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INTENTION AND LEGAL DISCOURSE: A COMPARISON BETWEEN LINGUISTIC PRAGMATICS AND HERMENEUTICS*

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1. PRAGMATIC ANALYSIS AND LEGAL TEXT

In legal language, due to its partially natural[1] character, we run into aspects of communication to which linguistic pragmatics paid a special attention. However, we should question whether the explanation provided by pragmatics can be, as a whole, exhaustive to account for legal language or, on the contrary, the hermeneutic explicative models are more adequate to grasp its specific character[2].

Moving from Levinson's conception of pragmatics, according to which it is concerned with linguistic analyses that necessarily refer to the context[3], the crucial point in the articulation of the sense is completely focused on the relation between speaker's intention and its correct reception by the recipient. In discourse someone says something which fully complies with the rules of language as it is used by a given linguistic community. The actual correspondence between intention and behaviour is, of course, matter of great importance for the legal enterprise as well one of its main aims.

The accomplishment of such a correspondence is differently explained by the pragmatic perspective and by the hermeneutic one. According to the former — as Grice pointed out — the meaning the speaker wants to convey results from what he expects the listener to think about what he actually implies and believes. Consequently, the interpretation of a sentence is described as an inference of what is implicit in the asserted proposition and makes the discoursive enterprise rational and cooperative. According to hermeneutics, on the other hand, discourse is, first of all, an event and is, as such, already endowed with a sense which is in a way independent of the speakers' intentions. Within the already established discoursive relation the rational and analytical controls will have to be searched, but the fact remains that its sense lies in the un-epistemological presuppositions of the epistemology[4].

In applying pragmatic analyis to legal discourse, the most obvious (though not unsolvable in itself) problem is that such analysis focuses mainly on conversational discourse, in which the partecipants speak to each other face to face outside specific institutional spheres[5]. Interlocutors must be present at the same time and so they can mutually correct their interpretations and understandings of their intentions. Such a condition may sometimes occur in law, for instance when people make agreements or fight in courts, but it does not apply to legal discourse as a whole. We are not «face to face» with the legisla-

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[1] In legal discourses ordinary language gets mixed with the technical one. It would be artificial and irrealistic trying to separate one from the other for the sake of a topic ideal of purification. See M. JORI, *Definizioni giuridiche e pragmatica,* in P. COMANDUCCI-R. GUASTINI (a cura di), *Analisi e diritto 1995,* Giappichelli, Torino 1995, pp. 109-144.

[2] I have already treated of the comparison between hermeneutic philosophy and analitycal philosophy, which linguistic pragmatics belongs to, in a general study: *Filosofia analitica, filosofia ermeneutica e conoscenza del diritto,* in F. D'AGOSTINO (a cura di), *Ontologia e fenomenologia del giuridico,* Giappichelli, Torino 1995, pp. 301-347 and in an essay namely addressed to legal science: *La critica dell'ermeneutica alla filosofia analitica italiana del diritto,* in M. JORI (a cura di), *Ermeneutica e filosofia analitica. Due concezioni del diritto a confronto,* Giappichelli, Torino 1994, pp. 63-104.

[3] S.C. LEVINSON, *Pragmatics,* Cambridge University Press, Cambridge 1983, p. 5. See also G.M. GREEN, *Pragmatics and Natural Language Understanding,* LEA, Nahwah, N.J. 1996[2].

[4] Speech acts theory has been critized because it understands propositional acts like propositions themselves and, as a consequence, because it construes discourse like a set of propositional units. See F. KAMBARTEL, *The Pragmatic Understanding of Language and the Argumentative Function of Logic,* in H. Harret-J.Bouveresse, *Meaning and Understanding,* W.de Gruyter, Berlin 1981.

[5] LEVINSON, *Pragmatics,* above n.3, p. 284. Linguistic pragmatics has not showed yet to be able to properly deal with other kind of discourses, and so to construe an alternative to the hermeneutic analysis of standards of discourse.

tor when interpreting a legal text, whereas face to face procedures are usual in legal practice. This is one of the reasons why the hermeneutic approach in legal interpretation has found such widespread backing from its beginning.

According to hermeneutics, the model of discourse is not to be found in conversation but in the comprehension of a text. The interaction that occurs with reference to a text has characteristics which I do not think can be assimilate to the conversation ones. It nearly seems that, when interacting with texts, people may discuss either with the text itself or with other people about a text they have not brought forth instead of discussing directly with the author of the text. I would like to underline, finally, such «face to face» interaction becomes more and more difficult when we interpret texts belonging to different cultures.

It should be added, moreover, that written discourse differs from spoken discourse in its giving more relevance to recipients than to speakers, since writing sets texts free from their bounds to the limited horizon experienced by authors. At the same time, the recipient is in a certain way universalized too, because written discourse escapes the limits of face to face interacting and does not adresse any privileged listener[6].

Even if we can do without any «face to face» interaction, some problems could be caused by two general principles of conversation which seem to be upstream of it and therefore basically linked with the pragmatic approach to language. I refer here to the principle of the central role played by the speaker and to the principle of «mutual knowledge». I do not mean that they are misleading for the interpretation of legal practice, but that they should be revised in order to demolish the separation between pragmatics and hermeneutics. This is, thus, the thesis I would like to show here.

2. INTENZIONI E CREDENZE

Pragmatic analysis of conversation has reaffirmed what, on the other side, had already been pointed out by hermeneutics: what is implied in a conversation may be more and different from what is explicitely said; besides, what is said during a conversation does not necessarily correspond to what is meant. There is a kind of surplus in language; it can expand itself when it is used within given contexts. Language may not be useful to understand the world, but it seems that world helps us understand the thickness of language. A sentence becomes clear in that it hints at something which is not explicitely mentioned but it, somehow, related to it. Consequentely, our main problem becomes how to interpret «what has not been said», which, according to pragmatics, corresponds to an unexpressed intention, though actual, whereas hermeneutics regards it as what Gadamer obscurely calls «the thing» of the text *(die Sache)*. The deep distance between linguistic pragmatics and hermeneutics completely lies in this radical conflict as to understanding of «what has not been said».

According to pragmatics, the speaker's intention is a state of affair that gives a sense to the language. It is not language that reflects this state of affairs (as it is the case according to the semantic level), but rather the latter which becomes clear through the use of language.

According to hermeneutics, the normative principle is what one is talking about or what one is doing. It is not a fixed meaning (as fixed as an intention can be). Gadamer, in fact, rejects Hirsch's thesis about the determinacy of meaning, which he regards the result of the communicative interaction. Entering this empty space, outside ordinary life (whereas pragmatic conversation takes place within the ordinary life), means for Gadamer (differently from Romantic aesthethics like Schiller) subdueing to a normative reality, i.e. constraints and rules. Any work of art has a binding character not because it constrains the author's intention, but because it has a claim for truth. Its meaning is the result of a partecipatory act. Aesthetic experience, just like historical understanding, involves a mediation between its actual meaning and the interpreter's state of mind. This is — as it is known — the role played by the so called «fusion of the horizons».

In this way, a different approach to the linguistic use becomes obvious too. According to pragmatics, such an approach is concerned, first of all, with the use of language within a conversational situation. As regards the hermeneutic approach, according to which texts must be paid the closest attention, the use of language is the outcome of a discoursive cooperation among those who use a language. In this sense, the way in which Gadamer takes up the metaphor of the game, originally employed by Wittgenstein, is significant. He says in game, like in enjoying works of art, the agent is the game itself. Players are in a way played by the game, which has a self-representive character: it rules the players, but

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6 P. RICOEUR, *Du texte à l'action: Essais d'herméneutique II*, Parigi, 1986.

it only exists through and within their actions. «Players are not the subject of the game; instead, the game that produces itself through the players is the subject.»[7]

In order to grasp Gadamer's concept of intention, we should try first to understand the difference underlying his theory and Hirsch's one[8]. When Hirsch identifies the meaning of text with the intentional meaning, I do not think he refers — as Schleiermacher does — to mental or psychological experience, but rather to the phenomenological conception of intentionality, according to which an object remains the same in spite of different mental acts. The «meaning of words» is determined by what the author means and not by his own intentional actions. Hirsch does not believe that the author can arbitrarily mean what he wishes, but that he is constrained by the linguistic conventions within a given culture. That implies a text may contain more than what the author meant from a psycological point of view. The meaning of words is clear to other speakers, since they share the very same linguistic conventions. The stability of these conventions enables the speaker to say what he actually means.

Nevertheless, Gadamer's problems in explaining the concept of intention are basically due to the fact that he conceives it in terms of will. Intention is what the author wants according to shared meanings. The latter are not part of intention, in its proper meaning, and, if anything, they are external constrains to it. Let us make an example. The speaker wants to play tennis and expresses his own intention to the recipient, but what actually makes his communicative act intelligible is a set of shared beliefs about tennis and its rules. The speaker's freedom of expression lies only in his decision whether to play tennis or not and in expressing his intention, but he is not free as to the concept of tennis itself and of its rules. The reference to such shared belief is useful to understand the speaker's intention, but it does not belong to intention itself. Therefore, if the meaning of a text is shared, then such sharing involves more than the knowledge of the author's intentions.

It goes without saying that Gadamer does not refer, after all, to steady linguistic conventions, but rather to those modes which are typical — almost in an ontological sense — of what the text deals with. His thought cannot be traced back to cultural relativism, since the problem here is to understand how a language can develope and how it can be shared by people belonging to different cultures, as it is the case with an author and his interpreter. Understanding is, of course, easier and prompter when the same language is shared. On the contrary, when the author and the reader do not share the same linguistic context, any interpretative process must necessarily restore linguistic conventions, constructing a common language that allows the access to the «truth» of the text will be the outcome of understanding the meaning.

I cannot discuss here this «ontological» aspect of Gadamer's thought, though such an aspect is basically relevant to understand his perspective. I shall focus on its less ambitious level which spread after the weakening of the hermeneutic theory, i.e. on the commonly shared beliefs which are at stake in ordinary social practices.

Just as we are not free to conceive tennis as we like, we are not free to express our intentions regardless of the standards of the culture we belong to, at least if we want to communicate. According to hermeneutics, if we reject the idea that the concept of intention plays a central role in the process of understanding, it is due to the fact that hermeneutics focuses completely on these conditions through which intentions can be grasped and can make sense. In fact, the sense that is to be understood does not stem from intention but from something else and, however, it cannot be grasped without it.

According to pragmatics, to construct meaning is necessary to appeal to belief, which is a mental state just like intention, but is not will-oriented. To begin with, the speaker must necessarily assume that something is shared by the recipient as well as by himself. In other words, he must assume that there is some common conventional knowledge underlying communication. The structure of «common knowledge», as it has been analysed by Lewis and Schiffer[9], tells us that A and B mutually know p if and only if

A knows p and B knows p,
A knows that B knows p and B knows that A knows p,
A knows that B knows that A knows p,
B knows that A knows that B knows that A knows p,

and so *ad infinitum*.

Pragmatics as a whole rests on the conception of mutual knowledge, without which Grice's analysis of cooperation in communication would not be intelligible.

It seems that the concept of belief, intended as a cognitive mental state, can hold against the Gadamerian critiques concerning the central position of intention and its will-oriented character. Belief

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7 H.G. GADAMER, *Wahrheit und Methode. Grundzüge einer philosophischer Hermeneutik*, J.C. Mohr, Tübingen 1960[1], p. 98; see also G. WARNKE, *Gadamer. Hermeneutics, Tradition and Reason*, Polity Press, Cambridge 1987, pp. 48 ss.

8 E.D. HIRSCH, *Validity in Interpretation*, Yale University Press, New Haven 1967.

9 See D. LEWIS, *Convention*, Harvard University Press, Cambridge 1969; N.V. SMITH (ed.), *Mutual Knowledge*, Academic Press, London 1982.

is not under our control, it is linked with those intersubjective meanings which are constitutive of a certain social matrix, to which individuals belong and in which they act. In pragmatic perspective presupposition rests on shared beliefs and on th beliefs about others' beliefs.

I do not deny that the structure of mutual knowledge may be a helpful means to explain how communicative interactions work and that it may also be used to account for even more complex social practices[10]. I do not mean to rise any problem as for those particular beliefs which are being assumed and modified through the experience of communicative interaction. Yet the question arises when analyzing meanings that constitute our basic social practice. If we comply with such practices, we are supposed to know and to accept their rules. But this particular situation does not seem to be accounted for by the structure of mutual knowledge, as we have described it above.

3. THE NORMATIVE CHARACTER OF SOCIAL PRACTICE

Charles Taylor has denied that the partecipation in social practices can be understood only on the basis of participants' subjective attitudes[11]. Practices consist in a set of rules and principles participants have to follow. The practice of contract, for instance, is identified by concepts and rules such as *bona fides*, individual autonomy, agreement and so forth. These are not beliefs which the conctracting parties have but rather knowledge they *ought to* have. No contracting party may justify himself by appealing to the fact that he does not know what contract means or that he has a different view of a certain practice. Therefore, to ascertain which beliefs participants have about the practice they have undertaken, an analysis on participants' mental states is not required. This means that the practice has a normative character, which is obscured by the model of mutual knowledge model. On the level of concepts and rules underlying a steady social practice, what is important is not what the subjects believe about intersubjective meanings, but which leaning they ought to have or they are supposed to ought to have. Consequently, reciprocity does not stem from the thoughtful character of the beliefs people actually have but from sharing the normative quality of the inter-subjective meanings, according to which individuals form their own particular intentions. On the other hand, conventions, once they are established, are normative even for those who have participated in consolidating them. Social life depends on the fact that these conventional rules are binding even for those who misunderstand or ignore them. Moreover, it is plainly stated by Grice himself: «I would like to be able to think of the standard type of conversational practice not merely as something that all or most do follow, as a matter of fact, but as something that is reasonable for us to follow, that we *should* not abandon»[12]. *Ignorantia legis non excusat.*

I confirm that this critique of the adequateness of the theory of mutual knowledge is valid only for those meanings that are commonly shared, which characterize steady and basic social practices. Nevertheless it is trivial that among them there are beliefs and subjective attitudes which, in their turn, must be implied to understand particular intentions and which are well explained by mutual knowledge. Mutuality lies neither in sharing the same state of mind nor in knowing mutually each other's state of mind, but in being or in finding oneself already within a context of communication, constituted by rules that are to be followed and, if possible, even exploited.

What I have pointed out involves the possibility of matching, somehow, the pragmatic and the hermeneutic perspective. They can co-exist since they play different roles. Pre-understanding is an anticipation of the sense of the cooperative enterprise which the interlocutors have jointly undertaken. It is not an anticipation of their own particular intentions but an anticipation of that particular kind of practice in which they are jointly involved. It concerns the identity of this practice, that is, the «thing» which is dealt with. This calls on intersubjective meanings that refer not only to linguistic conventions but also to values or «internal goods» embodied within the practice itself. When we interpret something we already put that something in a particular context *(Vorhabe)*, which is approached according to a given perspective *(Vorsicht)* and conceived in a particular way *(Vorgriff)*.

The pragmatic perspective is useful to see how particular agents actually use common practice, the peculiar aims to which they try to subdue it and the specific intentions they try to express. If I am allowed to use a trivial example, the pre-understanding of the practice in road traffic is connected with the

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[10] As an example of application of the structure of the common knowledge to social and legal customs, see B. CELANO, *Consuetudini, convenzioni*, in P. COMANDUCCI-R. GUASTINI (a cura di), *Analisi e diritto 1995*, above n. 10, pp. 35-87.

[11] See C. TAYLOR, *Interpretation and the Sciences of Man*, in «Review of Metaphysics», 25 (1971), pp. 3-51.

[12] H.P. GRICE, *Logic and Conversation*, now published in M ARTINICH (ed.), *The Philosophy of Language*, Oxford University Press, Oxford 1985, p. 163.

reasonableness of the conventional rules regulating it and yet, in order to move within it, one needs to formulate expectations about other drivers' behaviour, foreseeing what their behaviour will actually be.

Failing in drawing a distinction between these two levels — the stricly normative level and the factual one — is what one can critizise in Wroblewski's theses about application of pragmatics to interpretative judicial reasoning[13]. He distinguishes the semantic sense from the pragmatic sense of presupposition and points out that, in this second sense, what is presupposed assumes the meaning of an axiomatic assumption. Judicial reasoning moves from rules concerning legal language, facts and values. But it is obvious that all these things are not always presupposed in the same way and, first of all, that it is necessary to distinguish between the general sense of a practice and its actual fulfilment. Institutional constraints in the interpretation of the intentions of users of law are not rarely meant to protect the rationale of the practice, by taking it away from the fluctuations of the subjective beliefs. In the theory of contract, for instance, the legal concept of «presupposition» has progressively got disengaged from Winscheid's will-oriented conception and has ended up referring to objective state of affairs that should have been known by the parties instead of referring to inquiries into personal reasons or secret intentions[14]. What stated above may be true for the system of presumptions as well. The expectations of those who participate in legal discourse tend to be typified in order to give steadiness and certainty to the coordination of social actions, which is the rationale of the «thing» called law.

Conversation is one of these social practices as well, whose basic sense is represented by the way the Co-operative principle is expressed itself in the maxims of conversation. Of course, Grice's co-operative principle must be understood in a very general sense, since each single social practice or cooperative interaction, even if not a linguistic one, presupposes and needs it[15]. Grice seemed to intend the cooperative principle as the representation of values which are universally accepted by a given society. It rests on the fact that man is a social animal and that his behaviour should be supposed to be rational. Grice's appeal to Kant and the obviously Kantian structure of maxims themselves lead us to think that he is giving a logical foundation, rather than a historical one, to the co-operative principle. Consequently, he seems to give the structure of the conversation as well a transcultural universality.

To understand the content of what is not explicitly said, we need first to understand the content of what has been explicitly said. In other terms, one should understand the conventional meaning of the words which have been uttered (sentence-meaning). To make language comply particular intentions of communication, it is usually necessary to be aware not only of the conventional meanings, but also of the cooperative rules of the practice at hand, particularily if is about to infringe them.

Grice admits that his own formulation of maxims is deeply connected with his regarding the conversation mainly as an exchange of information and that different aims of conversation may cause a change of maxims themselves and lead to the addition of other maxims. Moreover, he maintains that conversation is just a special case of rational purpose-oriented behaviour, and that it bears resemblance with transactions, which are not conversation or exchange of words. They have some general features in common: in both there is a purpose shared by participants, their contribution to it are mutually dependent, the practice goes on and develops until both parties decide to give it up. The analogies between conversation and interactions relevant to transactions allow us to apply in some way principles of pragmatics to legal practice[16].

Any explanation of legal practice is much more complex than any explanation of conversational practice. Wittgenstein's idea that language-games have their own separate identity, which causes their incommensurability and the impossibility of translating one into the other, is denied by legal practice. This thesis has led Winch to the paradoxal situation of maintaining that we are able to understand a foreign form of life, by putting ourselves within those paradigms that are incommensurable with our own paradigms.

According to hermeneutics, on the contrary, more properly, the concepts of language-game and form of life are much more fluid and porous. Apel has criticized Wittgenstein for not having inquired enough over a special kind of language-games, namely those that have a hermeneutic relation to other games. He refers not only to the telling of a handed down by tradition and to the interpretation of a text, but also to all activities hermeneutic understanding can be applied to: preaches, lectures, adjudications, executions of pieces of music[17]. In the above said cases the interpretation of a practice becomes a part of the practice itself, thus creating a more and more complex game.

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[13] J. WRÒBLEWSKI, *Presuppositions of Legal Reasoning*, in E. BULYGIN-J.L. GARDIES-I. NIINILUOTO, *Man, Law and Modern Forms of Life*, Reidel, Dordrecht 1992, pp. 283-309.

[14] See M. SERIO, *Presupposition*e, in *Digesto (Discipline privatistiche)*, UTET, Torino, 1987[4], vol. I, pp. 294-300.

[15] LEVINSON, *Pragmatics*, above n. 3, p. 102.

[16] Some similar attempts have been made, even though not always in successfully way, by M.B.W. SINCLAIR, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, in «University of Pittsburg Law Review», 46 (1985), pp. 373-420; G.P. MILLER, *Pragmatics and the Maxims of Interpretation*, in «Wisconsin Law Review» 1990, pp. 1179-1227; H. HURD, *Sovereignity in Silence*, in «Yale Law Journal», 99 (1990).

[17] K.-O. APEL, *Transformation der Philosophie*, Suhrkamp, Frankfurt a.M. 1973, vol. I, pp. 368 ss.

Provided that the co-operative principle has features of universality, social practices, like chinese boxes, may be found one inside each other, thus creating a complex network of conventions, presuppositions and expectations. This may be mainly observed in those interpretative practices in which phenomeon of the hidden or implicit meanings is very frEquent, and the law is one of these (*implicit law*).

In law a further complication is provided by the multiplication of contexts of interaction. The first context is horizontal, since participants regard themselves as equal. The second one is vertical, because it concerns the relation between authorities and citizens. The third context concerns the relation between authorities themselves and officials.

The legal theorist Lon Fuller has showed in a convincing way that law itself is the result of an interaction of purpose-oriented trends between citizens and their government (*vertical interaction thesis*). Besides, the very existence of law requires a certain degree of congruence between the issued law and the horizontals conventions shared by citizens (*congruence thesis*)[18].

One expects that the citizens' understanding of what is required by the law should be anticipated by officials, who must foresee how citizens will use this understanding in their practical reasoning. Otherwise, the law will not succeed in guiding their actions and it will not reach its substantive ends. There is a kind of reciprocity between legislator and citizens. On the one hand, legislator should be able to anticipate what citizens, as a whole, will accept as law and what they will generally follow as that body of rules he has promulgated. On the other hand, citizens should be able to anticipate to which rules, among the promulgated ones, the government will appeal when judging their actions[19]. An actual legal order rests on a steady reciprocity of expectations and the latter are, in their turn, strenghthned not only by the forecast of what other citizens and official organs will do, but also by the expectations founded on what they will have to do. In law, the normative and the factual dimension are interwined in an inextricable way.

4. CONSTITUTIONAL LEGISLATOR'S INTENTION

In the light of what remarked above, it is necessary to analyse the legal issue concerning the legislator's intention. This topic is very widespread in Anglo-American countries nowadays, whereas its importance is declining in codified law countries. This is a particularly interesting phenomenon, the explanation of which lies of course in the central position the constitution is progressively assuming in legal practice. The issue of ordinary legislator's intention is, thus, easier to be solved, since there are pre-existent criteria constraining his biddings, i.e. constitutional criteria. But the same cannot be true when considering Constitution, which is usually intended as the fundamental law. Therefore, the problem is to define the role actually played by the framers in the interpretation of the Costitution and which role they should play.

We are dealing here with a peculiar intention, which does not only concern the merely factual dimension of practice but its deep structure, that is the set of general conditions the interpretation of law depends on and which, according to our perspective, refers to and to the level of understanding and the level of determination of the «thing» called law.

Nowadays it seems evident that such an issue is a basically political one. What is at stake is the meaning and the role of the authority of law. Therefore, if we think the state of mind of those men who some time ago met to make the Constitution is irrilevant for legal interpretation, then we will have to explain why the law they made has a compulsory and authoritative character for us. That is why the intentionalist thesis holds and continuously rises again.

We could say — like Dworkin does — that this issue is a basically political one and that it is therefore useless to search for an exhaustive linguistic or theorical solution to this problem. «There is no such thing as the intention of the framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented»[20]. Nevertheless we can state that, either because we think such issues necessarily require political decisions, or because we do not believe in the possibility of finding any linguistic solution to the problem of legislator's intention, or because of both reasons together. I do think that, according to the interaction between hermeneutics and pragmatics which I proposed, one should try to show the connection between the political aspect of the issue and the linguistic one and

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18 G.J. POSTEMA, *Implicit Law,* in «Law and Philosophy», 13 (1994), pp. 361-387.

19 See L.L. FULLER, *Human Interaction and Law,* in I D., *the Principles of Social Order,* Duke University Press, Durham 1981, pp. 211-246.

20 R. DWORKIN, *The Forum of Principle, in* ID., *A Matter of Principle,* Harvard University Press, Cambridge (Mass.) 1985, p. 39.

that, taking the theory of the meaning as use seriously, one should point out that there are linguistic uses which suit the topic concerning the legislator's intention. I can here make just some loose comments, all of which are part of this trend.

First of all there is a background issue, which is of general relevance. Can a legislative act be regarded as a communication of intentions (*intention-response conception of meaning*)? Should this not be the case, we would be out of the reach of pragmatics. Of course, according to the traditional imperativistic model, there can be found, on the one side, someone who bids and, on the other side, someone who receives the bidding[21]. The fact that there is a communication of intentions is out of question here. Yet, if we are to hyphothesize a democracy based on the principle of unanimity, we could think that, stricly speaking, a common decision cannot be communicated to anybody[22]. One cannot, in fact, communicate with himself. Moreover, if we are to think, on the ground of a given conception of authority (which is close to the hermeneutic perspective) that legal authority does not properly lie in people but in legal texts, then we could not talk about communication of intentions[23]. Is a legislative act a communication of intentions or not? Alf Ross, the analytical legal realist, denies it and prefers to take the interpreter's or listener's point of view into consideration[24]. I do not mean even to try to solve such an important issue here. Nevertheless, there is no doubt that law would be meaningless if it did not make communication possible between individuals who are unknown to each other. Being together and co-existence are communicative phenomena. Law makes use of communication and is itself communication[25]. Still, if we wonder what law actually communicates and particularly what is properly the purpose of communication conveyed by a legislative text, it seems to be wrong thinking that such a purpose lies in the intentions of particular subjects who have the authority of producing it. Modern law has developed according to the de-personalization of principle of authority. The fact that legal contents are independent from the mental states of participants of legal practice seems to be an essential condition for the certainty of law and for a steady realization of plans of life.

The second issue of general importance concerns the relations established between interpretation and intention. I do not think we may rightly maintain that intentions or mental states are interpreted. Rather, what is interpreted is the outcome of someone's intentions, that is a discourse, a written text or a behaviour. Intentions are not interpreted, since they are states of affairs, they are substantially facts. We ascribe intentions to legislators because of the concept of meaning. If there are meanings, there are intentions. Since legislation is a result of meaningful sentences in textual form, then it cannot be regarded as unintentional.

This also means that in the standard conversational model there is, strictly speaking, no interpretative activity. Our knowledge of others' mental states is a kind of descriptive knowledge, that is to say, an explanation in the proper sense of the word[26].

It may be objected to this that realizing what someone means in a given occasion is itself an object of intepretation. Of course, in order to describe what someone means, one has to describe the object or the content of intention. But this is not interpretation, it is merely a description, even if the phenomenon is a linguistic one.

A proof of this can be found in the fact that intention may be used as a criterion of interpretation. If it is an interpretative criterion, it cannot be also an object of interpretation. This complies with the general principle (which is, however, — as we shall see — denied by hermeneutics) according to which interpretation must be guided by a criterion which is independent from the meaning of what is being interpreted[27]. So, by analyzing what someone says in a given context, we can infer his state of mind and, on the basis of the knowledge of it, we can interpret the meaning of what has been said. This is the paradigm of conversational analysis. Yet, if it were applied to law it would lead to a radical form of intentionalism.

Within the domain of legal theories, another thesis is often supported, according to which the intention we are talking about is not the speaker's or writer's intention, but the listener's or reader's intention and that a text of law assumes the meanings which users of law assign to it on the ground of their own expectations and of their own state of mind (*reader-response-criticism*)[28]. Obviously this thesis is

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[21] See J. VINING, *The Authoritative and the Authoritarian*, University of Chicago Press, Chicago 1986.

[22] See J. WALDRON, *Legislators'Intentions and Unintentional Legislation*, in A. MARMOR (ed.), *Law and Interpretation. Essays in Legal Philosophy*, Clarendon Press, Oxoford 1995, pp. 329-354.

[23] See H. HURD, *Interpreting Authorities*, *ivi*, pp. 405-432.

[24] See B.S. JACKSON, *Semiotics and Legal Theory*, Routledge, London 1985.

[25] See D. NELKEN, *Law as Communication*, Darmouth, Aldershot 1996.

[26] See M.S. MOORE, *Interpreting Interpretation*, in A. MARMOR (ed.), *Law ad Interpretation*, above n. 22, pp. 21-22.

[27] *Ivi*, p. 9.

[28] S. FISH, *Is There a Text in this Class?*, Harvard University Press, Cambridge 1980.

unacceptable both for the communication-oriented model typical of conversation and for the hermemeutic model, since such a thesis would be based on intention as well.

The question is entirely that, whereas in conversation the concept of intention does not rise any problem and it is the speaker's state of mind in the conversation, in legal practice, on the contrary, some preliminary issues must be solved: whose intention? What can be regrded as «intention»? Is it possible to talk about the intention of a group or about the intention of an institution? As Dworkin brilliantly pointed out: «The importance question for constitutional theory is not whether the intention of those who made the Costitutional should count, but rather what should count as that intention»[29].

When we analyze legal literature dealing with intentionalism, we will notice that everything or almost everything has been considered an intention. Somebody distinguishes, according to linguistic pragmatics, between dictionary or sentence-meanings, which are also called «semantic intentions», and speaker-meanings, also called «linguistic motivations»[30]. Someone distinguishes between beliefs about legal effects of the law and beliefs about some other consequence caused by legal effects of the law[31]. Besides, someone distinguishes between abstract intentions, which contain the general principle of justice, by which the legislator is ispired, and concrete intentions, concerning the way he applies them according to cultural standards of his time[32]. The possibility of detaching the former from the latter would give an evolutive character to the intentionalist criterion.

To conclude, the concept of legislative intention is a product of interpretation and not an aknowledgement of a state of affairs. Therefore, it is necessary to draft an interpretative thesis about what should be regarded as legislator's intention. By applying such interpretative thesis we will work out interpretive criteria in order to identify the meanings expressed by legal practice. That differs greatly the communication-oriented model of the practice of conversation, even though one could try to modify this model and to question in a post-positivist way the concept of speaker's intention it assumes.

The theory of interpretation, whose task lies in reconstructing what one should mean by «legislator's intention» cannot assume, in its turn, the reference to intentions, beliefs and acts of those who are designated legislators as its independent criterion, since otherwise it would fall in a vicious circle. It should be first decided who will be regarded as «legislator» and what should be regarded as the «legislator's intention», first. After that, its content and, consequently, the meaning of laws might be grasped[33].

Generally — as it has been pointed out also by Rorty — we cannot regard the description subjects make of what they are doing as normative. They may be wrong in describing what they are doing and can describe their contexts of action in different ways. Nevertheless, practice cannot be detached from what identifies it without loosing its peculiar meaning[34]. Russel notices: «There is no more reason why a person who uses a word correctly should be able to tell what it means than there is why a planet which is moving correctly should know Kepler's laws»[35]. On the other hand, in law there is the so-called «authentic interpretation», which is far from being a merely interpretative activity, since it really brings another law forth.

As regards the way in which this interpretative theory might helps us reconstruct the concept of legislator's intention, I think that hermeneutics is in a much more favourable position than linguistic pragmatics, due to its unintentionalist tendency, for — as we have seen — the interpretative criterion, which defines what will be regarded as an intention, cannot be intentionalist. How will it be or how should it be?

5. AIMS OF LAW AS INTERPRETATIVE CRITERION

This problem is closely linked whith the more general and basic issue of the compulsory character of law. In order to individuate what should be regarded as «legislator's intention» it is necessary to ap-

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[29] DWORKIN, *A Matter of Principle,* above n. 20, p. 57.

[30] See L. ALEXANDER, *All or Nothing at All? The Intentions of Authorities and the Authorities of Intentions,* in MARMOR (ed.), *Law and Interpretation,* above n. 22, pp. 357-404.

[31] See G. BASSHAM, *Original Intent and the Constitution,* Rowman & Littlefield Publishers, Lanham, Md. 1992.

[32] Dworkin mentions this dinstiction in order to criticize it.

[33] DWORKIN, *A Matter of Principle,* above n. 20, p. 55. See, however, also his critique to the concept of «interpretative intention».

[34] R. RORTY, *Method, Social Science, and Social Hope,* in ID., *Consequences of Pragmatism,* University of Minnesota Press, Minneapolis 1982.

[35] B. RUSSEL, *My Philosophical Development,* Simon & Schuster, New York 1959, p. 147.

peal to a theory of legal authority and to a justification of the citizens' duty to obey laws. It is not possible to choose the most proper constitutional interpretation method without having a theory about what the Constitution is and about the source of its compulsority. Answers may be different, even within the hermeneutic perspective. Interpretations of the «thing» called law are different. The least one might say is that this is an activity which aims at making such bidding which must make people act according the moral duty of obedience[36]. Many people think it is only a political issue when, for instance, they are searching for such a conception of Constitution and for an interpretation of it which best suits the theory of representative government. I will only hint at the solution I regard as the best, but with the exclusive aim of showing the direction of a research.

Whereas the boundaries which distinguish the legal practice and the conversational one are rare, the comparison between legal interpretation, on the one side, and aesthetic and literary criticism — which, as we have seen, have been exploited by Gadamer in order to overcome intentionalism — on the other side, is recently more widespread. The meaning of a work of art does not depend on the private context of its creation. Even we are to assume the relevance of the artist's intention in order to determine the meaning, we cannot confuse this meaning with ideas, emotions and attitudes he expressed in it nor with the meaning he attaches to it. Artists are often surprised at what other people find in their works. There is a hidden meaning or a hidden side of the general meaning which interpretation and history of performances point out. Works of art are really cultural objects which share some general truth and are not bound to their authors' intention. That is the reason why there is no art without interpretation and without a practice of interpretation of works of art[37]. Yet, this does not mean that in law one is allowed to go to free himself of legislator's intentions.

The criterion of sharing some kind of general truth — if I am allowed to use this expression, which refers to something that has a common value and is the rationale of social practice — in law requires institutionalized subjects and official «authors». It is known how disastrous this may be for art. The State or court artist as such is not a reat artist. On the contrary, legislators must always be, somehow, a State one, otherwise he will be hardly a good legslator. I mean that the way for individuating what is significant must be drawn from the identity of the practice at hand. In other words, — as Raz says — interpretative criteria must be compared with the reasons we have for interpreting[38]. There are, then, values and aims which mould from inside cooperative enterprises.

We have seen that conversation has its internal values too. We have conversation in order to communicate. In a way, communication is the rationale of conversation and that is the reason why in it the co-operative principle shows itself in its pure character and without any other specification. This does not mean that the content has no relevance, but only that the practice does not completely identify with it. If this were the case, then we would be facing a different form of interaction, which is grasped on the trunk of communication and increases its difficulty.

We have good reasons to think that the coordination of actions, the solution of quarrels and the compensation of damages deriving from interaction are the aims of legal practice. We can think legal practice embodies the requirement that not all solutions to quarrels are acceptable, but only the «fair» ones or those which are regarded as fair. I incidentally notice that is a reason why we should look suspiciously upon a merely strategic explanation of legal interaction, since in the legal domain participants are not indifferent to any solution which might be found. Perhaps, we can also maintain that a fair and peaceful solution to social conflicts is the value which giudes the legal practice and that this, as a rule, requires a normative system supplying authoritative and controlled criteria, i.e. proper institutions. We could also notice that the aim of law is to provide common standards of actions in order to guide the behaviours of members belonging to a political community, that is, to create a net of rules and steady expectations which let individuals exercise their personal autonomy within a logic of interaction[39].

The «thing» called law might, in the end, be regarded as what we stated above and this might be the content of pre-understandings of those who participate in such a practice, that is, what they expect from it and their common interpretation of it. I mean that the *reasons* (not personal motivations) for the partecipation in the cooperative enterprise of law are what actually determines the structure of such enterprise as well the criteria to individuate what is relevant to it.

I do not know whether this explanation may be considered as «hermeneutic» or not. Someone wrongly thinks that a hermeneutic perspective should transfer authority from the authors' intentions to

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36 R.E. BARNETT, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, in R.P. GEORGE (ed.), *Natural Law, Liberalism, and Morality*, Clarendon Press, Oxford 1996, p. 156.

37 J. RAZ, Interpretion without Retrieval, in M ARMOR (ed.), Law and Interpretation, above n. 22, pp. 157 ss.

38 J. RAZ, *Intension in Interpretation*, in R.P. GEORGE (ed.), *The Autonomy of Law*, Clarendon Press, Oxford 1996, pp. 249-286.

39 See J. FINNIS, *Natural Law and Natural and Natural Rights*, Clarendon Press, Oxford 1980.

the texts themselves. However, to change from the intentionalist thesis to the textual thesis would not be a big progress. It has been said that it is not a text to have a sense, but a sense to have a text[40].

What is at stake here is the way we should understand these plexus of sense underlining our social practices. And the dialogue between hermenetics and pragmatics remains open on this point.

A strong objection may be made against the, broadly speaking, hermeneutic conception of social practices. It rests on that principle mentioned above of the independence of interpretative criteria from interpretative meanings.

As we said, referring to Dworkinian example of the practice of courtesy, that we do not learn to be kind and polite without having a reason to be such; we get to know such a reason independently from the practice itself. We are justified to regard practice of courtesy as a text from which we must learn how to practise its contents just because we appreciate the value of kindness. This value must show why we should consider a practice as meaningful before understanding what it means[41]. Well, this seems to me to be the crucial point of the disagreement between analytical philosophy and hermeneutic philosophy as regards the view of social practices, between Grice's Kantian perspective and the Gadamerian one which is accepted by Dworkin. Are values or reasons for action external to our practices or immanent in them? Do we learn what law is from its aims or do we learn its aims by practising it? There are reasons in favour and against both the first and the second theory. On the one side it may be said that law does not exist independently from its practice, but on the other side it may be objected that, however, one should be able to distinguish between right interpretations and wrong interpretations, which necessarily implies that we should be detached from legal practice itself. I do not think the problem can be solved; yet, any reasoning about it will be always instructive.

(Translation by Elena Pariotti)

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[40] J. HRUSCHKA, *Das Verstehen von Rechtstexten*, München 1972,

[41] This objection has been made by Moore: see M OORE, *Interpreting Interpretation*, above n. 26, p. 13.