Pragmatics of Adjudication. In the Footsteps of Alf Ross

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Precedent is a Jewish mother.
You don't have to do what it tells you, but
it makes you feel terrible about not doing it (S. Sedley)

Abstract Three insights about a pragmatic theory of legal interpretation are enumerated here: on legal sources, judicial precedents, and statutory interpretation, respectively. Firstly, with regards legal sources, a theory of them in terms of legal materials is restated on the basis of Ross 1952, with a slight caveat: legislation seems even more indeterminate than precedents, a mere starting point for such judicial inferential processes as qualification of facts-of-the-case, interpretation, and application. Secondly, common law's precedents and civil law's *jurisprudence* (in French), are different sorts of customary law which are likely to replace statutory law (in common law) or complement it (in civil law) in order to make judicial decisions less unpredictable. Finally, as far as the statutory interpretation is concerned, interpretive skepticism is restated by assuming that it is a trivial starting point for a truly realistic, pragmatic-contextualist and inferentialist theory of such an interpretation. This theory needs to conceive interpretation as the recontextualization of decontextualized statutes, where the ultimate context is provided by precedents or *jurisprudence* itself.

Keywords Legal adjudication • Interpretive scepticism • Legal precedent • Context

1 Introduction

The received view in the theory of law – a mix of legal positivism and legal realism I will call legal creationism, as opposed to legal evolutionism – relies on the wrong paradigm, legislation. After all, legislation is a discourse which is decontextualized

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enough to discourage one from pragmatic analysis. In order to clarify such a bold statement, the *first* section revisits Alf Ross's realistic theory of *legal sources* as mere legal materials actually used by courts in order to justify their decisions. The *second* section focuses on specifically judicial legal sources, namely common law's precedents and civil law's *jurisprudence constante* (in French), by distinguishing three steps in the history of common law adjudication: "pure" adjudication or mere case-law, non-binding precedents, and binding precedents. Finally, the third section extends such a history to a fourth and seemingly more refined step, namely legislation and statutory interpretation, by providing a first, rough and tentative pragmatic analysis of the latter.

2 Three Types of Legal Materials

After so many recent debates on legal sources, it is amazing to read the third chapter of *On Law and Justice* (1952; 1958) today: the classic formulation of a realistic theory of sources «as a factor in the motivation process of the judicial decision» (Ross 1946, 144). More than 60 years later this theory still seems to be the most sensitive and comprehensive available, just needing to be updated with regards subsequent constitutionalization and internationalization processes and, by the way, to be rephrased in pragmatically more sophisticated terms (but cf. yet Ross 1968, 1972 and Sardo 2015). Ross redefines the sources of law as legal *materials*, picked up by judges by establishing both a *ideology* and a *doctrine* of them, the latter explaining the former, which are in turn described by a realist, value-free *theory* of sources. Before analyzing the three types of materials listed by the author, let us consider the metaphor of materials itself.

According to him, far from dictating a complete regulation of their conduct, law only provides judges with legal materials: different kinds of products from which such a regulation can be inferred.

> Metaphorically speaking, we can perhaps say that legislation delivers a finished product, immediately ready for use, while precedent and custom deliver only semi-finished product, which have to be finished by the judge himself, and "reason" produces only certain raw materials from which the judge himself has to fashion the rule he needs (Ross 1958, 76–77).

Shortly after, Ross replaces this metaphorical notion of materials or products with a different, less metaphorical terminology: «The scheme of classification [of legal sources] will be: (1) the completely objectivated type of source: the authoritative formulations (legislation in the wide sense); (2) the partly objectivated type of sources: custom and precedent; and, (3) the non-objectivated, "free" type of source: "reason"» (Ross 1958, 78). Such "artificialist" metaphors (materials, industrial products), inspired by von Jhering 1857 (cf. Lloredo 2012), replace here the traditional "naturalist" metaphor of sources, making explicit Ross' view of law as an artefact, if not as a sort of object-in-the-world: an idea which is far from the more

pragmatic view of law and interpretation then provided by the same author. Now let us see, in reverse order, the three main types of legal materials listed in Ross 1958.

2.1 Surprisingly enough, if one thinks of Ross' meta-ethical emotivism, the *first* type of (mere) materials, i.e. raw materials or non-objectivated sources, is *reason* or, as Ross is quick to point out, *cultural tradition*: the "source" of both ancient and non-Western law. The use of "source", here is, of course, improper: reason, tradition, natural law, classic Greek *dikaion*, Roman *ius* and modern Islamic *shar'ia* too, strictly speaking, do not have sources as modern legislation does, i.e. do not provide anything like a fully-fledged rule-formulation. On the contrary, modern Western codes and legislation are sources-based in the sense they list a set of strictly legal materials, thus distinguishing them from religion, morals, and non-law in general. Herbert Hart also speaks about only modern law as a customary rule of recognition, thus denying that ancient law has such a rule and is sources-based.

Accordingly, in order to build a truly general theory of law which also applies to ancient and non-Western law, the term "sources" needs be replaced by "materials": a repository of maxims, arguments and techniques actually used by jurists. According to Ross, by the way, this replacement of "legal sources" with "legal materials" sheds light on the positivism-realism relationship: «The term"positivism" is ambiguous. It can mean both "which builds on experience" and"what is formally established" […] A realistic doctrine of the sources builds on experience, but recognises that not all law is positive, in the sense of "formally established"» (Ross 1958, 100–101). Here Ross reminds us, in spite of more recent neo-formalistic attitudes (cf. Barberis 2015b), legal realism by definition recognizes the existence of living law, which is of course different from the formally established one.

2.2 The *second* main type of legal materials, semi-finished products, or partially objectivated legal sources, includes *customs* and *precedents*: two different but strictly intertwined materials. In spite of John Austin's well-known theory, according to which customs are legal sources only insofar as they are applied by courts, an application that would turn them from positive morality into legal precedents, Ross rightly argues customs are legal sources in their own right, *ratione materiae*, when they regulate legal matters. The relationship of customs and precedents, however, is a bit more complex than he believes; in fact, it is not one but triune. *First*, as the so-called classic, declarative theory of the common law claims, English courts applied the immemorial customs of the land, thus turning them into precedents: as was the case with the origins of common law, but which can still occur (cf. Sect. 4.3 *in fine*).

Second, English courts began to follow their decisions on similar cases, first as a mere practice or regularity of behaviour, without the conviction they had to do so, or an explicit doctrine prescribing it. When such a conviction and doctrine prevailed definitively, between the eighteenth and nineteenth century, following precedents became a general judicial custom of the kingdom. *Third*, such a general judicial custom can be opposed to all the more particular judicial customs, namely a chain or line of precedents – in French, a *jurisprudence* – on the same legal question. As we shall see in Sect. 3, in fact, common law's chains of precedents and the very *stare decisis*' doctrine not only have customary origins but also a customary character – they are but judicial customs (cf. Barberis 2015c).

According to Ross, anyway, precedents work as materials suited to find and justify the solutions given by courts to cases: this is what transpires with common law's precedents, but also with civil law's *jurisprudence*. Ross's realist warning – non-formally established law does exist and, what is more important, it is what gives real life to the formally established one – reminds us that the distinction between Anglo-American precedents and European-continental *jurisprudence* is thinner than it is generally believed. In fact, the traditional legal comparatists' dichotomies – "binding" vs. "persuasive" precedents, "formal" or "factual" binding force of them – are increasingly blurred every day, as we shall see in Sect. 3.3: civil law and common law do not come close to one another, as is commonly said, rather it is Western law as a whole which is becoming, or coming back, more and more judicial.

2.3 The *third* main type of legal materials, as (allegedly) finished products or completely objectivated legal sources, is *legislation* widely conceived, including statutes, administrative regulations, and constitutional documents too. The remarks Ross makes on this subject are somewhat trivial: he seems to share here the common idea of legislation as the final result of a political will, decided once and for all. That, in fact, is an idea that Scandinavian realists share with mainstream legal positivists, but which in the case of Ross's chapter on sources is justified mainly by the opposition between legislation and other legal materials. In fact, the core of Ross's realistic stance on the subject is not here, in the third chapter of the book, but later, in the fourth one devoted to statutory interpretation. A critique of these remarks on legislation can be outlined here, however.

From a *legal* perspective, firstly, by opposing legislation to other sources, Ross seems even to adopt the simplistic idea that legislators produce ready-made rule formulations to be merely applied by courts without interpreting them – in contrast to Ross's own theory of interpretation. Such a view, that I have labelled elsewhere *legal creationism* (cf. Barberis 2015c), is close to the distinction drawn by Jeremy Bentham in a manuscript quoted by Postema 1986, 228, between *actual* law (legislation, codes) and *inferential* law (customs, precedents): «Though statute laws are "actual", Common Law rules are "inferential" [norms] as shall appear to be just the expression of judicial practice in like cases». C*ommon law* «exists not in any certain form of words: the acts it is founded on are acts of authority: but the words in which they are expressed are yours, are mine, are anyone's»: which amounts to the conclusion that, as an abstract norm, common law does not exist.

Secondly, from a *linguistic* perspective, Ross's attitude still relies on an old-fashioned semantic, non-pragmatic view: in fact, a very common one among the legal theorists of the 1950s, still influenced by logical positivism. According to such a view, adjudication could be reduced to statutory construction, conceiving the latter, moreover, as a mere decoding of signs previously encoded. This is a stance which is still very common in European-continental legal realism (cf. Barberis 2015a), especially in the Genoa School's mainstream theory of interpretation: just think of Pierluigi Chiassoni's theory of interpretive codes here (cf. Chiassoni 2007, and below, Sect. 3) Of course, the following chapter of Ross 1958, about statutory construction, and of course Ross 1968, will come closer to a pragmatic and inferentialist approach to law and interpretation as discursive practices: but it does so by

using "pragmatics" more in the sense of a teleological or consequentialist approach than in its strictly linguistic sense.

In short, Ross will also get rid of a merely syntactic or semantic approach, and will adopt a truly realistic, pragmatic-contextualist and inferentialist one. First, a truly *realistic* approach does focus from the beginning on the living law, and therefore on adjudication, by conceiving legislation as a mere limit to it (cf. here 2.). Second, a *pragmatic* approach (and also a *pragmatist* one, distinct from the former: cf. Butler 2005), following the current drift in linguistic studies towards the so-called pragmatization of semantics (cf. Peregrin 1999 and below Sect. 3.1). Third, an *inferentialist* approach which assumes, contrary to Ross's metaphor, that legislation is not a finished product, but that it is only the starting point for such inferential practices as legal qualification of the facts-of-the-case, interpretation, and application (cf. Canale and Tuzet 2007: 39, Canale and Tuzet 2009, both inspired by Brandom 1994).

3 Towards a Really Realistic Theory of Adjudication

A pragmatic analysis of legal discourse is unattractive so long as one adopts, as a model of law, the wrong paradigm, legislation, i. e. by far the most decontextualized type of law. Taking this into account, Karl Olivecrona famously remarked that legislation cannot be reduced to commands issued by the sovereign *vis-à-vis* his subjects, therefore dubbing statutes as *independent imperatives* (Olivecrona 1939, 42–49): where "independent" means precisely "decontextualized". Such legal documents as constitutional or international declarations of rights, indeed, are possibly even more decontextualized than domestic statutes: and this despite the fact their use by the courts is growingly accounted for, in the post-modern jargon, as a "conversation", a "talk", or even a "narrative", between so immaterial actors as courts, States, corporations, NGO's, and so forth.

As we have just seen, Ross himself tends to replace legislation with adjudication in the role of pivotal legal activity. Adjudication, however, is virtually reduced by him, and his Genoese followers, to statutory construction, and accounted for as an activity parasitic to legislation, a sort of decoding of previously encoded signs. In contrast, statutory construction is only an overrated part of adjudication, which is, in turn, not just the living law, but the conceptual core of legal phenomena. As Joseph Raz says, «the existence of norm-creating institutions, though characteristic of modern legal systems, is not a necessary feature of all legal systems», whereas «the existence of certain types of norms-applying institutions is» (Raz 1979, 105). As we will see in Sect. 4, moreover, the real heart of adjudication is not textual construction but legal qualification of the-facts-of-the-case with reference to the very legal materials.

A truly realistic, pragmatic and inferentialist theory of law, therefore, needs to be concerned with Anglo-American precedents or European-continental *jurisprudence* in a double sense. In the *first*, traditional sense, such a theory would still focus only

on *binding* legal sources, i.e. statutes and precedents in common law, statutes in civil law: although statutes are applied in their interpretation, which in common law *is* precedent *de iure*, in civil law *de facto*. In a *second*, less traditional sense, such a theory focuses on precedents, and *jurisprudence constante* too, not as binding sources or formally established law, but only as legal materials from which the living law is inferred. It is in this second sense that a new realist analysis is needed, a less demystifying and more constructive one: by conceiving precedents or *jurisprudence* as self-restraining devices emerging from the working of adjudication itself, and by distinguishing, in the wake of Ross, "pure" adjudication, non-binding precedent, and binding precedent.

3.1 *Pure adjudication*, as it were, is judicial activity free from the bounds of both precedents and legislation. Pure adjudication, accordingly, could seem a notion as mythological as Weberian *justice of cadi*, if not an ill-formed concept, contrasting with the very definition of "adjudication" as application of a law different from adjudication itself. Yet, historians and comparatists say that in the old good days of the Western legal tradition, during a period of at least 500 years and starting from events such as the rediscovery of the *Corpus iuris* in continental Europe and the Norman conquest in England, "law" denoted little more than judicial decisions, unbound both by legislation and precedents. In fact, this is precisely the paradigm of Western law: adjudication, i.e. «administering justice according to law between the parties» (Cross 1977, 233).

Here, not elsewhere, lies the alleged necessary connection of law and morals: law is, paradigmatically, the situation in which a judge does justice between two parties. Does such a conceptual remark justify natural law theory's central tenet that law and morals need have a logical, necessary or conceptual connection? In a sense, yes: in a first sense of "justice", internal to the law and more common in ordinary language, law is paradigmatically the situation where the judge aims to do justice (Hayek 1982, vol. II). However, in a second sense of "justice", external to the law and perhaps more common only in philosophical usage, law and morals have no necessary relationship whatsoever. Unjust judicial decisions, unjust legislation and an unjust constitution are perfectly conceivable, and in fact not uncommon: *pace* Robert Alexy's argument from injustice and his alleged performative contradiction (Alexy 2002).

Pure adjudication, by definition, is legally unbound, a sort of judgment one could even classify as merely moral, if any separation of law and morals would make sense here, i.e. with reference to ancient or extra-Western cultures, where the law/morals distinction is often not even nominalized. We must reject, accordingly, the temptation to apply to pure adjudication morally-centered approaches such as particularism: the idea of an *ad hoc*, case by case equitable justice (cf. Dancy 2004; Bouvier 2012; Cuono 2013; Muffato 2015). My own opinion, on the contrary, is that it is not morals that are apt to throw light on adjudication, but just the other way around. Paradoxically enough, one understands more of *moral* evaluation by looking at it from the perspective of its old *legal* true archetype, adjudication.

Courts, perhaps, always did justify their decisions *as if* they were application of a law different from their decisions themselves: a justification, however, which can-

not be reduced to a mere fiction or ideology, as Bentham believed, depending instead on the very concept of adjudication as a law-applying activity. The most serious candidates to the role of law to be applied, in the Western tradition, have been three: three types of law, adopting John Gardner's (2007, 73–74) definitions. In the ancient world, where legislation was still unknown or underdeveloped, the first candidate was customary law: e.g., the alleged immemorial customs of Englishmen. In more modern times, the second candidate was case-law: the individual judicial decisions or precedents (cf. Sect. 2.2–2.3.). Only after codification and French Revolution, legislation become the third candidate: a so overbearing one, however, to claim to be the law *par excellence*.

3.2 *Non-binding precedents* are past judicial decisions quoted by judges in order to adjudicate: a concept that after the civil law's codifications bifurcates into civil law and common law contexts. In civil law's contexts, where judicial decisions are not deemed binding sources of law, "non-binding precedents" denotes the use by a judge of a line of past judicial decisions or a *jurisprudence constante*. The case, here, must always formally regulated by some piece of legislation: a piece of legislation, however, which is in the long run interpreted according to such a *jurisprudence* no less than common law's statutes are (cf. Wróblewski 2001; Taruffo 2007). In common law contexts, instead, "non-binding precedents" denotes the application of almost an individual precedent *before* the Nineteenth century's adoption by the House of Lords of *stare decisis* doctrine: and this, mind you, either the instant case was devised by common law itself, or by parliamentary statutes.

It is fairly well known that *stare decisis* is a *doctrine* only in the sense of a general statement made by a Court, not by legal dogmatics. Ironically enough, common law theorists say very little about the pragmatic status of such a doctrine (cf. Tiller and Cross 2006; Kozel 2010). If a civil law theorist like me may hazard a definition, "*stare decisis'* doctrine" means: (1) a *judicial* discourse (as opposed to non-judicial one: cf. Gehrardt 2008, 111 ss), (2) *explicitly* or *implicitly formulated* in a Court's opinion, (3) in order to *bind* the same Court (horizontal force) and/or inferior ones (vertical force of precedents) to follow its decision as a precedent. According to this definition, *stare decisis* doctrine is a metalinguistic discourse about other discourses, the former being constitutive of the latter *qua* precedents: a decision *is* a precedent only according to such doctrine.

Non-binding precedents, in this sense, presupposes binding ones; only *after* the *stare decisis* doctrine prevailed previous decisions could termed, retrospectively, non-binding precedents, namely precedents without binding force at the time of their possible application. According to Gardner's definitions quoted above, a precedent is case-law *plus* the doctrine, peculiar to the common law, of following precedents. As already said (see above, Sect. 2.2.), the related concepts of precedent and *stare decisis* are connected in a threefold way with the concept of custom. First, there is a historical connection, as in declarative theory of common law: Courts do declare immemorial customs. Second and third, there is an even more important conceptual connection: both a chain of precedents, and the very doctrine of following them, *are* judicial customs.

As with all human activities, to be sure, it can be difficult to distinguish the mere *practice* and the proper *custom* of following precedent: that is, to repeat, the same practice *plus* the conviction of being obliged to do so. Such a conviction could, but it does not need to be justified by theoretical views about (external) justice as alike treatment of like cases, or even, more simply, by the practical easiness of justifying inferior courts' decisions by referring to superior courts' ones, or both. In fact, invoking non-binding precedents, as it occurs in civil law with *jurisprudence*, is only a legal argument between many others. The most recent civil law theory of argumentation just mentions the appeal to precedents or jurisprudence, admits its frequency and even its persuasiveness, but it seems reluctant to ascribe it the same status of other arguments (cf. Tarello 1980, 375, Alexy 1998, 215–219).

3.3 *Binding precedent* is the distinctive source of common law, its binding force amounting to the somewhat counterintuitive idea that «following precedent obliges judges to make decisions other than the ones they, in their best judgement, would have made absent the precedent» (Schauer 2009, 41; cf. Alexander, Sherwin 2007). In fact, binding precedent and *stare decisis* are two sides of the same coin, emerging only in the eighteenth century, in William Blackstone's treatise and in John Murray's, Earl of Mansfield, even more influential judicial decisions, and prevailed only in the nineteenth century, with the House of Lords' decisions as *Beamish* vs. *Beamish* (1866) and *London Tramways* (1898). In common law as well, at the end of the day, the only criteria in order to distinguish non-binding from binding precedents are the explicit statements of *stare decisis* doctrine.

Judicial binding precedent could be roughly defined as a previous concrete decision adopted by a judge as a justification of subsequent one, according the *stare decisis* doctrine, on a legal issue decisive for the solution of a case. In fact, two specifications are in order here. First, the concrete (non-general) character of the decision: a precedent is the solution of a concrete case, not – as English practice statements or French *arrêts de reglement* – of an abstract (general) one. Second, it is the very decision, not the formulation of its *ratio decidendi*, to form a precedent. Such a formulation, indeed, is not a necessary condition for the very existence of a precedent: the *ratio decidendi* can even be inferred by the decision *plus* the facts-of-the-case, without any obligation to provide a *motivation* (in French). Even when a *ratio decidendi* is effectively formulated, its formulation is not-canonical, i.e. it is qualitatively different from the formulation of a statute.

Formalistic reconstructions of precedents, such as Edward Levi's syllogistic model (Levi 1949, 2), in fact mirror a quasi-legislative view of precedents – the creationistic idea judges could legislate as Parliaments do. This wrong idea, notwithstanding, almost carries a good suggestion. European-continental codifications and legislation, on the one hand, and Anglo-American precedents and *stare decisis* doctrine, on the other, emerged almost simultaneously on either sides of the Channel in order to perform similar functions, to limit arbitrariness by the Courts as well as confer upon judges a contested legitimacy to produce law, *de iure* in the UK and US, *de facto* on the Continent. If precedent and *stare decisis* were really only a judicial form of legislation – as it is often claimed by the mystifying narrative formulated in Hobbes-Austin creationistic terms – then one could say both *Beames* and *London*

Tramways quasi-legislative acts have been by now repealed by the famous Practice statement of 1966, in the following terms.

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases […] Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case, and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

It would be really naive, however, to conceive their Lordships' statement as an act of judicial legislation, derogating previous ones. In fact, thereafter, the House of Lords and other superior English courts continued to follow their precedents neither less nor more than before (cf. Duxbury 2008, 126–149, esp. 128). The key to solving such a riddle and dissolving the mystery of binding precedents, I believe, is much simpler. The solution is to adopt Gardner's tripartition of types of law (cf. Sect. 3.1; cf. also Stone 1985, 173), and to admit, accordingly, the *stare decisis* doctrine but allowing – the linguistic formulation of – an abstract judicial custom about case-law. This abstract custom shares with all other less abstract judicial customs, namely chain of precedents on a same legal question, three often underestimated hallmarks.

In the *first* place, *stare decisis*' doctrine is as devoid of any authoritative or "canonical" formulation as both precedents and customs are (cf. Cross 1977, 172): adjudication is oriented to facts, to the solution of the case at hand, not to texts, as statutory construction is (cf. 4.). In the *second* place, the core of common law's adjudication is the legal qualification of the facts of a concrete case in terms of an other concrete case, not necessarily in terms of the concrete case's subsumption under an abstract norm: as occurs instead on the Continent because of the existence of an *obligation de motivation* (in French) according a statute. In the *third* place, finally, precedents and *stare decisis* doctrine are not more binding than customs: bindingness – a definitory property of both – ultimately depends only on the practice itself. Following a precedent, after all, is not a more pretentious thing than following a rule. To the question "Is this judicial decision a *binding* precedent?", one can just answer: wait and see.

All these remarks, I think, apply with a few modifications to statutory interpretation too, the subject of the next section. To adopt the dictum about constitutional law by Charles Hughes (Schauer 2009, 143), the law is, ultimately, what judges say it is: a dictum, however, which requires an important qualification. The law is not, to be sure, what *individual* judges say it is: common law lawyers would say this it's just the *evidence* of law, not the law itself. Law is what *all* judges – or a qualified majority of judges, or a final authority representative of all the judges… – say it is. The starting hypothesis of the next, final section is precisely that legislation, adopted in the Western legal tradition in order to remedy the well known defects of judge-made law, cannot perform this function as long as one does not recognize the decisive and pervasive role of adjudication, and in particular of Anglo-American precedents and Continental *jurisprudence*.

4 Statutory Interpretation: An Overrated Part of Adjudication

In the trend outlined above, legislation and statutory interpretation come just as a fourth step: yet not, so to speak, as the beginning of a different story. Legislation was designed to remedy arbitrariness in adjudication; after two centuries, however, the cure proved to be worse than the disease. Today, in fact, statutes are become less a restraint than a tool for judicial interpretation, and the latter, paradoxically enough, is converted into the last remedy to the darkness of legislation. This final section proposes some guidelines for a realist, pragmatic-contextualist and inferentialist theory of statutory interpretation, addressing three issues: (1) the legally relevant sense of "pragmatics", (2) the pragmatic status of statutory interpretation, and, above all, (3) a restatement of the alleged interpretive skepticism, as opposed to a really realistic interpretive realism.

4.1 First of all, some remarks about a legally relevant linguistic pragmatics are in order. Of course, this is not the place to tell the story of pragmatics (for an updated summary, cf. at least Sbisà 2013; on the highly debated semantics/pragmatics distinction, cf. Bach 1999; Peregrin 1999; Turner 1999, Horn and Gregory 2004; Bianchi 2004; for legal applications, cf. Sardo 2015). In order to apply pragmatic tools to legal issues, a shift is needed from the traditional act-oriented pragmatics, typical of founding fathers such as John L. Austin and John Searle, to a context-oriented and an inferentially driven one. Indeed, a *first*, generic view of context, typical of act-oriented pragmatics, refers only to the environment of the speakers' utterance: but legal acts as statutes or judicial decisions are independent imperatives, i.e. decontextualized texts, always needing recontextualization and so much more specific and sophisticated views of context.

The *second*, more specific view, conceives of context as shared knowledge or more exactly *information*: i.e. the possession of any relevant data whatsoever – facts, norms, values… – apt to be further processed in order to become practically relevant. Here context is only a set of more or less deep, and shared, and coherent assumptions which form the background of texts, and provide the necessary information in order to understand and construe them. This second idea, to be sure, is more in keeping with cognitive sciences, and is not necessarily incompatible, *pace* Marmor 2007, 233 ss., with legal issues, as a matter of normative language and strategic behaviour. However, even if adopted by legal theorists in alleged pragmatically oriented theories (e. g. Villa 2012), such a view of context proves desperately generic, i.e. underdetermined with reference to legal issues.

The *third* view of context, nearer to Yehoshua Bar-Hillel's concept of co-text – the set of other texts relevant for the understanding of a text – seems more suited to modern law, conceived as a legal system: namely, as an ordered set of norms – all the ordered sets of norms – inferred from legal texts. This third idea, coherent with a realistic and inferentialist view of statutes as materials bearing an inferential potential, proves more promising for a theory of statutory interpretation: indeed, the more the law is decontextualized, the more the interpretation amounts to its reco(n)

textualization, with reference to different co(n)texts, picked out by judges in order to adjudicate. A legal provision can be interpreted with reference to (1) other provisions in the same section of a statute or code, (2) others sections of the same statute or code, (3) other statutes or codes, (4) legal principles (cf. Poggi 2013).

Such an idea of context, nevertheless, proves problematic with reference to common law's precedents and civil law's *jurisprudence constante* too. These legal materials are not sources in the strict sense, as a statute is: they are only evidence of law, whose text is not canonically formulated. Accordingly, the interpretation of judicial decisions focus less on the text(s) than on the decision(s) themselves, and more specifically on the facts-of-the-case. It is with reference to such facts – whose legal qualification is the core of both previous and subsequent judicial decision – that a judge establishes if the precedent is relevant for the case at hand and can be applied to it. This reference to facts-of-the-case also forms the necessary condition of statutory interpretation, and anyway provides the main context of precedents or *jurisprudences* themselves: but a context, here, only in the first, generic sense of "context" mentioned above.

4.2 The pragmatic status of statutory interpretation was not specifically thematised by J. L. Austin's classic act-oriented pragmatics, nor by more updated versions of the context-oriented one. The trouble with such issues, I fear, is that the traditional Cartesian views of interpretation, understanding, explanation and so forth, as so many mental activities, have been strengthened by today's cognitive sciences. In terms of Wittgenstein's well-known rule-following passages, however, statutory interpretation can be conceived of as the linguistic activity of grasping meanings by means of the reformulation of their canonical formulation: i.e., as inference of a formulation from another. Such an inferential activity, however, can be further conceived by a legal theory pragmatically oriented as the recontextualisation of decontextualized legislative texts, with reference to different contexts in the sense considered in the previous sub-section.

Generally speaking, within so many senses of "statutory interpretation" (cf. Barberis 2014, 188–195), one can distinguish a common core of meaning and three more relevant sub-senses. The common core, according to Wittgenstein's insight, is the ascription of meaning to a statute, with its logical form "X means Y": where X denotes a sentence (a legal provision), Y the reformulation of such a sentence (a legal norm) in reference to a given context, and finally "means" suggests an inferential relationship so that Y is the best reformulation of X in relation to such a context. Such a common reference to a context excludes by the beginning that statutory **i**nterpretation can be conceived as a mere act of decoding, as in Chiassoni 2007, 78–80. Such an act can be deemed a move within a broader activity or language-game, as in Chiassoni 1999. Such an activity, with reference to *judicial* statutory interpretation, is adjudication: to do justice between parties.

The three more relevant sub-senses of "judicial statutory interpretation" for a pragmatically oriented theory of adjudication are perhaps the following. The *first* sub-sense denotes the individual *act* of ascribing meaning to a legal provision by a judge: an act instrumental to individual *activity* (interpretation in the second sub-sense), namely to adjudicate or to do justice. Such an interpretive act does not fall

into one of five illocutionary acts' types distinguished by J. L. Austin (cf. Austin 1962, 150 ss., Ross 1972; Sbisà 1984). In particular, such an act does not fall under the type of *verdictive* act: a type more suited to the final act of the broader individual activity whose interpretive act is only a part, namely adjudication. The act of judicial statutory interpretation is not an autonomous speech act, but only a part of the language-game of adjudication.

The *second* sub-sense of "judicial statutory interpretation" denotes precisely the individual *activity* of adjudication, as opposed both to the individual *act* (first sub-sense) and to *collective* activity (third sub-sense). A judicial individual activity of statutory interpretation, in this second sub-sense, is a set of acts forming a single instance of the language-game of adjudication: a set including the same individual act (first sub-sense), the argumentation or justification of the result of such an act, the legal qualification-of-the-facts-of-the-case in terms of a statute (subsumption) and especially the individual judicial act of adjudication, the very goal of the activity. Indeed, all these acts of judicial statutory interpretation in the second sub-sense are strictly functional to adjudication, that is they do justice between the parties, in the merely legal, internal sense of "justice» (cf. Fuller 1967, in terms of internal and external morality). Legal interpretation and moral evaluation are different language games precisely because the former concerns justice *according the law*.

Finally, the *third* sub-sense of "judicial statutory interpretation" denotes the *collective activity* of adjudication by different judges, which *can* (but not necessarily *must*) produce a *jurisprudence constante*, as unintended effect of all these acts and activities. Just as one cannot follow a rule *privatim*, so one cannot adjudicate this way: even "pure" adjudication, in the long run, approaches to some form of uniformity. This could even be called a condition of felicity (cf. Siltala 2000, 185–187) of both adjudication and interpretation: at this condition, indeed, one can say courts apply the law, not their individual wills. Anyway, only with reference to the individual act and activity (first and second sub-senses), interpretive skepticism can seem trivially true: as a matter of fact, an interpreter can always ascribe the meaning he likes to a text, and adjudicate accordingly. Interpretive skepticism sounds much less plausible, instead, in reference to the *collective* activities (third sub-sense).

4.3 The current theories of legal interpretation are still classified according to the old tripartite scheme drawn by Hart 1961: interpretive formalism, Hartian "mixed" theory, and interpretive skepticism. Sixty years after, however, perhaps the time has come to adopt other, more sophisticated categories. First, interpretive formalism is over, except perhaps for its normative versions provided by Dworkin and Fred Schauer. Second, Hartian mixed theory seems valid only with reference to the facts-of-the-case's legal qualification by courts: the core of common law adjudication. Third, interpretive skepticism proves to be a mere truism with reference to the *individual* act and activity (first and second senses) of statutory interpretation, and especially to the mere *possibility* of different interpretations. It must be relativized and restated, instead, with reference to the *collective* statutory interpretation's activity (third sense), and above all to the *likeness* of their results (cf. Barberis 2013b).

The very label "skepticism", coined by Hart in order to criticize American legal realism, can be safely replaced by "realism" (cf. Guastini 2006 e 2013). With refer-

ence to individual act and activity of statutory interpretation, legal realism proves to be a truism. All the interpretations, taken individually (*uti singulae*), are dubious; only if taken collectively (*uti universae*) they can produce a long-term certainty – the only which is necessary to guide human conduct (cf. Leoni 1991, 76–94). With reference to an individual *act* of interpretation, in particular, it is trivially true that the interpretive question "What is the meaning ot this provision?" always admits two or more answers. With reference to interpretive *activities*, however, the true problem – in fact, the only interesting one for lawyers – is another: provided that there are always several *possible* adjudicative answers, which of them are most *likely*?

It is precisely here that precedents and *jurisprudence constante* become crucially important, and the results of a realist and evolutionary theory of interpretation converge with legal practitioners' daily experience. Indeed, common law precedents, as well as civil law's *jurisprudences*, allow practicians and theorists too to distinguish likely interpretations from merely possible ones. And this is true both if the judicial decisions *replaces* legislation, as occurs in common law, and *a fortiori* when they *complement* it, as in civil law. Yet, European-continental legal realists, particularly Genoese ones, still seem to consider precedents, if not *jurisprudence constante*, as a sort of British eccentricity, like fox hunting. The opposite is true, perhaps: legal realism needs a theory of precedents and *jurisprudence*, if it does not want to remain a Genoese eccentricity (cf. Barberis 2013a).

In fact, European-continental legal realists seem reluctant to adopt pragmatic tools precisely because of their propensity to the following triple reduction. They tend to reduce law to legislation, adjudication to statutory interpretation, and statutory interpretation to the decoding of signs out of context, or referring only to the co-text formed by other texts. Judicial statutory interpretation, instead, is an inferential activity which does not occur in a vacuum. As an instance of the language-game of adjudication, it is a radically contextual activity, referring both to texts and facts. To be sure, among the common elements of the context as authors, readers, available languages, encyclopaedias (cf. Lecercle 1999), legal materials as judicial decisions hold pride of place in law, and through them the very facts-of-the-case relevant according them.

From such a radically pragmatic-contextualist point of view, the only qualitative difference between common law and civil law seems the following. An English or American Court can justify its decision just by referring to an individual precedent, whereas a Continental judge cannot to do so even with a chain of precedents (a *jurisprudence*), always needing a statute in order to justify her decision. This is also the very difference between respective ideals: the German *Staatsrecht* and the French *Etat de droit*, on the one hand, and the English *Rule of law* on the other. In both cases, however, the point of adjudication, including statutory interpretation, remains to do justice between the parties: just as in "pure" adjudication. This is the intended effect of the *individual* act of interpretation and adjudication, whereas the *collective* activity of adjudication is always likely to produce unintended effects as precedents or chains of them.

Common law's precedents and civil law's *jurisprudence constante*, shaped and reshaped by the courts over time, always serve purposes their individual authors had neither foreseen nor wanted. Unintended effects of intentional human action are the very engine of the overall evolution of the law. The evolution of both common law and civil law, indeed, depends not only causally, but conceptually, on judicial decisions. It is with reference to such activities that both take their sense of legal phenomena, by definition aiming to do justice between men. But if it is so, then legislation depends on jurisdiction, not only the other way around. This dependency of legislation on precedents is paradigmatically illustrated by the working of common law's statutory interpretation, itself producing precedents, so that here written law feeds the unwritten one.

At the end of the day, law is an evolutionary phenomenon, like language, market, or religion. For the understanding and explanation of such a phenomenon, accordingly, nothing less and nothing more than an evolutionary theory of law is needed (cf. Hayek 1982). E.g., the next application of a statute, or a precedent, or both, always could reverse an adjudicative or interpretive trend: but it can also confirm it. A chain of precedents is a path-dependent process, not likely to be inverted; its evolutionary direction, nevertheless, could be predictable only in the long term: in the short one, it is a matter for probability calculus, or prophecy. Yet, just as for natural evolution, the knowledge of contextual elements and something like a selection-of-the-fittest-hypothesis could allow us to predict – while not single legal decisions – overall judicial trends. *This* is still legal realism, although without interpretive skepticism and legal creationism.

5 Conclusion

From the three sections of this contribution three main insights could be drawn. First, with regards the theory of legal sources or materials, legislation seems, contrary to Ross's wording, even more indeterminate than precedents – a mere starting point for inferential processes concerning legal qualification of the facts, interpretation, application, and so on. Second, as fast as particular judicial sources or materials are concerned, *stare decisis* doctrine and chains of precedents work as judicial customs, likely not only to replace, but also to complement legislation, by making statutory interpretation more predictable. Finally, interpretive skepticism is assumed to be a mere starting point for a really realistic, pragmatic-contextualist and inferentialist theory of interpretation. By such a theory, interpretation needs be conceived as the recontextualization of decontextualized texts, where the basic context is provided by chains of precedents.

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