STILL DEFENDING MODERATE COGNITIVISM IN LEGAL INTERPRETATION: A REPLY TO FOUR, EXCELLENT, CRITICS

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ABSTRACT
In this reply, I address many of the comments raise by the four commentators of this symposium on my book *The Making of Constitutional Democracy: From Creation to Application of Law*. In particular, I defend the moderate cognitivism in legal interpretation developed in the book from the sharp critiques by each of the authors of the comments.

KEYWORDS
constitutional democracy, moderate cognitivism, legal realism, semantic minimalism, contextualism

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1. *Introduction*

I cannot but begin this piece by expressing my gratitude to the four colleagues – Jorge Baquerizo Minuche, José Juan Moreso, Nicola Muffato, and Lorena Ramirez-Ludeña – who have taken a considerable amount of time off their busy personal and professional schedules to engage so carefully with many of the key claims in my book *The Making of Constitutional Democracy: From Creation to Application of Law* (TMCD, hereinafter)[1]. This is, honestly, the best sort of engagement/feedback a book author could hope for. I am also thankful because their probing critiques grant me an opportunity to reconsider and hopefully further clarify those claims. I do not think for a second though that clarification alone will suffice in addressing at least some of the critiques levelled at the position I develop in the book on matters of legal interpretation. If anything, then, my reply might end up emphasising even more some of the differences in the theoretical viewpoints we respectively assume.

To begin with, it is worth emphasising where we seem broadly to agree: namely, on the conceptual dependence of constitutional democracy on the possibility of distinguishing between the activities of law-creation and law-application. This is clearly the case with Baquerizo Minuche, Moreso, and Ramirez-Ludeña — while Muffato (surely due to his radical realist/contexualist stance) is less committed to this distinction, speaking instead of the "compatibility" of constitutional democracy with a «diversification of the communicative and institutional roles of legislators and judges»[2]. But agreement, arguably, stops here. Each comment takes issues with one or more aspects of the account of law I put forward in TMCD, sometimes with considerable overlap between the different authors. This is why, in what follows, I reply by topic/issue rather than by responding to the comments of each scholar in turn. This will hopefully help me in addressing the challenges raised in the clearest possible way.

I begin by offering a brief methodological clarification, motivated by Muffato's reconstruction of several of the key arguments I put forward in TMCD as *modus tollens* ones. I then discuss the version of the distinction between law-creation and law-application developed in the book, to address a doubt raised by Baquerizo Minuche. Following this, I analyse Baquerizo Minuche and Muffato's rejection of the moderate cognitivist picture of legal interpretation I offer, raising doubts in turn as to the internal consistency of realist accounts which claim to be compatible with the collective autonomy and action-guidance requirements. I then offer a rejoinder to Muffato's

* My utmost gratitude goes to Sebastian Lewis for making time, at very short notice, to provide me with invaluable comments on a previous draft.

1 SANDRO 2022.

2 MUFFATO 2023, 40.

criticism of my conception of the relationship between law and language, followed by consideration of the critical notes offered by Moreso on the role of pragmatics (and of the intention of legislators) in legal interpretation. Finally, I consider the probing comments by Ramirez Ludeña which cast doubt on the compatibility between the theory of interpretation and the concept of discretion I defend.

2. *A brief methodological clarification*

I need to start from a methodological point. In this contribution *Who fears the anti-literalist bogeyman? On Paolo Sandro's meaning-determinism*, Nicola Muffato reconstructs several key claims I make in the book as *modus tollendo tollens* arguments where one or more premises are implicit[3]. This allows him then to clarify, in some cases, which premises of my reasoning my "opponents" – interpretive sceptics and radical contextualists – reject[4]. While I will engage with the rejection of those premises in sections four and five below, I want to clarify at the start why Muffato's reconstruction of my argumentative strategy in those passages is not quite correct.

That a reconstruction of my argument like Muffato's could be offered was indeed anticipated by Felipe Jiménez in the first journal review of TMCD ever published[5]. Jiménez, presciently, explains how some key claims in the book could be reconstructed as modus tollens arguments and as such easily dismissed, being revealed then as nothing more than misguided examples of «reverse *wishful thinking*»[6]. I reckon this is another way to capture what Muffato calls, quoting Talbot Taylor, «dogmatic insistence on mistaking common sense for scientific truth» or «languages mythologies»[7]. But, to my rescue, Jiménez goes on immediately in his review to illustrate how such a reconstruction of part of my argumentative strategy in the book would be "uncharitable". This is so because said reconstruction would miss a crucial meta-theoretical premise which underlies the whole work: the thesis that legal theory does not «merely describe legal practices but can also have an impact on them»[8].

This is indeed a crucial remark, as it clarifies that the theorist cannot stand "neutral" and pretend to be doing pure description of legal practices (*à la* Kelsen), but always needs to take into account the potential pragmatic impact of her theorising vis-à-vis the object of study (law). Thus, what I am doing in those (reconstructed) modus tollens arguments is not to claim the falsity of rule-scepticism or meaning-contextualism *because* they are incompatible with our constitutional democracies; but, rather, to convey that we have reasons, because of said incompatibility, to question their truth (or theoretical cogency)[9]. This step is necessary, as I explain in the introduction of TMCD, because barring very few exceptions[10] the incompatibility between various types of legal realism and our existing political practices is not made manifest in the literature. But this is only the first step of an argumentative strategy which then questions squarely and on their own terms some of the most basic theses put forward by interpretive sceptics and radical contextualists (to name but two of my book's "targets"). In hindsight, however, I should have made even clearer in the text of the book made that this is a two-step (and not one-step) argumentative strategy, so as to avoid the materialisation of the incorrect (but *prima facie* arguable) interpretation put forward by Muffato.

[3] MUFFATO 2023, 1.1., 1.3.
[4] MUFFATO 2023, 2.0.
[5] JIMÉNEZ 2023.
[6] JIMÉNEZ 2023, 79.
[7] MUFFATO 2023, 34.
[8] JIMÉNEZ 2023, 79-80. This position has been famously defended, among others, by MacCormick and Weinberger, Ferrajoli, and more recently by Arie Rosen (2018).
[9] JIMÉNEZ 2023, 80.
[10] MARTÍ 2002; CHIASSONI 2021.

3. *On the distinction between creation and application of law (part one)*

The main thesis of TMCD is that the possibility of distinguishing between the activities of law-creation and law-application – a possibility more or less rejected, through different theoretical routes, by many common legal-theoretical approaches in the literature – is constitutive of the very existence of constitutional democracy. This is because, if there is no such thing as law-application and individual rulings (be by civil servants or judges) are always the product of jurisgenerative activity by those who adopt them, neither the principle of democracy nor what I call the action-guiding function of law can ever obtain (or at least not in any meaningful way). As a result, given that in my view legal realist accounts of all kinds (including moderate ones) cannot argue for the possibility of the distinction while remaining consistent with their fundamental theoretical assumptions, I end up putting forward a rather stark dichotomy before the reader: either we assume some version of "moderate legal cognitivism"[11] or, if we are to subscribe to a sceptical view of legal interpretation, we must effectively completely revise – if not abandon – our institutional and political theories and practices[12].

In his comment *That Obscure Object of Desiring Literal Meaning. A critique to "moderate" legal cognitivism*, Baquerizo Minuche suggests that I might be proposing a false dichotomy after all. For, as he correctly notes, there are surely several different ways of conceiving of the distinction between law-creation and law-application. And among those, must there not be one which a legal realist is happy to subscribe to, thus demonstrating the ultimate compatibility between legal realism and constitutional democracy? Let us take each point in turn.

Baquerizo Minuche correctly notes that Guastini holds some version of the distinction despite the fact he is one of the most prominent legal sceptics/realists. For him, law-creation amounts to the formulation of a legal provision, while law-application is the activity of ascribing meaning to it. Furthermore, norm-creation amounts to the production of a norm via interpretation of a legal provision, while norm-application is to use that norm as a premise in a deductive reasoning whose conclusion is an individual precept. What's wrong with holding this version of the distinction? To begin with, "law-application" and "norm-creation" appear here to be different ways to call the same activity (the ascription of meaning to a legal provision which returns a norm). This is surely confusing. Also, cannot there be cases in which the application of law is not an instance of norm-creation?

Most importantly, though, Guastini's conception of the distinction between creation and application of law is completely idle when it comes with the two requirements – the democratic and the action-guidance one – that I submit any theory of law must respect to be compatible with constitutional democracy. For if law-application is the activity of ascribing meaning to a legal provision but there are always multiple meanings which cannot be pre-determined and can be assigned via different interpretive canons, it is not clear what is the applicative relationship between the text and the norm supposedly ascribed to said text. To put it differently: if the text of the provision does not determine, even in part, the contents of the norm that it is being ascribed to it via interpretive operations, I do not understand in what sense we can meaningfully talk of *applying* anything.

Cannot a legal realist hold this version of the distinction while still saying that the text of the provision somehow determines at least the range of potential meanings which can be ascribed via interpretation to said provision? This is precisely what Guastini does in one of his latest restatements of his legal realist theory. In chapter three of TMCD, however, I show precisely why his latest and "moderate" scepticism is untenable, being plagued by an inescapable internal

[11] Baquerizo Minuche 2023.
[12] See Martí 2002; Chiassoni 2021.

contradiction at the meta-theoretical level which leaves him unable to ground non-contradictorily the "determinative" function of literal meaning within his theory[13]. As I will argue in the next section, this same meta-theoretical contradiction seems fatal for all realist attempts to strike a middle ground between moderate cognitivism and radical scepticism (according to which everything goes – the law is what the courts say).

4. *The alternative between cognitivism and realism/scepticism*

Both Baquerizo Minuche and Muffato explicitly reject the "moderate cognitivism" I defend in chapters 5 and 6 of TMCD. Interestingly, both of them appear keen to be able to meet the challenge I raise in the book – namely that a theory of law compatible with constitutional democracy must meet the democracy and action-guidance requirements – while at the same time retaining a broadly realist or sceptical view about legal communication and legal interpretation. Or at least Baquerizo Minuche certainly does. Thus, after criticising my moderate cognitivism as "naïve", he goes on to argue that other mixed theories are available which meet the challenges above without falling into the naivete of my account.

As to the latter, Baquerizo Minuche identifies an ambiguity in the theory of legal interpretation put forward in TMCD between what he finds are two different theses that I would be alternatively holding:

a) A juxtaposition between the ideas of "understanding" and "interpreting" a rule, based on the discussion of the rule-following paradox by Wittgenstein in chapter 6, which would broadly support the famous legal maxim *in claris not fit interpretatio*; and
b) The idea instead that interpretation is always necessary in legal adjudication (and so no naïve account of merely 'understanding' a rule is at play), but that there are conceptual reasons which make preference for literal or sentence meaning a necessity for a theory of legal interpretation.

Both of these theses are naïve, for Baquerizo Minuche, because they neglect the complex, stratified, constantly changing institutional nature of legal interpretation. As to the first, a case is never clear *before* interpretation and the law never applies "by itself" to its addressees. As a result, Baquerizo Minuche says following Pino, «in legal communication, there is an inevitable intermediation of the law-applying organs and interpreters in general»[14]. Talking of "understanding" obscures this necessary "step" of legal interpretation. And while the second thesis is less naïve than the first one – because it recognises that there is *always* an interpretation between a rule and its applications – still it would be inaccurate to hold that in a majority of cases interpretation is a cognitive activity aimed to discover the literal meaning of legal utterances. Correct answers to legal problems are not simply "discovered" in this way, and Baquerizo Minuche raises a number of objections, 'ranging from the lack of agreement of definitions such as "literal meaning" and "literal interpretation" to the more fundamental observation that even a literal interpretation has always a discretionary or creative component.

Let me clarify a few things. First, I discuss the juxtaposition of "understanding" and "interpreting" as qualitatively different activities in the context of the rule-following paradox (or considerations) raised by Ludwig Wittgenstein in his *Philosophical Investigations*. Against sceptical readings of it (including the famous "Kripkenstein"), I defend a non-sceptical reading of

[13] SANDRO 2022, 108-110.
[14] BAQUERIZO MINUCHE 2023, 13.

Wittgenstein's thought which rejects the idea that there must always be an "interpretation" (a creative or discretionary activity) between a rule and at least some of its applications (in particular, core or "normal" ones). This, for the reasons I show in the book, is the most convincing reconstruction if we take a comprehensive view of Wittgenstein's discussion and especially considering his remark that «there is a way of grasping a rule which is not an interpretation»[15].

Now, as I explain on page 247 of TMCD, at least three levels of discourse about legal rules and their interpretation which should be kept separate are instead routinely bundled up together:

- The philosophical level, at which the question is about rule-following *tout court*;
- The language level, at which the question is about the relationship between the words we use and their meanings; and
- The juridical level, at which the question is about legal rules and their application to particular cases.

There is nothing contradictory, then, in holding at the same time that:

a) when it comes to rule-following, including following the rules of language (that is applying our words), there is a distinction between the mental activity which takes place in core or normal cases (understanding) and the mental activity which takes place in all other cases (interpretation)[16]; and
b) when it comes to following legal rules, that there is a level of meaning (literal meaning) that pre-exist (pragmatic) interpretation and that, in a majority of cases, this level of meaning must be given preference by the legal interpreter vis-à-vis other potential meanings (and in particular the purposive one) for *conceptual* reasons[17].

In other words. In my view, there is a way of grasping a legal rule – in core or normal cases, that is, when the statutory language in question is precise (determinate) enough to clearly refer to at least some scenarios in the real world – that does not involve a creative or discretionary interpretive activity, and for the conceptual reasons I explain at length in TMCD that grasping of a rule – however you might want to call it – must be preferred to other and *potentially infinite* interpretations of said rule. This means that, contrary to what Baquerizo Minuche holds, there is not always a "creative or discretionary" component even in literal interpretation, because setting aside those other potential interpretations of the rule is a theoretical necessity ensuing from the concept of law and legal system we adopt.

Of course, this picture can be complicated by the existence, in any given legal system, of a significant variety of accepted interpretive approaches (or codes) which depart from what we routinely call literal interpretation, as well as by the fragmentation, complexity, contradictoriness, and overall obscurity of statutory language. I broadly refer to all of these as sources of "systemic discretion" in chapter 4 of TMCD, and I will discuss them more in section seven below. The point is that the more systemic discretion is pervasive in a legal system, the more even literal interpretations of a legal rule will have to be considered discretionary, as the scope of core or normal cases where the rule can be directly applied to the situation at hand will diminish exponentially.

[15] WITTGENSTEIN 2009: para 202. As I write in TMCD, this constitutes «an insuperable obstacle for any sceptical reading of his analysis».
[16] Cf. PINO 2021, 336.
[17] SANDRO 2015; cf also PINO 2021, 178.

Is another moderate objectivism possible? And more specifically, can a realist theory of legal interpretation nonetheless meet the challenges of collective-autonomy and action-guiding as raised in TMCD? Baquerizo Minuche thinks so, and he illustrates in broad strokes the theory of legal interpretation put forward very recently by Giorgio Pino as an example.[18] Pino's masterful 2021 book was published when I had already sent the final manuscript version of TMCD to the publisher, and so I could not have discussed it within the text. Neither can I now do justice to such an impressive work – a true treatise on legal interpretation, notwithstanding what the subtitle says –[19] in the context of the present reply. I will limit myself to two macro-observations.

First (and foremost), Pino explicitly affirms that legal interpretation is always an interpretation of *something* (a normative text) and due to this is has also always a cognitive dimension. Such cognitive element, in turn, would establish limits as to what can be considered an interpretation properly speaking and what instead goes beyond the realm of acceptable or legitimate interpretive outcomes[20]. I see, *prima facie*[21], two problems with this position. On the one hand, any theory of legal interpretation which *establishes* (viz *recognises*, *postulates*, etc) limits as to which interpretations can be considered valid (or correct, or justified, etc) cannot be considered a purely descriptive theory. This is intrinsically problematic because it contradicts one of the epistemic tenets of legal realism (at least in its Italian and North-American variant), and forecloses the possibility of maintaining any neat distinction between cognitive and prescriptive approaches to interpretation[22]. On the other hand, on Pino's account it is not immediately clear what grounds the cognitive dimension of legal interpretation. For unless Pino presupposes a similar distinction between understanding and interpretation as the one offered in TMCD and which Baquerizo Minuche rejects, the sceptical paradox of rule-following appears again, and there can be no determinacy – but only «the illusion of determinacy», as Kripke puts it[23] – even in "core" or "normal" cases of the application of linguistic meaning. In other words, unless Pino presupposes the very thing Baquerizo Minuche rejects in my theory as "naïve", it is not clear at all how the legislative text from which an interpretation departs can set any limits as to which interpretations of said text might be correct and which are not so (as in the "plus two" rule example in the *Investigations*)[24]. There would be no objectivity, not even in a thin sense – as intersubjectivity – in law.

Second, standing tall among the reasons which in my view establish the conceptual necessity for literal or sentence meaning in legal interpretation in most cases is the crucial yet widely neglected observation that the majority of events in which legal rules are followed or applied take place outside courtrooms[25]. That is, Baquerizo Minuche seems to presuppose the traditional model of legal communication according to which there are only two actors, legislatures (or law-makers in general) and courts. This in turn returns a skewed picture of legal interpretation, both in the sense of the cases considered (predominantly hard cases) and in terms of the characteristics of the interpreters.

Things change dramatically though once we acknowledge a) that legal officials not necessarily equipped with formal legal training constitute the vast majority of *official* law-appliers; and b) that laypeople more generally must be part of any theory of legal interpretation, as they constitute, in a

[18] PINO 2021.

[19] "Like a treatise".

[20] PINO 2021, 333-34. Pino adds that this cognitive dimension of interpretation depends not only on the text at stake, but also on the accepted interpretive or justifying criteria in that particular legal culture.

[21] As I said above, I cannot do justice to Pino's wonderful book in this piece, and I look forward to engaging with it properly in the near future.

[22] BAQUERIZO MINUCHE 2023, fn 52; PINO 2021, 17-20.

[23] KRIPKE 1982.

[24] WITTGENSTEIN 2009, para 201.

[25] SANDRO 2015; SANDRO 2022.

significant number of cases, the primary addressees of legislation and other types of regulative measures. To put it differently, I reject the (Kelsenian) idea that «in legal communication, there is an inevitable intermediation of the law-applying organs and interpreters in general»[26] as a misleading reconstruction of legal phenomena in modern legal systems. I have illustrated the reasons for this at length elsewhere[27]. For the purposes of this reply I only want to add that putting laypeople (and other non-judicial officials) back at the centre of law's interpretive picture appears to complicate the relationship between the two criteria of correctness of legal interpretation for Baquerizo Minuche/Pino. For if "appropriate justifications" more regularly than not licence a significant departure from the "starting normative text", it is not clear (again) how the law can fulfil the democratic and action-guiding requirements Baquerizo Minuche is keen to comply with[28]. This indicates that in determining the concept of "correctness" of a legal interpretation we cannot put on the same level the meaning of the text to be interpreted and the interpretive codes or justifications accepted in the system, at least if we want to put forward a theory compatible with the tenets of constitutional democracy. And so we go back to legal realism.

5. *Law and language, law as language: a rejoinder*

Muffato's razor-sharp contribution shares many of the criticisms levelled already by Baquerizo Minuche against the theory of legal interpretation I sketch in TMCD. Thus after rejecting my quadripartition of legal realism as "ill-conceived",[29] Muffato explains what characterises the "moderate scepticism" position and differentiates it from radical scepticism: the fact that not *all* interpretive ascriptions of meaning to a legal text are justified (for any context of application). He then goes to discuss the potential overlap with contextualist positions in philosophy of language, of which he identifies at least eight, to highlight that I am "almost right" (but not quite) in identifying meaning-contextualism as the "drop point" for legal sceptics. This is because the sceptic, according to Muffato, does not need to buy wholesale into any defined contextualist position, but can rather «pick out only some contextualist arguments against literalism»[30]. This leads him, with his first horn of his critique, to adopt Chiassoni's argument against supporters of the "conventional meaning variety" that these latter positions would be plagued by a form of "linguistic naturalism"[31]. As Muffato sums it up:

> «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»[32].

My answer, *ca va sans dire*, is the same as above where the exact same criticism is raised by Baquerizo Minuche. But Muffato does not stop here: he brings on a second line of attack, this time aiming at the conception of the relationship between law and language developed in TMCD. Let's have a look.

Muffato, following this time Claudio Luzzati, warns against the identification of law with a semiotic system. Languages, says Muffato, cannot be created *ex nihilo*: for «even instrumental

[26] BAQUERIZO MINUCHE 2023, 13.
[27] SANDRO 2015; SANDRO 2022.
[28] See KRAMER 2007, 139-140.
[29] MUFFATO 2023, 35.
[30] MUFFATO 2023, 36.
[31] MUFFATO 2023, 37, citing CHIASSONI 2019.
[32] MUFFATO 2023, 37.

languages and sophisticated conceptual apparatuses can only be elaborated starting from ordinary language words and common sense concepts»[33]. Furthermore, individual judges do «not administer directly the legal language», given that their decision as to the meaning of a specific text must enter into «performative citational chains» in order to have an impact on the whole legal system[34]. This is why, according to him, it is better to understand written law as a corpus of legal sentences that are constantly interpreted rather than as a language, and that statutory law «cannot be deemed to control the meaning of its provisions»[35].

On this point, there is no amount of clarification on my part that can bridge our disagreement. To begin with, it is not clear to me how Muffato can claim that new languages cannot be created *ex nihilo*, given that there in an abundance of examples not just in computer science, but also if one thinks about constructed auxiliary languages and so-called *a priori* ones in particular. Muffato's objection appears to be that, to be truly considered 'created', a new language should be elaborated in a biological and cultural vacuum, but if this is the case, I think the objection misses the mark by a large margin. For what is relevant about the distinction between natural and artificial or administered languages is not the context in which the creation takes place (which clearly cannot be in a vacuum), but the possibility to establish conventionally the (macro) pragmatic purposes and the semantic and syntactic rules (at least) of said languages. This is not possible in natural languages, which persist over time precisely because they can be used for whatever purpose the speakers want and whose rules resist 'fixing' by linguistic authorities.

Muffato denies that this can happen in legal language as well: courts do not administer legal language directly. But it is hard to reconcile this position with what happens in our legal systems, where (to take but one example) apex courts – both in civil and common law systems – are indeed capable of fixing the meaning of legislative or other regulatory utterances for the system. This appears perhaps clearer in constitutional adjudication in many jurisdictions, where judicial decisions dealing with primary legislation in order to make it compatible with constitutional norms have effects *erga omnes* immediately. More generally, one can consider the citation by other courts as *constitutive* of the impact that apical judicial decisions have on legal language only if one denies normativity to the system of precedent. But if precedents are binding on lower courts (whether *de jure* or *de facto*, the point being secondary here) – and for all other purposes, including administrative decisions, practices, and so forth – then it seems hard to deny that courts *directly* administer legal language when they widen or restrict the rules of applications of legal concepts and expressions. The same is true, *mutatis mutandis*, for legislatures. Thus law is, as I put it in TMCD following Ferrajoli, at the same time a *langue* and a *parole*, a tongue and a discourse: it consists of *both* rules (about how to speak and what to say) and the discourses created by applying those rules[36]. And it is an *administered* language, in which certain users have the power to change those rules and create new ones.

After criticising my general understanding of law as a language, Muffato goes on to question the specific theory of legal communication I advance in TMCD. In particular, he characterises it as a "fixed/invariant conventional code" and argues that it amounts to an instance of the well-known "fixed-code fallacy", as it takes for granted the existence a "fixed public plan" for human communication[37]. To be sure, I am in extremely good company, because other defenders of the "code model" of legal communication include Hart, Carrió, Bulygin, Diciotti, to name but a few. But, like them, I would not provide any real *positive* argument – as opposed to one of the *modus tollens* inferences discussed above – to justify its adoption[38]. On this charge, for reasons of space, I can only

[33] MUFFATO 2023, 37
[34] MUFFATO 2023, 37.
[35] MUFFATO 2023, 38.
[36] SANDRO 2022, 186.
[37] MUFFATO 2023, 38 (following Harris).
[38] MUFFATO 2023, 38 f.

point the interested readers to the argument developed in chapter five of TMCD. I hope they will agree with me that the three main tenets of the argument developed therein – the necessity to include laypeople in the theory of legal communication and interpretation; the particular nature of law as an administered language; and the fundamental different structure of text-based communication as opposed to "conversational" one – provide a viable positive case for the existence of a substantially conventional level of meaning in many cases of legal communication.

In any case, as it turns out this preliminary observation does not seem even central to Muffato's critique, because he appears to reject altogether the picture that both "fixed code" theorists as well as radical sceptics *à la* Kripkenstein share: a "foundationalist picture of meaning" which stems «from a reifying and decontextualizing perspective that pictures sentences and meanings as (objective or subjective, empirical or abstract) things, objects, entities»[39]. Instead, the meaning of our words cannot be severed from their particular contexts of use[40]. Muffato, in other words, defends an occasionalist picture of meaning, which is commonly held to be the most extreme version of contextualism in philosophy of language[41]. It is no surprise then that my attempt to strike a middle ground between Platonism – the picture of meaning which sees words as abstract objects governing their own application in all cases – and radical contextualism at the end of chapter 6 of TMCD does not win him over. Nor does clearly my argument as to the specificity of text-based communication[42], because for him even text always requires a "recontextualization"[43].

Considering the different and sophisticated theories of meaning available out there, my disagreement with Muffato will have to be fully explored on another occasion. Here I will limit myself to note what could be the initial point of our future debate. Muffato denies that the extrapolative dispositions of language-users can successfully ground the advance determination of at least some instances of the application of a rule vis-à-vis anyone's judgement about it[44]. By contrast, I think they can. He nonetheless claims that "past uses" are capable of constraining ("partially") every speech- or text-act or act of interpretation in general[45]. This is rather surprising, as it is not clear: a) how past uses can constrain (even partially) future ones, if not precisely through the extrapolative dispositions of language-users; and b) more fundamentally, how meaning can be constrained *at all* from an occasionalist viewpoint (given that all meaning is *determined* by the context of use on this picture)[46]. Therefore, to conclude, it seems to me that also Muffato's attempt at showing the compatibility of a sceptical view of legal meaning and legal interpretation with constitutional democracy is not free from the intrinsic tensions (and, possibly, contradictions) I have already identified for other similar attempts above (and in TMCD).

6. *The role of pragmatics in legal communication*

The theory of semantic minimalism I endorse in chapter 5 of TMCD is also questioned by JJ Moreso in his contribution *The Discreet Charm of the Formalism: Paolo Sandro on Creating and Applying the Law*. Moreso agrees with me that «there are limitations to applying conversational pragmatics to legal communication»[47] and that legal interpretation requires a different approach from ordinary

[39] MUFFATO 2023, 39.
[40] MUFFATO 2023, 39.
[41] See eg. BORG 2012, ch 1.
[42] SANDRO 2022, 193-94.
[43] MUFFATO 2023, 39 f.
[44] MUFFATO 2023, 39.
[45] MUFFATO 2023, 40.
[46] See the discussion in SANDRO 2022, 183.
[47] MORESO 2023, 23.

conversation. Both the original context [of creation of the utterance] as well as that of application must be taken into account to determine meaning. Legal interpretation is akin to translation in this respect[48]. Yet Moreso does not want to exclude the relevance of the locutionary intentions of the members of a collective law-making body towards the determination of the meaning of legislative utterances. This is because «[s]ometimes we cannot determine the meaning of legal texts without certain pragmatic operations» such as implicatures or more general pragmatic enrichment[49]. He illustrates the point with an example from the jurisprudence of the Spanish Constitutional Court in which the Court interpreted the "silence" of a constitutional provision forbidding the Civil Administration from imposing penalties that may imply the deprivation of freedom as authorising, arguing *a contrario*, the Military Administration to do so. This is clearly a pragmatic argument – arguably an implicature, only one out of many. What is relevant, for Moreso, is that they are crucially dependent on *both* the context of enactment as well as of judicial interpretation.

For Moreso, then, the relevance of pragmatic enrichment to legal interpretation requires that the semantic minimalism for legal meaning I rely on (and partially modify) in TMCD must be rejected. As he puts it, «it is impossible to fully understand the content of legal texts without considering pragmatics»[50]. And so the text of legislative enactments is "relevant" – but possibly nothing more –[51] «for determining the content of our legal obligations, rights and power»[52]. Although he immediately adds that «pragmatic operations are compatible with the previous determination of the normative solution of individual cases»[53].

I must confess I am not sure about the extent of the disagreement between myself and Moreso. The theory of legal meaning advanced in TMCD does not exclude a role for pragmatics in legal interpretation altogether (as Moreso acknowledges at first): it excludes that a certain type of pragmatic enrichment based on the situational context of interpretation of a legal text is *always* necessary, i.e. for and in all contexts of application, to determine the meaning of said text (or of a portion of it)[54]. In other words, and as I have already highlighted before in this reply, I take a minimalist theory of meaning as necessary to explain how literal (or sentence) meaning can *constrain* the interpretation of text-acts, especially where a) the "author" of said text-acts is a collective body; and b) the contexts of application are potentially infinite and the context of creation (with the exception of the co-text) is opaque to the interpreters[55].

In this respect, denying relevance to the locutionary intentions of members of a legislature (*qua* law-making body) towards the determination of meaning does not exclude that pragmatic enrichment might be needed, for some contexts of applications, because the text-act is underdetermined (or, perhaps, because it produces "absurd" results). The point is that such pragmatic enrichment will be of a counterfactual, "objective" type – a reconstruction of the "will" or "intention" of an *ideal* (or rational) legislator[56]. But this could not be any other way, given that

[48] MORESO 2023, 23.

[49] MORESO 2023, 23, also noting the similar approach in PINO 2021.

[50] MORESO 2023, 25.

[51] MORESO 2023, 25 f., quoting Greenberg.

[52] MORESO 2023: 25. Other ways of putting the same point, for Moreso, are to say that legal texts might display potential meanings (following Dancy) or that they may determine the content of the law only *pro tanto* (following Asgeirsson). I won't be pressing the point here, but I do not think these expressions are equivalent.

[53] MORESO 2023, 25.

[54] SANDRO 2022, 201-202.

[55] SANDRO 2022, 201.

[56] Hence tenet (iv) of the minimalist semantics discussed in SANDRO 2022, 202. The more I think about it, the more I am convinced that pragmatic enrichment is counterfactual ("objective") even in the case of ordinary communicative exchanges, given that we do not have (presently) access to each other's mental states. One of the crucial differences between speech-act and text-acts, as I explain in SANDRO 2022, 195, is then precisely that legislative text-acts are "closed" and "unilateral", whereas in an ordinary conversational exchange we are always capable of asking our interlocutor: "is that what you meant?".

it is not far-fetched to think of examples in which a large numbers of members of a legislature might pass a bill they have not fully read or understood (let alone authored in the first place, which is very much the normal case).

Therefore, the problem on a contextualist picture of meaning is two-fold. On the one hand, its notion of "what is said" – being wholly dependent on speaker's intentions and retrievable only after pragmatic enrichment through inferential reasoning –[57] cannot be straightforwardly applied to the case of legislative enactments. On the other, and more fundamentally, the text itself cannot have any *direct* relevance towards the determination of meaning and so even less *constrain* interpretation[58]. In TMCD I defend instead a conventional notion of "what is said" in legal communication, one that is determined by the text and the co-text of the legislative (often complex) utterance[59]. Clearly, this notion of what is said won't return, for each and every context of application, a determinate result. In these cases, pragmatic enrichment is necessary – which will depend not only on the features of the individual context of application but also on the specific interpretive codes or canons accepted in that jurisdiction. This implies that, far from "disproving" it, the examples from Spanish and Italian Criminal Codes that Moreso discusses are wholly compatible with my approach. They are cases of ambiguity of the term 'man' in those legislative frameworks, which thus make the provisions in question under-determined at least vis-à-vis some (but not all) contexts of applications.

Once more, the consideration that the vast majority of acts of application of law takes place, non-problematically, outside courtrooms becomes relevant here. For it would be foolish to dispute the amount of legal agreement which takes place routinely among laypeople and officials alike. For example, there can be little if any doubt, in most developed legal systems, of what speed motorists are expected to limit themselves to in normal scenarios[60]. The theory of meaning I propose is capable of accounting for that – and more generally for the vast amount of legal agreement on what the law requires which takes places every day outside courts – in a plausible and non-contradictory way, while allowing for the need of pragmatic enrichment in cases where some features of the context make the conventional meaning underdetermined. Contexualist theories, as I have argued already in TMCD and in this reply, cannot do so without displaying an intrinsic tension and, ultimately, contradiction with their theoretical premises. For text (or sentence/literal meaning in general) cannot play any special role vis-à-vis other contextual factors within an internally consistent contextualist position[61].

7. *Discretion, semantic minimalism, and the distinction between law-creation and law-application (part two): Ramirez Ludeña's challenge(s)*

Last, but certainly not least, let us consider Lorena Ramirez-Ludeña's powerful challenge vis-à-vis the core theoretical framework developed in TMCD. Is my account plagued by an internal tension/inconsistency?

In her comment *Creative interpretation? The distinction between application and creation in hard cases* Ramirez-Ludeña starts by reconstructing the unified account of discretion in chapter four

[57] I am following BORG 2009 in noting that moderate contextualism is untenable (it necessarily "slides back" towards radical contextualism).

[58] See discussion in SANDRO 2022, 183 fn 96.

[59] SANDRO 2022, 203-05.

[60] WATSON 2023.

[61] In other words, it is always author's intention which is constitutive (and determinative) of meaning. See for example NEALE 2004 where he tries to reject the association of intentionalism with "Humpty Dumptyism" by asserting that sentence meaning does not constrain which potential meanings an utterance can express (this would be clearly contradictory for him), but what kind of "genuine communicative intentions" a speaker can hold in uttering it.

of TMCD, carefully illustrating the differences between normative, interpretive, and systemic discretion. Her first doubt is about the role of intentionality within the framework I have developed, in particular «what agents and facts are relevant to determine that there is intentional delegation (express or tacit)»[62]. This prompts a second, crucial, set of questions: are normative and interpretive discretion really distinguishable after all? And if that is the case, to what extent is the distinction (and the sub-distinction within interpretive discretion) useful towards the differentiation of law-application from law-creation? Ramirez-Ludeña illustrates with the example of the Spanish Supreme Court extending the scope of application of the term "violence" within the crime of "coercion" to the use of psychological coercion or the use of force on things. She asks: «[i]s this a case of normative or interpretive discretion»?[63] Was this a case of tacit delegation of decision-making power to the courts, given the opportunities to specify the legislation not taken by the Spanish Parliament? Or if it is interpretive discretion, is it semantic or systemic? And more importantly, how is the alternative between the two overall categories of discretion relevant for distinguishing between law-application and law-creation, given that this latter can occur in either case?

The doubts do not stop here. In the following section, Ramirez-Ludeña questions whether the semantic minimalism defended in chapter five of TMCD can "sustain" the distinction between semantic and systemic discretion. For is not precisely the case that a semantics for the legal domain must pay attention – rather than leave out from its scope – elements which are normally understood as interpretive tools and conventions?[64] And again, what is the role of intentions – and *whose* intentions? – in creating both the text and the co-text of legislative utterances? And how are we to understand the relationship between the norm expressed by a minimal literal content and other interpretive tools? This position, in other words, would not allow us to «distinguish between discretionary application and creation of law, for it would provide us with a reconstruction only of clear cases, not those in the penumbra»[65]. Moreover, she adds, the very concept of semantic discretion appears questionable, since «it seems that in this area there is either unproblematic application (without discretion) or creation»[66]. Overall, Ramirez-Ludeña thinks I face a dilemma with my theory: If I want to properly account for the concept of discretion, distinguishing it clearly from law-creation, I must abandon semantic minimalism; but if I "stick" with the latter, then my unified theory of discretion (or at least part of it) becomes superfluous.

Finally, Ramirez-Ludeña is not convinced by my acknowledgement, at the end of chapter six of TMCD, that due to the (contingent) existence of systemic discretion in every modern legal system, even ascriptions of meaning to a legal provision which are outside the communicative frame as developed in my book could be considered instances of law-application. What do the courts do in those cases? Are they creating law, or simply applying it (albeit discretionarily)? This means, once again, that on the picture of legal interpretation I sketch it is not clear how to draw neat boundaries between filling gaps (in which the judge would create law) and "adjudicative" interpretation, whereas the court instead opts for one of the potential meanings derived from applying the interpretive tools and conventions existing in that jurisdiction[67]. How cannot this second activity, she wonders, be properly considered a case of law-creation as well?

I try to address Ramirez-Ludeña probing challenges in what follows. My hope is that, if my answers are not convincing, we might continue this incredibly fruitful (certainly for me) discussion elsewhere.

[62] Ramirez-Ludeña 2023, 46.
[63] Ramirez-Ludeña 2023, 48.
[64] Ramirez-Ludeña 2023, 49.
[65] Ramirez-Ludeña 2023, 50.
[66] Ramirez-Ludeña 2023, 50.
[67] Ramirez-Ludeña 2023, 52.

First, what is the relationship between the unified account of discretion I develop in chapter four of TMCD and the overall distinction between law-creation and law-application I put forward? Is the former even necessary to ground the latter? And if so, how? To keep it brief, the overall distinction I draw between normative and interpretive discretion is necessary to identify the concept of 'bound' law-application – where there is no normative discretion, interpretive discretion is negligible, and the decision-making modality is obligatory – and distinguish it from discretionary and what I call (following Ferrajoli) "autonomous" law-application.[68] To simply say that there is *no* discretion in bound law-application would be theoretically coarse, as the discussion of the different characteristics of normative vis-à-vis interpretive discretion in chapter four of TMCD indicates. For while we could certainly imagine a legal system where the presence of normative discretion is a "yes or no" matter (because in that system normative discretion is recognised only in the presence of certain explicit linguistic markers), no amount of conventional rigidity in regulating the presence of legal discretion can eliminate completely the presence of factual and semantic one. Thus, in a significant sense, the explanatory powerful quadripartition of law-application is directly dependent on the account of discretion defended in TMCD.

In turn, the distinction between bound and discretionary (and autonomous) types of law-application has significant consequences for a theory of judicial review, especially when considering the question of whether a court is legitimated to adopt administrative acts *in lieu* of the relevant administrative decision-maker[69]. This analytical clarification of the different types of law-application would simply not be possible on the basis of the other accounts of discretion that exist in the literature: for the previous distinction between *administrative* and *judicial* discretion, as well as the one between *weak* and *strong* discretion, both confuse rather than clarify matters.

Second, as to the role of intentions within my account of discretion, how do we distinguish tacit normative discretion from interpretive systemic discretion?[70] As I explicitly say in chapter four of TMCD, there might well be cases where the two "overlap completely"[71]. This is particularly true when it comes to potential delegation of decision-making power through the use of vague concepts and expressions in legislative acts. I specifically alert that in these cases, as opposed to when the delegation is clearly signalled by the use of specific linguistic markers in the text of the legislation, the delegation of decision-making power is inherently more problematic, giving rise to doubts as to how exactly we should understand it. In any case though, as already indicated above, I understand "intention" and "intentional" necessarily in an objective sense, given that the reconstruction of a mental state must always be counterfactual.

[68] SANDRO 2022, 242-43.

[69] According to my theory, this would be wholly legitimate in cases involving bound law-application, and possibly legitimate (depending on the type of discretion at play) in case of discretionary law-application. I could not develop this point further in TMCD for reasons of space.

[70] I adopted the umbrella term 'systemic discretion' to try and capture all those contingent sources of discretion vis-à-vis interpreters which are not either clearly semantic (ie due to ambiguity, polysemy, etc) nor factual (ie related to the evaluation of the factual circumstances of application), but are inherent in the working of any modern legal system. I thought that such a category would be helpful from the analytical point of view with potential pragmatics benefits, because while semantic and factual discretion cannot likely be significantly reduced overall, at least some of the sources of systemic discretion – for example, the normative fragmentation and contradictoriness of the legal system – can (and arguably should) be. This was particularly important to me then precisely because – and not despite the fact that – the greater the degree of systemic discretion present in a system, the more officials could find themselves equipped with 'unintended' normative discretion. That is, I was well aware from the start that it would be virtually impossible to offer a principled distinction in general between cases of tacit normative discretion and systemic interpretive discretion. Once again, there are too many contingent variants at stake which cannot simply be theorised under a model which seeks to be general and multi-jurisdictional (like mine). See SANDRO 2022, 164-67.

[71] SANDRO 2022, 164.

This means that it is effectively always the practice which develops that determines the criteria to distinguish (if possible) between different types of discretion existing in each system[72].

So, in a nutshell, Ramirez-Ludeña is right when she writes that «controversies will arise» [in this respect] «that cannot be resolved by his account»[73]. But I believe that no *general* account of discretion can resolve such controversies, because how best to reconstruct theoretically each example will be a function of how the practice in that system develops (and other contingent features of that jurisdiction). And there might not be clarity even within a single system, as the debate in Germany over the *unbestimmte Rechtsbegriffe* indicates[74]. But, unlike Ramirez-Ludeña, I do not think that that takes away from the benefits of having a clear conceptual distinction which can be applied without issues at least in a relevant number of cases[75].

Third: is the sub-distinction between semantic, factual, and systemic interpretive discretion compatible with the modified version of semantic minimalism defended in TMCD? And more specifically, how can we properly distinguish between semantic and systemic discretion on this picture? Does not the former entail the latter? I did not specify the relationship between the minimal literal content of a statutory provision and other interpretive tools in TMCD because said relationship will depend significantly on the number and types of interpretive tools and conventions accepted in each legal system. As I said already above, I think it is a feature – and not a bug – of the theory I defend that it can (non-contradictorily) account for "clear cases" through the conceptual necessity for a conventional type of meaning[76], while leaving open how best to reconstruct unclear (or difficult) ones. Nevertheless, Ramirez-Ludeña's question remains: does a legal norm that is obtained via accepted interpretive tools and which, as such, goes beyond the literal content expressed by the provision in question count as law-creation or discretionary law-application?

Strictly speaking, all cases where the norm applied by a court goes outside the linguistic frame (which always includes the co-text) are problematic from the perspective of collective autonomy. But modern legal systems are not made up only by democratically-legitimated law. As I said at the end of chapter six of TMCD, this is precisely where the distinction between *lex* and *ius*, defended in chapter two as key to the development of modern constitutionalism, comes back to the fore[77]. The interplay between the two sources of law is complex, and will change depending on the specific features of legal culture in each system. Therefore, in my view, whether to consider a norm created via interpretive tools which goes beyond the "linguistic frame" of the text as an instance of either law-creation (or judicial construction, or interstitial legislation) or (discretionary) law-application will depend on a number of factors which resist general theoretical treatment: how many and what kinds of interpretive canons are accepted in that system; how consistent are courts in applying them; whether there is more often than not a contrast between different accepted interpretive canons; and what type of departure do they license from the literal meaning of the legislative text-act. Thus in a system with fewer accepted interpretive tools which are historically and consistently applied by courts and do not usually give rise to multiple conflicting interpretations, it will be more arguable that said norms

[72] SANDRO 2022, 164. This means that in theory a practice could develop that even when recognise interpretive discretion even in case of specific linguistic markers (the question would then be one of intra-systemic relation between the legislature and the courts of that system).

[73] RAMIREZ-LUDEÑA 2023, 47.

[74] SANDRO 2022, 148-49. As a result, I do not think I have all the elements to answer the question as to whether the decision by the Spanish Supreme Court to extend the concept "violence" to include also psychological and coercion or the use of force on things should be understood as an act of creation of law. Whether the court is creating new law or applying existing one will depend ultimately on two axes: how vague terms (like violence) are considered in that system, and how many, of what kind, and how consistently applied further interpretive tools and conventions are.

[75] RAZ 1979, 93-94.

[76] RAMIREZ-LUDEÑA 2023, 50 explicitly acknowledges this.

[77] SANDRO 2022, ch 2.

are still the product of law-application (in the sense of *ius*) rather than creation[78], whereas in a system at the opposite end of the spectrum that would not be the case[79].

But if we acknowledge that norms created outside the linguistic frame via interpretive tools can still be considered as an instance of discretionary law-application rather than law-creation, does not that significantly reduce the explanatory role/usefulness of semantic minimalism for legal interpretation? I do not think so. First and foremost, semantic minimalism is still the only theory of meaning capable to account non-contradictorily for the vast majority of cases of law-application in our modern legal systems, which take place outside courtrooms. Second, the more the meaning of the provision obtained via the accepted interpretive tools in difficult or hard cases is detached from its literal one(s), the more said norm will have to be understood as an instance of *ius* rather than *lex*. That is, the more the norm is outside the linguistic frame established by the relevant text (plus co-text), the less a court will be able to justify their decision through the formal democratic legitimacy of law-application and will have instead to resort to the substantive justificatory force of judge-made rules and principles[80].

Overall, the analytical account put forward in TMCD is capable of identifying the two core cases of law-application and law-creation respectively: clear cases where the literal interpretation (as understood in my book) suffices to determine the legal meaning of a provision and difficult cases where legal officials create a new norm that is not based either on the linguistic frame established by the relevant text nor on one of the accepted interpretive tools or codes in that jurisdiction. In between these two, there is the area of discretionary law-application in hard cases which can also be understood as law-creation depending on the specific practices and conventions of that jurisdiction, and where the literal meaning of the provision (as obtained through semantic minimalism) still represents a cognitive yardstick against which further interpretations of the norms can be evaluated.

8. *Conclusion*

I want to express again my utmost gratitude to Jorge Baquerizo Minuche, José Juan Moreso, Nicola Muffato, and Lorena Ramirez-Ludeña for their engagement with my work. While differences clearly remain, especially on the alternative between moderate realism and cognitivism, their sharp criticisms have pushed me to reflect so much more carefully about many of the claims in the book. That I will keep doing so for quite some time is a testament to the intellectual quality of their contributions.

[78] In such a system, indeed, there would be little if no difference between semantic and systemic discretion (in this respect).

[79] SANDRO 2022, 221.

[80] So effectively the decision could be considered at the same time a case of law-creation from the perspective of *lex* and of law-application from the perspective of *ius*.

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