THE DISCREET CHARM OF FORMALISM:

PAOLO SANDRO ON CREATING AND APPLYING THE LAW

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ABSTRACT
In this contribution, I first intend to explain in Section 2 the reasons why I agree with the main claim of Sandro's book, which is that constitutional democracy presupposes the ability to distinguish between creating and applying the law. However, I will then cast some doubts on Sandro's considerations on the meaning of legal texts, particularly in Chapter 5. In Section 3, I will discuss the text-act theory versus speech act theory, and in Section 4, I will present some objections to semantic minimalism. Finally, in Section 5, I will offer a more tentative consideration about the seemingly implausible relationship between formalism and arbitrariness.

KEYWORDS
Paolo Sandro's account, constitutional democracy, creation of law, adjudication of law, semantic minimalism, arbitrariness and discretion

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> Tarry a little, there is something else.
> This bond doth give thee here no jot of blood.
> The words expressly are 'a pound of flesh':
> Take then thy bond, take thou thy pound of flesh,
> But in the cutting it, if thou dost shed
> One drop of Christian blood, thy lands and goods
> Are, by the laws of Venice, confiscate
> Unto the state of Venice.
> William Shakespeare
> *The Merchant of Venice*
> [1596-1598]: Act IV. Scene I.

1. *Introduction*

In my opinion, the most significant argument presented in Paolo Sandro's (2022) beautiful book is that constitutional democracy requires the ability to differentiate between the creation and application of the law. I strongly agree with this claim, and Sandro supports his argument by discussing several crucial concepts such as power, politics, division of powers, constitutionalism, interpretation, legal realism, discretion, and more. The book is full of insightful observations that are always aligned with the author's purpose.

In this contribution, I will first explain my reasons for agreeing with Sandro's main claim in section 2. Afterward, I will raise some doubts about his considerations on the meaning of legal texts, primarily in chapter 5. In section 3, I will discuss the text-act theory v. the speech act theory, and in section 4, I will present certain objections to semantic minimalism. Finally, in section 5, I will introduce a more tentative consideration regarding the seemingly implausible relationship between formalism and arbitrariness.

Before diving in the main content, however, I would like to address the title. I believe that the most complete expression of the distinction between the creation and the application of the law is known as *legal formalism*. In a compelling paper by Schauer (1988, 510)[1], he wrote:

> Formalism is the way in which rules achieve their "ruleness" precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which rules are written. Thus the tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule. As a result, insofar as formalism is frequently condemned as excessive reliance on the language of a rule, it is the very idea of decisionmaking by rule that is being condemned, either as a description of how decisionmaking can take place or as a prescription for how decisionmaking should take place.

[1] As it is well known, the argument of this paper is the core of SCHAUER 1991. See also BOBBIO 1958.

In my view, this is the *discreet charm of formalism*. Although Schauer himself cautions against taking this point to the extreme, he suggests endorsing only *presumptive formalism*. I fully agree.

2. *Constitutional democracy as organic whole*

Constitutional democracy is an ideal which embodies a value. And, according to G.E. Moore, the value should be regarded as an *organic whole* in which a whole «bears no regular proportion to the sum of the values of its parts» (MOORE 1903, 27)[2]. Constitutional democracy is an ideal where three sub-ideals are intertwined: the ideal of democratic self-government, the ideal of the protection and honor of basic rights, and the ideal of the rule of law. The rule of law in its thin or procedural account includes only one sub-ideal, whereas its thick or substantive account encompasses all three sub-ideals. The third sub-ideal can be better described by the elegant expression used in the Québec French, "*la primauté du droit*". Understood in this way, the ideal contains the so-called features of the *inner morality of law* (FULLER 1969, ch. 2): (1) generality; (2) publicity; (3) prospectiveness; (4) clarity; (5) non-contradiction with other laws; (6) the possibility of conformity to the law; (7) constancy through time; and, finally, (8) congruence between the announced laws and their application, as well as the procedural or institutional requirements, such as an impartial and independent judiciary, the right to be heard and to present reasons and evidence, to ensure that judicial decisions are responsive to the evidence and arguments presented before it: *nemo iudex in causa propria, audiatur et altera pars* and *ubi non est actio, ibi non est jurisdiction*[3].

Thus conceived, constitutional democracy has greater value than its constituent parts. Moreover, the three parts presuppose the distinction between creating and applying the law.

If the various legal realisms were correct, we could not separate the creation from the application of law. If «general propositions do not decide concrete cases» (Holmes in the dissenting vote of Lochner *v*. New York)[4] and «in an important sense legal rules are never clear» (LEVI 1949, 3), then judges would always create the law for individual cases, and constitutional democracy would not be an ideal, but only an *illusion*. The three sub-ideals would be undermined by this account: self-government because we would not be governed by *our* laws, but by judicial decisions; the protection of basic rights because our bills of rights would always be in the fog, only cleared by the final judicial adjudication; and the procedural rule of law because the congruency between the enacted laws and their application would be empty, given that the enacted rules would never be clear.

For this reason, I will now examine how Paolo intends to draw the line. I assume that his objections to the sceptical arguments (in chapter 3) are well grounded and no more I will say on that.

3. *Logic and conversation*

In the introduction, Sandro argues that the speech-acts theory is not applicable to legal communication. Sandro (2022, 5) says:

The second limb of my strategy of to explain why the application of speech-act theory to legal communication is unsatisfactory and should be replaced by what I instead call "text-act theory". The point here is straightforward: speech-act theory is modelled after face-to-face – or conversational – communicative exchanges, that is, there taking place (at the same place and moment in time) between a speaker and a hearer. But this is clearly not what happens with legal communication.

[2] See this idea as developed in MORESO 2019.

[3] See, for instance, for a general presentation and discussion, WALDRON 2020 and CELANO 2022.

[4] Lochner v. New York, 198 US 45, 76 (1905).

And, in the chapter six he elaborates this point (SANDRO 2022, 195):

> [...] as complex sentences or "unsponsored" text-acts, legislative utterances are a-contextual or unconstitutional, both in the sense that there is no shared "situational" context between producers and receivers, and in that, by definition, legal utterances are created to be applied over multiple contexts across time and space. [note omitted]

While I agree that there are limitations to applying conversational pragmatics to legal communication, I have doubts on one of Sandro's conclusions (2022, 196):

> [...] the actual locutionary intentions of the members of Parliament – as opposed to their illocutionary intention – cannot be relevant, constitutively, towards the determination of the meaning of the legislative utterance.

In my view, legal interpretation requires a different approach from ordinary conversation because the context of legal communication is distinct. The context of enacting a legal text is very different from the context of applying it. Therefore, the legislator and the addressees of her rules cannot be considered to be part of the same conversation in a literal sense. Instead, legal interpretation requires the use of different instruments, such as those used to attribute meaning to literary and philosophical texts of the past. Legal interpretation is sometimes compared to *translation* (LESSIG 1993), because, like translating a text from another language, it involves taking into account the original context as well as the context of application. This allows us to fully grasp the meaning of the text. For example, literary works such as Shakespearean plays must be translated again from time to time because speakers of other languages (Spanish, Italian) may not understand all of its nuances of the language in which, say, *Richard III* was translated one hundred years ago[5].

In this sense, I agree with Paolo. Curiously, this is also the position of a recent book (POGGI 2020), which argues against the application of the Gricean pragmatics to legal communication. And it is curious because Francesca argues her position, which is completely different from Paolo's, to show that (POGGI 2020, 296) «legal interpretation is not essentially a question of communication». This is another expression of scepticism about legal interpretation, which is one of the targets of Paolo's criticism.

Nonetheless, I do not agree with the irrelevance of the locutionary intentions of the legislator. Sometimes we cannot determine the meaning of legal texts without certain pragmatic operations (GRICE 1975, 1989), such as implicatures, pragmatic enrichment and so on[6].

Let me introduce a ruling of the Spanish Constitutional Court (STC June, 15, 1981). Section 25.3 of the Spanish Constitution states:

> *The Civil Administration may not impose penalties which directly or indirectly imply deprivation of freedom.*

And the Court argues that «from the section 25.3 is derived "*a sensu contrario*" that the Military Administration may impose penalties which, either directly or indirectly, imply the deprivation of freedom». It is clear that the Constitution does not mention the Military Administration, but the Constitutional Court interprets the *silence* of the constitutional provision as allowing the Military Administration to use penalties that imply the deprivation of freedom. I think that here the Constitution establishes a strong protection, forbidding the civil administration to

[5] I developed these ideas in MORESO 2022.

[6] A similar position in PINO 2021, 121-124; 202-205.

impose this kind of penalties to, and that, as an *implicature*, allowing the Military administration to impose these penalties.

I believe that *a contrario* argument is *often* a pragmatic argument, which obtains an *implicature* in a certain context. Implicatures, as is well-known, are *cancellable* (for instance, DAVIES 2019). It is conceivable that a strongly freedom-protecting Constitution could extend the regime of civil administration to military administration.

The context determines whether the argument is suitable. In some contexts, silence, perhaps together with other regulations, is a good indicator that we can obtain the implicature, while in other contexts, it is not. For example, if I say that our friend Cristina will not arrive on time to the dinner we have planned in a restaurant, it seems that I conversationally imply that she will arrive. Clearly, I can cancel this implicature by adding something like «because she is outside the city». However, in most contexts, my linguistic utterance conversationally implies, but it is not a logical consequence, that Cristina will arrive at some moment during the dinner.

Therefore, in my view, the success of the *a contrario* argument depends on showing that the implicature is reasonable in a certain context. Perhaps for that reason, the *a contrario* argument is suitable in certain contexts, while in others, the *analogy* argument, which leads to the opposite conclusion, is more appropriate.

Something similar happens with the canon of interpretation *expressio unius est exclusio alterius*. As is known, this canon is one of the canons which a famous article of Llewellyn (1950) tried to show as always having a *parry*. In this case the opposite canon to the *expression unius* is the following:

> *The language may fairly comprehend many different cases where some only are expressly mentioned by way of example*.

In fact, canons are not only sometimes in opposition but they also cooperate in order to achieve the most suitable interpretation (see for this case, SINCLAIR 2008/2009). When F.C. von Savigny (1840, 215) introduced the well-known four elements for the interpretation – grammatical, logical, historical, and systematic – he added:

> These elements are not four kinds of interpretation among which we could arbitrarily choose. On the contrary, there are four different operations which only jointly are able to interpret the legal statutes, even though in certain circumstances one of them could be more relevant than the other.

My suggestion is that arguing *a contrario* is a way of arguing pragmatically. Determining accurately the context is crucial here. And the context, in cases of legal interpretation, is quite different from the context in common conversation, the preferred field of philosophers of language. In legal cases, the context of the enactment of legal provisions is relevant, but also the judicial interpretation, precedents, and so on; and the context of adjudication is also crucial.

In the following section, I will attempt to complete these considerations on the application of pragmatics to legal communication.

4. *Minimal meaning* v. *potential meaning*

Paolo argues that, to maintain the distinction between creating and applying the law, we must reduce the role of pragmatics in his speech-text theory to a minimum. In his words (2022, 6):

> The upshot of this move, for our purposes, is that we can then identify a 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.

And Paolo endorses Borg's *minimalist semantics* for this purpose (for instance BORG 2012), which involves four elements (SANDRO 2022, 202):

(i) Semantic account for sentences is truth-valuable content.
(ii) Semantic content for sentences is fully determined by syntactic structure and lexical content: the meaning of a sentence is exhausted by the meaning of its parts and their mode of composition.
(iii) There are only a limited number of context-sensitive expressions in natural language.
(iv) Recovery of semantic content is possible without access to current speaker intentions (crudely, grasp of semantic content involves "word reading" not "mind reading").

However, I believe that it is impossible to fully understand the content of legal texts without considering pragmatics. Semantics alone cannot provide access to the legal meaning of legal enactments. As an example, we can examine the standard way in which homicide is punished in the Italian and the Spanish Criminal Codes. Article 575 of the Italian Criminal Code states:

Chiunque cagiona la morte di un uomo è punito con la reclusione non inferiore ad anni ventuno.

And section 138.1 of the Spanish Code states:

El que matare a otro será castigado, como reo de homicidio, con la pena de prisión de diez a quince años.

In the case of the Italian regulation, the word "uomo" ("man") is ambiguous and can refer to all human beings – like in the handbooks of logic «All men are mortal» – or only to sexually male individuals – as in «most men over 50 years of age experience prostate problems». It is through a pragmatic operation, such as implicature or pragmatic enrichment, that we can determine which interpretation is appropriate. In this case, it is obvious that "uomo" refers to all human beings.

The Spanish regulation also requires a cooperative effort, «el que matare a otro» («that who kills another») does not explicitly state that the victim should be a human being. However, it is pragmatically implied that this is the case.

One important feature of implicatures is that they are *cancellable*. In both of these cases, the implicatures can be cancelled. For example, if the legislator decides to punish differently killing men and killing women in the Italian case, then the implicature is cancelled and "uomo" would mean "man". Similarly, if intelligent beings, who are rational and vulnerable like humans and can be both perpetrators and victims of death, come to Earth, then the implicature of "another" being a human being can be cancelled in the Spanish case. Changes in the world can make the Spanish regulation applicable to new cases[7].

Therefore, in my view, the Gricean principle of cooperation works well in legal communication. The communicative content of the authoritative decisions is *relevant*, in a way to be better specified, for determining the content of our legal obligations, rights and powers, and pragmatic operations are compatible with the previous determination of the normative solution of individual cases. We can assign meaning univocally to linguistic utterances, even in accounts that are friendly to the role of pragmatics in determining meaning, such as Recanati's account (2004). Legal texts may display *potential meanings* or *contributory reasons*, as Dancy (2004, 15-17) suggests, or they may determine the content of the law *pro tanto* way, as Asgeirsson (2020) argues.

However, whether the meaning of legal texts is sufficient to determine the legal context, as presupposed in the *Standard Picture* (GREENBERG 2011), or whether it is only the first word but

[7] In PERRY 2011 there is an explanation, completely convincing to me, of how changes in the world and changes in our knowledge of the world change the meaning of legal provisions.

not the concluding word (GREENBERG 2014) remains an open question. Unfortunately, I cannot elaborate on this crucial point here.

5. *Formalism and arbitrariness*[8]

I would like to conclude with a tentative suggestion that should remain as an idea to be developed in the future. What I mean is that the idea of the law as a book of rules, interpreted and applied with extreme formalism, often lends to the *arbitrariness*. It may seem like an *oxymoron*, but any legal system contains so many rules that it is always possible for the adjudicator to selectively apply only those that are convenient and neglect those that are not in a given case. Those who have lived in dictatorships (in my case, fortunately, for a short time when Franco died, I was an adolescent) and heard the saying *dura lex, sed lex* know how this combination of extreme formalism and extreme arbitrariness is possible.

During the lockdown in 2020, amidst the pandemic, I saw on TV a film adaption (directed by Michael Radford in 2004) of William Shakespeare's masterpiece, *The Merchant of Venice*. It seemed to me a very nice version (no doubt due to the magnificent actors, Al Pacino played Shylock, Jeremy Irons played Antonio, Joseph Fiennes played Bassanio, and Lyn Collins played Portia). Watching the film made me reflect on this point: Shylock has made claim to obtain a pound of Antonio's flesh, nearest to his heart, in virtue of a loan that bankruptcy prevented him from paying, a claim grounded on a literal interpretation of the applicable Venetian law. However, Portia – disguised as a young lawyer from Bologna – effectively objected to this claim by interpreting other provisions of Venetian legislation with the same literal tenor and formalist rigor, which led to Shylock's economic ruin. When Shylock was close to killing the poor Antonio, Portia argues in this very literal way (SHAKESPEARE 1596-1598: Act IV. Scene I):

> Tarry a little, there is something else.
> This bond doth give thee here no jot of blood.
> The words expressly are "a pound of flesh":
> Take then thy bond, take thou thy pound of flesh,
> But in the cutting it, if thou dost shed
> One drop of Christian blood, thy lands and goods
> Are, by the laws of Venice, confiscate
> Unto the state of Venice.

Therefore, another thing to learn from Shakespeare is that it is not a good idea to conceive the law as a book of rules which are auto-applying to the cases. This is not only because it can generate patently unjust solutions in many situations but also because such an account easily leads to a plainly arbitrary application. There is no good reason to either miss or long for the charm of formalism.

[8] This idea appears elaborated in MORESO 2020.

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