

## ***Some introductory remarks on legal interpretation and legal reasoning. A philosophical approach***

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This issue of *Etica & Politica / Ethics & Politics* is devoted to the topic of legal interpretation and legal reasoning. We believe that the legal field constitutes a privileged perspective from which to observe interpretative practice. As Stephen Toulmin points out, “lawsuits are just a special kind of rational dispute, for which the procedures and rules of argument have hardened into institutions.” (1) This point is also stressed by Neil MacCormick, who observes that legal interpretation “is perhaps a uniquely public and published form of reasoning, and therefore a resource of great potential interest to philosophers.” (2)

This very fact, i.e. that legal interpretation is often public and published, facilitates the identification of interpretation’s rules and techniques as well as the singling out of philosophical questions concerning the practice of interpreting. The papers collected here meet some – the most central – of these questions. This introduction aims briefly to show the philosophical relevance of legal interpretation and to distinguish the main perspectives of legal interpretation in the contemporary debate.

### *1. An outline of interpretation in general*

“Interpretation” is not a practice concerning only the law. We can interpret a novel, a painting, a speech, a symphony, human conduct and many other things. Thus, it is wise to specify the general meaning of the word ‘interpretation’.

A common definition is the following: ‘to interpret’ means to award a meaning to an *ens* (an entity) (like a novel, a statute and so on) which needs an ascription of meaning. (3) In the words of Michael S. Moore, interpretation “is the activity we engage in when we are trying to find the meaning of something.” (4)

Of course, starting from this general definition, we need to distinguish different kinds of interpretation depending on the domain we are concerned with. For

example, it is obvious that interpreting a political speech is not exactly the same as interpreting a facial expression. Anyway, before dealing with the theme we are interested in, that of legal interpretation, and before introducing the specific characteristics of interpretation in the legal field, I wish to stress that the word ‘interpretation’, at least in the case of textual interpretation, is often used in two senses: it means either the activity of establishing the meaning of some documents, or the result or the product of this activity; in other words, the meaning itself. So, it is also common and appropriate to distinguish between interpretation/activity and interpretation/product. (5)

It is possible to sum up these general observations in three points:

1) there is a concept of interpretation which underpins all the possible meanings of the term in different domains. (6)

2) Interpretation is always interpretation of something (a human practice, a novel, a work of art, a statute and so on); so it is possible to add that ‘interpretation’ identifies a relationship between three elements: a) the intention of the author of something (for example, what Shakespeare intended to communicate writing *Hamlet*); b) the meaning of the object of the interpretation quite apart from the intention of its author (what *Hamlet* communicates to us apart from Shakespeare’s own intentions); c) the intention of the interpreter himself (two different readers of *Hamlet* could find partly different meanings in it). (7)

3) The word ‘interpretation’ refers both to the act of interpreting and to the product of interpretation.

## 2. *Interpretation and law*

In the previous paragraph I said that “interpretation is always interpretation of something.” In the present case, it means that, before speaking of legal interpretation, we should determine what the object of this particular kind of interpretation is; in other words, we should determine what the law is.

As can easily be guessed, there is not a univocal answer to this question. As Hart observes “few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question ‘What is law?’” (8)

Running the risk of oversimplifying, we can assume – for the purposes of these introductory remarks only – that the law is a system of norms (rules or principles). (9) Consequently, legal interpretation is, chiefly, interpretation of norms. (10)

But what is a norm? It is, first of all, a linguistic formulation. More precisely, it is, more often than not (at least, in the contemporary western legal systems), a written linguistic formulation. Thus the main object of legal interpretation is language. To specify what a language is, it is useful to distinguish between signs

and symbols. A sign is something natural; a symbol is an artificial product of human beings. For example, the ground being damp is a sign of a recent rain-storm, while the red traffic light is a symbol that you have to stop. Symbols are conventional: we (i.e. all the members of a linguistic community) decide their meaning. The fact that we have to stop when the light is red is just a convention. As Alf Ross, the most prominent among Scandinavian legal realists, points out, a language is the most highly developed, most efficacious and most complex system of symbols. (11)

Thus some difficulties (perhaps the main ones) in legal interpretation are linked to some characteristics peculiar to language, in particular, vagueness and ambiguity. (12)

A word is vague if its reference is indeterminate or, more exactly, underdeterminate. (13) In the case of vagueness, there is a central core in which the word clearly applies, and an area of uncertainty concerning the possible uses of the word in particular conditions. Herbert Hart gives the following example. There is a legal norm saying: “No vehicles in the park”; clearly, this norm forbids the entrance of cars in the park, but does it also forbid the entrance of bicycles, people skating, kiddy cars and ambulances? This is not clear, just because the term ‘vehicle’ is a vague one. Another classical example of a vague term is ‘bald’. A person without hair is certainly bald, but there are cases in which it is not clear if a person is bald or not.

A word is ambiguous when it has more than one referent. For example, the word ‘bank’ refers either to the place where we deposit our money, or to the edge of a river.

Of course, many potential interpretative problems linked to ambiguity can easily be worked out by looking at words in their context (for example, in the sentence “today a robber held up the Bank of Italy”, it is clear that the meaning of the word ‘bank’ is the first one and not the second). But when ambiguity is something more complex than mere homonymy, looking at the context may not suffice. Let us think, for example, of the different meanings of the word ‘interpretation’ itself that we have already noticed. ‘Interpretation’ means either the activity of interpreting or the product of this activity and these meanings are so closely linked that looking at the context may not be sufficient for choosing the first or the second one.

Thus there are interpretative problems that are not easy to solve. With regard to the legal field, it is worth noticing at least the major presence of vague terms; one thinks of words or expressions like ‘reasonable’, ‘the common sense of decency’, ‘good faith’ and so on.

In this connection, it is possible to say that the object of legal interpretation is not so different from the object of literary interpretation. In the final analysis, *Hamlet* and a legal statute are both made up of words and propositions.

On the other hand, in spite of the fact that many legal theorists, for example Ronald Dworkin, emphasise the similarities among legal and literary interpretation, there are also important differences. The main one is linked to the very function of the law. The law fulfils a practical function, that of regulating social life, by prescribing or prohibiting given conducts. For that reason, legal interpretation is not an end in itself, but it is instrumental to the application of a general norm to a concrete case. It means that legal interpreters, in particular judges, have to choose just one of the many possible interpretations of a norm or a statute. This is not necessarily the case in literary interpretation. For example, a literary critic is not forced to say that the best interpretation of *Hamlet* is that of considering it as a political tragedy or a tragedy about death; he is allowed to accept both interpretations of the tragedy. On the contrary, a judge cannot say that that the word ‘vehicles’ in the previous example can be interpreted as referring only to cars or as referring to cars, bicycles, people skating, kiddie cars and ambulances, but has to make a choice between these rival interpretations.

To sum up:

- 1) the object of legal interpretation is, by definition, the law;
- 2) it is possible to describe the law as a system of rules or norms;
- 3) norms are written linguistic expressions; so,
- 4) language is the object either of legal interpretation or of literary interpretation;
- 5) this means that these two kinds of interpretation share some linguistic problems, like vagueness and ambiguity of words;
- 6) on the other hand, the legal interpreter, unlike the literary interpreter, is forced to choose among the various possible interpretations.

### *3. Interpretative formalism vs. interpretative anti-formalism*

On the basis of previous clarifications, it is possible to distinguish two conflicting perspectives in legal interpretation: formalism and anti-formalism. Quoting again from Hart’s work, “Formalism and rule-scepticism are the Scylla and Charybdis of juristic theory; they are great exaggerations, salutary where they correct each other, and the truth lies between them.” (14)

Interpretative formalism was popular in the 19<sup>th</sup> century, especially in France and Germany, after codification. The underpinning idea of formalism was that the only legal source was legislation, which shows the intention of a rational legislator. Here there is the evident trust in reason typical of the Enlightenment. Legal codes were considered precise, exhaustive and consistent, and so the job of judges and legal interpreters in general was reduced to identifying the rules

contained in the code. According to the celebrated claim by Montesquieu, “*Les juges ne sont que la bouche qui prononce les paroles de la loi.*” (15)

I said earlier that interpretation identifies a relationship between three elements: the intention of the author of a text, the meaning of the text itself, quite apart from the intention of its author and, finally, the intention of the interpreter. Interpretative formalism reduces interpretation to the first two of these elements. The task of the interpreter is a mechanical one: he should only correctly understand the meaning of a legal text. In other words, according to interpretative formalism, the meaning of a norm is not the product of interpretation, but comes before the interpretation itself. The interpreter merely repeats the legislator’s will. According to formalism, the model of legal reasoning is that of deductive logic. In logic, the conclusion is already implied by the premises. The best-known example is syllogism. For example, if we say “All human beings are mortal” (major premise); “Socrates is a human being” (minor premise), we must conclude that Socrates is mortal. But that conclusion adds nothing to the premises; it only renders explicit information already implicitly included in the premises. The logic of legal reasoning could be formalized in this way: we have a major premise like “if p, then q” (for example, if someone does not stop his car when the light is red, then he must pay a fine), then we have the minor premise “is the case that p” (that is, someone actually does not stop his car when the light is red), so the conclusion will be “q” (that is, X must pay a fine). The problem, which formalism underestimates, is that it is the interpreter, in the last analysis, that sets out the correct premises.

Indeed, according to formalism, gaps and antinomies in the law are only apparent, because the law itself offers criteria, like, for example, analogy, for going beyond these difficulties. Moreover, interpretative formalism believes that vagueness and ambiguity are vices that are completely absent in the law. In this way, formalism tries to preserve the well-known ideal of certainty of the law. If the law comes before interpretation, then everybody can know in advance what is required by the law.

By contrast, interpretative anti-formalism maintains the thesis that there are no constraints at all on judges when they decide a judicial case. This theory presupposes a sort of interpretative scepticism which could well be summarized by the following dialogue: “– ‘I don’t know what you mean by ‘glory’,’” Alice said. – Humpty Dumpty smiled contemptuously. ‘Of course you don’t’ -- till I tell you. I meant ‘there’s a nice knock-down argument for you!’ – ‘But “glory” doesn’t mean “a nice knock-down argument,”’ Alice objected. – ‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean -- neither more nor less.’ – ‘The question is,’ said Alice, ‘whether you CAN make words mean so many different things.’ – ‘The question is,’ said Humpty Dumpty, ‘which is to be master - - that’s all.’” (16)

Thus interpretative anti-formalism in the legal field presupposes a kind of rules and/or fact scepticism: rules are too general, vague and ambiguous for clearly directing the task of judging. Facts which judges have to subsume under a norm are elusive, so they can discretionarily establish every time whether a specific fact can be considered proven. The anti-formalists treat the ideal of “doing justice according to law” as a mere fiction and reduce the law to what judges do in the courts.

Jerome Frank, an anti-formalist American judge of the first half of the last century, expressed the most radical and intriguing form of interpretative scepticism in his book *Law and the Modern Mind* “in which the belief that there could be legal rules binding on judges and applied by them, not made by them, in concrete cases is stigmatized as an immature form of fetishism or father fixation calling for psychoanalytical therapy.” (17) Frank expresses his claim without circumlocution: “whenever a judge decides a case he is making law: the law of that case, not the law of future cases not yet before him. What the judge does and what he says may somewhat influence what other judges will do or say in other cases. But what the other judges decide in those other cases, as a result of whatever influences, will be the law in those other cases. *The law of any case is what the judge decides*”. (18)

Thus judges decide judicial cases on the ground of their own idea of justice, their mood, their favour for one or for the other of the parties involved in litigation and so on. Only after having decided in this way do judges find some legal justification (like a rule, a judicial precedent, a legal principle) to back up their decisions. In a nutshell, anti-formalism, excluding the intention of the author of the text and the meaning of the text itself, reduces interpretation to the third element, that is to say to the intention of the interpreter.

Of course, there are also less radical versions of anti-formalism. The best-known is perhaps that of Alf Ross. According to Ross, the work of judging is the outcome of a parallelogram of forces whose main vectors are formal legal conscience and material legal conscience. In brief, a legal decision is a combination of a cognitive interpretation of the law and of an evaluative attitude of judges. Thus norms alone cannot determine a legal decision, though they contribute to it. They can only help us to predict what the judges will do in deciding a case. (19)

#### 4. *The “interpretative turn”*

Contemporary legal thought has developed the awareness that legal practice is essentially an interpretative practice. In brief, this interpretative turn (20) means that it is no longer possible to sharply distinguish a theory on the nature of law from a theory on legal interpretation. This intuition is very well ex-



pressed by Neil MacCormick: “a satisfactory theory of legal reasoning indeed requires and is required by a satisfactory theory of law.” (21)

Moreover, the most interesting contemporary theories of legal interpretation, intentionally or unintentionally following Hart’s lesson, try to find a path between formalism and anti-formalism.

In this section, I will try to elucidate both these characteristics of contemporary theories of legal interpretation by briefly showing Ronald Dworkin’s conception of legal interpretation. Dworkin’s thought, indeed, is probably the most celebrated expression of this mainstream of thinking.

In *Law’s Empire*, Dworkin’s most important book on jurisprudence, it is possible to find a kind of manifesto supporting the interpretative turn: “I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of partisan politics, and a critique of law that does not understand the difference will provide poor understanding and even poorer guidance.” (22)

With this clear idea in mind, Dworkin distinguishes three different conceptions of law and of legal interpretation: 1) *conventionalism*, 2) *legal pragmatism* and his own conception 3) *law as integrity*.

According to conventionalism (to which Dworkin erroneously assimilates Hart’s legal theory), “The law is the law. It is not what the judges think it is, but what it really is. Their job is to apply it, not to change it to fit their own ethics or politics.”(23) Moreover, when judges face cases not expressly covered by existing statutes, they “must decide such novel cases as best they can, but by hypothesis no party has any right to win flowing from past collective decisions - no party has a legal right to win - because the only rights of that character are those established by convention. So the decision a judge must make in hard cases is discretionary in this strong sense: it is left open by the correct understanding of past decisions.” (24)

In conclusion, Dworkin considers conventionalism a revisited form of interpretative formalism. It distinguishes two different interpretative practices for easy and hard cases respectively. In easy cases, judges have to apply the law in a mechanical way. In hard ones, there are no constraints at all on judges, so they do not apply pre-existing law, but are completely free to decide what they prefer. In this latter case, judges act as legislators, exercising strong discretion.

Pragmatism is a revised form of an anti-formalist theory. Pragmatists are not interested in legal tradition at all and, moreover, they think it would be possible to go beyond tradition in the name of a positive change for society. On pragmatism Dworkin adds: “The pragmatist takes a sceptical attitude toward the assumption we are assuming is embodied in the concept of law: he denies that past political decisions in themselves provide any justification for either using

or withholding the state's coercive power. He finds the necessary justification for coercion in the justice or efficiency or some other contemporary virtue of the coercive decision itself, as and when it is made by judges, and he adds that consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one. If judges are guided by this advice, he believes, then unless they make great mistakes, the coercion they direct will make the community's future brighter, liberated from the dead hand of the past and the fetish of consistency for its own sake.” (25)

Dworkin strongly contrasts this way of thinking, arguing that “civilization is impossible unless the decisions of some well-defined person or group are accepted by everyone as setting public standards that will be enforced if necessary through the police power. (...) If judges were seen to pick and choose among legislation, enforcing only those statutes they approved, this would defeat the pragmatist’s goal because it would make things not better but much worse.” (26)

In conclusion, by definition interpretation does not have a big role to play in a sceptical approach to law; the fact is that the task of judges is not to *find* a solution which the law permits, but to *create* the best solution for the case in hand. In other words, pragmatism is built on the political conviction that only by treating each case in an individual way is it possible to ensure justice and/or efficiency.

Introducing the concept of integrity, Dworkin aims to build a theory of law placed in between conventionalism and pragmatism. Dworkin’s ambition is to ensure an important place either for the requirement of fidelity to the law promulgated, or for the needs of justice. According to Dworkin, the interpretation of the law constitutes, in a way that is not trivial, the law. In “Is There Really No Right Answer in Hard Cases?”, an essay collected in *A Matter of Principle*, Dworkin shows very clearly his thought about the relations between law and interpretation: “It is open for a lawyer to argue, as I have myself, that the impact of the statute on the law is determined by asking which interpretation, of the different interpretations admitted by abstract meaning of the term, best advances the set of principles and policies that provides the best political justification for the statute at the time it was passed. Or it is open to him to argue the much more conservative position that if a statute was vague it must be taken to have changed the legal status quo ante only the extent justified by the indisputable core of the language employed.” (27)

The challenge of the interpretative turn in legal interpretation is that of finding a suitable balance between the demands of certainty and those of flexibility.

Law as integrity is an attempt to face this challenge: “Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretative judgements and therefore



combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative. So law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.” (28)

The risk is the sceptical drift implied by the challenge of the interpretative turn, as is clearly pointed out by Michel Rosenfeld in the concluding remarks of *Just Interpretations*: “In sum, all intersubjective meaning is derived by interpretation, and law, ethics, and politics...are at bottom but interpretation. At the end, the best we can do is to aim at a justice that depends on interpretation. That may not seem to be much, but it is everything.” (29)

### References

- (1) S. Toulmin, *The Uses of Argument*, Cambridge University Press, Cambridge, 1969, pp. 7-8.
- (2) N. MacCormick, *Legal Reasoning and Legal Theory* (1978), Clarendon Press, Oxford, (rev. ed. 1994), p. 7.
- (3) See, for example, G. Tarello, *L'interpretazione della legge*, Giuffrè, Milano, 1980, pp. 1-5.
- (4) M. S. Moore, *Interpreting Interpretation*, in A. Marmor (ed. by), *Law and Interpretation. Essays in Legal Philosophy*, Clarendon Press, Oxford, 1995, pp. 1-29. The definition of interpretation I quoted is at p. 2.
- (5) See G. Tarello, *L'interpretazione della legge*, ibidem.
- (6) On the concept/conception distinction, see H. L. A. Hart, *The Concept of Law*, Clarendon Press, Oxford, 1961, chapter VIII and also J. Rawls, *A Theory of Justice*, Oxford University Press, Oxford, 1971, chapter I.
- (7) See U. Eco, *I limiti dell'interpretazione*, Bompiani, Milano, 1990, pp. 15-38.
- (8) H. L. A. Hart, *The Concept of Law*, p. 1.
- (9) On the distinction between rules and principles, see R. Dworkin, *The Model of Rules I* (1967), now collected in ID., *Taking Rights Seriously*, Duckworth, London, 1977, pp. 14-45.
- (10) It is rather common – at least for the Italian and Spanish speakers who are scholars of legal philosophy – to distinguish between ‘disposition’ and ‘norm’. ‘Disposition’ indicates an utterance, legislative in a broad sense. ‘Norm’ indicates the meaning of this utterance. In other words, legislative dispositions are the object of legal interpretation, while norms are the output of the interpreting activity in the legal field. In this introductory note I do not take this distinction into account. On this distinction, introduced by Giovanni Tarello, see, for example, R. Guastini, *Teoria e dogmatica delle fonti*, Giuffrè, Milano, 1998, pp. 15-20.

(11) See A. Ross, *On Law and Justice*, Steven & Sons Ltd, London, 1958, chapter IV.

(12) This thesis is supported for example by H. L. A. Hart, *The Concept of Law*, chapter VII. Against the centrality of linguistic problems in legal interpretation see L. L. Fuller, *Positivism and Fidelity to Law*, “Harvard Law Review”, 1958, 71, pp. 630-672 and also, more recently, B. Bix, *H. L. A. Hart and the “Open Texture” of Language*, “Law and Philosophy”, 10, 1991, pp. 51-72.

(13) On the distinction between indeterminacy and under-determinacy see L. B. Solum, *Indeterminacy*, in D. Patterson (ed. by), *A Companion to Philosophy of Law and Legal Theory*, Blackwell, Oxford, 1996, pp. 488-502.

(14) H. L. A. Hart, *The Concept of Law*, p. 147.

(15) CH. Montesquieu, *De l'esprit des lois* (1748), in *Oeuvres completes*, book XI, chapter VI, Gallimard, Paris, 1951. Almost the same claim can be found in Beccaria's book *Dei delitti e delle pene*: “In ogni delitto si deve far dal Giudice un sillogismo perfetto; la maggiore dev'essere la Legge generale; la minore, l'azione conforme, o nò alla Legge; la conseguenza, la libertà, o la pena. Quando il Giudice sia costretto, o voglia fare anche soli due sillogismi, si apre la porta all'incertezza. Non vi è cosa più pericolosa di quell'assioma comune, che bisogna consultare lo spirito della Legge. Questo è un argine rotto al torrente delle opinioni [In every criminal cause the judge should reason syllogistically. The *major* should be the general law; the *minor*, the conformity of the action, or its opposition to the laws; the *conclusion*, liberty, or punishment. If the judge be obliged by the imperfection of the laws, or chooses to make any other or more syllogisms than this, it will be an introduction to uncertainty]” [C. Beccaria, *Dei delitti e delle pene* (1774), Edizione anastatica, Feltrinelli, Milano, 2001, § IV-*Interpretazione delle Leggi*, p. 9].

(16) CH. Montesquieu, *De l'esprit des lois* (1748), in *Oeuvres completes*, book XI, chapter VI, Gallimard, Paris, 1951. Almost the same claim can be found in Beccaria's book *Dei delitti e delle pene*: “In ogni delitto si deve far dal Giudice un sillogismo perfetto; la maggiore dev'essere la Legge generale; la minore, l'azione conforme, o nò alla Legge; la conseguenza, la libertà, o la pena. Quando il Giudice sia costretto, o voglia fare anche soli due sillogismi, si apre la porta all'incertezza. Non vi è cosa più pericolosa di quell'assioma comune, che bisogna consultare lo spirito della Legge. Questo è un argine rotto al torrente delle opinioni [In every criminal cause the judge should reason syllogistically. The *major* should be the general law; the *minor*, the conformity of the action, or its opposition to the laws; the *conclusion*, liberty, or punishment. If the judge be obliged by the imperfection of the laws, or chooses to make any other or more syllogisms than this, it will be an introduction to uncertainty]” [C. Beccaria, *Dei delitti e delle pene* (1774), Edizione anastatica, Feltrinelli, Milano, 2001, § IV-*Interpretazione delle Leggi*, p. 9].

- (17) H. L. A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, "Georgia Law Review", volume 11, number 5, 1977, pp. 969-989, quotation at p. 974.
- (18) J. Frank, *Law and the Modern Mind* (1930), Anchor Books Doubleday & C., Inc., Garden City, New York, 1963, p. 136, italics added.
- (19) See A. Ross, *On Law and Justice*, chapter IV.
- (20) For a more detailed analysis of this feature of contemporary legal thought see K. J. Kress, *The Interpretive Turn*, "Ethics", 97, 1987, pp. 834-860.
- (21) N. MacCormick, *Legal Reasoning and Legal Theory* (1978), p. 258.
- (22) R. Dworkin, *Law's Empire*, Fontana Paperbacks, London, 1986, p. 146.
- (23) R. Dworkin, *Law's Empire*, p. 114.
- (24) R. Dworkin, *Law's Empire*, p. 115.
- (25) R. Dworkin, *Law's Empire*, p. 151.
- (26) R. Dworkin, *Law's Empire*, p. 153.
- (27) R. Dworkin, *A Matter of Principle*, Harvard University Press, Cambridge (Mass.), 1985, p. 129.
- (28) R. Dworkin, *Law's Empire*, p. 225.
- (29) M. Rosenfeld, *Just Interpretations. Law between Ethics and Politics*, University of California Press, Berkeley, Los Angeles, London, 1998, p. 278.