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A constructivist conception of legal interpretation

Some critical remarks

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Abstract

This essay explores a number of issues central to a value-based yet positivist conception of law and legal interpretation. In particular, after some reflections on whether and in what sense a theory of law can be considered axiologically and/or methodologically superior, some classic issues in the theory of legal interpretation are discussed: the distinctions of noetic versus dianoetic interpretation, *interpretatio legis* versus *iuris*, and simple versus difficult cases. The analysis then focuses on the claim to correctness inherent in legal reasoning, on its pragmatic connotations, on its controversial relations to the thesis of the so-called separation of law and morality, and to ethical conformism. I argue that the conception of legal interpretation proposed by Isabel Lifante is instead a non-neutral conception of law that contributes to the reinforcement of a Dionysian and Herculean legal practice.

Index terms

Keywords: legal interpretation, noetic vs. dianoetic, interpretatio iuris, claim of correctness, conformism, rule of law

Full text

1 Introduction

1 This essay explores several issues central to the work of Isabel Lifante Vidal, in particular her book *Argumentación e interpretación jurídica: escepticismo, intencionalismo y constructivismo* and the essay “In defence of a constructivist conception of legal interpretation”, which is a summary of the theory presented in the book.[1]

2 There are many reasons to appreciate and share Lifante's analysis, and I refer in particular to her book's conclusions. However, in the spirit of a methodological principle that she also values, namely critical analysis as a method, I will focus only on the points that I consider more critical or problematic, and on which I disagree. It is more productive to address the points on which we disagree, because (rational) criticism is essential to improving theoretical debate and bringing theory and practice closer together. Moreover, my comments in the following paragraphs, although critical, have a constructive aim. Since there are many points on which I agree with Lifante, I would like to suggest some improvements to her theory rather than abandoning it.

3 In this respect, I share her intention to formulate a constructivist or value-dependent conception of legal interpretation, and to argue for its "superiority" over competing conceptions. In particular, I share her intention to show to what extent approaches that argue for the neutrality or scientificity of legal method in general, and legal interpretation and legal reasoning in particular, are fallacious. To avoid any misunderstanding, I am not referring to the thesis that discretion and indeterminacy necessarily characterize legal interpretation and argumentation, which I believe to be correct, and which is also advocated in Lifante's essay and book.

2 Axiological superiority

4 A first general critical remark concerns precisely the claim of "superiority".[2] This point, while introductory, is by no means a minor aspect of the proposed conception of legal interpretation. Lifante does not simply place her conception on the defensive. Rather, her defence is proactive and a counter-attack. She asserts the "superiority" of her theoretical proposal, but she does not clarify what that superiority consists in. It is never right to criticize an analysis for what it does not say or does not contain. My comment on Lifante's view, however, concerns a lack of explanation and justification that is fundamental at the methodological level.

5 It is common knowledge that the superiority of a theory can be judged according to various criteria, and that any judgement in this regard depends on further basic methodological assumptions. Some philosophers strive for superiority in the sense of the greater explanatory power of their theories. Others may strive for superiority in the sense of greater conceptual clarity. Moreover, someone may first seek superiority in rhetorical or persuasive terms to increase the legitimacy of his or her own theses. Furthermore, some theories are considered superior by their authors or commentators from a normative or axiological perspective. In this case, the theory's purported superiority may depend on values embedded in the theory that are assumed to be superior, or the same theories may be assumed to achieve certain supposedly superior values. It is almost trivial to say that there is no necessary connection between these different conceptions of methodological superiority. Moreover, according to the approaches that defend an ideal of neutrality and pure scientificity in legal method and methodology, it would be a contradiction in terms to link superiority with persuasion, axiology and normativity. Under the assumption of methodological neutrality, any approach that commits to axiological assumptions and/or goals, or is dedicated to enhancing persuasion and legitimacy, would by definition be "inferior", i.e. purely ideological in the negative sense of the word.

6 However, given Lifante's premise—which I believe to be correct—that legal method and methodology cannot be neutral, I believe that her constructivist approach to legal interpretation is not merely aimed at greater explanatory power or greater conceptual clarity. She claims that her constructivist conception of legal interpretation is normatively superior, both in terms of the values embodied in that theory and in terms of those that the theory intends to promote. As I will explain in the following sections, its constructivist conception of legal interpretation is normatively superior to sceptical approaches because it is stronger. It is more attractive to all participants and especially to jurists, because it is more consistent with their point of view, which is in fact equally creative and fully connected to interests, values and political choices.

3 Noetic and dianoetic interpretation: Concepts and inferences

7 Lifante likens the distinction traced by Letizia Gianformaggio between noetic interpretation and dianoetic interpretation[3] to the distinction recently developed by psychologists such as Daniel Kahneman between two systems of thought: System 1 and System 2.[4] According to Lifante, "[u]nderlying these two meanings of

interpretation is the same distinction" between what is called System 1 and System 2: "a fast or intuitive one and a slow and reflective one that relates to the act of deliberation."[5]

8 I think there is at best a very broad and general similarity between Gianformaggio's distinction and Kahneman's theory. There is not at all the same basic distinction between the two juxtapositions: noetic interpretation vs. dianoetic interpretation on the one hand, and System 1 (fast thinking) vs. System 2 (slow thinking), on the other.

9 The opposing terms "noetic" and "dianoetic", as used by Gianformaggio, hark back to an idea of Amedeo G. Conte, who coined these two terms to distinguish between the conceptual and the inferential dimension of understanding. In reality, Conte did not use this distinction in relation to the process of (legal) interpretation and the attribution of meaning to statements. Conte instead used the distinction in his studies on the concepts of validity and normativity, and in explaining the so-called is-ought question.[6] In relation to the latter, Conte applies the term "dianoetic" to the pair of terms "ontic" and "deontic", and in particular to describe the distinction between descriptive and prescriptive propositions, while he uses the term "noetic" to explain the same distinction in relation to descriptive and prescriptive concepts. In any case, it must be stressed that both the noetic and dianoetic dimensions are logical in Conte's work.

10 Thus, when Gianformaggio speaks of noetic interpretation, she means conceptual interpretation, i.e. interpretation as conceptual understanding. The concept is bound to an immediate and intuitive conceptual association *in vacuo*, which defies all inference. In the background is the echo of the conceptual analysis of legal terms. Dianoetic interpretation in the legal field, on the other hand, always consists of practical reasoning: it involves an act of communication, which thus involves intersubjectivity.

11 In this respect, the only partial connection with Kahneman's conception concerns the fact that System 1 is an associative system: a vast network of interconnected ideas, while System 2 is connected to reasoning. However, the conceptual vs. inferential distinction is completely outside the scope of Kahneman's theory.[7] "System 2 performs complex computations and intentional actions, both mental and physical."[8] Therefore, it is not limited to or equated with inferential reasoning. System 1, on the other hand, is shaped by biological and causal factors. It is activated by any stimulus or situation and is highly context-dependent.[9] System 1 is thus not conceptual in the sense that Conte and Gianformaggio thought. Both fast and slow thinking are a fiction, a teaching tool designed to appeal to our basic cognitive instincts.[10] Moreover, both can be rationally explained in terms of inferences and rules.[11]

12 Lifante's explanation of Gianformaggio's dichotomy of the noetic and dianoetic interpretation of law is also not entirely correct. According to Gianformaggio, noetic interpretation is an activity that is always necessary (whenever we are in a communicative situation, we have to grasp meanings), while dianoetic interpretation is also necessary in all communicative situations. In other words, it is not correct to restrict dianoetic interpretation to difficult or obscure cases where there is doubt about the meaning to be attributed to the object being interpreted. Dianoetic interpretation concerns reasoning (i.e. argumentation).[12] Although the inferences may be greater and more obvious in cases of interpretative doubt and disagreement, there are latent inferences in every application of legal norms, and therefore also in clear cases. In this context, we should not confuse two distinctions: (i) the first distinction between intuitive or immediate understanding and reflective or sophisticated understanding; and (ii) the other distinction between simple or clear cases where there is no doubt, and difficult or opaque cases where there is interpretive doubt or disagreement. When insights are reasonably convergent, there is intuitive agreement without interpretive doubt. On the other hand, when people's intuitions differ, interpreters have to deal with interpretive doubts. Nor is dianoetic interpretation only useful when there is doubt about the interpretation. In many cases, reasoning makes the interpretation more robust and/or refines it, regardless of whether there are any doubts about that interpretation.

13 I also disagree with Lifante about the thesis that "difficult cases are the interesting ones: cases where doubts arise and where it is necessary to carry out interpretative activity in a dianoetic sense".[13] First, I assume that the comparison is with non-controversial cases, or the so-called easy or clear cases, which do not give rise to doubt or disagreement. Although such delimitation is notoriously controversial, we can leave this debate aside. The fact is that in some cases we agree on the correct resolution of a legal case and in others we do not. In this regard, I believe that Lifante's conception of interpretation is too narrow and circular. According to her definitions of dianoetic interpretation, only doubtful cases requiring reconsideration should be given attention. On the contrary, however, the current law is based on a very broad convergent interpretative practice. In fact, a remarkable number of aspects are not discussed at all, despite forming the legal context or texture in which everyone interprets, makes decisions and behaves. Of course, disputes are ubiquitous in the

legal field. Conflicts of interest are commonplace, and the law is there precisely to resolve such conflicts. Nevertheless, legal disputes and disagreements involve a variety of interstices and margins of legal practice, which is generally cooperative and convergent. It is a fact that we never dispute anything and everything: as soon as this happens, the law breaks down. Legal disagreements, while permanent and ubiquitous, are local and selective. Interpretative doubts concern certain aspects of a provision or paragraph, a single word or syntactic concordance, etc., the use or meaning of a legal argument, the hierarchy of a legal norm, etc. Not everything in a case is in dispute.

14 In summary, noetic and dianoetic interpretations are not mutually exclusive and the latter begin with the grasping of a meaning (however imprecise). Noetic interpretation always takes place, in both clear and doubtful cases. It is also not true, nor did Gianformaggio claim, that dianoetic interpretation is only necessary in doubtful cases.[14] Nor is it true that "in easy cases interpretation would be a cognitive activity, though merely noetic."[15] Since all legal reasoning is based on practical inferences (that's quite a tautology), even if not limited to logical inferences, dianoetic interpretation exists in both plain and doubtful cases. In the former, inferences usually remain implicit, while in the latter they are usually expressed.

4 *Interpretatio legis* versus *interpretatio iuris*, and doubtful cases

15 The connection between dianoetic interpretation and doubtful cases is also not entirely consistent with the rest of Lifante's proposed theory.

16 The analysis also argues—and this time correctly—that "Interpretative activity (in the dianoetic sense) consists in arguing in favour of attributing a certain meaning to an object",[16] whether there is any doubt or not. On the other hand, Lifante refers to Wróblewski's notions of interpretation *sensu largissimo* (SL-interpretation) and interpretation *sensu largo* (L-interpretation),[17] whereas if doubt were the issue, then the relevant notion to refer to would be that of interpretation *sensu stricto*. Indeed, according to Wróblewski:

> (c) 'Interpretation' sensu stricto (S-interpretation) means an ascription of meaning to a linguistic sign in the case its meaning is doubtful in a communicative situation, i.e. in the case its 'direct understanding' is not sufficient for the communicative purpose at hand. Unlike L-interpretation, S-interpretation refers, thus, only to 'problematic' understanding, due to such phenomena as obscurity, ambiguity, metaphor, implicitness, indirectness, change of meaning, etc. Legal practice often faces such problems, and consequently there is a tendence to view this sense of 'interpretation' as the only relevant one for law.[18]

17 Moreover, the parallelism between Wróblewski's distinction between SL-interpretation and L-interpretation, on the one hand, and the classical distinction between *interpretatio legis* (the interpretation of provisions in statutes or other authoritative legal documents) and *interpretatio iuris* (the interpretation of the law as a whole), on the other, is not entirely clear.[19] Lifante understands *interpretatio legis* as the activity of determining the meaning of a legal statement, and counts as *interpretatio iuris* the integration activities, the resolution of antinomies, the identification of norms, etc., i.e. all those activities that serve to arrive at that statement that is the object of *interpretatio iuris* (in her sense). However, SL-interpretation differs from this activity of *interpretatio iuris*, which is more similar to L-interpretation: while SL-interpretation concerns the concept of law (i.e. answers the question: *quid ius*?), L-interpretation deals with hermeneutic operations in and for a given law (i.e. answers the question: *quid iuris*?) and is thus an echo of *interpretatio iuris*.

18 Lifante believes that it is better to use the term "legal interpretation" for *interpretatio iuris*, i.e. to say "L-interpretation". I believe that the analyses in interpretation theory that have led to a refined distinction between the determination of meaning, integration, the resolution of antinomies, etc., have made an important contribution to legal method and methodology. So I think Lifante's approach is in some ways a step backwards in terms of clarity. This is not just a deviation in the terminology chosen. Rather, much of the theory of legal interpretation considered by Lifante in her essay and book relates to *interpretatio legis* rather than *interpretatio iuris* in her sense. There is thus a discrepancy between the targets criticized (sceptical and cognitivist theories of legal interpretation, intentionalists, etc.) and the theoretical constructivism proposed, which is more a proposal for a conception of law.

19 The relations between *interpretatio iuris* and *interpretatio legis* pointed out by Lifante also need some revision. According to her, "interpretation iuris will always imply carrying out interpretative activities in the sense of interpretation legis (interpretation of statutes or other authoritative legal materials): the starting point for the reconstruction of law must always be statutes, namely legal provisions endowed with authority."[20] I believe that there is an overlap between the different plans of analysis. First, it is neither a logical or theoretical necessity nor a factual truth that *interpretatio legis*[21] always takes precedence over "*interpretatio iuris*, which incorporates a broader scope of activities than the previous case: not just precision of the meaning of linguistic expressions contained in legal provisions, but also the resolution of antinomies, principles balancing for the resolution of gaps, etc."[22] In many cases of *interpretatio iuris* in Lifante's sense, the starting point is not and cannot be a "provision contained in laws or other authoritative legal documents" because, for example, it does not exist. Most importantly, the thesis that "the starting point for the reconstruction of law must always be statutes, that is, legal provisions endowed with authority"[23] reflects a particular doctrine of sources and marks a political choice. It is by no means a matter of describing the relationship between *interpretatio iuris* and *interpretatio legis* in general terms.

20 We can agree that *interpretatio iuris* and *interpretatio legis* (i.e. the reconstruction of law, balancing, dogmatic reconstruction, systematization, etc.[24]) are interrelated. However, I think that an approach to legal interpretation as *interpretatio iuris* does not help to clarify such interconnections and complex relationships. On the other hand, it is not compatible with the thesis that "Law is interpreted to find its meaning in those cases when *prima facie* it permits more than one possible reading",[25] since interrelationships exist even in plain or clear cases. Finally, a number of theories—which also differ from Lifante's constructivist view of legal interpretation—can subscribe to the truism that in the legal sphere the activity of interpreting a rule must be demonstrably legally grounded, i.e. in accordance with the law.[26] This is true even in simple and unambiguous cases where legal conclusions are equally well-founded, in accordance with the law, albeit implicitly.

5 Interpretative arguments: The claim to correctness and pragmatic acceptability

21 In this context, whether one follows MacCormick's proposed taxonomy of interpretive arguments or not,[27] the question is whether Lifante's theory offers an answer to the eternal question of the justificatory criteria of a particular interpretive solution, and if so, what that answer is. The fact is that there is no agreement on what those criteria are, what kind of criteria there are, and in what order they are applied. On this point, I agree with Lifante's critique, which is directed at sceptical and cognitive approaches.

22 However, neither her essay nor her book make clear which parameter (evaluative, not empirical) controls the claim to correctness that characterizes legal argumentation.[28] Lifante mentions the criterion of pragmatic acceptability,[29] which however remains undefined.

23 In particular, I do not consider her references to a "constructive process of legal materials establishing the values and objectives pursued by law" and to "ends considered valuable", which are to be developed "to their best extent", to be adequate explanations of this criterion.[30] It is obvious that the criterion of pragmatic acceptability is already extraordinarily indeterminate, vague and ambiguous, and this is all the more true for her references to unspecified "values and objectives pursued by law" and "ends considered valuable". When the "best extent" of all this is mentioned, the already remarkable degree of indeterminacy is heightened.

24 The claim to correctness reflects a (macro-)pragmatic assumption of legal discourse conducted from the internal point of view, i.e. from the participant's point of view.[31] It would be absurd or counterintuitive for anyone to support a particular legal conclusion or interpretive thesis by asserting the opposite (that it is not correct). The game of legal practice implies that each player can only assert the correctness of his or her own interpretation. Otherwise, the interpreter would take himself out of the same game, and his or her speech would be pragmatically infelicitous. The claim to correctness is thus made by all participants in the practice of law. On the one hand, there is the claim to correctness of the decision-maker, such as the judge, the arbitrator, the official who has decision-making functions. On the other hand, there is the claim to correctness of citizens and lawyers, as well as judges and officials who do not have decision-making functions (e.g. public prosecutors and *amicus curiae*). The

pragmatic claim to correctness is also an internal element of theoretical-legal metadiscourses, so it must be taken into account in order to understand the nature of theoretical disagreements. The pragmatic perspective adopted is not about whether "a unique solution to these disputes actually exists",[32] nor is it a matter of whether it is true or false that "for all practical purposes there will always be a right answer in the seamless web of our law."[33] The pragmatic approach does not imply a formalist or cognitive position at the level of method and theory of legal interpretation; it is compatible with a non-cognitive or moderately sceptical theory of legal interpretation. Even where there is broad scope for interpretation, reasoning and application, all legal (meta-)discourse involves a claim to correctness that (i) can never be fully satisfied, (ii) will never be absolute but always relative and internal to given premises, and (iii) implies a methodological conformism that precludes scientific neutrality. For these reasons, formulating legal theses in terms of correctness is not a sign of hypocrisy or intellectual dishonesty. It leaves open the possibility that some theoretical disagreements may be philosophically infinite, and that some disagreements may be genuine while others are not. Similarly, this view does not rule out the possibility that someone may abuse the claim to correctness or use it with false consciousness.

6 The value-laden approach and the separation between law and morality

25 Lifante rightly emphasizes that the determination of the criterion of correctness or the criterion of pragmatic acceptability depends on certain theoretical assumptions that relate to two upstream issues: the nature of law and the nature of practical rationality in general.[34] This advocates the idea of law as social practice and a post-positivist (or non-positivist) conception of law.[35]

26 Nevertheless, recognizing that law is a social practice that entails a set of values to be realized through the same practice does not, in my view, mean that a legal positivist conception must be abandoned. It is not alien to legal positivism, but is rather an essential part of it, that law involves values that serve as criteria for evaluating the choice of one possible solution, over another, to the problems posed by social practice. On the other hand, this does not mean that the conceptual separation between law and morality must be rejected or discarded. Even in the constitutional framework, we must distinguish between (i) moral values that are integrated into the law (which become legal values) and (ii) those that are not, and which remain external values belonging to a wide possible variety of ethical systems (individual or social). In other words, I believe that there is no necessary link between a constructivist or values-based conception of legal interpretation and an anti-legal-positivist conception. Apart from the eternal diatribes about legal positivism and its name, a constructivist or value-based conception of legal interpretation can coexist well and does not blur the distinction between law and morality, between *being* and *ought*. The above distinction is even more important in a constructivist or value-dependent conception of legal interpretation, because it is obviously essential for addressing the question of which values and which morals enter into the law. Usually, but not necessarily, it is social morality, i.e. that which is accepted and predominant in the social community in question.

27 On the other hand, the assumption (which I subscribe to as an author) that practical rationality plays a role in legal reasoning[36] is not sufficient to provide a substantive answer to legal problems, nor does it lead to the assumption of harmony between principles, rules and criteria laid down in an applicable law.

28 The separation between law (with its embedded morality) and morality is itself a moral principle that serves to remind us that there may be other individual and public moralities that are not already accepted and institutionalized in and through the law in force. This leaves room for criticism and non-conformism. No one disputes that law is also ethics and politics enacted in institutions. The point is that the ethical principles institutionalized through existing laws are not immutable or innate, and are not an objective point of reference. Underlying this view is a metaethical conception based on freedom and self-determination, which does not deny that every existing law contains values and is the result of a compromise between different and conflicting ethical systems. The ideal of practical rationality reinforces and supports this metaethical view. Unless we adopt an objectivist and cognitive, but above all exclusive, view, it is not true that law is a coherent set of principles and values. It is instead true that, from the standpoint of political and ethical compromise, law contains contradictory ethical, political and ideological positions. Law is the site of ethical-political compromise. Examples of this can be found at all levels of sources, from constitutions to acts of private autonomy, and in all spheres (private and public, civil

and criminal, etc.). The philosophical belief in universal harmony is reassuring and comforting, but unrealistic and mendacious.

7 Conformism and the rule of law

29 A further important part of Lifante's theory is the emphasis she puts on interpretive activity as a goal-oriented activity.[37] Her statements point to an instrumental or teleological conception, not only of law but also of legal method. I believe that this aspect should be explicitly mentioned, because law is not separate from the legal method. A special feature of law is that the method itself becomes part of the phenomenon. It conditions and permeates it. Lifante is right to highlight these questions as fundamental: Why do we interpret the law? And how is law to be interpreted, or by what criteria should we evaluate interpretations? A conception of law that neglects these questions would betray its own assumptions. Since law is practical, its understanding, construction, implementation and even any critical or approving stance run through these practical questions. On the other hand, it is clear that there is no single (right) answer to such questions.

30 Lifante assumes that law itself is valuable and essentially reduces the second question to the first. It gives its own answers to the above questions (i.e. "Why do we interpret the law?" and "How is it to be interpreted?"), although these are indeed ambiguous and highly contested. In particular, the question "Why do we interpret the law?" can be asked and answered from an internal or a more external point of view. Moreover, the "why" can be meant in different senses: it can mean for what reason or causes, but also for what purposes or goals.

31 For Lifante, all participants must pursue the improvement of the law to the furthest extent possible.[38] Whether or not it is true that judges, as lawyers like everyone else, are involved in such a practice, the proposed vision is irenic. The existence of a general collaboration to best implement a unified project is unrealistic, or only illuminates a very basic aspect of legal practice. Certainly law, like any social practice, would not exist without general cooperation. However, law is characterized by constant and pervasive conflict and precarious balance. Law consists of a constant alternation of strategic and cooperative actions. A continuous spectrum ranges from the ideal extreme of total conformity to the opposite of radical criticism of the legal order. The latter marks the boundary between the play of the participants and the view of those who are "outside" the practice.

32 Lifante's position can be better explained, I think, by saying that if we accept the law and regard it as something valuable (to be implemented and improved), the activity of the participants—in order to be consistent and coherent with its premises—should be directed precisely towards the affirmation, implementation and improvement of the practice of law itself.

33 Obviously, the problem lies in the premise. Why should we accept legal practice? This raises the question of the acceptability of an existing law. This question naturally arises before the proposed constructivist conception of legal interpretation.

34 Lifante's position is also fraught with a logical leap or gap. Even assuming, *ex hypothesis*, that in order to compare different and competing *prima facie* interpretations one should take into account "the very values that law seeks to materialize", it is not clear on what basis "the criteria of correctness in the field of interpretive activity commit us to the answer to the question of the value of law: the ideal of the rule of law." There is an obvious logical leap between (i) the first statement and the assumption that—in order to maintain internal coherence—the party involved should seek to interpret the law itself (according to an axiological orientation consistent with the values within the law itself) and (ii) the second, according to which the criterion of correctness should be the rule of law. To close the gap, it should be added that the existing laws under consideration are those, and only those, that are (at least ideally) consistent with the rule of law.

35 In other words, Lifante's conception, like that of many philosophers referred to in her essay and in her book, is also a conception of law intended for only some laws, namely those that conform to the ideal of the rule of law.

36 The preference (and my personal preference) for this ideal is not in question here. The point is that the existing laws—unfortunately, I might add—are by no means all based on this ideal. Many denounce and betray it in a systematic and tragic way. All this despite the fact that the rule of law, like any ideal, is a goal to be striven for, and that its limits and content are highly debatable.

37 Therefore, the constructivist conception of legal interpretation proposed by Lifante is not universally valid. It applies only to certain laws in which certain values are contained. Lifante herself, in order to be consistent with her own values, should realize that her conception is not defensible at all, but rather should be questioned whenever the law does not embody the ideal of the rule of law. In light of these cases, apart from

denying them the status of law and thus putting a definitional stop to them, I think it would be something of a moral and intellectual embarrassment to argue that every interpreter, as well as "any other participant in the [legal] practice must pursue" "its improvement" "to the furthest extent possible".[39]

38 In my opinion, from a methodological point of view, we should recognize that such statements are ideally applicable to cases of laws that we would not approve of, and which we would reject because they involve values that we do not approve of. The proposed constructivism should therefore consider the price of a method that is either valid only if we like it, or which lends itself to the amelioration of even the most shameful and immoral laws (from our particular convictions). The first solution tends to choose the convenient method, while a method should not depend on convenience.

39 My proposal is not—to be clear—to abandon the idea that participants are compromised. On the contrary, the proposal is only to look with disillusionment at reality and accept that no choice, including that of method and methodological application, is in vain.

40 Incidentally, I note that the fact that law itself is valuable, because it embodies the ideal of the rule of law, does not mean or imply that the criterion for the correctness of interpretive activity is that same ideal. On the other hand, this ideal is so controversial that it offers few answers, parameters or criteria for the correctness of interpretation.

8 Once prescription is the best description

41 Lifante rightly points out that the rule of law is a contested concept: different conceptions compete with each other, depending on the weight given to axiological and authoritative elements—especially, but not exclusively. Lifante favours a conception of the rule of law that gives priority to rights and treats certain forms (democracy, the separation of powers, etc.) as instruments for their protection and preservation.

42 However, even if one subscribes to this value-prioritizing view, Lifante's conception ultimately does not provide effective answers to the questions it raises. According to her constructivist conception of legal interpretation, "legal practice demands the interpreter to choose the interpretation that makes these authoritative legal materials become the best possible example of law, namely, the fairest."[40] It seems to me illusory to believe that appealing to such ephemeral and transitory criteria can be a way to achieve the postulated ethical-political goals. Similarly, the proposal to give more weight and space to teleological and deontological arguments directly linked to the evaluative dimension of law[41] can only work in an ideal model where there is a convergence of values. Rather, the laws in force are the arena in which different values, interests, etc. find ever-precarious compromises, and where conflicts are latent. The proposed constructivist conception of legal interpretation risks leading to an amplification and implosion of the ethical contradictions that law should seek to regulate.

43 Nevertheless, Lifante's conception, like Atienza's and Dworkin's,[42] has one undoubted merit: that it is in full harmony and is an excellent description of the true practice of law by lawyers and beyond. The legacy of these theories is the legitimization of a legal practice characterized by muscular operations. Discretion is cultivated to the highest degree, sometimes unconsciously because of the human tendency to live on irenic illusions, and sometimes deliberately, to bend unspecified principles and values to personal interests and purposes.

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Bibliography

Conte, A. G. (1986). Deontico vs. dianoetico. *Materiali per una storia della cultura giuridica*, 16, 489-494.

Conte, A. G. (1988). Minima deontica. *Rivista internazionale di Filosofia del diritto*, 65, 425-475.

Conte, A. G. (2006). Normativismo. In *Enciclopedia filosofica* (Vol. 8, pp. 7949-7950). Bompiani.

Dascal, M., & Wróblewski, J. (1989). Transparency and doubt: Understanding and interpretation in pragmatics and in law. *Theoria: An International Journal for Theory, History and Foundations of Science*, *4*(11), 427-450.

Dworkin, R. M. (1977). No right answer? In P. M. S. Hacker, J. Raz (Eds.), *Law, Morality and Society: Essays in Honour of H. L. A. Hart* (pp. 58-84). Oxford University Press.

Gianformaggio, L. (1987). Lógica y argumentación en la interpretación jurídica o tomar a los juristasintérpretes en serio. *Doxa: Cuadernos de filosofía del Derecho*, 4, 87-108.

Grayot, J. D. (2020). Dual process theories in behavioral economics and neuroeconomics: A critical review. *Review of Philosophy and Psychology*, 11, 105-136.
DOI : 10.1007/s13164-019-00446-9

Kahneman, D. (2011). *Thinking, Fast and Slow*. Farrar, Straus and Giroux.

Kahneman, D. (2012). Two systems in the mind. *Bulletin of the American Academy of Arts & Sciences*, 55-59.

Lifante Vidal, I. (2018). *Argumentación e interpretación jurídica. Escepticismo, intencionalismo y constructivismo*. Tirant lo Blanch.

Lifante Vidal, I. (2019). En defensa de una concepción constructivista de la interpretación jurídica. *Revus – Journal for Constitutional Theory and Philosophy of Law*, 39, 63-84.
DOI : 10.4000/revus.5423

Lifante Vidal, I. (2020). In defence of a constructivist conception of legal interpretation. *Revus – Journal for Constitutional Theory and Philosophy of Law*, 40, 63-83.
DOI : 10.4000/revus.5897

O'Brien, D. T. (2012). Review of *Thinking, Fast and Slow* by Daniel Kahneman. *Journal of Social, Evolutionary, and Cultural Psychology*, *6*(2), 253-256.

Shapiro, S. (2007, March). The 'Hart-Dworkin' debate: A short guide for the perplexed. *Public Law and Legal Theory Working Paper Series*. (Working paper no. 77). http://ssrn.com/abstract=968657.

Shleifer, A. (2012). Psychologists at the gate: A review of Daniel Kahneman's *Thinking, Fast and Slow*. *Journal of Economic Literature*, *50*(4), 1-12.

Solaki, A., Berto, F., & Smets, S. (2021). The logic of fast and slow thinking. *Erkenntnis*, 86, 733-762.
DOI : 10.1007/s10670-019-00128-z

Zorzetto, S. (2019). Jueces, juristas y pretensión de corrección. Algunas consideraciones de pragmática jurídica. In E. Sotomayor Trelles (Ed.), *La teoría y filosofía del derecho en el estado constitucional: problemas fundamentales* (pp. 69-89). Zela.

Notes

1 See Lifante Vidal 2018 for the book and Lifante Vidal 2019 and 2020 for the essay (first in Spanish and then in English). For the sake of clarity, I always refer to the content of the essay (in English), when I do not explicitly refer to the book. In this commentary, I follow the order of the theses and arguments presented by the author in her essay, as it is very clear.

2 Lifante Vidal 2020: 1; 2018: 11.

3 Gianformaggio 1987: 90-96.

4 Kahneman 2011: 20ff.

5 Lifante Vidal. 2020: para. 2; 2018: 21-24.

6 Conte 1986, 1988, 2006.

7 See e.g. Shleifer 2012; Grayot 2020.

8 Kahneman 2012: 57.

9 Kahneman 2011: 20ff.; 2012: 58.

10 O'Brien 2012.

11 Solaki Berto & Smets 2021.

12 In this sense, see Lifante Vidal 2020: para. 18.

13 Lifante Vidal 2020: paras. 4 and 11.

14 Lifante Vidal 2020: para. 11.

15 Lifante Vidal 2020: para. 11.

16 Lifante Vidal 2020: para. 8.

17 Lifante Vidal 2020: paras. 5-6.

18 Dascal & Wróblewski 1989: 427-428.

19 Lifante Vidal 2018: 19ff. and 28ff.

20 Lifante Vidal 2020: para. 7.

21 That is to say, for Lifante, the interpretation of provisions contained in statutes or other authoritative legal documents.

22 Lifante Vidal 2020: para. 6.

23 Lifante Vidal 2020: para. 7.

24 Lifante Vidal 2020: para. 7.

25 Lifante Vidal 2020: para. 31.

26 Lifante Vidal 2020: para. 7.

27 Lifante Vidal 2020: para. 8; 2018: 49-56.

28 Lifante Vidal 2020: paras. 11 and 22-23; 2018: 211-212, 219.

29 Lifante Vidal 2020: para. 13; 2018: 68.

30 Lifante Vidal 2020: para. 8; 2018: 217-218.

31 Zorzetto 2019: 57-58.

32 Shapiro 2007.

33 Dworkin 1977: 84.

34 Lifante Vidal 2020: para. 18.

35 Lifante Vidal 2020: para. 20.

36 Lifante Vidal 2020: paras. 21-23; 2018: 207-213.

37 Lifante Vidal 2020: paras. 24ff.

38 Lifante Vidal 2020: paras. 25-26 and 29.

39 Lifante Vidal 2020: paras. 28-29.

40 Lifante Vidal 2020: para. 39.

41 Lifante Vidal 2020: para. 39.

42 Lifante Vidal 2018: 173ff.

References

Electronic reference
Silvia Zorzetto, “A constructivist conception of legal interpretation”, *Revus* [Online], 48 | 2022, Online since 07 June 2022, connection on 23 June 2022. URL: http://journals.openedition.org/revus/8234; DOI: https://doi.org/10.4000/revus.8234

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