Statutory Interpretation. Pragmatics and Argumentation

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Interpretation and Statutory Interpretation

1.1 THE IDEA OF INTERPRETATION

The English word "interpretation" comes from Latin *interpretatio*, from *interpres*, originally meaning an intermediary, broker, or agent, and then also an explainer or translator (De Vaan, 2008, 307). In its turn *interpres* seems to have resulted from the fusion of *inter* (between) and *praes*, a word that possibly shares the same root with the Latin *pretium* (price), thus being linked to the idea of an economic exchange (lending, buying, or selling). The semantic area of "interpretation" is also covered by terms of Greek origin, such as "exegesis" and "hermeneutics," often used in religious contexts. In Latin, *intepretatio* was used normally as a synonym for translation (McElduff, 2009), which included both transposing a text into a different language and explaining the meaning of a text to one who does not understand it (Cicero *De Legibus*, 1.14.9). However, *interpretatio* was also used in a broader sense, for referring to the activity of interpreting "laws, dreams and omens as well as languages, though the notion of transferring information of one sort or another from person to person or from god to person is always key to its usage" (McElduff, 2009, 136).

In the medieval dialectical tradition, and in particular in Abelard, *interpretatio* was a technical term. It was used for the activity of explaining the meaning of a word completely unknown, such as (normally) a foreign word (Abaelardus, *Dialectica*, 583–584), in particular, by reference to word's etymology, or to the analysis of its component morphemes (Abaelardus, *Dialectica*, 340).

The strict relationship between *interpretatio* and translation is also maintained in the following centuries (Rener, 1989, 273–280), reserving the specification of "*interpretatio paraphrastica*" to the explanation of the language of an original, elucidating obscure words and passages.

The term "interpretation" is used today in a very broad range of domains: whenever *Y* is an account, endorsed by actor *A*, of object *X*, we may say that an actor *A* interprets *X* as *Y*, or that *Y* is an interpretation of *X* by *A*. Omitting the actor (the interpreter) we may just say *X* is interpreted as *Y*, or that *Y* is an interpretation of *X*. Let us consider, for instance, *Google-Spain* (Case C-131/12, decided on May 13, 2014),

where the European Court of Justice (ECJ) affirmed that the "processing of personal data" in the 1995 European Data Protection Directive also includes the processing of web pages by search engines, regardless of the fact that such processing (harvesting, indexing, and searching all available content) concerns all kinds of data and does not distinguish personal data from any other piece of information. We may say that in this case the ECJ interpreted the expression "processing of personal data" as also covering the operation of search engines, or that the ECJ's interpretation of "processing of personal data" also covers the operation of search engines. As this example shows, and as we will discuss later, an interpretation of a text or an expression (i.e. the use of a linguistic item) does not need to be a full account of its meaning; it may also address a partial aspect of what would be a full account of such a text or expression. In particular, the interpretation of a linguistic expression may just affirm that the expression includes or excludes a certain class of entities.

The term "interpretation," and the verb "to interpret," may be used to refer to a cognitive process, namely, the activity that delivers a certain account of an object, as well as to the outcome of that process, namely to the account being delivered (see Tarello, 1980 39ff.). Thus, in our example, in the locution "interpretation of 'processing of personal data' by the ECJ", the term "interpretation" may on the one hand refer to a sociocognitive activity, the process of reasoning and discussing by the judges through which they determined the meaning of the expression "processing of personal data." The same locution may, on the other hand, also refer to the outcome of that activity – the conclusion endorsed by the ECJ on the basis of that activity, namely the specification that "processing of personal data" also includes the activity of search engines. In this regard, the term "interpretation" behaves no differently than other terms that are used to refer both to individual or collective cognitive processes and to their outcome, such as the terms "understanding" or "perception."

1.2 INTERPRETATIONS OUTSIDE OF THE LAW

Our focus is only statutory interpretations, namely, those accounts of (fragments of) legislative texts that are meant to reconstruct the meaning and legal effect of such texts. However, as we shall see in the following sections, the term "interpretation" is also used in many other contexts.

1.2.1 *Interpretation in Science*

We may say that a scientific theory interprets a set of natural phenomena, meaning that the theory provides an account of those phenomena, usually in terms of causal explanations and corresponding forecasts. For instance, Francis Bacon in his "New Organon" (Bacon, *Novum Organum*) provided researchers with "Directions for the Interpretation of Nature." In a similar spirit, Galileo Galilei in the "Assayer" connected the interpretation of texts and the construction of causal mathematical

models by claiming that "the book of nature is written in the language of mathematics" (Galilei, *Il Saggiatore*).

However, in current scientific discourse the idea of interpretation is rarely applied directly to theories of natural phenomena, except with regard to competing high-level visions, among which the empirical data do not support a definitive choice (e.g., the different "interpretations" of quantum mechanics). The term "interpretation" is more often applied to the analysis of empirical data. In empirical sciences interpreting a set of data means providing an account of such data, though not necessarily a fully developed scientific theory. In statistics, or data science, for instance, "interpreting" a set of data involves (a) identifying particular dependencies and correlations between these data (the variables) – for example, between smoking habits and lung cancer, or between vaccination and various illnesses; (b) making hypotheses on this basis (see Abbott, 2016, 9); and possibly (c) moving from the identification of correlation to the construction of causal models (see Pearl, 2000).

The notion of interpretation as "making sense of empirical data" is also used in the context of legal evidence, to emphasize the fact that different accounts of the same data may be possible, as happens in legal cases involving complex evidence, in particular, scientific evidence. Such interpretations can be supported by arguments pointing to the grounds for preferring one causal account over another, based on the extent to which that account is supported by the data, and corresponds to accepted scientific theories.

1.2.2 *Interpretations of Intentional Systems*

The notion of an interpretation assumes a peculiar characterization when it is applied to human behavior, or more generally to intentional systems, namely systems having a goal-directed behavior. Such systems tend to select and implement the actions that are appropriate to achieve their goals. They may also form intentions, namely, determinations to perform the selected actions, which persist until the intended action is accomplished or the intention withdrawn. In such cases the system's behavior can be accounted for (interpreted/explained) by adopting the "intentional stance" (Dennett, 1997), that is, by assuming that the system implements the actions that it has selected, according to its beliefs in order to achieve its goals.

When human action is at stake, intentional interpretation also includes taking account of other aspects of human psychology, such as emotions and norms. This kind of interpretation may be required in criminal cases. For instance, to prove that an accused has committed a crime, in the absence of direct evidence, the prosecution may need to show that the accused had sufficient motives for engaging in the criminal action, based on the contextual interpretation of his or her antecedent or subsequent behavior. Similarly, to establish that the accused had the required *mens rea* (e.g., the intention to kill the victim), an interpretation of his or her behavior may be needed. In such cases, opposed arguments are often developed, supporting one or

other interpretations of the behavior of the accused (he intended to kill the victim versus he did not want that unfortunate outcome).

The idea that an understanding of human action requires interpretation is at the center of Dilthey's (1989) account of historical cognition, according to which human action can be accounted for by the psychology of the human actors, to be understood historically, namely in the context of the culture of their time. This idea has been further developed in the context of the so-called hermeneutical studies, according to which the interpretation of a cultural object results from the dialectical tension, interrogation, and merging between two historically conditioned cultural horizons or traditions: the contemporary environment of the interpreter and the past environment of the object being interpreted (Gadamer, 1989). The idea that the study of human action requires an interpretation (of the psychological determinants of the individual action), according to an intentional perspective, is also at the basis of the social theory by Max Weber, who argues that sociology is "a science which attempts the interpretative understanding of social action in order thereby to arrive at a causal explanation of its course and effects" (Weber, 1978, 4).

Still different issues pertain to the interpretation of human attitudes, thoughts, or dreams within psychology and psychoanalysis, which focus on conscious and unconscious psychic determinants and effects. For instance, in his famous "Interpretation of Dreams," Sigmund Freud affirms that dreams are "psychical phenomena of complete validity-fulfilments of wishes; they can be inserted into the chain of intelligible waking mental acts" (Freud, 1965, 200).

1.2.3 *Interpretation in Communication*

Let us now move from intentional actions in general to intentional communicative actions, namely, actions through which a communicator intentionally transmits some information to a receiver, which is supposed to know that the sender has this intent in performing that action. In such cases, according to Paul Grice (1969), the meaning (to be detected through the interpretation) of the communicator's action consists in a multilayered intention of the communicator: (1) his intention i_1 that his action engenders a certain response in the receiver; (2) his intention i_2 that the receiver recognizes intention i_1; (3) his intention i_3 that the receiver's recognition of i_1 provides the latter with a reason for her response. For instance, the meaning of the action of a police officer raising his traffic paddle to order a driver to stop consists in (1) his intention i_1 to make the driver stop, through this action; (2) his intention i_2 that the driver should recognize i_1 (i.e., that the paddle raising was meant to make her stop); (3) his intention that the driver's recognition of i_1 motivates her to stop. According to Searle (2007), this account should be refined by distinguishing the speaker's intention to perform a certain speech act (e.g., the intention to order the driver to stop), having certain success conditions (that its content is realized, namely

that the driver stops), from the speaker's intention to communicate this speech act to the hearer, by having the hearer recognize this very communicative intention.

Interpretation takes a further turn when it concerns a linguistic expression, namely, a symbolic sequence endowed with a conventional meaning. In communication using a conventional language, a distinction emerges between the semantics of the message (what the message says according to semantic rules of the language) and the speaker's meaning (what the speaker intends to communicate), by using an expression that has certain conventional semantic meaning. To capture the speaker's meaning, presuppositions and implicatures of communicative behavior have to be taken into account (Grice, 1975), according to pragmatics, namely the study of how the context of use of linguistic expressions (which have a semantic meaning according to linguistic conventions) affects their meaning. In this connection we may want to distinguish what the speaker meant, what he should reasonably have meant, what the hearer understood, or how she should have understood, given the pragmatic clues and the linguistic conventions that were accessible to her in the context of the speech act.

1.2.4 *Interpretation in Art*

The idea that the meaning of a linguistic expression is determined by the speaker's intention – though quite plausible with regard to individual communication – becomes questionable when the expression is put in writing or in any way recorded on a permanent medium, being destined to open audiences. With regard to works of art, various approaches to interpretation can be distinguished, on whose merit critics themselves are divided: 1) actual intentionalism, according to which determining the meaning of a text consists in retrieving the intention of its authors; 2) anti-intentionalism or conventionalism, according to which meaning is only determined by linguistic conventions and general background knowledge, the identity of the author being irrelevant; 3) hypothetical intentionalism, according to which meaning is determined by the best hypotheses that an ideally careful and informed audience would form about the actual author's intentions; 4) reader-response theory, according to which meaning is determined by the understanding of individual readers or of their communities; 5) value-maximization theories, which assume that meaning is determined by the interpretations "that make the work out to be artistically more meritorious as literature are to be preferred" (Davies, 2007, 185).

When a text continues to be relevant through time, as is the case for some literary works (e.g., the creations of Homer, Dante, or Shakespeare), and some legal document with persistent validity (e.g., the US Constitution, the UN Declaration of Human Rights, the Italian Civil Code), a further issue emerges, namely, whether the meaning of a text is fixed by the circumstances existing at the time when it was produced, or whether the text may acquire a new meaning in the present context. Is the meaning of the text fixed by the intention of its author and the understanding of

its contemporary audience, or is it rather determined by the understanding "interpretative community" that is presently accessing it (Fish, 1989)?

1.3 LEGAL INTERPRETATION

After this short and sketchy overview of various kinds of interpretation and corresponding issues, let us specifically address legal interpretation.

1.3.1 *The Object of Legal Interpretation*

Multiple sources contribute to the law: statutes (enactments by legislative bodies), constitutions and constitutional revisions, administrative regulations, international treaties, judicial decisions, administrative decisions, soft laws (such as guidelines and recommendations), private acts (such as wills and contracts), legal customs, and other normative social practices. All such sources have to be interpreted to determine their content, and consequently, their contribution to the law.

However, here we focus only on legislation broadly understood, namely, on explicit authoritative statements meant to change the legal system, by establishing new norms, and possibly modifying and removing preexisting norms. Such statements are enacted by legal authorities – usually collective bodies – and are directed to multiple addressees, namely citizens, administrative agencies, and law enforcers.

A typical instance of these statements is represented by statutory documents produced by legislative bodies, such as parliaments and other legislative assemblies. Statutory documents are the result of procedures that culminate in the approval of such documents. They become binding from the moment of their approval, or rather, as is often the case, after their publication and, possibly, after a time lapse meant to enable citizens to know of the new norms and adapt to them (this time lapse is called *vacatio legis* in civil law jurisdictions).

As statutes convey legal norms, they provide guidance to all those who have a disposition to be guided by the law. A statute is primarily directed to the addressees of the norms it introduces, that is, to the holders of normative positions – rights, powers, entitlements, duties and responsibilities – directly or indirectly conferred by the statute. However, the statute is also directed to the adjudicators of cases involving the application of these norms, and particularly to judges.

The interpretations by addressees and adjudicators mutually interact, and as a consequence, they usually tend to converge. On the one hand, the interpretation by the addressees is guided by the expected interpretation of the adjudicators, since the addressees, to be successful in future litigations, have to comply with or at least use the norms as interpreted by the adjudicators. On the other hand, the interpretation of adjudicators is guided by the interpretations of the norm addressees, to the extent that adjudicators do not want to frustrate the expectations of well-meaning addressees (the interaction of these expectation was described in Fuller, 1981).

1.3.2 *The Practical Significance of Legislative Interpretation*

To exemplify the practical significance of legal interpretation we consider some recent cases involving Facebook. Facebook not only tracks the behavior of its users – in particular for the purpose of sending them targeted advertising and messages – it also combines the data obtained through different services it controls, such as the communication services WhatsApp and Messenger. The contract (terms of service) that users accept in order access the Facebook social network includes a clause according to which Facebook has the option of merging users' personal data obtained within Facebook with the personal data obtained within other services controlled by Facebook. This practice has been challenged by some Facebook users, who have addressed data protection authorities and competition authorities, claiming that this practice violates EU data protection law (the General Data Protection Regulation – GDPR), since users' consent to the combination of their data under such conditions is invalid.

According to EU law (Article 6 of the GDPR), the processing of personal data is only permissible when it has a legal basis, and consent is the only legal basis that can apply to the merging of users' data by Facebook: if users have not given a valid consent to the combination of their data collected through different services, the combination of these data will have no legal basis. Consequently such a combination will be unlawful, and will be subject to civil and administrative sanctions for unlawful processing of personal data. Thus, the issue to be addressed to determine the legality of Facebook's practice is whether users' agreement to the combination of data collected from different services may count as a valid *consent* to it. For this purpose we have to take into account the way in which "consent" is defined in the GDPR, which at Article 4(11) states that "'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her." There is no doubt that Facebook users affirmatively agree to the processing consisting in the merging of data obtained through different services. However, we may wonder whether the agreement is free, since Facebook requires its users to agree to this processing in order to use the Facebook social networking service, a service which is provided under conditions of market dominance, and for the delivery of which the data from other services are not needed.

Thus the interpretative issue to be considered to determine the legality of Facebook's behavior is whether the concept of "freely given indication of the data subject's wishes" is to be interpreted in such a way as to include the data subjects' agreement to a processing of their personal data, when, as in the Facebook case, the provision of a service, under condition of market dominance, is made conditional on the users' agreement to the processing and the processing is not necessary for the provision of the service.

The answer to this question has great practical implications. Let us assume that the concept "freely given indication of the data subject's wishes" is interpreted in such a way that it includes an agreement given under the conditions just described. Then the users' agreement to the Facebook clause would be lawful, Facebook could legally combine the data collected through different services, and users should be content with the freedom to choose between not using the Facebook social network at all or using it and letting Facebook combine the data.

Let us assume, on the contrary, that the expression "freely given indication of the data subject's wishes" is interpreted in the sense that an agreement given under the indicated conditions is not covered by it. Then Facebook, if it wants to comply with the law, should stop all processing based on such an agreement, and should give its users the opportunity to use the Facebook social service without agreeing to the combination of the data collected within different services. Data protection authorities (or judicial authorities), following this interpretation, should enjoin Facebook to terminate all processing based on the invalid agreement, and subject it to sanctions – up to millions of euros – for unlawful processing.

The latter interpretation was recently adopted by the German Competition Authority (*Bundeskartellamt*), whose president, Andreas Mundt, made the following statement: "Voluntary [freely given] consent means that the use of Facebook's services must not be subject to the users' consent to their data being collected and combined in this way. If users do not consent, Facebook may not exclude them from its services and must refrain from collecting and merging data from different sources."

For another simple example of the practical implication of legal interpretation, consider the issue of whether the expression "cruel and unusual punishment" – which describes the punishments that are prohibited by the Eighth Amendment to the US Constitution – also includes the death penalty. If that expression is interpreted in this way, then the infliction of the death penalty is constitutionally prohibited in the United States, laws imposing that penalty are invalid, judges are forbidden from imposing the death penalty, and criminals have the right not to be subject to it. If on the contrary this expression is understood as not including the death penalty, then the infliction of the death penalty is constitutionally permitted, the laws imposing it are valid, judges have an obligation to impose the death penalty when required by criminal statutes, and criminals under appropriate conditions are liable to it. The legal interpretation of "cruel and unusual punishment" can make the difference between life and death.

1.3.3 *Legal Interpretation and Legal Decision*

These examples show the peculiar practical significance of legal interpretation, namely, the way in which it may affect individual and social interests. This practical significance is determined by the fact that legal norms play a role in decisional

process of citizen and officers (Conte and Castelfranchi, 2006). On the one hand, both citizens and officers have the propensity to view legal norms as reasons for thoughts and actions: when they are convinced that a legal norm exists, they tend to act accordingly (Pattaro, 2005). On the other hand, they have the propensity to view valid legal texts (legal sources) as generators of legal norms, namely, the norms resulting from the appropriate interpretation of such texts. This means that a law-compliant addressee/adjudicator will have the propensity to respect the norms that she considers to be the (correct) interpretation of valid legal texts.

A well-meaning complier will in fact adopt a reasoning scheme having the following structure:

1. General premise 1: If a norm X is the right interpretation of provision Y in a valid legal document Z, then X is a valid legal norm.

2. General premise 2: If X is a valid legal norm, then I will adopt X as a standard for my behavior and comply with it or apply it as required.

Assume that a norm addressee or adjudicator endorses both premises 1 and 2 and that she also believes that a particular norm is the right interpretation of a certain provision in a certain valid legal document. The addressee or adjudicator will consequently adopt that norm and behave accordingly (e.g., issuing a fine against Facebook).

For instance, assume that an employer adopting general premises 1 and 2 faces a case in which one of his employees, a woman in a same-sex relationship, whose partner gave birth to a child, asks for fifteen days' paid leave, based on a legislative provision stating that "the father is entitled to fifteen days of paid leave at the birth of his child."

Assume that the employer believes the expression "father" in that provision has to be interpreted liberally, in such a way that it may also includes a woman being the same-sex partner of the mother of the child. Consequently, he will conclude that the provision establishes a norm to that effect, that is, that "the father (interpreted as including the same-sex partner of the mother) is entitled to fifteen days of paid leave at the birth of his (or her) child." By applying that norm, the law-compliant employer will provide the leave.

Assume now that the employer, on the contrary, believes that the interpretation of the expression "father" in that provision includes only the male person who is the biological father. In this case, the law-compliant employer, by applying this latter interpretation of the same provision would refuse the leave. Assume that the woman being refused the leave sues her employer. Then the judge, depending on the way in which she interprets the provision at issue, will order the employer to grant or not to grant the leave.

The practical significance of legal interpretation explains why legal interpretation is so important and controversial: debates on legal interpretation are not merely

theoretical exchanges (as is the case for other kinds of interpretation); different legal interpretations lead to different decisions being made and then enforced using public force. The practical relevance of legal interpretation concerns not only the actors that comply with or apply and enforce the norms they believe to be expressed in legal document. It also concerns the actors that recommend certain interpretations, or the rejection of certain interpretations, and in particular doctrinal jurists.

1.3.4 *Descriptive and Evaluative Interpretative Assertions*

We have to distinguish two kinds of interpretative claims. The first includes descriptive assertions to the effect that, as a matter of fact, a certain expression has been, or is likely to be, interpreted in a certain way (by certain individuals or bodies). For instance, we may truthfully state that in *Google-Spain* the ECJ interpreted the term "controller" in the 1995 Data Protection Directive as including also search engines, while other judges had previously interpreted this term as not including search engines. Similarly, we may state that until the 1980s the Italian judiciary interpreted the term "damage" in the civil code as only including pecuniary losses, and that since then the interpretation has evolved, so that now this term also includes health damage not involving a reduction in earning capacity, and further kinds of non-monetary prejudice.

The second kind of interpretative claim includes the evaluative assertions to the effect that it is better, preferable, or most correct to interpret a certain provision or expression in a certain way. For instance, before *Google-Spain*, various authors argued that the word "controller" in the EU Data Protection Directive should not be interpreted as including search engines, since search engines index all data present on the open web and have no control over what data is uploaded on the web by third parties. This argument was also endorsed by the EU Advocate General in his opinion preceding the decision of the ECJ in *Google-Spain*. Other authors argued that, on the contrary, "controller" should be interpreted as including also search engines, since search engines choose to process all data present on the open web, and therefore they also choose to process whatever personal data happens to be there.

Descriptive and evaluative interpretative assertions have independent assertability conditions. We may consistently affirm that a certain expression is interpreted in a certain way (by certain actors) and claim at the same time that this same expression should preferably be interpreted in a different way. For instance, we may consistently say that the ECJ, in *Google-Spain*, interpreted the notion of controller in such a way as to include search engines, but that it should not have interpreted the notion of "controller" in that way. After the decision of the ECJ, the situation has changed, with regard to the justification of the legal interpretation of that expression. Now there is an additional, and stronger argument, for interpreting "controller" as the court did, namely, the very decision of the court, in combination with the view that

precedents of the ECJ have some binding or persuasive force. Thus, one may consistently affirm that before the decision of the court "controller" should have been interpreted as not including search engines, but that now it should be interpreted as including them.

When speaking of interpretative claims and interpretative arguments supporting them, we shall focus on evaluative claims affirming the legal preferability of one interpretation over specified or unspecified alternatives. The distinction between descriptive and evaluative interpretative claims is relatively clear when we oppose assertions on what interpretations have been adopted or are likely to be adopted by certain interpreters, or on what interpretations should preferably be adopted in a new case. The distinction between descriptive and evaluative interpretative claims is less clear concerning the claims concerning the justification of certain interpretations based on certain goals, values, attitudes, or preferences. In this case, interpretative claims tend to transform into technical prescriptions on what interpretation would better achieve certain outcomes. For instance, it may be claimed that we should interpret the term "controller" as excluding search engines, if we want to prevent search engines from engaging in online censorship (as their controllership entails a responsibility to block access to personal data unlawfully published by third parties), or on the opposite, that we should interpret this term as including search engines, if we want to provide a stronger protection of online privacy.

Assertions to the effect that that a certain interpretation "may" or "might" be adopted by a certain legal interpreter or in a certain legal system also can be ambiguous. Consider for instance the assertion that the ECJ might as well have interpreted the notion of controller as not including search engines. This assertion could be used to convey an evaluation, namely, the view that this interpretation too would have been legally acceptable, remaining within the space of discretion legitimately enjoyed by the ECJ. The same assertion could also be used to convey a less selective and evaluative message, merely to point to the fact that resources existed in the EU legal system that would allow the construction of arguments supporting this assertion (even though such arguments would have little chance of success and little merit). Or the same assertion could also be used in more empirical tone, just to point to the uncertainty preceding the decision of the ECJ on that matter.

In Chapter 6, we shall provide a logical characterization of the assertions establishing that a certain proposition may or must be adopted as a possible or a necessary interpretation within a certain legal context (characterized by a set of accepted interpretative canons).

1.4 THE SCOPE OF LEGAL INTERPRETATION

The concept of legal interpretation, broadly understood, covers every attempt at determining the meaning of a statutory provision, and every outcome of such

attempts. However, more restricted uses of the term "interpretation" have also been proposed, as well as attempts to segment the semantic field covered by the term "interpretation," distinguishing different kinds of interpretations.

1.4.1 *Interpretation and Understanding*

The scope (the extension) of the term "interpretation" can be restricted in two opposite directions: on the one end, easy and immediate determinations can be viewed as instances of mere "understanding" rather than interpretations; on the other end, complex and reasoned/evaluative determinations can be viewed as "constructions" rather than mere interpretations (Figure 1.1).

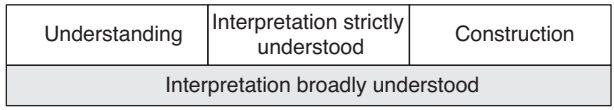

FIGURE 1.1 Understanding, interpretation, and construction

The distinction between understanding and interpretation concerns whether the transition from a linguistic expression in a legal document to the meaning of that expression is "automatic" and unreflected or rather involves a stage of doubt, after which one of the available options is consciously selected. The idea that automatic understanding has to be distinguished from doubt-solving interpretations stems from the observation that competent language users normally comprehend the meaning of most sentences effortlessly, without consciously questioning their content. In this regard, sentence comprehension is not different from other cognitive mechanisms for recognition and classification, such as the perceptual identification of objects or human faces: quick responses are delivered by automatic and unconscious mechanisms, and reasoned reflection is only called upon when such mechanism fail to deliver definite outcomes, or when reasons emerge to doubt their outcomes.

Even for syntactically ambiguous sentences (e.g., "time flies like an arrow"), the most plausible meaning is usually selected automatically, by default, through our psycholinguistic mechanisms for sentence comprehension. Such unconscious mechanisms perform, in a fraction of a second, complex combinations of partially parallel analyses involving phonological, syntactical, and semantic aspects of the sentences being read, and deliver outputs that are not consciously questioned by the reader, unless reasons to do so emerge (Newman, Forbes, and Connolly, 2012). This also applies to the comprehension of legislative statements: the prima facie meaning of such statements, as delivered by "automatic" mechanisms for sentence comprehension, is only challenged when we become aware of reasons to doubt the prima facie output.

Thus, the separation between understanding and interpretation requires us to distinguish situations of clarity and situations of doubt, an idea that is expressed by the traditional saying *in claris non fit interpretatio* (in clear matters interpretation does not take place). One perspective would consist in assuming that a legal text is clear when semantic rules unequivocally determine its meaning, and it is unclear when pragmatics – the reference to the context – is needed to solve indeterminacies. However, this perspective does not fit the distinction between automatic and reflected determination of meaning (nor the complex relationship between semantics and pragmatics). On the one hand, the determination of the meaning of an expression may be automatic also when pragmatic aspects are involved, these aspects being processed by our unconscious sentence comprehension mechanisms; on the other hand, reflection may be needed also when the semantics of the linguistic expressions seems to determine univocally its meaning, but this meaning appears to be incompatible with pragmatic aspects with which the reader is familiar. For instance, in the example of the paid paternity leave, the semantics of the English language would exclude the application of the term "father" to the lesbian partner, but a reader aware of pragmatic-teleological legal considerations (pertaining to equality with regard to same-sex partnerships, or to the needs of the child of the couple) may immediately question that meaning ascription.

Dascal and Wróblewski indeed argue that the distinction between understanding and interpretation in a strict sense (doubts-solving interpretation) should not be mapped onto the distinction between semantics and pragmatics. They consider that interpretation in a strict sense is needed for "an ascription of meaning to a linguistic sign" when the meaning of that sign "is doubtful in a communicative situation, i.e., in the case its 'direct understanding' is not sufficient for the communicative purpose at hand" (Dascal and Wróblewski, 1988, 204). Thus, the determination of whether there is clarity ultimately pertains to pragmatics, since it requires determining whether a contextually adequate inquiry on the meaning of a text would raise reasonable doubts. The fact that the prima facie, "automated" understanding delivers an ascription of meaning does not exclude that doubts can be raised at a later time, based on contextual clues (e.g., in case the prima facie meaning leads to unwanted consequences, or is in conflict with the intention of the legislator as resulting from the parliamentary debates, etc.). For instance, the notion of a "natural family based on marriage," contained in the Italian Constitution, was understood for decades as univocally pointing to the union between a man and a woman, but recently the debate on gay marriage has challenged this notion, introducing doubts. This example shows how the prima facie understanding of a legal provision may be challenged by new information, so that what appeared to be clear may fall under doubt, and the determination of the meaning may consequently require interpretation in a strict sense.

In conclusion, the distinction between understanding and interpretation in a strict sense points to different ways of coming to a determination of a meaning: on the one hand the direct, automatic, and unreflected understanding, and on the

other hand the reasoned, mediated, doubt-resolving interpretation in a strict sense. This distinction does not provide us with a noncontextual way of determining when one or the other way of ascribing meaning is needed.

Let us consider, for instance, how we would apply the distinction between understanding and interpretation to the famous example of a provision stating that "vehicles are not allowed in the park" (Hart, 1958, 607). Mere understanding – involving no conscious doubt resolution – would lead us to assume that a car is a vehicle for the purpose of this provision, and that a wheelchair or the kick scooter of a child are not. This unreflected meaning determination results not only from the semantics of the word "vehicle" – which on the contrary may, according to some dictionary definitions, also include wheelchairs and kick scooters – but rather from our familiarity with the fact that private cars are usually excluded from public parks, while wheelchairs or kick scooters are usually allowed in. This meaning ascription is confirmed by the fact that no negative emotional reaction is aroused by the presence of these transportation means in the park, given that no nuisance is caused by them. On the other hand, a bicycle is likely to raise doubts (does "vehicle" only include motor-powered carriers, or also some human-powered ones?), given its size, the way in which it may affect pedestrians, and the fact that in some public parks bicycles are indeed forbidden.

1.4.2 *Interpretation and Construction*

The concept of interpretation in a strict sense has also been opposed to the idea of construction, the latter involving an outcome that goes beyond interpretation in a strict sense (see our Chapter 3 for a further discussion on this topic).

According to Solum (2009), the distinction between construction and interpretation concerns the opposition between the determination of linguistic meaning (including semantics and pragmatic conventions) of a provision and the determination of its legal effect. As an example of interpretation, Solum mentions the conclusions by Justice Scalia in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), that the "right to keep and bear arms," in the text of the Second Amendment to the US Constitution, means "the individual right to possess and carry weapons in case of confrontation." According to Solum, this determination was an instance of mere interpretation, rather than construction, since it was obtained by focusing on how this expression would be understood at the time of its utterance, according to facts pertaining to the language and culture of the time. Legal construction, on the other hand, "gives legal effect to the semantic content of a legal text." As examples of legal constructions, Solum lists, with regard to the First Amendment:

> (1) the prior restraint doctrine, (2) the rules that define the freedom of speech doctrine governing expression via billboards, and (3) the distinction between content-based regulations and content-neutral time, place, and manner restrictions.

> Arguably, such theories, developed by the US legal doctrine and judiciary, went much beyond whatever can be understood as the semantic meaning of the first amendment, that just reads "Congress shall make no law . . . abridging the freedom of speech."

As another example of judicial construction, consider the principle of mutual recognition under EU law. This principle was affirmed in the case *Rewe-Zentral* v. *Bundesmonopolverwaltung für Branntwein* (1979), known as *Cassis de Dijon*, concerning the sale in Germany of a liqueur (Cassis de Dijon) having a lower level of alcohol than required by German law on fruit liqueurs. The European judges ruled that goods that "have been lawfully produced and marketed in one of the member states" can in principle be "introduced into any other member state," even if they fail to meet the requirements established for goods produced in the latter state. This principle was presented by the judges as resulting from Article 34 of the Treaty stating that "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." In this case too, arguably, the ruling of the judges went much beyond whatever could be seen as the semantic meaning of the Article 34, at the time in which it was enacted.

The distinction between interpretation and construction can also be mapped into the distinction proposed by Soames (2013) between identifying what legal content lawmakers asserted in adopting a certain linguistic expression, and rectifying that legal content. The first (identification) consists in determining "what the lawmakers meant and what any reasonable person who understood the linguistic meanings of their words, the publically available facts, the recent history in the lawmaking context, and the background of existing law into which the new provision is expected to fit, would take them to have meant" (Soames, 2013, 598). The second (rectification) consists in changing the law, namely, in introducing new law by modifying the legislatively asserted content. According to the deferentialist approach normatively supported by Soames, this should only happen when there is the need to precisify the legislative content or harmonize its content with the content of other laws or with the purpose for which the law was adopted. This deferentialist approach was not adopted, according to Soames, in important cases, such as those in which the US Supreme Court recognized new constitutional rights, nonenumerated in the US Constitution.

The distinction between interpretation and construction tends to separate the domain of evaluative choices from the domain of factual inquiry meant to determine what the prescribers might have intended to state and what their addressees might have reasonably comprehended. This distinction, however, cannot easily be mapped into the distinction between empirical and evaluative analyses of meaning. The difficulty is particularly relevant with regard to teleological interpretation. In some cases, an interpretation favoring the purposes of the prescriber fits into the idea of enriching the content of a prescription with

pragmatic inferences. Consider for instance a municipal regulation requiring restaurants to have "clean and well-kept indoor restrooms." Such a prescription would certainly implicate that such restrooms should not only be clean and well-kept but also open and accessible to the restaurants' patrons (Marmor, 2008, 441). However, the usual idea of pragmatic inference does not seem to apply to those cases in which the prescriber's goal and the ways to achieve it are not part of the apparent communicative intention of the prescriber, even though they can be determined without resorting to moral evaluations, relying on mere counterfactual reasoning – what would the prescriber have stated, had he considered certain features of the case at stake? A classic example is *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892), which concerned whether the prohibition to facilitate the importation of "labor or service of any kind" also included the transportation of a foreign clergyman to be employed by the Holy Trinity Church. The US Supreme Court interpreted this provision as only concerning manual work, and in any case as not concerning religious ministers. This interpretation was supported by teleological considerations pertaining on the one hand to the economic purpose of the regulation (preventing the competition of cheap labor) and on the other hand to the need to preserve and support religious practice. Such considerations, while clearly pertaining to goals pursued by the legislator of the time, were not included in the linguistic meaning of its message, as intended by the legislator (who did not focus on the case of clergy when enacting this provision) and understood by its addressees (see Marmor, 2008, 427–429).

1.4.3 *Legal Construction and Creation of New Law*

The distinction between interpretation and construction is often mapped into the distinction between finding the existing law and creating new law. However, whether construction involves the creation of new law depends not only on the gap between the linguistic meaning of the input documents and the output of the construction, but also on views on the connection between law and political morality (i.e., ideas on justice, on the function of the State, on the relation between the State and its citizens).

In fact, constructions are often based on normative considerations pertaining to political morality, which are in principle irrelevant to the determination of linguistic meaning. However, whether such constructions may be considered as new laws also depends on assumptions concerning the nature of the law and its relationship with morality. If we assume that the law already contains (includes) moral-political reasons, then we may also assume that it already includes (implies) the constructions that are justified by such reasons, even before such constructions are adopted by the competent authorities, or become part of the shared legal culture. If we assume, on the contrary, that the law is based only on social sources, we should conclude that the law does not include any constructions that – while fitting good moral

principles – have not yet been adopted by decision makers or by the community of legal experts.

Consider for instance the *Roe* v. *Wade* (1973) decision of the US Supreme Court, which ruled that the US Constitution implies a right to privacy, including a woman's liberty to have an abortion. This judgment was arguably based on a "political" view of the US Constitution that emphasized individual autonomy, the limitation of state power, and judicial activism. If we assume that these ideas pertain to the political morality (the view on how a State should be organized and what its relations to the citizens should be) that was most appropriate to the United States at that time, we can conclude that indeed *Roe* v. *Wade* was well decided. If we further assume that the law includes aspects of political morality, we may say that the ruling of this case was somehow, even before the decision, a part of the US law, being supported by the "best construction" of that law, according to valid principles of political morality. Note that this perspective assumes to some extent metaethical cognitivism, namely, the view that is possible to know what political morality requires (that political morality is not just a matter of preferences).

Thus, the view that the law includes principles and moral values leads us to the conclusion that correct constructions do not create new law, but are rather findings of what the law already is. This idea was developed in particular by Ronald Dworkin (1985), according to whom the purpose of legal reasoning in hard cases is to discover the best construction of the law, by balancing considerations of fit (adherence to history and social sources) and justification (political morality). A similar view was also developed by Robert Alexy (2002), according to whom there is a necessary connection between law and morality, so that the most morally justified interpretations of legal sources are part of the law, when the law is approached from the perspective of a participant in the legal system.

If we assume, on the contrary, that moral principles are not included in the law – regardless of their substantive merits – we must conclude that the *Roe* v. *Wade* decision was not implied by the preexisting US law; it rather consisted in a change in that law. Some may think that this change was welcome, given the urgency of the issue and the inertia of legislators; others that the same change should not have been made, either for its substantive wrongness, or since it violated principles of judicial deference. In both cases, however, the legal theorist refusing to merge law with political morality would conclude that the ruling of *Roe* v. *Wade* was not part of the preexisting law.

Thus, the view that legal construction creates new law is generally endorsed by those authors that adopt an exclusivist positivistic perspective, according to which the law only is determined by social facts, and in particular, by authoritative legal sources (see Marmor, 2002). Such social facts may also include legally relevant values and principles shared by the members of community or by legal scholars and decision makers, but such shared values and principles, given also the diversity of

political preferences that usually coexist in a legal community, rarely support a single legal construction, to the exclusion of all alternatives.

1.4.4 *Conclusion on Understanding, Interpretation, and Construction*

The tripartition of the semantic field of legal interpretation into the three areas just presented – understanding, interpretation strictly understood, and construction – emphasizes important differences in the ways in which the legal significance of authoritative texts may be determined.

The notion of understanding points to the fact that the determination of the meaning of a linguistic expression – in legal reasoning as also in commonsense reasoning – is often the outcome of unreflected automatic cognitive processes. Only when doubts emerge, are the cognitive mechanisms for unconscious sentence comprehension supplemented by the conscious and reasoned analysis of alternative interpretations, and hopefully with the choice of one of them. Under this perspective, the opposition between understanding and interpretation may be descriptively relevant to distinguish different meaning-determinative processes. However, this opposition does not provide us with a criterion to determine in advance whether unreflected understanding or conscious interpretation is needed relatively to a certain text, since the need to switch from understanding to interpretation hangs on whether doubts emerge relatively to the meaning of the text, which does not depend only on the semantics of that text, but rather also on its context and on the information that is made available to the reader.

The notion of construction points to the fact that the determination of the legal effect of authoritative documents in some cases requires inputs that go beyond the linguistic resources available to the originators and the addressees of such documents at the time in which the documents were produced. In particular, such inputs may include considerations pertaining to political morality broadly understood. The distinction between interpretation strictly understood and construction is descriptively relevant, since it points to different aspects of meaning ascription process, which involve different premises and inferences. However, this distinction also fails to provide us with a clear criterion to determine in advance what approach is needed, since even when linguistic analysis gives a clear outcome, further considerations may indicate a different conclusion, and the choice of whether to give preference to linguistic or to other considerations may depend on evaluative assessments.

In conclusion, while the distinction among understanding, interpretation in a strict sense, and construction provides us with useful perspectives to look at meaning ascriptions in the legal domain, it is difficult to clearly demarcate the scope of these concepts. Therefore, we shall use the term "interpretation" to cover all meaning ascriptions to normative documents, including automatic ones (understanding) as well as those based on nonlinguistic clues (construction). We shall,

however, occasionally use the terms "understanding" and "construction" respectively to point to instances of interpretation in which automatic determination of meaning or nonlinguistic elements are at stake.

1.4.5 *Interpretation and Semantics*

The distinctions just presented – understanding versus interpretation strictly understood versus construction – are based on the types and uses of the grounds used in interpretative reasoning: no ground is consciously considered in the automatic understanding; only linguistic-pragmatic grounds are taken into in interpretation in a strict sense; and extralinguistic grounds are used in construction.

A different classification, often used in civil law systems, focuses on the outcome of interpretation, more precisely on the relation between this outcome and the semantics of the text being interpreted, as resulting from linguistic rules. Three kinds of meaning ascriptions are correspondingly distinguished: (1) declarative interpretation, which assigns to the interpreted expression the meaning that is most immediate and plausible according to semantic rules and generally shared presuppositions; (2) extensive or restricted interpretation, which deviates from declarative meaning but is still consistent with linguistic conventions; and (3) analogy or reduction (exception), which provides for extensions or restrictions of the scope of a legal norm that do not fit usual linguistic conventions (see Figure 1.2). The distinction between extensive interpretation and analogy is particularly relevant in criminal law, in legal systems where the use of analogy is forbidden in that specific body of law.

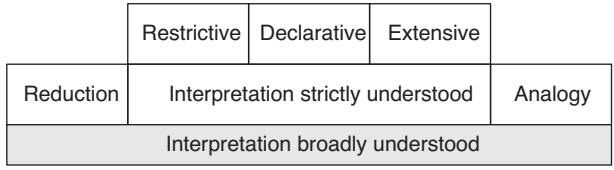

FIGURE 1.2 The scope of interpretations

Using the example of the rule "no vehicles in the park," we may say that an interpretation that views this rule as applying to all motor-powered vehicles capable of carrying an adult person may possibly be viewed as declarative. An interpretation that includes bicycles in the prohibition could be viewed as extensive, while an interpretation that excludes electric scooters could be viewed as restrictive. Finally, an interpretation that includes wheelbarrows could be viewed as analogical, while an interpretation that excludes golf carts could be viewed as a reduction.

As an example of the difference between extensive interpretation and analogy, consider the issue of unauthorized reproduction of software, as it was to be addressed in Italy before a new law was enacted (in 1983). The Italian judges approached the

issue by referring to the provisions establishing civil damages and criminal sanctions for the unauthorized reproduction of literary works. They applied civil damages to the unauthorized reproduction of software, assimilating it through an analogy to the unauthorized reproduction of literary works. However, they did not apply criminal sanctions, considering that the expression "literary work" could not be interpreted as including software, even under the most extensive interpretation.

The difficulty in demarcating extensive interpretation from analogy is shown by another Italian case, which concerned a radio station (Vatican Radio) that emitted strong electromagnetic waves, allegedly causing nuisance and harm to people living nearby. The judges issued a (mild) criminal sanction against the managers of the radio, by applying extensively (though without the need of an analogy, according to their assessment) a criminal prohibition against causing harm and nuisance by "throwing things": they assumed that radio waves could be viewed as a kind of "thing," and that emitting radio waves could be viewed a way of "throwing" such "things." Whether this was really an extensive interpretation or rather a masqueraded analogy is an issue that cannot be addressed here (and for which probably no uncontroversial answer can be found).

As an example of reduction of the scope of a legal provision that goes beyond what appears to be its most restrictive linguistic interpretation, consider again the *Holy Trinity* case, where teleological interpretation led the US Supreme Court to exclude from the scope of the expression "labor or service of any kind" the service of a clergyman, which appears to be undoubtedly included in the semantic meaning of that phrase.

1.4.6 *Cognitive and Decisional Interpretation*

The distinction between interpretation in a strict sense and construction is connected, but not identical, to the distinction between scientific interpretation and political interpretation proposed by Hans Kelsen (1967, Ch. 8), and to the similar distinction between cognitive and decisional interpretation advanced by Guastini (2015). Such distinctions are based on the opposition between the identification of the different possible interpretative options that are offered by the legislative language, and the choice of one among such options (see also Pino, 2013), in the context of legal practice.

For Kelsen, scientific interpretation understood as the "cognitive ascertainment of the meaning of the object that is to be interpreted" can only determine "the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame" (Kelsen, 1967, 351). On the contrary, the selection of one of these meanings, for the purpose of legal decision, is not an act of cognition, but rather an act of will, which is inspired by political preferences. Thus, following Kelsen's analysis, the scientific determination of the meaning of the term "vehicle" in the example above would consist in distinguishing multiple

alternative notions of a vehicle, as covering, for instance, all devices capable of transporting humans, or only motor-powered devices, and so on. The choice of one of those meanings would consist in a political determination, broadly understood, inspired by the fact that the interpreter attributes a prominence to the certain evaluative considerations. Such considerations may lead the interpreter, for instance, to include also bicycles in the scope of "vehicle," and consequently to make them forbidden in the park.

It seems that Kelsen's approach to scientific interpretation can be understood in two ways. According to a first perspective, the alternative meanings to be identified through scientific interpretation consist in the opportunities that are offered by the linguistic syntax and semantics of the provision being interpreted. In a second perspective, the meanings to be determined though scientific interpretation consist in the interpretative conclusions that are offered by all kinds of legal arguments in use. These interpretative conclusions may fail to include some grammatically possible meanings, but they may also go beyond what appears to be grammatically acceptable (as would happen when an analogy or a reduction is involved). The second approach is advocated by Guastini, for whom the cognitive interpretation aims to "identify, of a normative document, the different possible meanings (taking into account linguistic rules, different interpretative techniques being used, the dogmatic opinions widespread among jurists, etc.) without selecting any one of them" (Guastini, 2011, 27–28, authors' translation). Decisional interpretation, on the contrary, consists in selecting and arguing for one of these meanings.

Kelsen's analysis of interpretation provides for a descriptive approach to interpretation, which consists in mapping what appears to be admissible in the context of a certain language or legal culture. This analysis may however be the basis of a prescriptive approach to interpretation, which encourages the decision maker to refer to its individual conscience or moral/political preferences in making fundamental interpretative decisions, given that the law leaves a broad set of alternatives open for individual choice. This view is developed by Bobbitt (1991), who argues that when conflicting interpretations are possible, according to the available arguments, the choice should be a matter for the conscience of the decision maker.

The idea that linguistic meanings offer a range of possibilities to legal interpretation can also be linked to the famous distinction proposed by Hart (1958, 607) between the "core" meaning of general terms, which covers standard or prototypical cases of their application, and the surrounding penumbra. The penumbra includes "debatable cases" to which the application of the term is neither obvious nor obviously ruled out. These cases will "each have some features in common with the standard cases to which the concept is certainly applicable; they will lack other features or be accompanied by features not present in the standard case." Following this perspective, we might say that the range of possible linguistic interpretations of a general term is obtained by including or rather excluding from the meaning of the term any classes that are located in the term's penumbra. For example, both the

inclusion of bicycles in the extension of the term "vehicle" and their exclusion from it may be viewed as distinct, linguistically possible, interpretations. The presence in a penumbral case of features that are in common with the standard cases for the application of the term may support arguments for the inclusion of the penumbral case in the term's meaning (extension), while the presence of different features may support arguments for its exclusion (see Section 3.1 below). Fuller (1957, 630) contrasted Hart's position, arguing for a prominent role for purpose and pragmatics in legal interpretation. Consequently, he observed that legal interpretations cannot be confined within the borders of the ordinary language meaning of the terms used by legislator.

1.5 REASONS IN INTERPRETATION: FROM TEXTS TO PURPOSES AND VALUES

The interpretation of legal or other normative texts has been the object of theoretical reflection from ancient times. For instance, in Roman law we can find the famous recommendation by Celsus that interpreters should not focus only on the literal meaning of the text to be interpreted, but rather address its purpose: "To know the laws doesn't mean to know the text of the law, but understanding its force and power," and that by Paulus, who pointed out that the "letter" should not be slavishly followed when it contradicts the "spirit."

In this section, we will not provide a full account of interpretative argumentation – as this will be developed in the following chapter – but rather briefly consider what main reasons can be advanced to support an interpretation.

1.5.1 *Reasons and Motives for Interpretation*

We may oppose on the one hand the *motives* of interpretation, namely, the psychological factors that may lead an interpreter to select one or another interpretation, and on the other hand the *reasons* for the interpretation, namely, those aspects that, within a certain legal culture, support a certain interpretation, that is, provide appropriate grounds for it. The motives of an interpretation may consist in any kind of psychological determinants: they may include whatever factors may induce a party to adopt one interpretation rather than another, they may pertain to individual interests as well as to social values, and they may be illicit as well as licit.

For instance, in 2001 the Court of Appeal of Palermo condemned an Italian judge in the Supreme Court of Cassation for collaborating with the Mafia. According to the Palermo Court, this judge had ordered the release of forty-two individuals accused of participating in organized crime (some of whom were well-known Mafia bosses), based on a peculiar interpretation of a statutory provision, which the judge had adopted in order to favor such individuals. This provision addressed the way of computing the detention time before conviction, for the purpose of establishing whether the maximum pre-conviction detention term had been

reached, after which the accused should be released. It established that in the computation of the detention time before conviction, the time of trial sessions involving the accused individuals was not to be included. This provision had been created to address the fact that the defendants used various delaying tactics to prolong trials in order to reach the maximum pre-conviction detention time before the end of the proceedings, so that they could be released. The accused judge, however, had interpreted this provision in such a way that that the non-inclusion of the trial sessions would require a specific judicial order to that effect. Since no such order had been issued in the proceedings involving the forty-two accused, the time of their trial sessions was included in the calculation of their pre-conviction detention time. Consequently, it was determined that their detention had exceeded the maximum time, and they were released.

The Court of Palermo considered that the accused judge had adopted this interpretation precisely to favor the Mafia bosses, to whom he was connected, and convicted him for the crime of "external participation in mafia association" (in Italian, "*concorso esterno in associazione mafiosa*"). His conviction was then annulled by the Italian Supreme Court, who argued that there was no decisive evidence that the judge had adopted this interpretation for this unlawful purpose; he might as well have genuinely opined that this was the legally correct interpretation of the statutory provision at issue, an opinion supported by appropriate – through by no means univocal – legal clues.

For our purpose, it is sufficient to remark that the purpose of obtaining the release of the Mafia bosses could have been a (unlawful) motive for adopting the interpretation but could not have constituted a reason for it, in the context of Italian law at the time.

1.5.2 *Reasons for Interpretations*

Let us now focus on what may count as acceptable inputs for a legal interpretation, inputs that may not only motivate the interpreter to adopt that interpretation but may also be viewed as valid reasons justifying the adoption of the interpretation.

In continental Europe, the analysis of legal interpretation by Carl von Savigny (1840) has been particularly influential, and is often reproduced, sometimes with refinements and additions, in many accounts of legal interpretation. Savigny, after affirming that interpretation has the purpose to "reconstruct the thought dwelling in the law," distinguishes four "elements" of interpetation: the grammatical, the logical, the historical, and the systematic. The grammatical element concerns the semantic meaning of the words used by the legislator according to linguistic rules. The logical element consists in combining word meanings to determine the meaning of whole provisions. The historical element concerns the changes that the text was meant to produce in the historical context in which it was enacted. The systematic

element addresses the relation between the text being interpreted and the entire system of law.

To these four elements, Savigny adds a fifth, the ground of the law (*ratio legis*), and distinguishes two aspect thereof: previous high-level laws, to be implemented through the law being interpreted, and the objectives pursued by the legislator. He argues that while the ground is no part of the content of the law strictly understood, it can be cautiously used to determine that content.

In the many years that have passed since Savigny's account, multiple approaches and ideas have been presented to develop or attack his analysis. In particular, various approaches to interpretation have focused on what Savigny called "the grounds of law," namely the objective or purpose of the text being interpreted. This idea has been prominent since the end of the nineteenth century in continental and common law legal cultures, which tended toward what is also called legal pragmatism, namely, the view that legal provisions are tools used by legislator to achieve certain ends, and should be interpreted accordingly (Jhering, 1913; Holmes, 1899).

Various trends in legal theory and judicial practice, both in the civil law and in the common law domain, have indeed emphasized the role of purpose in interpretation, and the possibility to override the prima facie meaning of legal texts in order to achieve certain social goals or to protect certain interests. Originally the idea of purpose was focused on the objective pursued by the legislator, or on how the legislator meant to adjudicate between competing interests (according to the so-called jurisprudence of interests, see Heck, 1914). Following World War II, the first aspect of the "ground of law" as indicated by Savigny, namely the reference to higher laws, has become prominent. In the context of international and regional human right charters and of national constitutions, the teleological analysis has been driven by the rights and social goals indicated in such documents. As interpretation aims at multiple purposes, involving competing rights and values, proportionality (Alexy, 1989) becomes a key aspect of it (Bongiovanni and Valentini, 2018; Sartor, 2018). Purposive interpretation has become so dominant that it tends to absorb all the other elements of interpretation (Barak, 2007).

1.5.3 *The Semantics of Words and their Combinations*

The first element of interpretation, according to Savigny's account, consists in the meaning of the single terms used in a legislative provision. Usually, it is not necessary to point at the semantic rules specifying such meanings, these rules being shared and undisputed presuppositions. However, a discussion on linguistic meanings is relevant in some controversial cases. For example, in *ACLU* v. *Clapper*, 785 F.3d 787 (2015), the American Civil Liberties Union argued that the mass collection of phone metadata by the US government was not authorized by Section 215 of the Patriot Act, which only authorized the collection of data "relevant to investigation." In agreeing with the ACLU, the judges cited the definition of

"investigation" in the Oxford dictionary: "examine (a matter) systematically or in detail; to make an inquiry or examination into." They excluded that the mass collection of data to identify suspects to be inquired or to support future inquiries would qualify as an "investigation" according to this linguistic specification.

The second element to be considered, in Savigny's list, is the way in which words are combined into sentences. The "compositional" meaning resulting from the combination of word meanings into syntactic structures is usually noncontroversial, since only one such combination is syntactically correct, or at least only one stands out as being clearly more sensible than others. However, in some cases syntax comes to the fore; when the legislative provision allows for multiple equally plausible syntactic structures, the choice among them becomes legally relevant (for a further analysis, see our Section 3.2). For instance, in Case C-486/12 the European Court of Justice had to interpret Article 12 of the 1995 Data Protection Directive, which gives data subjects the right to obtain a copy of their data "without excessive delay or expense." The issue to be addressed was whether data controllers could require data subjects to pay a small fee in order to obtain the data. The answer to this issue depended on whether the locution "without excessive delay or expense" was to be read as "without excessive delay and without excessive expense" or rather as "without excessive delay and without any expense," namely, on whether the scope of "excessive" covers both "delay" and "expense," or whether it only concerns "delay." Following the first interpretation, the request of nonexcessive fees would be permissible; following the second it would be forbidden, that is, the data subject would have the right to obtain the data at no cost.

The court examined how this provision was expressed in other languages (in EU law, legal documents are delivered in all official languages, each version having the same legal value). In French, as in other languages in which adjectives are postponed to the word they qualify, the adopted formulation ("*sans délais ou frais excessifs*") indicated unambiguously that the term "excessive" also applied to expenses. Thus, the judges adopted the latter interpretation, as required by the interpretative principle, often used by the ECJ, that multilingual legislative documents should preferably be given meanings that are compatible with all linguistic versions.

1.5.4 *The Historical Context in Which the Legislative Text Was Adopted*

The extent to which legal interpretation depends on historical context is at the center of the debate between the so-called originalist and evolutionary (or living tree) doctrines. According to the originalist perspective, the correct interpretation of a legal text is permanently fixed by the legal-cultural-social context existing at the time when that text was enacted; according to the evolutionary perspective, interpretation may change through time, and reflect the evolution of law, politics, and culture. As an important example of a decision inspired by an originalist approach, we can mention *District of Columbia* v. *Heller*, by the US Supreme Court on

June 26, 2008. This decision, adopted with a 5–4 majority, struck down a District of Columbia statute prohibiting the possession of useable handguns in the home, on the ground that this prohibition violates the Second Amendment to the US Constitution, which reads "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." According to Justice Scalia's majority opinion, this article also covers the right to possess weapons for the purpose of individual self-defense, a conclusion that is reached by considering the English law of the time, which, according to Justice Scalia, included a right to bear arms for self-defense (for a critical discussion see Solum, 2009).

As is well known, the idea of originalism can be approached in multiple ways. A key distinction is that between "original intent," namely, the purpose pursued by the legislator, as it can be retrieved by parliamentary debates and preparatory materials, and "original meaning," namely, the understanding of the people at the time, given the culture and legal system of the day. An example of an interpretation inspired by original intent may possibly be found in the *Slaughter-House Cases*, decided by the US Supreme Court in 1873. These cases concerned a Louisiana statute that conferred to a single corporation a monopoly over the New Orleans slaughtering business. The law was considered to be consistent with the Fourteenth Amendment, granting all citizens "equal protection of the laws," since, according to the judges, the Fourteenth Amendment had only one "pervading purpose" at the time in which it was enacted, the protection of the newly emancipated slaves (it did not apply to commercial companies).

A number of approaches exist on how to understand originalism, or how to combine it with the need to take into account the evolution of the law, culture, and social attitudes (see for instance Balkin, 2018). The reference to original intent may be substituted by a reference to hypothetical intent (what legislators would have intended to establish through the provision at stake had they been rational, or respectful of fundamental legal principles), or to the present legislators (what would today's legislators have intended to establish through such a provision). For instance, one may argue with regard to the prohibition of "cruel and unusual punishments" that had the US legislators of the time been aware as we are today of the sufferings caused by the implementation of a death penalty and of its current unusualness, they would have considered it to be both cruel and unusual.

1.5.5 *Coherence with Other Norms, and with the Purposes of the Norm and of the Systems*

Finally, the idea that norms have to be put in the context of the legal system as a whole, and be coherent with it, plays a key role in interpretative reasoning (on coherence, see Peczenik, 2005, Chapter 4). This traditional requirement has acquired a particular relevance in the context of fundamental rights and more

generally of constitutional provisions, where it supports the choice of interpretations that best fit constitutional principles.

As a recent example, consider the judgment adopted by the European Court of Justice in *Scarlet* v. *Sabam* (2012), where the ECJ had to determine whether a Belgian judge could order an internet service provider (Scarlet) to filter all communications in order to identify unlawful downloads of copyrights materials. The ECJ had to interpret Article 15 of the 2000 eCommerce Directive, which prohibits member states from establishing "general obligation on providers . . . to monitor the information which they transmit or store" or "to seek facts or circumstances indicating unlawful activity." The court – by considering this provision in the context of the EU directives on the protection of intellectual property and the fundaments right to privacy, economic initiative, and intellectual property – concluded that EU law precludes injunctions obliging providers to filter all communications in order to identify the transmissions of copyrighted content.

A very controversial example is a recent Italian legislative provision (Article 4 of legislative decree 113/2018), according to which a residence permit granted further to an asylum application "does not amount to a registration as a resident." The purpose of this provision, as explicitly stated by the leaders of the majority parties in parliamentary debates and in the media, was to prevent asylum applicants from being registered as residents (and obtaining the social benefits that are dependent upon residence). However, the Civil Court of Florence (order 361/2019) ordered a municipality to accept a request for registration presented by a person whose asylum application was still pending. The judge argued that the new provision – to be coherent with other Italian rules that conferred residence based on the ascertained determination to settle on a municipality, as well as with requirement of equality and nondiscrimination in the Italian Constitution – should not be interpreted as excluding asylum applicants from the registration of residence. According to the judge, the provision should rather be interpreted as affirming that the mere presentation of an asylum application was insufficient to this purpose; the application had to be combined with the applicant's determination to reside in the city in which he or she was applying for residence. By adopting an interpretation that contradicted the clear intention of the legislator enacting the interpreted provision, the judge in this case refused to act as an agent of that legislator, his refusal being based on consideration pertaining to coherence with other laws (enacted by previous legislators) and with constitutional norms, as interpreted by the judge.

The coherence between a specific provision and other provisions in the legal system was also at stake in *Dunnachie* v. *Kingston-upon-Hull City Council*, discussed by MacCormick (2005). This case concerns a claim for a compensation for non-pecuniary damages by an employee who had been unfairly dismissed, and as a result claimed to have suffered humiliation, injury to feelings, and distress. The key issues to be addressed in this case pertained to the interpretation of Section 123(1) of the UK Employment Rights Act 1996, which reads that "the amount of the compensatory

award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal." To determine whether the claimant should be compensated not only for his financial losses, but also for his psychological harm, the scope of the expression "loss" had to be determined. The employee argued that an interpretation of this provision in the context of, and in coherence with, all the relevant sections of the statute would grant him the recovery of *losses* other than financial losses narrowly construed. The employer argued that the relevant sections of the current UK legislation only allows for the recovery of *financial loss*, this interpretation corresponding to the ordinary meaning of the expression "loss."

1.6 ARGUMENT SCHEMES IN LEGAL INTERPRETATION

From the argumentation perspective, an interpretative statement – namely, the claim that a certain legislative expression should be interpreted in a certain way – is a claim that can be supported through arguments. These arguments can be attacked by other arguments, which, in their turn, may the object of further attacks. For instance, in Italian law there has been, through the years, a progressive extension of the kinds of damages that can be indemnified under civil law. The starting point of the debate was the established view that the notion of indemnifiable loss covers only pecuniary losses, since this is usually the meaning of "loss" in ordinary language and in legal tradition. A counterargument was built for the conclusion that non-pecuniary "losses" (e.g., permanent physical impairments, such as disability or disfigurement, that do not affect one's capability to earn through one's work) should also be compensated, based on the view that physical integrity and health are rights established in certain provisions of the Italian Constitution, directly enforceable in court. This counterargument was endorsed by the Italian judiciary, even though it was contested on the ground that recognizing compensation for non-pecuniary losses would lead to increased litigation, insurance cost, and so on. The latter counter-counterargument was in its turn attacked by arguing on the one hand that the realization of constitutional values should be a prevailing concern, and on the other hand that the inconveniences resulting from the compensation for non-pecuniary damages could be limited by defining precise standardized criteria for computing the amount of damages for non-pecuniary losses.

As this example shows, the process of the justification of an interpretation may consist in a dialectical process involving the construction or arguments and counter-arguments. The outcome of the process consists in an architecture of arguments and counterarguments that as a whole supports the interpretative claim (we shall provide a precise analysis in Chapter 6).

In the following we shall present three lists of types of argument (which we refer to as "argument schemes") provided by leading legal theorists – Giovanni Tarello, Neil MacCormick and Robert Summers, and Jack Balkin – at different points in time

(1980, 1991, and 2018), and with regard to different cultural contexts (Italy, worldwide comparison, and US constitutional law).

1.6.1 *Tarello's List of Interpretative Arguments*

The Italian legal philosopher Giovanni Tarello (1980, Chapter 8) lists fourteen types of interpretative arguments:

1. *Arguments a contrario* reject interpretations departing from literal meaning.
2. *Analogical arguments* support interpretations according to which the meaning of an expression in a legal provision is extended to apply a rule to a case not regulated by the given provision (a case which is included in neither the core nor the periphery of the application area of the provision), but presents a relevant similarity with the cases covered by it.
3. *Arguments a fortiori* support interpretations according to which a legal provision is applied to cases that are not covered by the terms of that provision, but deserve, to a higher degree, the same discipline as the cases covered by the provision.
4. *Arguments from completeness of the legal regulation* exclude interpretations that create legal gaps.
5. *Arguments from the coherence of the legal regulation* exclude interpretations of different legal statements that make them conflicting.
6. *Psychological arguments* support interpretations driven by the actual intent of the authors of the text.
7. *Historical arguments* support interpretations giving a legal statement the same meaning that was traditionally attributed to other statements governing the same matter.
8. *Apagogical arguments* exclude interpretations that generate absurdities.
9. *Teleological arguments* support interpretations contributing to a purpose pertaining to the goals or interests that the law is supposed to promote.
10. *Nonredundancy arguments* exclude interpretations that would make the interpreted expression superflous under the assumption that the legislator does not make useless normative statements.
11. *Authoritative arguments* support interpretations already given by authoritative courts or scholars.
12. *Naturalistic arguments* support interpretations aligning a legal statement to human nature or the nature of the matter regulated by that statement.
13. *Arguments from equity* support (exclude) (un)fair or (un)just interpretations.
14. *Arguments from general principles* support (exclude) interpretations that are supported by (incompatible with) general principles of the legal system.

Tarello's list, while being based on Italian legal practice, has been referred to in Perelman (1979), who discusses it with examples from French and Belgian law.

1.6.2 *MacCormick and Summers*

MacCormick and Summers (1991), in synthesizing the outcome of a comparative inquiry into statutory interpretation, identify a list of eleven kinds of interpretative arguments.

1. *Arguments from ordinary meaning* require that a term should be interpreted according to the meaning that a native speaker would ascribe to it.
2. *Arguments from technical meaning* require that a term having a technical meaning and occurring in a technical context should be interpreted according to its technical meaning.
3. *Arguments from contextual harmonization* require that a term included in a statute or set of statutes should be interpreted in line with the whole statute or set.
4. *Arguments from precedent* require that a term should be interpreted in a way that fits previous judicial interpretations.
5. *Arguments from statutory analogy* require that a term should be interpreted in a way that preserves the similarity of meaning with similar provisions in other statutes.
6. *Arguments from a legal concept* require that a term should be interpreted in line with the way it has been previously recognized and doctrinally elaborated in law.
7. *Arguments from general principle* require that a term should be interpreted in a way that is most in conformity with general legal principles already established.
8. *Arguments from history* require that a term should be interpreted in line with the historically evolved understanding of it.
9. *Arguments from purpose* require that a term should be interpreted in a way that fits a purpose that can be ascribed to the statutory provision, or whole statute, in which the term occurs.
10. *Arguments from substantive reasons* require that a term should be interpreted in line with a goal that is fundamentally important to the legal order.
11. *Arguments from intention* require that a term should be interpreted in line with the intention of the legislative authority.

MacCormick (2005) proposes grouping interpretative arguments into three main supercategories, over the above categories of interpretative arguments.

1. *Linguistic arguments* appeal to the linguistic context of a provision to support its interpretation (they are definitional arguments, according to Macagno and Walton, 2015, 2017). Linguistic arguments may include the first three items in the above list by MacCormick and Summers (1991).

2. *Systemic arguments* take into account the special context of the authoritative text within the legal system. Such arguments merge the authority of the source with the reconstruction of definitions from the text. Systemic arguments may include items 4 through 8 in the above list.
3. *Teleological-evaluative arguments* make sense of a text in light of its aim or goal (they are classified as pragmatic arguments by Macagno and Walton, 2015). Teleological-evaluative arguments may include items from 9 to 11 in the above list.

1.6.3 *Balkin's List of Interpretative Arguments*

As a recent list of argument types we can mention the proposal by Balkin (2018, 181–183), which focuses on US constitutional law, and is to some extent based on the analysis proposed by Bobbitt (1982).

1. *Arguments from text*, including arguments about definitions of words and phrases in the text; arguments that compare and contrast different parts of the text; arguments that compare the text with other texts; and arguments that employ traditional canons of statutory interpretation.
2. *Arguments about constitutional structure* and the structural logic of the constitutional system.
3. *Arguments from purpose*, including arguments about the purposes, intentions, and expectations of the people who lived at the time of the adoption of the Constitution and its subsequent amendments, as well as purposes attributed to the Constitution over time.
4. *Arguments from consequences*, concerning the likely consequences of interpreting the Constitution in one way rather than another.
5. *Arguments from judicial precedent*, based on previous judicial decisions, about what is holding and what is *dicta*, about what is controlling authority and what is merely persuasive authority.
6. *Arguments from political convention*, concerning political conventions and settlements that arise within institutions or branches of government, or among institutions or branches of government.
7. *Arguments from the people's customs and lived experience*, considering the public's customs, expectations, and ways of life and whether a proposed interpretation of the Constitution will conform to, vindicate, assist, defy, or disrupt them.
8. *Arguments from natural law or natural rights*, concerning rights that governments exist to secure and protect (natural rights), as well as what kinds of laws are necessary to protect human flourishing (natural law).
9. *Arguments from national ethos*, appealing to the character of the nation and its institutions and to important, widely shared, and widely honored values of Americans and American culture.

10. *Arguments from political tradition*, appealing to cultural memory, to the meaning of key events in American political history, and to the lessons to be drawn from those events.
11. *Arguments from honored authority*, appealing to the values, beliefs, and examples of cultural heroes in American life.

1.6.4 *The Legislator's Intention*

An important role in interpretative reasoning is played by what MacCormick (2005) calls "appeal to the lawmaker's intention." This idea, however, is controversial and can be understood in different ways.

First of all, we need to distinguish between the private, or sometimes illegal, goals that contribute to the choices of individual members of a legislative body (e.g., obtaining financial contributions in exchange for measures that favor certain individuals or companies), and the social goals that such members aim to achieve through their choices. Only the second kind of goals may be viewed as intentions of the legislator as a public body.

Second, we need to distinguish between the goals that were pursued by the legislator and the means that that the legislator intended to prescribe in order to achieve such goals. It may happen that a provision would achieve the goals aimed at by the legislator only if it were given a meaning that is different from what was intended by the legislator. For instance, a provision introducing a new tax may be effective only if it were applied differently from how the legislator apparently intended, to counter ways of eluding the tax that the legislator had not considered.

Third, we need to distinguish between those social goals that are pursued as a matter of fact by the legislator, according to its political ideology and vision of the public good, and the goal that the legislator should pursue, according to legal principles, constitutional requirements, and shared standards of political morality.

The three issues just mentioned lead to the distinction between the empirical intention that the historical legislator had, in issuing a certain provision, and the intentions that could be attributed to an ideal or rational legislator, in issuing the same provision. The distinction between the real and the ideal legislator's intention is complicated by the fact that what can be attributed to an ideal legislator is also dependent on the interpreter's views (1) on the most efficient ways to achieve the legislator's goals, (2) on the goals that should or should not be pursued by the legislator according to constitutional requirements and political morality, and (3) on the extent to which political morality and constitutional requirements should override the legislator's preferences. This issue is manifest in cases like that the above-mentioned case concerning immigrants' right to obtain residence, in which the judge refused to act as an agent of the Italian legislator, according to his view on the applicable constitutional principles.

The arguments that support interpretations based on the intention of the legislator, as observed by MacCormick (2005), tend to have a transcategorial nature: they tend to range across all interpretative schemes, as linguistic, systemic, or teleological-evaluative considerations can support the attribution of intentions to legislators (see Chapter 6). For instance, let us assume that the legislator has competently used ordinary language to express its intention in framing a provision. In this case, the interpretation of that provision that fits ordinary language will also capture the intention of the legislator. Similarly, if we assume that the legislator competently framed its provision in awareness of how it would fit with other legal provisions and principles, then the interpretation that most coheres with such provisions and principles will best meet the legislator's intention.

1.6.5 *Criteria for Comparing Interpretative Arguments*

As Karl Llewellin (1949) famously observed, different canons for legal interpretation may apply to the same provision and lead to opposite outcomes. In such cases a choice may be required of one among the alternative interpretative outcomes. For instance, in the *Dunnachie* case mentioned above, a choice was required between the outcome of an ordinary language argument, according to which the expression "loss" would be interpreted as "pecuniary loss," and the outcome of a teleological argument, according to which that expression would be interpreted as including also categories of non-pecuniary harm.

When a conflict of interpretative argument arises, the issue to be decided is which of such arguments should take the lead. The law may provide some general criteria for dealing with certain conflicts of this sort, though often such criteria fail to provide decisive clues. Alexy and Dreier (1991, 95–98) cite criteria such as the following: (1) in criminal law, arguments from ordinary meaning have priority over arguments from technical meaning; (2) in criminal law, generic arguments based on the intention of the legislator have priority over arguments not based on authority, but do not have priority over linguistic arguments. Similarly, it could be argued that considerations pertaining to constitutional principles are most relevant where fundamental rights are at stake, while considerations pertaining to legislative intention, or to teleology, are most relevant where economic or social policies are at issue.

There may be two ways to approach conflicts between interpretative arguments, and solve the legal indeterminacies resulting from the lack of decisive indication on how to adjudicate such conflicts.

The first, more optimistic, approach may consist in assuming that all indeterminacies are caused by the fact that the strength of interpretative canons is context dependent, and indeed related to the extent to which the rationale of each canon applies to the situation being considered. For instance, we may agree that an argument based on ordinary language tends to be stronger the more the ordinary language is univocal in a legal text, and the more it is important that people's expectations are respected (e.g., in the definition of crimes). Thus, even if it is not possible to determine in the abstract

which canon should prevail in all cases, it should be possible to build reasonable arguments on why one canon should prevail over the opposed canon in any given context.

The second, less optimistic, approach, more consonant to realistic traditions in legal theory, assumes that whenever the law fails to give a clear answer to a conflict of interpretation, there is no shared or rational way to approach the matter: it is up to judicial discretion or to judicial conscience to decide one way or the other, according to the ethical or political preferences.

1.6.6 *Rationales for Interpretative Canons*

Interpretative argument schemes have a double nature.

On the one hand, they may merely be viewed as conventions for legal reasoning, namely, positive components of a certain legal system (participating in legal tradition and culture) that determine what is generally considered as a relevant argument in that system. Under this perspective, interpretative argument schemes do not need justification; the justification of their use within a legal system consists in the mere fact that they are part of it, so that their use is indeed authorized by the conventions, or the "grammar," of that legal system (for this idea, see Patterson, 1996). Following this approach, no legally relevant criticism can be brought against the way in which such schemes are currently used in legal reasoning. Thus, if an originalist approach to interpretation is used within a certain jurisdiction, this would be part of the grammar or language game currently in use in that jurisdiction, and could not be critically addressed from a legal perspective.

On the other hand, interpretative schemes may be viewed as appropriate ways to achieve legal determinations, which can be assessed according to the outcomes that are obtained through their use, relatively to the legal and social values at stake. Under this second, critical, perspective, interpretative argument schemes and their relative importance may be supported by reasons and subject to criticisms, and such reasons and criticisms may be relevant to their legal use. Interpretative schemes may be supported by rationales pointing to the beneficial outcomes resulting from their application in favorable contexts or can be contested based on the negative outcomes resulting from their application in unfavorable contexts.

The latter approach is developed by Walton and Sartor (2013), who argue that for establishing whether an argument scheme should be used in a dialogue, a party to that dialogue may consider:

1. to what extent the use of the scheme by that party is likely to lead the party to appropriate epistemic or practical conclusions;
2. to what extent the use of the scheme by that party is likely to advance that party's goals in the dialogue; and

3. to what extent the use of the scheme by that party is likely to advance the goals (and values) underlying the dialogue itself and the practice in which it is embedded.

Argument schemes such as those listed above can indeed be provided with appropriate rationales that pertain to the legal process and the functioning of the legal systems. For instance, the ordinary language canon can be supported by considerations pertaining to legal certainty (citizens tend to form expectations concerning the application and enforcement of legal rules, based on the ordinary language meaning of legislative texts), the division of powers (respect for ordinary language may limit judicial discretion and abuses of judicial power), formal equality (the generality of ordinary language may prevent idiosyncratic interpretations), and so on (for some consideration on the importance of ordinary language, see Beccaria 1764, Chapter 4). Ordinary language arguments could also be supported by the rationale of respecting the legislative intention, to the extent that it can be assumed that the legislator was carefully using ordinary language to express its intentions.

Similarly, arguments from coherence can be supported by considering that the expectations based on different legal norms, as well as the acts through which such norms are complied with and applied (by citizens, administrators, and judges), should not interfere with one another, but rather operate in a synergetic way.

The reliance on some inference schemes is often criticized in legal reasoning. For instance, a debate on the merits and limits of different kinds of originalism persists in US law, while in Continental legal systems there is an ongoing debate on the extent to which precedents should be followed. In both such debates, reasons pertaining to legal certainty and limitation of judicial discretion are opposed to reasons in favor of innovation, experimentation, and adaptation to new context and values.

In considering the merit of using certain argument schemes, we should consider that legal arguments can be used correctly or incorrectly, and they can be suitable for a specific context while being inappropriate for other contexts. In particular, we need to take into account whether the reasoners who are supposed to use an argument scheme have the cognitive capacities to apply it correctly, considering their institutional role, competence, and resources. For instance, it may be argued that judges should not base their interpretations on controversial moral appreciations, or on complex economical assessments, since they have neither the resources nor the legitimation to engage in such assessments (see Sunstein and Vermeule, 2003).

The evaluation of shared argument schemes must take into account the fact that coordination in argumentation may be a value in itself: the mere fact that an argumentative convention is in place may provide a reason to stick to that convention, even when the convention is not optimal relative to other possible conventions. Thus, the mere fact that an argument scheme is generally adopted may support its persistent adoption, as long as having that additional argument scheme in the legal repertoire is better than not having it, and no smooth transition to a better alternative is available (see Walton and Sartor, 2013). This can explain why the use of argument

schemes in legal reasoning shows both conventionality and path dependency. Once a certain reasoning scheme has become established, not only is it individually convenient to use it, but its general use contributes to shape interactions, support dialogues, and provide mutual acceptance and stability.

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