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A Relativistic Note on Villa's Pragmatically Oriented Theory of Legal Interpretation

Vittorio Villa (2010) argues that the pragmatist view in semantics is the one that is suitable for contemporary theories of legal interpretation that accord a constitutive role to the notion of interpretation. In this critical note I raise two difficulties in Villa's theory, not from a point of view internal to the debate among legal theories but from that point of view of the philosophy of language. The first difficulty concerns whether illocutionary acts (and propositional attitudes) can be ascribed to legislators. The second difficulty concerns the kind of attitude that relates legislators, who lay down legal dispositions, and jurists, judges and public officers, who create legal norms by interpreting legal dispositions. The difficulties I raise are not meant to be knockdown arguments but evidence that some aspects in Villa's theory still need to be worked out. Finally, I consider the possibility that another theory in semantics—semantic relativism—is the one which is the most suitable for contemporary theories of legal interpretation.

Key words: theory of legal intepretation, contextualism, relativism

Villa begins his analysis with the consideration that the notion of interpretation has gained more and more attention in the field of legal theories. Although the notion of interpretation has always been considered a necessary and prejudicial feature of the activities of jurists, judges and public officers, contemporary theories recognize a higher and constitutive role of interpretation in the processes that bring legal norms into being. In such theories, interpretation no longer starts working upon norms, whose existence has already been verified, but rather begins at the very time when the issue of the existence of law is raised. Both theoretical and historical reasons have led theorists to reframe the role of interpretation: the approach that looks at law as a social practice, the prevalence of constitutional systems that oblige jurists to check the material validity of legal norms in relation to constitutions, the approach that looks at norms as possible meanings of legal dispositions, the abundant production of special laws in some legal systems, such as the one in effect in Italy since the 1960's, the approach to legal activity as an activity of enacting justice in concrete cases, just to mention a few of them.

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The renewed, constitutive role of interpretation highlights a potential threat to democratic institutions since judges, as well as legislators, become the creators of new laws. This becomes a menace not only to the principle of legal certainty but also to the principle of the separation of powers whereby only the legislator has the power to produce new laws.[1]

It is in this theoretical framework that Villa presents his pragmatically oriented theory of legal interpretation. Villa's aim is to characterize interpretation as an activity that proceeds along with two dimensions, the dimension of discovery and the dimension of creation, in order to obtain a balance between the role of legislators who lay down legal dispositions and the role of jurists, judges and public officers who interpret legal dispositions, bringing legal norms fully into being. The principle of the certainty of law and the principle of the separation of powers cohere with Villa's theory in so far as what legislators do poses constraints on what interpreters are allowed to do. The key idea in Villa's theory is that interpreters cooperate with legislators to express normative contents. However, although constitutive, the creative role of legal interpretation is constrained by the role of legislation. The dimension of the discovery of the constraints posed by legal dispositions cannot be eluded before proceeding with the dimension of the creation of normative contents.[2]

1 *Cf.* Vittorio Villa, Pragmatically Oriented Theory of Legal Interpretation, *Revus – European Constitutionality Review* (2010) 12, 93: "It must be added that for many jurists (but also for public opinion) this increase in the 'degree of judicial creativeness' constitutes a very worrying element. The fact is that although it is often not the result of a free choice by the judge but the 'necessary' outcome of the attitude that today our institutional order takes; however, it could constitute a danger for our democratic institutions, because in actual fact it involves the possibility that the judge too, as well as the legislator, may become a 'creator of new law' (though in an 'interstitial' way). Behaving in this way, the judge not only endangers the fundamental principle of legal certainty, but also potentially challenges the basis of our democratic order: the principle of the separation of powers, as a result of which only the legislator would be the depositary of the power to produce new law"; accessible at <www.revus.eu>.

2 An anonymous referee of this journal pointed out that my brief presentation of Villa's theory does not make it clear that Villa's theory offers a descriptive analysis of legal interpretation (e.g.: what does it mean to interpret? What are the relevant characteristics of legal interpretation?) and not a prescriptive analysis (e.g. the value of principles such as the legal certainty or the separation of powers). I stress the point that the purpose of this critical note is not to assess Villa's theory in the field of legal interpretation but to focus on Villa's claim that there is a conceptual tie between the theory of interpretation and the theory of meaning (*Cf.* Villa 2010 (n. 1), 95: "a theory of interpretation is *necessarily* a theory of meaning... It is precisely from this point of view that we can legitimately speak of a *conceptual or internal relation* between interpretation and meaning") and his claim that pragmatic versions of contextualism are the most suited to account for the peculiarities of legal interpretation (*Cf.* Villa 2010 (n. 1), 110 "I will now delineate the basic features of a pragmatically oriented theory of meaning tailored for legal interpretation").

Consider the following example.[3] Suppose that one of the regulations of a town council states that *it is forbidden for vehicles to circulate in the municipal park* and that at the entrance of the municipal park there is an officer in charge of making sure the regulation is applied. Clearly, in order to do so the officer has to interpret the meaning of the term "vehicle", i.e. to assign it an extension and in each particular case to decide whether or not the vehicle in question falls into that extension or not. The idea is that interpreting the meaning of "vehicle" is not a process of discovering the meaning intended by the legislator who laid down the town council regulation. Rather, in each particular case, the officer has to evaluate the circumstances, trying to reconcile conflicting demands (e.g. the right to circulate freely, the right of other people not to be hampered in the exercise of their own right to circulate, the right of people to be safe and to enjoy the peace and quiet of the park, the protection of the animals in the park etc.). The way the officer reconciles all of these contrasting demands[4] in each particular case affects the meaning and the extension of the term "vehicle", and consequently his decision to allow or not to allow a vehicle to enter the park. For example, in normal circumstances a private car is not allowed to enter the park. In such circumstances, the extension of "vehicle" includes all private cars. But the same private car might be allowed to enter the park when another park goer has had a heart attack and the quickest way to transport him to hospital is to use the car. In this instance, the same car no longer belongs to the extension of "vehicle". In another instance, when the vehicle is an ambulance, the officer would allow the ambulance to enter the park. In that instance, the extension of "vehicle" does not includes ambulances. But in a different circumstance the very same ambulance, say after being stolen and driven by an impostor, might be included in the extension of "vehicle" and not be allowed to enter the park. In general, the same vehicle might be allowed to enter the park in certain circumstances and not allowed in others. Of course what change are not the vehicles, as by hypothesis they are the same, but the extension of the term "vehicle". It is the officer who broadens or restricts the extension of the term "vehicle". In doing so, the officer interprets the text of the regulation and in each particu-

3 *Cf.* Villa 2010 (n. 1), 103–104. Actually in those pages the example is used to clarify Hart's eclectic theory. But on page 111, Villa adapts the same example to his theory: "In the example of 'vehicles in the park', it is only through concrete, real or imagined, situation that the expression 'vehicle' is given a complete meaning, within the speech act producing the utterance expressing that given sentence in a contextually determined way, also settling any doubts on the interpretation of single objects as being part or not of the 'class of vehicles' ('is the pedal car a vehicle or not?')". Note that in this passage Villa says that the meaning—and consequently the extension—of an expression occurring in a legal disposition might change insofar as its conventional meaning can be pragmatically completed in different ways in different contexts.

4 An anonymous referee of this journal pointed out that *demands* are different from *legal rights*. Here I am repeating Villa's terminology (*cf.* Villa 2010 (n. 1), 104) and leave aside the exegetical interpretation of Villa's paper. As I said above, giving an assessment of Villa's theory in the field of the theory of legal interpretation is outside the purpose of this critical note.

lar case his interpretation constitutes the normative content of the regulation. There is no norm before the interpretation of the officer. This is not to say that the interpretation is arbitrary. It is constrained by the conventional meaning of the term "vehicle" that figures in the text of the regulation together with the efforts to reconcile and balance the contrasting demands.

This is the point where the theory of legal interpretation matches the pragmatic theory in semantics. The pragmatic theory in semantics holds that the conventional meaning of an expression underdetermines its semantic value. This is to say that the truth-conditions of a sentence are underdetermined by the conventional meaning of the expressions that occur in the sentence. It is only in the context of utterance that a sentence gets a complete semantic content as the result of pragmatic processes that are not guided by linguistic competence alone. Pragmatists in the theory of meaning adhere to some versions of the following principles:[5]

- No sentence S ever semantically expresses a proposition, i.e. a full propositional content that has truth-conditions. Any semantic content that the conventional (literal) meaning assigns to S can be no more than a propositional fragment (or propositional schema, or propositional radical), where the hallmark of a propositional fragment is that it does not determine a set of truth conditions, and hence cannot take a truth value (is not truth evaluable).
- Only an utterance of S can express a complete proposition, have truth conditions and so take a truth value.[6]

In general, pragmatists attack the principle in formal semantics that the conventional, literal meaning of a sentence determines its truth-conditions. Pragmatists argue that such a principle is false: there is no algorithm, no matter how it is implemented into a semantic module, which is capable of return-

5 For a critical exposition of the pragmatist view in semantics see Herman Cappelen and Ernie Lepore, *Insensitive Semantics,* Oxford, Blackwell, 2005, 6.

6 There is textual evidence that Villa adheres to this form of contextualism: "In accordance with the semantic theory that I accept here (a theory which I will qualify later on as *semantic contextualism*), only *utterances* of sentences can express a complete meaning, and precisely as expressions of sentences that are brought into being in given contexts. In short, it is only within a specific context of use that the sentence, expressed by a given speech act, enacts a complete communicative message (Villa 2010 (n. 1), 98). See also Villa 2010 (n. 1), 111: "It is worth stressing, to conclude these considerations, that from the point of view of this theory the complete meaning of a sentence can only be produced through the combined intervention of the *distal context* and the *proximal context*. Before this we only have, as a starting basis, semantic frames or schemata of meaning, and that is to say the *conventional meanings* of the single expressions contained in the sentence, which constitute the framework of what we want to say, a space of signification that also represents a major constraint for the process of specification and concretization that will lead to the complete meaning. But, as I have said, the complete meaning is only given through the single speech act that produces an utterance of the sentence by contextualizing it".

ing the logical form or the semantic structure of a sentence from the literal meaning alone. This is so not only in the widely accepted sense that the logical form and the semantic structure can be returned only at the end of lexical and structural disambiguation. The stronger pragmatist claim is that even after the disambiguation process, the application of literal meaning yields truth-conditional results that are either incomplete or not consonant with the intuitions of competent speakers. Pragmatists say that the semantic module is inadequate because working exclusively on literal meaning is unable to return satisfying truth-conditional results. In order to reach satisfying truth-conditional results, contextual phenomena falling within the province of pragmatics need to be incorporated into the process that delivers truth-conditional interpretations.

Coming back to Villa's example, there is no ambiguity, lexical or structural, in the disposition "it is forbidden for vehicles to enter the municipal park". However, the text of the disposition does not express a complete propositional content because the extension of the term "vehicle" is underdetermined by its conventional meaning. It is the officer who has to complete the meaning of the term "vehicle" by exploiting contextual information to find out a pragmatic completion which provides a full truth conditional content. For example, the officer might exploit the contextual information that there is a visitor in the park in need of urgent medical care to complete the meaning of "vehicles" with "except those that can save someone's life". When the text of the disposition is contextually interpreted, it works as an utterance. Utterances are the bearers of normative contents, which might vary when the contextual information changes from context to context.

In the remainder of this short critical note I raise two difficulties in Villa's theory. The first difficulty concerns the kind of linguistic act that can be ascribed to legislators once Villa's theory is accepted. The second difficulty concerns the kind of attitude that relates legislators who lay down legal dispositions, one the one hand, and the jurists, judges and public officers who bring legal norms into being by interpreting the legal dispositions. The difficulties I raise are not meant to be knockdown arguments but rather evidence that some aspects of Villa's theory still need to be worked out.

First difficulty. Dispositions and norms (directives) have a prescriptive function that is different from the informative function of sentences that are uttered to describe states of the world (assertions).[7] Villa accepts[8] the view that the same sentence with the same content can be uttered with a prescriptive function or with an informative function. The difference consists in the illocutionary force of the linguistic act that is performed by the utterance of a sentence. The difference in illocutionary force does not affect the content. This is to say

7 Here I follow Villa's terminology. See Villa 2010 (n. 1), 109.

8 See Villa 2010 (n. 1), 109–110.

that one and the same sentence with one and the same content can be uttered to perform acts with different pragmatic force, i.e. an assertion, a question, a command, a request etc.

One point that I think is in need of clarification in Villa's theory is what kind of illocutionary act legislators perform when they lay down legal dispositions. The difficulty stems from the fact that an illocutionary act is the combination of an illocutionary force with a proposition.[9]

Propositions have essentially truth conditional contents, they have essentially truth conditions. If propositions exist, they are entities that are essentially truth evaluable. Yet, according to the pragmatist view, in the theory of meaning sentences do not express propositions but only propositional fragments that are not truth evaluable independently of completions that are extracted by pragmatic processes working on contextual information. If one applies the pragmatist view in the theory of meaning to the theory of legal interpretation in the manner Villa does, legislators lay down legal dispositions that function like sentences that jurists, judges and public officers have to interpret. It is the interpretation of legal dispositions that, like contextual utterance of sentences, expresses full propositions. It follows that there are no full propositions that legal dispositions express. If that is so, legislators do not perform any illocutionary act.

There is no doubt that legislators perform locutionary acts.[10] They use strings of signs according to morphological, syntactical and semantic rules. Pragmatists might have reasons for holding that the town council *said* literally that it is forbidden for vehicles to circulate in the municipal park, in the sense that the town council laid down a regulation using the string of signs "it"-"is"-"forbidden"-"for"-"vehicles"-"to"-"circulate"-"in"-"the"-"municipal"-"park" as a token of the sentence "it is forbidden for vehicles to circulate in the municipal park" with the morphological, syntactical and semantic structure it has in English. But the literal, conventional meaning of "it is forbidden for vehicles to circulate in the municipal park" does not express a full propositional content.

In addition, if legal dispositions have no full propositional contents, as they only express propositional fragments, it is unclear how anyone could establish any relationships of contradictoriness and incompatibility among dispositions. Contradictoriness and incompatibility are defined by the notions of truth and falsity. They are relationships over the bearers of truth values. Contradictoriness and incompatibility clams cannot be advanced if legal dispositions do not have

9 An illocutionary act always involves a proposition, although it might not involve a grammatically complete sentence, for example in cases in which subsentential expressions are used elliptically.

10 No doubt, legislators perform perlocutionary acts as well, dissuading people from certain courses of action, for example..

truth conditions (= their contents do not have truth conditions) and hence are not truth evaluable. It is also unclear how anyone could establish whether a particular interpretation of a disposition is coherent or compatible with a disposition or not. As I said, this difficulty is not meant to prove that Villa's theory is flawed but to highlight an aspect of it that deserves further detailed reflection.

Second difficulty. I have argued that there is an unclear point in Villa's theory as to whether one can ascribe illocutionary acts and propositional attitudes to legislators when they lay down legal dispositions. The second difficulty I want to discuss emerges from the consideration that there seems to be weighty evidence that one must be able to ascribe illocutionary acts and propositional attitudes to legislators. Moreover, there seems to be evidence that such illocutionary acts and propositional attitudes need to be of a kind that does not accord with the pragmatist theory in semantics.

Consider the following case. The legislator A lays down the disposition that it is forbidden for vehicles to circulate in the municipal park. The public officer B prohibits John from entering the park with his private car saying that it is forbidden for vehicles to circulate in the municipal park. Intuitively we say that the public officer has the right to do what he does because of what the legislator did, i.e. because there exists a legal disposition of the town council saying that it is forbidden for vehicles to circulate in the municipal park. This is to say that in the exercise of his public function the officer agrees - actually he must agree - with the legislator that it is forbidden for vehicles to circulate in the municipal park. Yet, in this sense, agreement is a propositional attitude that has a full proposition as its object and we cannot say that the public officer agrees with the legislator if the legislator did not express a proposition when he laid down the disposition.

Consider another case. In context 1, the public officer B prohibits John from entering the park with his private car. In context 2, the public officer C allows John to enter the park with his private car in order to pick up a visitor who needs to be taken to the hospital for urgent medical care. One can summarise B's reasoning as follows:

It is forbidden for vehicles to circulate in the municipal park.

John's car is a vehicle.

Therefore

It is forbidden for John's car to circulate in the municipal park.

C's reasoning must share the same major premise as B's reasoning, to the extent that C is taken to conform to the same legal disposition as B.

It is forbidden for vehicles to circulate in the municipal park.

After all, both B and C must agree that it is forbidden for vehicles to circulate in the municipal park, since what gives them the right to do what they do is just

that they both are in agreement with the legislator's disposition. Yet the conclusion of C's reasoning is:

It is not forbidden for John's car to circulate in the municipal park.

Therefore the minor premise in C's reasoning must be:

John's car is not a vehicle.

Villa's theory explains this case in that B and C complete the meaning of the term "vehicle" in different ways. C completes the meaning of "vehicle" with the sense *a vehicle that is not necessary for saving someone's life*. This explains the fact that John's car is in the extension of "vehicle" for B but not for C. My objection is that if Villa is right, then B's and C's reasoning do not share the same major premise. They do not agree on the same disposition because such a disposition does not express a complete proposition and therefore it is not something on which people might or might not disagree, and cannot share the same norm because they interpret the disposition in different ways. As a result, it is difficult to explain how B and C gain the right to do what they do from the same source, namely the legislator's disposition that it is forbidden for vehicles to circulate in the municipal park. I do not hold that this difficulty, like the previous one, is a definitive argument against Villa's theory. Still it is a point that needs to be answered.

I close this critical note with a reflection on another approach in semantics that might provide a better theoretical framework for Villa's theory of legal interpretation. The above discussion revealed that there exist data supporting the view that there is stability of content across a variety of contexts where pragmatists are committed to the idea that content varies. The content of the first premise does not change from B's reasoning to C's reasoning. On the other hand, there are data supporting the idea that the extension of terms occurring in legal dispositions might change across contexts. The extension of "vehicle" changes from B's reasoning to C's reasoning, since B puts John's car in the extension of "vehicle" and C does not, and John's car did not change. Yet neither B nor C makes an error. How is it possible to have stability of content and a change of extension? Can anyone have their cake and eat it? Perhaps yes, if one endorses semantic relativism.[11]

Semantic relativism offers an elegant way out of the difficulties I have presented. Semantic relativism develops Kaplan's idea of the 'double' index. One index represents the context of the utterance of a sentence and the other the circumstance of evaluation. Expressions (in the context of utterance) have extensions relative to the circumstances of evaluation. The contents of expressions are

11 For an exposition of semantic relativism see Max Kölbel, *Truth without Objectivity,* London, Routledge, 2002, and John MacFarlane, Making Sense of Relative Truth, *Proceedings of the Aristotelian Society* (2005) 105.

construed as function-theoretic entities: the content of a singular term is a function from circumstances of evaluation to individuals, the content of a n-place predicate is functions from circumstances of evaluation to n-tuples and the content of a sentence (in context of utterance) is a function from circumstance of evaluation to truth values. What parameters there are in the circumstance of evaluation is a theoretical choice, depending on the kind of language one is dealing with. For example, the circumstances of evaluation might be triples of worlds, times and locations: the sentence "John is sitting" will be true relative to some worlds, times and locations and false relative to others. A 'count-as' parameter can be put in the circumstances of evaluation as well. The count-as parameter is a function from predicates to intensions, which are functions from worlds to extensions. Roughly speaking, the count-as parameter fixes what things have to be like in order to count as falling in the extensions of a predicate at a circumstance of evaluation. For example, a sports suit with a tie counts as falling in the extension of "formal attire" in circumstances where the count-as parameter is the one relevant for restaurants, but does not at a circumstance of evaluation where the count-as parameter is the one relevant for an invitation to the ambassador's party. The very same idea can be applied to the term "vehicle" in Villa's example. John's car counts as falling in the extension of "vehicle" according to the count-as parameter relevant in context C_1 but does not according to the count-as parameter relevant in context C_2. The interesting point is that the content of the term "vehicle", as a function-theoretic entity, does not change from context to context. What changes is the extension of "vehicle" at different circumstances of evaluation, where the count-as parameter of the circumstance of evaluation is determined by the context of the utterance (interpretation).

Semantic relativism solves the difficulties I have raised. The disposition "it is forbidden for vehicles to circulate in the municipal park" has a stable content, which is a function from circumstances of evaluation to truth values. It is the same content both for the legislator and for all public officers and is an object of illocutionary acts and propositional attitudes. What the legislator does is an illocutionary act that entails that the legislator and all public officers agree that it is forbidden for vehicles to circulate in the municipal park. Actually, public officers must agree that it is forbidden for vehicles to circulate in the municipal park and, in doing so, they gain the right to prohibit or allow the entrance of cars to the park. Moreover, semantic contextualism defines a disquotational truth predicate that can be used to define contradictoriness and incompatibility among legal dispositions:

– The content *it is true that S* is true at a circumstance of evaluation iff the content *S* is true at that circumstance of evaluation.

Assuming bivalence and the standard account of biconditional, all claims of the form *it is true that S iff S* are true at all circumstances of evaluation.