

IS STATUTORY INTERPRETATION SOLELY AN EXERCISE IN RETRIEVING THE DRAFTERS' INTENTIONS? R. DWORKIN'S VIEW OF JUDGES' INTERPRETATION OF THE LAW

FERNANDA ARANHA HAPNER¹

Abstract: It is not always clear what method the judges use to interpret the law applicable to the cases to be ruled. It is argued by some philosophers of law that one should investigate the drafter's intention in order to reach an adequate judgement. On the other hand, authors including Ronald Dworkin explains how this method of interpretation cannot be useful and neither considered correct. This essay focus especially on Ronald Dworkin's thought and his explanations on the subject.

Key-words: law interpretation, drafter's intentions, Ronald Dworkin;

Resumo: Nem sempre é claro o método que os juízes utilizam para interpretar a lei aplicável aos casos a serem julgados. Vários filósofos do direito argumentam que se deve investigar a intenção do legislador para alcançar um julgamento adequado. Por outro lado, autores dentre os quais se inclui Ronald Dworkin explicam como esse método de interpretação não é útil e nem deve ser considerado correto. Este ensaio enfoca especialmente no pensamento de Ronald Dworkin e em suas explicações sobre o assunto.

Résumé: On ne sait pas toujours quelle méthode les juges utilisent pour interpréter la loi applicable aux affaires à juger. Plusieurs philosophes du droit soutiennent que l'on devrait enquêter sur l'intention du législateur de parvenir à un jugement approprié. D'autre part, des auteurs comme Ronald Dworkin expliquent en quoi cette méthode d'interprétation n'est pas utile et ne devrait pas être considérée comme correcte. Cet essai se concentre particulièrement sur la pensée de Ronald Dworkin et ses explications sur le sujet.

¹ Master of Laws at University College London in 2016. This essay was produced in April, 2016. email: fernandahapner@hotmail.com. ORCID: <https://orcid.org/0000-0002-4334-3869>

Palavras chave: interpretação legal, intenção do legislador, Ronald Dworkin.

Les mots clés: interprétation juridique, intention du législateur, Ronald Dworkin.

Following the big revolution, the next big step in philosophy of law was the development of theories that would enrich the former as taught by legal positivism. Legal positivism rejected the idea that Law should be inspired by moral principles or metaphysical concepts.

W. Blackstone was one of the main anglo-american positivists, and his theory argued that there was a direct connection between the validity of the law with its enforceability. H. Hart questioned his theory, and in his main work, “The Concept of Law” published in 1961,² he argued that whereas moral should not define the role of law, it could not be completely excluded.

Although some pupils of Hart, such as J. Raz, denied the interference of moral principles in law, R. Dworkin, who followed Hart’s Jurisprudence chair at University of Oxford, had a different way of thinking. Dworkin was one of the main thinkers of legal interpretivism. His theory, if it could be briefly summarized, argued that legal positivism is not fit to explain the judge’s decision in the ruling of cases, since the same rule enacted by Congress could be understood differently when applied to a concrete case. Henceforth, the interpretation of the applicable law could vary and this could not be ignored by the theory of law. If one law could be differently understood according to its interpretation, the latter should be studied as an important element in jurisprudence.

Legal philosophers as Raz, accepted Dworkin questioning and a discussion about the elements that could interfere in statute’s interpretation by the judges was raised. Different elements could interfere when choosing certain rule as applicable to a case scenario and some philosophers of law, including Raz, pointed the legislator’s intention as an element of main importance for this task. Dworkin did not agree.

Following Dworkin’s understanding, this paper questions whether the legislator’s intention, who participated in the enactment of the law, is important or not for the interpretation of a rule when applied to a concrete case by the relevant judge.

Now, this essay proposes to discuss the theories behind the question of which method of interpretation best suits the work of a judge when interpreting the law. Dworkin presents three options in chapter II of *Law’s Empire*: (i) conversational; (ii) scientific; and (iii) creative interpretation, and chooses the last one. Does the legislator’s intention play a role in it? *Is statutory inter-*

² H. Hart owned the Jurisprudence chair at University of Oxford until 1968.

pretation solely an exercise of retrieving the drafters' intentions? It seems it is not. According to the author's view, investigating the drafter's intention is not the most useful tool to reach a conclusion about the meaning of a statute's text, nor even a relevant one.

If Dworkin's position is considered sound,³ the correct form of interpretation for judges to address the law in general is *creative* interpretation. Under this category the author fits both artistic and social practice interpretation, whose objects are, respectively, pieces of art (like paintings and poetry), and social practices (law). Creative interpretation is a method concerned with the motives and purposes of the author, but with a constant interaction with the object. It is a method that Dworkin calls *constructive*.⁴

The method called *Scientific* interpretation is causal, since it involves analyzing empirical data. The work done in scientific interpretation is limited to the *description* of the object (according, for example, to their physical elements), and knowing their determinants.⁵ An example of the use of this method is the research made in the field of Biology, for instance, the description of the process of transformation of a seed into a flower.

Conversational interpretation, as Dworkin explains, is a method in which the interpreter has the sounds or words of the other person as object of analysis, and his or her role is to investigate and determine the content of the information which was transferred to the author, in the exact meaning the other person's thoughts.

It is purposive (opposite to causal) because it does not focus on the explanation of the object exposed. The meaning of what the person has said is entrenched in his or her motives, purposes and concerns, and is directly associated with the discovery of his or her intentions.⁶ It is not merely an attempt to describe, but includes a process of investigation. Many theories consider that this kind of interpretation is the one which reflects best the work of a judge when interpreting the law.⁷

Conversational interpretation includes a scenario of *contemporaneous* exchange of information. The presence of both the author and the interpreter in a determined period of time makes possible for the interpreter constantly inquire the author about circumstances regarding the information that he or she intends to obtain.

Probably the most difficult task when trying to reach someone's intention is understanding all the linguistic and meta-linguistic signs shared by the

³ R. Dworkin, *Law's Empire* (Hart Publishing, 1998). See chapter 2.

⁴ Dworkin, *Law's Empire*, 50-51.

⁵ Dworkin, *Law's Empire*, 50-51.

⁶ Dworkin, *Law's Empire*, 50-51.

⁷ Dworkin, *Law's Empire*, 51.

author as the object of communication to be analyzed. This complex scenario cannot be completed in an instant, but may take a few interactions between author and interpreter until they reach the same mental picture.

This kind of interpretation may be useful for casual exchanges of information, as they occur in a determined period of time and allows the adjustment and generation of expectations.⁸ If not in a determined short period, this exchange of expectations may become more difficult. In a wider interval of time, it is difficult to say that even the author is aware of his mental state during a specific moment in the past, as people can change their point of view in face of new experiences.

The fact that the conversational interpretation occurs in a *determined moment* influences the method. The interpreter can reach a conclusion as he is in a position to pose enough number of questions in order to be in the same circumstances of thought of the author. Their thoughts, meeting to the point where they become very similar, or the same would resemble a perfect scenario. These are circumstances which cannot be easily attributed to the process of interpretation of law, which may follow a different process of interpretation.

In the context of statute interpretation with the purpose of deciding a case, the judge is not in the position to have a conversation with the legislator in order to adjust the characteristics of the scenario over which the words were written. The problem goes further. Even if the judge effectively chases to contact one member of the parliament that was present in the session of the enactment of the law, he would be limited to eventually understanding the intention of one person, but not of a significant number of them. Although it could be considered a good solution by some philosophers, chasing to understand the point of view of all the drafters involved in the enactment of a bill does not seem compatible with the judicial process of deciding cases.

As each lawsuit is a different case, the judge would have to inquire the drafters intentions in different circumstances. The most probable scenario is that the responsible legislative body may not have thought about each of them specifically. Dworkin came to this conclusion and foresaw a different answer: the interpretation of law is not a task of achieving the drafter's intention. The judge's role is to *construct* a solution.

Dworkin calls it *creative* interpretation. It is constructive, rather than conversational, because it bears an interaction between author's purpose and object.⁹ Although this view accepts the existence of the author's intention, it

⁸ Nicos Stavropoulos, 'Words and Obligations' in Luis D' Almeida *et alii*, *Reading HLA Hart's 'The Concept of Law'* (Oxford: Hart Publishing, 2013), 36. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309492.

⁹ Dworkin, *Law's Empire*, 52.

is seen as a supporting role in the interpretation process, with low importance for the work of the interpreter.

Reaching the author's intention, in the circumstance of statute's interpretation by a judge, is almost impossible, and a viable and coherent process relies on the intellectual work of analysis and conclusion through the thoughts of the interpreter himself. This idea becomes "more concrete" supposing the judge had enough time and collected each of the drafter's opinion. In order to transfer the different points of view into one capable of solving the case, the judge does not have any parameter but his own. The other alternative is to admit from the beginning that the interpreter will have to come up by himself with a solution. He would have to *construct* it with the limited amount of information which was disposed in the statute or correlating applicable law.

It is interesting how Dworkin addresses the process of creative interpretation to works of art¹⁰ and how he shifts to apply the same concepts and way of thinking to social practices, more specifically, legal practice and statute interpretation by judges.

Addressing the artist interpretation, Dworkin inquires the meaning of the word *intention* and whether it is different from the concept of *finding value* on the artist's work.¹¹ He concludes that it is not possible to analyze a work of art only from the point of view of the author, ignoring the context in which the interpreter finds himself.¹²

Shakespeare wrote his texts in a certain context of the history, in which the elements of the role had a specific meaning for the contemporaneous society. In order to present the same values which Shakespeare did by his time, an interpreter would have to adapt them to a language of elements or explanation feasible for another society, in another moment of history. Henceforth, this process cannot be dissociated from the interpreter himself, as the intellectual work of interpreting the elements was his. Again, the concept of change of time affects the object. The object ends up transformed accordingly to the new interpreter point of view.¹³

The artist's own intellectual work is always present. However, once exposed to anyone other than the artist himself, it cannot be dissociated from the interpreter analysis anymore.¹⁴ Addressing the paragraph in which

¹⁰ Dworkin, *Law's Empire*, 55.

¹¹ Dworkin, *Law's Empire*, 55.

¹² Dworkin, *Law's Empire*, 56.

¹³ Dworkin, *Law's Empire*, 56: "applying" that abstract purpose to our situation is very far from a neutral, historical exercise in reconstructing a past mental state".

¹⁴ Dworkin, *Law's Empire*, 57: "An insight belongs to an artist's intention, on his view, when it fits and illuminates his artistic purpose in a way he would recognize and

Dworkin analyses Shakespeare work, a further conclusion is reached: the interpreter has a parameter for his intellectual process of understanding the object, which can be the same as the author's or not.¹⁵

Henceforth, another question arises, which is, what the interpreter's parameter is. Dworkin concludes that it is "the best it can be". The starting point of the interpreter's work shall shift from the author's intention to the parameter of "the best".¹⁶ The discussion is relevant because it shows how much the interpretation process distances itself from the author's intention. Again, it constitutes an element, but it is not central. The *intention* is turned into mere possibility of an element, which, if useful to "the best" concept, may compose the best final conclusion. It becomes a piece in a bigger game, and as it happens with interpretation of art work, it happens with social practice interpretation - and, henceforth, its specie, statute interpretation.

The "intention" being a piece of the game means that the judge will have the legislator's notes of the process of enactment. But they will be elements to be considered on themselves, as political events, and not a door to the legislator's intention.¹⁷

What does the parameter the "best" in work of art means for the context of statute interpretation? It is what Dworkin calls "the aims of a community of principle"¹⁸ and "a coherent scheme of conviction dominant within the legislature that enacted them".¹⁹ It is interesting how Dworkin comes to this conclusion as a result of trying to fit the legislator's intention in the process of statute interpretation.

He proposes an analysis of a scene he illustrates with an imaginary judge (Hermes) and an imaginary legislator (Smith). In the beginning it was Her-

endorse even though he has not already done so (...). This brings the interpreter's sense of artistic value into his reconstruction of the artist's intention in at least an evidential way, for the interpreter's judgement of what an author would have accepted will be guided by his sense of what an author should have accepted, that is, his sense of which readings would make the work better and which would make it worse".

¹⁵ Dworkin, *Law's Empire*, 56: "It inevitably engages the interpreter's own artistic opinions in just the way the constructive account of creative interpretation suggests, because it seeks to find the best means to express, given the text in hand, large artistic ambitions that Shakespeare never stated or perhaps even consciously defined but that are produced for us by our asking how the play he wrote would have been most illuminating or powerful to his age."

¹⁶ Dworkin, *Law's Empire*, 52; 62: "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong".

¹⁷ Dworkin, *Law's Empire*, 316.

¹⁸ Dworkin, *Law's Empire*, 328.

¹⁹ Dworkin, *Law's Empire*, 330.

mes idea to follow Smith's intentions in order to help him to understand the solution of a case. But as the analysis evolve, he comes to the conclusion that her intentions are not relevant, as the interpretation must not follow her will, but the aims and principles of the political scenario of the context in which Hermes was.²⁰

If the interpreter would consider "intention" to be a piece of the game, which piece would it be? The mental state of group consciousness?²¹ Could it be translated into the "intention" of a whole legislative body? Does such thing exist? Dworkin answers pointing that the focus is not on the people meanings, but on the *practice* itself,²² and that a different conclusion is logically impossible.

If one considers that a social practice is the intention of all, the interpreter's work would depend on knowing each of the legislator's thoughts (bearing in mind the diversification of origins of them). However, it is not compatible with the idea of the interpreter to position himself outside of the practice. Being inside is necessary in order for him to have an adequate point of view and be able to reach a solution to the case.

A social scientist cannot rely on the understanding and mental state as if he were one of the members of society. He has to come up with his own analysis and understanding as a point of view of an outsider. The author's intention can help as a background for the interpreter's intellectual work, but no more than that. The interpreter can reach the same conclusion as the author. But not as a result of interpretation as search of the author's intention. They would be two separate intellectual works which by coincidence come to come to the same conclusion.

It is the same process when looking at Hermes interpretation of the legislation. He tries to stick to Smith's history of thoughts in order to get to her intentions. But maybe she had reasons not exposed and which were not democratic legitimate.²³ Or he would come to the conclusion that he would not be able to investigate each legislator record, or to try to make a legitimate combination of them. However, it would be of great difficulty to combine individual intentions to arrive at a fictitious group intention. So Hermes will look for the "most plausible set of convictions in whatever manner will provide the most plausible set of convictions to attribute to the legislature as a whole acting as the servant of a community of principle".²⁴

²⁰ Dworkin, *Law's Empire*, chapter 9.

²¹ Dworkin, *Law's Empire*, 63.

²² Dworkin, *Law's Empire*, 63.

²³ Dworkin, *Law's Empire*, 323.

²⁴ Dworkin, *Law's Empire*, 337.

Through the process of constructive interpretation, Hermes relies on records of institutions and practices, which legitimate values of political morality, and not personal understandings. He does not rely on his own convictions to reach a solution, neither in a difficult concept of group intention. In summary, constructive interpretation avoids the obstacles which would exist in a process of ruling which would try to understand the legislator's intention.

There is, however, one last point which might be interesting to be addressed. Is intention present at all at the statute's interpretation process? Even if not central, Dworkin admits its existence. He says it provides a *formal structure* to the interpretive claims, although not related to not anyone's in particular or people in general.²⁵

Joseph Raz, for example, wrote in defense of the Authoritative Intention Thesis and, in his opinion, the concept of the drafter's intention is strictly connected to the process of enactment of law and the concept of law itself. According to the author, the intention of the legislator that the content of the Bill is turned into law, for example, is of central importance for the process of law creation.²⁶

This argument does not convince under the theory of law as integrity and the statute's interpretation process proposed by Dworkin. He argues that a judge cannot rely on the reasons a drafter enacted a law because there may be present political and non-valuable criteria, which the judge would not wish to consider in his decision. He would rather search for the meaning of the law according to the political morality principles of the context. If the judge does not consider relevant the legislator's intention to enact the law when deciding a case, the role of intention shall be at least questioned.

If this is the most important role which can be attributed to the drafter's intention in statute's interpretation, then the answer to our initial question, the question whether statutory interpretation is solely an exercise of retrieving the drafters' intentions is negative.

Bibliography

- R. Dworkin, *Law's Empire*. (Hart Publishing, 1998).
 G. Letsas, *A theory of interpretation of the ECHR*. (Oxford: Oxford University Press, 2007).
 Joseph Raz, 'Intention in Interpretation' in R. George (ed), *The Autonomy of Law* (Oxford: Clarendon Press Oxford, 1996).
 N. Stavropoulos, 'Words and Obligations' in Luis D' Almeida, et alii, *Reading HLA Hart's 'The Concept of Law'*. (Oxford: Hart Publishing, 2013).

²⁵ Dworkin, *Law's Empire*, 58-59.

²⁶ Joseph Raz, 'Intention in Interpretation' in R. George (ed), *The Autonomy of Law* (Oxford: Clarendam Press Oxford, 1996), 267.