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Vittorio Villa*

Theory of Legal Interpretation and Contextualism

Replies to Kristan, Poggi and Vignolo

In this essay I will attempt to answer the critical observations made by Kristan, Poggi and Vignolo of my theory of legal interpretation. I express the opinion that, apart from some gaps and defects to be addressed, my theory can satisfactorily overcome this criticism. In answering these observations, I again stress the fruitfulness of moderate contextualism as a semantical point of reference for legal interpretation, also striving to deepen the notion of "background context", and to clarify the differences among four types of interpretative disagreements. I also maintain that the most important and problematic issues in interpretative legal practices today are those which express, as in bioethics, *profound intensional divergences*.

Keywords: theory of legal interpretation, meaning, contextualism, background context, interpretative disagreements, profound intensional divergences

1 A CONTEXTUALIST APPROACH TO LEGAL INTERPRETATION

Andrej Kristan's proposal to devote two issues of the journal *Revus*, in their thematic section, to a discussion of my theses on the theory of legal interpretation is obviously very gratifying for me and I thank him for it, just as I thank my colleagues (Kristan himself, Poggi and Vignolo) who have collaborated on this initiative.[1] But the thanks are twofold because their essays have highlighted

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1 The first two comments — Francesca Poggi, Contextualism, But Not Enough. A Brief Note on Villa's Theory of Legal Interpretation, *Revus* (2012) 17, 55–65, and Massimiliano Vignolo, A Relativistic Note on Villa's Pragmatically Oriented Theory of Legal Interpretation, *Revus* (2012) 17, 67–75 — refer to my essay: Vittorio Villa, A Pragmatically Oriented Theory of Legal Interpretation, *Revus* (2010) 12, 89–120. The third comment — Andrej Kristan, Spremenba sodne prakse: izziv za kontekstualiste. Kritična beležka o novi knjigi Vittoria Ville, *Revus* (2012) 18; Italian version: Una sfida per i contestualisti: i disaccordi senza errore. Nota critica sul nuovo libro di Vittorio Villa (unpublished manuscript) — is instead in this issue, together with this reply of mine, and only refers to my subsequent book: Vittorio Villa, *Una teoria pragmaticamente orientata dell'interpretazione giuridica,* Torino, Giappichelli, 2012, which appeared after Poggi and Vignolo had written their comments. In my book a few points that are the subject of critical analysis in the two previous essays, especially that of Poggi, are

the gaps and unsatisfactory aspects of my work, and have therefore forced me to re-examine some parts of it, both from the point of view of the reconstruction (of concrete interpretative cases), and from the point of view of construction (as regards developing my own perspective).

I nevertheless remain convinced of the validity of my approach, although certainly some points need re-examining and some parts need to be integrated. I will list, for the moment very schematically, the defects that seem to me the most important in my book on interpretation, aiming to go into the details of some of these issues in the continuation of the essay.

First of all, the notion of "context" is not developed adequately: a satisfactory configuration is not given of the three dimensions in which context develops, and the relationship of mutual interaction between them is not shown. More specifically, the *background context* is shaped in a static way, also in contrast with the dynamic approach selected by my theory, as if the only role of such a type of context, in interpretative activity, were to determine, following changes in the background assumptions that are part of it, changes in the conventional meaning of the expressions contained in legal sentences.

Secondly, there is no clear distinction between the different ways in which interpretations of the same legal sentence can possibly diverge from one another, *synchronically* or *diachronically*, and therefore we do not get a sufficiently clear picture of the important difference between cases in which the semantic divergence concerns the meaning (or *intension*), and cases in which it concerns the *reference* (or *extension*) of the expressions contained in the disposition. The aim of a distinction of the kind should be to separate cases in which such divergences depend on mere errors made by one of the interpreters sequentially involved in the interpretation of the disposition (*disagreements due to error*) more clearly from those in which the divergences are instead of a different nature (*faultless disagreements*). The latter series includes some *deep intensional divergences*, which may for instance concern expressions which an Italian legislator uses to characterize the so-called *general clauses*, such as "giusta causa" (art. 2119 cod. civ.), "diligenza del buon padre di famiglia" (art. 1176 cod. cov.), "termine congruo" (art. 1454 cod. civ.), or "comune sentimento del pudore" (art. 529 cod. pen.). The interpretation of such phrases involves bringing in *background ethical conceptions*, which may also appear radically alternative to one another, and therefore orient interpretation of the phrases in a totally divergent way. It also seems to me, by the way, that this type of profound intensional divergence, of an evaluative character, does not receive sufficient attention in the comments by Kristan and Vignolo.

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further developed and in part modified. In my reply I will try to take account of this difference in the sources used, which determines some misunderstanding on some points of my theoretical discourse, especially by Poggi.

In this essay I will endeavour, as far as possible, to throw light on the points indicated above, or at least to point out what the most appropriate research pathways should be in order to develop them in a more adequate and complete way. Here, in this introductory paragraph, I would like to highlight a fundamental methodological profile of my work, concerning the way in which I have used the theory of meaning, and particularly the contextualist semantic approach. In my book I defend the thesis of the existence of an *internal relationship* between interpretation and meaning, whereby every theory of interpretation necessarily has to develop, or at least to presuppose (possibly implicitly), a theory of meaning. In my book, the theory of meaning performs two fundamental tasks: a *reconstructive task*, in the sense that it allows me to bring to light more clearly the semantic presuppositions (certainly wholly implicit) of the various conceptions (*interpretative formalism*, *interpretative antiformalism*, *mixed theories*) that I examine; and a *constructive task*, in the sense that I use it as one of the basic elements to set up my theoretical apparatus.

In constructing my theory I chose *moderate contextualism* as a semantic reference point.[2] Now it is important to clarify, in this connection, that the adoption of this theory of the meaning must not be seen in an uncritical way as a mechanical operation of carrying over that semantic theory into interpretation theory. Besides, in my book I qualify, in terms of "acceptable level of adjustment",[3] the goal towards which the "dovetailing process" between the two theories should tend, thus indicating that the transplantation of that semantic approach into legal interpretation theory is neither easy nor obvious.

It also needs to be specified that the methodological indications that guided me in this operation of transplantation aimed much more to guarantee the explanatory power and general consistency of theory of legal interpretation, and the reinforcement of some values at the basis of interpretative activity, rather than the level of completeness and precision with which the contextualist semantic theses were used. In this connection, I have tried to take from the

2 In doing this I particularly use, as regards the background contest, the pioneering work of Searle (see in particular John Searle, *Intentionality. An Essay in the Philosophy of Mind*, Cambridge, Cambridge University Press, 1983; Italian translation: *Della intenzionalità. Un saggio di filosofia della conoscenza*, Milano, Bompiani, 1985, 138–161; John Searle, The Background of Meaning, in J. Searle, F. Kiefer & M. Bierwish (eds.), *Speech Act Theory and Semantics*, Dordrecht, Springer, 1980, 221–232; and, as regards the most specifically contextualist semantic theses, the volume by Recanati (François Recanati, *Literal Meaning*, Cambridge, Cambridge University Press, 2004), of fundamental importance for the development of my theses, and then the contributions by Travis (Charles Travis, *The Use of Sense. Wittgenstein's Philosophy of Language*, Oxford, Clarendon Press, 1989; Charles Travis, *The True and the False*, Amsterdam, John Benjamins, 1981; Charles Travis, Pragmatics, in B. Hale & C. Wright (eds.), *A Companion to the Philosophy of Language*, Blackwell, Oxford, 1998, 87–107) and Carston (Robyn Carston, *Thoughts and Utterances. The Pragmatics of Explicit Communication*, Oxford, Blackwell, 1982).

3 Cf. Villa 2012 (n. 1), 47.

contextualist approach the pieces that seemed to me most useful for achieving this "dovetailing" operation; this also means that I did not feel wholly bound to accept the whole theoretical construction of contextualism, in one of its possible versions, with everything that goes with it.

Apart from the differences between the various versions, there is at any rate a fundamental intuition of semantic contextualism that I have maintained for a long time, even before becoming aware of the presence of contextualist positions in contemporary philosophy of language:[4] it is the one according to which the *conventional linguistic meaning* of the expressions used in ordinary language (as also in legal language), and therefore, for this very reason, the meanings of the sentences that include it, underdetermine *full meanings* which are produced, in a *dynamic and sequential* process, by interpretative activity that is, always and necessarily, *contextually oriented*. The context, in its three dimensions (on which we will dwell more later on), is always a necessary element of interpretation: there is no full propositional meaning without the intervention of context.

The point relating to the dynamic construction of meaning, in a process that goes *through several phases* and *through several hands*, has always seemed fundamental to me for interpretation theory, also because it is perfectly harmonized with a theoretical perspective of a general character that, in the wake of Hart and Dworkin, looks on law as a *normative social practice*. Besides, I am not at all sure that, as an alternative to contextualism, the use of another recent theory of meaning (*semantic relativism*), as suggested by Kristan and Vignolo, can allow one to reach the same results.

However, I will return to this point later. For the moment I am concerned to stress that conventional meaning (but it would be better to say the "conventional dimension of meaning") has an important role in my theory, but not because, in the reading that Kristan offers of my position,[5] it can serve as a bulwark against the accentuated variability of interpretations of the same legal sentence, and thus guarantee the principle of the certainty of law. Here Kristan introduces too strong a reading of the function that this dimension of meaning has in my theory.

There is no doubt, however, that the meaning conventionally assigned to the expressions of ordinary language (by a *community of speakers*), and to the expressions of legal language (by a *community of jurists*), acts as a frame and a constraint for the interpretations that will stem from it. Let us look a little more closely at this role of conventional meaning.

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4 Two previous versions of my theory of interpretation, worked out without the help of semantic contextualism, whose existence I did not know of then, are contained respectively in my two books *Conoscenza giuridica e concetto di diritto positivo*, Torino, Giappichelli, 1993, 289–331 (where I already speak of *pragmatically oriented* theory of legal interpretation); and *Il positivismo giuridico. Metodi, teorie e giudizi di valore*, Torino, Giappichelli, 2004, 201–227.

5 Cf. Kristan 2012 (n. 1), 132.

In the first place, *negatively*, the conventional semantic dimension can allow us to recognize certain types of *erroneous interpretation*: precisely those that in an absolutely unjustified way go outside the semantic frame contained in the sentence. Here we can use the epistemological scheme of *negative realism*, which Eco uses to say, speaking both of texts and of aspects of the world, that "ogni ipotesi interpretativa è sempre rivedibile….., ma, se non si può dire definitivamente se una interpretazione sia giusta, si può sempre dire quando è sbagliata";[6] and, in a way which for me is significant, given the frequent use that I make of the example of the legal provision regarding vehicles in a park, Eco, polemicizing with the postmodernists, also affirms that by the word "table" we can refer to an infinity of things ("kitchen table", "desk", "set of atoms", etc.), but certainly not to a "pedal vehicle."[7]

In the second place, *positively*, this semantic dimension orients the *intensional* and *extensional* processes of construction of full meaning. In my theory, the dynamic construction of meaning concerns both the *extension* (the delimitation of the field of reference of a term and the decision on the insertion of a single object inside it), and the *intension* (the construction of a possible full notion beginning from what I call *concept*, and that is to say the conventional semantic starting point).

This conventional semantic dimension, nevertheless, is strongly limited by inevitably having a *contingent* nature. It is able, indeed, to change, even radically and not always predictably, due to changes occurring in the assumptions that belong to the background context. In our culture, beginning from the 1970s, the process of the *costituzionalizzazione*[8] of the legal order produced the interesting phenomenon of *constitutionally oriented* interpretations. This can be considered as a change in the background context – in its "local" peripheral part – belonging to our community of jurists (in the broad sense of "jurists"), in that it implies a sort of methodological directive according to which jurists and operators must, always and in all cases, interpret legal sentences on the basis of constitutional principles, therefore attributing the meanings that are best harmonized with those principles. In my book, as an example of a change in the basic conventional semantics of some expressions of legal language, I chose the most recent interpretations of the phrase "comune seentimento del pudore" (*common sense of decency*), to which I will return at the end; but many other examples could be given (to mention just one, "responsabilità extra-contrattuale" in the private sphere). By the way, I believe that constitutionally oriented

6 Umberto Eco, Di un realismo negativo, in M. De Caro & M. Ferraris (ed.), *Bentornata realtà. Il nuovo realismo in discussione*, Torino, Einaudi, 2012, 105.

7 Eco 2012 (n. 6), 97–98.

8 For an acute and penetrating analysis of this phenomenon, cf. Riccardo Guastini, La 'costituzionalizzazione' dell'ordinamento italiano, Ragion Pratica (1990) 11, 185–206.

interpretations represent a very interesting field of investigation (incidentally not yet sufficiently explored) upon which the reconstructive scheme given by pragmatically oriented theory could have something to say.

There is thus no sufficient grounds for the criticism that Francesca Poggi[9] makes of my thesis regarding the presence of a *completely non-contextual conventional meaning*. In my book, which Poggi did not take into account in her comment, I challenge the stability and rigidity of this conventional semantic basis, also for the purpose of rejecting the traditional dichotomic distinction between *easy cases* and *hard cases*, seen as an objective and prejudicial distinction in relation to interpretative activity.[10]

Things being so, I do not believe that a possible methodological prescription for judges to always respect the conventional initial meaning of the expressions contained in the language of the legislator can help to fill the "certainty deficit" by which our legal order of today is afflicted. The conventional semantic frame does not adequately guarantee this principle. In any case, for my part I do not believe that the principle of certainty of law can be minimally guaranteed by a stability of interpretations that is consequent on the rigidity of conventional meanings. I believe, instead, that this principle can be more guaranteed, certainly in a way which is always tendential and balanced with other principles, in situations in which there occurs, within a given legal culture, a tendential *uniformity of interpretative styles* and *evaluative orientations*.

I will now examine in more detail the critical comments by Kristan, Poggi and Vignoli. However, I am convinced that my discourse will prove more fluid and comprehensible for those who have not participated in the discussion, if, instead of separately examining, author by author, the criticisms made of my theses, I consider all of these criticisms together, distinguishing them by topic. Bearing this in mind, I will therefore discuss the theme of the contextualist perspective as the semantic reference point of my theory (sections 2 and 3) first of all; and then the theme of the role of the context in interpretation (section 4), that of interpretative disagreements (section 5), and, finally (section 6), that linked to the reconstruction of the sequence of legal cases concerning common sense of decency.

2 "TOO LITTLE CONTEXTUALISM?"

I will now examine in detail some of the criticisms that have been made of my theses (I do not really believe that I can deal with all of them). I have been criticized on two opposing fronts: on the one side, by Poggi, for "being insuffi-

9 Poggi 2012 (n. 1), 60–61.

10 Villa 2012 (n. 1), 38–41.

ciently contextualist", and, on the other, by Kristan and Vignolo for the very fact of "being a contextualist", and that is to say for having chosen semantic contextualism – in a moderate version – as a background perspective.

Let us proceed in order and start from Poggi. First of all it is appropriate to notice, as I have already done so, that Poggi used a previous essay of mine for her comments[11] and not my book, and that is to say an essay in which some important points of my theory were only still roughly outlined, or at any rate not dealt with adequately. The result, as will soon be seen, is that many of her critical observations either concentrate on some theses that I have in the meantime abandoned, or highlight gaps that I have already set about correcting, even though only partially (and this is the case of the failure to recognize the basic role of the *co-text* in a contextualist theory of interpretation).

The first series of cases includes the criticism that Poggi makes of the distinction, which I formulated in the essay,[12] between *three layers* of meaning: *meaning in a weak sense* (of the single expressions of the sentence), *meaning in a narrow sense* (the general semantic content of the sentence, its *topic*), and *meaning in a broad sense* (the overall *quantum* of communication expressed by the sentence). It is the thesis that Poggi calls the "club sandwich" (the "T1" thesis, in her reconstruction), and that perhaps occupies the main part of her critical observations.[13] Poggi rightly maintains that this thesis, contradicting the contextualist approach that I have chosen, implies the existence of three autonomous meanings, between which there are no mutual interactions. This thesis, among other things, could suggest that *in easy cases* conventional meaning is an absolutely invariable and self-sufficient entity, and can only be subject to changes and integrations in *hard cases*.

Poggi is perfectly right on this point: the distinction between these three layers still represents an "unripe" phase of the development of my theory, and is not consistent with other parts that I have subsequently introduced. First of all, it still implies a static vision of meaning, in which there are three autonomous semantic layers, among which it is not possible to observe any mutual interactions, the recognition of whose existence is of fundamental importance for a contextualist approach. Secondly, on the basis of this distinction it becomes difficult to explain how conventional meaning can also undergo radical changes following the intervention of the background context. Thirdly, the – at least partial – self-sufficiency of conventional meaning renders unavailable a very strong argument against the traditional dichotomy between easy cases and hard cases, a dichotomy that is not consistent with the characteristics and goals of a contextualist theory of interpretation.

11 Villa 2010 (n. 1).

12 Villa 2010 (n. 1), 113–114.

13 Poggi 2012 (n. 1), 57–63.

A deeper discussion of the definition of "context" and of its role in legal interpretation will be found below, in section 4. In this section I would like instead to discuss two further critical points, and then to conclude with some observations on the way, for me inadequate, in which Poggi views the distinction between *moderate contextualism* and *radical contextualism*.

The first point again concerns the distinction between the three layers of meaning, but this time regards the specific thesis that introduces a third level of meaning, related to meaning as an "autonomous quantum of communication." Considering the matter carefully, there is no serious reason to maintain this third level, which proves to be completely redundant. The full meaning of the sentence (one of its possible meanings), as it is produced by a given interpretative action, in a specific context, already represents an "autonomous quantum of communication", one of the full communicative results that can be derived from a given semantic frame, which at that given moment is assumed as a stable semantic starting point. There is, therefore, no reason to distinguish between a second and a third level of meaning.

Therefore, in continuing my research I have abandoned this third layer and I have concentrated attention on the process of *contextual semantic construction* that starts from single expressions and phrases that are part of a legal sentence (involving both their *sense* and their *reference*), and then arrive at the production of a possible full meaning of the same sentence, as it results from the connection, syntactically "well formed", of the meanings of the single words and phrases that have been attributed in the sphere of interpretation.

The second point concerns the charge of "reductionism" that Poggi makes against me,[14] because I maintain that "a prescriptive meaning does not exist at all". Poggi seems to consider this affirmation as semantically equivalent to another that I make in the same context of discourse, according to which the semantic content of the sentence (which Hare terms *phrastic*[15]) is identical for both assertions that use it in an informative function and for precepts that use it in a prescriptive function. On this basis, Poggi attributes to me the thesis that "the prescriptive function is parasitic to the assertive one."[16]

My reply is first of all that I have never maintained the latter thesis and, secondly, that in any case it does not follow from the premises that Poggi attributes to me. The fact is that from the thesis according to which "no prescriptive meaning exists" one cannot conclude that the prescriptive function is parasitic with regards the informative one.

14 Poggi 2012 (n. 1), 57.

15 Richard M. Hare, *The Language of Morals*, London, Oxford University Press, 1952; Italian translation: *Il linguaggio della morale*, Roma, Ubaldini, 1968, 28–32.

16 Poggi 2012 (n. 1), 60.

Here, however, it is appropriate to dwell on the statement relating to the "non-existence of a prescriptive meaning", because in this way an important point is touched on, even apart from the discussion with Poggi. The thesis according to which "no prescriptive meaning exists" is used by me as one of the basic argumentative passages to show that the differences between legal language and conversational language (used in an informative function) are not so important as to preclude adoption of the perspective of moderate semantic contextualism within legal interpretation. The problem arises because the contextualists choose, as their privileged object of investigation, conversational language of an informative type, in which those who send and those who receive the message belong to the same context of communication.

Poggi has some different ideas regarding the possible analogies between conversational language and legal language:[17] she believes that in the conversations of ordinary language the purpose of the person receiving the communicative message is to understand the intentions of the speaker; the receiver, therefore, relies on the elements that belong to the context of utterance of the message. In legal interpretation, instead, the context of the utterance of the legal sentence (which concerns the legislator) has much less importance; the interpreter directly faces the message, and the context to be privileged becomes almost exclusively that of the receiver (the jurist or the judge), a much less predictable and much more mutable context.

Poggi's objections on the point at issue do not appear to me at all insuperable. First of all the contextualists, although relying above all, as a privileged source of examples, on daily conversations, do not at all rule out the possibility that their conception can also serve to account for cases (like those that concern legal interpretation) in which a contextual exchange of information is not produced, and the communication has a unidirectional course and is received in a different context from that in which it is created. The contextualist theses of Charles Travis, for instance, are applied both to *context-sensitivity* situations that depend on the context in which the speaker is present (situations that he qualifies as *speaker-use sensitivity* ones), and to those that concern situations in which what counts is how the receiver of the message appraises thoughts, written notes, et cetera, in the absence of the sender (situations that he qualifies as *purpose-use sensitivity* ones).[18]

In both series of cases the context is, at any rate, a necessary element for the semantic enrichment of the starting sentence. In the language of the legislator, it is true that the meaning of the sentence breaks away from the intentions of the sender; and this places the linguistic medium in which the message is produced in a position of much greater importance, and therefore the linguistic sentence

17 Poggi 2012 (n. 1), 63–64.

18 Travis 1989 (n. 2), 31–32.

with its conventional meaning, but it does not challenge the possibility of using the contextualist semantic theses as a reference frame for the theory of legal interpretation.

From this point of view, when I speak of the "neutral" common meaning of an sentence, to be considered as independent of its "functional modulation", I refer precisely to the conventional meaning of the expressions contained in the sentence in question. It seems to me one can agree, for instance, that, in a given background context *x* (which, let us remember, can always change in time), "vehicle" has a common conventional meaning, independent of the different functional modulations to which the sentence in which it is inserted can be submitted; after all, we are talking about the meaning that can be found in a common dictionary and could be expressed as follows: "vehicle is an object endowed with wheels and able to transport people or things". But then the various interpretations of the meaning of this term can obviously open up to different ramifications (even very different ones) according to the type of context in which the expression is used, and thus produce a series of full meanings that is numerically not predictable.

I suppose, for instance, that there is a profound difference between the full meaning of the term "vehicle", inserted in a sentence that is part of the discourse found in a "car magazine", and that of the same term inserted in a municipal legal provision. The interpretation of the provision, in giving the specification of its content, will use all three contexts ("background context", "co-text" and "situational context"), in a dynamic process of mutual interaction, inside which even an object normally considered a vehicle (an ambulance) could no longer be considered as such; this is because a change in the background context, provoked by the concrete situation (there is an injured person to be taken to hospital in the park), replaces the goals normally attributed to that disposition (protection of the safety and peace and quiet of people in the park) with another one, deemed at that moment more important (taking care of the injured person). During this process – and here Poggi is right – the element of the prescriptive function, and therefore also the purposes of that prohibition on circulation, will markedly influence the production of the full meaning.

To conclude on this point, it seems that there is no contradiction or inconsistency in maintaining, on one side, the thesis of the independence of meaning from function, but only as regards conventional meaning (of single expressions and phrases), and, correlatively, that of the "non-existence of a prescriptive meaning"; and in denying, on the other hand, that the prescriptive function is "parasitic" to the informative function.

As we come almost to the end of this section, a last disagreement with Poggi's theses needs to be stressed. In her writing, but also in other previous writings, Poggi openly declares that she adheres to the theses of radical contextualism

and criticizes me because my contextualist position seems too soft to her. The problem is that her version of contextualism does not seem to me to be delineated in a satisfactory way; in other words, I have the impression that her position oscillates between moderate and radical contextualism. From my point of view, the basic aspect of the distinction between the two conceptions lies in the fact that radical contextualism maintains a position that can be called *meaning eliminativism*:[19] that is to say, it is a thesis according to which we do not need linguistic meanings, even as inputs for the process of complete construction of full meaning; the construction can quietly proceed without any need for *context-independent word meanings*. The contextual meaning of the expressions is directly calculated on the single occasion of use by making reference, as inputs, to the previous uses of the same expression in sufficiently similar situations. Thus there is no longer an initial linguistic meaning: there is only the *semantic potential* of a word, a sort of "collection" of situations of potentially applicable past application.

Returning to Poggi's position, it seems to me that she oscillates between these two conceptions: in some passages she defends theses clearly inspired by radical contextualism, such as that according to which literal meaning is directly an utterance meaning, because legal sentences can also be characterised as utterances (and therefore there is no conventional meaning existing before use[20]); and that according to which literal meaning is what a sentence expresses in the contexts that for us are statistically most frequent.[21] Elsewhere, instead, Poggi seems to accept the existence of a conventional meaning, which may be partial and is not context-free.[22]

In short, Poggi's position in contextualism is not quite clear. Certainly it is not enough, in opting for radical contextualism, to limit oneself to maintaining that there is no clear non-contextual meaning determined only by semantic rules, since meaning also depends on contextual assumptions.[23] In this connection, the thesis of the absence of clear non-contextual meaning holds for both types of contextualism.

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19 Recanati uses this expression to characterize the theses of radical contextualism (François Recanati, *Literalism and Contextualism: Some Varieties*, in G. Preyer & G. Peter (eds.), *Contextualism in Philosophy. Knowledge, Meaning and Truth*, Oxford, Clarendon Press, 2005, 188–191). Other very useful reconstructions are those by Marcelo Dascal, Contextualism, in H. Parret, M. Sbisà & J. Verschueren (eds.), *Possibilities and Limitation of Pragmatics*, Amsterdam, Benjamins, 1981, 153–177; and Carla Bianchi, *La dipendenza contestuale. Per una teoria pragmatica del significato*, Napoli, Edizioni scientifiche italiane, 2001, 297–325.

20 Francesca Poggi, Contesto e significato letterale, *Analisi e diritto* 2006, 183–187.

21 Poggi 2012 (n. 1), 61.

22 Poggi 2012 (n. 1), 59–61.

23 Francesca Poggi, Semantics, Pragmatics and Interpretation. A Critical Reading of Some of Marmor's Theses, *Analisi e diritto* 2007, 175.

To conclude this section, it seems important to me to return to a consideration that I made at the beginning, when I said, at the end of the first section, that the methodological indications that guided me in this research were dictated by theoretical and evaluative demands and linked to interpretation theory, rather than by the need to slavishly apply a model deriving from a particular theory of meaning. Well, this indication proves to be confirmed by the choice of moderate contextualism, in the place of radical contextualism. Indeed, if the latter were chosen, then in the sphere of theory of interpretation the idea would prevail, dear to the most radical antiformalism, that interpretation does not need a conventional initial meaning serving as a frame and at once as a constraint, but rather creates meaning on a specific occasion of use, only having to limit itself to noticing the *remarkable similarity* between the features of the latter occasion and those of other previous occasions on which a determined type of meaning was extracted, which could be reproduced for the case in hand. In short, in the sphere of interpretation theory the idea would prevail, which would have major *normative implications* (I am convinced, but on this point I will dwell subsequently, that every interpretation theory also has to propose to orient legal practice), that there is no longer a major difference between *interpretation* and *integration of law*, and therefore that interpretation can legitimately take on a very strong creative role, such as to allow it to create norms even apart from the conventional meaning of the sentence to be interpreted.

Well, a theory of interpretation that assigned such a major creative role to interpreters would end up over-sacrificing the value of the *certainty of law* in favour of that of the *equity of the concrete case*. For my part, I believe that both values must be kept in mind and appropriately balanced by theorists of interpretation when it comes to defining the role and aims of interpretative activity. Too big a sacrifice of one of the two values, in favour of the other, would produce some very large distortions inside the legal system in question.

3 "NO CONTEXTUALISM?"

In this section I will answer some criticisms by Kristan and Vignolo regarding my choice of semantic contextualism, but only touching on some profiles of those criticisms; of the other profiles I will return in the following sections.

In Vignolo's opinion,[24] in particular my contextualist thesis according to which full propositional meaning is produced through an act of utterance of the interpreter, would not allow me to consider as *illocutionary* the action of the legislator that prepares the legal sentence, precisely because it would not produce a full meaning. The fact is that, according to the standard thesis of the analyti-

24 Vignolo 2012 (n. 1), 71–73.

cal philosophy of ordinary language,[25] the illocutionary act is the combination of a proposition and its illocutionary force. Therefore, according to Vignolo, remaining at the level of the language of the legislator we would not be dealing with propositions, but with sentences (dispositions), and therefore it would be impossible to establish any type of logical relationship (of inconsistency, of incompatibility, et cetera) between these non-propositional linguistic entities.

In answering this observation I ignore exegetic matters relating to the interpretation of Austin's thought regarding the notions of "locutionary act" and "illocutionary act"; and I have no intention, moreover, of entering into the issue, an extremely complicated and controversial one, of the relationships between law and logic. I will merely observe that the distinction between sentence-disposition and proposition-norm (though not all researchers would qualify the norm as a "proposition", except in a strongly analogical sense) is now a commonplace one in contemporary legal theory,[26] and hence not only in that of analytical inspiration. It is a distinction of great importance, both theoretical and practical, making it possible, among other things, to distinguish, within the general category of "validity", the *validity of the legal sentence*, which concerns the *formal* aspect of the existence of the sentence itself, and consists in the conformity of the mode of production of the sentence to the scheme predisposed by the immediately higher norm from the hierarchical point of view; and the *validity of the norm*, which concerns the material dimension of the existence of the norm itself, and therefore implies relations of *content* between norms, and specifically relations of substantial compatibility between the lower degree norm (for instance, a legal rule) and that of a higher degree (for instance, a constitutional principle).[27] One thinks, for instance, of the use that can be made of this distinction for distinguishing, within the decisions of the Constitutional Court, between those that directly cancel the *legal sentence* and *interpretative* ones that instead declare constitutionally illegitimate not the legal sentence itself but an interpretation of it, and therefore a *norm*.

I therefore have nothing to object to with regards Vignolo's observation that ascertainment of the relationships of inconsistency concerns norms and not legal sentences, and, that is to say, concerns sentences that have already been interpreted. But I do not see how this element can influence my theory, at least no more than is the case for all other theories (and they are the majority) that accept the sentence-norm distinction. Besides, interpretative activity is not only the competence of judges and operators, but of all those people that use and

25 Here the reference is obviously to the theses of John L. Austin, *How to Do Things with Words*, Oxford, Oxford University Press, 1962, 92–116.

26 The first legal philosopher to formulate this thesis rigorously on the plane of philosophy of language was Tarello. A particularly clear and persuasive formulation of this thesis can be found in Giovanni Tarello, *L'interpretazione della legge*, Milano, Giuffrè, 1980, 9–10.

27 On this point cf. Riccardo Guastini, *Teoria e dogmatica delle fonti*, Milano, Giuffrè, 1980, 130.

apply norms, and that therefore, at least implicitly, preliminarily interpret the sentences that incorporate them; the legislator himself interprets the dispositions that he or she creates, both before their official promulgation and subsequently. It is therefore perfectly possible to ascribe to the legislator the locutionary acts and the propositional attitudes to which Vignolo refers, but they will always concern legal sentences interpreted as norms.

A second profile, the most important one, of the critiques concerning my choice of semantic contextualism concerns the proposal, which Kristan[28] and Vignolo[29] share, though on the basis of partly different considerations, to use a more recent conception, *semantic relativism*, as an alternative to contextualism, as a model for interpretation theory.

I have to confess that in my studies on the most recent theories of meaning I have not dealt with the conception of semantic relativism. I am therefore not able to give a complete and documented answer to this observation, which raises much more complex problems, also from the logical point of view, and besides contains both a criticism and a proposal. I believe I understand at any rate that the general sense of the criticisms, both of Vignolo – who speaks generically of moderate relativism – and of Kristan – who divides the relativist model into the two versions of *moderate semantic relativism* and *relativism of truth* – can be summed up as follows: my theory, not prefiguring a stable semantic content for the sentence that are objects of interpretation, would fail, unlike semantic relativism, to account not only for the relations of incompatibility and/of inconsistency of the various interpretations referring to the same sentence, but also for mere disagreements between those interpretations. By contrast, semantic relativism would succeed in satisfying this explanatory need, because it maintains that the semantic *content* of the sentence is stable, and that the changes instead doubly concern the *context of application* and that of the *circumstances of evaluation* (of truth or, if we prefer, of correctness) of the content in question.

My answer hinges on two orders of considerations, which for the moment leave aside the theme of interpretative disagreements, to be dealt with in section 5. The first consideration is that if one assumes (as Kristan and Vignolo seem to do) that the semantic content remains stable for all the various possible interpretations of the disposition, and only the context of application and that of evaluation change, what is once again proposed is a *static* conception of interpretation, in which the attribution of meaning is no longer seen as a *dynamic* process, but is entrusted to a single "topical moment", whether it is situated within the context of application or within the circumstances of evaluation. But it is precisely that *static quality* of the element, common to the three great conceptions of legal interpretation, that I have radically sought to challenge in my

28 Kristan 2012 (n. 1), 145–150.

29 Vignolo 2012 (n. 1), 74–75.

book. A basic aspect of this criticism of mine was not only that linked to the incapacity of such conceptions to account for a fundamental feature not only of legal interpretation, but of *interpretation in general*, that of appearing as a "mixture of discovery and creation."[30] Only a dynamic approach configuring interpretation as an activity that progressively builds meaning through a *sequential* process of specification, a process that can obviously branch out in different directions, is able to adequately explain this mixture of discovery and creation that constitutes an important peculiarity of every type of interpretative activity.

The second consideration aims to highlight the fact that an approach like the one proposed by Kristan and Vignolo is much better equipped to explain *extensional* changes and disagreements in meaning, rather than more radical *intensional* changes and disagreements. *Extensional* changes are those in which different values are assigned to a general term, varying in relations to the different contexts, contexts that serve to fix, each time, a determined field of reference. It is not by chance that Vignolo[31] speaks of these terms using the formulation *function-theoretic entity*, and therefore chooses an appropriate logical terminology for extensional projections of general terms; and likewise it is not by chance that he exclusively focuses on the example of the general term "vehicle", contained in the municipal provision, for which different extensional projections are proposed.

I would like to point out, on this subject, that the most meaningful changes concerning interpretative cases, in both a synchronic and a diachronic key, are instead intensional changes – changes in *sense* – that legislative expressions and phrases can undergo. Such changes are very often due to the fact that the legislator, for instance in the case of general clauses, entrusts the task of the attribution of meaning to the interpreter-judge. These terms cannot be characterised by the property of *vagueness*, but rather exhibit the property of *indeterminacy*, that is they express a much broader and more radical openness of meaning than the previous one, which concerns, long before the field of extension, the very sense of the notion conveyed by the term. These are the cases, for instance, in which the legislator adopts the formula of the general clause ("danno ingiusto", "giusta causa", "pudore", et cetera) and leaves the definition of the notion in question to the appreciation of the judge.

It is clear that here the semantic frame constrains in a blander way and can also, more frequently than in other cases, be in some sense *obliterated*, or at any rate *profoundly modified* also in its very generic conventional meaning, even if the linguistic formulation is unchanged (this happens, for instance, in the matter

30 Dworkin is one scholars of legal interpretation who insists the most strongly on this aspect, though, unfortunately, he does not do so with the necessary analytical rigour. Cf. Ronald Dworkin, *A Matter of Principle*, Cambridge Mass, Harvard University Press, 1985, 147, 162.

31 Vignolo 2012 (n. 1), 75.

of "common sense of decency"). Above all, and it is a notation of decisive importance, many of these expressions have strictly evaluative content (it is the case of the expressions mentioned as examples of general clauses). Well, it does not seem to me that in cases of the kind one can speak of a semantic content that is stable in different interpretations, as happens in the extensional projections of a general term whose intension is previously clearly known. In the case of intensional changes, it is precisely the semantic content that must be built, and this often produces radically alternative attributions of the sense of the same term.

A result of this kind may be due to the fact that in interpretation of the evaluative expressions the interpreter, to produce a determined attribution of meaning, needs to presuppose a determined "ethical background conception" (among the various ones available). Many of our interpretative issues of the last few decades have undergone an important turn with the affirmation of a "constitutionally oriented" interpretive strategy, which profoundly modified the traditional interpretation of some evaluative expressions contained in the principles and norms that deal with the regulation of some basic themes from the ethical-political point of view. Certainly the cases linked to interpretation of the "common sense of decency" represent good examples of the kind. But I would like to always avoid using the same examples to support my theses. Let us look, then, at sentence 21748 of our "Corte di Cassazione" (16-10-2007) on the "Englaro case", representing a turning point within the bioethical issue of the "termination of life." In that decision the Court, overturning a previous sentence by the "Corte di Appello" of Milano, offers, among other things, a highly innovative interpretation of the phrase "respect for the human person", contained in art. 32 of our constitution: highly innovative with respect to that given by the "Corte di Appello" (16 December 2006), according to which recognition of the property of *autonomy*, which is necessarily part of the baggage of the human person, does not attribute to the person herself or himself the right to be able to decide about his or her own life, in certain extreme situations; according to the "Corte di Appello", in short, the "respect due to the human person and his or her dignity" includes the intangibility of life. By contrast, according to the "Cassazione", the respect due to the human person also includes, in certain cases, not interfering in decisions that concern the very life of the person. In the case in point, according to the "Cassazione", it is possible to accept the application, coming from the father-guardian, to interrupt the treatment that kept his daughter Eluana alive, precisely as an *extreme gesture of respect for the autonomy of the sick person*.

It is clear that here there is a clash, in the background, between two alternative ethical conceptions, one of a *secular-liberal* type (that of the "Cassazione"), the other *of a religious* type (that of the "Corte di Appello"), conceptions that can however both be legitimately used as a basis for the interpretation of the

concept of person, as defined by the constitutional principles that refer to it. Neither of the two conflicts with the normative data.

At all events, I will postpone some further reflections on the issue of interpretative *faultless disagreements* until section 5. I will only confirm here that in this example, as in many others of the kind, we find ourselves in the presence of different intensional projections of the same concept (which serve to pass from the *concept* to a *full notion*), inside which what changes, from one interpretation to the other, is just the *sense* of an evaluative phrase (beginning from the – very bland – constraint represented by the linguistic formulation in which the concept in question is expressed).

It seems to me, in conclusion, that semantic relativism, with its complicated logical-linguistic apparatus (brought into play by Kristan), is perhaps well equipped to explain the extensional projections of a general term which by its nature is *vague*, but instead is not able to account for terms with an indefinite sense, whose interpretation is susceptible to provoking these deep divergences of an intensional character.

4 THE DEFINITION OF "CONTEXT"

I have already recognised, in the first section, agreeing on this with my critics, that one of the principal gaps of my work has until now been having given an inadequate definition of "context" and having explained in an unsatisfactory way its triple role in interpretation. This unhappy configuration first of all concerned the very generic way in which I dealt with the *background context*, and then the static character with which I characterized the three dimensions of the context, giving the impression that there were no mutual interactions between them. I will take advantage of this essay to try to offer a deeper and more complex characterization, especially in relation to the background context.

In my book I defined the background context as follows: "that collection of information and beliefs on nature (for instance on natural laws) and on culture (for instance on 'how to do certain things', like 'cutting a cake' or 'cutting a lawn'), but also of shared evaluative orientations, which are in the background of every communicative situation and render stable (if changes are not produced in that information and in those beliefs and orientations) the conventional meanings of the expressions that we use."[32]

I have to recognize that this is a particularly unsatisfactory definition, above all because it puts together, in a single "cauldron", beliefs and evaluations that should instead be situated in different layers. The impression that one gets is that the background context is a sort of homogeneous monolith, which it is not.

32 Villa 2012 (n. 1), 133.

The task that I set myself in this section is to try to give a first classification, certainly still provisional, between different layers of this context, to which belong beliefs that are certainly all contingent, but whose stability varies considerably according to the level on which they are situated. In working out this distinction I will use the fundamental analyses by Searle and Grayling.[33]

The classification that I propose, for now merely an outline, is founded on the different levels of depth and generality that contribute to the beliefs that belong to the background context.

There is a *first and deeper layer* which includes so-called *basic beliefs*, that is to say the beliefs that we implicitly share as human beings (independently of the community to which we belong), and that express a sort of *common core* (the anthropologist Donald Brown calls them *anthropological universals*[34]) of elements that are assumed to be shared in all cultures; elements that we do not need to express linguistically, but which are implicitly presupposed in our interactions with the world and with our fellow-men. We can borrow some examples of beliefs of this type from Grayling. He mentions, for instance, the belief

> that the world be regarded as stable and regular, with at least largely orderly connections between different states of affairs, and with it being possible for us as perceivers and communicators to discriminate among items of our shared experience, to identify and re-identify such items, and on the whole to succeed both in making reference to them and in describing them.[35]

A *second less deep layer* includes those that we can call *general beliefs*, and that is to say less general beliefs than the previous ones, but still ones with a broad spectrum, which are halfway between basic beliefs and local beliefs. A common frame of beliefs of this type is represented by what we can call, for now very approximately, "western culture", which collects together beliefs of a natural and cultural character, consolidated habits, standardized ways of doing certain things, et cetera, which cannot be presumed to be shared by all human beings, but, precisely, by several cultures that are in some respects homogeneous.

It is in this second layer that we can meet some elements that belong to the ethical-legal sphere, in the form of some very general evaluative orientations: for instance, that according to which "it is ethically wrong to resort to torture", or that according to which "every human being must be recognized to have some fundamental rights."

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33 I have already mentioned the most relevant works by Searle on the theme in question in note 3. See also Anthony Grayling, *The Refutation of Skepticism*, London, Duckworth, 1985, 2–18.

34 Donald E. Brown, *Human Universals*, New York, Mac Graw-Hill, 1991, 142–144. On this subject also see Robin Horton, Tradition and Modernity Revisited, in M. Hollis & S. Lukes (eds.), *Rationality and Relativism*, Oxford, Blackwell, 1982, 256–257.

35 Grayling 1985 (n. 33), 6–7. I provide a deeper and more thorough analysis of these basic beliefs in Vittorio Villa, Relativismo. Un'analisi concettuale, *Ragion Pratica* (2007) 28, 70–72.

The *third layer* includes cultural, social, ethical, etc., beliefs of a *local* character, which are part of a specific cultural context. But it needs to be clarified that inside a given historical-cultural context there can be sets of beliefs that are alternative to one another, which are valid for forming local contexts that are different from one another, though they are based on commonly shared general beliefs. It is inside this third layer that the background context is formed (or, more exactly, that piece of background context), which is much more mutable, in which the theoretical and evaluative convictions lie that make up a specific legal culture (or a section of that legal culture), in a given spatio-temporal context. These convictions also have legal interpretation as their object. One of these, for instance, is one which is dominant at the moment in our legal culture (and connected to the process of *costituzionalizzazione*), according to which the interpretation of laws have to be characterized as *constitutionally oriented*, and that is to say necessarily have to take constitutional principles as a fundamental criterion of orientation for interpretative and argumentative strategies. Other normative beliefs on interpretation that belong to this third layer are those that in my book I call *indirect value judgments*,[36] those that guide, often very implicitly, interpretative activity as a whole, orienting the choice of meanings and the selection of arguments towards evaluative orientations of a general character, concerning the aims that interpretation should promote in a given legal system. Such evaluative orientations can very schematically be delineated, tracing out an alternative between the value of "certainty" and that of "equity of the concrete case", seen as evaluative reference points guiding the interpretative strategies (and indirectly the single semantic options) of jurists and judges.

In general, it can be said that all of the beliefs belonging to the different layers delineated above are contingent, in the sense that they do not represent the content of *analytical judgments*; further, this content cannot be considered as expressed by *judgments of a merely empirical character* either. Indeed, on the one hand, such beliefs have a presuppositional role compared to other empirical assumptions, in the sense that they are not things that in a strict sense we affirm positively (we simply rely on them); on the other hand, they are still linked to a determined context of experience, though the latter, as regards the beliefs of the deepest layer, can also be extremely broad from the temporal point of view (in some cases it can even comprise the "entire cultural history of humanity"). It would not be wrong to affirm, actually, that they pass through the distinction "analytical-synthetic."[37] Moreover, we are talking about assumptions that have

36 Villa 2012 (n. 1), 58–59.

37 This is the view expressed, for example, in Hilary Putnam, *Reason, Truth and History*, Cambridge (Mass.), Cambridge University Press, 1981, 16–17, and Joseph Margolis, *Pragmatism Without Foundations. Reconciling Realism and Relativism*, Oxford, Blackwell, 1986, 294–296. I investigate this aspect more thoroughly in Vittorio Villa, *Costruttivismo e teorie del diritto*, Torino, Giappichelli, 1999, 23–24.

a varying degree of stability; indeed, we can say that their degree of stability is directly proportional to the depth and the level of generality of the layer in which they are placed.

I cannot go into this point more deeply here. I can only observe that from this picture there emerges a non-monolithic image of the context, quite different from that which Kristan and Vignolo take as a reference point for their critical observations. From this point of view it is clear that when we speak of differences – or of identity – of the background contexts that serve as a reference points for the sequence of interpretations of a given sentence, one has to take care to specify of what type of beliefs one is speaking, and of what layer they are a part.

Another gap in my analysis of the notion of "background context" concerns the static character of its role in interpretation. From what I maintain in the book it would seem that this context only comes into play in situations in which real integrations of positive law and not mere interpretations are produced: that is to say, in situations in which the conventional initial meaning of the disposition is in some sense radically modified or even. But this is not the way things are. In reality the background context is constantly operative in interpretation, in the sense that, in a process of mutual interaction with the other contextual dimensions, on one side, it orients the processes of selective reconstruction of the elements that belong to the *situational context* (the concrete situation, with all its elements, in which that determined interpretative action is placed) and of the *co-text* (the overall linguistic text in which the disposition to be interpreted is inserted, together with all the other relevant linguistic materials, like dogmatic reconstructions, argumentative rules, etc.); and, on the other side, it is constantly brought into play by the elements of the situational context and of the co-text in which a determined interpretative act is placed, elements that contribute to selecting those aspects of the background context that are *relevant* for that determined decision. For instance, in the matter of the "common sense of decency" it is the choice of the third interpretative orientation, the one that operates a *re-conversion of the value that is the object of penal protection* (a choice also dictated by the various concrete situations and by the prevailing dogmatic orientations), that activates a conflict, at the level of the background context, between *direct value judgments* (those that are possibly required for the attribution of meaning to the formula "common sense of decency") and *indirect value judgments* (those that orient interpretative activity as a whole).[38]

Lastly, at the end of this section, I have to highlight another gap in my book, regarding the treatment of the notion of "context": it is the one that concerns the dimension of the *co-text*, which is discussed in a very limited and cursory way, causing an undue mingling of elements of the *co-text* and elements of the

[38] I reconstruct this conflict in Villa 2012 (n. 1), 213–215.

background context. However, I will not deal with this point here; I will give the necessary clarifications on another occasion.

5 INTERPRETATIVE DISAGREEMENTS

Both Kristan[39] and Vignolo[40] criticize me for the fact that my theory, precisely because of its adhesion to contextualism, fails to account for *faultless disagreements*, which moreover, in their opinion, represent an unsolved problem for contextualism as a whole. In legal interpretation in particular, according to Kristan, such disagreements (at least those that intuitively seem to be such) can concern two attributions of meaning to the same legal sentence – interpretations made, for instance, by two different courts on the same case, or on similar cases. Such attributions would in some sense respect the conventional meaning (or one of the possible conventional meanings) of the same sentence (and therefore would not be seen as erroneous for this reason), but they would in some sense conflict, because, set in two different contexts, they would produce different interpretative results. By the way, here it seems that Kristan makes reference to the background context and not to the other two types of context too, though he is not very clear on this; I will assume, however, in what follows, that he only refers to background contexts. Well, again in Kristan's view, the thesis of the contextualists affirms that in these cases we would not be looking at a real disagreement, because both contenders would be right from their own point of view. The disagreement would therefore prove to be "unexplained."

In answering this criticism I will adopt a strategy that will avoid having to follow all of Kristan's line of argumentation (actually not always linear and perspicuous), also because, as I have already said, I have never directly dealt with semantic relativism in my studies, which is the conception constituting the source of his observations. I will limit myself to two orders of considerations: the first will hinge on that inner composition of the background context that I have sketched in the previous section; the second will endeavour to show, through a distinction between various types of semantic disagreement in interpretation, that many cases in which the disagreement cannot be explained are in reality cases in which one cannot speak of a real disagreement, but of something much more radical, which can be qualified as *profound conceptual divergence*.

But let us proceed in order. As regards the first order of considerations, in the previous section I said that the background context does not have a monolithic character, but rather appears as a very complex structure, divided into several

39 Kristan 2012 (n. 1), 133–141.

40 Vignolo 2012 (n. 1), 74.

layers. Things being so, to speak of shared or conflicting interpretations, on the basis of the presumed identity or difference in the background contexts, does not tell us very much from the explanatory point of view if it is not clarified what type of conflict is involved, especially regarding its position in the various layers making up the background context. In many of these cases for instance, due to reference to local and peripheral contexts that are different from one another, the interpretative differences can immediately be explained by making reference to the common sharing of the upper layer, which includes general beliefs. This would certainly make it possible to understand some disagreements, separating the elements of dissent from the shared ones.

As regards the second order of considerations, for my part I am convinced that we cannot adequately discuss the issue of interpretative disagreements (*faulty* or *faultless*) if we do not clearly distinguish the various types of divergences that can occur in interpretation between different attributions of meaning to the same sentence. In this connection, there are very big differences between the various possible types of disagreement. On this subject, it does not seem me that Kristan, in his analysis, adequately bears in mind the need to make this distinction.

I believe it is useful, at this point, to try to trace a classification between – at least – four types of disagreement: the first two primarily have an *extensional* character, and therefore concern different projections on the plane of reference of a general term contained in a disposition, the intension of which is in some sense shared; the last two have an intensional character, and therefore concern different attributions of sense to the general term in question, attributions that produce different notions. Two of the four disagreements, one extensional and the other intensional, are due to error, while the other two are not.

(**D1**) The first disagreement, of an extensional character, between two interpretations of the same expression (and therefore of the sentence that comprises it) occurs when two different interpreters construct in a different way the field of reference of a general term (let us suppose it is the term "vehicle", contained in the municipal provision), but one of the two does it without respecting, in a totally unjustifiable way, the conventional initial meaning of the term, and therefore inserting in its field of extension an object that cannot clearly be included in it, at least according to what is suggested by our intuitions as competent speakers of that language. An error of the kind would be committed, for instance, by the policeman-interpreter that inserted the subclass of "chandeliers" in the class of vehicles, denying entry to the park to a person carrying a chandelier. Such an interpretation would clearly be in disagreement, but due to an error of a categorial character, with the interpretation of another officer, who instead forbade the entry of an automobile.

(**D2**) The second disagreement, of a character that is at least partially extensional, is between two extensionally divergent interpretations of the same general term, a different interpretation of whose conventional meaning has been given, not through mere error, but adopting, entirely legitimately, two different types of argumentative strategies.

This second category of disagreements would include, for instance, two different interpretations of the term "vehicle" by two different officers on the same class of cases, those that refer to the toy car that is not dangerous for the safety of pedestrians in the park but is very noisy. The first interpretation would include the pedal car in the class of vehicles, and therefore would forbid access to the child driving it, while the second would not insert that object in the class of vehicles, and therefore would allow the child access. Neither of the two officers would commit an error in the two cases in question; the differences between the two decisions would be determined by two different ways of interpreting the initial meaning of the term "vehicle", dictated by two different reconstructions of the hierarchical order existing between the principles that are relevant for the interpretation of that provision (we can suppose that these principles warrant the protection of the "right of the driver to circulate freely in public places", and protection of the "the wayfarers' right to have full enjoyment of that place"). I believe that the divergence in question, which would then give rise to two divergent extensional ramifications of the same term, could be explained in absolutely comprehensible terms by highlighting the issues on which the different semantic reading given of the conventional meaning of the term is founded, which would lead, precisely, to two divergent extensional projections.

(**D3**) The third disagreement has a frankly *intensional* character, and directly concerns the *sense* of the notions connoted by a term or by a phrase contained in a disposition. In this third case too, as in D1, the divergence between two interpretations would be wholly unjustifiable, due to a categorial error. A divergence of this type would arise, for instance, following the interpretation by a judge that mistook the notion of "decency" for that of "honour." It is clear that an interpretation of this type, independently of its consequences, would diverge profoundly from interpretations that, although very different from one another, took the meaning of the expression contained in that clause seriously, possibly in order to be radically distanced from it, but always in a clearly argued way, and therefore offering some justification of a type considered as acceptable within that cultural context.

(**D4**) The fourth disagreement, the most problematic of all, also has a frankly intensional character, but is not due to a categorial error. It occurs when to an expression or phrase ("decency", "autonomy and dignity of the person", etc.) entirely different meanings are attributed, due to different ways of reconstructing

the local background context, or, if we like, due to different local background contexts.

Undoubtedly these are the most interesting issues of disagreement, the ones that, for instance, arise in bioethics, (issues that concern cases of "abortion", "artificial insemination", "termination of life", etc.), where alternative background ethical conceptions clash. In these cases, the adoption of one of these conceptions, rather than another, produces very different interpretative results.

To demonstrate this, in the book I gave the example of the "common sense of decency", where three divergent interpretative orientations clash (the historical-evolutionary orientation, the deontological and the constitutionally oriented), which in the background imply different meta-ethical conceptions: a wholly *relativistic* vision, an *objectivist vision with a meta-legal character* (there are objective ethical values external to law), an *objectivist* vision of constitutional values and a *relativistic* one of ethical values external to law. The adoption of one of these conceptions, to the detriment of the others, produces radically divergent interpretations of the phrase "common sense of decency." In the case of the latter conception I have tried to show that, in reality, the interpretation of the legislative formula ends up flowing into an act of real *integration* of law, as one no longer takes into account the adjective "common" contained in the formula (because it is believed that considering it would produce interpretative results in contrast with the constitutionally guaranteed value of *ethical pluralism*).

However, I will return to this interpretative issue in the last section. In my book, among other things, I gave another example of this type of radical interpretative divergence, also regarding evaluative expressions: these are divergences concerning the "Englaro jurisprudential case", in which we find ourselves, speaking of the arguments used by the "Corte di Appello" and those used by the "Cassazione", facing a radical disagreement concerning the interpretation of the notion of the "human person" and of his or her most relevant attributes ("autonomy" and "dignity").

It is the latter type of disagreement that arouses the most serious problems, above all in cases in which conceptions of an ethical character come into play. In this connection, the moment has come to ask ourselves if it really is not possible to account for disagreement D4. And if not, why not?

I will endeavour to answer these questions. My answer starts, first of all, from the consideration that in the D4 cases we face a very different situation from the previous ones, because, at the level of the local background context, these cases lack common coordinates that in this type of example have an evaluative character. Two conceptual schemes, in this case two background ethical conceptions, come face to face in a situation in which neither can be qualified as "true" or "false"; and these conceptions orient the interpretation of the

phrases in question in radically divergent ways, none of which, likewise, can be characterized as the "correct" one, unless we adhere to some form of *ethical objectivism*.

This point needs further clarification: here we are no longer talking about differences in extensional projections, but of radical *divergences of conceptual schemes*, of the same type as those described by Kuhn speaking of scientific paradigms;[41] nevertheless, unlike what Kuhn and Feyerabend sometimes seem to believe,[42] between these schemes (whether paradigms or ethical conceptions) there is not a situation of incommensurability, in the sense that a shared parameter is missing that at least allows the participants in that practice (whether scientific or interpretative) to realize that they are speaking, in some sense, of the "same thing" (for instance, of "decency", or of "human person"). We again need to remember what I said in the previous section, and that is that the local layers of the background context are rooted in two other deeper layers, that of general beliefs and that of beliefs of the common core; and these shared elements provide some points of common anchorage for these divergences.

It can therefore certainly be said that these divergences are "comprehensible." Here, by the way, it is better to use the predicate "comprehensible" rather than "explainable", because the use of the latter term gives the idea of a controversy that can be explained through methods of an empirical character, which even allows one to qualify a certain interpretative choice as "true" or "correct" (I have the impression that at some points in his critique Kristan puts forward an idea of this kind). In any case, it is profoundly wrong to consider D4 as similar to the other three types of disagreement. For D4, actually, it would be better to use the phrase "profound conceptual divergences", precisely to underline this kind of difference. It could therefore be said that if we appraise D4 with the same yardstick as the other disagreements, it cannot, in a strict sense, "be explained."

In this connection, I am not convinced by what Kristan says regarding the fact that judges, when they link their interpretative decisions to divergent decisions by other judges on the same case (or on similar cases), make "correctness claims."[43] According to Kristan, this type of disagreement, which brings into play the criterion of correctness of interpretations, cannot be explained by contextualism. But the fact that judges conduct their arguments using this lexicon does not mean that it corresponds to the real meaning of these disputes. Judges, it is true, will sometimes tend to present their decisions as "right" or "correct", and to qualify decisions divergent from their own as "wrong" or "incorrect" (but they do not always do so; for instance, the Casssazione does not do it in

41 Cf. Thomas S. Kuhn, *The Structure of Scientific Revolutions*, Second Edition Enlarged, Chicago, University of Chicago Press, 1970, 77–122, 149–150.

42 Cf. Paul K. Feyerabend, *Science in a Free Society*, London, New Left Books, 1978, 66–69.

43 Kristan 2012 (n. 1), 146.

the "Englaro case"): but it is only a form of presentation, sometimes due to the adoption of an ideological version of the conception of *interpretative formalism*, according to which the judge, when he interprets, "discovers existing law", and this discovery can therefore only be evaluated in terms of "correctness" or "incorrectness."

It is precisely here that the "external point of view" of the legal scholar has to intervene; he or she unmasks this ideological disguise and, bringing into play his or her theoretical apparatus, provides a reading of the matter that sets in motion the following operations: *first of all*, he or she reconstructs the sequence of the various decisions considering them as divergent interpretative choices regarding the semantic content of the legal sentence in question, all legitimate ones (if faultless); *secondly*, he or she ascertains whether, in the case in question, there has been an *interpretative act* (in the limits in which one remains, in some sense, "inside the frame"), or an *integrative act* (in the limits in which one has gone, in some sense, "beyond the frame"); *thirdly*, he or she highlights the *argumentative apparatus* used by the various judges, looking at it in the light of the argumentative strategies and the evaluative orientations currently available within the legal reference community.

6 THE MATTER OF THE "COMMON SENSE OF DECENCY"

I conclude my essay – which is perhaps rather too long – with some brief comments on the observations that Kristan makes throughout his paper on the reconstruction that I offer of the issue of the "common sense of decency."

However, I would like to specify that, first of all, the reconstruction of concrete interpretative cases and the resulting interaction with the practices of judges and jurists is not a purely optional activity for the theory of interpretation, serving to "embellish" a discourse that is autonomously already developed on its own account. The reconstructive study of legal practices,[44] normatively and evaluatively oriented, is a necessary component of legal interpretation theory; moreover, interaction with legal practices is in general an essential aspect of legal theory. It is only in the light of the reconstruction of interpretative practices that it is possible to measure the fruitfulness of a theoretical approach, including the fruitfulness of the theory of meaning that is assumed as a reference point.

I will now make some comments on Kristan's observations on my reconstruction of the matter.

44 On the subject see Villa 2012 (n. 1), ch. III.

First of all, Kristan criticizes me[45] for not bearing in mind that the formulation of art. 529 is ambiguous, because it allows one to interpret words "the actions and objects that, according to the common sense, offend the sense of decency." in two different ways. This formulation, according to Kristan, could be interpreted as either connecting "common sense" to "offend", as if the first phrase only served to measure the type of offence and instead left untouched the notion of "decency"; or, instead, connecting "common sense" to "decency" and thus offering a legislative definition of the latter expression

I will answer by saying that I was absolutely aware of this ambiguity, but that I considered it as irrelevant, since the first semantic option of which Kristan speaks has, in point of fact, never been taken into serious consideration in concrete interpretative cases, which have instead concentrated on the second type of option, and that is to say on the interpretation of the formula "common sense" considered as a criterion to define "decency." After all, the task of the theory of interpretation, contrary to what Guastini[46] maintains for instance, is not to reconstruct all of the possible meanings that can be abstractly attributed to a legal sentence, but to account for those that are in fact attributed (which are the most interesting ones to bring to light). To conclude on this point, it therefore seems to me entirely useless from the explanatory point of view to take into account this further semantic option (there are already so many involved!).

I will now move on to a rapid examination of how Kristan deals with the way in which I reconstruct the various argumentative strategies adopted in the matter. First of all, it is not correct to maintain, as Kristan does, that the first two orientations, the historical-evolutionary one and the deontological one, diachronically followed one another in time.[47] In actual fact, they coexisted for a long time (from the 1950s to the 1970s). The second one appeared later on the scene as a sort of reaction to the laxity of customs that, in the opinion of those people who adopted it, could arise following the adoption of the historical-evolutionary orientation. It does not seem to me either, consequently, that the arguments used by the deontological orientation mark the passage from a culturally homogeneous society to a more heterogeneous one.[48] I would say that rather the opposite is true: the deontological orientation represents the attempt – destined to fail – "to turn back the clock", proposing once again the ethical model of a society endowed with unchangeable values, consistent with the definition of decency as an "objective" value.

Lastly, I disagree with the reading that Kristan gives, speaking of the role as "indexical" that, in my reconstruction, would be played by the predicate

45 Kristan 2012 (n. 1), 143.

46 Riccardo Guastini, *Nuovi studi sull'interpretazione*, Roma, Aracne, 2008, 16.

47 Kristan 2012 (n. 1), 129.

48 Kristan 2012 (n. 1), 129.

"common."[49] By the way, this observation is connected to the one according to which I failed to show that the third orientation (that of the "conversion of the protected value") is an example of *creative integration*. I would not say that in my reconstruction the term "common" has the role of an "indexical", because in reality it represents, read together with "sense" and "decency", a formula with dense evaluative content, exposed to the profound intensional changes I spoke of in the previous section, and not to changes of an extensional type (as would seem to spring from the reconstruction by Kristan). If we accept this type of interpretation, then it is easier to clarify that the obliteration of the predicate "common", by the third interpretative orientation, truly corresponds to a profound turn, which implies the conviction, belonging to the background context, that in a situation of *ethical pluralism* it is no longer possible to submit to interpretation the formula "common sense", for the simple reason that it is no longer possible to find a "common sense of decency."

Here again we can notice the importance of profound conceptual divergences in interpretation, above all when they correspond to radical ethical dissents. To conclude, I believe it would be very important for a theory of interpretation, well equipped from the methodological and semantic point of view, to reconstruct interpretative issues of the kind (concerning, for instance, the sphere of bioethics), also so as to be able to test their explicative fruitfulness.

49 Kristan 2012 (n. 1), 135.