SOME REMARKS ON PRAGMATICS AND LAW

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ABSTRACT
The present paper examines some of the ideas contained in the volume *Pragmatics and Law. Philosophical Perspectives*, edited by Alessandro Capone and Francesca Poggi. In particular, it analyzes the contributions bearing on defeasibility, rational law-giving, legal disagreements, and logical relations between deontic modalities.

KEYWORDS
Pragmatics, defeasibility, legal disagreements, rationality, deontic logic

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1. *Foreword*

The two volumes edited by Capone and Poggi on the pragmatic analysis of law[1] are outstanding contributions to the debate on the linguistic character of law and deserve a special interest in contemporary discussion of analytical philosophy. In particular, facing the idleness of many contemporary debates on whether morality can be a condition of legality and the like, they provide the reader with a fresh and rich array of insightful essays on very significant aspects of law, its structure and its functioning.

Here I shall only deal with the first of these excellent volumes: the one bearing on philosophical perspectives on law and pragmatics[2]. I agree with many of the conclusions reached in the great majority of essays. Consequently, here I shall confine myself to analyzing some features of those papers, which have a closer connection with the topics I have been investigating, and writing about in my academic life: defeasibility in the legal domain, law's supposed systematic character and rationality, legal disagreements, and deontic logic.

2. *Marmor on Defeasibility and Pragmatic Indeterminacy*

In Marmor's contribution, defeasibility is regarded as a predicate of inferences. In short, it is the rejection of monotony (MARMOR 2016, 15 f.), in so far as new premises defeat a certain conclusion. More precisely, following a standard distinction, Marmor distinguishes between rebutting and undercutting. A rebutting defeat is one in which the additional (henceforth: superseding) premise to a *prima facie* warranted inference is such that it *negates the conclusion* of the inference. In cases of undercutting, the superseding premise might be such that it undermines the initial evidence we had for the conclusion.

[1] CAPONE, POGGI 2016; POGGI, CAPONE 2017.
[2] CAPONE, POGGI 2016.

In addition to rebutting and undercutting, Marmor identifies *conflicting defeats*: cases in which the superseding premise renders the initial inference genuinely indeterminate (MARMOR 2016, 17). The defeasibility in such cases consists in the fact that it becomes indeterminate whether the putative conclusion follows or not. Marmor asserts that «[i]n such cases, decision-makers must make their judgments on the basis of considerations not dictated by the relevant law» (MARMOR 2016, 17)[3].

This "new" kind of defeasibility is illustrated by means of two examples.

The first example refers to the competence of FDA (Food and Drug Administration) to decide on the admissibility of tobacco products on the basis of the 1965 FDCA (Food, Drug and Cosmetic Act), that provides the FDA with the power to regulate any product that is «intended to affect the structure or any function of the body». Once the issue of the competence on tobacco products is resolved affirmatively, other sections of the FDCA apply according to which the FDA ought to ban tobacco products. However, other pieces of legislation were predicated on (even though they did not state explicitly) the permission of selling tobacco products[4]. According to Marmor, the real issue is whether the later pieces of legislation, regulating the sale and advertisement of tobacco products, actually withdrew the putative authority of the FDA to ban tobacco products or not.

Marmor observes:

> «The contextual background of these later pieces of legislation is muddled; when they were enacted, the FDA did not claim authority to regulate tobacco products. [...] Given this background, the inference from the enactments regulating the sale and advertisement of tobacco to the implication that the FDA has no authority to ban the sale is defeated. But notice that the defeat is not of a rebutting kind. The contextual uncertainty does not rebut the putative implication of those laws; it only renders them inherently uncertain» (MARMOR 2016, 29).

The second case is *West Virginia University Hospitals v. Casey*. In this case, a

[3] Regarding the problem that normally goes under the heading of "defeasibility" (i.e. implicit exceptions to legal norms) Marmor confines himself to saying that «[s]o what does the open-endedness of possible exceptions to legal rules amount to? In the legal case, at least, the answer is that it is essentially a matter of legal authority. Legal systems need to assign the authority to modify rules and adapt them to varying circumstances. Why? Because legal rules are enacted for reasons, aiming to achieve some particular purposes, and it may happen that the reasons for a given legal norm are either not well served by applying the law in a particular case of its putative application, or else they conflict with other reasons that apply» (MARMOR 2016, 26 f.).

[4] At this regard, Marmor affirms: «These laws imposed various restrictions on the ways in which cigarettes and other tobacco products can be sold, prohibiting their sale to minors, restricting advertisement in mass media and imposing various labeling requirements. Now, evidently, all these laws implicate that the sale of tobacco products, albeit restricted, is not illegal. If Congress says that you can only sell a product X if it is labeled as Y, it clearly implicates that if the product is labeled as Y you may go ahead and sell it. Or if Congress says that you may not sell X to minors, it clearly implicates that you are allowed to sell X to adults» (MARMOR 2016, 44).

hospital that had prevailed at the trial court, according to the provision of a federal statute, was awarded the cost of its attorney's fees, which included the cost of expert fees paid by the attorneys to their non-legal experts.

> «The case went to the Supreme Court only on this last point: The defendant argued that expert fees are not included within the expression of the federal statute allowing the court to award "a reasonable attorney's fee". Indeed, the experts are not attorneys. Justice Scalia, speaking for the majority, agreed, but not because the ordinary meaning of the expression under consideration would naturally exclude the cost of experts to the attorneys in question. [...] Scalia's argument was based on a kind of pragmatic inference: the fact that, in many other acts of Congress (though not all of them) awarding attorney's fees to a prevailing party in civil litigation, the act explicitly mentions attorney's fees *and* expert witness fees. Ergo, if Congress chose to use only the expression "attorney's fees" without the addition of expert fees, the latter were meant to be excluded» (MARMOR 2016, 29).

From his reconstruction of situations like this, Marmor generalizes and reaches the following conclusion: «In the cases we have been discussing, what the law says or implicates is legally indeterminate, and thus any judicial decision is going to amount to a modification of the law, perhaps creating new law if the decision is followed as a precedent» (MARMOR 2016, 31).

Marmor's theoretical proposal concerning the reconstruction of such situations seems to me deeply unconvincing. Regarding the second example, I am really not able to see why a pragmatic analysis should be here regarded as relevant. Scalia is simply using an *a contrario* argument in its productive version supported by an intentional interpretation of the provision at hand.

Regarding the first, peculiar, example, here I confine myself to three simple remarks.

(a) First, Marmor does not take into account a simpler explanation than the one he proposes: the competence to decide on the ban of tobacco products is based on a power-conferring norm, whereas the conflict between the prohibition and the (implicit) permission of selling tobacco is between regulative norms, which deontically qualify action. The competence on deciding whether to ban or not tobacco is a logical presupposition of the normative conflict, since – once the competence is established – the competent authority supposedly faces the normative conflict.

(b) Second, if one applies *lex posterior* to solve the antinomy, one can simply state that the sale of tobacco products was allowed. This move might be criticized, since the permission was mostly an implicit one, which was ingrained in the regulation of the sale of tobacco products. At any rate, in order to eliminate the competence of FDA, one should find some norm stating that the FDA is

incompetent to decide on tobacco products (or something of that sort): which was not the case in the example at hand.

(c) The reasons to dub such situations as cases of "defeasibility" are quite mysterious. Surely one should not abandon monotony in order to explain them, and there is no norm which is defeated by implicit exceptions. Marmor affirms that what is defeated is the inference from the enactments regulating the sale and advertisement of tobacco to the implication that the FDA has no authority to ban the sale. But such an inference is not at stake here and is fallacious, as we mentioned, because it conflates the negation of power-conferring rules and regulative rules.

By way of conclusion, we can observe that a more general criticism can be made regarding Marmor's proposal. This general criticism is twofold:

1) Marmor says that conflicting defeats are cases in which the superseding premise renders the initial inference genuinely indeterminate. According to Marmor, defeasibility in such cases consists in the fact that it becomes indeterminate whether the putative conclusion follows or not. This may happen for three reasons[5]: (1) changes of the premises, (2) changes of the rules of inference, (3) change of both. But, pace Marmor, this is not a new kind of defeasibility. It is a well known problem, regarding the changes of the element of a piece of reasoning. We must observe however that the uncertainty exists only in so far as the elements at play are not ordered. Once they are ordered and the law systematized, uncertainty dissolves.

2) Marmor may want to object that the defeasible character of the inference is due to the pragmatic assumptions which are at play in these cases. However, since pragmatic inferences are deemed to be defeasible by definition, again one can conclude that no novelty in his account can be found.

3. *Capone on Rational Law-Giving*

One of the main theses of Capone's contribution is that «reading, understanding and interpreting a legal text is to take into account the point of view of the rational law-maker» (Capone 2016, 147).

Capone embraces a prescriptive doctrine of legal interpretation – rather than providing a reconstruction of legal interpretations actually carried out – which sees contextualism as crucial. One of the main (axiological) reasons for contextualizing meaning is that if a law were applicable only literally, then potential trespassers could modify their conduct accordingly (Capone 2016, 148).

[5] Alchourrón, Bulygin 1971, 90 f.

So, law is to be read by means of a blend of literality and purpose. However, the overall meta-canon of legal construction is rationality:

> «the rationality of the interpreter and of the law-maker is best seen when the interpreter and the law-maker reconcile conflicting canons of construction and place greater emphasis on a canon rather than on another by dwelling on rationality considerations» (CAPONE 2016, 155).

Within such a compass,

> «the law-maker referred to in legal reasoning cannot be real, past or present, agency, but is rather a construct, which functions as an ideal point of reference for the purpose of defining the rationality of a decision. In short, such a law-maker is either a rational or a perfect law-maker» (CAPONE 2016, 151).

Following Dascal and Wróblewski, Capone identifies three sets of characteristics to define the rational law-maker: (a) the rational law-maker cannot be self-contradictory, so that we must interpret his provisions in such a way so as to avoid contradiction, (b) the rational law-maker is a rational agent, who has good reasons for his decisions, (c) the good reasons in question fulfill certain formal criteria: e.g. no good reasons can be inconsistent or incoherent; the decisions are reached through the application of valid rules of legal reasoning (CAPONE 2016, 153).

Despite Capone's optimism regarding the rationalizing contextualization of the lawmaker's provisions, it seems that there are different notions of rationality at play here and it also seems that they work in different fashions. Sometimes they are even incompatible with each other.

– The first notion is based, roughly, on the idea that a lawgiver is rational as far as it provides a logically consistent (and maybe also complete) set of regulations of the human conduct.

– The second notion is twofold[6]: (i) the lawgiver is rational in so far as he offers reasons or founds his norms on reasons; (ii) his norms are the *best* (or at least a satisfactory) means to achieve the purposed goals or reasons.

Both notions are different and each of them deserves some words of comment.

There can be – as CELANO (2013) pointed out – a strategic rationality which uses contradictions for non-standards legislative goals. One can object that what Capone has in mind is logical rationality. However, the notion of consistency in the legal domain is different from the strictly logical one. From the stance of propositional logic, for instance, the sentence providing that "O(p→q)" & "O(p→¬q)" is not a real logical conflict, since it does not imply any sentence whatsoever. Rather, it

[6] BOBBIO 1971.

logically implies "O¬p"[7]. This means that a lawgiver issuing such norms is not necessarily irrational. He can be a malicious lawgiver, but totally rational (indeed, he is *logically rational*).

Things do not fare better with reasons, since consistency is a problematic property when it is predicated of a system of reasons, since they are regarded as defeasible standards. Indeed, if the antecedent of a principle is not regarded as a sufficient condition (or as one providing sufficient conditions) of its consequent, no inconsistency is derivable from them, for inconsistency is only derivable when *modus ponens* and strengthening of the antecedent are applicable.

It would seem, then, that the system of principles or reasons cannot be inconsistent by definition, since it is composed of defeasible normative standards. If it is so, however, it is not clear, from a logical point of view, how the relation of coherence between the system of principles and the system of rules should be framed. An option consists in regarding the principle as a "tentative confirmation" of the normative consequence provided by a certain set of rules. The more confirmed a certain normative solution provided by a rule is, the stronger appears the relation of coherence between the underlying principles and such a rule. However, what is important to stress here is that the idea of competing confirmations presuppose inconsistencies of solutions within the system of rules (i.e. lack of rationality in the system of rules). Coherence relations would thus be, or might be used, as tools liable to tentatively solve antinomies afflicting sets of rules.

These remarks ideally connect with some interesting insights by Capone about the relevance of the concept of rational law-making for juristic systematization. Capone interestingly observes at this regard that «[i]n interpretation, much more than in codification, we are interested in the rational law-maker, *qua* abstract construct, not *qua* historical law-maker» (Capone 2016, 152). Indeed, the idea of a rational law-maker is a regulative ideal for interpreters. The system is the product of jurists' systematizing activities, rather than being a pre-existing datum. However, rationality is not a global activity: it is not the whole legal order to be

[7] Analogously with what happens in propositional logic. This is easily seen from the following truth-table:

p → q	&	p→¬q	≡	¬p
1 1 1	*0*	1 0 0	**1**	*0*
1 0 0	*0*	1 1 1	**1**	*0*
0 1 1	*1*	0 1 0	**1**	*1*
0 1 0	*1*	0 1 1	**1**	*1*

systematized. The idea – which Capone embraces – that the rational law-maker would always choose legal rules which are the best suitable ones for implementing the purposes he sets for the law must be balanced with what we have observed before: first-order rationality and second-order rationality are different and sometimes the latter seems to presuppose the absence of the former. So, the purposes set for the law – e.g. completeness, consistency, and coherence – cannot always be reached altogether. And this is a great limitation to the idea of rational law-making.

4. *Legal Disagreements*

There are two papers in the book dealing with the lively debated issue of legal disagreements.

The first is by Vittorio Villa and is concerned with what he calls "deep interpretive disagreements", i.e. «very profound and radical divergences that sometimes take place among jurists in legal interpretation» and are «genuine, faultless and unsolvable» (VILLA 2016, 92).

The necessary condition that allows to identify deep interpretive disagreements is the presence, in the linguistic materials to be interpreted, of evaluative expressions, such as "life", "human person", "dignity", "personal autonomy", "decency" and so on (VILLA 2016, 95). These expressions, according to Villa, lack *sense*, and so they are *indeterminate*; and do not lack, at least directly, *reference*, and so cannot be characterized as *vague*. In these cases – Villa says – we cannot even pose a question of reference (for instance, the question if "that given behavior is contrary to decency"), if we don't previously answer the question of sense ("what is decency?") (VILLA 2016, 97).

Such disagreements are genuine, that is to say that those who engage in them are not talking past each other. They are faultless, i.e. they do not depend on interpretive mistakes (that is to say that the canons used for interpretation are legitimate according to the legal culture of reference). They are also unsolvable, in that there is no way of finding a single right answer for the interpretive questions that are on the table. According to Villa, disagreements of this kind trigger debates about metaethical choices on how to fill-up the debated concepts.

I agree on many conclusions reached by Villa concerning deep interpretive disagreements, even though I do not share virtually any methodological premise of his. Since this sounds rather peculiar, I should elaborate it a little bit more.

I agree on the fact that the disagreements under scrutiny are normally genuine (at least in the eyes of those who disagree), faultless, and unsolvable in the sense Villa uses these terms. However, I would not say that the expressions that trigger such disagreements lack sense but have reference. How it is possible to reasonably detect the extension of the concept of "dignity" without knowing its intension is

quite mysterious to me. It is like to try to identify the set of the citizens of Milan without knowing anything about Milan.

But apart from this, it seems to me that any interpretive disagreement is genuine, faultless, and unsolvable. This is not a characteristic of deep interpretive disagreements only. Indeed, any disagreement about interpretation is genuine (at least in a strategic way), without error (in so far as the canons which are used are culturally legitimate), and unsolvable (in the exact sense that there is no one right answer). So, what differentiates deep disagreements from other kinds of interpretive disagreements is the presence of evaluative terms in the legal provisions from which they stem. The difference, however, is only one of degree and mainly one of legislative drafting. The difference can perhaps be explained by resorting to Schauer's theory of rules.

As Schauer affirms[8], it is often possible for the rules to be a specific instance of its background justification. Rules are designed to serve their background justifications, but it is the rule itself that carries the force of law, and it is the rule itself that ordinarily dictates the legal outcome. In the case of evaluative framed provision, what the lawmaker does consists in eliminating this force of the rules and issuing directly the background justification. Accordingly, he opens the door to disagreement and judicial discretion. As Schauer observes,

> «people understand that the background justifications themselves are often too vague to be helpful, too fuzzy to give people the kind of guidance they expect from the law, and too subject to manipulation and varying interpretation to constrain the actions of those who exercise power» (SCHAUER 2009, 16).

The second paper is by Genoveva Martí and Lorena Ramírez. The authoresses sophistically compare and contrast descriptivism and what they call the new theory of reference regarding the relations between sense and reference.

> «Whereas for the descriptivist speakers refer in virtue of being in possession of a description that determines the reference of each of their uses, for the new theorist speakers refer in virtue of their objective position in the network or chain of communication. What determines the reference of each use may well not be transparent to the speaker, according to the new theory of reference» (MARTÍ, RAMÍREZ 2016, 124 f.).

I am not able to thoroughly assess the consequences of such a debate for legal theory. But here I want to make only one major criticism regarding the paper: the reading of the second Dworkinian attack on legal positivism seems to me to be quite procrustean.

[8] SCHAUER 2009, 15.

Martí and Ramírez affirm:

> «Dworkin has distinguished between empirical and theoretical disagreements and he has argued that descriptivists can account for empirical disagreement, the kind where people disagree whether a particular thing has or not a particular property, but they have difficulty in accounting for theoretical disagreement, the kind that occurs when the concepts or descriptions they entertain are different» (MARTÍ, RAMÍREZ 2016, 128).

The authoresses then go on to point to the concept of "death" as a possible topic of theoretical disagreement, which descriptivists might have difficulties in explaining.

But in Dworkin there seems to be virtually nothing about such a debate regarding the notion of reference to be used. Dworkin distinguishes two ways in which it is possible to disagree about the truth of a proposition of law. First, people might agree about the grounds of law, but disagree about whether those grounds are in fact satisfied in a particular case (*empirical disagreements about law*). Second, people might disagree about the grounds of law, i.e. about which other kinds of propositions, when true, make a particular proposition of law true (*theoretical disagreements about the law*). In the former case – the case of empirical disagreements about law – people agree about when the truth (or falsity) of other (more familiar) propositions would make a particular proposition of law true (or false). In the latter case – the case of theoretical disagreements about the law – people would agree about what the statute books and past judicial decisions have to say about a case. Yet, they might still disagree about what the law actually is, since they might disagree about whether statute books and past judicial decisions exhaust the pertinent grounds of law.

Another criticism that can be put forward is that Martí and Ramírez have too a limited notion of legal indeterminacy. «Legal disputes in which there are no sufficient elements to determine a relevant use, or cases that involve an extension of the domain of application of a term, are cases of legal indeterminacy» (MARTÍ, RAMÍREZ 2016, 137). In so holding, they seem to renew this widespread and mistaken way of thinking according to which the problems of legal interpretation are interstitial problems that mainly stem from the vagueness of concepts. But to do so is equivalent to deny the relevance of what is characteristic of legal interpretation: i.e. the attribution of meaning to legal provisions.

5. *Poggi on Grice on Law*

I agree on everything Francesca Poggi argues for in her article (POGGI 2016).

Here I shall only add an argument against the usage of the first maxim of quantity in the normative domain that runs as follows "indicate clearly if you intend to permit, or to prohibit or compel".

Here the pragmatic analysis, I submit, obscures the logical analysis. Permit, forbid, and oblige are interdefinable from a logical point of view. So, to forbid smoking would be equivalent not to permit smoking. As a consequence, the maxim is vacuous, since it is deprived of any relevant conceptual content.

So, the example "Using mobile phone is permitted within the hospital" implicates "Using mobile phone is not mandatory within the hospital" (i.e. "Not-using mobile phone is also permitted within the hospital") is quite misleading and is based on a double ambiguity of "permitted".

First ambiguity: if "permitted" is understood in the weak sense (i.e. as absence of a mandatory rule), the sentence is reasonable regarding the absence of obligation (since an obligation would imply strong permission). By contrast, if "permitted" means strongly permitted (i.e. presence of an explicit authorization), it is not granted that using mobile phone is not mandatory (since, as we have just noticed, a strong authorization logically follows from an obligation).

Second ambiguity: if "permitted" is understood as unilaterally permitted (that is, *p* is permitted, but *not-p* is indeterminate), the sentence is not acceptable, since from that it does not follow that also the complementary action (i.e. not using the phone) is permitted. By contrast, if "permitted" is understood as bilaterally permitted (both *p* and *not-p* are permitted), the sentence is acceptable, since bilateral permission implies non-obligation and allows for the carrying out of a certain action and its complementary.

6. *Conclusion*

Here I have critically, although succinctly, dealt with some of the interesting issues raised by some of the most intriguing contributions collected in Capone's and Poggi's volume. Many other things could have been said and many other tantalizing tenets can be revealed and analyzed in these must-read books. But I leave the reader the pleasure of discovering and examining them in their full scope.

References

ALCHOURRÓN C.E., BULYGIN E. 1971. *Normative Systems*, Vienna, Springer, 1971.

BOBBIO N. 1971. *Le bon législateur*, in «Logique et Analyse», 14, 1971, 243 ff.

CAPONE A. 2016. *The Role of Pragmatics in (Re)Constructing the Rational Law-Maker*, in CAPONE A., POGGI F. (eds.), *Law and Pragmatics. Philosophical Perspectives*, Dordrecht, Springer, 2016, 141 ff.

CAPONE A., POGGI F. (eds.) 2016. *Law and Pragmatics. Philosophical Perspectives*, Dordrecht, Springer, 2016.

CELANO B. 2013. *Law as Power: Two Rule of Law Requirements*, in SCIARAFFA S., WALUCHOW W. (eds.), *Philosophical Foundations of the Nature of Law*, Oxford, Oxford University Press, 2013, 129 ff.

MARTÍ G., RAMÍREZ L. 2016. *Legal Disagreements and Theories of Reference*, in CAPONE A., POGGI F. (eds.), *Law and Pragmatics. Philosophical Perspectives*, Dordrecht, Springer, 2016, 121 ff.

MARMOR A. 2016. *Defeasibility and Pragmatic Indeterminacy in Law*, in CAPONE A., POGGI F. (eds.), *Law and Pragmatics. Philosophical Perspectives*, Dordrecht, Springer, 2016, 15 ff.

POGGI F. 2016. *Grice, the Law and the Linguistic Special Case Thesis*, in CAPONE A., POGGI F. (eds.), *Law and Pragmatics. Philosophical Perspectives*, Dordrecht, Springer, 2016, 231 ff.

POGGI F., CAPONE A. (eds.) 2017. *Law and Pragmatics. Practical and Theoretical Perspectives*, Dordrecht, Springer, 2017.

SCHAUER F. 2009. *Thinking like a Lawyer. A New Introduction to Legal Reasoning*, Cambridge (Mass.), Harvard University Press, 2009.

VILLA V. 2016. *Deep Interpretive Disagreements and Theory of Legal Interpretation*, in CAPONE A., POGGI F. (eds.), *Law and Pragmatics. Philosophical Perspectives*, Dordrecht, Springer, 2016, 89 ff.