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Ana Nettel

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INTERPRETATION IN LAW

Ana Nettel

The aim of this paper is to trace the main problems raised by interpretation in law. This is a difficult task, for the interpretative question is likely to be the central question of law; so a complete outlook of interpretation would involve reviewing the whole history of law, which is impossible in a brief space. This is why I will examine what I consider the key subjects of legal interpretation put forward by the main trends in legal philosophy.

Law being an authoritative social practice, is applied by officials; that is, people who are entitled by it to establish whether it is the case that the law regulates in a certain manner a state of affairs. Therefore, the question is what are officials entitled to do when applying the law?

There are at least five different positions:

- 1) The law is not to be interpreted; if there is not a clear answer there is no answer at all. We could call it the zero degree of interpretation, paraphrasing Barthes.¹
- 2) The text of the law is sometimes clear; when this is not the case officials must interpret it by discovering its hidden sense.²
- 3) There is no law prior to interpretation. The law is what the interpreter says it is; that is, whatever officials decide.³
- 4) The law is often indeterminate or sometimes incomplete; this is why judges must use discretion to choose among different possibilities which all are good answers or by creating an answer for the non-regulated case.⁴

¹ See Barthes, 1972.

² This was the traditional position maintained and developed at the end of the nineteenth century, among others by the Exegesis School in the Continental tradition. See for example Bonnacase, 1924 and Gény, 1919, for an account of this current.

³ This is the realists' position, both Americans (see Holmes, 1897, Frank, 1930, 1931, and Llewellyn, 1930, 1931) and Scandinavians (see Ross, 1958). Today, different trends claim to be their heirs: Michel Troper 1995 refers to a French Realist trend and the post-modernist currents whether neo-pragmatists (like Fish, 1980) or post-structuralists like Derrida's deconstruction followers. (Anthony D'Amato, 1989).

⁴ Positivists like Kelsen, 1967 and Hart, 1997 maintain that discretion is the means by which judges decide which of the different possibilities given by the text of law is to be enforced.

5) Law has a point; legal interpretation is a constructive enterprise that consists in rendering the best sense of law according to its point. Hence, there is always a right answer, one that best fits the point of law.⁵

All of these claims correspond to different conceptions of the nature of law. I will try to outline some of the problems raised by legal interpretation in virtue of their different theoretical assumptions. Firstly, I will consider the authority of the text of law. Secondly, intention in interpretation. Thirdly, I will refer to the problem of clearness. Fourthly, to the object of interpretation in law. And finally, to facts in legal interpretation.

The authority of the text of law

It has been argued that texts are, at least in legislated systems, the means by which the law is communicated to people, in such a way that they can guide their conduct. So what has been expressed in the text is the law, whether it correctly expresses the legislator's will or not.⁶ This position in its strongest version implies that the text of the law has a literal meaning, i.e. a univocal sense that must prevail independently of its author's intention. Hence, what has been called the prominence of the letter over the "spirit" of the law. However, the idea of literal meaning has been forcefully contested. It has been suggested that the semantic meaning of a sentence is indeterminate most of the time, due to the vagueness and ambiguity of natural languages.⁷ Therefore, its meaning is not univocal and can only be grasped by means of interpretation. On the other hand, if the law is created, or made by acts of communication of the legal authorities, i.e. a speech act, its meaning depends on both the situation and the context and cannot be reduced to its semantic meaning (J.L. Austin: 1962 and J. Searle : 1964).

⁵ Dworkin sustains this position against both positivists and postmodern currents. Against positivists, mainly for his rejection of 1) the idea that the law is indeterminate so there is not one right answer to all cases and 2) against the separability thesis; opposing postmodernists because of their refusal to accept that there is one better interpretation than others, i.e. that all interpretations are equally worthy.

⁶ This was Blandeau's position, who was in 1841 the Dean of the Faculty of Law at Paris University; cited by Gény, 1899.

⁷ The idea of a literal meaning corresponds to the referential theory of language, which was contested specially along the twentieth century's development of linguistic sciences.

A stronger sceptical position goes further by maintaining that there is nothing to be discovered in a legal text that we could call its meaning. The only meaning for a legal or any other text, contends this view, is the one that arises from interpretation. In that sense, prior to interpretation legal texts do not have any sense, they are only expecting the meaning the interpreter will give them (Troper: 1995). Would this mean that the interpreter is free to give any meaning to a legal text or are there any constraints from elsewhere?

(Neopragmatists like Fish think that interpreters are not free to give any meaning to a text in a particular sense, i.e. they are determined by the assumptions and beliefs of the community they belong to (Fish S., *Is there a Text in this Class? The Authority of Interpretative Communities*, Cambridge, MA, Harvard University Press, 1978 and *What Comes Naturally: Change, Rhetoric and the Practice of the Theory in Literary and Legal Studies*, Durham, Duke University Press, 1989).

Intention in Interpretation

The problems posed by the intent of the author of law are related to those of the authority of law. To identify who is the legislator amounts, under some conceptions, to determining who has the authority to command. However, the idea that the aim of legal interpretation is to retrieve the legislator's intention poses several problems. Firstly, who is the legislator? Secondly, how can we find out what his intention was? And thirdly, why and when is his will decisive?

Throughout the history of legal interpretation, the most pervasive conception is without doubt that which stems from the idea that law is the work of a guiding authority. This conception naturally relates the legislator with the figure of God: as God created the World *ex nihilo*, so the legislator is the author of the law. Hence, according to this vision of law, to interpret the law means to interpret the legislator's intent. This is why legal methods of interpretation ran parallel to the exegesis of the Holy Scriptures. As the priest is an intermediary between God and men, so the interpreter is an intermediary between the legislator and the law's subjects.

Yet the idea of the legislator's intention poses the problem of the nature of intentions. On the one hand, it has been suggested that only persons can be said to have intentions. Consequently, the idea that legal interpretation consists in retrieving the legislator's intent would only give

account of the cases where the legislator is a psycho-physical unity. However, in most modern legal systems, legislative bodies are collective entities to whom one cannot attribute intentions under the above idea. It has been argued that, notwithstanding the fact that legislative bodies are mainly plural, and that they are certainly not psycho-physical units, they nevertheless can have a collective intention, formed by the shared intentions of its members.

On the other hand, granted that intentions can only be attributed to human beings, how could we explain an intention ruling beyond the life of the author? To face this problem, some authors shift from the idea of human intentions to a conception of law that focuses on its institutional character. So law is only metaphorically understood as the work of an author, hence the idea of the intention of the legislator is only to be taken as a fiction that gives account of the rational purpose embedded in the whole legal system. The *Rational Legislator* theory asks judges to think as a super-rational legislator while interpreting the law, that is, to integrate the law in a coherent way that takes into account the whole system in order to avoid inconsistency. A further conception of intention could be one that is embedded in a collective enterprise, as in customary law or in other social practices.

Finally, an intentionalist has to face the justificatory question, namely: why and when has the interpreter to defer to the legislator's intention? As for the latter, it has been argued that certainly not all the intentions present in the mind of the legislator are relevant for the interpretation of a statute. For example, when the legislator would have had the purpose of obtaining personal advantage by enacting a law. This clearly would not be an intention that settles the meaning of the law.

As for the former question, namely the 'why', there are very strong arguments that favour the idea that judges should limit themselves to seeking the legislator's intention. One argument is that of democracy, which runs as follows: the obligatory character of law comes from the fact that it is created by an elected authority, whereas judges are generally not elected but named. A second argument is that of the division of powers: there must be a balance of power amongst those who make the law and those who apply it. If, while interpreting, a judge makes a new law, he would accomplish both functions. The third argument is that of legal certainty: people must know in advance what the law is in order to be able to avoid sanctions, but the subject would be unable to predict the consequences of his or her conduct if the judge while interpreting makes the law. Linked to this argument is the

principle of no-retroactivity or the rule of law, people must not be judged by laws created *ex post facto*, i.e. by men but by general standards that apply equally to all.

Assuming that the legislator's intention could be clearly identified, there are still many objections against these arguments. The main one involves questioning the idea that new generations should abide by past decisions. Hence, the interpreter's task should not be limited to retrieving the legislator's will in a conservative way. Conversely, according to the so-called Historic School (Savigny, among others), the judge's role consists in adapting the sense of legal norms to present social needs. Being judged by a law adapted to present times could paradoxically result in more certainty than by one that responds to the needs of former times.

Intention remains, after all these considerations, a problematic and unavoidable subject in legal interpretation.

The problem of clearness

It is said that when the law is clearly expressed, he who applies it must limit him or herself to its text. As we have stated above, the idea that a text might have only one semantic meaning has been highly contested.

Granted that texts may have a semantic⁸ meaning, there is still the possibility that at least occasionally there is no clear answer for a case. It might be because the law is not clear or because sometimes there is no specific law regulating a state of affairs. Given that most modern legal systems impose on judges the duty to give an answer to all the cases brought to them, the idea that if there is no clear answer there is no answer at all is untenable. Nevertheless, it is interesting to ask when we do find that there is a clear answer to a case. In other words, what are easy cases as opposed to hard cases?

Redundantly expressed, a clear case would be one where the answer is stated by a legal norm. According to some authors, this is roughly the case when the semantic meaning of a sentence is understood by any competent speaker, hence in those cases interpretation is not needed (A. Marmor 1992; ch.2). This is not the case when the norm is indeterminate or stated in such terms that its applicability to a case is not certain or when there is no legal norm regulating a case. Some authors deny the latter on the basis that, when the law does not regulate a conduct, it is permitted; hence there are no gaps. Others contend that, in those cases, judges have

⁸ I mean "semantic" in the Anglo-Saxon sense.

discretion to make new law. Various reasons have been given to explain the lack of certainty due to indeterminacy of the law. The following are just some of them:

Law may be indeterminate:

- 1) Because of natural language vagueness and ambiguity (Hart).
- 2) Because of an inconsistency between the will and the expression of the legislator (Kelsen).
- 3) Because of the impossibility to regulate everything explicitly (Kelsen).
- 4) Because of the diversity of the cases it regulates and the necessity to treat them differently (voluntary indeterminacy in Kelsen).
- 5) Because of our ignorance of all the cases that can be presented to a judge and all the facts involved (Hart).
- 6) Because of the evolution of purposes and aims a society may have.

Hence, if law is indeterminate, it has been argued, judges have to choose among different possible good answers or make new law when there is no applicable one. Legal interpretation according to this trend consists ultimately of an exercise of power.

Given all these reasons for indeterminacy, we can hardly think of a case where none of them is present. Nevertheless, easy cases can also be understood, as those cases where an answer to the interpretative question has gathered consensus amongst a community of legal experts. However this does not mean that no interpretation was needed, it only means that one answer is entrenched in the community. Understood in these terms, clarity would be a provisional characteristic of legal texts or cases; this accounts for the undeniable evolution of their sense.

The object of interpretation in Law

Up to now we have been tracing a debate about how to interpret or what to look for when interpreting a text of law; this presupposes that the object of interpretation in law is known. Nevertheless, this is far from being evident. Indeed the debate about interpretation can be posed as one about the object of interpretation in law. Is it an isolated article of a statute, a statute, a decision, or the legal system as a whole, namely the institution? This delicate question is crucial for the status of interpretation in law. The question of the identity of the object of interpretation in law seems to draw the frontier between a position that claims objectivity in legal thought and another that makes a shift into what some may pejoratively qualify as

subjective. The first trend could be described as one that sees interpretation in law as an activity about something that is 'out there', a fact. Interpretation would then be parallel to the common way in which knowing is understood. Conversely, a second trend contends that the interpreter of law is not the interpreter of a particular text: his task consists in retrieving the meaning of the institution itself. As a consequence, the problem of interpretation in law becomes the problem of the meaning of law instead of the meaning of a legal rule. According to this view, any theory of interpretation refers to a conception of law i.e. to its sense and purpose. Hence, even in difficult cases, there is always a right answer: the answer that is coherent with the point of law.

This second trend sees interpretation in law as a constructive activity, one that, by interpreting, creates its object at the same time. According to this view, there would be continuity between practice and theory. This again poses the main objection advanced by positivism to natural law theories, namely that they do not respect the requirements of objectivity demanded by science, for they constitute the object of study instead of describing it; and therefore their enterprise is not a scientific but political one.

Is objectivity an aim of interpretation or the opposite of interpretation?

Facts in legal interpretation

Now I will address another aspect of interpretation in law where the traditional concept of objectivity has much to do with the way it has been conceived by legal theory, namely the question of facts in judicial decisions.

Judicial decision is traditionally presented as a linear sequence of decisions: firstly, the decision about which is the norm regulating the case; secondly, the decision about the sense of this norm; thirdly, the decision about the facts of the case; and fourthly, the final decision given in the verdict. These decisions are presented in the form of a syllogism, in which the major premise is constituted by the relevant norm to be applied and the minor premise by the facts of the case; the final decision of the judge is the conclusion derived from them. The idea that these decisions follow a linear sequence suggests that each decision is self-contained, so to say, and that these different decisions are only related by the role they play in the syllogism. However, this is far from being the case. Judges are engaged in a complex and dynamic activity, going back and forth between the evidence

and their knowledge of the law. In order to decide what is the rule of the case the judge must first have a pretty good idea of what the facts are. Before deciding what is the law that rules the case, both in legislated systems as well as in Common Law, the judge, when looking for the rule or precedent relevant to the case, has to consider the so-called questions of fact. Therefore, the need to interpret in adjudication is not solely one that regards the law.

A canonical distinction between questions of law and questions of fact has distracted the attention of legal scholars from fact interpretation in law. The idea that they are very different matters is even more evident in legal systems where juries are entitled to decide questions of fact and judges questions of law. It is generally considered that the problems encountered in the constitution of the minor premise are problems of evidence, i.e. problems of coincidence between propositions and the outside world. According to this view, facts would be the objective part of the judicial decision, one which hinges on simple verification of data taken from 'what is out there.' The construction of the minor premise, it has been suggested, is far from being a simple question of verification, exterior to the subject of knowledge. There are no brute facts, not even those traditionally considered as observational; the more "objective" elements of science are theory-laden. Thus, the premise regarding evidence, that is, the minor premise of a judicial decision, is constructed within a tradition of legal reasoning. The acceptability of the statements establishing the facts in a case rests on the coherence with which the judge weaves the arguments through which he appraises the evidence submitted to him and by which he constructs the facts. 'Truth' then depends on the coherence with a web of beliefs shared by the community of specialists where it is produced, hence is context-dependent. According to this position 'truth' and 'objectivity' rely on what Michel Foucault termed 'truth system.'

To sum up, I would say that interpretation is inevitable in law due to at least four reasons: firstly, given the need to establish rules in advance of the events to be judged. This requires the use of general terms that are necessarily unable to describe in a precise manner. Even if this was possible, a general norm cannot refer to the particularity of the cases in which the law is applicable. Therefore, to subsume particulars under the legal general description inevitably requires interpretation. The second reason stems from the fact that law is expressed in natural languages because of its guiding function, and natural languages are vague and ambiguous. The third reason is that most legal systems impose on judges the duty to resolve the cases brought to them, so they are obliged to give an

answer no matter how difficult the case is. A fourth reason is the impossibility of foreseeing the features of coming cases and the future aims of society.

Roughly, we can say that the concepts of interpretation oscillate between two extreme positions. On the one hand, to interpret is to disembowel the meaning of something that is already 'there', in the object to be interpreted. On the other hand, to interpret is to give a meaning and more broadly a sense to the object of interpretation. The latter conveys the idea that interpretation is only required when the formulation of the rules leaves doubts as to its applicability in a set of circumstances. The former leads to the idea that interpretation is always required because rules do not have meaning; it is the interpreter who gives them a meaning. Among these extreme visions there is of course plenty of room for many intermediary positions.

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