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A Sceptical View on Legal Interpretation

1. *Scepticism Defined*

By scepticism – in the province of legal interpretation theories – I mean the thesis according to which interpretive statements are neither true nor false.

An interpretive statement is a meaning-ascribing sentence, i.e., a sentence to the effect that a legal (e.g., constitutional, statutory, etc.) text T means M or, in a slightly different formulation, that a legal provision P expresses a certain rule R<sup>1</sup>. This sceptical thesis does not suppose any particular theory of meaning<sup>2</sup>. It is merely the conclusion of the following simple argument.

(i) Jurists and judges actually disagree about the meanings of most statutory and constitutional sentences. In other words, most legal provisions are in fact interpreted, at least diachronically, in different ways.

(ii) *Ab esse ad posse valet consequentia*. Therefore most legal provisions are liable to different and competing interpretations.

(iii) Nevertheless, no truth-criterion is available for meaning-ascribing sentences – at least, nobody was able to identify and defend a convincing criterion. E.g., the theses according to which the truth-criterion of interpretive statements is either the common usage of language or the intention of lawgiving authorities – which in fact seem to suggest such criteria – are but normative theories of legal interpretation.

(iv) As a consequence, any interpretive decision – i.e., any act of interpretation accomplished by subjects, such as judges, who apply the law – supposes a choice between competing possibilities<sup>3</sup>. This amounts to saying that interpreta-

<sup>1</sup> Cf. R. Guastini, “Interpretive Statements”, in E. Garzón Valdés et al. (eds.), *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Bulygin*, Berlin, 1997.

<sup>2</sup> The thesis only assumes that words (viz., sentences) have no “objective” or “proper” meaning independent of use and understanding.

<sup>3</sup> Interpretation accomplished by law-applying organs must not be confused with “cognitive” interpretation, as accomplished by legal scientists, which consists not in choosing a definite meaning, but in listing – in a descriptive mood – the various possible meanings of the legal text at issue.

tion is not an act of knowledge but rather an «act of will»<sup>4</sup>, which always implies discretion.

(v) Hence the language of interpreters is not descriptive in character. Interpretive statements are not “constative” sentences: they lack truth value, i.e., they are not capable of truth or falsity<sup>5</sup>. Indeed, they do not describe the one and only supposedly pre-existing meaning; rather, they *ascribe* meaning.

## 2. *Variety of Interpretive Controversies*

The statement to the effect that most legal provisions are liable to different and competing interpretations should not be taken to imply that most legal provisions are (strictly speaking) ambiguous, i.e., that they can be interpreted *either* as expressing a certain rule *or* as expressing another. Of course ambiguity (semantic and syntactic) is an important source of interpretive perplexities and controversies<sup>6</sup>, but it is probably not the main one – after all, genuine ambiguity is rather unusual. Other kinds of controversies deserve to be mentioned – e.g., the following ones.

(a) Sometimes interpreters agree that a certain legal provision P expresses a certain rule R1, but they disagree as to whether P also expresses the rule R2.

(b) Sometimes interpreters agree that a certain legal provision P expresses a rule R1, but they disagree as to whether R1 also entails the rule R2.

(c) Sometimes interpreters agree that a certain legal provision P expresses a rule R1, but they disagree as to whether R1 is defeasible – i.e., subject to implicit and unspecified exceptions<sup>7</sup>.

Almost all legal sentences can give rise to interpretive questions of the mentioned kinds.

## 3. *Sources of Interpretive Controversies*

Interpretive controversies are often supposed to spring from certain objective properties (such as ambiguity, vagueness, indeterminacy, etc.) of lawgivers’ lan-

<sup>4</sup> H. Kelsen, *Introduction to the Problems of Legal Theory* (1934), translated and ed. by B. Litschewski and S. L. Paulson, Oxford, 1992, 82.

<sup>5</sup> The obvious reference is to J. L. Austin, *How to Do Things with Words*, Oxford, 1962.

<sup>6</sup> This is especially true of ambiguity affecting whole sentences and stemming (not from their formulation, but) from their context.

<sup>7</sup> On the concept of defeasibility cf. C. E. Alchourrón, “On Law and Logic”, in *Ratio Juris*, 1996.

guage<sup>8</sup>. This, however, gives an overly simplified picture of how legal communication actually works. The variety of interpretations of one and the same *legal* text stems mainly from two other factors (which are absent from everyday communication): first, the variety of commonly accepted interpretive techniques; second, dogmatics, i.e., the variety of juristic doctrines.

Different interpretive methods – such as analogy, distinguishing, argument *a contrariis*, and so on – lead to conflicting interpretive results.

Juristic doctrines – such as the doctrine of parliamentary government, the doctrine of the rule of law, the doctrine of torts, the doctrine of contracts, etc. – are logically independent of interpretation (being construed by jurists prior to interpretation and independently of the interpretation of any specified legal text) but nevertheless influence interpretation, either by turning it in a particular direction or by excluding certain interpretive choices.

#### 4. Interpretation and Law Creation Distinguished

In a sense, interpretation is the very source of legal rules, since «it is only words that the legislature utters», and legal texts «do not interpret themselves»<sup>9</sup>. I mean that law-giving authorities issue not meanings (rules), but just sentences, whose normative meaning contents – i.e., the expressed rules – are to be detected by means of interpretation<sup>10</sup>. This is not to say that legal sentences have *no meaning at all* before interpretation. Scepticism claims only that, prior to interpretation legal sentences have no *definite* meaning, since they are liable to different interpretations.

Nevertheless, interpretation is to be distinguished from the creation of new rules. A legal sentence typically admits of a number of interpretations – but it does not admit any interpretation *whatsoever*. Following Kelsen, one may say that each legal sentence provides interpreters with a “framework” of possible meanings<sup>11</sup>. Such a framework depends on the rules of the language at stake, the methods of interpretation commonly accepted, juristic doctrines, precedents, etc.

It may happen, however, that a particular interpreter (e.g., a judge) breaks out of the framework, and ascribes to a legal sentence a “new” meaning which is *not* included in the framework. Such an ascription of meaning is not a suitable move in the game of interpretation strictly understood – it amounts to the creation of a “new” rule.

<sup>8</sup> Cf. e.g. A. Ross, *On Law and Justice*, London, 1958, 111 ff.

<sup>9</sup> J. C. Gray, *The Nature and Sources of the Law*, second edition from the author’s notes, by R. Gray, New York, 1948, 170, 125.

<sup>10</sup> G. Tarello, *L’interpretazione della legge*, Milano, 1980.

<sup>11</sup> H. Kelsen, *Introduction to the Problems of Legal Theory*, 80 f.

### 5. *Hard and Soft Scepticism*

The *soft* form of scepticism defended in this paper<sup>12</sup> is not to be confused with what I shall call *hard* scepticism. According to hard scepticism, in the game of legal interpretation “anything goes”: interpreters, namely supreme courts judges, can ascribe to any legal text any meaning *whatsoever*, making it impossible to distinguish between genuine interpretation (i.e., the choice of one definite meaning within a framework of admissible meanings) and the creation of new rules<sup>13</sup>.

*Prima facie*, hard scepticism seems to be supported by a thesis of Kelsen’s, viz., the thesis according to which, in most legal systems, positive law attaches legal effects to any interpretive decision whatsoever that may happen to be enacted by a law-applying organ. In other words, positive law does *not* distinguish between interpretive decisions falling within the framework of admissible meanings and interpretive decisions falling outside such a framework<sup>14</sup>: all interpretive decisions of law-applying organs have the same legal consequences, viz., they create “individual norms” in force.

Kelsen’s thesis is quite correct. However, it is immaterial to the theory of legal interpretation. Kelsen here provides nothing more than a description of positive law. Perhaps all interpretations are, in a sense, equivalent from the point of view of positive law, but they are not equivalent from the standpoint of the theory of legal interpretation, which investigates interpretation as such, not the positive rules which govern the legal effects of interpretive decisions. Kelsen’s thesis in no way denies the distinction between interpretive decisions within and outside the framework; and that distinction is of utmost significance for the analysis of actual interpretative practices.

### 6. *Text-oriented and Fact-oriented Interpretation*

Two kinds of interpretation should be sharply distinguished.

(i) Text-oriented, or *in abstracto*, interpretation amounts to ascribing meaning to a legal text – i.e., deciding which rules such a text expresses – without attention to any particular case<sup>15</sup>. Text-oriented interpretation resembles translation: it consists in giving the interpreted text a new formulation, i.e., “translating” the lawgivers’ language into the language of the interpreter. Accordingly,

<sup>12</sup> *Supra*, § 4.

<sup>13</sup> M. Troper, *La théorie du droit, le droit, l’État*, Paris, 2001, 69 ff.

<sup>14</sup> H. Kelsen, *Théorie pure du droit* (1960), traduction par Ch. Eisenmann, Paris, 1962, 453 ff.

<sup>15</sup> Rules attach legal consequences (obligations, rights, sanctions, etc.) to *classes* of cases.

its result is a new text purportedly synonymous with the original one.

(ii) Fact-oriented, or *in concreto*, interpretation, in turn, amounts to subsuming an individual case under a rule, i.e., to deciding whether or not an individual case falls within the scope of a given rule (belongs to the class of cases subject to the rule). Its output, in continental jurists' language, is the "legal qualification" of the facts of the case.

Text-oriented interpretation is interpretation in the strict sense. Fact-oriented interpretation simply amounts to the application of law. Text-oriented interpretation affects the major premiss of a judicial syllogism, while fact-oriented interpretation affects the minor premiss<sup>16</sup>.

### 7. Scepticism vs. Open Texture Theory

Nowadays, the most influential theory of legal interpretation assumes that the main problems of interpretation depend on the open texture of language. Any legal provision has a core of settled meaning side by side with an area of penumbra – or so the theory runs. Accordingly, two classes of cases can be distinguished: easy cases (which fall within the core) and hard cases (which fall within the penumbra). Law-applying organs have no interpretive discretion in clear or easy cases, where a "right answer" is provided directly by the law, while any interpretive decision is discretionary when a hard or borderline case is at hand<sup>17</sup>. In easy cases interpretive statements are true or false; only in hard cases are they not.

This view is correct as far as fact-oriented interpretation – i.e., the application of rules to individual cases – is concerned. Fact-oriented interpretation, however, aims at determining the scope of rules. Therefore it presupposes the previous identification of the rules at issue. In other words, it presupposes text-oriented interpretation. But the main problems of interpretation do not pertain to the application of previously identified rules. Rather they pertain primarily to the identification of rules themselves, i.e., to the process of extracting rules (meaning contents) from legal sentences<sup>18</sup>. The open texture theory completely disregards the problems of text-oriented interpretation.

<sup>16</sup> Cf. M. Troper, *La théorie du droit, le droit, l'État*, 106 ff.

<sup>17</sup> Cf. e. g. H. L. A. Hart, *The Concept of Law*, Oxford, 1961, 124 ff.; N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford, 1978, 195 ff.; C. Luzzati, *La vaghezza delle norme. Un'analisi del linguaggio giuridico*, Milano, 1990; G. R. Carrió, *Notas sobre derecho y lenguaje*, 4th ed., Buenos Aires, 1994, 49 ff.; J. J. Moreso, *La indeterminación del derecho y la interpretación de la Constitución*, Madrid, 1997, 108 ff.; E. Diciotti, *Interpretazione della legge e discorso razionale*, Torino, 1999, 367 ff.; T. Endicott, *Vagueness in Law*, Oxford, 2000.

<sup>18</sup> *Supra*, § 2.

The open texture theory therefore gives a seriously misleading picture of legal interpretation, since interpretive discretion relates almost entirely to text-oriented interpretation, rather than to subsumption. As far as text-oriented interpretation is concerned no “right answer” exists, since various “answers”, i.e., alternative interpretations, are always available, and, from a purely descriptive point of view, no one of them can be deemed right.