourse on interpretation, concerned with developing a model that could serve to understand what interpretation *is* (and not

This could mean that, even though there are cases in which interpretation involves «a creative or discretionary activity», in the majority of cases interpretation would be just a cognitive task aimed at discovering the literal meaning of legal utterances[53]. Nevertheless, this idea would overlook some important aspects frequently highlighted in theoretical discourses about legal interpretation:

a) The notion of "literal interpretation" is not univocal: it could be understood in different senses, and not just as an *a-contextual* interpretation[54].
b) The same thing occurs with the very notion of "literal meaning", which is actually a rather complex notion that can be defined in many different ways[55] (and not only in the same terms specified by Sandro).
c) When the "literal meaning" is appealed to (even in an intuitive way), it could conceivably refer not only to the meaning that a term has in ordinary language, but also to the meaning that it has in legal (or other specialized) language[56].
d) Furthermore, legal language is not governed only by the rules of ordinary language, but also by rules and conventions that are specifically *legal*[57].
e) There are certainly "clear", paradigmatic cases of "literal meaning", but also doubtful cases in which "literal" meaning precisely constitutes the source of an interpretative doubt[58].
f) There is nothing fixed about the fact that something could count as a "clear" case of literal meaning: even the paradigmatic cases of applying a term can change over time and can be questioned[59].
g) Even literal interpretation has "a creative or discretionary" component because it presupposes a choice of the interpreter: the choice to set aside other possible interpretations[60].

In sum, the point here is the following. Sandro's cognitivism seems indeed "moderate" because it does not lead to affirm that *all* the cases have always a "correct" answer; he accepts that the content of the law is "typically" (not always) «determined by what the authorities communicate»[61] and, therefore, that «in some contexts of application what is communicated by the law might turn out to be underdetermined»[62]. However, at the same time, this cognitivism seems a bit *naïve*, because it leads to assuming that, in a majority of cases, the "correct" answer exists objectively[63] and is simply "discovered": either by simply understanding (without interpretation) or simply by a literal interpretation[64]. In any case, either of these two alternatives

what interpretation *should be*; this would not be a part of a "theory of legal interpretation" but, rather, a prescriptive discourse for developing an *ideal* model of interpretation).

53 SANDRO 2021, 208.

54 Guastini refers to other two possibilities of understanding: as a "*prima facie* interpretation" or as a "declarative interpretation" (GUASTINI 2011a, 95-97).

55 PINO 2021, 280 and 280, nt. 22.

56 PINO 2021, 280-281. Thus, "literal meaning" could refer to the "common meaning" of words; to a technical-juridical meaning; or to a technical but non-juridical meaning. In this context, Pino points out the problem of what will be the "literal meaning" of a term that exists (with different meanings) both in legal language and in ordinary language. See PINO 2021, 281.

57 PINO 2021, 336.

58 PINO 2021, 280.

59 PINO 2021, 100; GUASTINI 2011a, 96-97.

60 GUASTINI 2011a, 402 and 402, nt. 10.

61 SANDRO 2021, 210.

62 SANDRO 2021, 202.

63 «[T]he problem seems to be with the determinacy as much as with the objectivity of legal rules: [...] about what makes an application of law *correct* and another one *incorrect*» (SANDRO 2021, 247).

64 This is precisely what characterizes the "naïve conceptions" of interpretive objectivism (PINO 2021, 75).

of reconstruction is highly problematic (as we have seen); furthermore, assuming them implies losing sight of the variety and diversity of the interpretative activities involved in the acts of law-application, as well of the complex "dialectic" of legal phenomena[65].

Of course, Sandro defends this "moderate" cognitivism because he tries to avoid what he refers as the "current interpretive orthodoxy" in legal interpretation, according to which there is always «a gap between a rule and its applications»[66]. In his view, «[t]his clearly threatens law's autonomy» and leads to conceiving law-application as «an inherently subjective and, at least in one potential sense, political activity»[67]. So, in Sandro's view, his cognitivism is the only theory capable of respecting the objectivity of legal rules, which is required for evaluating an act of law-application as *correct* or *incorrect*. But is there really no other option?

3.2. *Another "moderate" objectivism is possible*

As is well known, "moderate" or "mixed" theories of legal interpretation constitute an extended family with diverse versions that use different criteria[68]: «the *Vigil* is compatible with many philosophical assumptions, without thereby implying severe ontological or semantic commitments for their adherents»[69]. In this sense, there are other theories that predicate a level of objectivity in the interpretation, without depending on some level of "pre-existing" meaning that *precedes* interpretation or that has to be *discovered* by a literal interpretation.

My point is that it is not necessary to commit to this type of cognitivism assumed by Sandro in order to maintain the connection between constitutional democracy and the distinction between "creation" and "application" of the law. There is certainly an alternative, and I synthetize it as follows:

a) The distinction between "law-creation" and "law-application" can only be accurately formulated if we take into account the stratified nature of law and of legal communication, i.e., the level of *provisions* and the level (or multiple levels) of the interpretations of those provisions (the level of *norms*)[70]. According to this, it is possible to identify diverse and separable activities of "law-creation" and "law-application" on both levels (provisions and norms), in the same way explained by Guastini.
b) Following this way of stating the distinction, the solution of legal cases is carried out through the application of *norms* (and not directly through the application of provisions). But that the norms are the result of interpretative activities does not imply that their application to concrete cases amounts to completely forgiving the importance of textual formulations or constitutes "an inherently subjective" or "political" activity. It is in this precise context that it is useful to turn to another type of "mixed" theory.
c) The mixed theory of interpretation to which I refer[71] is one that could be able to recognize that: a) the law is an institutionalized normative phenomenon that includes not only normative-producing organs (which produce normative texts) but also law-applying organs (which, through interpretation, extract the norms from these texts to be applied to legal cases)[72]; b) legal interpretation has necessarily a *creative* dimension since the language of normative-

[65] PINO 2021, 348.
[66] SANDRO 2021, 246.
[67] SANDRO 2021, 247.
[68] PINO 2021, 75.
[69] MORESO 1998, 160.
[70] GUASTINI 2015, 48-51. PINO 2020, 396.
[71] From now on I will entirely rely on the theory of legal interpretation articulated by Giorgio Pino (PINO 2021).
[72] PINO 2021, 347-348.

producing organs (the "legislator") is continuously transformed by the interpreters[73]; c) legal interpretation is by no means a totally free activity: it is always an interpretation of *something* (a normative text) and because of this it has also a *cognitive* dimension[74].

d) To reach a certain level of objectivity in legal interpretation – and, therefore, to have a standard that allows evaluating an act of law-application as *correct* or *incorrect* – it is possible to resort to the use of interpretive criteria considered right (e.g., because they are unanimously shared) or interpretive criteria used under ideal conditions[75]. This way, it is possible to recognize "easy cases" based – not in the existence of any objective and pre-existing meaning before the interpretation but – in certain common circumstances: incompletely theorized interpretive agreements, consolidated interpretations, paradigmatic cases and partial interpretive convergences, etc[76].
e) Even if there is not a clear dividing line between "easy" cases and "hard" cases[77] – and, therefore, between "correct" and "wrong" interpretations and further applications – it can be said that, in principle, there are two determinant factors that contribute to making possible the evaluation of a specific interpretation in terms of correctness: a certain correspondence with the starting normative text and the presence of appropriate justifications[78]. These factors operate reciprocally from an evaluative level: the greater the distance from the starting normative text, the greater the burden of argumentation and the need to justify such a distance[79].
f) The above is not equivalent to saying that «the more the judicial meaning of a provision is distant from its communicative one, the more the justificatory strength of the concept of law-application is undermined»[80]. This is so because even the interpretations that exhibit a pronounced distance from the starting text can still be considered "correct" if the justification is strong; and even the interpretations that are close to the textual meaning can still be considered "wrong" because they ignore the existent arguments for the opposite way (e.g., when the literal meaning gives rise to absurd or unconstitutional results)[81].
g) Last, but not least: incorporating this layered nature of law and legal communication is just the natural consequence of an adequate reconstruction of the law as a set of legal texts produced by the normative-producing organs, and the interpretations of those texts made by law-applying organs. And this does not prevent us from applying the characteristics of the rule of law to both levels: the resultant scheme is compatible with the tenets of constitutional democracies.

[73] PINO 2021, 348.
[74] PINO 2021, 74, 333, and 348.
[75] PINO 2021, 100.
[76] PINO 2021, 92-97.
[77] PINO 2021, 99.
[78] PINO 2021, 333.
[79] PINO 2021, 334.
[80] SANDRO 2021, 245.
[81] PINO 2021, 334.

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