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Law and Legal Interpretation

Edited by

**Fernando Atria Lemaitre
and D. Neil MacCormick**



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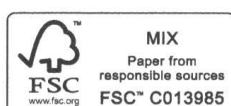
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Introduction

Interpretation is one of the central elements in legal thought and activity. Lawyers have always needed to ascribe meaning to general terms and face cases in which either the meaning of them is not perspicuous or circumstances are present that are special in some way. For legal theory, however, interpretation and legal reasoning were important but marginal subjects, in the sense that the central questions legal theorists wanted to discuss did not include interpretation as a topic. Thus some of the most sophisticated legal theorists of the twentieth century did not think it necessary to develop a complete theory of legal interpretation as part and parcel of a broader theory of law. As an illustration of this claim one could turn to Kelsen's *Pure Theory of Law* (1970) which explicitly discussed interpretation in the last (and shortest) chapter or Hart's *The Concept of Law* which, as Hart himself conceded some 30 years after its publication, 'said far too little . . . about the topic of adjudication and legal reasoning' (Hart, 1994, p. 259).

During the last decades, however, interpretation (together with the related issue of legal reasoning) has been at the centre of the theoretical reflection about law. What is it that lawyers and judges and laypersons do when they *interpret* the law? Does the process of legal interpretation show that there is some connection between law and morality? Is it constrained by what is interpreted, or is it always (or usually, or sometimes) 'unfettered discretion'? How much of what lawyers do is properly called 'interpretation'? Questions such as these have been hotly discussed at least since the publication of Ronald Dworkin's 'Is Law a System of Rules?' (1970), which has been reprinted so many times that it has not been included in this collection (see, for example, Dworkin, 1977a and 1977b).

Starting from questions of this kind, one could try to systematize the problems surrounding the issue of legal interpretation in current legal theory under six headings, which form the basic structure of the present collection. This arrangement makes the collection more manageable for the reader, but risks giving the impression that only the corresponding subject is being discussed in each essay. In this Introduction we want to discuss generally the relevance of these six topics, and indicate the important contributions made by each of the selected essays. Along the way this will allow us to mention some of the aspects in which arguments or positions discussed in one essay have broader implications for subjects other than that denoted by its respective heading.

Interpretation and Law: Why is Interpretation Important for Law?

That interpretation is central to the practice of law is something that can hardly be denied. But this does not settle the theoretical problem, *why* is interpretation so important? An answer to this problem cannot be limited to pointing out that legal rules are general rules and they are used to solve particular cases, because in many social practices the need to apply general rules to particular cases does not make interpretation as important as it is in law (consider the 'interpretation' of the rules of chess, for example) (cf. Atria, 2002, ch. 1). Hence there must be

something special about law that makes it so dependent on interpretation. As Joseph Raz says in Chapter 2, this seems to suggest that there is something to be learned 'about the nature of law from the fact that interpretation plays such a crucial role in adjudication' (p. 17).

The two essays grouped under this heading provide two different answers to this problem. In his 'Law, Philosophy and Interpretation' (Chapter 1), Ronald Dworkin provides a useful restatement of the theory of law and interpretation he has developed over the last 20 years, particularly in and after *Law's Empire*. Dworkin's theory is particularly interesting when discussing the issue of legal interpretation, because he believes that there is an important sense in which interpretation is not something lawyers and judges sometimes do, but is in a way *constitutive* of law. Traditionally, one would think of interpretation as a specific activity directed to understand a rule or apply it to a particular case. This view seems to imply that there are (first) legal rules that have to be (second) interpreted and applied. Dworkin's thesis of law as an interpretive concept challenges this viewpoint.

In his essay Dworkin emphasizes the fact that interpretation is not a purely legal phenomenon. Reliance upon interpretation is common for practices that share one feature: they are 'regarded by those . . . who take them up not as pointless but as beneficial or worthwhile in some other way' (p. 9).

Now, the particular way in which a particular practice like history or law is valuable depends on the participant's opinions about the practice. Hence, for example, Dworkin explains that there is a significant difference between historical and legal interpretation, in that the latter is not guided by an 'explanatory purpose' (p. 14) as the former is – a difference that will resurface in Detmold's essay, based on the idea of law being practical as sociology is not (cf. p. 36). Legal interpretation aims to make law 'as just as it can be' (p. 14). In this way, Dworkin treats law as inextricably connected with political morality, which is the reason why MacCormick (1976) called him a 'pre-Benthamite'. But this seems to leave Dworkin open to the objection that law is 'subjective' in the same sense in which political morality is. To this, Dworkin has famously replied with his 'right answer' thesis.¹ In its current version, the right answer thesis cashes in on the performative contradiction that prevents any agent from saying *both* that there is no 'correct' answer to controversial questions of political morality (or morality, or law and so on) *and* that something (abortion, say) is right (or wrong). Any objectivity that law may have is founded on the objective nature of the basic truths of political morality, *as perceived by the participants*.

In *Law's Empire* this argument was presented as the distinction between external and internal scepticism: *internal*, interpretive scepticism is *substantive* scepticism, in the sense that it is the conclusion we could reach after having examined the reasons for and against a particular proposition or decision and rejected them all. *External* scepticism is scepticism about the interpretive process: it is not an interpretive claim; it is a claim about interpretive claims. Dworkin believes that we can ignore external sceptics because they do not engage with us. The only scepticism that should give participants to an interpretive practice cause for concern is internal scepticism.² But there is no reason to believe that it will be sensible to adopt a generalized internal sceptical position: sometimes we will have reasons to believe that one action, decision or proposition is true (or justified or whatever), and we will have reasons to reject the sceptical position on that issue. And sometimes we might be convinced of the non-existence of an answer that is correct or true or justified, and we will accept scepticism regarding this issue. Notice that if we adopt the internally sceptical position regarding an issue (for example, abortion), then,

when asked, we will have to say that we take the position that there is no way of deciding whether it is right or wrong. This argument of Dworkin's, and the broader subject of the possibility of solutions to controversial questions (hard cases) being correct, is one subject that is discussed by many of the essays in this collection.

Dworkin's rejection of external scepticism, and his claim that only internal, *interpretive* scepticism is to be taken seriously, shows that interpretive practices are self-referential, in the sense that whether or not practices are interpretive is in itself an interpretive question. If we grant Dworkin's point, all the following questions should be understood as being interpretive: 'Is the law interpretive?', 'Are interpretations "objectively correct"?', 'Are there right answers to difficult questions?' and the like.

In his essay, 'Why Interpret?' (Chapter 2) Joseph Raz seems to get close to a Dworkinian theory of interpretation when he writes that '*[a]n interpretation successfully illuminates the meaning of its object to the degree that it responds to whatever reasons there are for paying attention to its object as a thing of its kind*' (p. 23). There appear, however, to be two significant differences between them. First, Raz seems to believe that his (quoted) claim at p. 23 warrants some sort of 'interpretive pluralism' that seems to be incompatible with Dworkin's right answer thesis. Having noticed that different people may have different reasons to understand history, he goes on to say that 'it is plausible to suppose that these reasons will lead to somewhat divergent interpretations of various historical events and processes. Hence pluralism' (p. 24). To establish pluralism, however, it is not enough that different interpretations are possible: one has to claim that they are all equally valid. And Raz indeed adds, '[i]t is possible for them to be good reasons, and they may be valid simultaneously' (p. 24).

Second, Raz differs from Dworkin in terms of the viewpoint from which his argument is formulated. Dworkin's theory of law is, and has always been, formulated from the 'internal, participants' point of view; it tries to grasp the argumentative character of our legal practices by joining that practice and struggling with the issues of soundness and truth participants face' (Dworkin, 1987, p. 9). Raz's is a *detached* perspective – that is, a perspective characterized by the fact that the observer, who is not a participant, *mimics* the attitudes of participants to understand their practices as they appear to them.³ This helps to explain the notion of interpretive pluralism defended by Raz in this essay: If *I*, as a participant, believe that history is about 'predicting the future' (one of the possible reasons for historical interest in Raz's example at p. 24), *I* must also believe that those who think that history is about 'understanding God's message to man' are mistaken. But *I* might be observing an argument between two people holding these two views. If this is the case, *I* might report *their* disagreement about history as the confirmation that there is more than one plausible way of understanding the value of history.

Turning to legal interpretation, Raz claims that what makes legal interpretation important is that, in law, 'we value . . . continuity [and] authority, legal development and equity' (p. 25). The key to the question, 'Why interpret?' is provided, however, by the values of continuity and authority. Raz believes that law's immanent claim to be morally justified accords to these two values a pre-eminent role in answering this question because 'to understand the law we must understand the way the law understands itself' (p. 26). This is the reason why the answer to the title question is 'the moral respect we owe to [the law]' (p. 27). The two other values, legal development and equity, come in only at a second stage, when the question is not 'Why interpret?' but 'How should we interpret?'.

Raz's essay belongs with a number of his other pieces on legal reasoning and interpretation, a subject to which he has devoted a series of essays including the one offered in this collection (see, for example, Raz, 1994a; 1998a; 1998b). They naturally invite the question, 'How compatible are Raz's considerations concerning legal reasoning with his own theory of law, as deployed in works such as *Practical Reason and Norms* (1992), *The Morality of Freedom* (1986) and "Authority, Law and Morality" (1994b)?'. In another essay also included in this collection, Fernando Atria (Chapter 4) investigates this issue, claiming that they are at odds. The reason for this, in brief, is Raz's characterization of legal rules as exclusionary reasons (Raz, 1992, pp. 142–43). If rules are exclusionary reasons, it seems that, after having understood the meaning of a rule, all that is left for the institutions called to apply it is to act on the basis of that rule, excluding all conflicting considerations. In the terminology of Raz's theory of law, Atria claims, those conflicting considerations would be pre-empted by the exclusionary character of legal rules.

Interpretation and Legal Reasoning: Law and Morality

We have seen that one of the reasons why interpretation became such a fashionable topic for legal theory in the last decades was Dworkin's idea of *constructive* interpretation, of interpretation being, in a way, constitutive of the practices in which they are formulated and consequently of *legal* interpretation being, in some way, *constitutive* of law. But there is another reason that explains the increased interest in the related subjects of interpretation and legal reasoning, and it is that these topics became the battleground in which that very traditional and recurrent problem for legal theory was disputed: that of the existence of some form of necessary relation between law and morality.

In *The Concept of Law* (1994), Hart tried to provide a theory of law that could do justice to the normativity of law – as previous theories like those of Bentham and Austin had failed to do – while holding fast to the distinction that they (and others) had drawn between law and morality (MacCormick, 1981, ch. 2). This he achieved, or so it seemed, with his theory of social rules, and in particular (for law) with his seminal idea of the rule of recognition. The rule of recognition was conceived of as a social practice the existence of which could be ascertained independently from its moral worth, and its function was to set out the criteria for any *other* normative criteria to belong to the legal system. In this way, Hart was able to explain the fact that rules could be both valid *and* unjust. A legal rule exists as such when it fulfils the criteria specified by the rule of recognition, and there was no reason why those criteria *had* to include reference to moral value.

In a way, this point seemed to fit with the way in which legal systems work, in the sense that the criteria for something being a rule of (say) English law seems to be non-moral, pointing mainly to the occurrence of *facts* such as the queen giving royal assent to a piece of legislation that has been voted favourably by a majority of members of both Houses of Parliament and so on.

In this context, and with regard to legal reasoning and interpretation, one might concede (or remain agnostic concerning) Hart's point about rules being valid regardless of their intrinsic moral worth *and* claim that this is not enough to support the positivist's claim about the separation of law and morality. This is the position taken by Atria and Detmold in their essays in this collection, although they offer different reasons to support their claims.

In his 'Law as Practical Reason' (Chapter 3) Detmold takes as his starting point the *practicality* of law. From law's practicality follows the practicality of legal reasoning: 'legal reasoning is practical in the sense that its natural conclusion is an action' (p. 35). In applying rules to particular cases, judges need to cross what Detmold calls 'the particularity void', because:

... there is a radical logical difference between the most highly defined set of universals and a particular case; a radical difference between interpretation and the crossing of the particularity void. (p. 38)

The particularity void occupies a space between a hypothetical rule mandating one normative consequence (nc) to follow the occurrence of operative facts (op) and a particular case in which (op) and indefinite other facts are present.⁴

For Detmold, this is a void 'about which nothing can be said (anything I *say* will be universal)' (p. 55), about which 'only mystical, poetic things can be said or nothing'. Furthermore, '[j]udges enter this realm every day (if they only knew)' (p. 56). Respect for particulars demands that the particularity void be bridged, and to bridge the void the judge needs to address the particular *as particular*, not as simply an instance of a universal rule. In other words, the judge will have to make a *judgment* about the reasonable thing to do in the circumstances, in the concrete and particular case.

Does this not amount to a claim that the judge is never bound by law? Not for Detmold. Here we come to the point made before, of interpretation and legal reasoning as providing a different way of tackling the old problem of the relation between law and morality.⁵ In principle, one could accept Hart's view on the rule of recognition, and with it the claim that the existence of a legal rule is something that is not necessarily linked to its moral value, *and* Detmold's claim that legal adjudication is necessarily a matter for practical (moral) judgement. Detmold points this out by distinguishing:

- (1) apply what is reasonable
from
- (2) apply what is reasonable to apply.

The judge is bound by law insofar as he or she is not supposed to discuss what is reasonable. A rule that fulfils the criteria set out by the rule of recognition specifies what is reasonable, and '[t]here is no question of redeliberating that question' (p. 52). But Detmold makes the point that this still leaves the judge in the dark, because 'what is reasonable to apply has not been decided by the legislature and cannot be decided ... no respect can be given to a decision that has not been made' (ibid.).

In a likeminded way, Fernando Atria's essay, 'Legal Reasoning and Legal Theory Revisited' (Chapter 4), deals with the relation between a theory of law and a theory of legal reasoning. Atria claims that a theory of law, in answering the question 'What is law?', specifies what counts as a normative premise for legal reasoning. We can then test the correctness of a theory of law by considering whether the picture of legal reasoning and legal interpretation permitted by a given theory is acceptable (see, further, Atria, 2002). Concerning legal positivism, Atria claims that it implies either rule-formalism or rule-scepticism. Reduced to its essentials, the argument is this: we can formulate the central problem of a theory of legal reasoning as an answer to the question 'What does the law require in this particular case?' or, identically, 'What

is the legal obligation of the judge concerning this case?'. Positivism leads to formalism if it claims that rules apply to all cases that are covered by the semantic meaning of their operative facts, regardless of any other feature the particular case may have or lack. To avoid formalism, positivism could claim that the question 'What is the law?' is different from the question 'What is the law *for the case?*', so that from 'the law is: if (op) then (nc)' we could not immediately infer that (nc) is legally required in a particular case displaying (op), because the case may also display some other features that defeat the application of the rule. This, however, would imply rule-scepticism insofar as the link between the validity of a general rule requiring 'if (op) then (nc)' and a particular case displaying (op) would be severed: in order to apply a general rule to any particular case, the judge would have to make what Hart (1994, p. 135) called a 'fresh judgment' to the effect that the rule is not defeated. But, of course, this judgment is one for which, according to legal positivism, the judge has discretion. So judges have discretion in all cases (=rule-scepticism). Atria claims that this problem is visible in the theories of such authors as Neil MacCormick, Joseph Raz and H.L.A. Hart.

Instead of discussing the issue of interpretation and its relation to morality, as Detmold does, or to legal theory, as Atria does, Michael Moore, in 'A Natural Law Theory of Interpretation' (Chapter 5), defends a theory of interpretation – a theory that aims at explaining how interpreters should interpret the law. The theory of interpretation that Moore defends, however, is not neutral concerning issues about the linkage of law and morality. It is, in fact, as the title says, a 'natural law' doctrine of interpretation, a phrase that he explains as holding, first, that there is a right answer to moral questions, 'a moral reality if you like' (p. 122), and, second, 'that the interpretive premises necessary to decide any case can and should be derived in part by recourse to the dictates of that moral reality' (ibid.). A further point of importance stressed by Moore in other writings, and relevant here too, is the claim that there is a 'legal reality' that is connected to, but by no means identical with, moral reality. In the same way, however, in both cases there are true statements about law and morality that are true by virtue of the character of the subject matter they describe, rather than by virtue of conventions built into language or social usages that are prevalent here or there. In the view of such a robust metaphysical realism (not to be confused with legal realism!), the essence of a good interpretative practice is that it discloses the true meaning of the object in view, not that it constitutes such a meaning by virtue of being a good interpretation, as Dworkin seems to suggest.

In the essay, Moore examines the relevance that four notions have for interpretation: meaning, legislative intention, precedent and values. All these notions except legislative intention are taken up by Moore's theory in special ways.

Take meaning, for example. In the essay Moore defends a realist position with regard to the issue of the meaning of meaning.⁶ Moore believes that our general conceptual terms, including terms like law, refer to real objects, and new discoveries about the nature of the objects in question do not involve a change in the meaning of the term in question but a better understanding of what it means. A prominent feature of Moore's work is to try, in this context, to figure out the idea of 'texts' as the subject matter of activity that is interpretative in the humanistic sense, rather than in the causal sense that would apply in the natural sciences. He puts this concisely in an essay written ten years later than the seminal essay reprinted here:

There is a text, and thus interpretation in the desired sense, whenever (1) people have some good reason (2) to treat some phenomenon they do not yet know the meaning of, as meaningful, (3) in