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CHAPTER X

TO WHOM DOES THE LAW SPEAK? CANVASSING A NEGLECTED PICTURE OF LAW'S INTERPRETIVE FIELD

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Abstract: Among the most common strategies underlying the so-called indeterminacy thesis is the following two-step argument: 1) that law is an interpretive practice, and that evidently legal actors more generally hold different (and competing) theories of meaning, which lead to disagreements as to what the law *says* (that is, as to what the law *is*); 2) and that, as there is no way to establish the prevalence of one particular theory of meaning over the other, indeterminacy is pervasive in law. In this paper I offer some reflections to resist this trend. In particular I claim that a proper understanding of law as an authoritative communicative enterprise sheds new light on the relation between the functioning of the law and our theories of interpretation, leading to what can be considered a neglected conclusion: the centrality of the linguistic criterion of meaning in our juridical interpretive practices. In the first part of the chapter I discuss speech-act theory in the study of law, assessing its relevance between alternative options. Then I tackle the 'to whom does the law speak?' question, highlighting the centrality of lay-people for our juridical practices. Lastly, I examine the consequences of this neglected fact for our interpretive theories.

Keywords: Indeterminacy Thesis; Law as Communication; Legal Interpretation; Norm-addressees; Speech-act Theory.

X.1 INTRODUCTION

A growing bulk of legal scholarship, conceiving of law as a communicative phenomenon (eg Van Hoecke 2002),[1] revolves around the question 'what does the law say?'. On a first approximation, to ask this question is tantamount to ask 'what is the law?', in general or as to a specific case. This is indeed a common way in which a layperson would seek legal advice from her solicitor: 'What does the law *say* on buying land estate without a written contract?' The solicitor would then go on and explain the *content* of the law, that is, she would tell her client what the law *is* (at least from the best of her knowledge) on real estate. But on a more careful consideration, what the law *says* – ie the text of legal sources such as statutes and judicial decisions – does not always correspond with what the law *is*, viz with the norms (rules, standards, principles, etc.) that govern a certain activity or situation.[2] Such variance depends on the role one assigns to pragmatics (and context in particular) in the determination of the content of legal utterances, and this point represents one of the most debated issues in

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[1] This trend is particularly evident in criminal law and criminal justice (see for an overview Stark 2013).

[2] This variance presupposes the distinction, still slightly underdeveloped especially in Anglo-American jurisprudence, between norm-sentences and norms *tout court* (eg Guastini 2011).

jurisprudence nowadays (eg Marmor 2008, 2011), straddling the philosophies of law and language.

In this chapter I shall focus on a different, albeit clearly related, question. Operating within the same understanding of law as communication I ask, 'to whom does the law speak?' Such a question might sound naïve, at best, or pointless, at worse. For if we skim through law books and manuals, it seems that the law *speaks* only to judges, officials, lawyers and (sometimes) jurists,[3] as it is only their interpretive practices which are analysed. In other words, the law addresses only those agents whose interpretation bears some authoritativeness, directly (judges, officials) or indirectly (lawyers, jurists). Hence our theories of legal interpretation are (and must be) modelled around their operations, taking into account the specificity of the resulting interpretive field and considering legal interpretation as a highly specialised practice. Now, is this picture of law's interpretive field apt? I seriously question this contention. Of course, to deny the high degree of complexity of legal interpretation as carried out by judges and other institutional agents would be readily counter-intuitive as a descriptive claim. Rather, in this chapter I plan to suggest that this picture of law's epistemic field is, at best, incomplete, and that a different, more comprehensive, picture of it must be canvassed. But why is this operation worth pursuing? If the arguments I put forward are sound, important consequences for our theories of legal interpretation arise, and in particular as to the so-called 'indeterminacy problem'.

In this regard underpinning our liberal institutional paradigms is the belief that legal 'facts' are in some sense, and at least partially, objective and determinate (Leiter and Coleman 1995). On the interpretive side, this position is usually defined as 'mixed' theory (see eg Hart 1994; Marmor 2005; Moreso 1998) precisely because it acknowledges an area of objectivity and determinacy in our adjudicative practices. And yet we see judges, lawyers and academics constantly disagreeing about what the law is, both in general and in particular cases: for legal actors interpret the (text of the) law in different ways, and thus they obtain different answers as to what the law is. Viz, they seem to disagree about the *meaning* of legal utterances, because they hold different theories of meaning: so that, descriptively, no one among them can be considered to be prevalent (Guastini 2011, 153-154). But if this is so, legal utterances cannot be truth-apt – they do not have '*one* definitive objective meaning' (Guastini 2011, 152, italics original). As such, the indeterminacy of law would follow from its interpretive nature and two seem the main strategies available to us:[4] either we resort to the Dworkinian approach that might allows us to reach always a right answer (thus preserving the legitimacy of adjudication), but at the cost of embracing the idea of law *as integrity* all the way down (Dworkin 1986, 2011); or we are faced with the necessity to acknowledge the pervasiveness of indeterminacy in law, and to draw the ensuing implications in terms of the legitimacy of our liberal institutional practices.

My contention is that the considerations offered in what follows as to law's interpretive field help assessing, and rebutting, the indeterminacy thesis as we have just

[3] cf Hart 1994, 35-41, criticising Kelsen on the point.

[4] Granted, there might be even more theoretical options available to us (see eg Stoljar 2003); but for the sake of this chapter I group all 'moderate' or 'mixed' views about determinacy and interpretation together, hence leaving as alternatives only holistic views à-la-Dworkin and radical indeterminacy theses (as those held by most legal realists and critical legal scholars).

outlined it. As such they are not sufficient to establishing the case for objectivity and determinacy in law, but they offer corroborating reasons to uphold a mixed theory of interpretation against critical and radical indeterminacy positions. The chapter breaks down like this. In section two I discuss the use of speech-act theory in the analysis of law, briefly assessing the suitability of the former vis-à-vis the communicative nature of the latter. To this end, section three examines the peculiar relationship between sender and receiver of legal utterances, and statutes in particular. This leads to the question of 'who are law's addressees?', which I take up in section four. I argue that there are sound meta-theoretical reasons to consider laypeople as the first and foremost addressees of legal communication. Finally in section five I deal with the consequences of this latter claim for our theories of interpretation, the most important being the need to recognise the prevalence of the linguistic criterion of interpretation amongst the ones available. This is necessary, I argue, for the existence of a legal system as such.

X.2 PRELIMINARIES ON SPEECH-ACT THEORY AND THE STUDY OF LAW

The use of speech-act theory to analyse law represents one of the principal waves that have swept legal philosophy over the last few decades. Beginning with the collaboration between J.L. Austin and H.L.A. Hart in Oxford, legal rules have been understood in their quality of performatives – in their being not just *words* (like when we describe the motion of planets), but actual *actions* through *words* ('I hereby declare you man and wife'). Since then speech-act theory has progressively gained relevance in legal-philosophical discourse, providing it with a 'general orientation and framework for analysis and research' of 'legal utterances with which it is confronted.' (Amselek 1988, 199) Through speech-act theory several interpretative issues have been tackled and (purportedly) resolved (eg Marmor 2011). Among these, the relationship between semantics and pragmatics in legal utterances (and particularly legislative texts) has been clarified, showing the (potential) degree of difference between the communicative and the legal content of legislative utterances (eg Marmor and Soames 2011). But parallel to the far-reaching, mainstream popularity that speech-act theory has gained in legal discourse, a mounting sense of uneasiness with it has come to the fore in the work of several authors. This is precisely the subject of the contribution of Marcin Matczak in this volume.[5] Following a certain, minority orientation in philosophy of language, he argues that speech-act theory cannot be fruitfully applied to legal utterances because it cannot explain in the first place written text. That is, the development of speech-act theory – in the seminal works of J.L. Austin, J.R. Searle, H.P. Grice, P.F. Strawson, and many others – has revolved only upon face-to-face oral interaction, and in this regard speech-act theory is plagued vis-à-vis legal utterances by what he calls (i) the fallacy of a-discursivity and (ii) the fallacy of synchronicity. That is, it is not true that legal rules can be analysed as (i) single oral utterances, to be analysed in isolation from other statements and (ii) utterances which are performed between a hearer and a speaker who share a *conversational* context (ie, one in which contextual factors are *directly* accessible to both interlocutors, and as such can be

[5] This is, I believe, precisely one of the distinctive features of collected volumes, originating from conferences' proceedings, such as this one: namely that of allowing different authors to cross-interact directly on one or more topics, enhancing not only debate but also mutual cognitive enrichment.

presupposed by both parties). We shall come back to this latter fallacy shortly. For now I want to jump to Matczak's conclusions as to the role of speech-act theory in legal scholarship. As I just said, the problem is that speech-act theory has focussed almost exclusively on the oral, *face-to-face* mode(l) of communication thus neglecting written – or anyway, 'non-conversational' – ones (see eg Stubbs 1983).[6] Hence applying the traditional model of speech-acts to the legal situation – statutes in particular, but also judicial decisions – yields ill-formed results. I have reached the same conclusion within my own line of research (Sandro 2014); and as if this was not enough, Brian Slocum's contribution in this volume too points to the fundamental distinction between oral conversations and texts that requires a rethink of the relationship between speech-act theory and legal analysis.[7] Here though it is not entirely clear to me whether Matczak argues for abandoning speech-act theory in legal philosophy altogether (as it seems from the title of his contribution, and from having read previous drafts of it), embracing alternative theoretical frameworks ('complex text-acts'), or rather for amending speech-act theory in light of the peculiarity of legal utterances (as one could think from some passages in the text).[8] Surely, most applications of speech-act theory to legal discourse have been plagued by these fallacies: but there are also a few relevant exceptions (Kurzon 1986, Duarte 2011) that Matczak overlooks and on which the next section builds upon. That is why, between abandoning speech-act theory in the study of law or amending it to such purpose, I opt for this latter possibility: for one can use the legal example to address speech-act theory general shortcomings and to begin finally to address satisfactorily the differences between conversational and non-conversational communicative instances. This last endeavour of course goes far beyond the scope of this chapter;[9] here I am only going to focus on the relationship between sender and receiver of legal utterances.

X.3 SENDER AND RECEIVERS IN LAW: A PECULIAR RELATION

In our ordinary conversations we usually have a speaker and a hearer who interact being in the same place and at the same time. They can be said to share a *situational* context.[10] This latter often enriches the semantic content of the utterance, so that in philosophy of language, following the seminal work of Grice, we have come to distinguish consistently between

[6] Indeed, two parties could be communicating by means of written text and yet be in a conversational situation, that is in a situation in which contextual resources can be accessed by both independently of the communication itself, and such epistemic resources be presupposed by both parties. Hence the problem is not with written communication as such – but with communicative instances in which context is, or better the contexts are, epistemically inaccessible to one or both parties.

[7] The concurrence between Matczak, Slocum and myself on this central claim, considering that we reach it starting from different backgrounds and through autonomous theoretical routes, is quite exceptional: as such this volume could constitute the beginning of a larger 'movement' or 'doctrine' that purports to reconceive of the relationship between philosophy of language and the study of law.

[8] Matczak clarifies to me, in a private conversation, that it is indeed the second case: he wants to amend the theory to make it more suitable for the analysis of written utterances, that in this sense must be conceived of as 'text-acts' and not as 'speech-acts'.

[9] But the reader might be interested to know that this is a route I have already begun to explore (Sandro 2014).

[10] This is the context surrounding the utterance, viz the state of the world (consisting of material and immaterial things, such as beliefs) as it exists at the $time_X$ and $space_X$ of the $utterance_X$. This type of context must be contrasted with what, following Habermas, I call 'lifeworld' context, which is instead the set of cultural and linguistic conventions somehow shared between subjects of any (minimally) successful communication (Sandro 2014, cf Habermas 1989, 122-123).

sentence and speaker meaning (Korta and Perry 2012). Imagine the following situation: my friend John screams '*We* won!' in front of the television just after the football match. The situational context of his utterance consists of, among other things, the fact that John's favourite football team won the finals and that we just watched the match together (so that I know that he knows that, and vice versa) and thus I am able to make sense of his exclamation, ie I am able to understand what he means by uttering '*We* won!'[11] Traditional speech-act theory builds upon these 'ordinary conversation' situations (Matczak 2014).

Things seem different when we consider legal utterances, and in particular those as contained in statutory instruments, whose sender is the normative authority and whose receivers are the agents within an institutional system.[12] I limit my focus to statutory texts – statutes, directives, etc – and more generally to all those official normative texts which are addressed to the public in general and which contain norms that purport to regulate people's behaviour. Such a restriction is arbitrary – legal communication is constituted by a variety of speech-acts which are different from each other, judicial decisions being a paradigmatic example of them – but justified: if law is the enterprise of 'subjecting human conduct to the guidance of rules' (Fuller 1969; cf Rawls 1999, 208-212),[13] statutory communication represents the only viable means, at least so far, to do so when to be regulated is a large society like modern ones (Hart 1994). As such, it constitutes the core of legal communication. This seems confirmed by the fact that law is, in the first place, only conceivable as such within a 'common sense' discourse that originates from the social practice of the society – that is the general public at large – itself (Jori 2010).[14]

There is a first important difference between ordinary speech-acts and legal ones, for it seems clear that legal utterances are 'closed unilateral speech acts' (Duarte 2011, 116), in the sense that they normally do not require an answer by their recipients. Rather, they require a 'human behaviour' – which by the way is not even 'oriented towards the normative authority' (ibid). This is a very important qualification, as their aim as speech-acts then is not the successful *exchange* of information, but the successful *reception* of information that *can*, together with non-linguistic factors (Pattaro 2005), lead the receiver to act in a certain way (Marmor 2008).[15] This consideration has to be taken into account when interpreting a legal utterance, for it puts already a relevant constraint not only on the illocutionary value(s) of the

[11] In this case, I successfully understand that the indexical 'we' does not refer to us, me and John, as it would do literally, but to John's football team, to which he feels some sense of belonging or membership – so that the meaning of his utterance is really 'My football team just won the game!'

[12] cf the analysis in this section with the (mostly) concurring one in Slocum (2014).

[13] This is particularly true, again, in criminal law (see eg Stark 2013, 163). This should not surprise, being criminal law the context in which our most basic freedoms are usually at stake and thus in which the requirements of the principle of legality should be applied strictly (see Ferrajoli 1990).

[14] Jori purports to amend – or to reallocate – Hart's rule of recognition and his insistence on the role of officials in determining it: in the sense that even the rule of recognition of a legal system cannot but exist on the ground of a 'common sense' social practice that identifies both 'law' (the concept of law, in general) and 'the law' (the law in force in a given jurisdiction, eg Italian law or English law).

[15] To be clear: successful reception of information on the part of the agent is not tantamount to compliance, nor implicates it as a matter of *necessity* - for compliance is always, and merely, a possibility. My point is rather the opposite: if there is no successful reception of information, how can the agent be thought of complying with, that is, of *following* the rule?

act itself,[16] but also to the potential enrichment brought to the utterance's meaning by the implied content, which is in this sense limited by both the strategic nature of the act performed and the ultimate aim of the communicative endeavour (Marmor 2008, 428).

Another significant sense in which legal utterances are different from speech acts taking place in ordinary conversation has to do with the inevitable lack of direct *relation*, in terms of time and space, between 'who' performs the speech act and who is (supposed to be) its recipient. This roughly corresponds to Matczak (2014) 'fallacy of synchronicity'. Here though I am not referring only to the lack of a 'situational context', that is to the fact that sender and receiver of legal utterances are not in the same place at the same time; rather, the point is that

> norm sentences are a kind of speech act where the connection speaker→hearer (reader) is played out on both sides by indeterminate actors, [so that] [e]ven though it is possible to connect a norm sentence with the person or group of persons that at a certain time act as the normative authority, from the speaker's point of view, the fact is that the speaker is, precisely, the normative authority and not that person or group of persons (Duarte 2011, 117).[17]

The importance of this remark should not be underestimated. While Matczak (2014) deploys it to highlight the role of multi-contextuality in determining the lawmaker's intention, and thus in order to justify the need to distinguish between the locutionary and the illocutionary intentions of lawmakers,[18] I want to stress how this 'a-synchronicity' of legal utterances, far from being accidental, constitutes instead a distinctive and necessary feature of law as an institutional normative system (MacCormick 2007). For otherwise nothing like the rule of law, as opposed to the rule of men, can (ever) exist. That is, one of the differences between the two lies precisely in the fact that the *power to rule* ceases to be held by one or more individuals in their quality as such, and it is instead conferred upon an institution or *officium* – the 'legislator' – that pushes into irrelevance the people temporarily exercising it. At the same time, the fact that legal utterances contained in statutory texts are not addressed to individual subjects, but to categories (types) of them, ensures the formal rationality ('like cases should be treated alike') of law and thus equality (of treatment and consideration) among its subjects.

The overall peculiarity of the relationship between sender and receiver of legal utterances vis-à-vis ordinary conversational situations leads us to ask: 'Who are the addressees of legal utterances?' At first glance, this question might seem just foolish.[19] Especially if we are heavy consumers of jurisprudence books and articles, we might get the impression that legal utterances' addressees are judges, lawyers and more generally legal officials, i.e. the agents within the system that are institutionally called to interpret (and apply) those very legal utterances (Cao 2007, 76). Only these agents' interpretations 'count' –

[16] Thus diminishing the relevance of context in determining the illocutionary values of legal speech-acts; cf Bianchi (2013); contra Matczak (2014).
[17] cf Hart (1994, 21-22).
[18] Whereas Duarte (2011) shows how multi-contextuality reduces the pragmatic impact of context in determining the semantic value of the utterance.
[19] Perhaps not so much in the criminal law context: cf Duff (2007, ch 2) (thanks to Findlay Stark for the pointer).

after all, isn't this idea that both Hart's rule of recognition and Kelsen theory norms presuppose, and only to name perhaps the two most prominent theorists of last century?[20] And isn't this the perspective from which radical sceptics and legal realists start off in order to criticise the traditional picture of legal interpretation (Guastini 2011)? The convergence among different authors on this point seems difficult to set aside.

And yet, isn't something missing from this picture? Namely, where are *we, the people*? Aren't we statutes' addressees, first and foremost? This especially in light of the consideration that adjudication, as Green (2009, 21) reminds us, is always 'law's Plan B'. Law's 'Plan A', as often left unspoken, is that of a successful communication, on part of the law-maker, and application, on part of the public, of legal rules that does not lead at all to adjudication; for the guidance offered by rules is effective in offering reasons for action and thus constraining behaviour.[21] As such, isn't the way in which laypeople interpret and apply the law at least as worthy of theoretical consideration as that of legal officials? And if this so, why seem theories of law and legal reasoning to be overlooking this (rather apparent) fact so often?

X.4 LAYPEOPLE AS THE FIRST (AND FOREMOST) ADDRESSEES OF LEGAL COMMUNICATION

I cannot speculate on this last question. But I readily argue that there is something wrong with our mainstream theories of interpretation when they simply remove laypeople from law's interpretive field. I contend that this is an unwarranted move, one that yields non-negligible effects on the way in which we understand law. Before stating what are these consequences, let me make the case for the claim that laypeople are the first – and at least in one sense, the foremost – addressees of legal communication.

First, as we have briefly touched on it already, there is a flaw in all those theories that narrow down law's interpretive field to that of institutional agents and judges in particular. For they seem to forget that adjudication is always an only merely *potential* 'moment' in juridical phenomenology (Fuller 1969, 55; Levenbook 2006, 74; Miers 1986). That is, a legal system could be said to be in place even without a system of courts or in any case without an 'adjudicative moment',[22] provided that the (primary) communication of normative standards is successful amongst its subject, in the sense that they comply with what the law requires.[23] The fact that such scenario perhaps never historically occurred does not make the remark any

[20] Hart's rule of recognition seems to be predominantly official-oriented despite the fact that he criticises Kelsen's idea that (primary) norms are addressed only to officials (Hart 1994, 35-42). I owe this point to Alex Latham.

[21] As I said already, to this end non-linguistic factors are necessary – I assume them for granted for the purposes of this chapter.

[22] Raz (1979, 105) and Waldron (2008, 20-24) strongly resist such claim. Perhaps there is a way to explain such a stark opposition, which seems to leave no space for a middle position: it has to do with the dual nature of law, as an institutional and as a normative system. Hence, while it seems impossible (as Raz and Waldron hold) to conceive of law as an institutional system without a hierarchy of courts, it is instead possible to do so when law is understood in its normative sense, that is as a system of norms that purport to guide behaviour.

[23] Of course, this presupposes non-contradiction and completeness on part of the legal system, and this is all but self-evident – yet being only an argumentative strategy the reader can assume both conditions.

less theoretically relevant.[24] But the opposite does not hold, ie a normative system with a fully functional hierarchy of courts[25] but where there is little or no compliance of primary norms (for whatever reason) is no legal system at all.[26] Hence on what grounds do mainstream theories establish the exclusive relevance of institutional agents' interpretive practices, and of courts in particular, if a (hypothetical) legal system could do without the *moment* in which this latter kind of interpretation takes place?

Granted, this is no objection to the claim that the first and foremost recipients of legal utterances are indeed lawyers and not laymen. This neglected fact would come to the fore by adopting the (disputed) distinction between the official, the implied and the instantial author of a given text, mirrored by that between the official, the implied and the instantial reader: Kurzon (1986, 26-29) argues that notwithstanding which one of the three simultaneous relations we entertain, in the case of statutory communication authors and readers are always, substantially, lawyers and not laypeople. Now, although this description might have been empirically sound until some time ago, it is questionable that is still the case nowadays.[27] For the role of lawyers as *medium* both in the process of coding and decoding deontic content seems shrunk. This is due to a variety of factors, among which one can think of the developments of information technology as applied to communication, the always higher level of literacy and higher education amongst citizens in developed countries, the specialisation of entire market-sectors and the always expanding regulative sphere of the law that has embraced fields progressively more and more directly connected to every day's life. The result is that laypeople are constantly, in their daily business, confronted directly by the text of the law, either on newspapers, on the internet, in their professional environments and so on – and are called upon to act *applying* the law. Hence they seem to be after all the first (and foremost) addressees of statutory communication, at least in non-specialised cases,[28] and this fact wins them back centre-stage within law's interpretive field. As Surden (2011, 66) puts it,

> in law generally, it is probably true that the vast majority of legal analysis and assessment of legal outcomes is conducted, not by officials like judges or by trained lawyers, but by lay (non legally-trained) individuals.

This latter claim seems confirmed from yet another perspective, namely from considering the systemic relationship that establishes between law as an 'administered'

[24] Cf Priel 2013, 8-10.

[25] Notwithstanding the fact that, for a hierarchy to be there, there must be some successful communication and application (at least) of primary rules.

[26] Cf Hart's claim that '[I]f it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when the occasion arose, nothing that we now recognize as law could exist' (Hart 1994, 124).

[27] Stark (2013, 163) convincingly argues that '[i]n planning their lives, citizens must be able to understand properly the nature of what the law declares to be a criminal offence, and it is obvious that this will usually be conducted without the benefit of legal advice.'

[28] That is, clearly I do not mean to claim that a particular statute regulating a specific, technical area (medical, engineering, and so forth) is addressed first and foremost to laypeople, as this would appear unsound on the descriptive level but also on the theoretical one: for likely the addressees of such norms are highly-specialised individuals who possess the skills not only to understand, but also to comply with the requirements of the law. What I do claim though is that these 'specialised' statutes can but only constitute a subsidiary part of statutory communication, one that necessarily presupposes the successful outcome of the non-specialised one.

language (Pattaro 2005) and the natural language Y in which legal utterances are encoded. In this sense, if we agree that there is a formal reception by the legal system X of the given natural language Y (Duarte 2011), then the [rules of the] interpretive practice of speakers of Y *must* be taken into account by any theory of interpretation of X. For that interpretive practice (of the community of speakers of the given natural language as a whole) becomes constitutive of the meaningfulness of the law as much as the law-specific interpretive practices established by institutional actors like courts (cf Velluzzi 2008, 502-503; Stark 2013, 164-166). Clearly the *transformative* power of the two interpretive practices will be different, as natural language processes usually extend over a considerable timespan whereas the law can be changed in theory day by day; what is relevant is that *we* use today the expression 'personal device' in quite a different way than we did just twenty years ago, so that a norm containing 'personal device' will not apply to the same situations as twenty years before. This seems also to offer some grounds to the thesis – on which I cannot dwell upon in the context of this chapter - that the normativity of law is premised to some extent upon that of language (Sandro 2014); so that transformative processes in the latter will directly produce effects in the former too.[29]

X.5 *SO WHAT?*

The prominence of laypeople as the first addressees of statutory communication is usually used to support the so-called 'plain language' movements in law-making, whose aim is to ensure that public agencies use 'clear Government communication that the public can understand and use.'[30] I want instead to shift the focus on the potential consequences that can follow from this move as to our theories of interpretation.

I believe that two very different pictures of law's interpretive field stem from whether we assume that both laymen and legal officials are recipients of legal communication or not. In the latter case, which seems to be the traditional starting point for mainstream theories of legal interpretation, the fact that we consider only legal officials as addressees of legal utterances requires us to hold complex theories of interpretations, for our theories *must* account for the (pragmatic) characteristics of this community of legal interpreters. These pragmatic characteristics are, roughly:

1) the *authoritativeness*, and in some case the *finality*, of their decisions;
2) the high-level of specialisation, in terms of practical reasoning, of interpreters;
3) their self-reflexive understanding as being *part* of the normative institutional system, in particular as exclusive addressees of Hart's 'secondary rules' (Hart 1994);
4) their (superior) epistemic abilities as to both questions of law and questions of fact as opposed to lay-men;
5) the vast array of interpretive methods developed (Leiter and Coleman 1995, 213);
6) so-called juristic theories or 'legal dogmatics' (Guastini 2011, 148).

[29] The take-home point is the overall interaction between the two systems, language Y and law X, and the fact that the rules governing meaning in Y must be considered governing the same practice in X – this without denying the possibility for X to 'atomistically' re-define words and concepts from the set Y (Duarte 2011, 115).
[30] US Plain Writing Act of 2010 (HR 946, Pub L 111-274).

As a matter of course, a theory of interpretation that has to take into account (likely) even more than these listed features cannot but possess a highly degree of complexity. For several different theories of interpretation can be, and have been, put forward (linguistic, constructivist, consequentialist, originalist, coherentist, moral, etc.), each stressing different aspects of the practice of law. The result is the highest theoretical and pragmatic disputability of the (universal) adoption of *any* theory of legal interpretation; but more importantly a compelling ground – *rebus sic stantibus* – for the (radical) indeterminacy thesis of law.[31] Different theories of interpretation may lead to different (interpretive) results in a given case, and as there is no superior meta-principle that enable us to pick one of them as the right or correct one, we must do so, as realists say, by resorting to extra-legal, normative, considerations (moral, political, etc.),[32] as such acknowledging the *pervasive* indeterminacy of law.

What if then we adopt the former possibility, viz the idea that laypeople are addressees of legal communication (at least) as much as legal officials? Is there any difference, in particular as to the indeterminacy thesis? Well it seems to me that in this case the possibility of pragmatic enrichment of our interpretive working field changes altogether, and the fact that we consider laymen as the *first* recipients of deontic communication (Cao 2007, 76) yields relevant constraints upon our theory-elaboration process. In this regard, our theory of interpretation must now take into account, among other things:

1a) the relative non-specialisation of the *great majority* of norm-interpreters;
2a) the difference of the non-institutionalised pragmatic meta-context in which the deontic communication takes place (Duarte 2011);
3a) the different epistemic abilities of members of the public compared to those of high-skilled legal officials;
4a) the relative absence of second-order theories (juristic theories) which constrain interpretation;
5a) the coordinating and action-guiding function of law (Fuller 1969, Kramer 2007) and legal reasoning (Spaak 2007).

As we have seen, amongst the most prominent legal realist theses is that there is no way (and perhaps no meta-theoretical reason) to establish the predominance of *one* criterion of interpretation – and of the linguistic one in particular –[33] over the others in the interpretive practices of legal officials (Guastini 2011, 153-158; Leiter 1995). But does this still hold if, as I argue, we broaden our field and consider as the relevant community of interpreters the

[31] Here, I think, determinacy stands also for objectivity, notwithstanding the fact that Coleman and Leiter warn specifically against conflating the two concepts (Coleman and Leiter 1995, 600).
[32] Cf Guastini (2011, 148).
[33] By 'linguistic' criterion of interpretation I roughly mean what Asgeirsson (2012) calls 'textualist thesis of legal content', according to which 'the legal content of a statute is the linguistic content that *a reasonable member of the relevant audience* would, knowing the context and conversational background, associate with the enactment' (italics added). I want to stress how in such definition identifying the 'relevant audience' is preliminary to assessing the meaning of a given utterance – which is precisely the overall point I am trying to make in this chapter. cf also with Slocum's (2014) very compelling defence of an objective approach to interpretation and with his concept of 'ordinary meaning'.

sum of the two groups, laypeople and legal officials? In this case things seem quite different. If law is the enterprise of 'subjecting human conduct to the guidance of rules' (Fuller 1969), and if laypeople are the first and foremost addressees of legal utterances, it follows the prevalence, already at the descriptive level, of the linguistic interpretive criterion over the other available –[34] so that these latter become only residual or supplementary (Velluzzi 2008, 501-502). We must in other words acknowledge that in the great majority of cases laymen can be understood as *applying* the law[35] in their everyday lives by relying on the linguistic meaning of legal utterances.[36] For the linguistic criterion is the only one that squares with laymen's original epistemic abilities and that as such is shared with (specialised) legal officials.[37] This 'horizon of common meaning' between law's different types of addressees also ensure – in the sense of *making possible* – law's *certainty*, particularly in the negative sense of excluding whatever is outside the range of possible linguistic meanings of a legal utterance from its legal meanings (ibid), thus constraining interpretative operations. This allows legal rules to constitute *intelligible* reasons for action for their addresses (Sandro 2014) and as such to give rise to *genuine* rule-following practices (Wittgenstein 2009).[38] What are the consequences for our meta-theory of interpretation then?

I can think only of two alternatives here. Either we still maintain, notwithstanding this move, some sort of fundamental difference between the two types of addressees, so that we are forced to predicate two different theories of legal interpretation in our domain; or we must say that the linguistic criterion is the most relevant one, to be ranked descriptively above the others. The former option is indeed found in existing scholarship (Dan-Cohen 1984, Marmor 2008). It is based upon the well-known distinction between 'conduct' and 'decision' rules,[39] conceived of though as two *independent* sets of rules addressed to two *independent* sets of receivers, laymen and courts (Dan-Cohen 1984, 626-630). Dan-Cohen has purported to show, using a theoretical model of 'acoustic separation', on the one hand the beneficial effects - in terms of the realisation of both sets of norms' underlying policies - if one communicative

[34] The prevalence of the linguistic criterion is positively established in some civil codes, see for instance art 12 of the Italian Civil Code.

[35] Cf Hart (1994, 39). This is what sociology of law does for instance when measuring the effectiveness or lack thereof of the law. Obviously this is but a theoretical reconstruction: many people are actually partially or completely ignorant of the text of the law.

[36] This is a descriptive claim that is paired, on the normative level, by claims that the law *ought* to be interpreted linguistically, first and foremost – see eg the 'presumption of common natural language' in Wróblewski (1992). This convergence between descriptive and normative claims, in turn, strengthens the meta-theoretical point I am defending here.

[37] Hence the only one that can be required by the law on their part. Two qualifications are in place here. First, this contention has to do with the epistemic, and not moral, problem of *agency* in a deontic system (cf Fuller 1969, 162-167; Duff 2007, ch 2). In this regard, ascription of responsibility is premised upon so-called 'reason-responsiveness', that is, 'a responsible agent is one who is *capable* of recognising and responding to the reasons that bear on his situation' (Duff 2007, 39, italics added). But being able to recognise reasons implies, it seems to me, being able to understand the medium in which those reasons are communicated – hence, being able to understand language. As such, linguistic capacity is a necessary but not sufficient element for the ascription of any type of responsibility in our legal systems. Second, I am not claiming that laypeople are always incapable of interpreting the law according to criteria other than the linguistic one, but all these different types of interpretation (eg teleological) presuppose the linguistic one, viz are parasitical on it.

[38] Cf Stark (2013, 166) for the convergent claim that law must respect citizens as 'planning agents' (in the context of criminal law at least).

[39] For the origins of the distinction (tracing back to Bentham and lately Kelsen and Hart) see Dan-Cohen (1984, 626-630).

deontic 'channel' is more or less concealed from the other set of receivers, so that lay-men are more or less unaware of (some) decision rules that must be applied by courts in their jurisdictional function; on the other, to highlight that the law indeed makes use to a greater or lesser extent of 'strategies of selective transmission' to 'segregate its normative messages' in some cases, e.g. in criminal law (Dan-Cohen 1984, 636). This has brought Marmor to talk of a 'legislative double-talk' that must be understood as implying almost a 'conflicting implicature' on part of legislators (Marmor 2008, 437-438).

Now, Dan-Cohen's thesis that conduct and decision rules are *logically* independent has been already convincingly criticised (Duarte d'Almeida 2009). But even if we were to accept his thesis, the argument that decision rules *should* be to a greater or lesser extent concealed from the public seems unsound also on the normative one. In particular, I refer to his claim that 'by definition, conduct rules are all one needs to know in order to obey the law. Decision rules, as such, cannot be obeyed (or disobeyed) by citizens; therefore, knowing them is not necessary (indeed, it is irrelevant) to one's ability to obey the law.' (Dan-Cohen 1984, 673) It seems to me that Dan-Cohen fails to realize that the distinction between conduct and decision rules is, if any, a *relative* one - given that those same decision rules might become 'conduct' ones if infringed upon by a judge (Ferrajoli 2007, 681). So, how would it be possible for a citizen to file a lawsuit and report the violation of one of those rules (e.g. a procedural rule), if those very rules are to be concealed from her?[40] Hence those normative arguments that question whether these strategies of selective transmission can be deemed compatible with the rule of law in the first place seem reinforced (cf Duff 2007, 43).[41] For 'far-reaching incongruities between the law as it is articulated and the law as it is administered will be fatal to the existence of a legal system' (Kramer 2007, 138), and the legislature talking with 'two voices' would not but lead to increase such gap.

X.6 CONCLUSIONS

If what has been argued above is persuasive, one ought to recognise the prevalence of the linguistic criterion as it ensues from a sound elaboration of law's interpretive epistemic field – and more generally from correctly conceiving of law as an authoritative communicative enterprise. This entails that our meta-theory of interpretation must acknowledge this point and elaborate models of interpretation that display the interaction between the linguistic criterion of meaning and the other available (Velluzzi 2008, 502). Without acknowledging the necessary centrality of the linguistic criterion of meaning, it is not clear how can a theory of law account for the great bulk of legal phenomenology that allows more complex interpretive practices – like those of judges and lawyers, or those in specialised sectors of society – to take place. According to Kramer (2007, 139-140)

> two constraints are met by any genuine legal system. First, a key aim of the officials is to interpret and apply the formulations of the norms of their legal system in accordance with what would be expected by a dispassionate

[40] Indeed, Dan-Cohen (1984, 632, ft 14) explicitly supposes that decision-makers would not give reasons for their decision, thus in this way preserving the acoustic separation between themselves and the public. I hope the unacceptableness of the claim is so crystal clear that I do not need to linger at all on it.
[41] *Contra* Dan-Cohen (1984, 667-677).

observer who knows those formulations and who also knows the interpretive canons that prevail within the system. Second, naturally, those canons themselves – which consist of technical conventions for dealing with specialized legal terminology and concepts, but which also draw upon all or most of the ordinary conventions of the language in which the formulations of the legal norms are written – are such as to satisfy rather than dash the expectations of a dispassionate observer who is familiar only with the formulations and with the language (such as English) in which they are written. This second constraint is a crucial supplement to the first, since it rules out interpretive canons that would license and indeed require significant aberrations from the terms of the law on the books.

In other words, that the content of legal utterances which guides people's behaviour must be interpreted (first and foremost) according to the linguistic criterion of meaning used by the norms' addressees themselves [42] seems a very important requirement for the existence of a *genuine* legal system.[43]

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[42] Cf Raz (1979, 217): 'it is obvious that it is futile to guide one's action on the basis of the law if when the matter comes to adjudication the courts will not apply the law and will act for some other reasons'; see also Slocum (2014).

[43] The argument proposed in this chapter can be understood as taking the cue from, and thus in some sense as supporting (but from a different angle, that of philosophy of language), the early legal positivist project that purported to vindicate law's autonomy from morality through its scientific and technical method. This political project, which can be retrieved more clearly in the works of Friedrich Carl von Savigny, Jeremy Bentham and Gaetano Filangieri, highlighted the dangers, among other things, of interpretation when this latter carries the law too far away from the posited text of the legislation. I owe this point to Francisco Saffie.

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