Legal Interpretation and Scientific Knowledge

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Editors

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Introduction

Legal interpretation is a powerful tool in the context of legal reasoning. Its resonance in the field of legal theory goes well beyond the mere study of the meaning of words. Legal interpretation truly represents the arena in which most discussions over legal objectivity and legal science take place and the various accounts of this common practice symbolise the adoption of several, often diametrically opposed, legal theories: objectivists, interpretivists, neo-sceptics, originalists, purposivists, etc. But legal interpretation is empirically also a vehicle for the promotion of moral and political views of the interpreters. This happens in legal day-to-day life as any practitioner will know better. A demarcation issue thus arises: what counts as interpretation and what should be deemed as going beyond this intellectual move are of critical relevance.

The connection between legal interpretation and scientific knowledge, made apparent in the title of the book, does not intend to convey a specific account of legal interpretation. In fact, the vast majority of the authors in this book hold different views on what should count as legal interpretation and what features and properties identify this activity. Notwithstanding, all are committed to endorsing a strong scientific take on dealing with the matter, that is, with the use of hard concepts and predominantly logical arguments. This becomes apparent with a brief description of the articles.

Jaap Hage opens up by drawing an interesting line between law *tout court* and positive law while providing reasons for minimising the relevancy of deploying hermeneutical arguments in law. In his view, positive law only determines law to a given extent as the latter is first and foremost a practical reason: an answer to the question of how to act and, more in particular, the question of which rules to enforce by collective means. He focuses specifically on how hermeneutical theories may undermine legal certainty and democracy. He goes on to conclude that positive law can only contribute to legal certainty if its application is predictable, something that does not happen when positive law is liable to different interpretations. His conclusion is that, that being so, hermeneutical theories—*qua* theories about the interpretation of positive law—are particularly relevant precisely where positive law is not

relevant for the content of the law *tout court*; therefore, lawyers should not waste their time on them.

Riccardo Guastini's article sustains a moderate view of interpretive scepticism and provides reasons for this account of legal interpretation. He begins by distinguishing the different senses of 'interpretation' and the conceptual limits of this intellectual move, notably by arguing that not every sentence claiming to be interpretive can be reasonably subsumed under the concept of interpretation. His moderate scepticism is portrayed by the defence that interpreting encompasses ascribing one meaning to words provided that such meaning falls within the range of meanings arising out of linguistic usage, accepted interpretive methods and juristic (dogmatic) constructions. He concludes that such a concept is of paramount importance to draw a line between ordinary ascription of meaning to legal texts—*i.e.*, adjudicative interpretation properly understood—and genuine 'interstitial legislation' by jurists and judges.

Interpretive scepticism is taken a bit further with Giorgio Pino's essay. His article poses relevant questions as to whether legal interpretation may be dubbed a scientific enterprise. He claims that, ultimately, legal interpretation belongs less to the realm of science than to the realm of politics as it is depicted as an intensely evaluative and decisional activity rather than a descriptive, objective and value-neutral one. Therefore, an interpretive endeavour truly departs from scientific canons as they are currently accepted. Giorgio Pino provides us with several examples and concludes by sustaining that a scientific account of legal interpretation may lead to distorting some central features—indeed the very 'essence'—of the practice known as 'legal interpretation'.

Interpretive scepticism is also at stake in the next essay. Pedro Moniz Lopes and Raquel Franco intend to devise a naturalistic account of legal interpretation rooted on the neo-sceptical paradigm of legal interpretation, particularly the non-cognitivism of Riccardo Guastini. Upon drawing the main conceptual premises of legal interpretation, they challenge the paradigm, accepted by most analytical legal theorists, of the 'free-willed rational man' and pin it against the main scientific theses of neuroscience and evolutionary psychology. In doing so, they suggest that it may be time to conceive 'naturalizing' legal interpretation by complementing an otherwise anthropologically spare model by attending to the invariants of both language and human interpreters. A theory of interpretation should have explanatory power: describing and explaining what input (that is, what combination of facts and reasons) produces what interpretative output while accounting for the differences between 'hardware' and 'software' or, as they call them, the permanent (P-)conditions and contextual (C-)conditions of interpreters.

Jorge Silva Sampaio takes non-cognitivism down a notch in his article. He takes on interpretive scepticism and sustains that legal knowledge may indeed be (objectively) obtained to a certain extent. Rooted on a 'soft normativist model', Jorge Silva Sampaio sustains a broad account of legal interpretation, mainly that (1) interpretation falls upon the object of legal formulations; (2) law is only partly or locally indeterminate, which guarantees a high level of scientificity in the cases of determinacy; and (3) interpretation is a norm-guided operation by natural language and legal

interpretative norms. He finishes off by attempting to demonstrate that legal knowledge can be scientific, especially in cases of legal determinacy. In view of this, Jorge concludes that, if it is possible to make truth-bearing propositions about law in some cases—clear cases— then there is room for legal objectivity.

Izabela Skoczeń departs from the array of subjects dealt with in the previous articles. She focuses her analysis on W. Baude's and S.E. Sachs's paper entitled 'The Law of Interpretation', in which the authors sustain that a 'law of interpretation'—*qua* a set of both written and unwritten rules, including the canons of construction—exists in the law. She begins by assessing the non-homogeneity of such unwritten rules and relates that non-homogeneity with different more fundamental facts to which these unwritten rules of interpretation are related. Izabela Skoczeń argues that the elements of the law of interpretation that are indeed incorporated into the law are in fact scarce and conducts an investigation on the reasons for this state of affairs. She concludes that the main two reasons for such scarcity are to be found on the nature of context and the structure of all-things-considered moral arguments, which she thoroughly analyses.

Ana Escher's paper focuses specifically on linguistic ambiguity, particularly vagueness. She opens up by questioning what should count as a vague term. Then she moves on to identify the unclarity of this property across relevant literature, something that she links with a predominant adoption of a borderline definition of vagueness. Ana Escher then proceeds to criticise the accuracy of this account of vagueness and presents a different, more workable, criterion for identifying vague predicates, making a case that this is even more indispensable in law where vagueness implies discretion. She concludes with addressing relevant questions of what causes vagueness and how it is to be distinguished from familiar semantic phenomena.

Bojan Spaić provides us with an overview of doctrines that represent the 'institutional turn' in theories of legal interpretation, notably those of Jeremy Waldron, Victoria Nourse, Cass Sunstein, Adrian Vermeule and Scott Shapiro. He concludes that while the institutional turn in legal interpretation offers some significant insights into legal interpretation and interesting perspectives on the appropriate interpretative methodologies, it should not go without remarks. His stance is that the 'institutional turn' eschews parts of traditional accounts of legal interpretation that are arguably worth preserving in any theory of legal interpretation.

The book ends with David Duarte's take on the demarcation problem and the scientificity of legal science. He claims that scientific endeavours in law depend both on a correct definition of the tasks of legal science and on the degree of compliance with 'demarcation criteria'. In his view, a correct definition of the tasks of legal science allows for differentiation from other related, albeit totally different, subject areas, while the degree of compliance with demarcation criteria provides legal science with scientific reliability and enables it to produce truth or truthlikeness outcomes. David Duarte claims, however, that both previous conditions cannot ascertain and develop with the traditional descriptions of the tasks performed by legal scholars. He concludes that scientificity of legal science demands for a normative epistemological approach in order to establish a perimeter of what might be

'good science' and to define the goals to be accomplished within an activity with the specificity of the 'ought to be' as object of inquiry.

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