

Authentic Interpretation

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Abstract. I approach the identification of the principles of legal interpretation through a discussion of an important but largely forgotten strand in our legal heritage: the idea (and at some points in English law, the rule) that the interpretation of legislation is to be done by the lawmaker. The idea that authentic interpretation is interpretation by the lawmaker united the Roman emperors Constantine and Justinian with Bracton, Aquinas, King James I of England, Hobbes, and Bentham. Already in the early 17th century, a new modern approach was emerging in England. The modern approach separates the interpretive power from the legislative power, and allocates the interpretive power to an independent court. I argue that there are some cogent, general considerations in favour of the modern approach. But it is worth identifying the elements of good sense that made it seem that the interpretive power ought to be reserved for the lawmaker. And it is worth identifying the drawbacks in the modern approach; I argue that they are highly relevant to the complex question of how judges ought to interpret legislation.

1. Interpretation and the Dual Aspects of Law

Legal interpretation is a crucial nexus between the factual and the normative aspects of law. As Professor Robert Alexy (2010) says, law's two aspects are "dual."¹ The normative aspect of law is its existence as a dynamic system of norms, answering an array of interconnected questions as to what is to be done in a political community. The factual aspect of law is a set of events with a history; it is also a set of dispositions of persons and agencies at the present moment. That set of events and that pattern of dispositions (we can call the complex a "practice") can be identified as a matter of fact, from an external point of view (the point of view that you or I might take as observers). The factual aspect of law is its existence as a practice (including the practice of treating the law as a system of norms, and the practice of treating decisions—legislative, executive, judicial, public, and private—as having normative force). The norms are to be identified from the internal point of view (the point of view that you or I might take in deciding what to do)—although any of us might identify the norms of the system without adhering to it or taking that point of view, as long as we can understand it.

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¹ Cf. Alexy 2013, 97: "[...] law necessarily comprises both a real or factual dimension and an ideal or critical one. The real dimension consists of authoritative issuance and social efficacy, the ideal refers to moral correctness." I think that the terms *real* and *ideal* are potentially misleading: I do not think that the normative aspect of law is less real than its factual aspect, and although there is an association between every norm and an ideal (understood as something that is to be hoped for and aspired to), I would rather focus directly on what is to be done, rather than on what is ideally to be done. So I will speak of the factual and normative aspects of law.

The two aspects of law are *dual* because of the connections between them. And legal interpretation is a crucial connection between the law as a practice, and the normative content of the law. Legal interpretation can be a principled activity only insofar as the interpreter holds the two aspects of law in the right relation.

I think that legal interpretation can be a principled activity. In this essay I will attempt to identify its most basic principles. By *principles*, I mean the abstract major premises that you and I and anyone engaged in legal interpretation ought to adopt in reasoning as to our own conduct as interpreters: that is, in reasoning as to whether to interpret, and what to interpret, and what would be a good interpretation (and which putative interpretations are *not* interpretations). If we do not abide by those principles at all, we are not really interpreting, even if we would like to think that we are. And in order to interpret well, we need to abide by those principles intelligently and faithfully.

I will approach the identification of those principles by way of a discussion of an important but largely forgotten strand in our legal heritage: the idea (and at some points in English law, the rule) that the interpretation of legislation is to be done by the legislator. The idea is that only interpretation by the authority that made the law is authentic. *Authentic interpretation* is, in fact, a very old technical term for interpretation *by the lawmaker*. I will argue that there are some cogent, general considerations in favour of the modern approach, which is to separate the interpretive power from the legislative power (and from other lawmaking powers), and to allocate it to an independent court (Section 4). But it is worth remembering that the modern approach is a newfangled form of separation of powers (and not, as modern law students may assume, a necessary feature of the nature of law). And it is worth identifying the elements of good sense that made it seem that the interpretive power ought to be allocated to the lawmaker. And it is worth identifying the drawbacks in the modern approach; they are relevant to the complex question of how judges ought to interpret.

The argument supports an account of the basic principles of legal interpretation (Section 5), which I set out to explain and to defend:

0. the principle of legality;
1. the principle of conferral of lawmaking power;
2. the principle of conferral of interpretive power;
3. the principle that the purpose of legal interpretation is to provide a norm for the application of the law;
4. the principle that the discretions that result from interpretive power are to be exercised justly and for the public good.

And it supports a general account of those principles: They are the structural requirements that legal interpretation must meet, if the interpreter is to make the right connection between the two aspects of law. Legal interpretation determines the *normative* effect of the *fact* of a lawmaking decision.

As a test case to focus the discussion, I would like to introduce you to *Sturgeon v Condor*, a decision of the Court of Justice of the European Union (CJEU).² It is one of my favourite examples of a kind of case that you too may have

² Judgment of 19 November 2009, *Sturgeon v Condor Flugdienst GmbH*, Joined Cases C-402/07 and C-432/07, EU:C:2009:716 (hereinafter *Sturgeon v Condor* or *Sturgeon*).

encountered, in which the judges describe their legal ruling as being based on an interpretation, while they seem to be doing anything but interpreting. I am fascinated by the fact that the process of reasoning by which such decisions are reached can be described as “interpretation” by leading judges, accountable (to themselves and to their communities) for their adherence to law, deciding publicly and giving an articulate account of their reasoning, when you might well think that they are not interpreting at all.

2. *Sturgeon v Condor*: Legal Interpretation, or Judicial Amendment of a Regulation?

Sturgeon v Condor concerned an EU regulation that gave air travellers a right to compensation if a flight is cancelled. If a flight is only delayed, the regulation provided no right to compensation.³ Some people whose flights had been delayed—but not cancelled—asked the CJEU to hold that they had a legal right to compensation. The claimants said that if a flight is delayed long enough, it can be just as bad as if the flight had been cancelled. They were right about that, of course: If you are going away for a three-day holiday and your flight is delayed for three days, the impact on your plans is the same as if your flight had been cancelled.

In the opinion of the advocate general, Eleanor Sharpston, the claimants were right to argue that a delay can be as bad as a cancellation. But she said that there was a problem, inevitably arising from the difference between a cancellation and a delay: Someone has to decide how long the delay has to be, before persons subject to a delay ought to be treated in the same way as if their flight was cancelled. The judges, she thought, could not solve that problem, because their job was to interpret the regulation. The problem (the failure to treat those subject to delay in the same way as those subject to a cancellation *where the delay was extreme enough to be as bad as a cancellation*) could not be solved by the Court; it would have to be left to the legislature.

The actual selection of the magic figure is a legislative prerogative. [...] Any figure one cared to pick would involve reading into the Regulation something it plainly does not contain and would be a judicial usurpation of the legislative prerogative. [...] I do not think that the underlying problem can be “fixed” by interpretation, however constructive [...].⁴

The advocate general in the CJEU is not an advocate for a particular party, but an officer of the Court who gives an opinion to assist the judges before they reach their decision. In *Sturgeon*, her argument did not restrain the judges. They fastened on the “principle of equality”—one of the general principles of EU law—and treated that principle as requiring the regulation to be interpreted as giving a right to compensation. Without

³ “In case of cancellation of a flight, the passengers concerned shall [...] have the right to compensation.” In the case of delay, “[...] passengers shall be offered free of charge: [...] meals and refreshments, hotel accommodation [where necessary] [...]” Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91. *Official Journal* L 046 of 17 Feb. 2004.

⁴ Opinion of Advocate General Sharpston in *Sturgeon v Condor* (2 July 2019), EU:C:2009:416, paragraphs 93–97.

mentioning the advocate general's view of the limits of interpretation, they seized on a period of three hours as what she called "the magic figure."

Given that the damage sustained by air passengers in cases of cancellation or long delay is comparable, passengers whose flights are delayed and passengers whose flights are cancelled cannot be treated differently without the principle of equal treatment being infringed. [...] Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated [...] as passengers whose flights are cancelled [...] where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours.⁵

They abolished the distinction that the legislature had drawn between cancellation and delay. They took away the incentive that the legislature had evidently decided to give to airlines, to avoid cancellations in favour of postponements. And they presented that abolition as an *interpretation* of the regulation. On the advocate general's view, the Court's technique for solving the problem that she identified was not an interpretation. And in that case, the Court's technique is only defensible (if it is defensible) as a new measure adopted by the Court itself, to regulate the airlines differently from the way in which Regulation No 261/2004 regulated them. The Court changed the regulation.

Was it wrong for a Court to take such a measure? Perhaps EU law has evolved (through the CJEU's own development of its jurisdiction, and through the jurisprudence on general principles of EU law) to a point at which the CJEU has lawful power to change regulations to impose new liabilities and to confer new legal rights that were not imposed or conferred by the legislature; the peculiarity of that idea is, of course, that the judges do not put it that way. And the Court certainly did not claim an open-ended lawmaking authority of the kind that the Treaties confer on the legislature, to create new EU regulations. The Court did not adopt a general rule that all persons have a right to compensation against any defendant under the principle of equal treatment, if the reasons for awarding compensation are as strong as the reasons for awarding an air traveller compensation for the cancellation of a flight. The Court only claimed the authority to create a new right to compensation *for airline passengers*, and only *for those who suffer a harm "comparable"* to the harm for which the regulation provided compensation.⁶ The authority the Court claimed under the principle of equality is constrained by an unspecific, underarticulated limitation of comparability (which seems to involve a form of proximity) to the measure that the legislature had adopted. The Court will create new liabilities analogous to those created by regulations, but the analogy has to be close.

So we might say that the Court in *Sturgeon* changed a rule to give effect to a general principle. It is not a principle of equality, although that is the term for it in EU law. And it is not an antidiscrimination principle, since it does not depend on a ground

⁵ *Sturgeon v Condor*, paragraphs 60 and 69. The Court seized on three hours as the magic figure because the regulation provided that when a flight is *cancelled*, the airline does not have to compensate passengers if they are rerouted so that they arrive no more than three hours later than the originally scheduled flight would have arrived. Regulation (EC) No 261/2004, Article (5)(1)(c)(iii).

⁶ The requirement of "comparability," with its inarticulate restriction to close analogies, was stated in the judgment of 9 September 2004, *Spain v Commission*, C-304/01, EU:C:2004:495, paragraph 31.

of discrimination. It is a principle of *equality where the circumstances of a claimant are proximate* to those of other persons to whom EU law has given some advantage.

Here, it seems to me that there is a conundrum for a theory such as Professor Alexy's, which counts what I will call "substantive" principles (such as the principle of equality-in-proximity) as part of the law, and analyses principles as optimisation requirements.⁷ Substantive principles require that the law should promote or secure a particular value. What if the EU legislature makes rules that are incompatible with a substantive principle of EU law? A rule is a peremptory norm that is to have effect according to its terms, subject to any exceptions that it provides. An optimization requirement—a principle, in Alexy's theory—is to be balanced against other considerations of the same order. Principles, on Alexy's theory, are commensurable with each other,⁸ and on that view, the requirements of EU law can potentially be seen as a coherent set of implications of a body of principles. But here is the conundrum: How can the principles be commensurable with *rules*, which are not optimisation requirements?⁹ If we see the content of EU law as a set of principles, I do not see how we can also see it as including rules, if rules are peremptory norms that exclude "optimization."¹⁰

Legal principles are best understood not as optimization requirements, but as abstract major normative premises for sound legal arguments.¹¹ And they are compatible with the existence of legal rules. Equality may well be a general principle of EU law—an abstract premise that like cases are generally to be treated alike (or perhaps, that like cases are generally to be treated alike if they meet the unspecific requirement of proximity). But that principle does not necessarily weigh in favour of amending a regulation to add a requirement of compensation for flight delays. For you need further premises (not just the abstract general premise—the principle—that like cases are to be treated alike) to support the conclusion that the CJEU can and should amend a regulation. That would require not merely a principle of equality, but a conferral of power. The principle of equality weighs in favour of exercising a discretion in one way rather than another, but not in favour of doing what the court has no discretion to do.

⁷ See Alexy 2005. On optimisation requirements, see Alexy 2002, 47–8.

⁸ Ibid. For an argument that optimisation requirements are very commonly incommensurable with each other, see Endicott 2014b.

⁹ H. L. A. Hart found a similar conundrum in Ronald Dworkin's view as to the role of principles in law, and argued that because of the possibility of conflict between a rule and a principle, Dworkin's theory (in which principles have weight, but rules apply all-or-nothing) was not coherent. See Hart 2012, 262.

¹⁰ Professor Alexy has addressed this conundrum, writing that *rules* establishing constitutional rights (such as the prohibition of the death penalty in Article 102 of the German Basic Law) are "strictly binding," and that the "positive or authoritative dimension" has priority. But the priority is only *prima facie*, and the binding force of rules is limited by the effect of any principle that is "of greater weight than the formal principle of the authority of the constitution" (Alexy 2014, 62–3). So perhaps in his theory, rules have only *prima facie* effect. But then the conundrum becomes a paradox: There are no rules, as Alexy defines them: "If a rule is valid and if its conditions of application are fulfilled, it is definitively required that exactly what it demands be done" (ibid., 52).

¹¹ In his earlier work, *A Theory of Legal Argumentation*, concerning principles such as "the dignity of man should be respected" and "like cases should be treated alike," Alexy wrote: "Because of their high level of generality, such statements cannot be used directly in the justification of a decision. Further normative premises are needed" (Alexy 1989, 243). I find that approach to principles more attractive than the claim that they are optimisation requirements.

I think that it is best to understand EU law in the way the Treaties present it: that is, as a regime in which the legislative institutions have legal authority to make law.¹² For that reason (and because principles such as the principle of equality cannot coherently function as a basis for identifying the right ascribed to the claimants in *Sturgeon* as a legal right made by the EU legislature), it seems best to describe the decision in a case such as *Sturgeon* as a lawmaking decision. It was an exercise of a power to change the effect of a regulation that was not conferred by the Treaties, but finds its source in the doctrine of the CJEU itself.

Now suppose you agree with this conclusion (and with the advocate general). The decision in *Sturgeon* resulted from a judicial change to a regulation. How could the judges present what they did as an interpretation—that is, as an articulation of what “Regulation No 261/2004 must be interpreted as meaning”?¹³ If you agree with the advocate general you will say that interpretation does not support their conclusion, but you have no reason to doubt their good faith or their seriousness. The judges were not pretending. They very evidently persuaded themselves that it was their role to *interpret* the regulation as meaning that there was to be compensation for flight delays. It is worth asking how they could present their decision in that way to themselves, and to the public.

What does it take for a conclusion to count as an interpretation? The conclusion must be based on the abstract major premises for interpretation—that is, on the principles of interpretation. I am not concerned about whether we use the word *interpretation* for what the judges did in the *Sturgeon* case. *Interpretation* is an extravagantly flexible word. But it is worth asking whether the principles of interpretation support the decision. If so, then the Court’s interpretation was a genuine interpretation.

3. Authentic Interpretation—the Tradition

Our shared heritage offers a master principle for genuine legal interpretation. A procession of great historical figures—from Justinian to Bracton to Aquinas to Hobbes to Bentham—all thought that the basic principle of interpretation is that, if an interpretation is to have legal effect, it should be given by the authority that made the law. The idea was a durable strand in the civil law,¹⁴ and it influenced the common law.

¹² “To exercise the Union’s competences, the institutions [the Council, the Commission, and the Parliament] shall adopt regulations.” Article 288 of the Treaty on the Functioning of the European Union.

¹³ *Sturgeon v Condor*, paragraph 69.

¹⁴ “[...] the theory of the Continental codes has been ‘that the legislator alone may explain laws in a manner generally binding.’ Except where there is ‘authentic interpretation’ by the same authority that enacts a law, the Continental codes contemplate that the judge shall have full liberty of interpretation; but only for the case in hand. No one else is bound by his interpretation and he himself need not follow it another time. Until there is authentic interpretation, the point remains open for other cases” (Pound 1946, 273). John Austin (1861, 19) was familiar with the civil law tradition of authentic interpretation: “Acts on the part of legislatures to *explain* positive law, can scarcely be called laws, in the proper signification of the term. [...] they properly are acts of *interpretation* by legislative authority. Or, to borrow an expression from the writers on the Roman Law, they are acts of *authentic* interpretation.” Austin contrasted authentic interpretation with “the spurious interpretations styled *extensive*” (ibid., lxviii), which are based on “analogy, proportion, or equality.” The interpretation in *Sturgeon* was an extensive interpretation—that is, it was an interpretation that extended the rule to a case that the court deemed comparable.

Today we have mostly forgotten the long tradition of calling interpretation by the lawmaker itself “authentic interpretation.”

It was once a rule of English law. The authoritative 13th-century survey of the common law published under the name of Henry de Bracton explained that judges could not interpret statutes:

Private persons cannot question the acts of kings, nor ought the justices to discuss the meaning of royal charters: not even if a doubt arises in them may they resolve it. Even as to ambiguities and uncertainties, as where a phrase is open to two meanings, the interpretation and pleasure of the lord king must be awaited, since it is for him who establishes to interpret his deed.¹⁵

Judges, according to Bracton, could interpret contracts. If you and I have a contract, you and I are the joint lawmakers, and it is our interpretation that is authentic; but if we end up in court, disagreeing over its interpretation, it is merely impossible for the judges to act on an authentic interpretation, and they need to do something else instead. Similarly, judges could interpret wills, according to Bracton.¹⁶ At the point of execution of the will, it is too late to ask the testator to give an authentic interpretation. With contracts and wills, the court may have to engage in an inauthentic form of interpretation, as a matter of juridical necessity.

As regards statutes, there was an exception that proved the rule where judges had themselves played a role in legislating, sitting in the early parliaments and on the King’s Council in the late 13th and early 14th centuries. Then, the judges could give an authentic interpretation—they were part of the lawmaking body.¹⁷ When they no longer served in a legislative capacity, the rule required them to refer points of interpretation to the council. From their commission as judges to do justice according to law in legal disputes, they gained no authority to interpret statutes.

The crucial clause in Bracton’s account was a popular maxim that was very old in Bracton’s day: *Eius sit interpretari cuius est condere* (it is for him who establishes to interpret his deed).¹⁸ It originated in Roman law. Not in the days of the Republic, when the interpreters of the law were independent jurists, or even in the early Empire, when emperors patronized jurists. But by the time of Justinian, the interpretation of the laws was at the centre of the emperor’s exclusive competence. On the completion of the great compilation of Roman law that he commissioned, Justinian decreed:

¹⁵ Bracton 1997, vol. 2, p. 109. Similarly, in Gilbert de Clare’s case in the 1285 Northampton Eyre, it was argued that “it was only the king who could interpret the charters of his predecessors” (Brand 2005, vol. 3, 122 SS 245–9 [85 Northants. 11]).

¹⁶ Bracton evidently considered it to be the task of judges to interpret private legal instruments in general. A document assenting to dower was subject to interpretation by the judges (Bracton 1997, vol. 2, p. 274). He also used *interpretation* as a term for presumptions: that judgments of courts are valid (vol. 3, p. 122), that a person is free rather than a villain (vol. 3, p. 91), that a person may take an inheritance (vol. 4, p. 333).

¹⁷ See Brand 2016, 7. The judge in a case might remember what had been intended, or might be able to consult other judges who had been involved in the enactment. See also Plucknett 1922.

¹⁸ For a commentary on the place of this idea in Bracton’s theory of kingship see Kantorowicz 1957, 158–9.

If anything should appear ambiguous, the judges must refer it to the Emperor to be clarified by the supreme authority, who alone is to establish and to interpret the law.¹⁹

To Bracton, this had become an undoubted rule of law, in respect of the King of England as of an emperor. To Thomas Aquinas, writing in the same century as Bracton, authentic interpretation was one element in a complex theory of the grounds and limits of political authority. His *Summary of Theology* includes a statement of Bracton's maxim:

The only one who can interpret the laws is he who can make the laws [*ad eum solum pertinet leges interpretari, cuius est condere leges*]. But those who are subject to the laws cannot make the laws. Therefore they have no right to interpret the intention of the lawgiver, but should always act according to the letter of the law.²⁰

It may sound as if he was advocating an absolute concentration of power in the hands of the lawmaker. But in fact, Aquinas was pragmatic and flexible on this point. It is very significant that this argument appears as one of the putative objections that, in the dialectical form of the *Summary*, Aquinas would regularly raise against the propositions that he was discussing. It was a putative objection to the proposition that a person subject to a law might rightly act contrary to the letter of the law. And Aquinas had an answer to it:

He who follows the intention of the lawmaker does not simply interpret the law, where it is manifest because of an evident harm, that the lawgiver intended otherwise. For if there is doubt, he must either act according to the letter of the law, or consult his superiors.²¹

Likewise in his discussion of equity, Aquinas considered the following putative objection to the proposition that equity is a virtue:

But only the ruler can interpret the intention of the lawmaker, for which reason the Emperor says, in the *Codex of Laws and Constitutions*, "We alone can and should interpret between equity and law."²² Therefore acting on equity is illicit, and consequently equity is not a virtue.²³

Aquinas's answer to this objection is complex and rather delicate:

¹⁹ My translation. The Latin original: "Si quid vero, ut supra dictum est, ambiguum fuerit visum, hoc ad imperiale culmen per iudices referatur et ex auctoritate augusta manifestetur, cui soli concessum est leges et condere et interpretari." *Codex Justinianus* 1.17.2.21 (AD 529, 2nd ed. 534). Justinian went so far as to ban the publication of commentaries on the meaning of the *Digest*; presumably his purpose was both to entrench the monumental achievement of the *Digest*, and also to protect his own lawmaking authority (Falcone 2014, 14). In AD 316 Constantine had decreed: "We alone can and must give an interpretation between law and equity" (*Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere*). *Codex Justinianus* 1.14.1. But perhaps that decree was designed to prohibit judicial departures from the laws on grounds of justice, rather than to prohibit judicial interpretation.

²⁰ *Summa Theologiae* I-II q. 96 (my translation).

²¹ *Ibid.* (my translation).

²² *Codex Justinianus* 1.14.1, quoted at n. 19.

²³ *Summa Theologiae* II-II q. 120 (my translation). See above n. 19 for this decree of the emperor (Constantine).

Interpretation has its place in doubtful cases, in which without the interpretation of the sovereign, it is not right to depart from the letter of the law. But in manifest cases, the task is not to interpret, but to give effect to the law.²⁴

Interpretive authority, on this approach, is an element in the sovereign's authority, and involves clarifying the meaning of legislation where it is doubtful. But the allocation of that authority to the sovereign does not mean that a subordinate of the sovereign should not act equitably. This approach is more sophisticated than Bracton's simple legal rule. Aquinas seems to have accepted the general principle that the authority to interpret belongs to the lawmaker; yet he viewed that principle as being compatible with equitable decision-making by a judge, and also with judicial interpretations where it was manifest from the circumstances that a departure from the words of the legislation was justified or even required by the presumed intention of the lawmaker. The court, on this view, only needed to refer matters of interpretation to the lawmaker when the judges were uncertain what meaning to give to the legislation.

Aquinas took this approach because he always kept the public good in the centre of his thinking; he saw the authority of a king or emperor not as that prince's *right*, but as authority that the prince held legitimately because it was good for the political community that the prince should be able to exercise it.²⁵ And then the public interest in equity, and in just administration of the law, might justify very flexible adjudication, as long as the judge kept in mind the reason for the authority of the lawmaker.

But in England, the absolutist Stuart kings came to think of the interpretive power as their right. The whole idea of authentic interpretation came into question in 17th-century England, as politics slid toward civil war. The legacy of the 17th century includes the complete abandonment of the common law doctrine of authentic interpretation.

The tension over authentic interpretation emerged in a confrontation between King James I and Sir Edward Coke. We should not overstate Coke's responsibility for the end of authentic interpretation. He was an innovative judge who was working with the new political possibilities that were emerging from the early modern development of parliamentary political power, and his innovations would only be established for the future after the English Civil War and the Glorious Revolution. But Coke was the knife's edge.

Nearly four hundred years after Bracton, King James stood for the traditional view:

The King beinge the author of the Lawe is the interpreter of the Lawe.²⁶

He thought that God had given an "absolute prerogative"²⁷ to the English kings, and he explained how very wise God had been, by reference to the judges' capacity for arbitrary decision:

²⁷ "As for the absolute Prerogative of the Crowne, that is no Subject for the tongue of a Lawyer, nor is lawfull to be disputed" ("Speech in the Star Chamber, 1616," in McIlwain 1918, 326–45, at 333).

²⁴ *Ibid.* (my translation).

²⁵ On this aspect of Aquinas's thought see Finnis 1998, 264, and generally chap. VIII.2, "Government: Limited and Ruling by Law."

²⁶ *Case of Prohibitions*, 2 November 1608, from Sir Julius Caesar's notes: Usher 1903, 673.

If the Judges interpret the lawes themselves and suffer none else to interpret, then they may easily make of the lawes shipmens hose. (McIlwain 1918, 669)

Sir Edward Coke anticipated the disaster of the Civil War in the *Case of Prohibitions* by holding that the King was required by law to delegate the judicial power to his judges,²⁸ and that the judicial power included the authority to interpret statutes:

it was good for the weal public, that the Judges of the Common Law should interpret the statutes and Acts of Parliament within this realm.²⁹

To a 21st-century law student it sounds like a platitude; in 1611 it was revolutionary. Coke's way of thinking would prevail as a side effect of Parliament's triumph after the Civil War and the Glorious Revolution. The juridical result was that Parliament separated the legislative power from the king in person, and the judges separated the interpretive power from the king in person.

Yet even during the Civil War, Thomas Hobbes was holding out against the new approach, specifically addressing Coke and rejecting his view in the *Case of Prohibitions* on the question of "whose Reason it is, that shall be received for Law" (Hobbes 1991, 187). Hobbes stood up for authentic interpretation:

[...] it is not the letter, but the intendment, or meaning; that is to say, the authentic interpretation of the law (which is the sense of the legislator), in which the nature of the law consisteth; and [...] the interpreters can be none but those which the sovereign (to whom only the subject oweth obedience) shall appoint. For else, by the craft of an interpreter, the law may be made to bear a sense contrary to that of the sovereign, by which means the interpreter becomes the legislator. (Ibid., 190)

Of course, by *legislator*, Hobbes meant the sovereign—that is, "one man, or assembly of men" to whom members of a society submit because they are forced to do so or because they have agreed among themselves to do so. The sovereign "may use the strength and means of them all as he shall think expedient for their peace and common defence" (ibid., 121). That sovereign power included, in Hobbes's view, the power not only to make laws but also to interpret them.

For all the brilliance of his original account of the reasons for political power, Hobbes did not answer our question of the principles of interpretation. The two interrelated reasons are first that he did not have a developed account of the proper relation between judges and other institutions of the state;³⁰ secondly, he blurred the idea of authentic interpretation by allowing that an authentic interpretation might be given not by the sovereign, but by the sovereign's appointee. His theory of judging was undeveloped; his great treatise offered no account of the way in which the sovereign ought to exercise the power of interpretation, or ought to appoint or control judges. He drew a distinction between "subordinate judges," and "an interpreter authorized by the sovereign" whose interpretations could bind the subordinate judges; if "subordinate judges" decide cases based on the interpretation of legislation

²⁸ *Prohibitions del Roy* (1607) 12 Co Rep 64.

²⁹ *High Commission* (1611) 12 Coke Reports 84, 77 ER 1361 at 1362.

³⁰ For a creative exercise in developing such an account from Hobbes's materials, see Dyzenhaus 2009, 506.

without such an interpreter, he said, their decisions ought to have no precedential effect, because “no error of a subordinate judge can change the law, which is the general sentence of the sovereign” (ibid., 194).³¹ His theory was abstract (although he often referred to English particularities), and offered no criterion for determining whether the judges of a court like the English Court of King’s Bench are “subordinate judges” or “interpreters authorized by the sovereign.” Perhaps the criterion is independence. After the Act of Settlement 1701, the English judges could not be dismissed by the monarch. They were still symbolically delegates of the king or queen, but they were less vulnerable to the monarch than Sir Edward Coke had been. But Hobbes was inconclusive on whether the emerging modern English practice—interpretation of statutes by independent judges—was contrary to his theory.

The doctrine of authentic interpretation of statutes vanished from the common law while the doctrine of parliamentary sovereignty was emerging. The judges developed the way of speaking that they still use, in which an interpretation of a statute is justified as reflecting the intention of Parliament. But Coke’s view that judges should interpret acts of Parliament was a truism by the 19th century, as it is today.

In that context Jeremy Bentham was, unlike Hobbes, clearly a counterrevolutionary. Bentham may seem to be a strange theoretical ally for Thomas Aquinas and the emperor Justinian. They all agreed on authentic interpretation because from very different starting points, they shared a concern for the importance in the public interest of the authority of the lawmaker, and an appreciation of the lawmaking significance of the power to interpret. None of them would be surprised by the *Sturgeon* case: It is just what they thought might happen if an institution like the CJEU has the interpretive power.

But unlike the pragmatic and sensitive Thomas Aquinas, Bentham had a characteristically vehement, angry ground for saying that judges should not interpret statutes. The legislature will form judgments in a way that is calculated to promote the general happiness, whereas the judge will only promote the happiness of judges:

[...] when the judge dares to arrogate to himself the power of interpreting the laws, that is to say, of substituting his will for that of the legislator, every thing is arbitrary—no one can foresee the course which his caprice may take.³²

So he thought that the job of interpreting ought to be the legislature’s job. And he had a scheme for references from the court to the legislature on the interpretation of statutes (Endicott 2014a).

And although Bentham had specifically utilitarian grounds for sharing in a pattern of thinking about interpretation that goes back to the Roman Empire, his reasoning was an instance of a more general argument in favour of authentic interpretation. Interpretive authority is authority to determine what legislation means; all of our

³¹ Hobbes also said: “The subordinate judge ought to have regard to the reason which moved his sovereign to make such law, that his sentence may be according thereunto, which then is his sovereigns sentence; otherwise it is his own, and an unjust one” (Hobbes 1991, 187). Perhaps Hobbes thought (1) that it was in order for the subordinate judge to have jurisdiction to decide a case, (2) that an exercise of that jurisdiction was unjust (and contrary to law?) if it was not in accord with “the reason which moved his sovereign,” and (3) that in any case, the subordinate judge’s interpretation should not make law.

³² Bentham 1843, pt. I, chap. XVII (“Power of the Laws over Expectation”), p. 325.

thinkers from Constantine to Bentham thought that the constitution's own reasons for allocating lawmaking power to a legislature are, by the same token, reasons for allocating the interpretive power to the legislature. Interpretation is inauthentic—not *really* interpretation, but the interpreter's mere caprice—if it does not give effect to the decision of the lawmaker. And only the lawmaker can do that.

4. Against Authentic Interpretation

Enthusiasm for authentic interpretation has not been limited to theorizing, or to the proclamations of Roman emperors. The great Prussian codification of 1794 provided for authentic interpretation, requiring courts to refer questions of interpretation to a legislative body, the *Gesetzcommissiön*:

If the judge finds the true meaning of the law to be doubtful he must, without naming the parties to the proceeding, notify the Law Commission of his doubt, and ask for its judgment.³³

Bentham and Justinian and Bracton and the Prussian codifiers all had a point: They were all trying to protect the rule of law. There is a risk of arbitrary governance, if the judges can decide that legislation means what they will. And I do not think that it is a necessary truth about legal systems, that they are well-ordered only if the judges interpret legislation.

But I do think that there are structural reasons for favouring interpretation by an independent court. It is a practice that involves a particular kind of separation of powers between the maker of the law, and the agency with jurisdiction to resolve legal disputes. And it can be useful to separate the interpretive power from the law-making power.

With contracts, perhaps authentic interpretation is ideal. When we have a dispute as to what our contract means, there is no reason why you and I should not agree, if we wish, to proceed upon any interpretation we see fit (and, it is important to notice, we do not even need to work out whether our new agreement *is* an interpretation of our original agreement, or is an alteration). But the practical problem, when we do not reach an agreement on how to interpret the contract, is a problem for the rule of law. Having an independent court that can interpret the agreement meets the need of the parties—and of the community—for resolution. And it puts contracting parties into a very useful predicament at the point of contract formation: a predicament in which each knows that the agreement had better be clear on any issue that may prove important—insofar as the other side will agree. On such an issue, it is in the party's

³³ Allgemeines Landrecht für die Preußischen Staaten (1 June 1794) § 47 (my translation). The German original: "Findet der Richter den eigentlichen Sinn des Gesetzes zweifelhaft, so muß er, ohne die prozeßführenden Parteyen zu benennen, seine Zweifel der Gesetzcommissiön anzeigen, und auf deren Beurtheilung antragen."

The Austrian Civil Code of 1812, still in effect, provides as follows concerning interpretation: "In the application of a law, it must not be used in any sense except that which is evident from the particular words in their context, and from the clear intention of the legislature" (my translation). The German original: "Einem Gesetze darf in der Anwendung kein anderer Verstand beygelegt werden, als welcher aus der eigenthümlichen Bedeutung der Worte in ihrem Zusammenhange und aus der klaren Absicht des Gesetzgebers hervorleuchtet." ABGB § 6, <https://www.jusline.at/gesetz/abgb/paragraf/6>.

interest to make the agreement clear enough, that an independent adjudicator will give it the meaning that the party desires.

As with private contracts, so in international law—in the absence of a court of general jurisdiction—the state party's interest is in making a treaty clear enough, that it will be difficult for the other party to deny that the treaty has the desired meaning. For obvious reasons, there is a long tradition of dealing with disputes as to the meaning of treaties by seeking to achieve an authentic interpretation—that is, an interpretation agreed by the parties.³⁴

Now, we can make a similar point about legislation. There is value in giving authority to an independent interpreter. First of all, at the point of lawmaking, it puts the legislature in the predicament of having to express the law clearly and openly enough that an independent court can be expected to understand it in the way that the legislators want it to be understood.

Secondly, there may be value in interpretation of legislation by those who are expert in the law in general—although it seems to me that the value depends on the nature and the context of particular legislative measures.³⁵

Thirdly, in dispute resolution, a process of references to the legislature would be so inconvenient as to be more or less impossible. The day-to-day operation of a court is organized by a docket—a list of particular matters between parties. The day-to-day operation of a legislature has a more complex dynamic that has no such listing, and is not shaped by a docket, but by its rules of deliberation, and by the agenda of a government, and by the politics of the day. *All three* of these determinants tend to make a legislature ill-suited to the interpretive task (and to listening fairly and impartially to what each side has to say on the interpretive dispute). There is a huge cost to the litigation process, if the interpretation is not done at the point of dispute interpretation. And there is a cost to the political process, insofar as the system imposes on the legislature a task for which it is not well suited, and which is a distraction from its fulfilment of its legislative and other political purposes.

Fourthly, a scheme of references (if we could carry it out, and if the legislature even cared and was prepared to dedicate the time it would take) would be a doorway to new kinds of arbitrariness. In resolving disputes about legislation made in the past, the legislature would act in its pursuit of today's political agenda. Even if the membership of the legislature did not change between the point of legislation and the point at which a court refers a question of interpretation to the legislature, we could not confidently expect the legislature to give effect to the meaning that it had in

³⁴ “An authentic interpretation exists when all parties to a treaty reach an agreement, governed by international law, to henceforth understand the treaty in some specific way” (Linderfalk 2007, 25). Uncertainties can arise as to the legal force of such agreements: See Berner 2016, 845, arguing that “authentic interpretation is law-making in all but name.” See also Orakhelashvili 2008, 514–5.

³⁵ This virtue of judicial interpretation was undoubtedly exaggerated by the common law judges in the early modern era, who used to treat every departure from the common law with suspicion; they would interpret statutes on the presumption that *no departure* from the common law was intended. From that perspective, it was obviously of urgent importance that the interpreter should be expert in the common law. Cf. Justice Warburton: “a statute is to be expounded according to the rules of the common law, whereof they have no knowledge, and no one may expound statutes who does not know what the common law was before the making of the statute” (quoted in Baker 2017, 366, citing to CUL MS MM 1.21 fol. 106v). And see *Page v Tulse* (1676) 86 ER 954.

mind when it made the legislation. We can illustrate this problem with a vivid image that Hobbes used—ironically, in his attempt to explain why interpretive power ought to belong to the lawmaker:

To him therefore there cannot be any knot in the law insoluble, either by finding out the ends to undo it by, or else by making what ends he will (as Alexander did with his sword in the Gordian knot) by the legislative power; which no other interpreter can do. (Hobbes 1991, 191)

A person untying a knot in a rope has to treat the ends of the rope as given. The lawmaker can establish new ends, just as Alexander established new ends by taking a sword to the knot. But then, a lawmaker *will not be interpreting* if it pursues new ends in resolving a dispute, any more than Alexander was untying the Gordian knot. In that respect, the legislature will be like the parties to a contract or a treaty who find that they need to agree an interpretation: There will be no criterion for distinguishing between an authentic interpretation, and a new exercise of legislation. So there will be no criterion for adherence to law. The putative promise of authentic interpretation is to support the rule of law; it is an unreliable promise.

Ironically, judicial interpretation may be better calculated to give effect to the legislation than interpretation by the legislature itself. So I think that there are steps forward for the rule of law in judicial interpretation of statutes, even though it is true, as Bentham knew, that it poses a danger both to the achievement of the lawmaker's purposes, and also to the rule of law.

And for a tribute to the value of interpretation of legislation by judges, we can actually turn to the early common law. It may not surprise you to discover that the doctrine of authentic interpretation was honoured at least partly in the breach. Paul Brand has given a meticulous demonstration that judges were interpreting statutes in the 13th and 14th centuries. That is, they were resolving controversies over the meaning of statutes. The conclusion is interesting because of the stable orthodoxy of the doctrine that they were not meant to do it. And when they did so anyway, they sometimes distinguished between exposition and interpretation, and claimed to be expounding the statute, not interpreting it (Brand 2016). Perhaps their practice was always more in line with Aquinas's flexible approach to the duty of a judge, than with Bracton's rule of authentic interpretation.

5. The Principles of Legal Interpretation

By *principles of interpretation*, remember, I mean starting points, from the first-person point of view, for reasoning as to how to interpret. Imagine that you are a judge of the Court of Justice of the European Union. You have to decide what meaning is to be given to a regulation (I think that is what the judges saw themselves as doing in the *Sturgeon* case).

On what principles should you act? You might start with a principle that is actually a *prerequisite* for good interpretation, so let's call it "Principle Zero." It can be stated without mentioning interpretation. It is the principle of legality. I expect that the judges of the Court of Justice had the commitment to act according to law, which is demanded by the principle of legality. Let's start with that, and it will give force to the first principle. The First Principle of legal interpretation is the principle of legal

conferral of lawmaking authority. European Union law confers on the legislature of the European Union the authority to make regulations. And the law may confer a variety of lawmaking powers on a variety of public and private actors (not only legislatures, but contracting parties, testators ...).

The First Principle is a principle of comity with another authority (see Endicott 2015). You ought to exercise your significant but subsidiary lawmaking power—the interpretive power—in a way that respects the different, primary lawmaking power of the legislature. Each institution ought to have respect for the role of the other. I think that this is the lesson we can take from the history of authentic interpretation. I have argued that the conferral of interpretive authority on a court is not necessarily the abandonment of the rule of law that Bentham thought it was. But the kernel of good sense in his angry opposition to the approach of Sir Edward Coke is that the legal system will be in bad shape if the interpreter uses its power without respect for the primary lawmaking power of the legislature.

I think that in the *Sturgeon* case, the advocate general had it right on this point. Her opinion as advocate general was a model of comity between courts and legislature, and the judges ought to have gone along with it. When the Court created compensation for flight delays, it showed no respect for the legislature's decision not to create compensation for flight delays.³⁶ I hasten to add that the CJEU is unique. It has a law-building role that emerged from the remarkable part it played in creating a transnational constitution for the European Communities in the 1960s and 1970s, and giving EU law supreme direct effect in the domestic law of member states, and then in filling in so many aspects of this new legal order.³⁷ It has turned itself not into a deputy legislature, but into an overseeing body and, in *Sturgeon*, into an amending commission like the Prussian *Gesetzkommission*.

The Second Principle of legal interpretation is the principle of legal conferral of *interpretive* authority. Prussian law in 1800 required judges to refer questions of interpretation to the legislature; where the law confers the interpretive power on courts, the courts must exercise it. Ordinarily the lawmaker says nothing about the interpretive power. And in that case, in the modern era, judges always assume that the law authorizes them to interpret. We might say that, because of the modern presumption that judges are to interpret legislation, the interpretive power is conferred on judges merely as a resultant of the conferral of a jurisdiction to apply the law with final legal effect. The Treaty on European Union (TEU), by contrast, expressly gives its Court the authority to determine the meaning of legislation:

The Court of Justice of the European Union [...] shall insure that in the interpretation and application of the Treaties the law is observed. (Article 19 TEU)

If you are a judge of that Court, you ought to do your best to carry out that creative power that the law has given you. By *creative*, I mean that it is up to you to use it one way or another (while the law may or may not demand that you use it in one particular way). And either way, you will be creating the law's answer to a question of

³⁶ I do not mean that judges should never override legislation. Judicial review of legislation does not necessarily show disrespect for the role of the legislature, and the CJEU has an entirely appropriate role to play in nullifying acts of EU institutions that violate the Treaties.

³⁷ Judgment of 5 February 1963, *Van Gend en Loos*, Case 26/62, EU:C:1963:1.

interpretation. If, as in the Court of Justice of the European Union,³⁸ judicial decisions are used as sources of law, your decision will make law for the future, as well. You will not be exercising a *legislative* power (even in the *Sturgeon* case, as I argued in Section 2 above, the Court was acting in a way that is distinct from and parasitic on the primary role of the legislature), but the interpretive power is certainly a *lawmaking* power.

The Third Principle of legal interpretation is that its purpose is to provide a norm for the application of the law. The interpretive power of judges is in aid of their exercise of their duty to give effect to the law, and it should not be used in a way that derogates from the Court's responsibility to give effect to the act of legislation. This principle follows from Principle Zero and the First Principle. And like the First Principle, it calls for judicial humility.

As Principle Zero is a prerequisite, the Fourth Principle follows at the end of the interpretive process: The court ought to act justly and for the public good in the exercise of the various significant discretions that inevitably result from interpretive power.

Here is the resulting list of basic principles of legal interpretation:

0. the principle of legality;
1. the principle of conferral of lawmaking power, i.e., respect for the legal conferral of lawmaking authority on the legislature or other lawmaker;³⁹
2. the principle of conferral of interpretive power, i.e., respect for the legal conferral of interpretive authority on the court;
3. the principle that the purpose of legal interpretation is to provide a norm for the application of the law (and its exercise is not to be incompatible with the judicial responsibility to give effect to an act of legislation);
4. the principle that the discretions that result from interpretive power are to be exercised justly and for the public good.

6. Conclusion

I do not—this should be obvious—mean that these are the only principles of legal interpretation. I have sketched some structural principles, and you will have noticed that I have given no account of the substantive principles of interpretation, that is, general reasons to prefer an interpretation that promotes or secures a particular value. Those principles are crucial to good interpretation; they also vary in complex ways that depend on the whole legal and political culture, and on the particular issue, and on the needs of those whom the law ought to serve, and on the purposes

³⁸ The Court of Justice was already treating its decisions as a source of law from its earliest days. "According to the established case-law of the court" was already a standard formula in the 1950s. See, e.g., judgment of 17 July 1959, *Société des aciers fins de l'Est v High Authority of the European Coal and Steel Community*, Case 42/58, EU:C:1959:20. And see the opinion of Advocate General Lagrange (5 November 1960, EU:C:1960:41) in the judgment of 23 February 1961, *Steenkolenmijnen v High Authority*, Case 30-59, EU:C:1961:2: "It is for the Court to rule on each case, gradually developing its case-law" (p. 37).

³⁹ Generally, we could apply Principles Zero through Four to all interpretation of the law made by other lawmakers—constitutions, contracts, wills

of the lawmaker. To give a general statement of them would be akin to giving a general statement of the principles of political reason (by which I mean the principles on which the agencies of a political community ought to act).

But I venture to say that the structural principles have a *prima facie* priority over the substantive principles. The principle that a particular value is to be secured or promoted is not ordinarily a good ground for departing from the principles of interpretation that I have outlined, any more than such a principle is generally a good ground for a court to depart from the law. That is one of the ironies of law: It requires, to some extent, that a court not act on the values that the law ought to embody.

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