Pragmatic Contextualism and Legal Interpretation: Moving Beyond Interpretative Scepticism

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ABSTRACT
This paper explores José Medina's Pragmatic Contextualism as a compelling approach to longstanding dilemmas in jurisprudence, challenging traditional theories of legal interpretation. In the legal realm, by highlighting the role of discursive agency, Pragmatic Contextualism not only clarifies legal intelligibility but also illuminates the evolving nature of interpretation and the crucial responsibility of interpreters in the stability and change of legal language.

KEYWORDS
legal interpretation, contextualism, discursive agency, interpretive scepticism, interpretative cognitivism, eclectic theory of legal interpretation

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1. *Introduction*

Legal interpretation is a central topic in jurisprudence. In contemporary legal thinking, there are three theories or models of legal interpretation: a cognitive theory, a non-cognitive or sceptical theory, and an eclectic theory[1]. These theories present competing views on what legal interpretation is, and in general, they present themselves in opposition to one another. The cognitive theory understands legal interpretation as a cognitive enterprise, whereas sceptics see it as a decisional activity. Eclectics simply position themselves in the middle. They claim that legal interpretation sometimes focuses on cognitive aspects, while at other times it involves decision-making[2].

José Medina, combining insights from Wittgenstein and Dewey, elaborates a minimal philosophy of language that constitutes an adequate response to semantic scepticism[3]. Medina calls it Pragmatic Contextualism. As I will argue, applying this theory to the legal context can help improve our understanding of legal interpretation and address the dilemmas arising from debates among traditional theories of legal interpretation.

Although other pragmatic and contextualist proposals have already ventured into similar paths[4], Medina's theoretical framework has the potential to explain aspects that previous contextualist approaches to legal interpretation could not fully address. Specifically, pragmatic contextualism can explain how legal meaning emerges and how our discursive agency is responsible for its stability and change.

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[1] GUASTINI 2011a, 408 ff. For the sake of clarity and brevity, I will speak here of three theories. However, strictly speaking, they are not three *theories*, but three *families of theories*, in each of which we can find different theories (almost one for each author who tries to theorise on this matter), only sometimes coinciding in their theses. Nonetheless, some scholars have challenged this traditional tripartite classification, arguing that it does not fully capture the complexity of legal interpretation, cf. PINO 2021, 72 ff.

[2] This distinction between understanding interpretation as a cognitive or a decision-making enterprise can also be viewed from the perspective of the result or product of interpretation. In this light, for cognitivists, interpretative statements have a truth value. In contrast, for sceptics, no interpretative statements can have a truth value and, for eclectics, some can and some cannot. See, GUASTINI 2011a, 418-420.

[3] MEDINA 2006. Semantic skepticism is understood as doubting whether we know what our words mean and as questioning whether meanings are sufficiently determinate and stable to support communication (MEDINA 2006, 2, 195).

[4] See VILLA 2010, 2012.

In the European legal tradition, theories of interpretation are associated with ideologies that determine the correct methodology for a judge or a lawyer to interpret legal provisions[5]. This work will not focus on these ideologies but on theories of legal interpretation *stricto sensu*, which attempt to analyse what legal interpretation is conceptually. This work will also refrain from engaging with the debate on the necessity or relevance of adopting (or recognising) a theory of meaning as a prerequisite for a theory of legal interpretation[6].

This paper begins by briefly summarising the central tenets of cognitive, sceptical, and eclectic theories of legal interpretation (Section 2). Secondly, it elaborates on the main characteristics of pragmatic contextualism (Section 3). Thirdly, it applies this form of contextualism to discussions of legal interpretation to see whether it can overcome the limits of pre-existing theories (Section 4). Finally, it argues that pragmatic contextualism presents an innovative method to explain the difference between traditional theories of legal interpretation and to overcome old debates (Section 5).

2. *Theories of Legal Interpretation*

As explained, legal philosophers have traditionally distinguished between three main groups of theories concerning the nature of legal interpretation and the characteristics of the interpretative statements it produces. I will now outline the key features of the cognitive, sceptical, and eclectic theories to illustrate the comparative advantages of Medina's pragmatic contextualism[7].

2.1. *Cognitive Theory*

Legal Scholars, often concerned with the indeterminacy of law and the discretion of legal officials, attempt to explain that legal meaning does not depend on the choice of the interpreter but rather

[5] TARELLO 1997, 75 ff. Tarello explains that the term "theory of interpretation" can have multiple meanings. In a technical philosophical sense, a theory is understood as a system of propositions about an object that are true or assumed to be true. However, «in the European legal tradition of the XIXth and XXth centuries (...) the expression "theory of interpretation" often does not designate theories but doctrines (...) mainly directed to singling out a strange entity which would be the "correct", or "exact", or "right" method for the performance of interpretative activity.» (TARELLO 1997, 75). In this sense, these theories are part of the political activity of jurists and thus express an ideology. This is part of Tarello's broader realist approach, which involves identifying traces of "legal politics" in the work of legal scholars who present their work as merely technical, and detached from political considerations, thereby evading their political responsibilities.

[6] Guastini has argued that adopting a theory of meaning is irrelevant to a theory of legal interpretation. Cf. GUASTINI 2011b, 153-156. He explains that theories of meaning can be properly understood either as descriptive theories (about what meanings are ascribed) or as theories about how meaning should be understood (and therefore not as genuine *theories*). Moreover, he contends that the two existing descriptive theories of meaning, the theory of literal meaning and the theory of meaning as intention, do not correctly describe interpretative legal practices since it is well known that different arguments are used to justify different interpretations, not just legislative intent and literal meaning (arguments based on the ratio legis, arguments from coherence, systematic arguments, and the like). Thus, there is more than one way in which an interpretation may go. A descriptive theory of legal meaning (that does not presuppose *the correct meaning*) will do the same work as the sceptic theory of legal interpretation.

Canale discusses Guastini's position, arguing that every theory of interpretation presupposes a theory of meaning. He argues that a descriptive theory can describe the attributions of meanings (meaning theory) or explain them (theory of meaning). According to Canale, the scholar who wants to describe the meanings that are attributed must necessarily presuppose some conception of what it is that is being attributed – i.e., what meanings are, how they arise, whether they can be known and how. Cf. CANALE 2012.

[7] I present a general overview of these positions, but it is important to note that this account does not represent all the different positions and views on the matter and that my reconstruction mainly focuses on the approaches of the Genovese school of legal interpretation.

that legal provisions already have a meaning that the interpreter should seek to uncover[8]. In this sense, meaning is viewed as fixed, and interpretation is understood as a cognitive enterprise. Thus, interpretative statements can either be true or false. Different explanations have been proposed regarding the source of this real meaning, such as interpretations based on literal meaning (word meaning) or those based on the legislator's intention (speaker meaning).

There are also very different explanations for literal meaning. For example, some theorists argue that the best available relevant theory determines the meaning of terms used in the law[9]. There are also the so-called interpretative or constructive positions, which consider interpretation as an argumentative activity. Even if argumentation is not just cognition, the goal of interpretation is, in both cases, the same: to reach the correct interpretation. Here, it is therefore a claim of correctness. However, theorists who endorse this view argue that the object of interpretation is not the specific legal provision in question but the law in its enitrety[10]. Correctness is determined by moral values endorsed by the ideology which is prevalent the legal order.

The central tenets of the cognitive theory are usually presupposed, perhaps unconsciously, by lawyers or legal scholars, for example, when they argue about *the* correct interpretation of a legal provision. This is one of the main arguments for the theorist to insist on adopting it as an appropriate explanation of how legal interpretation works.

Nevertheless, these theories encounter difficulties in properly accounting for some aspects of interpretative practice, such as changes in interpretations despite unchanged legal provisions or the co-existence of different interpretations of the same terms by different courts or across distinct areas of law.

2.2. *Sceptic Theory*

Sceptics argue that interpretation is always an act of decision. In every situation, interpreters choose the meaning. Legal provisions do not possess an intrinsic meaning before the interpreter decides which meaning to attribute to them; thus, meaning is the product of interpretation[11]. Words or phrases do not have a determined and fixed meaning; it is the interpreter who decides on each occasion what meaning to attribute to them.

Different theories associated with legal realism defend a sceptical approach to legal interpretation. Nevertheless, not all sceptics endorse an extreme form of scepticism. For example, Guastini's paradigmatic position. On the one hand, he accepts that generally, there is a frame of possible meanings that the interpreter may identify through cognitive interpretation, from which he then chooses which to attribute to the provision under interpretation. On the other hand, he concedes the existence of a plain, literal, or *prima facie* meaning —corresponding to common usage.

Mostly, sceptics do not want to deny the existence of commonly shared linguistic rules or conventions (or simply habits). If we do deny the possibility of a *prima facie* meaning, «no analysis of legal language would be possible —at least in the legal domain the enterprise of linguistic (logic, philosophical, etc.) analysis would be pointless or even senseless; it would be

[8] As Tarello explains, this view can be historically associated with the exegetical school and the historical school of jurisprudence from the early 19th century. Cf. TARELLO 1974; TARELLO 1997,76.

[9] Brink argues that an ideal, correct interpretation depends on a coherence analysis that considers legal principles, constitutional provisions, statutes, and precedents. Since this may be a Herculean task, he proposes that «[r]ather (...), they might try to set out an elaborate theory of law which articulates the structure of our legal system, the values on which it rests, and the relative weight of various legal rules and principles. Given what we have said, constructing such a theory of law would involve determination of the moral and political foundations of civil, criminal, and constitutional law and of the sort of moral and political theory or scheme of which these fundamental values could be a part» (BRINK 1988, 133).

[10] On the matter see, e.g., LIFANTE VIDAL 2019.

[11] See GUASTINI 2011; GUASTINI 2011b; TROPER 2006; TROPER 2008, 104.

impossible even distinguishing between senseful and senseless sentences, between ambiguous and non-ambiguous sentences, etc.»[12]. Therefore, sceptics about interpretation in the legal context do not necessarily deny the possibility of shared meanings in ordinary language[13]. Nevertheless, they emphasise that due to the characteristics of language in the legal context, a different approach to its analysis must be favoured. Since «assuming or recognising the existence of a pre-existing literal meaning is *not* equivalent either to saying that this is the *unique* (admissible) meaning or that this is the meaning judges (and jurists) *ought* to ascribe to legal texts»[14]. Guastini explains that the central thesis of the sceptical theory of legal interpretation is that a legal text almost always admits multiple possible interpretations and that there is no criterion for determining the truth of interpretative statements[15].

2.3. *Eclectic Theory*

Hart's attempt at finding a middle ground between formalism (or conceptualism) and scepticism in legal interpretation is a paradigmatic example of an eclectic theory[16].

Hart does not explicitly present a theory of legal interpretation. However, he famously distinguishes between easy and hard cases when applying the law; in the former cases, rules are automatically applied, and in the latter, the interpreter must decide if rules should be applied. He explains,

> «In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable (...) but there will also be cases where it is not clear whether they apply or not. The latter are fact-situations, continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack»[17].

Easy cases do not require any deliberate act of interpretation. Thus, there is no explicit account of how the legal operator goes from the legal provision to its application. Hence, theorists pay no attention to or have no interest in distinguishing between a legal provision (the legal text) and the rule it expresses (its meaning). This suggests that there is an exact and clear meaning for each provision[18]. Thus, in easy cases, an interpretative statement that applies a legal provision to a case

[12] GUASTINI 2011b, 157.
[13] See also POGGI 2020.
[14] GUASTINI 2011b, 158.
[15] GUASTINI 2011b, 158, 159.
[16] HART 1994, cap. VII. It is important to note that according to Hart, formalism consists in minimising or concealing the choices of the interpreter when deciding whether a case is to be subsumed under a rule by establishing that the meaning of the legal rule is determined and fixed (HART 1994, 129). In contrast, skepticism embodies the opposite exaggeration, wherein the indeterminacy of legal rules is overstated (HART 1994, 130).
[17] HART 1994, 126. Here, Hart introduces the problem of the *open texture* of natural languages, which indicates that, when applying general terms to cases, their application can eventually be questioned. He then goes on to say, «So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact» (HART 1994, 128).
[18] Another possible explanation is that Hart rejects the existence of linguistic meaning and pays attention only to past uses in a particular context and the sense in its current use. It is interesting how this feature of Hart's theory resembles (or may presuppose?) much of Wittgenstein's insights about meaning. In Recanati terms (RECANATI 2003), Hart, following Wittgenstein, may be a *Meaning Eliminativist*, and thus, adopts a form of Radical Contextualism. Such an idea would not be implausible considering the extent to which Wittgensteinian theses permeate other parts of Hart's work.

or asserts that a legal provision regulates a case can be correct or incorrect, either true or false. However, in hard cases, the interpreter must decide if a legal provision regulates a particular case. Thus, a statement that expresses such a decision cannot be true or false.

Several authors have defended similar eclectic theories, building upon some of Wittgenstein's considerations and emphasising the distinction between understanding and interpreting[19]. Their main point is that *understanding* legal rules is quite different than, and conceptually prior to, *interpreting* provisions[20]. Understanding a rule is not a mental act or state that could be propositionally expressed. Rather, it is the ability to specify which actions or situations conform to a rule under ordinary circumstances. This ability is exhibited in action (i.e., the use and application of the rule)[21].

These three perspectives shed light on different aspects of interpretative practice—our need for knowledge, our decisions, and the distinctions between different types of cases—while simultaneously overlooking the aspects emphasised by alternative theories.

In this vein, for example, sceptics argued that the cognitive theory incorrectly describes legal interpretative practices since it is not true that the interpreter is engaged in a cognitive enterprise. For sceptics, the eclectic theory also incorrectly describes legal interpretative practices since it has no view on the problem of the ambiguity of legal texts (*in abstracto* interpretation); this suggests that the eclectic theory also endorses a cognitive view on the matter. As Guastini explains, norms can always be indeterminate (in the sense indicated by Hart) and judges will always discretionally decide which cases are instances of those norms. However, he adds that legal texts are always equivocal (i.e., there are different possible interpretations for a text). Guastini distinguishes between the ambiguity or equivocity of a text (i.e., the existence of different permissible interpretations of a text), and its vagueness (i.e., the existence of cases which fall in the penumbra of general terms). The problem with determining meaning, then, is not only the vagueness of general terms but also the ambiguity or "equivocity" of legal texts that come with an *in abstracto* interpretation. It is one thing to ascribe meaning to a legal provision and another to classify cases[22]. On the contrary, for the sceptic,

> «any thesis claiming that interpretative problems admit but one "right" (i.e., true) answer is false, and this is so precisely because of the indeterminacy of the legal system in the sense specified [*in abstracto*], which claims that interpretative sentences have no truth-value»[23].

At the same time, sceptics are criticised for merely describing the variety of possible meanings or the different arguments interpreters use, without recognising the criteria for determining which meaning is correct. An alternative to this approach, it is argued, is to understand interpretation as an argumentative activity that involves a claim to correctness, which must be considered within the realm of practical general reasoning[24]. Sceptics may have no problem acknowledging the practical nature of legal interpretation but would reject the idea that a theorist should take a stance on the appropriate criteria for correctness. For example, Chiassoni argues that textual interpretation is a practical activity[25] in which

[19] See, ENDICOTT 2000; MARMOR 2005, 2014; SANDRO 2022, 245-259.

[20] The distinction between understanding and interpreting has a long history in the philosophy of language and legal theory, and, as it has been noted, is usually defended by authors more aligned with the later Wittgenstein.

[21] Cf. MUFFATO 2017.

[22] See GUASTINI 2019. *In abstracto* interpretation has also been referred to as "text-oriented interpretation", distinguishing it from *in concreto* or "fact-oriented interpretation". For illustrative examples of interpretative disagreements in both cases, see KRISTAN & PRAVATO 2022.

[23] GUASTINI 2011b, 146. For critiques of Guastini's skeptical thesis regarding the true value of interpretative statements, see, for example, RAMÍREZ LUDEÑA 2012.

[24] LIFANTE VIDAL 2019.

[25] CHIASSONI 2018, 2019. Chiassoni's "Pragmatic realism" is a sophisticated form of non-cognitivism that assumes

> «the meaning of legal provisions is constructed out of pre-existing materials by means of a typically reflexive and holistic process, which involves the use of an *interpretative code* (a discrete set of interpretative rules) and a set of interpretative resources, and depends, ultimately, on each interpreter's cooperative, or non-cooperative, attitude towards the text, the issuing authority and the legal order as a whole, where the attitude may be in turn the effect of the endorsement of some (comprehensive) legal ideology»[26].

Chiassoni endorses a constructivist conception of legal meaning, in which the judge always engages in a reflexive and evaluative activity where all interpretative acts are characterised by a practical attitude of conformism towards an existing interpretative code. Even in "clear" cases where interpreters claim they are "discovering" the meaning of the text, they are actually conforming to the culturally dominant doctrine[27].

3. *Pragmatic Contextualism*

In *Speaking from Elsewhere*, José Medina proposes a theory of meaning, which offers a deflationary perspective on meaning and interpretation[28]. His account challenges traditional semantic theories—in particular, semantic realist approaches and semantic scepticism—on the grounds that they tend to reify and decontextualize meaning.

At base, Medina argues that the problem with semantic realists, as well as semantic sceptics, is that they both share a foundational conception of meaning. Whereas semantic realists aim for an overly ambitious ideal of determinate, fixed, and thus discoverable meanings, semantic sceptics are typically too quick to infer that when we fall short of such an ideal, we must, at the same time, give in to radical indeterminacy and naked discretion.

At this point, it is important to clarify that *semantic realism* is not equivalent to *legal realism*. On the contrary, within jurisprudence, legal realist theories typically adopt a sceptical stance towards legal meaning. While semantic realism is generally defended—or at least presupposed—by theorists who endorse cognitive and eclectic approaches to legal interpretation.

The basic tenets of Pragmatic Contextualism are the following:

(i) *A deflationary perspective*

Medina argues that realist semantic theories understand meaning as determinate and fixed (a natural, ideal, or mental entity). Indeed, realists believe that meaning must be determined and fixed for communication to be possible. However, the difficulty of establishing which sort of physical and material, or ideal and transcendental, relations should hold between meanings and the components of the external world has paved the way for the sceptics, who question the very conceivability of determinate and fixed meanings. In this sense, Medina points out, that the realists and the sceptics are foundationalists about the nature of meaning: they both conceive determination and fixity as necessary conditions for the very existence of meanings.

Medinas' pragmatic contextualism, whose purpose is to dissolve metaphysical disputes about meaning, offers an alternative to foundationalism. In his view, meaning is *interactional*, as it depends on the practical engagement of the participants in a discursive practice.

the pragmatic linguistic approach. According to this view, while there is room for knowledge in legal interpretation, it is always and necessarily embedded within a framework of practical decisions and attitudes.

[26] Chiassoni 2018, 32.

[27] Chiassoni 2018, 39.

[28] Medina 2006.

(ii) *Meaning as a product of our discursive agency*

Meaning is contextual and interactional[29]. The repetitive agency of speakers constantly regenerates the underlying background consensus. This discursive agency is hybrid because it merges freedom and constraint. The repetitive renewal is the source of semantic innovation and change; therefore, consensus *does not fix meaning* in the context. The consensus or background agreement is established by a training process, where we are taught how to conform to previous linguistic behaviour and a normative attitude toward this behaviour. Moreover, this learning process causes that

> «...the meanings that look overdetermined from the perspective of those trained in the relevant practices may appear utterly indeterminate from the perspective of those who do not participate in the consensus of action underlying those practices...»[30].

Under this approach, discursive agency generally echoes past uses:

> «[the] meaning of our speech acts depends on citational chains, on a constant process of recontextualization that repeats and echoes past uses in new circumstances, but in ways that admit the possibility of modifications and eccentric innovations, which can in turn be echoed»[31].

According to this form of pragmatic contextualism, meanings are not static; they are in constant transformation. In a discursive practice, there may be more or less stability. The stability of consensus in linguistic action depends on the various dimensions of the practice in which language is used (materiality, performativity, sociality, and temporality). Moreover, it is strongly influenced by materiality, which, as we will see, constrains or establishes the framework within which linguistic actions occur.

In some practices, there are very stable meanings thanks to a series of institutions restricting the possibilities of use. However, the background consensus on the use of language is always open and provisional. Medina emphasises that, «[o]ur tacit agreement in action is subject to a constant process of transformation, and therefore, our semantic negotiations are *always constrained but never determined and fixed*»[32].

(iii) *Contextual determinacy*

Pragmatic contextualism attempts to answer semantic scepticism by demonstrating that our linguistic practices do not assume determination and fixity of meanings (contrary to the presuppositions of semantic realists). What it suggests is that our language practices do not presuppose absolute determination or fixity. Therefore, if we are not seeking the foundation of meaning, it is apparent that traditional theories distort language's image. In our linguistic

[29] Here, we can observe its connection with other philosophers of language who view language as closely tied to linguistic action and contexts of use, such as Wittgenstein, Austin, Searle, and Grice. However, Medina's theory, by firmly adopting Wittgenstein's rejection of metaphysics, diverges from the Austin, Grice, and Searle's positions and the foundational contemporary debate regarding the facts that determine meaning. A debate between internalism and externalism, which, according to Medina, presents a false dilemma. On the debate between internalism and externalism in the philosophy of language see, SKOCZEŃ 2019, ch. V. Although Medina also regards the idea of language use as a form of action as central, and therefore acknowledges the relevance of language users' agency, his approach can be seen as structural. In this light, it proves helpful in analysing how power relations impact the semantic efficacy of different language uses within both cooperative and non-cooperative practices.

[30] MEDINA 2006, 40.

[31] MUFFATO 2017, 26.

[32] MEDINA 2006: 49.

practices, meanings are not fixed. A background consensus of action among language users sustains meanings, but this consensus does not fix meaning.

According to pragmatic contextualism, we know what a word means and that meanings are sufficiently determinate to allow communication[33]. Medina does not deny that meaning can be underdetermined but argues that this does not lead us to accept indeterminacy. He proposes a form of contextual determinacy: a transitory and relativised form of determinacy «in particular contexts of communication, given the purposes of communicative exchanges, the background conditions and practices, the participants' perspectives, their patterns of interactions, and so on»[34].

To comprehend this contextual determinacy, we should consider the four dimensions of our discursive practices: materiality, performativity, sociality, and temporality, brought together by the tacit agreement in action.

a) Materiality: language is inextricably interwoven with non-verbal actions and circumstances. The context refers to a heterogeneous whole with verbal and non-verbal elements. This dimension represents the material conditions of the use of language.
b) Performativity: speaking is part of an activity; language and context of use are action-oriented.
c) Sociality: meaning should be considered only in the context of a shared practice.
d) Temporality: meaning must be understood as situated in a specific time and place.

Radical indeterminacy arises when we do not consider all these perspectives and attempt to elucidate meaning without considering language users' background agreement. It is important to stress that this does not amount to a naïve conventionalism, which suggests that meaning is merely what it is agreed upon within a community of speakers:

> «The relation between meaning and agreement is more indirect: agreement in practice is the *background condition* for the emergence of meaning. (...) meaning is *constrained but not determined* by the tacit agreement of our practices»[35].

Meanings are not localised in a particular space as they are interactional, and agents participate simultaneously in different contexts. Thus, contexts are open[36], and intercontextuality is fundamental in the continuous shifting of meanings.

(iv) *Normalcy and Eccentricity in ascriptions of meanings*

In different contexts of use, where we have been trained, we can find both normalcy and eccentricity when ascribing meanings. Generally, normalcy is presupposed, except for some classes of subjects of which we are often suspicious. Without a doubt, we can think, for example, of a foreigner learning a country's language or a student being taught vocabulary during a lesson. However, other individuals are subject to more subtle forms of suspicion—for instance, women in contemporary society, particularly within implicitly patriarchal contexts.

Thus, in these teaching/learning practices, participants are in different positions. Some participants have more authority than others; they are considered teachers and play a fundamental part in maintaining and normalising new uses. Other participants are not

[33] We may say that it is a form of practical knowledge.
[34] MEDINA 2006, 16. Medina's Pragmatic Contextualism can be understood as a radical form of contextualism, see RECANATI 2012.
[35] MEDINA 2006, 36. It is a precondition.
[36] MEDINA 2006, 160 ff.

recognised as such an authority[37]. This opens the context to becomeing a site for the negotiation of our meaning attributions. As Medina explains:

> «The assumed normalcy of certain uses of words and courses of action and the assumed abnormality of others provide the requisite normative background in which we can negotiate our semantic interpretations, that is, the normative context in which semantic possibilities are endorsed or rejected»[38].

As already seen, not all speakers have the same bargaining power in these negotiations. This is relevant when the speaker makes eccentric new uses of language. For Medina, «What a violation of expected normalcy does is to *shift the burden* onto the shoulders of the eccentric user, who must now prove the meaningfulness of her speech acts. We can call it "the burden of eccentricity"»[39]. Furthermore, this burden may be rather different considering who the subject that meets it is ––that is, whether she has authority in the discursive practice or not.

It is important to stress that

> «...this contextualist analysis (...) does not suggest that the normative expectations speakers share, or the violations they incur and the burdens they take up, are conscious moves in our language games that require the explicit recognition of speakers. On the contrary. This analysis tries to make explicit that tacit normative attitudes exhibited in speakers' actions and reactions»[40].

Medina explains that pragmatic contextualism «is *not* an *intermediate* position, a *moderate* view between two extremes [i.e. meaning realism and meaning scepticism], but rather, a view that is *beyond* the dichotomy between semantic realism and scepticism, a view that is in a different conceptual space where the common assumptions about determinacy and fixity shared by realists and sceptics are overcome»[41]. In the following section, we will explore how pragmatic contextualism offers a distinct explanation of legal interpretation compared to cognitive, sceptical, and moderate theories, and in what ways it can be used to address disputes among these traditional approaches.

4. *How Can Pragmatic Contextualism Contribute to Explain Legal Interpretation?*

Pragmatic contextualism criticises traditional semantic theories. However, it is interesting to question whether this criticism can contribute to overcoming conflicting positions on legal interpretation. Pragmatic contextualism, I argue, does not merely offer an intermediate position between cognitive (or quasi-cognitive) and sceptical theories of legal interpretation. On the contrary, it provides a new beginning because it discusses various presuppositions on which traditional theories of legal interpretation rest.

4.1. *The decision/cognition dilemma*

Pragmatic contextualism clearly shows that the dilemma presented to us by the traditional competing theories of legal interpretation —decision or cognition— is truly a false dilemma. There is not always purely cognition, nor purely decision, nor even, as the eclectic view

[37] It is crucial to notice that this learning process is based on inequality because there is an unequal distribution of power and authority between the participants of the language practice. Cf. MEDINA 2006, 45.
[38] MEDINA 2006, 41.
[39] MEDINA 2006, 42.
[40] MEDINA 2006, 43.
[41] MEDINA 2006, 49.

maintains, merely different cases. In our use of legal language, we find both cognition and decision simultaneously[42].

Cognition is always operative as one requires training in a particular practice to recognise and distinguish normalcy from eccentricity. It is necessary to have acquired the relevant *Know-how* to apply legal provisions and to translate legal provisions.

In response to legal realists, or more generally, those sceptical about legal interpretation, it can be argued that the understanding of texts necessarily involves a cognitive activity. However, it must also be emphasised, that interpretations —both *in abstracto* interpretations and the subsumptions of cases under specific legal provisions— are acts inherently involving decision-making, just like any form of speech act. Our discursive agency chooses how to go on and whether to continue echoing past uses. The agent, as Chiassoni argues, either adopts a practical attitude of conformity (and, in that case, their interpretation falls within a "normal" use), or adopts a non-conforming attitude (and, in that case, their interpretation falls within an eccentric use).

Moreover, Medina's pragmatic contextualism demonstrates that not everyone can hold an eccentric interpretation in legal practice. In legal systems, we have specific institutions that control normalcy; even judicial interpretations are subject to the strict control of other judges and ultimately, supreme courts.

Understanding how interpretative arguments can act as tools to legitimise both stability and changes to meanings offers a valuable perspective. In general, some interpretative arguments can be used according to a more conservative function, while others seek a more innovative attitude[43].

For example:

- Conservative: *a contrario* argument or appeal to authority.
- Innovative: *a simili* argument or use of the principle of equity.

These arguments may vary from practice to practice, from one legal culture to another, and from time to time. The accepted arguments and the extent to which they are accepted depend on the material dimension of the particular situated legal practice[44]. Consider, for instance, originalism, a theoretical framework positing the interpretation of the Constitution in accordance with the original intentions of its framers[45]. This perspective is commonly associated with a conservative approach to constitutional interpretation.

One of the main objections to applying ordinary language theories to legal interpretation is the peculiarities and differences that language uses have in the legal contexts and how it may differ from other communicative practices. Among these, two particularly puzzling issues are the lack of cooperation between participants[46] and the authoritative positions of some participants when ascribing meaning.

[42] In opposition to Villa's proposal, who argues that we should consider different and progressive moments. For Villa, traditional interpretative theories share a "static vision of meaning", i.e., visions where meaning is "discovered" or "created" or sometimes one or the other, "all at once". Instead, he argues that the interpretative activity is a dynamic process, «a process that therefore goes through several phases and touches on both the dimension of discovery and that of creation» (...) meaning in not produced 'all at once', but constitutes the result of a process that goes through-several phases, or at any rate of a process that can be analytically distinguished into several phases (...) in this process the meaning of a disposition tends to be progressively specified» (VILLA 2010, 106-107).

[43] GIANFORMAGGIO 2018, ch. III.

[44] This may be called the "ideology of legal interpretation", which determines the content of the interpretative directives. Cf. WRÓBLEWSKI 1992.

[45] There are different readings of this position, giving prominence either to the actual legislative intent or to the meaning those terms have at the moment of interpretation. See, SCALIA et. al. 1997; TROPER 2008.

[46] In this vein, Poggi, for example, has discussed «the limits of the applicability of Grice's theory of conversational implicatures to legal interpretation» (see POGGI 2011, 2020). Similarly, considering the theory of implicatures, Marmor warns about the limited extent of cooperation in cases of strategic speech, such as in legal contexts (MARMOR 2014).

Regarding the first aspect, pragmatic contextualism stresses the role of negotiations. We should pay attention to the contextual material conditions in all our linguistic practices. Those conditions may also differ across practices and over time. This also explains the expected attitude of a participant, which may evolve from a cooperative stance, towards a more aggressive style of negotiation (or even imposition). Moreover, this is strongly connected with the second aspect, which is that participants do not all have the same bargaining power. This aspect may also vary across practices. However, even in ordinary language practices, we can distinguish between teachers and learners, and in legal practice this is also institutionalized, making some subjects more competent to declare if a particular use is "normal" or "eccentric". As we have already suggested, legal systems have specific institutions that aim to control normalcy.

4.2. *In Abstracto* Interpretation

Another advantage of pragmatic contextualism is that it can explain *in abstracto* interpretation. In legal practice, we often engage in the activity of making interpretative statements about the texts present in legal sources. These interpretative statements help to adjust our uses and explicitly articulate the assumptions we are operating under. Omitting to consider this aspect could constitute a problem for a theory that purports to describe how our interpretative practices work.

Under the theoretical framework of pragmatic contextualism, these *in abstracto* interpretations can be understood as translations. Nevertheless, it is necessary to highlight that just as ostensive definitions or the enumerations of the cases to which the provision is applied, *in abstracto* interpretation cannot fix meaning. Thus, even accepting *in abstracto* interpretations, it is critical to note that, even in these cases, the interpreter does not determine the meaning of the legal provision. The jurist engaged in this activity is translating the legal provision into another text.

The interpreter can translate normally or eccentrically. In the latter case, the result —i.e., its acceptance by the community— depends on the authoritative position the interpreter holds within the practice. If the interpreter lacks the necessary authoritative power to normalise new uses, the interpretation will be considered eccentric, and she will bear "the burden of eccentricity"[47]. Therefore, even in the activity known as *in abstracto* interpretation, there is not only creation. Again: there is always a decision, but there is not always creation. Both interpretations, *in abstracto* and *in concreto*, are abilities that presuppose a *know-how* that enable us to distinguish normalcy from eccentricity, even in the legal context.

4.3. *Intercontextuality*

The reference to intercontextuality also explains certain complexities of the ascription of meanings in law. The context of law is typically related to other contexts since it is known that law is pervasive and regulates almost all areas of human life. The debates that occur in different contexts of life also influence the content of law, its changes, and how we understand it.

Medina presents his proposal to overcome the dilemma between the inside and outside of language[48]. Since contexts are interrelated, agents usually cannot isolate their speech acts. As such, a single act can be understood simultaneously as part of different contexts. In this way, these acts can favour eccentric interpretations within the context of law and, consequently, the transformation of legal practice itself.

[47] MEDINA 2006, 42.
[48] MEDINA 2006, 51.

4.4. *A pragmatic contextualist explanation of legal interpretation*

Pragmatic contextualism does not import a direct difference in how we should interpret; instead, it provides an explanation of how interpretation works. Thus, when facing cases of legal interpretation, adopting pragmatic contextualism will not change the interpretative outcome but rather the explanation of the interpretive activity. The claim here is that the pragmatic contextualist explanation provides a more effective explanatory framework to traditional explanations, as it can account for both stability and change while also, through its emphasis on discursive agency, opening up the debate to the responsibility of interpreters—a responsibility traditionally recognised only by the sceptical theories[49].

Consider, for example, the former Article 86 of the Argentine Penal Code, which established cases in which abortion was not punishable. The text read as follows:

> *Abortion performed by a licensed physician with the consent of the pregnant woman is not punishable if:*
>
> 1. *It is carried out to prevent a danger to the life or health of the mother, and if this danger cannot be avoided by other means.*
> 2. *The pregnancy is the result of rape or an act of indecency committed against a woman who is intellectually disabled or mentally ill* (...).

While the first paragraph of the article foresaw the case of therapeutic abortion, the legal doctrine debated for decades (since its promulgation in 1921 until 2012, with some temporary alterations during the periods of dictatorial governance) the correct interpretation of the second paragraph, whether it referred to one or two grounds for exemption. Specifically, the question was whether the rape of a mentally healthy woman was also a case of non-punishable abortion. The syntactic ambiguity arises from the use of the connector "or."

The arguments used in the debate will not be analysed here; instead, this example serves to illustrate how different theories can illuminate certain aspects of interpretative practice while obscuring others in their explanations[50]. As mentioned earlier, a cognitive theory of interpretation is better positioned to explain the stability of interpretations, thus supporting the existence of shared meaning. Nevertheless, based within cognitive theory, the interpretative debate within Argentine legal culture concerned the true meaning of the provision, with jurists engaged in a cognitive effort to determine the correct interpretation. In this debate, some interpreters proposed a literal reading, while others argued for an intentionalist approach, and others endorsed an interpretation aligned with the moral and political values upheld by the Argentine legal system.

On the contrary, in their explanations, sceptics may argue that the arguments chosen to support one interpretation over another were decisions made to favour the preferred outcome of the interpreters, emphasising that interpretations vary over time according to the shifting interests of interpreters. For sceptics, then, there is no right or wrong interpretation since the theory does not account for what interpreters should do but instead describes what interpreters do and stresses the ideological character of their decisions. In this example, a sceptical theorist might argue that interpreters recognise the various possible interpretations of the provision in question and emphasise that the choice of which interpretation to adopt ultimately depends on the interpreter's decision.

Under the eclectic theory basis, this scenario is a hard case, or, more precisely, given the distinction between interpretation *in abstracto* and *in concreto*, a hard text. Thus, in this case, interpreters were confronted with having to make a choice over which interpretation to adopt:

[49] Tarello 1974.

[50] For an analysis of the interpretative arguments involved in the debate, see Alonso 2012.

the correct choice not being pre-determined by the syntactically ambiguous legal provision, allowing space for judicial discretion. Then, in the present example interpretation for the eclectic theorist operates in a manner comparable to that of a legal realist.

As previously argued, pragmatic contextualism can explain the stability of meanings in the legal context by considering interpretative decisions that adhere to previous uses of the legal language. Moreover, it can account for cases of change in the interpretative practice as it recognises the possibility of innovative uses, such as in cases of overruling[51]. The peculiarity is that in all cases, interpretation works in the same way; it is the discursive agency of the interpreter who chooses whether to echo past uses or to give an excentric interpretation. Thus, under this view, the interpretative activity does not change its character if a case is considered easy or not. The interpretative activity always involves the interpreter's cognitive abilities and the production of a linguistic act of interpretation that involves decision-making.

Pragmatic contextualism may also offer a broader picture of the interpretative practice, which may help analyse interpretative disagreements. In the proposed example, the Argentinean Supreme Court resolved a longstanding debate within criminal law doctrine with an authoritative interpretation. Until the Court decision in 2012[52], which settled the question and held that there were three types of non-punishable abortion, the narrow interpretation—considering abortion due to a woman's health in cases of rape as punishable—persisted in practice due to the political influence of Catholic and anti-abortion groups. The Court referred to the existing practice as a *contra legem* practice, encouraged by healthcare professionals and validated by various actors within both national and provincial judicial powers. Even though there has been a longstanding disagreement in legal dogmatics due to the syntactical ambiguity of the text, the material conditions of the context, hospital protocols, and local practices of healthcare operators seeking judicial authorisations making it very difficult to apply a broad interpretation, thus making abortion in cases of rape almost unrecognised and unpractised. We can observe how the material conditions of the context influenced the provision's interpretation and how the Court's interpretation changed normalcy in Argentinean legal practice by noting the semantic efficacy of such a decision. In this case, it is easy to see the performative dimension of the Supreme Court's decision that established an authoritative interpretation of the disputed provision.

5. *Final Remarks: Interpreting from Elsewhere*

Another point in favour of adopting pragmatic contextualism is that it highlights a fundamental distinction between the sceptical, the cognitive and eclectic theories in an innovative fashion: they consider the legal practice from different perspectives[53].

We can posit that the sceptical theory describes the legal practice from the perspective of an observer who is not necessarily trained in the field, or who intentionally refrains from adopting any normative stance. Consequently, meaning becomes underdetermined, and various, possibly conflicting, interpretations become equally admissible. In this context, the sceptical theory of legal interpretation may be perceived as an external theory of legal interpretation, with sceptics interpreting from an external standpoint. In this sense, sceptical theorists are interpreting *from the outside*.

[51] Consider, for example, the well-known case Dobbs v. Jackson Women's Health Organization, U.S. Supreme Court, Judgment of 2022, 597 U.S.

[52] F., A. L. s/ Medida autosatisfactiva, Supreme Court of Argentina, Judgment of 13 March 2012, Case No. 259.XLVI.

[53] For this purpose, I am using Hart's dichotomy between internal and external points of view (HART 1994).

On the other hand, the non-sceptical theories do not recognise the indeterminacy of legal texts, either because they assume a semantically realist view on meaning or because they explain the interpretative practice from the point of view of the participant of the practice, which has been trained and has acquired the relevant normative attitude and can distinguish normal from eccentric uses. These theorists are interpreting *from the inside*.

In particular, the Hartian eclectic theory of legal interpretation may be regarded as an internal theory[54]. It accounts for legal interpretation from the standpoint of those who participate in the discursive practice of interpreting legal provisions. However, it can still be considered an *explanatory theory* of legal interpretation, rather than an ideological stance on how interpretation ought to be conducted. It is a theory that requires one to become a participant to comprehend an interpretative practice.

In conclusion, while cognitive and eclectic theories of legal interpretation focus on the possibility of shared meaning and intelligibility, scepticism underscores the inherent instability of meaning and its susceptibility to the interpretive choices made by authoritative interpreters. This divergence suggests that each theory approaches interpretative practices from distinct perspectives and with varying theoretical objectives.

Pragmatic contextualism emerges as a robust framework for elucidating the dynamics of stability and change within discursive practices, effectively addressing certain challenges posed by traditional theories of legal interpretation. It not only accounts for the intelligibility inherent in legal scenarios, contingent upon ongoing learning processes, but also navigates the intricate terrain of evolving interpretive practices. Crucially, it sheds light on how meaning intertwines with power dynamics, participants' cooperative and non-cooperative stances, and the pervasive intercontextuality of legal practice.

Within discursive agency, pragmatic contextualism reveals the inherent element of choice, enabling an examination of whether specific speech acts or interpretations perpetuate or alter chains of meaning. Consequently, it prompts a consideration of the responsibility of agents for their speech acts and interpretative decisions. In this way, it underscores the significance of normative proposals regarding the obligations of legal interpreters and officials in interpreting legal provisions.

Ultimately, pragmatic contextualism stresses the intercontextuality of legal interpretation, which implies viewing the legal context as inherently polyphonic and the imperative of acknowledging and incorporating the voices of marginalized or overlooked groups, whose interpretations may lack semantic efficacy, in the interpretation of legal provisions. Thus, pragmatic contextualism in legal interpretation brings to the forefront the responsibility of legal interpreters to grapple with the complexities of interpreting legal provisions *from elsewhere*.

[54] Legal Realists may criticize the idea of an "internal theory", as they argue that only an external empirical discourse (i.e., an external discourse) can underpin a theoretical discourse. Under this assumption, all internal discourses are sustaining the prevailing ideology. About the possibility of an *internal theory*, see SCAVUZZO 2021.

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