WHO FEARS THE ANTI-LITERALIST BOGEYMAN?
ON PAOLO SANDRO'S MEANING-DETERMINISM

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ABSTRACT
The paper is devoted to deepening the philosophical background of Paolo Sandro's conceptual distinction between law-application and law-creation. In §1, I present his main arguments for this distinction, which recommend the adoption of Mario Jori's macro-pragmatics combined with text-act theory and semantic minimalism. I then offer an alternative characterization of their rival conceptions, skepticism and contextualism in §2, before raising five objections to Sandro's a-contextualist meaning-determinism, to show how its persuasiveness depends on a misleading conception of language, the fixed-code fallacy – to borrow Roy Harris' captivating label.

KEYWORDS
literalism, interpretive legal skepticism, contextualism, reification of norms, fixed-code fallacy

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1. *The central pillar (and some modus ponens arguments)*

I am grateful for the opportunity to discuss Paolo Sandro's thought-provoking and well-written book, *The Making of Constitutional Democracy* (henceforth, MoCD). I apologize in advance for not being able to do full justice to its complexity and the connections of the theses the author argues for within this limited space. I will instead directly approach a central argument that I consider flawed and try to deepen in the philosophical background it presupposes of the work.

Sandro's main goal consists in defending a reconstruction of the common fundamental structure of constitutional democracies grounded in the distinction between law-creation and law-application. By *law-creation* Sandro means – if I'm right – a (legally) proceduralized linguistic production of a text providing a set of provisions that communicates new general and abstract legal norms. By *law-application*, he refers to a (legally) proceduralized linguistic production that results in a particular and concrete legal norm and expresses a decision whose content can be either bound – i.e., derived from a general and abstract norm (*application in a strict sense*) – or discretionary – i.e., implying a choice among possibilities pre-determined by the communicative frame vehiculated in the relevant legal text. To make a long story short, for Sandro, if this distinction is *de facto* or theoretically blurred – as some legal realists suggest – then 1) against the rule of law, the exercise of power by legal authorities appears to be indeed unconstrained; 2) against the principle of legal certainty, law is prospectively indeterminate and cannot guide the actions of individuals to solve conflicts and cooperation problems; 3) against the democratic principle of collective autonomy, people cannot rule themselves through their elected representatives.

Sandro adopts a fruitful multidisciplinary methodology, offering historical, political theoretical, sociological, and philosophical considerations to resist different debunking analyses and narratives about the unfeasibility of the law creation/application distinction. However, the central pillar that bears most of the weight of his jurisprudential cathedral is, in my opinion, a conceptual argument from analytical language philosophy. It can be summarized along the following lines:

1.1. First, the law is a semiotic system, «a linguistic, and more generally expressive, activity, in that it is based on (abstract) entities such as rules (and norms) created through speech acts»[1]; it is «the kind of practice whose point is the general guidance of conduct through rules expressed linguistically, and those rules must be able to be followed, by and large, by the public without further intervention by the courts»[2]. Accordingly, «the legal system needs to successfully communicate standards of behaviour (at least in a majority of cases) to incredibly vast audiences in a stable manner across time and space and through multiple contexts»[3]. Moreover, it must accomplish this task assuring a sufficiently high level of objectivity, otherwise a legally

1 SANDRO 2022, 25.
2 SANDRO 2022, 177.
3 SANDRO 2022, 201.

organized society would not exist at all. These conditions can be met, and wherever they are met legal communication takes place.

Sandro's first point can also be framed as an enthymematic *modus tollendo tollens* argument:

> «if we always needed to go through the adjudicative moment in order to know what the law is for a given situation, it is not clear at all how law [...] could ever [i.e., law could never] fulfil [its] general guiding function»[4]

– first premise ($A \rightarrow B$ or $A \leftrightarrow B$);

but (it would be absurd to deny that) the law fulfils its general guiding function (at least in a great majority of cases) – second premise ($\neg B$);

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therefore, it must be possible to know what the law is without going through the adjudicative moment – conclusion ($\neg A$).

1.2. The fulfilment of law's guiding function – and this is Sandro's second point – is only possible if legal language works in a very peculiar way. This remark was originally made by Mario Jori[5], who described legal language as a *tertium genus* between ordinary language (spontaneously and cooperatively evolved, characterized by a general effability and a bottom-up, "customary" normativity) and "instrumental/technical" languages (intentionally developed by experts to pursue specific aims, characterized by a limited effability and a top-down normativity). Legal language is different because its use is not backed by a common specific aim or principle of cooperation. Instead, given the semiotic backlashes of the practical conflicts the law deals with, it is administered by linguistic legal authorities, *in primis* legislatures and judges. These subjects «establish what can and cannot be said with specific uses of legal language, thus reducing its overall pragmatic scope»[6]. More precisely, «legal authorities retain the power to modify the rules of legal language (in particular at the semantic level) in their pursuit of a more precise and verifiable intersubjective tool to expose and manage conflicts within the group».[7] So, according to Sandro, legal discourses «are more formalised (in the sense of the precision of their semiotic rules) and less dependent on context than ordinary linguistic conversation»[8]. In brief, the macro-pragmatic structure of legal language guarantees a sufficient degree of determinacy of the meanings of legal texts.

1.3. This second point is reinforced by a consideration of the *textual* nature (at least in the great majority of cases) of legal communication. Statutory norms, for example, are conveyed by written provisions, which can be seen as text-acts. Now, the third fundamental thesis in Sandro's reconstruction holds that to offer an adequate account of legal communication, we should replace conversational pragmatics and speech act theory with a text-act theory supported by some qualified versions of semantic minimalism, the variety of literalism defended by Emma Borg[9]. On one side, only text-act theory takes the written, unilateral ("closed"), context-free (or context-invariant), and unsponsored dimensions of legal communication seriously. On

4 SANDRO 2022, 176.
5 Cf. JORI 1996.
6 SANDRO 2022, 188.
7 SANDRO 2022, 188.
8 SANDRO 2022, 185.
9 Cf. BORG 2004.

the other, semantic minimalists' reference to a layer of conventional meaning better fits the needs of compositionality and explains, without conjuring up more or less hidden non-linguistic causes, the normal convergence in the abiding behaviours of officials and lay-people: they simply come to understand the sufficiently pre-determined meaning-contents of legal provisions. As Sandro maintains,

> «the author of a text-act can make the co-text of an utterance as informative as she considers necessary for the successful outcome of the communicative act [...] in these communicative text-acts the author, if she wants to successfully transmit exactly the same message to any number of different recipients across a variety of contexts, must seek a higher degree of 'accuracy and precision of meaning' than in ordinary, face-to-face conversation. This means not just reducing as far as possible syntactical ambiguity, but also, for instance, making the co-text as informative as possible – so that the saturation and/or connotation of lexical-grammatical elements are exhausted by said co-text and, in this sense, determined by it»[10].

More precisely, not only are legal provisions independent from the context of legislative utterances and the potentially infinite contexts of reception/interpretation, but even "the boundaries of the relevant co-text [...] can be artificially fixed ex ante, unlike in ordinary communicative exchanges" [11].

As one might expect, Sandro cannot examine in detail the endless ramifications and subtleties of the enduring debates between literalism and contextualism. He rather proceeds arguing again by *modus tollens*. Here are some examples:

(1) «if [legal standards of behaviour] were to be, in the vast majority of cases, a function of the opaque context of creation and potentially infinite wide contexts of reception, then it is not clear how the law could communicate ([i.e., the law could never communicate] in a stable manner anything at all»[12]

– first premise (A→B or A↔B);

but (it would be absurd to deny that) law can communicate in a stable manner its prescriptions – second premise (¬B);

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therefore, legal standards of behaviour are not, in the majority of cases, a function of the opaque context of creation and potentially infinite wide contexts of reception – conclusion (¬A).

(2) According to contextualism, despite the difference between the context of legislation and the potentially infinite contexts of interpretation, «there is a striking convergence of (pragmatic) interpretations [...]. But what is this convergence due to, if not precisely to the conventionality of (the level of) meaning deployed by the author(s) of a text?»[13]. In other words, if the meaning of the legislative text were not conventional, then the convergence of pragmatic interpretations would be either impossible or a striking coincidence – first premise (A→B or A↔B);

but (it would be absurd to deny that) the convergence of interpretations is a normal fact about legislative communication – second premise (¬B);

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[10] SANDRO 2022, 204.
[11] SANDRO 2022, 199.
[12] SANDRO 2022, 201.
[13] SANDRO 2022, 209.

therefore, the meaning of the legislative text must be conventional – conclusion (¬A).

(3) «if it is always context-dependent [...], semantic (lexico-syntactic) meaning cannot be used as a general means of transmitting constantly any kind of content across different subjects and different contexts [...], any kind of objective relation – even minimal – between signifier and signified is obliterated»[14]

– first premise (A→B or A↔B);

but (it would be absurd to deny that) meaning can be used as a general means of transmitting constantly any kind of content across different subjects and different contexts, and signs exist – second premise (¬B);

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therefore, meaning is not always context-dependent – conclusion (¬A).

In sum, law's communicative goals are achieved in virtue of the macro-pragmatic peculiarity and textual nature of legal language, which can pre-determine the meaning of, e.g., legislative utterances, and fix their co-text. Legal provisions can thus be applied without always resorting to interpretive discretion, thereby securing the distinction between law-creation and law-application and a conceptual space for the rule of law and the principle of collective autonomy.

2. *Philosophical crossfire*

2.0. The narrative/rhetorical development of MoCD can be reconstructed as the dramatization of a dialectical battle against interpretive skeptics, who contend that the law is inevitably indeterminate, and contextualists, who deny that the meaning of a text can be fixed and determined before its interpretation, in the context of reception. Both the skeptic and the contextualist attack the *modus tollens* arguments sketched above, rejecting their premises. The skeptic typically deems the second premise (¬B) to amount «to a dogmatic insistence on mistaking common sense for scientific truth»[15]. The contextualist, on the other hand, disallows a construction of the first premise as a biconditional logically equivalent to an exclusive disjunction (¬A aut B = A↔B) – regarded as a false dilemma – and offers a completely different conception of signification, not compromised with language mythologies. Taken together, skeptical and contextualist arguments subject Sandro's view to a fatal crossfire.

Before delving into these dialectics, however, let us pause to see how Sandro defines the skeptical and contextualist positions. The third chapter of MoCD is devoted to distinguishing four varieties of skeptical claims applied to law: 1) the *radical-immanent indeterminacy thesis*, according to which the law is globally indeterminate due to the characteristics of the legal practice – there are neither objective *legal* meanings nor binding *legal* norms nor exclusionary *legal* reasons; 2) the *radical-transcendental indeterminacy thesis*, which denies *tout court* the possibility of objective meanings and binding norms; 3) the *moderate-immanent indeterminacy thesis*, according to which the law is indeterminate only in litigated cases; 4) the *moderate-transcendental indeterminacy thesis*, which states that interpretive statements are neither true nor false, but only more or less persuasive.

[14] SANDRO 2022, 183.
[15] TAYLOR 1997, 189.

Sandro's quadripartition, however, is ill-conceived. Not only does it fail to precisely indicate the sense in which the moderate-transcendent indeterminacy thesis is both "moderate" and "transcendent", but it also misses the fundamental difference between radical and moderate *meaning*-indeterminacy, which is conceptually independent of the fact that some cases happen to be litigated and others not, and surely does not rely on the acknowledgement of easy cases. According to the skeptic, a case is not easy because its solution is pre-determined by legislative provisions or past decisions. A sounder alternative classification, then, could be the following: the radical skeptic accepts that "anything goes" because if there is no objective standard against which to measure the correctness of meaning-ascriptions, then, *à la* Ivan Karamazov, any interpretation is permissible. The "moderate" skeptic, instead, allows for the possibility of *unjustified* meaning-ascriptions[16] (interpretive errors), while insisting that every speech or text is subject to multiple interpretations (*plurality thesis*), which are equally justified (*parity thesis*)[17]. Nonetheless, it must be noted that the plurality thesis admits degrees, so that it can appear more or less skeptical depending on the breadth of the range of the admitted interpretive canons and solutions.

Translating this distinction into two "law-immanent" theses, we obtain that 1) radical skepticism amounts to the view of a Humpty-Dumpty in robes, according to which the meaning of a legal provision is created (depends on) the interpreter, while 2) moderate skepticism maintains that any interpreter can always ascribe more than one (but not whatever) meaning to each legal text, in each context of application of the relative norm, by either following the ordinary linguistic rules or employing the variety of alternative interpretive methods and techniques, legal doctrines, and normative theories available to lawyers in their interpretive community. Moderate skepticism seems, then, to conceive of interpretive criteria as technical (non-regulative) rules.

Moreover, some authors observe that the indeterminacy *of law* does not depend so much on *linguistic* indeterminacy as on the *practical attitudes* of the interpreters – especially judges – towards the legal norms[18]. Beyond the distinctions between literal and non-literal meaning, what is *said* and what is *meant*, interpretation and integration are often hard to trace. Not only is the locution *literal meaning* itself ambiguous, but the very fact that a norm is entrenched or defeasible depends on how the interpreter *treats* it, in a publicly justifiable way: legality must be balanced with other principles.

A legal skeptic might thus say that:

(a) legal rules can (and do) exist and can be (are) binding, but "paper" rules are not *real* rules, due to the indeterminacy of their a-contextual meaning (*interpretive skepticism*);
(b) legal rules can and do exist, but they can always be treated as subject to unpredictable yet justifiable exceptions (*unrestricted defeasibilism*);
(c) "General propositions [linguistic formulations of legal rules] do not decide concrete cases"[19] (*particularism*).

But there is more. The last station along the tracks of skepticism is the claim that

(d) we are not justified in assuming that legal rules exist at all (*rule-skepticism*).

In current jurisprudential debates, however, (d) is rarely – if ever – expressly underwritten.

[16] As a first approximation, a meaning-ascription is unjustified when it is not supported by valid reasons, that is, accepted meaning rules and reasonableness standards. Whenever a meaning-ascription lacks this support, it is usually unpersuasive.
[17] Cf. LAUDAN 1990; MEDINA 2006, 15 s.; CHIASSONI 2019, 98.
[18] Cf. SCHAUER 2012, 23 f.; LUZZATI 2016a, 306; CHIASSONI 2019, 240-253.
[19] HOLMES 1905, 76.

A further problem in the classification of the skeptical varieties concerns its possible overlaps with the spectrum of contextualist positions. To clarify, let me list some theses in the analytical philosophy of language:

(i) a-contextual meaning is always theoretically determinate (*radical literalism*);
(ii) in many cases, if not all, a-contextual meaning can be *known* because it is sufficiently determinate – univocal, clear, precise – for the purposes of communication (let us call *moderate literalism* this conception);
(iii) a-contextual meaning – if it makes sense to talk about an "a-contextual meaning" at all – is always theoretically indeterminate (*anti-literalism*);
(iv) contextual meaning is always *theoretically* determined – that is, it can be inferred with enough approximation by applying a hierarchy of rational principles to the salient features of the context (*radical cognitivist contextualism*);
(v) contextual meaning is always theoretically indeterminate (*theoretical contextualist skepticism*);
(vi) contextual meaning is always *practically* determined – that is, it can be ascribed as the result of a semiotic process that always involves decisions (*non-cognitivist contextualism*);
(vii) in some cases (hard cases) contextual meaning cannot be theoretically determined and must be practically determined (*moderate cognitive contextualism*);
(viii) contextual meaning is always theoretically and practically indeterminate (*radical meaning skepticism*).

Leaving aside (viii) – which I will try to make sense of later – it is quite apparent that an interpretive/meaning skeptic would reject both literalism and cognitivist contextualism. This would leave her with anti-literalism, theoretical contextualist skepticism, and non-cognitivist contextualism. Note, however, that the latter is not, strictly speaking, an indeterminacy thesis. Sandro is then almost right when he assumes that the drop point for the interpretive legal skeptic is meaning-contextualism[20]. Yet, the skeptic can pick out only some contextualist arguments against literalism because she is called to turn out the idea that the ascription of meaning in context and the relative contextualization are just (or usually) rule-governed inferential processes: the contextual meaning cannot be fixed through meaning rules that make rational interpretive principles appliable as if they were algorithms.

2.1. As far as I can see, Sandro's arguments aim at rejecting the parity thesis and unrestricted defeasibilism by showing that, in a legal system informed by the requirements of legality and collective autonomy, there's a default standard of interpretive correctness – the literal, a-contextual, conventional, fixed meaning of legal provisions. But skeptics and contextualists know this line of thought very well and have their counterarguments.

Pierluigi Chiassoni provides a first clear objection in his recent book *Interpretation without Truth*, where he criticizes *semantic formalism*, i.e., the conception according to which the provisions enacted by a legislature, in most situations, «prove univocal [...] [and] determinate enough so as to clearly include [the facts of the case] within the scope of the norms, or clearly exclude them from it»[21] and *limited cognitivsm*, i.e., the view that «interpreters face an interpretive code that is objective, intrinsically endowed with strict normativity, and exclusive»[22] (even if the code may

[20] Cf. SANDRO 2022, 203: «radical contextualist theories (à la Recanati) applied to legal communication reinforce certain strands of scepticism, and are used to disprove the notion of sentence (or literal) meaning as a valid candidate for the meaning of legal utterances». This idea is shared by skeptical legal realist Pierluigi CHIASSONI (2019, 86-97).
[21] CHIASSONI 2019, 81.
[22] CHIASSONI 2019, 131.

prove inefficient, so that the interpreters are called to exercise their applicative discretion). Chiassoni notes that to pass from the premise that legal provisions are made of certain "linguistic materials" to the conclusion that the literal meaning conventionally associated to these materials is their correct *legal* meaning, a further *normative* premise is required: an interpretive directive (or a wider "hermeneutic code") that prescribes the interpreter to treat the literal meaning as the correct legal meaning. However,

> «[t]he need for adding such further premises is, apparently, something supporters of the conventional meaning variety seem to overlook, being somehow bewitched by a sort of "linguistic naturalism". There is indeed a further point they seem to overlook when they present the conventional linguistic reading of legal provisions as the "proper", "obvious", "natural", "evident" legal way of reading them. They seem to overlook that such a claim [...] actually belongs to the normative theory of interpretation and normative philosophy of law. Indeed, it is in fact a claim about the correct, proper, natural way of interpreting legal provisions, and, consequently, a claim concerning the correct, proper, natural way of establishing what the law – what the actual content of legal systems – really amounts to. A moment's reflection suggests that the conventional meaning variety is the (perhaps unconscious) servant to an influential practical master: the legal policy master preoccupied with such ethical goals as "making practical sense of legislation", "restoring the dignity of legislation as a veritable legal source", "establishing legal security so far as possible", "making the law, so far as possible, readable and knowable to any competent speaker of the relevant natural language", etc. Notice that all these ethical goals belong to the Enlightenment doctrine of legislation. They belong to a specific normative view of legislation and statutory construction»[23].

In brief: adherence to the literal meaning of statutory provisions is not bound by the very concept (essence?) of legal communication; it requires instead a well-considered or conformist *decision* to adopt literalism out of many other possible doctrines of interpretation.

Sandro would probably address this criticism by pointing out 1) that the law is not a natural, ordinary language, but an administered, more determinate, language and 2) that the written character of legislative communication speaks in favour of its a-contextuality. Moreover, he would probably add 3) that the fact that the meaning of legal provisions is in most cases pre-determinate, is a condition for the fulfilment of law's guiding function.

2.2. Let us then move to a second objection. Claudio Luzzati[24] warns against identifying the law with a semiotic system. In his view, law and language are two different normative systems, that are, however, at least partially inter-dependent. It is true that in most cases legal statements are expressed using words from ordinary language, while legal authorities often modify the meaning rules of the natural language through legislative re-definitions. Yet, not even a legislator can create an entire new language. Languages evolve and can be made more precise for specific purposes, but not created *ex nihilo* (which is why I find the figurative expression *law-creation* unfortunate): even instrumental languages and sophisticated conceptual apparatuses can only be elaborated starting from ordinary language words and common-sense concepts. On the other hand, a single judge surely administers the law relative to a given case, but she does not administer the legal language directly: her decisions usually concern the meaning of a legal text, but to have an impact on the whole language and on the way legal concepts are generally understood by other officials and, in some cases, lay-people, these decisions need to enter in *performative citational chains* as *legacies of use*[25].

[23] CHIASSONI 2019, 116.
[24] LUZZATI 2016b, 98-102.
[25] MEDINA 2006, 140 f.

I will return to these ideas in §2.5. Here, I just want to highlight that written law is better understood as a corpus of a legal sentences that are repeatedly interpreted, rather than as a language, and that statutory law – although diachronically considered – cannot be deemed to control the meaning of its provisions, even if the language it employs is especially refined. Even legislative language is semiotically distributed, made and re-made by all legal operators (in civil law systems, especially by legal science/dogmatics) within open-ended cultural processes. Now, if legal meanings are influenced by all legal-operators and "administered" by many different legal authorities whose conceptions and practical attitudes towards the law may vary and diverge, why should we expect that the way statutes are usually written and applied by the courts produces «a more precise and verifiable intersubjective tool to expose and manage conflicts»?

2.3. Third, in many passages, Sandro claims that legal language can be seen as a fixed/invariant conventional code. Roy Harris characterizes this conception as the *fixed-code fallacy*, which is part and parcel of a persistent *language myth*. The fallacy consists in taking for granted that

> «[i]ndividuals are able to exchange their thoughts by means of words because – and insofar as – they have come to understand and to adhere to a fixed public plan for doing so. The plan is based on recurrent instantiations of invariant items belonging to a set known to all members of the community. These items are the "sentences" of the community's language. They are invariant items in two respects: form and meaning. Knowing the forms of sentences enables those who know the language to express appropriately the thoughts they intend to convey. Knowing the meanings of sentences enables those who know the language to identify the thoughts thus expressed. Being invariant, sentences are context-free, and so proof against the vagaries of changing speakers, hearers and circumstances, rather as coin of the realm is valid irrespective of the honesty or dishonesty of individual transactions»[26].

Chiassoni shows how this assumption becomes, in the legal domain, a *code model of legislation* (where the word *code* refers not to a legal code, but to a "linguistic cipher"):

A legislature, wishing to convey a certain regulation of a certain matter, codifies the intended regulation in a message made of a string of sentences in a natural language, according to the grammar and semantics of that natural language. In the form of a statute published, say, in the Official Journal, the message is sent to the interpreters (the judges). These, in turn, translate – decode – it according to the grammar and semantics of that natural language, retrieve the normative communication the legislature meant to convey [...] and use it to decide individual cases[27].

According to Chiassoni, many defenders of the code model – such as Herbert L.A. Hart, Genaro Carrió, Eugenio Bulygin or Enrico Diciotti – if asked to justify its adoption,

> «would answer, apparently, either by pointing to the "evident" explanatory correctness of the model (the relation between legislature and judges plainly works in that way), or by suggesting that it would be absurd denying the code model, since legal provisions are formulated in a natural language precisely to that very purpose, or else by claiming that it is the only way compatible with allowing for the existence of (definite) legal norms, indeed, with our "having norms" at all»[28].

[26] HARRIS 1981, 10. See also MEDINA 2006, 3.
[27] CHIASSONI 2019, 82.
[28] CHIASSONI 2019, 82.

The similarity of this justification with at least part of Sandro's argumentation, transfused in his *modus tollens* inferences, is apparent.

If this is the received view about communication (legal or not), then the doubts raised by the radical meaning skeptic become, at least philosophically, more comprehensible: for all we know, even if we act as if we understand each other, mutual understanding and the existence of shared, objective meanings could be an illusion. In fact, the radical skeptic *à la* Kripkenstein «argues that we are unable to isolate facts that can endow our words with fixed and definite meanings, that is, facts that can ground our normative assessments and allow us to deem every application of a term either correct or incorrect»[29]. Following Ludwig Wittgenstein and Gary Ebbs, José Medina diagnoses such skeptical challenge as stemming from a reifying and decontextualizing perspective that pictures sentences and meanings as (objective or subjective, empirical or abstract) things, objects, entities – a foundationalist picture of meaning shared by both the "fixed-code theorist" and the skeptic – «in a vain attempt to distil the semantic essence of our words»[30] from particular contexts of use. The main point of Wittgenstein's regress argument in his rule-following considerations consists in showing that, if meanings are objects, their identity will always escape our attempts to determine it: «The indeterminacy that afflicts objective reifications casts doubts on [...] the idea that the world has self-indicating powers, that it contains self-identifying objects [...] unaffected by our conceptualizations and our ways of dealing with the world»[31]. Subjective reifications of meaning as mind-dependent objects do not fare better, «for nothing is intrinsically self-interpreting, neither mind nor the world»[32].

In his *Post-Scriptum* to the sixth chapter of MoCD, Sandro tries to avoid the regress threat and, at the same time, satisfy the requirement of *advance determination* – i.e., the condition that «[a]t least some instances of application of the rule must be determined in advance of anyone's judgements about it»[33] – which is deemed crucial for the fulfilment of law's guiding function. His solution, borrowed from Jussi Haukioja's *meaning determinism*, consists in relying on the *extrapolative dispositions* of language-users. The problem with this explanation is that the dispositions to extend the patterns of application of a concept to new cases are not acquired out of any context and are always exhibited in the varying circumstances of application. They are thus developed as abilities to *contextualize*, i.e. to make a sign signify in order to achieve something, *taking into account* the varying circumstances in which it will be interpreted and to treat an action or its visible traces (e.g., the written text) as signifying, taking into account how the author of the signifying action perceived (or imagined) and conceptualized the context (or contexts) of interpretation. This is quite different from using a ready-made meaning.

2.4. What about the written character of modern and post-modern law? Is not textuality evidence of the possibility of a-contextual communication? According to the fourth objection, it is not. Even if the advent of glottic writing made the incorporation of spoken words into a material support possible, thereby separating them from their "human sponsors" and facilitating theoretical decontextualizations and "the institutionalised orthographical practices of literate societies"[34], the following step in the semiotic process always requires a recontextualization. As Dorthe Duncker explains,

[29] MEDINA 2006, 5 f.
[30] MEDINA 2006, 13.
[31] MEDINA 2006, 10.
[32] MEDINA 2006, 5 f.
[33] SANDRO 2022, 253. Cf. HAUKIOJA 2005, 38.
[34] LOVE 2017, 146.

> «Unless someone in a particular situation attaches semiological value to it, the sign is simply not a sign. A sign does not have a form of existence in which it is not contextualized by a person. [...] Nevertheless, it is perfectly possible to treat signs in this way, as if they were decontextualizable, without discovering that their identity and original (historical) semiological status are thereby affected, misconstrued, and possibly even destroyed, because it is impossible to talk about an abstraction without (re)contextualizing it. This can happen because and only because language is reflexive»[35].

In fact, in writing a text, its author produces an artefact that functions as a tool for contextualization as and when required, not an instance of an autonomously existing abstract entity.

2.5. The fifth objection is directed against the anxiety-provoking determinist sting, presenting the defenders of constitutional democracies with a contextualist alternative to literalism and skepticism. Contextual variability is not something to be afraid of. Historical linguistic continuities are matters of course: they depend on our biological capacities, shared training, education, the enculturation we receive from childhood, joint participation in social dynamics, and the repetition/re-contextualization/re-signification of successful communicative behaviours on new occasions. Biology, education, socialization, and episodes of successful repetition shape our dispositions to find similarities between the contexts of application and expectations of normalcy, which in turn have a stabilizing effect over the communicative practices.

However, people's perception and understanding of the communicative situation, as sign-makers, are different, since the contexts are not self-contained, isolated vessels that encapsulate meaning, but unsaturated and reciprocally interconnected aspects of different (re-)significations that can echo each other through unfinished citational chains. Accordingly, «there is no room in pragmatic contextualism for a conservative attitude towards semantic innovations and eccentricities»[36] or for a «polarized dichotomy between rigid contextualization and unconstrained decontextualization»[37]. Every speech act, text-act, or interpretation is at the same time linked to and partially constrained by past uses and is susceptible to innovative re-signification for which the sign-maker has to take responsibility. As Medina emphasizes,

> «[t]he contexts of use in which a term finds application can be expanded and diversified; or they can be narrowed down and homogeneized; and, accordingly, meaning *can* grow or shrink, become enriched or impoverished. But what a meaning *cannot* do is to become absolutely static, frozen in time»[38].

In the legal domain, consider the principle of precedent: new judicial decisions are citationally linked to (and echo) past holdings, but every new reconstruction of the norms implicit in the practice is also innovative, even if the degree of innovation may vary (from unnoticeable variations to declared overrulings). In the case of legislation, each statute is citationally linked to (and echoes) past statutes, but also to judicial decisions and doctrinal conceptualizations, and every new reconstruction of their meaning in a new context inherits some degree of similarity with past cases and transformative possibilities. This view is compatible with a diversification of the communicative and institutional roles of legislators and judges, but the making of a constitutional democracy cannot be subtracted from the *open-ended intercontextual constitution*[39] of our linguistic agency.

[35] DUNCKER 2019, 11.
[36] MEDINA 2006, 21.
[37] MEDINA 2006, 145.
[38] MEDINA 2006, 10.
[39] MEDINA 2006, 147.

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