Meaning in Law.
Two Theories of Ordinary Meaning for Statutory Interpretation and Why They Do Not Work

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Abstract

The mainstream view on legal interpretation relies on different theories of ordinary meaning in order to set down what the legal meaning is and how to grasp it. In this essay I distinguish among the current theories of meaning by classifying them into two broad groups, or better, two ideal models: rule-based theories and speaker-based theories. This distinction is not meant to be mutually exclusive nor collectively exhaustive. However, these two models, and the difference between them, are interesting for my purposes in so far as they are usually considered the best candidates to account for legal meaning, i.e. the meaning of legal texts. Against these common views, I will attempt to show that the application of both models to legal interpretation is problematic. Even though for different reasons, both models are not suitable for legal domain. The failure of both models brings out an irreducible difference between ordinary understanding and legal interpretation and produces some unpleasant consequences. In particular, it results in the collapse of the distinction between creation and application of law.

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1. Statutory Interpretation and Ordinary Meaning

The standard picture of legal interpretation is focused on language and the lin-

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guistic tools to discover the meaning of a statute, and legal interpretation is therefore conceived as a subfield of linguistics (Baude & Sachs 2017). More precisely, the mainstream view relies on different theories that have been developed with respect to our everyday linguistic interaction in order to set down what the legal meaning is and how to grasp it (Poggi 2020a). The basic assumption sounds very reasonable: since legislation mainly employs natural language, and since it should be understandable by its recipients in order to direct their conduct, it seems to follow that legal interpretation does not or should not significantly differ from ordinary understanding. However, there are many competing theories of ordinary understanding and they can be classified according to various criteria and different degrees of abstraction. Thus, for example, we can distinguish between semantic and pragmatic theories, cognitively oriented theories and realistic theories of meaning, contextualism and literalism, or – adopting narrower parameters – inferential theories and reference theories, radical and moderate contextualism, semantic minimalism, relativism, indexicalism, and so on.

Herein, I propose that some current theories of meaning be categorized into two broad groups: speaker-based theories and rule-based theories. I will adopt this classification simply because it is more useful for my purposes, without claiming that it is better than the others. In particular, my proposal is to be understood as a distinction between two ideal models. I believe that the distinction between speaker-based theories and rule-based theories is fruitful from an epistemic point of view, since it enables one to clarify some debatable points. However, such a distinction is neither mutually exclusive nor collectively exhaustive[2]. Not only are there mixed theories, which blend some features of the two models above, but there are also theories that cannot be attributed to either of these two models. Nevertheless, these two models, and the difference between them, are interesting for my purposes in so far as they are usually taken as the best candidates to account for legal meaning, i.e. the meaning of legal texts. In fact, as we will see, there are both good reasons to argue that a theory of legal meaning should be a speaker-based theory as well as good different reasons to maintain that it should be a rule-based theory instead. Contrasting these common views, I will argue that the application of both models to legal interpretation is problematic: these models seem unsuitable for legal domain. In particular, I will consider the problems related to the application of these two models to statutory interpretation, which I assume to be, here and now, a paradigmatic case of legal interpretation.

I will proceed as follows. I will explain the distinction between rule-based theories and speaker-based theories of meaning (§ 2) and I will provide some examples

[2] However, I think the same holds for all the classifications among theories of meaning: in a sense they are all ideal models, which have epistemic usefulness, but that can always clash with recalcitrant data. In fact, whatever classification we adopt we can always find authors that have developed mixed theories.

(§2.1). Then, I will try to show why speaker-based and rule-based theories of meaning, despite their apparent appeal, are not suitable for legal interpretation (§§4-5). Afterword, I will examine the unpleasant consequences that follow from their inadequacy (§6). In fact, the failure of both models brings out a difference between ordinary understanding and legal interpretation and it leads to the collapse of the distinction between creation and application of law.

2. Speaker-based Theories and Rule-based Theories of Meaning

By "speaker-based theories of meaning" I mean theories according to which the meaning of a sentence is the meaning that the speaker intends to communicate by uttering it. According to this view, the speaker's intention is what sets the identity of meaning. Surely, these theories recognize that communication is also a matter of rules, but within this model, rules are simply instruments through which the speaker's intention can be inferred.

In contrast, according to rule-based theories, the meaning of a sentence is the meaning established by the relevant set of rules. The relevant set of rules is what defines the identity of meaning. Surely, this approach recognizes that speaker's intention plays a role in the communicative process, yet the speaker's intention is relevant only if it complies with the rules. In other words, speakers are supposed to express their intention in accordance with the relevant rules, so that the meaning established by the rules and the meaning intended by the speakers coincide. However, if they do not, the rules prevail.

It is worth noting that both approaches assume that context is also important, but they assign different roles to context. According to speaker-based theories, context is an element that, along with rules, makes it possible to infer speaker's intention. According to rule-based theories, context is an element which rules can refer to in order to establish the meaning of some constituents of the sentence[3].

[3] I would like to emphasize that, in my view, the above theories are primarily theories of meaning – theories on how meaning is determined – and, secondarily and consequently, theories on how to grasp meaning. It is true that adherents of both theories often distinguish different levels of meaning, but this is not always the same as adopting different concepts of meaning. In particular, authors advocating the speaker-based model conceive of these levels as successive theoretical articulations to explain a communication process which is unique (see, e.g., Bach 2005) or as levels that reproduce internal inferences made by listeners and/or speakers to determine the intended meaning (see, e.g., Sperber, Wilson 1986). By contrast, the supporters of rule-based theories distinguish between a rule-based, invariant, express and necessary meaning and an optional pragmatic implicit meaning which is built on the former (see, e.g., Cappelen & Lepore 2005). Thus, if for the proponents of speaker-based theories there is only one concept of meaning, for the proponents of rule-based theories there seems to be more than one. However, in their perspective what matters is the priority and autonomy of the rule-based meaning: see below (footnote 4 and § 4.1).

The problem is, then, how to establish which approach is better: fortunately, on this point, there is a broad consensus. In fact, it seems that speaker-based theories are to be preferred if there are cases in which the sentence meaning, as determined by rules, is irremediably indeterminate or under-determined[4]. Unfortunately, whether such cases exist is a highly controversial issue. In order to clarify the point as well as the proposed distinction, in the next section I will provide two examples: both refer to very complicated debates, but I will simplify them as much as possible, in light of my purposes.

2.1. Examples: Pragmatic Completion and Demonstratives

Let's consider the following sentence:

(a) It's raining

According to the speaker-based theories (a) expresses an indeterminate meaning. We cannot know whether (a) is false or true if we do not know where it is raining. And we cannot know where it is raining without referring to the speaker's particular communicative intention, the determination of which is not a matter of rules. So, e.g., according to some authors, (a) includes an unarticulated constituent: a pragmatic constituent that is not triggered by anything in the syntax or semantics of (a) (see Perry 1998; Recanati 2004).

Rule-based theories challenge either that (a)'s meaning is indeterminate or that its completion is not a matter of rules. So, e.g., some authors claim that (a) expresses a complete proposition which amounts to "There is an instance of (unlocated) rainfall"[5]. In contrast, other authors sustain that (a) is in fact incomplete, but they argue that its completion is trigged by a hidden variable in the syntactic or semantic structure of the sentence. Therefore, the identification of the relevant place amounts to the saturation[6] of a (hidden) indexical. Various tests have been devised in order

[4] More precisely, we prefer the model that can explain and predict all the phenomena explained and predicted by the competitor model plus some phenomena that the competitor model is not able to explain and predict. Currently, the dispute focuses on whether speaker-based theories have a stronger explicative and predictive power: most theorists opine that in order to prove that they have it, we must prove that in the some cases the sentence meaning as determined by rules is irremediably indeterminate or under-determined.

[5] This thesis is usually advanced by the supporters of semantic minimalism: see Borg 2004; Cappelen & Lepore 2005. It is worth noting that, as we shall see later (§ 4.1.), these authors do not claim that the meaning of (a) within a conversation is exhausted by "There is an instance of (unlocated) rainfall". They claim that (a) has primarily this meaning, on the basis of which other implicit meanings are subsequently elaborated. Minimalism is an attempt to vindicate the autonomy of semantics showing that communication is a bottom-up process which rests on solid semantic bases.

[6] Saturation is "the contextual provision of a value for a syntactically marked context-sensitive item" (Carston 2012: 671).

to show when a constituent is truly unarticulated or when there is really a hidden indexical: none seems ultimate and all are disputed (see Stanley 2000; Recanati 2004).

If the phenomenon of pragmatic completion is still being debated, a more powerful argument in favour of speaker-based theories seems to be provided by demonstratives. Let's consider the following sentence:

(b) I love that[7]

'I' is a pure indexical: it is linguistic expression whose reference can shift from context to context[8]. However, 'I' has a single invariant linguistic meaning or character (Kaplan 1989), which approximately amounts to "'I' refers to the person who is speaking". It is because of this fixed linguistic meaning that (b) can have a virtually unlimited number of contents in different contexts. In summary, a pure indexical has two kinds of meanings: an invariant linguistic meaning (or character) and a content that is determined by its character plus some contextual elements. It is important to stress that the character precisely determines which contextual elements are relevant in order to fix the content, and moreover, it refers to a very narrow context. So, for example, the only contextual element which is relevant to establish the reference of 'I' is the speaker[9]. But what about 'that' in (b)? Suppose that I utter (b) pointing at an empty bottle of porto wine. In this context of utterance, (b) can mean:

(b1) I love that kind of wine – i.e. I love porto wine
(b2) I love that brand of porto wine
(b3) I love the shape of that bottle
(b4) I love that the bottle is empty

'That' is a true demonstrative: its reference – and, therefore, the meaning of (b) – is not (at least, not entirely and not always) determined by its character (nor by the speaker's pointing gesture). It seems that the reference of true demonstratives depends on the speaker's communicative intention (Bach 1992): an element on which rules have no control. However, a complication arises. Suppose that I mistakenly believe that the bottle I'm pointing at is a bottle of champagne and that, by uttering (b), I intend to communicate that I love champagne. It is very counterintuitive to say that the meaning of my utterance is that I love champagne. Even if some exceptions

7 The example is from Bianchi 2003, 42.

8 Actually, not all theorists accept this characterization of indexicals: see Braun 2017. For the sake of simplicity, I will not address this difficulty here.

9 In Perry's terms 'I' is an automatic and narrow indexical. An indexical is automatic if its reference is determined by its linguistic meaning and some public contextual facts, such as speaker and time. An indexical is narrow if its reference is determined by a narrow context including only speaker, time and location. See Perry 1997; Perry 2001: 58ff.

are possible – e.g. if I'm victim of the practical joke of friends who are making fun of my wine ignorance – no one would say this. Moreover, in this example, the speaker has two conflicting communicative intentions: the intention to mean that she loves the kind of drink that was contained in the bottle she is pointing at and the intention to mean that she loves champagne. Which one prevails (and why)?

Various solutions have been devised in order to avoid the problems above and provide a satisfactory treatment of demonstratives: some of these are closer to the speaker-based models, others are closer to the rule-based models, and still others have mixed elements. Currently none of these solutions is unanimously accepted and all are challenged[10]. Therefore, also the dispute on demonstratives is still open.

The previous examples were meant to show the distinction between speaker-based theories and rule-based theories of meaning: two models that try to explain meaning and understanding with regard to our ordinary communication. Establishing which one is better is beyond the scope of this paper. Instead, in the next sections I will attempt to argue that both models are unsuitable within legal domain.

3. Speaker-based Theories and Statutory Interpretation

There are very good reasons for thinking that speaker-based theories can account for statutory meaning. It seems reasonable to conceive of legislation as an intentional phenomenon. Raz makes this point very clear: «Only acts undertaken with the intention to legislate can be legislative acts» (Raz 2009: 282). Raz claims that «the notion of legislation imports the idea of entrusting power over the law into the hand of a person or an institution, and this involves entrusting voluntary control over the development of the law, or an aspect of it, into the hands of the legislator» (Raz 2009: 282). It follows that legislation cannot be identified without reference to legislative intent: the idea of an unintentional act of legislation is inconsistent. Moreover, Raz argues that the intentional nature of legislation supports the "Authoritative Intention thesis", according to which «To the extent that the law derives from deliberate law-making, its interpretation should reflect the intention of its lawmaker» (Raz 2009, 275)[11].

More recently, Goldsworthy claims that, as a matter of fact, statutory interpretation fits with a speaker-based theory, in some countries at least. According to Goldsworthy «legal meanings of legal texts are determined ultimately if not entirely by the practice of legal offices», and «linguistic grounds (…) are relevant only if they are consistent with, and help to illuminate or clarify, existing legal practices» (Goldsworthy 2019: 175). On this regards, Goldsworthy claims that the legal prac-

[10] See, e.g., Devitt 1981; Wettstein 1984; Perry 2009; King 2012; Braun 2017.

[11] However, as we will see (§4), Raz does not embrace a speaker-based model.

tice of Anglo-American legal systems includes two fundamental constitutional doctrines: Legislative Supremacy and Legislative Intention. The commitment to these doctrines involves the adoption of a speaker-based theory according to which the content of law is the content that the legislators intend to communicate. That is to say, the actual legal practice fulfils and, at the same time, founds a speaker-based model. «[I]t is the practice of legal officials that directly determines the matter [i.e. what statutes mean], their normative commitments helping us to understand why they adopted and continue to adhere to that practice» (Goldsworthy 2019: 181). Therefore, a version of the speaker-based theories «provides the most plausible account (interpretation, if you will) of the orthodox legal understanding of the content of Anglo-American Statutes and written constitutions» (Goldsworthy 2019: 181).

Goldsworthy's idea may well be extended to other legal systems. In many jurisdictions judges and lawyers often invoke legislative intent and one would have to assume that these practices are serious and make sense[12].

Nevertheless, the application of speaker-based theories to statutory interpretation raises well-known problems. Many scholars have claimed that legislative intent is a «transparent and absurd fiction» (Radin 1930: 863)[13] or «a metaphor» (Luzzati 2016: 134ff.). Collective entities such as legislatures do not have a mind and, therefore, they cannot bear mental states. Thus, even if we confine ourselves to the law enacted by legislative assemblies – thus excluding customary law and common law –, it seems hard to identify a legislative intent that is able to play the same role that a speaker's intention plays in ordinary conversation. Legislative intention can obviously be ascribed to individual legislators, i.e. to each member of a legislative body, but individual intentions do not determine the content of legislative texts (Pettit 2001: 250-1). When a legislative body passes a statute, all we know is that the majority intended the statute to be enacted, not that the members of this majority intended to convey the same normative content by enacting it.

In order to clarify this point, it is worth noting that, according to the speaker-based model, the meaning of a sentence is the meaning that the speaker intends to communicate by uttering it. Briefly, the relevant communicative intention of the speaker is the intention to have the recipient understand what the speaker means by making the recipient recognize this intention[14]. This complex and reflexive communicative intention can be broken down into the following levels:

[12] Many authors claim that, when invoking legislative intent, judges and lawyer actually refer to the different things, such as the most reasonable reading of the legal provision, or the subjective purpose of the legislators, or the so called *ratio legis*, i.e. an objective purpose which is intrinsic to the norm, e.g., the value it expresses, and/or the aim it pursues, and/or its inner justification (see Diciotti 1999, 312ff.; Guastini 2004, 150ff.; Guastini 2008, 38ff.; Velluzzi 2013: 74ff.; Luzzati 2016: 145ff.). However, one could object that these readings do not take legal practice seriously, do not put it in the best light.

[13] See also Dworkin 1986: 335ff.

[14] See, e.g., Grice 1989, 86ff.

(i) the intention to utter (write) something;
(ii) the intention to utter (write) a given sentence (*x*) and not something else;
(iii) the intention to mean (communicate) something (equal/other/different)[15] by uttering *x*;
(iv) the intention to mean (communicate) *S* and nothing else by uttering *x*[16].

The first level – i.e. the intention to utter (write) something – is very important: it is what characterizes the communication and activates the interpretive activity as an activity aimed at understanding what the speaker intends to communicate. Consider the following example:

(c) These spots mean measles

Here the verb "to mean" refers to causal connections among spots and measles. It is a matter of regularity between certain facts and other facts of which the former constitutes the symptoms or the indications. There is no intention to communicate anything[17]. Similarly, imagine that the sea has washed up some shells on the beach. I can certainly argue that those shells have taken a shape that means 'cat', but here the verb "to mean" does not refer to someone's intentional communication. The sea has no communicative intention that those shells reveal. It follows that the first level of intention is what defines communication – what makes a certain set of sounds or signs count as, or have value of, communication. This level is also the *conditio sine qua* of any interpretative activity, seen as the activity that aims to understand what a speaker intends to communicate.

The intention to enact a statute amounts to this first level[18]. The Parliament intentionally enacts a statute since this enactment is the result of several intentional actions of its members. The intentional participation in the legislative procedure ensures that the law can be understood as the intentional product of (the intentional actions of) the members of the Parliament, i.e. as a communicative instance. Never-

[15] Speaker-based theories do not deny that sometimes an utterance can mean what it means according to the relevant set of rules. However, according to speaker-based theories, an utterance means what it means according to the relevant set of rules if the speaker intends it. On this point see Strawson 1973; Bach 1997; Rysiew 2007.

[16] See Canale and Poggi 2019; Poggi 2020b; and, on the two last levels, Asgeirsson 2017: 82. Notice that the four levels of intention identified in the text should not be confused with different kinds of intention. They simply identify the internal articulation of a unique communicative intention.

[17] This is Grice's *natural meaning*. See Grice 1989: 213 ff.

[18] As we will see (§4), this is Raz's minimal intention: the intention to participate in the legislative procedure and to enact a given text as law. «A person is legislating (voting for a bill, etc.) by expressing an intention that the text of the Bill on which he is voting will […] be law» (Raz 2009: 284). According to Raz, this minimal intention «does not include any understanding of the content of the legislation» (Raz 2009: 284).

theless, this minimal intention is irrelevant in order to establish the intended meaning of the statute enacted[19]. The other three levels of the speaker's communicative intention must come into play.

As far as the second and the third level are concerned, they are very problematic regarding those who voted in favour of the text without reading it. In fact, «It is uncontroversial that most legislators do not read most of the text of the statutes on which they vote» (Greenberg 2011: 239)[20].

Leaving aside the cases in which MPs vote on texts that they have not read – which might be considered as pathological cases, as deviations from the standard (though they are very frequent) – the last level of the speaker's communicative intention is very problematic also with respect to MPs who have read the text and voted in its favour. Within the speaker-based model, the fact that two speakers utter the same sentence does not ensure that, in doing so, they intend to communicate the same meaning. In fact, according to the speaker-based model, sentence meaning is underdetermined or indeterminate. Therefore, it is always possible that two speakers intend to communicate different meanings through the same sentence: it is the speaker's intention which determines the communicated meaning. An epistemic problem also arises: how do we know whether two speakers have the same communicative intention when they utter the same sentence? Within ordinary conversation, context plays a fundamental role in order to grasp speaker's intention. However, as far as legal interpretation is concerned, context does not help: I will return on this point in sect. 4. For the moment, it is enough to stress that, as far as legislative assemblies are concerned, sometimes it is unquestionable that there is not a single communicative intention. Legislation is a matter of negotiation and compromise. «As a result, the language is often chosen not in order to implement anyone's communicative intention, but because, for example, it is unclear enough

[19] This point is clearly stated by Lifante 1999.

[20] Raz seems to dispute this point. He claims that legislators – who have the minimal intention that the text of the Bill on which they are voting will be law – «know that they are, if they carry the majority, making law, and they know how to find out what law they are making. All they have to do is establish the meaning of the text in front of them» (Raz 2009: 284-5). I think that this passage is very problematic. Considering that, according to Raz, «legislation requires not merely legislating; it requires knowing what one legislates» (Raz 2009: 282), can we say that a member of the majority, who has not read the text of the bill, knows what she is legislating simply because she could find it out? If I do not know German and I intentionally pronounce the sound "Hund", can it be argued that I intend to say "dog", only because I *could* find it out with a dictionary? An affirmative answer would make no sense within a speaker-based model of meaning. Within ordinary conversation, it is untenable to say that a speaker *intends* to communicate *S* by uttering *x*, if all that the speaker actually intends is to make a sound, whose meaning she ignores, with no other communicative intention. In the same way, it is untenable to say that a member of Parliament intends to enact the norm *N* by raising her hand, if she has not read the bill on which she is voting. All that she intends is to pass a bill, not to enact the norm *N*. Briefly, a speaker cannot be said to express a communicative intention if she does not know what she is uttering and does not intend to communicate a given meaning by uttering it.

for a majority to accept» (Greenberg 2011: 253). Therefore, very often, the MPs (or the majority that votes for the text) do not have a unique intention about how to intend an unclear statute[21].

In the next sections I will consider two possible strategies against the previous objections: theories of collective intentionality and the objective communication theory.

3.1. Why not Collective Intentionality?

The first strategy is to appeal to some theories of collective intentionality in order to solve the above problems[22]. I contend that this strategy does not work. The most popular and plausible theories of collective intentionality usually require that collective intentionality must rise (emerge, etc.) from individual intentions with some (at least partially) coincident propositional content. But here the point at stake is precisely whether the parliamentarians' individual intentions are directed to the same meaning. In other words, theories of collective intentionality do not suppose the existence of a collective mind capable of bearing collective intentions that are independent from the individual ones: collective intention is always the result of particular individual intentions related to each other in specific ways[23].

Consider for example Bratman's famous theory. According to Bratman, collective intentionality derives from individual planning agency, so that we do not need any new basic elements in our metaphysics or philosophy of mind in order to account for robust forms of collective agency[24]. It follows that there can be a legislative (collective) intention to mean (communicate) *N* (and nothing else) by enacting a provision *P*, only if each member of Parliament (or of the majority) bears the intention "I intend that we intend to mean (communicate) *N* (and nothing else), by enacting a provision *P*". However, as we have seen, the existence of this intention is precisely the point at stake.

In a nutshell, the collective intention to mean *N*, by enacting the provision *P*, presupposes that each member of Parliament (or of the majority) bears the same

[21] Speaker-based theories are also inconsistent with some legal interpretative practices. Sometimes, for instance, a legal provision is interpreted according to a superior constitutional norm that was enacted later: according to a speaker-based model, it makes no sense to intend an utterance in the light of a context that the speaker could not know. However, the existence of similar interpretative practices does not amount to a critique of the viability of speaker-based models within statutory interpretation: one can simply argue that sometimes judges are wrong, since they do not try to grasp the legislative intention.

[22] E.g. Ekins 2012 follows this strategy.

[23] See Roversi 2016. The types of the relevant individual intentions and the way in which they are interconnected vary from one theory to another.

[24] This is the core of Bratman's *continuity thesis*: «The conceptual, metaphysical, and normative structures central to such modest sociality are […] continuous with structures of individual planning agency» (Bratman 2014, 8).

communicative intention, and therefore it cannot ground the existence of that communicative intention.

A detailed analysis of the theories on collective intention is beyond the scope of this essay, but I claim that the same hold for other theories of collective intentionality[25], such as Tuomela's and Gilbert's[26].

3.2. Why not Objective Intention?

The second strategy in order to overcome the criticisms against the plausibility of a speaker-based model of statutory interpretation consists in appealing to an objective communicative intention.

Especially Goldsworthy (2019) develops this strategy. He supports an objective communication theory [OCT], which makes reference to manifest communicative intentions, i.e. intentions that are accessible through textual and contextual evidence (Goldsworthy 2019: 180). Quoting Scalia, Goldsworthy says that «We look for a kind of "objectified intent" – the intent that a reasonable reader would gather from the text of law, placed alongside the remainder of the *corpus juris*» (Scalia 2018: 31), and «other admissible contextual evidence of intent» (Goldsworthy 2019: 180).

Surely, different reasonable readers can reconstruct the reasonable legislative communicative intention in different ways, especially depending on which admissible contextual evidence they rely on (§ 4). However, Goldsworthy concedes this point. Goldsworthy admits that judges understand and reconstruct the legislative objective intention in different ways, but he claims that this fact does not compromise the existence of such intention. «We can agree that something exists notwithstanding theoretical disagreements about its nature; if not, there would be virtually nothing we could believe exists» (Goldsworthy 2019, 177)[27]. Judicial disagreements

[25] Perhaps this is not true as far as Searle's theory is concerned. According to Searle, group intention is formed in the mind of an individual (there are not collective minds) but it is irreducible to individual intentions: collective intentionality (we-intention) is biologically primitive. As far as cooperative actions, there is a collective intentionality if an individual has the collective intention-in-action of B (for example, I intend that we play a duet) by ways of her individual action A (for example, by ways of my playing the plan) plus the belief that also the other subjects of her collective intention have the same collective intention-in-action of B, by way of the execution of their individual action (Searle 2010: 50ff.). However, Searle admits that an individual can also mistake her situation: e.g. it can be false that you have the collective intention-in-action to play a duet with me. Therefore, a single member of the Parliament can bear the we-intention to enact the norm *N*, by passing the provision *P*, even if she is the only one who intends *N* by voting for *P*. As Ekins observes, «It is more than a little odd to think there may be group intentions without a group» (Ekins 2012: 53).

[26] See Schweikard and Schmid 2013; Roversi 2016. Actually Gilbert (1992) speaks of "plural subject", but with this expression she simply refers to the relationship between individual commitments. See Gilbert 1992: 428ff.; Gilbert 2013: 9-10.

[27] "Eminent philosophers of language disagree among themselves about the nature of the communicative contents of utterances, but that does not show that utterances do not have communicative contents

do not compromise even the existence of the legal practice that, adhering to the doctrines of Legislative Supremacy and Legislative Intent, relies on the legislative objective intention. They simply make the practice more indeterminate (Goldsworthy 2019: 181). Moreover, according to Goldsworthy, nor even the fact that sometimes judges clearly depart from whatever attempt to reconstruct the legislative intention compromises the existence of the practice. In fact, it confirms it. Also judges who tamper with the doctrine of Legislative Intent pretend to engage in the practice of reconstructing the legislative intention. And, according to Goldsworthy, «what judges say they do is much better evidence of the scope of their lawful authority than what they might sometimes actually do» (Goldsworthy 2013: 308; Goldsworthy 2019: 192-193). «It follows that the legal content of a statute is what the orthodox interpretative doctrines authorize judges to identify or construct, regardless of occasional dissembling» (Goldsworthy 2019, 193).

Goldsworthy's view seems impregnable. All what matters is that judges declare that they are committed to the doctrines of Legislative Intent and Legislative Supremacy, regardless how they actually reconstruct the legislative objective intention, and regardless if they are actually reconstructing the legislative objective intention. Still I think that Goldsworthy's thesis is untenable for three reasons at least.

Firstly, it is true that something can exist notwithstanding theoretical disagreements about its nature. If we are speaking about *X*, and you think that *X* is *a*, while I think that *X* is *b*, our disagreement does not prove that *X* does not exist (nor that *X* exists). However, our disagreement implies that we are not speaking about the same thing, except on a very abstract level of description – i.e. we are both speaking about *X*. Thus, if judges reconstruct the objective legislative intention in different ways, they are not engaging exactly in the same practice[28].

Secondly, it seems to me odd that what judges say they do determines a practice much better than what they actually do. This idea sounds reasonable only if the deviations from the practice are marginal, exceptional. What about if the majority of judges pay only a formal homage to the doctrine of Legislative Intent without ever even attempting to follow it? Nor Goldsworthy nor I have empirical data to show whether or not this is the case.

Finally, my main objection is that Goldsworthy's thesis turns the legislative communicative intention into an empty notion, which is very different from the

[…] Moreover there is not good reason to exclude in advance the possibility that philosophers of language will one day prove that some version of OCT is superior to others" (Goldsworthy 2019, 177-178).

[28] A supporter of the direct reference theory could object that, even if judges do not share the same concept of objective legislative intention, they can still refer to the same object and, therefore, speak about the same thing. However, this objection is off-target. The point here is that the judges reconstruct the objective legislative intention behind the same legal provision in different ways: therefore, they actually refer to different things. Of course, this does not exclude that one reconstruction might be correct and the other wrong, but it excludes that the practice is the same.

notion of communicative intention developed by the theories of ordinary meaning. In ordinary conversation one can claim that the meaning of an utterance is the meaning that a reasonable speaker intends to communicate, given a certain context of utterance. Surely, also in ordinary conversation the context is huge, and it is sometimes doubtful which contextual elements the speaker has reasonably assumed as relevant – and therefore which contextual elements are relevant in order to infer the speaker's reasonable communicative intention. Listeners make an (unconscious) evaluation, and they sometimes fail – misunderstandings are always lying in wait. However, in ordinary conversation we have a criterion to know whether and when the recognition of the relevant context, and therefore the communication, has failed. If the speaker's actual communicative intention does not amount to what I think she has reasonably intended, then the communication has failed. The failure may be due to the speaker – who was not reasonable, e.g. because she has assumed as mutually known a context which was not –, it may be due to the listener – who did not recognize the relevant context – it may be due to both or neither. Nothing similar usually happens in statutory interpretation.

In legal domain, as we will see (§ 4) and as Goldsworthy concedes, there are many possible different reconstructions of the relevant co-text. Each one is reasonable. To each one corresponds a different construction of the legislative objective intent. And it lacks a criterion to establish which one is better. In statutory interpretation, the objective notion of communicative intention does not find a counterbalance in any actual intention on the part of the legislators: i.e., a criterion to establish the success of the communication is missing. Precisely because there is no parameter to establish communicative success, and because, in fact, there is no consensus on the relevant context, each interpretative proposal has theoretically the same validity as the others.

4. Rule-based Theories and Legal Interpretation

If one agrees that speaker-based theories are untenable in statutory interpretation, the obvious option is to turn to rule-based theories. In fact, rule-based theories are very popular among legal scholars. Raz himself seems to adhere to a kind of rule-based theory. As we have seen (§3), Raz claims that legislation is an intentional phenomenon. However, according to Raz, the minimal intention that is required in order to conceive of the legislation as an intentional phenomenon is the intention to engage with the legislative procedure and to enact a bill as law. As far as the "Authoritative Intention thesis" – according to which the statutory interpretation «should reflect the intention of its lawmaker» (Raz 2009: 275) – Raz actually dissolves the lawmakers' intention into the linguistic conventions. Raz claims that «In the cycle of convention and intention, convention comes first, […] in the sense that the content of any intention is that which it has when interpreted by reference to

the conventions of interpreting such expressive acts at the time» (Raz 2009: 286). Moreover, he maintains that «given that normally, legislation is institutionalized in a way which virtually removes the risk of a slip of the tongue, loss of physical control, or any other explanation for misfire actions, and given that any conceivable theory of authority puts a high premium on relative clarity in demarcating what counts as an exercise of authority and what does not, the possibility of having to go behind what is said to establish what was meant becomes very rare. For practical purposes it may altogether disappear» (Raz 2009: 287).

From the quotations above, it seems to follow that Raz adheres to a rule-based model. As we have seen, rule-based theories claim that the meaning of an utterance is the meaning established by the relevant set of rules. Speakers are supposed to express their intention in accordance with the relevant rules, so that «the content of any intention is that which it has when interpreted by reference to the conventions» (Raz 2009: 286). In particular, as far as legislation is concerned, Raz's position is sustainable and sound if the meaning of statutory provisions is fully determined by rules and conventions due to the legislation's own features.

In fact, Raz's position is very widespread in legal theory[29]. The general idea is that, no matter what happens in ordinary conversation, in legal interpretation rules and conventions suffice in order to grasp a complete, determinate, legal meaning. In this section I will attempt to overturn this thesis and show that, even if rule-based theories were to be preferred within ordinary discourse, they are not suitable for legal interpretation.

Rule-based theories of meaning claim that the meaning of a sentence is the meaning established by the relevant set of rules and conventions. More exactly, as emerges from the provided examples (§2.1.), some supporters of rule-based theories argue that the meaning of a sentence is determinable – even if not determined – by rules. That is to say, some supporters of rule-based theories admit that the meaning of certain components of the sentence can be determined only by reference to some contextual elements, but they argue that which contextual elements are relevant is fixed by the rule associated to those components. In particular, this position is shared by the so-called invariantist theories. So, for example, according to hidden indexicalism some expressions have a unique meaning, which, however, includes a hidden variable (or indexical) that must be saturated by some contextual elements that are specified by the variable itself. Or, to provide another example, according to relativism, some expressions have an invariant meaning content, but their extension (and therefore the true value of their content) shifts from context to context since it is relativized to non-traditional parameters[30].

[29] See, e.g., Marmor 2008; Asgeirsson 2017.

[30] So, e.g., Lasersohn (2005) argues that the predicates of personal taste, such as "fun", do not vary in content from context to context but do vary in extension with respect to judges and /or standards of taste.

It is important to stress that, for the rule to be saturated, the context must be fixed and determinate. Let's introduce this point with a mental experiment. Imagine that I'm walking in a park with my friend Eugenia and we meet our common friend, Isa, with a big black dog on her leash. Suppose that Isa utters

(d) This dog is Guinness

Here, (d) does not raise any problems for the supporters of rule-base theories. "This" refers to the dog closest to the speaker. In that context there is one and only one dog that satisfies this requirement, i.e. the black dog that Isa brings on her leash. All the parties (Eugenia, me and Isa) are aware that there is one and only one big black dog on Isa's leash, and they mutually know that each one of them is aware of this fact. But now imagine that, when Isa utters (d), she is seeing a big black dog on her leash, while Eugenia sees a white little dog and I see no dog at all. If this strange situation occurred, the meaning of (d) would be problematic: the rule associated to "this" still identifies which element of the context is relevant – i.e. the dog closest to the speaker – but for each party the rule selects a different object.

This mental experiment aims to show that a necessary condition for rule-based theories to individuate a complete determinate meaning is that the context must be fixed: context has to be a factual piece of data, an object of mutual knowledge. In ordinary conversation this often occurs, and often does not.

The failure in determining a precise truth-functional meaning is not a problem for rule-based models. The supporters of these models argue for the primacy of semantics and syntax: they claim that communication is a bottom-up process trigged and driven by rules. They may concede that sometimes rules and context do not suffice to individuate a determinate meaning and, therefore, the sentence has not a determinate meaning and the parties of the conversation do not understand each other, as in fact it occurs[31]. Nevertheless this picture arises a lot of problems as far as statutory interpretation is concerned. In fact the context of legislation is constitutively opaque: it needs to be reconstructed by interpreters and it can be reconstructed in several different ways[32]. That is to say, in statutory interpretation context is almost never fixed, it is almost never an object of mutual knowledge, but it is a matter of reconstruction and dispute. Therefore, the adoption of a rule-based

[31] Let's consider again sentence (a) "It's raining". The supporters of the invariantist theories may concede that the precise truth-functional meaning of (a) is not clear every time the context does not provide clear indications on how to saturate the indexical that is hidden in its syntactic form. What matters in their perspective is that there is such an indexical that must be saturated, and, therefore, that the determination of meaning is always guided by rules – even if sometimes the result of saturation is undetermined. After all, misunderstandings and linguistic inaccuracies are real phenomena that any theory must account for.

[32] See Poggi 2013. On the opacity of legal context see also Marmor 2008; Assgeirson 2017.

theory lead us to conclude that the meaning of legal provisions is very often indeterminate – more often than we would like.

As it is well known, the main context of legislation is represented by other legal materials: a statutory provision is not interpreted alone, but in relation to a system of other legal provisions and principles. Such a "reference-system" includes, but it is not limited to, the other provisions of the same statute. Moreover, it does not usually coincide with the whole legal system. In particular, this subset may include all the provisions or principles regulating the same subject matter (*pari materia*), or other provisions and principles that are not strictly related to the statutory provision but might be regarded as relevant according to certain criteria. It also may embrace the legislative history, the relevant case law, the ends that the statute seeks to realize, the parliamentary reports, international agreements, and so on.

As far as the identification of this context, a twofold problem arises.

Firstly, which elements must be included in the reference-system? In this way, for example, the concept of *pari materia* is vague, indeterminate, and open to dispute. E.g., it can be argued that the criminal provision on the cultivation of marijuana and the provision that defines the legal concept of farmer cover the same subject, as both relate to cultivation, or it can be argued that they do not since one is a criminal provision and the other is a provision of commercial (or fiscal) law[33].

Secondly, even if we agree that a given element must be included in the legal context, its interpretation can be open to dispute. For example, we all agree that in order to interpret a statutory provision, the other parts of the statutory scheme must be taken into account. However, the content conveyed by the other statutory provisions might be disputed as well. Similarly, the ends that statute seeks to realize are not always explicitly stated by the legislature. In most cases, the purpose of a statutory provision is inferred from the same contextual elements considered thus far. It is therefore a result of the interpretive activity and not a common assumption. Furthermore, even when the purpose of the statute is quite clear, it can be specified at different levels of abstraction depending on the case to be decided[34].

The two previous problems are actually two sides of the same coin: in order to decide whether an element is to be taken into account when interpreting a given provision, we must have already interpreted that element, but its interpretation depends in turn on a reference system.

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[33] The example in the text is provided by Poggi 2013.

[34] Surely, the legal culture at stake – Raz's legal conventions – can exclude some elements from the relevant context. So, e.g., in some legal systems, international agreements or parliamentary reports are not considered relevant, while in other legal systems they are. National interpretative conventions can also establish a hierarchical order among the relevant elements. For the reasons explained in the text, these conventions can reduce problems related to the identification of the relevant context, but they do not eliminate them: the elements to be taken into account are howsoever numerous and each of them might be in need of interpretation.

Moreover, in legal interpretation is not clear whether we have to refer to the context at the moment of the enactment or to the context at the moment in which a legal provision has to be applied. It is worth noting that in ordinary conversation this problem rarely arises, either because the parties of the conversation are simultaneously present or because it is otherwise clear to which context they refer. So, e.g., if a voice mail message says "Now I'm not at home", it is clear that "now" refers to the time in which the message is listened to and not to the time in which it was recorded. On the other hand, if I read the sentence "A terrible event happened today" in a newspaper published three days ago, "today" refers to the day in which the newspaper was published and not to the day in which I read it.

It follows that different interpreters of the same legal provision can reconstruct the relevant legal context in different ways, and therefore they can reach different interpretations. Rule-based theories cannot establish which interpretation is correct. Actually, they are all correct with respect to their reference-context and they are all wrong with respect to other reference-contexts. From the perspective of rule-based theories, if some overt or hidden indexical is involved and the context is not clear enough to establish how to saturate it, the sentence truth-functional meaning is and remains indeterminate.

Let's provide an example: the famous case of *Smith v. U.S.*[35].

In this case, the United States Supreme Court had to decide whether someone who exchanges a gun for drugs should to be convicted according to Title 18 U.S. C. § 924(c)(I):

> (e) Whoever, during and in relation to any crime of violence or drug trafficking […] uses […] a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.

Here, "to use" is a so-called pro-act verb, like "to do": a verb that can mean a number of activities. Using a very simplified rule-based model we can think that the verb "to use" is always associated with a hidden variable, which stands for "to do something". The context must fill that variable. So for example, "To use a chair" always means "To use a chair to do something", and according to different contexts, "To use a chair to sit down" or "To use a chair to lock a door" or, again, "To use a chair to stand up on it". Therefore, the saturation of the variable depends on context. Now, what is the relevant context for the saturation of "To use a firearm/to do something" in (e)?

As the Supreme Court stated, «Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation

[35] *Smith v. United States,* 508 U.S. 223 (1993).

may become clear when the word is analyzed in light of the terms that surround it»[36]. In *Smith* the majority argued that the relevant context was represented by other provisions of the same statute and by the legislative purpose.

As far as other provisions, the Court observed that, according to § 924(d)(1), any «firearm or ammunition intended to be used» in the various offenses listed in § 924(d)(3) is subject to seizure and forfeiture, and that § 924(d)(3) also lists offenses in which the firearm is not used as a weapon but instead as an item of barter or commerce.

As far as the legislative purpose is concerned, the Supreme Court identified it with the «purpose of addressing the heightened risk of violence and death that accompanies the introduction of firearms to drug trafficking offenses»[37].

So, coming from this context, the majority decided that "To use a firearm/to do something" in (e) needs to be filled with reference to the activities listed in § 924(d)(3).

The minority (Justice Scalia, Justice Stevens and Justice Souter) disagreed with this conclusion, as well as with the identification of the context of reference. Also according to the minority opinion, it is a «fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used»[38]. However, the minority included different elements in that context.

Firstly, according to the dissenting opinion, the most important contextual element is the phrase, the provision itself. In this regard, «adding the direct object, "a firearm" to the verb "use" narrows the meaning of that verb (it can no longer mean "partake of")»[39]. It follows that the contextual element represented by § 924(d) is not relevant, because it does not employ the phrase "uses a firearm," but provides for the confiscation of firearms that are "used in" referenced offenses[40].

Secondly, the minority opinion attributed relevance to the United States Sentencing Guidelines, which provide for enhanced sentences when firearms are «discharged, brandished, displayed, or possessed», or «otherwise used». Thus, according to United States Sentencing Commission, Guidelines Manual§ 2B3.1(b)(2) (Nov. 1992), «"otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or another dangerous weapon»[41].

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36 508 U.S. 223 (1993), 229.

37 508 U.S. 223 (1993), 224.

38 508 U.S. 223 (1993), 241.

39 508 U.S. 223 (1993), 245.

40 More precisely, according to the dissenting opinion, "to use" has different meanings within different provisions: "just as every appearance of the word "use" in the statute need not be given the narrow meaning that word acquires in the phrase "use a firearm," every appearance of the phrase "use a firearm" need not be given the expansive connotation which that phrase acquires in the broader context of "using a firearm in crimes such as the unlawful sale of firearms" (508 U.S. 223 (1993), 245).

41 508 U.S. 223 (1993), 243.

Thirdly, the minority considered the legislative history: in fact, § 924(c)(1) originally dealt with use of a firearm during crimes of violence, while the provision concerning use of a firearm during and in relation to drug trafficking offenses was added later. It is quite obvious that "using a firearm during crimes of violence" means using it as a firearm, using it to commit the crime.

Finally, the minority included the rule of lenity within the relevant context. According to this rule, where there is ambiguity in a criminal statute, doubts are resolved in favour of the defendant.

Arguing from this different context, the minority concluded that "To use a firearm/to do something" in (e) has to be filled as "to do what is distinctively done with it/ i.e. to use as a weapon".

It is worth noting that from the point of view of rule-based theories neither the majority nor the minority are right. If, as a matter of fact, the context is not clear enough for the rule associated to the indexical allows its saturation, then the meaning is and remains indeterminate.

4.1. Why not Semantics Minimalism?

In the previous section I've argued that rule-based theories are troublesome for statutory interpretation, in so far as they admit that context can be an essential element in order to determine the complete meaning expressed by a sentence, and in the legal domain context is structurally opaque. However, not all rule-based theories recognize the necessity of context in order to grasp the truth-functional content of a sentence. In this respect minimal semantics might be tempting. According to Minimal Semantics, every sentence always expresses a minimal, complete propositional content, which does not depend on pragmatic/contextual processes, including variables or indexical saturation. So, for instance, Borg defines this minimal content, which she labels as "Liberal truth conditions", as

> conditions which are liberal since they clearly admit satisfaction by a range of more specific states of affairs. A liberal truth-condition posits 'extra' syntactic material (i.e. material in the sub-syntactic basement) *only when* it is intuitively compelling to do so, or when there is good empirical evidence to support the move. Furthermore, what these truth-conditions take as being delivered by sub-syntactic information is merely the presence of an additional argument place, marked by an existentially quantified argument place in the lexical entry, *and not* the contextually (intentionally) supplied value of this variable[42].

[42] Borg 2004, 230, italics added.

Borg provides a few examples:

(f) If u is an utterance of "Jane can't continue" in a context c, then u is true iff Jane can't continue something in c

(g) If u is an utterance of "Steel isn't strong enough" in a context c, then u is true iff steel isn't strong enough for something in c

Now, one can claim that this minimal content is all we need in order to determine the meaning of legal provisions. It is worth noting that minimalism is mainly an attempt to save the autonomy of semantics as an independent field of study. Supporters of minimal semantics do not claim that the meaning of an utterance in a conversation amounts to its minimal content (Cappelen and Lepore 2005). Borg expressly admits that it is quite rare that speakers and listeners fully recognize or use "liberal truth conditions" while processing linguistic data (Borg 2004; Borg 2012). However, more recently, Borg claims that there are cases of literal communication: cases in which the communicated content of an utterance perfectly matches its minimal content. Literal communication «occurs in contexts where accuracy and precision of meaning matters […] where content is likely to be assessed in a range of different contexts and where access to important features of the context of utterance may be later be limited» (Borg 2019: 522). According to Borg, legal context meets these requirements and, therefore, legal interpretation often rests on minimal semantic content. I contend that this claim is untenable. As it emerges also by the previous sections, the minimal content of the statutory provisions is often very underdetermined[43]. So, for example, the minimal content of the legal provision

(h) In case of danger of hurricane, construction sites must close

amounts to

(h^1) In case of danger of an [unlocated] instance of hurricane, construction sites must close [for a period of time whatsoever, including a second]

I do not think that any judge would ever interpret (h) in the sense of (h^1).

Moreover, in some passages, Borg seems to argue a different and weaker point. Discussing *Smith v. United States* – where the majority interpretation certainly did not rest on the minimal semantic content – Borg writes: «the claim here is not that this judgement was the right or the only one to reach in this case […] but simply that we cannot even make sense of the Supreme Court judgement unless we admit

[43] See Skoczén 2016, who also correctly observes that "there may be propositions, which are true or false in every 'liberal' context" (622).

a propositional content for the statute independent of rich pragmatic adjustment» (Borg 2019: 527). It seems to me that claiming that the provisions have a minimum content is not the same as claiming that the legal meaning coincides with this minimum content. The minimum content can be conceived as a kind of frame, which, however, can be filled in many different ways.

5. Unpleasant Consequences

In the previous sections I have tried to argue that both speaker-based theories and rule-based theories are not suitable for statutory interpretation, though for different reasons.

Speaker-based theories are not viable either because there is no intention to which one can appeal in order to determine the meaning of legal provisions or because there are too many objective intentions and it lacks a criterion to choose the correct one.

In the first case, the meaning of legal provisions remains indeterminate. In other words, since according to the speaker-based model sentence meaning is in most cases undetermined or indefinite and it can be identified only by grasping the speaker's communicative intention, and since in statutory interpretation there is no such an intention that can be grasped, then the meaning of legislative provisions remains indefinite or undetermined. That meaning must be determined otherwise. Judges and legal interpreters have to establish that meaning by appealing to criteria that are different from the speaker's actual communicative intention.

In the second case, the meaning of legal provisions is over-inclusive: there is an open set of meanings – or, better, there are as many meanings as the possible reconstructions of the reasonable legislative intention. Judges and legal interpreters have to choice between such meanings, but it lacks a legally binding or unanimously agreed criterion to guide their choice.

In both cases, some unpleasant consequences follow.

Firstly, legislators do not have full control over the law. More precisely, law is an intentional phenomenon in the sense that the statutes enacted are the products of the intentional actions of the MPs. However, law is not intentional in the sense that the meaning of the statute – and therefore the change that the statute produces into the law – is what is intended by MPs. The intention of the lawmakers is the intention to take part in the legislative procedure and pass the bill, but this intention is not relevant when it comes to interpreting the statute and determining its meaning (Lifante 1999).

Secondly, as a consequence of the previous point, the difference between creation and application of law splits. Judges actually contribute to the creation of law in so far as they specify the indeterminate meaning of legal statutes or they choose

among several reasonable legislative objective intentions. Therefore, law turns out to be the product of both legislators and judges.

Finally, if speaker-based theories are to be preferred within ordinary conversation, and if I have successfully shown that these theories are not suitable in the legal domain, then an irreducible difference between ordinary understanding and legal interpretation emerges[44].

Instead rule-based theories are not in themselves unsuitable for statutory interpretation. However, if we agree that legal context is structurally opaque, their application very often leads to conclude that the meaning of the legal provisions is undetermined. This happens every time legislators employ a context-sensitive expression, that is, very often. Therefore, it is not true that as far as statutes are concerned, «the possibility of having to go behind what is said to establish what was meant becomes very rare» (Raz 2009: 287). Since what is said is indeterminate and judges cannot apply an indeterminate norm, they must go behind – or, better, beyond – what is said: they must reconstruct the relevant context, and they do it in many different ways.

It is important to stress that this is not a problem for rule-based theories: if these theories work within ordinary conversation, then they also work within legal interpretation. Here the difference between common understanding and legal interpretation is merely quantitative: if we adopt these theories, legal meaning is more often indeterminate than common meaning. Nevertheless, this quantitative difference is relevant because, when it occurs, it leads to the collapse of the distinction between creation and application of law. Since the complete meaning of a legal provision has to be determined through the identification of the relevant context and the relevant context is determined by judges, law again appears as the product of both legislators and judges.

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[44] One could challenge that this latter consequence is really unpleasant, but I think it is, if we believe that the law should be clearly understandable by its addressees.

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