

# **EXPLAINING MEANING**

## **TOWARDS A MINIMALIST ACCOUNT OF LEGAL INTERPRETATION**

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For my parents, Margarida and Carlos, and my daughter Francisca

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## ABSTRACT

To interpret is to seek understanding. This formulation hides as much as it reveals and I propose to unpack it. I argue that interpreting is only a part of what legal theorists and practitioners do. In Part I, I attempt an ‘in vitro’ analysis and present the bare concept of interpretation: interpretation is an activity that needs an object; interpreting is reasoning about meaning when there is a possibility of mistake about that meaning.

Part II focuses on two domains of interpretation: musical performance and adjudication. I rely on Joseph Raz’s account of interpretation as explanation or display and identify the former domain as a paradigm of display and the latter as a paradigm of explanation. Both are examples of interpretation for others and involve a claim to theoretical authority on the part of interpreters. But, unlike musicians- who interpret only works of music- judges interpret a great variety of objects. Musical interpretation is identified by its object, whereas legal interpretation is not. Legal interpretation is *explanation* of legal meaning.

I then discuss the tenets of the minimalist view of legal interpretation: (i) legal rules are not interpretable and legal texts are not primary objects of legal interpretation; (ii) there is a difference between *interpretative authority* (a form of theoretical authority) and *legal authority* (a form of practical authority) and interpretative conclusions can be theoretically authoritative without being exclusionary reasons for action; (iii) Interpreting and adjudicating are different *activities*. Interpretation explains, adjudication resolves. Legal interpreters do not produce legal rules: they are required to be *guided* by them.

## TABLE OF ABBREVIATIONS

- AM- *Aesthetics and Music*, Andy Hamilton (2007)
- AMP- *A Matter of Principle*, Ronald Dworkin (1985)
- AS- *The Authority of the State*, Leslie Green (1988)
- AU- *The Aesthetic Understanding*, Roger Scruton (1983)
- BAAI- *Between Authority and Interpretation*, Joseph Raz (2009)
- CE- *Collected Essays*, John Finnis (2011)
- CL- *The Concept of Law*, H.L.A. Hart, 3<sup>rd</sup> ed. (2012)
- CLS- *The Concept of a Legal System*, Joseph Raz (1980)
- CTB- 'Can There Be a Theory of Law?', Joseph Raz (2004)
- DD- Dworkin's detour
- DSP- 'Dworkin's suggested purpose', from John Gardner's LA
- DT- 'Definition and Theory in Jurisprudence', H.L.A. Hart (1954)
- ELT- *Evaluation and Legal Theory*, Julie Dickson (2001)
- FNR- *From Normativity to Responsibility*, Joseph Raz (2011)
- GA- Gardner's alert
- HHSS- 'Herbert Hart and the Semantic Sting', Timothy Endicott (1998)
- IPLT- *Introduction to the Problems of Legal Theory*, Hans Kelsen (1992)
- JII- *Judging Interpretations*, Scott Hershovitz (2001)
- JIR- *Justice in Robes*, Ronald Dworkin (2006)
- LA- 'Law's Aim in *Law's Empire*', John Gardner (2008)
- LALOF- *Law as a Leap of Faith*, John Gardner (2012)
- LE- *Law's Empire*, Ronald Dworkin (1986)

LI- 'Legal Interpretation', Timothy Endicott (2012)

LTPS- 'Legal Theory and the Problem of Sense', Ronald Dworkin (1987)

M- *Meaning*, David Cooper (2003)

MET- 'Methodology', Coleman (2004)

MF- *The Morality of Freedom*, Joseph Raz (1986)

ML- *The Morality of Law*, Lon Fuller (1969)

MU- *Wittgenstein: Meaning and Understanding*, Baker and Hacker (1980)

NLNR- *Natural Law and Natural Rights*, John Finnis (1980)

OI- *On Interpretation*, Annette Barnes (1988)

ORA- 'On Reason and Authority in *Law's Empire*', John Finnis (1987)

PG- *Philosophical Grammar*, Ludwig Wittgenstein (1974)

PI- *Philosophical Investigations*, Ludwig Wittgenstein (2001)

PIIP- 'Putting Interpretation in Its Place', Timothy Endicott (1994)

PRAN- *Practical Reason and Norms*, Joseph Raz (1975)

SIS- 'Sovereignty in Silence', Heidi Hurd (1990)

SRAO- 'Some Remarks About the Obvious', Annette Barnes (1982)

TRS- *Taking Rights Seriously*, Ronald Dworkin (1977)

TSP- 'The Standard Picture and its Discontents', Mark Greenberg (2011)

TV- 'Two Views of the Nature of the Theory of Law', Joseph Raz (1998)

UM- *Understanding Music*, Roger Scruton (2009)

VIL- *Vagueness in Law*, Timothy Endicott (2001)

## TABLE OF CASES

Don Jayasena v R [1970] AC 618

Flannery v Halifax Estate Agencies [2000] 1 WLR 377

Goodrich v Paisner [1957] A.C. 65

Mason v Bibby [1865] 159 ER 365

Quinn v Leathem [1901] AC 495

R v Harrow Crown Court [1994] 1 W.L.R. 98

Spectrum Plus [2005] 2 AC 680

# CONTENTS

TABLE OF ABBREVIATIONS

TABLE OF CASES

INTRODUCTION 1

PART I THE BARE IDEA OF INTERPRETATION

CHAPTER ONE INTERPRETATION AND THE VIRTUES OF MINIMALISM

1.1.	A minimalist account of interpretation	8
1.2.	The bare concept	10
1.2.1.	Activities, outcomes, and intersecting circles	10
1.2.2.	Putting intentionality in its place	23
1.2.3.	Making sense of meaning	27
1.2.4.	A note on uncertainty	35

CHAPTER TWO WHY LAW AND MUSIC?

2.1.	Resemblance and asymmetry	44
2.1.1.	Relevance vs. dominance	48
2.2.	Identifying relevant shared features	51
2.2.1.	Interpreting for others	51
2.2.1.1.	The role of texts	53
2.2.1.2.	Authoritative interpreters	58
2.2.1.2.1.	Authority and reasons	64
2.2.2.	Explanation and display	76
2.3.	Artefacts	83

2.3.1. Authors and artefacts	83
2.3.2. The artefactuality condition	89
2.3.2.1. Restricting the artefactuality condition	94
2.3.3. Acts of communication	100
2.3.4. The connection with interpretation	102

## PART II VESTING INTERPRETATION. EXPLANATION AND DISPLAY: TWO PARADIGMS

### CHAPTER THREE DISPLAYING MEANING: MUSIC

3.1. The basics visited	105
3.1.1. Sound	106
3.1.2. Intentional ordering	110
3.1.3. Art	113
3.1.4. Not a functional kind	115
3.2. Performance	121
3.2.1. Three possible objections	123
3.2.2. Compliance, creativity, constraint	131
3.3. On musical meaning	137
3.3.1. Experiencing, describing, interpreting	148
3.3.2. Emotion and belief	152
3.4. A few notes on the authority of musical interpreters	157
3.4.1. The claim	160
3.4.2. Interpretative reasons	161

3.4.3. Normativity	164
* Taking stock	166
CHAPTER FOUR EXPLAINING MEANING: LAW	
4.1. Legal interpretation as explanation	168
4.1.1. Three fine (preliminary) distinctions	169
(i) Explanation and description	169
(ii) Explanation and justification	172
(iii) Explanation and ascription	175
4.1.2. Explanation and authority	176
4.1.2.1. The equal standing of explanation and display	178
4.2. On the variety of objects of legal interpretation	183
4.2.1. Rejecting the rule-centric view	183
4.2.2. Exposing the texthood myth	193
4.2.2.1. Communication: enthusiasts v sceptics	194
4.3. Interpreting within a 'system'	205
4.3.1. System	206
4.3.2. Legal meaning v the content of the law	210
4.4. On the authority of judges	215
4.4.1. The disjunction thesis	219
(i) Interpretative authority v legal authority	220
(ii) The link	226
4.4.2. Judicial interpretation and justification	227

4.4.3. The duty to interpret as a subsidiary duty	231
*Taking stock	237
CHAPTER FIVE MINIMALISM	
5.1. Adjudication and legal reasoning	240
5.1.1. Resolution, application, justification	242
5.2. Legal interpretation and application	247
5.2.1. A few brief notes on a different brand of scepticism	252
5.2.1.1. Scepticism and minimalism: differences and points of overlap	256
5.3. Is legal reasoning predominantly interpretative?	268
5.3.1. Recasting the ‘centrality claim’	269
5.3.2. Reformulating the ‘connection thesis’	278
* Taking stock	281
CONCLUSION	291
BIBLIOGRAPHY	294

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## INTRODUCTION

‘It is a grievous error to think that in understanding an utterance one always or even usually engaged in interpretation.’<sup>1</sup>

The concept of interpretation is elusive. Though central to law, it is difficult to delineate. General interest in its metaphorical power contrasts starkly with an apparent reluctance to turn it into an object of study in its own right. Both because and in spite of its popularity, this thesis attempts an ‘in vitro’ analysis of interpretation. It proposes a minimalist account of interpretation based on a ‘bare concept’.

In this thesis, I do not propose to offer a theory of legal interpretation. My aim is to take the first few steps towards a minimalist account of legal interpretation. The minimalist view of interpretation stems from the bare concept presented in Part I, but domain-specific accounts of interpretation can be minimal too. Indeed, my suggestion in this thesis is that they *should* be. Part Two will make this clearer.

Two domains of interpretation are the focus of this thesis: musical performance and adjudication. Chapter Two isolates a number of similarities and differences between them. The most important difference to note is that unlike musical interpretation in performance, judicial interpretation (and legal interpretation in general) is not identified by reference to its object. Since only music has musical meaning, musical interpretation is interpretation of musical works. But law (legal artefacts) does not have a monopoly of legal meaning. In fact, legal norms (unlike legal texts) *constitute* legal meaning: they are not objects of interpretation. Legal rules and standards are not interpretable.

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<sup>1</sup> P.M.S Hacker (1988), 168.

Following Joseph Raz's definition of interpretation as explanation or display, I identify musical performance as a paradigm of display and judicial interpretation as a paradigm of explanation and argue that, in both domains, interpreters claim epistemic authority over their audience. I contrast interpretative authority (a form of theoretical authority) with legal authority (a form of practical authority) and conclude that interpretative statements made by authoritative interpreters are a source of reasons for belief rather than for action.

This thesis also does not purport to put forward a theory of musical interpretation. Chapter Three is offered simply as a point of contrast and as a source of interesting examples of interpretation as display. It focuses mostly on the abstract, autonomous character of Western art-music and reflects on our concept of music and on the nature of musical experience and understanding. In it I argue that music, like law, is not a functional kind and that, just like adjudication, musical interpretation in performance is an outward-looking activity, that is, interpretation for others. I also claim that, as interpreters, performers purport to offer their audiences reasons for belief. I note that in music, as in law, authority must be earned.

What is one to make of the idea that anyone can interpret the law? This is a very common assumption, just like the idea that to interpret is to produce *one's* view of something (not to convey the *meaning* of something but to express what something *means to me*). This thesis aims to shed light on the informative, but at times misleading, role of common assumptions such as these. Although they reflect and follow common linguistic usage, they often overlook important- and sometimes fine- distinctions.

Broadly conceived, the category *legal interpreter* includes any citizen (I call her Mary) who tries to understand what the law requires of her or allows her to do<sup>2</sup>. No doubt, Mary engages in

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<sup>2</sup> Joseph Raz (EPD, 326) tells us legal reasoning is 'a humble enough activity'. L. Alexander (2000\*) calls it 'banal'. Legal interpretation, however, is not banal or humble in this sense. It requires a certain type of knowledge and understanding.

legal reasoning whenever she asks herself such a question. In order to answer it *correctly* she must inform herself, investigate and learn what the law says on the particular topic in which she is interested. Based on a certain type of knowledge (knowledge of the law on a particular matter), some of her conclusions may be interpretative. If no legal knowledge is present, if no *legal reasons* are invoked for her conclusions, no legal reasoning takes place.

But is Mary a *legal interpreter*? The view put forward in this thesis is that she is not. Mary may *reason* about legal meaning, but she does not have a duty to *explain* it to others. Legal interpretation, and judicial interpretation as its central case, is interpretation *for others*. Unlike a judge, Mary does not have a *legal* duty (or, indeed, any kind of duty) to interpret for others, nor is she required to justify her conclusions about what the law requires of her or permits her to do. So, whilst seeking legal knowledge and reasoning about the legal meaning of certain facts in her life, Mary may be engaging in interpretation, she is not a paradigmatic example of a legal interpreter because she merely interprets for herself and has interpretative authority only in a marginal sense (offering herself, and only herself, reasons for belief).

More important to my argument is that the answer to Mary's second question ('what does the law require of me or allow me to do?') is not itself an interpretative conclusion: interpretative statements are explanations of legal meaning, not directives. Mary may engage in legal reasoning on a regular basis but she is not *legally required* to explain legal meaning to others and justify her interpretative conclusions. She is also not required to make interpretative choices: she may be convinced that she is stating the obvious or that she is merely describing an arrangement or set of facts. Choosing involves being aware of different options and knowing that there is more than one possible answer to one's question<sup>3</sup>. Mary *can* be a legal interpreter,

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<sup>3</sup> While one can interpret without being aware that one is interpreting, one cannot choose without being aware that one is choosing. Interpreting, thus, does not necessarily involve choosing. Interpretative explanations, however, do involve choosing (Barnes 1988, 155). Not only does the interpreter choose to explain legal meaning (not historical

but only if she meets two requirements: (i) that she explains legal meaning *to others* (interprets for others, not merely for herself); (ii) that she purports to exercise *theoretical authority* over those to whom her explanation is directed (i.e. claims that her conclusions are correct, that the reasons adduced for the conclusions are *good* reasons, and that her statements- or the propositions they state- are true).

For all the reasons identified above, the distinction between interpretation and adjudication is crucial. Legal interpreters, as interpreters, are theoretical authorities. They are not, as such, required to adjudicate. Rather, their interpretative authority is the foundation for their role as legal officials. This role, albeit defining, is not distinctive. Whilst all legal officials *may* be interpreters, not all legal interpreters are legal officials, and only judges are *legally invested* with interpretative authority as a condition for the fulfilment of their adjudicative duties. Legal interpretation relies on theoretical authority, whereas adjudication is an exercise of practical authority: the authority to determine legal positions, to offer people (the parties in a dispute and judges deciding similar future cases) legal reasons for action<sup>4</sup>, and, by implication, to create new legal norms *on legal grounds*<sup>5</sup>. Legislators, by contrast, create new legal norms on non-legal grounds.

Interpretation and adjudication are distinct activities with very different results. One important tenet of the minimalist view is that, though legal reasoning is not *predominantly* interpretative, judges are under a *duty* to explain legal meaning in the process of giving reasons

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meaning, for example) but, if authoritative, she also often chooses among various possible meanings. The availability of various (germane) meanings is a feature of both musical and legal interpretation.

<sup>4</sup> 'What is unique about adjudication is that it occurs when there is doubt and it proceeds based on reasons and justifications; in short it is a reflective activity.' Hershovitz (2002), 639-640.

<sup>5</sup> Gardner 'Myths' 217

for their decisions. Interpretation is an element of *justification* and is not to be confused with the *application* of law.

Chapters Four and Five build upon three main points (mentioned at the beginning of Chapter Two): (i) legal systems are constituted and identified by reference to social and institutional facts; (ii) legal objects are objects with legal meaning; (iii) legal meaning is capable of being explained. The minimalist view of legal interpretation depends on two important elements: (i) a broad notion of legal system (one which accommodates both content-dependent and content-independent views), and (ii) a contextual account of legal intelligibility (meaning).

Legal meaning depends on institutional facts which exist only if claims to authority made on behalf of the law are credible. But it also depends on social facts, normative practices, and standards to which the *system*, and its authoritative officials, are *committed*. We can distinguish between the question whether something has legal meaning, and the question of what its legal meaning is. *Legal meaning* is not to be confused with *legal content*. The question whether legal meaning is identical with the *content of the law* or the *content of authoritative pronouncements* is a question about what something's legal meaning is. The idea of legal meaning as *legal intelligibility in context*, in turn, corresponds to the question whether an object has legal meaning (whatever exactly it may be).

On this view, severing legal meaning from the content of authoritative legal texts does not necessarily involve rejecting the sources thesis or denying the tight link between law and authority. My interest is in the role of interpretation in legal reasoning, particularly in judicial reasoning and adjudication. The minimalist view of legal interpretation this thesis offers is not incompatible with a view of law as claiming practical authority over its subjects, with a view of law as identified by reference to its sources, not its merits.

It offers an authority-based account of legal interpretation as a more frugal, lucid way of thinking about the role of interpretation in legal reasoning. Such an account depends on the crucial distinction between *interpretative* and *legal* authority. Creating a basis for understanding how these two forms of authority interact in judicial reasoning is my ultimate aim in this thesis. An important but subsidiary aim is to afford some clarity as to the distinction between explaining legal meaning and changing legal positions, i.e. between *interpreting* and *applying* the law to a particular case (adjudicating or ruling), and between *interpreting* and *creating* law anew.

Minimalism rejects the idea that rules are interpretable and that legal texts are primary objects of interpretation. Objects with meaning in general are interpretable and texts are not the only objects with legal meaning. The sustaining pillar of the minimalist view of legal interpretation, of which judicial interpretation is a central case, is the disjunction thesis presented in Chapter Three and developed in Chapter Four. According to it, judges purport to exercise two different kinds of authority when judging: interpretative authority and legal authority (*stricto sensu*).

Interpretative conclusions are meaning-statements and constitute content-independent peremptory reasons for belief in the truth of the propositions they state. They are not *legal decisions*, though, in the case of appellate judges, they often become rules of interpretation (legal rules aimed at guiding the interpretative process: the existence of a rule of interpretation is a reason for action, e.g. to give priority to the literal meaning of a text, to the intention of the drafter, or to the guiding purpose of the provision) which bind other judges in relevantly similar future cases. Legal authority is a form of practical authority. It is not necessarily the authority to make *new law*, it may be the authority to leave a trail of interpretation or to determine how an object is to be classified. But judicial decisions change litigants' reasons for action. As

interpreters, judges justify interpretative choices. As legal authorities (or legal officials) they justify judicial decisions. The object of justification is different under each exercise of authority.

This thesis takes the first steps towards a minimalist view of legal interpretation which aims to find a proper place for authority and explanation in adjudication and in the justification of judicial decisions. It proposes to offer a fresh look at an elusive, overused concept which merits more careful treatment than it generally receives.

# PART I

## THE BARE IDEA OF INTERPRETATION

### CHAPTER ONE

#### INTERPRETATION AND THE VIRTUES OF MINIMALISM

‘Und minder ist oft mehr’<sup>6</sup>

#### 1.1. Towards a minimalist account of interpretation

Interpretation lacks sharpness. We see this lack of sharpness both in ordinary discourse and in the literature on the role of interpretation in particular domains, art criticism and legal theory among them. With rare exceptions, the concept is used as an umbrella under which a large *variety* of otherwise unrelated things fit comfortably. So choosing interpretation as one’s focus of attention is risky. It is risky because the pressure to find order can easily lead to a manipulation of the concept with view to turning it into a tool at one’s disposal. This would be a mistake. In what follows, I make a start at identifying a few salient features of interpretation found across domains. Distinguishing what is necessarily true of interpretation from what is contingent is the first step towards a shaper (and more illuminating) account of what it is to interpret.

While it is possible to make meaningful claims based on a crude, pre-theoretical concept of interpretation, problems arise when one attempts to stress the particular role of the concept of interpretation in the study and practice of law or in the arts. In such circumstances, the need

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<sup>6</sup> Christoph Martin Wieland, ‘Neujahrswunsch’, in *Der Teutsche Merkur* (January 1774), 4. ‘Less is more’ later became the motto of modern architect Mies van der Rohe (1886-1969).

for a clarified notion of interpretation becomes particularly acute. Once a concept becomes the foundation of a theory, it cannot remain fuzzy.

In order to understand the place of interpretation in law and legal theory, or why interpretation may be said to be part of the legal theorist's task *qua* legal theorist, attention will be paid in this chapter to what I call the 'bare concept' of interpretation, i.e. the concept as used by most of us, ornithologists, scientists, anthropologists, artists, astrologers, actors, literary critics, marketing specialists, mathematicians, archaeologists, poets, chefs, musicians, chess players and lawyers alike.

A fruitful philosophical analysis of interpretation ought to rely on what I call a 'minimalist' account of interpretation with the 'bare concept' at its core. Such an account is minimal in as much as it is based on a limited number of *necessary* features of interpretation. The bare concept has four pillars and there is no place in it for contingent aspects of interpretation whose occurrence varies across domains, from situation to situation, and from object to object. Although they may enrich one's account of interpretation, there is no place for them in a philosophical analysis of the concept<sup>7</sup>.

Considerations made on the basis of the 'bare concept' of interpretation apply to legal interpretation as much as to the interpretation of artworks, poems, dreams, and rituals. Most importantly, it applies to the task of legal theorists in their quest for an account of the nature of law<sup>8</sup>.

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<sup>7</sup> Endicott, PPIP 457.

<sup>8</sup> This assumes that the bare concept is such that there is no feature x needed for interpreting artworks and y needed for interpretation in legal theory. Anything beyond the bare concept is domain-specific.

A minimalist account of interpretation will help us understand that there is no entailment between interpretation and construction (in the Dworkinian sense) and between interpretation and moral evaluation. Such connections are merely contingent and, *pace* Dworkin, do not result from the ‘bare concept’ or from an analysis of the concept of interpretation. I shall begin with the basics.

## 1.2. The bare concept of interpretation

### 1.2.1. Activities, outcomes and intersecting circles

Interpretation is commonly used to refer both to an activity and to an outcome. On the one hand, interpreting is necessarily an activity (‘What exactly did she say? Well, that is a matter of interpretation’) and, on the other hand, it is common to speak of interpretation as the result of that very activity (‘Alice is a child on an adult’s journey’). The word is frequently used to refer to judgments, conclusions, views, and opinions. But the result presupposes some activity and could not occur without it<sup>9</sup>. The question thus seems to be what makes a conclusion interpretative. The suggestion is that there must be something distinctive about the process of reaching that conclusion. It is more accurate to speak of interpretation as an activity which both presupposes and results in a certain conception of the *interpretandum*<sup>10</sup>.

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<sup>9</sup> According to Wittgenstein (PI 212e) - and despite his very particular use of the word ‘interpretation’ as a synonym of ‘reformulation’ or ‘substitution’- ‘when we interpret we form hypotheses, which may prove false’.

<sup>10</sup> This thesis does not distinguish ‘activity’ from ‘process’. There might, however, be some room for doubt as to whether interpretation can be said to be a process, rather than an activity. As stated below, reasoning is a process and interpretation is defined in terms of reasoning. On the other hand, if one assumes that processes can be constituted by activities, saying that interpreting is engaging in an activity may be helpful in showing that

Interpretation answers a question about an object<sup>11</sup> and offers a way of understanding it: ‘What do you make of this?’<sup>12</sup> The outcome of an interpretative process is an *understanding* of the interpreted object. The meaning of the object may be conveyed through an interpretative explanation or display. Interpretation may allow a complete<sup>13</sup> or enhanced understanding of the meaning of an object. But the resulting understanding of the object presupposes not only the ability to reason and to understand<sup>14</sup>, but also the process through which a subject comes to understand. This process may be conscious and deliberate, but it may also be unperceived. This could suggest that interpretation and understanding can be represented as two concentric circles:

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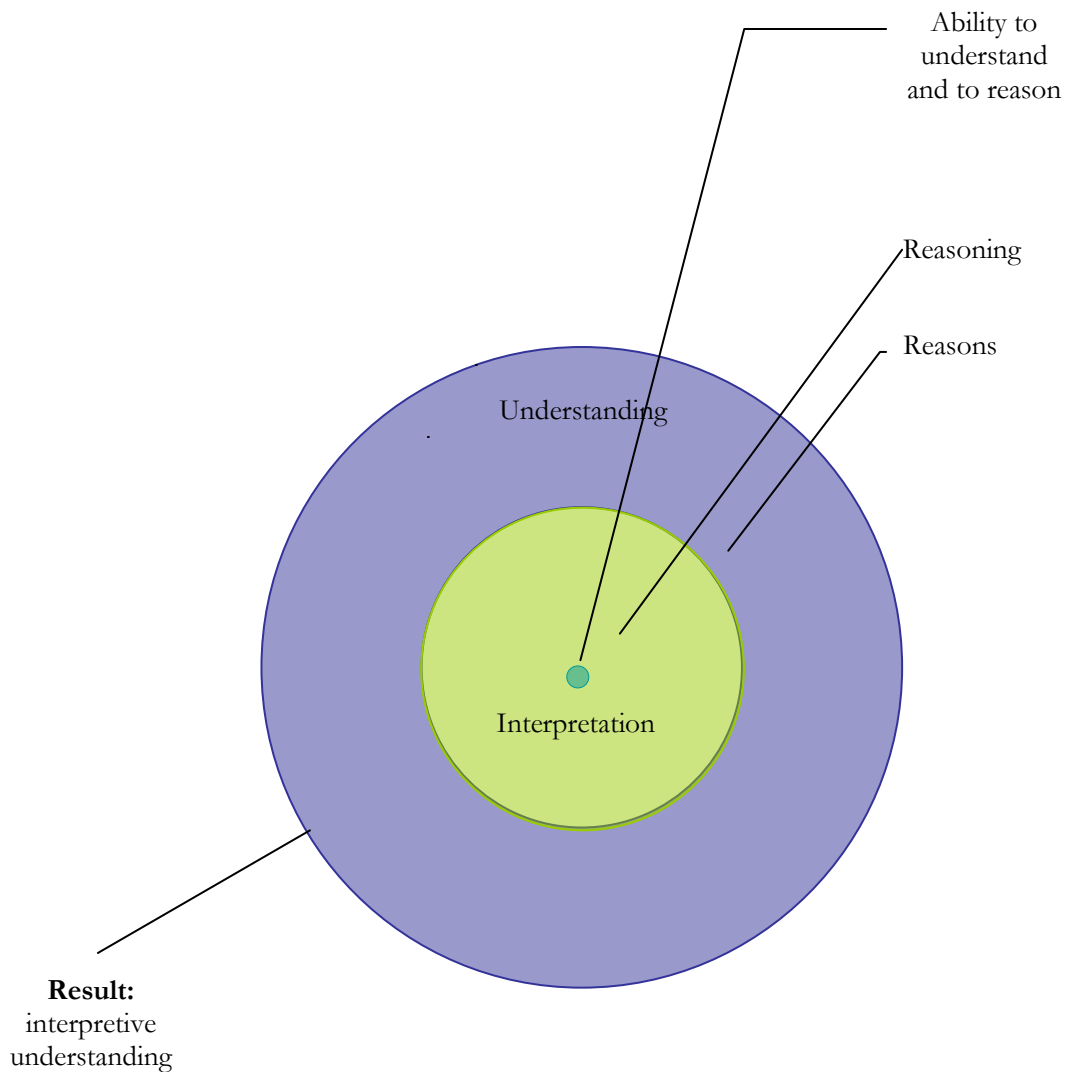
interpretation is not an omnipresent process necessary to understanding. I thank Hans Oberdiek for alerting me to this important distinction.

<sup>11</sup> Or an ‘original’, in Raz’s terminology (BAAI 241).

<sup>12</sup> Endicott, PIIP 451.

<sup>13</sup> The questions we ask about an object are as many as our imagination allows (JI 21). ‘Completeness’ is not synonymous with ‘exhaustion’ of an object’s possible meanings. It refers to a specific question-answer cycle regarding a particular aspect of an object.

<sup>14</sup> There is no ability to understand without the ability to reason. This is not to say that there is no understanding without conscious reasoning, for there is such a thing as intuitive understanding. The ability to reason entails the ability to understand and vice-versa. However, there can be understanding without conscious reasoning. Conscious reasoning typically involves weighing reasons. Certain kinds of understanding simply occur and surface without an active weighing of reasons. The reasons are there, but they are not consciously made sense of, arranged, prioritized.



It is more illuminating to refer to interpretation as an activity that allows the removal of obstacles to understanding. On that basis, a first formulation of the notion of interpretation can be advanced:

**[FF] Interpreting is an activity which facilitates understanding**

FF shows interpretation as an activity instrumental to the purpose of understanding. In that instrumental role, it is also a kind of reasoning. Reasoning is a process of reaching a conclusion from a set of premises<sup>15</sup>. Interpretation is a reason-giving activity that culminates in

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<sup>15</sup> Blackburn (1994), 320-21.

an understanding of the interpreted object<sup>16</sup>. An interpretative conclusion follows from a set of interpretative premises.

If we took a moment to look at understanding autonomously, we might conclude that it is tri-dimensional. It involves the *ability* to understand. It is due to one's ability to understand that one finds connections among objects, thinks rationally, reasons, infers, discriminates, recognizes patterns and deviations from those patterns, and produces solutions to problems. Without the ability to understand, one would not reason at all<sup>17</sup>.

Understanding is also frequently defined as an achievement. After being asked what those two men on the other side of the street were doing, Laura replies that they were greeting each other. That is her understanding of the gesture she saw (the two men were shaking hands and smiling). The answer shows her understanding of the situation and is the product of an ability to understand. Laura had the ability to understand what those men were doing because (among other more or less obvious things) in her society people shake hands when greeting. Understanding is, from this viewpoint, a successful result of the use of cognitive powers.

Looking at these three dimensions would show us why the ability to do something contains the means to achieve the envisaged end. What does the ability refer to? The answer to this question depends on the answer to two other questions: a) what is the aim of the activity; and b) which activity is it?

### **Martha can sing**

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<sup>16</sup> For a different conclusion, see Michael Moore, 'Interpreting Interpretation', in *Law and Interpretation* (1995), 29.

<sup>17</sup> Hershovitz (JI 20) points out this aspect of understanding when he defines the latter as 'a set of skills and capacities'. He regards understanding as a bi-dimensional concept: it can be both a 'set of beliefs about an object' (outcome) or 'a set of skills and capacities' (ability). For an enlightening account of understanding in Wittgenstein's philosophy, see MU 321-346. Wittgenstein conceived of understanding as a 'state of the mind', rather than an 'activity of the mind' or mental process. He regarded it as a '*state of mind from which the future applications of understanding follow*', (328).

Martha's *ability* to sing is typically joined by her *aim* to sing<sup>18</sup> and comprises the *activity* necessary to reach that aim. Without the ability to understand there is no process of reasoning and without a process of reasoning there is no understanding. One could rely on these three dimensions to compare and distinguish understanding and interpretation. One feature of understanding which can already be identified is that it manifests itself in the *ability* to make certain statements about an object. Those statements, however, must be *correct* if the ability is to be confirmed. Correctness is part of the notion of understanding. The following notion of understanding [NU] is in line with the picture I have been drawing:

**[NU] x understands y only if x reaches a correct conclusion about y**

If one tried to conceive of interpretation and understanding (as defined by NU) as concentric circles, one would be able to look at understanding as the general frame within which (and in virtue of which) interpretation takes place. If one looked at understanding as a broad circle originating in the ability to understand and reason, one could look at interpretation as a smaller circle inscribed in the circle of understanding and radiating from the same centre. The centre of both circles would be the ability to understand and reason and the line delineating the broader circle would be the outcome or result of the process of understanding. The interpretative process, then, would be inscribed in the broader, more comprehensive process of understanding. It too would be shown to presuppose the ability to reason and, ultimately, the ability to understand. It would, however, be a process in its own right.

Is this model satisfactory? Does it succeed in showing us that understanding occurs in the absence of interpretation? Clearly not. By inscribing interpretation within understanding the diagram obscures the difference between the two. Do they necessarily occur simultaneously? They need not and do not. And timing is not the issue at all. A useful model must be able to

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<sup>18</sup> Although it is clear that Martha *can* sing whether or not she *wishes* to.

clarify the difference between what is being interpreted and what is being understood. The concentric circles model makes them seem too similar. What is needed is a way of showing that they are *relevantly* different, not just two words one can play with at will<sup>19</sup>.

What have we so far? Interpretation is an activity. Understanding, on the other hand, is not usefully seen as an activity: it is closer to the idea of result. There is also the trivial contention that not all understanding is interpretative: one need not interpret in order to understand and understanding is not conceptually dependent on interpretation. The same cannot be said of the latter, though: interpretation does depend on understanding and a certain understanding of the *interpretandum* and of the relevant context is a necessary condition of interpretation. As will be argued in section b), there is no interpretation without an object; there is no interpretation without some understanding of the interpreted object.

An intermediate notion of interpretation [IN] may help us to proceed:

**[IN] x interprets y if x engages in reasoning about certain features of y and reaches a conclusion about y.**

One feasible preliminary conclusion is that understanding a certain feature of the object is the *purpose* of the interpreter *qua* interpreter. The separation line would be drawn between activity and purpose, and understanding would always be the purpose of interpretation:

- a) Understanding a certain feature of y is the *purpose* of x's interpretative reasoning.
- b) Understanding a certain feature of y may be the *result* of x's interpretative reasoning. If this is the case, the result is an interpretative understanding of y by x.

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<sup>19</sup> This is one of Endicott's objections to Marmor's 'exception thesis': the difference between interpretation and understanding is not a difference between norm and exception. They are different *categories*. See Endicott VIL 172-173.

In interpreting one seeks to understand what is interpreted. But this is trivial: there must be more to say about these two notions. There must be a way to offer a more accurate, illuminating account of the distinctive character of interpretation. And there is one: interpretation and understanding are different *categories*. Interpretation is an *activity*, understanding is an *ability*<sup>20</sup>.

Understanding is the ability<sup>21</sup> to *use* an object in an intelligible way. The correct *use* of an object may be facilitated by its interpretation or by the interpretation of related objects<sup>22</sup>. Understanding an object consists in the ability to relate it to other objects, whose place and role one understands. No object can be understood in isolation, be it a word, a ritual, an inscription on a cave wall, a musical score or performance. An object is understandable (and interpretable) only in its relation to other objects.

The interpretative process is a facilitating device, a tool which contributes to the advancement of understanding. The important point of this very simplistic view is that understanding *may*, but *need not*, be preceded by an interpretative process. One *may* be able to advance one's understanding of an object because one has interpreted it, i.e. one's ability to make use of the object and to relate it to other objects in the relevant spectrum of possibilities may or may not be the result of interpretation.

However, what is understood and what is interpreted need not coincide. Using the colour green to express hope in a painting need not involve interpreting the colour green but

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<sup>20</sup> PIIP 461, n.15. MU 321-346.

<sup>21</sup> Not just a *capacity*. An ability involves *actually* being equipped to do something. One may have a capacity without ever developing an ability. Everyone has the capacity to learn any language during early toddlerhood, not all of us have the ability to speak more than one language. And after losing the initial capacity, one cannot develop the corresponding ability. I owe this insight and the very helpful parallel with learning natural languages to Hans Oberdiek.

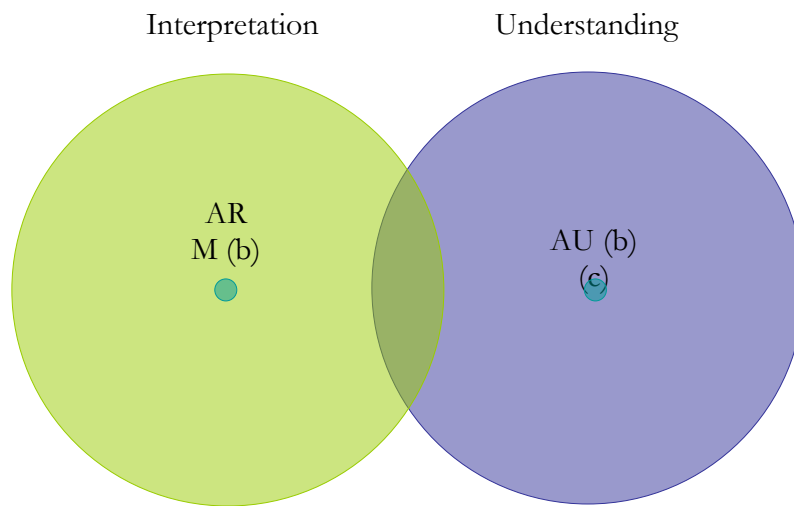
<sup>22</sup> The word 'use' is a mark of Wittgenstein's later philosophy (PI 30, 41, 43, 120, 138, 197, 532, 556, pp.149-50, 155). MU 361-366.

certainly entails interpreting certain features of paintings as artworks, say by the artist at work. Such use of colour shows the artist's ability to produce an effect likely to be recognised by those who view it, i.e. it is intelligible to the relevant audience, but the interpretative process involved in choosing between green and blue has a different object: the feature of the work of art expressing that meaning. What is understood is often distinct from what is interpreted. This entails the above mentioned trivial truth that not all understanding is interpretative<sup>23</sup> and that there is an important difference between interpretation and understanding: interpretation is a process which both presupposes and results in understanding. That one may interpret something in order to achieve understanding of something else is evidence of the intermediate nature of interpretation and of its distinctness as an activity. Understanding, by *contrast*, is an ability which is made manifest by a correct *use* of an object.

The unhelpful concentric circles model may now be replaced by a first version of my intersecting circles model (1):

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<sup>23</sup> PI 201. Baker and Hacker (MU 346) note that 'Although Wittgenstein correlates understanding with ability (PG 47) and remarks that calling understanding a process produces a false grammatical attitude to understanding (PG 85), he does himself call understanding a process, and distinguishes the processes that are criteria for understanding from the process of understanding (PG 82). (...) he concludes that 'understanding' is a family resemblance term, naming a family of processes.' Wittgenstein presents understanding as 'not an experience (PI 153), a mental process (PI 152, 154), or a mental state (PI 149), although it has a certain kinship with each of these. (...) "I would rather say that these kinds of uses of 'understanding' make up its meaning, make up my *concept* of understanding. For I *want* to apply the word 'understanding' to all this" (PI 532)'



Things can be put more clearly with the help of an example. Imagine a painting in which there are three hands. Two of those hands, painted in a faded shade of grey, are letting go of each other. The other is holding a waving green handkerchief. An art teacher points at a projected image of the painting and says to her students:

The green handkerchief dissipates the bitterness and sadness of the grey hand that lets go

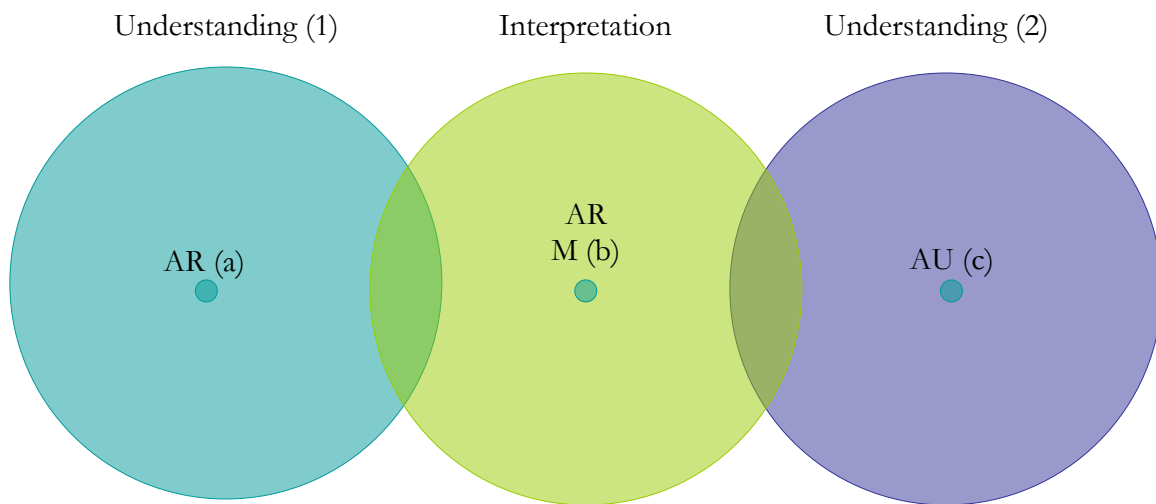
This statement shows her understanding of both the symbolic power of the colour green and the meaning of the waving handkerchief in that painting. She can be said to *use* the symbol in an intelligible way. But what she can be said to understand is different from what she might have interpreted. Assuming that she was interpreting (which she might or might not have done), it is not accurate to say that she interpreted the colour green. Her grasp of the meaning of the symbol is the result of an interpretation of the painting, to which the possible connotations of the colour green are a background assumption. That background assumption is itself displayed in the interpretative process. *Using* the green handkerchief to make that particular claim shows her understanding of its symbolic potential. Understanding is the ability to make *use* of an object in a meaningful way. That meaningfulness must be anticipated, even if only in a tentative way, in order for interpretation to occur. There is no interpretation without understanding. The decisive question is *what* is understood.

Let us try to clarify further. There are three possible propositions in my 'green' example:

- (i) 'Green is the colour of hope'
- (ii) 'This painting shows a friction between the freshness and promise of youth, and the tragedy of war'
- (iii) 'The green handkerchief in the painting dissipates the bitterness and sadness of the grey hand that lets go'

Only proposition (iii) is explicit. (i) and (ii) are merely implicit. There are different objects at stake in each proposition. Proposition (i) has the colour green as its object; proposition (ii) clearly refers to the painting as a whole; and the object of proposition (iii) is the painted green handkerchief.

Not only are there different objects in each proposition, but there are different categories at stake<sup>24</sup>: (i) shows that the speaker understands one of the possible meanings of the colour green; (ii) is an interpretation of the painting; (iii) shows that the speaker understands the meaning of the green handkerchief in the context of that painting, i.e. has the ability to use that symbol accordingly. This picture is shown in the diagram below (2):



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<sup>24</sup> Endicott, PIIP 461

Distinguishing interpretation from understanding through a contrast between ‘activity’ and ‘result’ would be insufficient and too imprecise to be of use in a quest for the bare concept. My claim is that seeing interpretation as a mere result (i.e. disregarding the distinctiveness of the underlying process) would be to neglect the dependence of interpretation on conscious reasoning, and would easily blend it with understanding. It is not contended that ‘interpretation’ cannot refer to a result, but rather that it is not accurate to present it *simply* as such. The Wittgensteinian account of understanding as an ability, whose noting by Endicott has been summoned above, offers further means of clarification, but there remain some difficult questions about how the two are to be distinguished when occurring simultaneously (as most often is the case).

Statement (iii) in my example above can be said to be *an interpretation* of the green handkerchief as a symbol within the painting, but, according to one modality of ‘interpreting’ (the two possible modalities I have in mind- interpreting for oneself and interpreting for others- will be addressed in section d)), it need not imply that the art teacher was *interpreting* the symbol. As far as one knows so far, she may merely be reporting a conclusion or making a claim. My aim was to show that (iii) is different from (ii) because it has a different object and because it confirms the speaker’s ability to *use* an object (the green handkerchief in the painting) in a certain way<sup>25</sup>.

Additional evidence is needed and the notion of reasoning is a good candidate. Reasoning can be decisive in a quest for a way of distinguishing interpretation from understanding if one accepts the following statement: interpretation involves conscious

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<sup>25</sup> Or to *recognise the use* of that object by others as intelligible, as playing a certain role.

reasoning (albeit not always involving explanation<sup>26</sup>), whereas understanding involves reasons without necessarily involving conscious reasoning<sup>27</sup>.

A few more questions are in order: a) What is x's immediate purpose? b) What about the object does the interpreter seek to understand through interpretation? c) What really makes an understanding interpretative? Does interpreting allow a certain kind of understanding of the object or does it simply allow the interpreter to understand a certain aspect or feature or property of the object?

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<sup>26</sup> It does, however, involve the ability to explain even if that ability does not ultimately result in a proper explanation. Interpreting a piece of music, as has been mentioned, does not always involve explaining it. A performance can very successfully convey meaning without relying on explanation, and its success often depends on the very ability to break free from the limiting force of propositional form: '(...) to use art as a means to the emotions of life is to use a telescope for reading the news' (Bell, *Art* (1914), 28-30). While appropriate for expressing 'the emotions of life', words can be inadequate and insufficient when it comes to artistic meaning. The absence of articulation does not entail the absence of interpretation.

<sup>27</sup> There is such a thing as intuitive understanding. For an illuminating analysis of the concept of intuition and an account of its role in law and legal theory, see Priel (2005). One of his contentions is that 'intuitive judgments', though unconscious, involve reasoning (66-81): 'recognising' an object as an instantiation of a concept one possesses involves reasoning, albeit being immediate (69). One could say that, despite involving reasoning, it does not involve interpretation. For an account of reasoning, including the possibility of unconscious reasoning, see Grice, *Aspects of Reason* (2001). See also Allott 'P.Grice, reasoning and pragmatics' (2005). For an illuminating explanation of the concept of reason, see Gardner and Macklem, 'Reasons' (2002). For the distinction between reasons and causes, see e.g. Brandom, *Making it Explicit* (1994); Davidson, 'Actions, Reasons, and Causes' (1963); von Wright, *Explanation and Understanding* (London: Routledge & Kegan Paul, 1971). For the difference between explanation of intentional action and causal explanation, see Risjord, 'Reasons, Causes, and Action Explanation' (2005).

### 1.2.2. Putting intentionality in its place

Intention is often the kernel of theoretical disagreement about what it is to interpret and how one ought to interpret in particular domains. Even those who do not place retrieval of authorial intention at the centre of a general account of interpretation, point out its intentional ‘formal structure’<sup>28</sup>. Intentions are not always part of the meaning of the object being interpreted. Intention is relevant to interpretation when the interpreted object is intentionally made (or when it is created with the intention to communicate). This is not always the case. Non-intentionally made objects are as interpretable as intentionally made ones and a general account of interpretation must cater for both.

This section is not concerned with the role of authorial intention in interpretation. Not all objects of interpretation have authors. The goal here is to point out a requirement of interpretation and the second element of the bare concept: the need for an object. The claim that interpretation is always and necessarily concerned with retrieving real or counterfactual intentions is part of an altogether different kind of enquiry. This claim may be true of interpretation in certain contexts, and of certain objects, but it is not part of the bare concept<sup>29</sup>. Interpreting may only contingently require the identification of intentions. The inescapable variability of interpretable objects and contexts of interpretation excludes intention from the bare concept<sup>30</sup>. The role of intention in interpretation must be assessed contextually,

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<sup>28</sup> LE 52.

<sup>29</sup> PIIIP 454-458. ‘The simple account makes the same point by saying no more about intentions than that, if there are any, they are relevant to interpretation because they characterize the object.’ (458); ‘Intentions may or may not be decisive. Interpretation is what you can do when you have to make something of an object. Sometimes you can get away with something other than a statement of what the author of the object was trying to communicate, and sometimes you cannot.’ (475)

<sup>30</sup> Barnes, OI 58-59.

taking into account the specificities of the interpreted object. But this is not my task. My quest is for what is *always* the case. My present concerns are conceptual, not contextual.

Under the heading of ‘intentionality’ another distinction is waiting to be made: a) interpretation is ‘conscious’; b) interpretation is ‘reflexively intentional’.

If conscious reasoning is a necessary condition of interpretation, then there is no such thing as an unconscious interpretation. This is what a) states: one is necessarily aware of the fact that one is reasoning, in order to interpret<sup>31</sup>. As it involves the weighing of reasons, interpretation is a necessarily conscious process. If interpretation involves conscious reasoning, and if what distinguishes interpretation from understanding is that the latter may involve unconscious reasoning, then there can be no interpretation in the absence of consciousness.

However, some qualification is needed. To say that interpretation is ‘intentional’ could mean one of two things: it can mean that it is the interpreter’s intention to interpret or that interpretation needs an object. The first sense of ‘intentional’ is more accurately labelled as ‘reflexively intentional’: interpreting as a purpose of interpretation. *Pace Raz*<sup>32</sup>, one does not have to want to interpret in order to interpret<sup>33</sup>. One must want to understand or refer to some feature of the object, but one can interpret without wanting to interpret or even without knowing that one is, in fact, interpreting. It is possible to be mistaken about the focus of one’s reasoning: it is possible to mistake the meaning of an object for a formal/physical aspect or for

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<sup>31</sup> Though not necessarily aware that one is *interpreting*, at least under that description.

<sup>32</sup> Raz, BAAI 243

<sup>33</sup> Barnes, SRAO 30. That no reflexive intention is needed is entailed by the statement that no awareness is needed. But my point is slightly more demanding than this one which, after all, is not in disagreement with Raz’s. My point is that, not only may one not intend to interpret under that description, but that one may not be aware of the fact that one is reasoning about what one is reasoning about (meaning), let alone intend to reason about it. The noted inability to distinguish interpretation from description is an example of the point made. More than the attribution of labels is at stake.

the object's position<sup>34</sup>. Interpretation is easily mistaken for description<sup>35</sup>. Interpreting an object is reasoning about its meaning. Describing an object is enumerating the features by which it can be recognised or identified.

Modernism, for example, famously relied on the distinction between aesthetic impact and meaning, and separated beauty from both<sup>36</sup>. Beauty ceased to be the essence of art and became contingent, one of various possible aesthetic qualities of a work. In admiring a painting one may mistake meaning for aesthetic impact: one may be struck by the 'numbness' caused by the visual impact of the painting and not be aware of the fact that that effect is part of the meaning of that work of art. Numbness as a metaphor for indifference, for example, and not just as a reaction to the artist's choice of colours, could be part of the meaning of the painting. It is therefore possible to interpret without intending to interpret and without being aware of the interpretative nature of one's reasoning.

Contrastingly, and most importantly, interpretation is necessarily 'intentional'. To interpret is to interpret *something*. Interpretation *needs* an object. The issue of intentionality bears upon the question of what constitutes mental states, what they are directed at, what they are about<sup>37</sup>. Interpretation may involve and generate different mental states. Interpretation may give rise to beliefs, intentions, judgments, desires, fears, and hopes, feelings of love or hatred. Alice is *curious* about the Cheshire Cat; John is *irritated* by Clare's petulance; Mary is *confused* by James'

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<sup>34</sup> The distinction between 'describable' and 'emergent properties' of object (Margolis) s may be useful to understanding the difference between identifying an object and interpreting it. (OI 48-49)

<sup>35</sup> Barnes, SRAO 30: '(...) in a panel discussion of Henry James' *The Turn of the Screw*, one panellist offered what he took to be a description (as opposed to an interpretation) of the work. He 'described' it as a story "told by a governess, who lets us know how she saw two children under her charge, a little boy and a little girl, (...) corrupted by the ghosts of two evil servants." The other panellists took issue with this characterization, implying that the first panellist "had offered an interpretation rather than a description".

<sup>36</sup> Danto, *The Abuse of Beauty* (2003), xv.

<sup>37</sup> Anscombe, *Intention* (1979), 1: 'an action can be intentional without having any intention in it.'

behaviour; Mia is *perplexed* by Duchamp's *Fountain*; Jane is *ignorant* of the absence of relevant structural differences between rural and urban communities in Angola, etc. All mental states are directed at an object, be it real or imaginary. To say that mental states are necessarily intentional is to say that the mental processes originating them are intentional too. The object of a mental state is the object of the process that generates it. To say that interpretation needs an object is to say that it is a necessarily intentional process. Interpretation without an object is as senseless as beheading a headless body or severing a bodiless head<sup>38</sup>.

Another step has been taken towards a clarified notion of interpretation. Here is my second formulation [SF]:

**[SF] Interpreting is consciously reasoning about an object**

Intentionality is aboutness; intention is a mental state/content. Interpretation's need for an object is definitional, it is a conceptual requirement; interpretation's link to certain mental states is not. Related to that distinction and relevant to my present task are the frequent misconceptions of meaning that certain accounts of interpretation encourage<sup>39</sup>. The time has come to make sense of meaning.

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<sup>38</sup> AAIW 143-144: 'The executioner's argument was, that you couldn't cut off a head unless there was a body to cut it from: that he had never had to do such a thing before, and he wasn't going to begin at his time of life.'

<sup>39</sup> Hirsch, *Validity in Interpretation* (1967).

### 1.2.3. Making sense of meaning

One could simply say that meaning is what an interpreter, *qua* interpreter, seeks. But this tells us very little. Meaning is everywhere. But what exactly is it? Is it what puns are made of? Is it an empty label?

A working notion of meaning is needed in order to understand the concept of interpretation. There is much to be gained from isolating interpretation from other activities with which it might be confused. This can be done by placing meaning at the centre of one's enquiry<sup>40</sup>. There can be no bare concept of interpretation without a modest notion of meaning at its core. It must, however, be a disciplined, circumscribed notion, unpretentious enough to keep my account of interpretation as minimal as I need it to be.

There is more to meaning than words and communicative acts. We access meaning through the medium of a natural language but we need more than words to grasp the meaning of what we interpret. Furthermore, words and utterances are not the only meaningful objects out there. As has been noted before, we may interpret situations, artworks, diagrams, tea leaves, institutions, facial expressions, sounds, and gestures as often as one interprets words and sentences. In order to know what my interlocutor is saying I need not understand what she means. And there may also not be an interlocutor at all: there may simply be an object and a curious, willing interpreter. We need more than words to reach meaning. We need context and occasions of use.

With what is said above in mind, one may say that the immediate purpose of the interpreter *qua* interpreter is to understand or convey the meaning of an object. Meaning is what

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<sup>40</sup> BAAI 258: 'we cannot be deemed to have explained interpretation without explaining meaning, at least to a degree'.

the interpreter seeks. The meaning of the object is what the interpreter's reasoning, *qua* interpreter, is about. Interpretation involves reasoning about meaning:

**[IN\*] x interprets y if x reasons about the meaning of y**

**[IN\*\*] x successfully interprets y if x reaches a correct conclusion about the meaning of y**

Interpreters seek meaning. Meaning is possible only within the bounds of a language, of a form of life. There are various possible approximations to the meaning of 'meaning'. The notion of 'appropriateness'<sup>41</sup> is attractive and points towards the normative character of meaning<sup>42</sup>: to mean is to use a certain object to express something; in order to be recognised as expressing what it is used to express, there must be an implicit assumption that object *y* is an (if not the) appropriate way of expressing  $\xi$  in a certain context. And that assumption may at once be descriptive and prescriptive:

(1) '*y* means  $\xi$ '

(2) 'In fact, *y* expresses  $\xi$ '

(3) '*y* is an appropriate way of expressing  $\xi$ '

All three formulations above refer to the meaning of *y*. Of course there is a clear variation in levels of abstraction: (1) can be said to refer to those properties of *y* which 'remain constant across all contexts and occasions of use'<sup>43</sup>; while (2) and (3) refer to *y* as occurring

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<sup>41</sup>Cooper, M 42. 'Items are meaningful in virtue of their appropriateness to something larger than or outside themselves' (132); 'all explanations of meaning indicate appropriateness' (35). See Brandom, *Articulating Reasons* (2000).

<sup>42</sup> For a discussion of the normativity of meaning, see K. Gluer-Pagin, 'Sense and Prescriptivity' 14 *Acta Analytica* (1999), 111-128; & P. Pagin 'Rules of Meaning and Practical Reasoning', 117 *Synthese* (1999), 207-227; 'Dreams and Nightmares: Conventions, Norms, and Meaning in Davidson's Philosophy of Language', in P. Kotatko, P. Pagin, G. Segal (eds.), *Interpreting Davidson* (Stanford CA: CSLI Publications, 2001), 53-74; P. Boghossian, 'Is Meaning Normative?', in *Philosophy, Science, Scientific Philosophy: Main Lectures and Colloquia for GAP.5* (Paderborn: Mentis, 2005), 205-218.

<sup>43</sup> Neale, 'Textualism With Intent' (2008), 26-27.

within a particular context. (3) is more directly connected with (2) than with (1), but all three propositions are about the meaning of *y*. The purpose of using these three propositions as examples is, in this case, that of showing that both (1) and (2) amount to (3). And *y* may, of course, be a word or a sentence.

One can use a word/sentence in a particular context, with a particular intonation, accompanied by particular facial expressions or gestures, with the particular purpose of producing a certain effect commonly (and conventionally) associated with that word. Deviations from the usually produced effect presuppose that there is an 'appropriate' effect by reference to which the deviation occurs. The difference between semantic and pragmatic meaning depends on this distinction<sup>44</sup>. The (semantic) meaning of a word underdetermines the meaning of an utterance made using that word. The meaning of a sentence is different from what statements using that sentence may mean. What is stated can also be different from what is implied<sup>45</sup>.

Words, sentences, statements and the like are not the only conceivable bearers of meaning. There are many non-linguistic bearers of meaning. Not all objects of interpretation are linguistic objects, though one could say that all meaning is linguistic (in a broad sense, as in the phrase 'the language of music' or 'the language of love'), it is always conveyed through language. Meaning is as much about significance as it is about signification.

It may well be that in order to understand meaning one must make a judgment of appropriateness<sup>46</sup> rooted in the common practices of a certain community. All sorts of rules, not only semantic rules, are involved in the search for and conveyance of meaning. Appropriateness is a normative term and, according to such a notion, conclusions about the meaning of an object

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<sup>44</sup> Grice (1989), 117-137. Searle (1969), 42-50, and (1979), 160-179.

<sup>45</sup> Grice (n 55), 25-26, 41-50, 86, 118, 341.

<sup>46</sup> Cooper, M 58.

are falsifiable (can be judged correct or incorrect). Rules are pervasive in human activities. From the use of language to cooking, from dressing for dinner to composing a symphony, playing Hamlet or writing a sonnet: rules and regularities are inescapable.

Meaning as appropriateness is a normative notion. It requires not only regularity but also the willingness to use a certain code as the vehicle of a certain message because that is the code recognised by the relevant community. Alice misses Wonderland's relevant codes most of the time and that makes her experience extraordinary. Her interlocutors certainly speak English, and yet she often feels as if they are speaking different languages. It is precisely on the basis of agreement on the meaning of words that Carroll's humorous deviations are possible. The relevant codes are not concerned with the meanings of words but with the relation between concepts and facts, i.e. with the appropriateness of certain objects to the concepts they instantiate. It is in that very space that meaning takes shape and interpretation arises: where life meets our concepts.

Meaning can be normative in two different senses<sup>47</sup>: it may be normative in its consequences: using an object in a certain way implies that there are ways in which such an object *should* be used in order to convey a particular meaning; on the other hand, the normativity of meaning is often said to lie in its *determination*. In that sense, meaning is determined by rules. As Katrin Glüer-Pagin usefully notes, the two notions are reducible to one formulation:

Meaning determining rules tell us what should be done with an expression if it is to have a particular meaning<sup>48</sup>.

The normative notion of meaning is intuitive. Consider two different statements:

(a) 'y does not mean x'

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<sup>47</sup> Glüer-Pagin (1999) 112.

<sup>48</sup> Glüer-Pagin (1999) 113. The word 'expression' could be replaced by the word 'object' in order to make the point that expressions (phrasings) are but one type of interpretable object.

(b) ‘*y* means *z*’ is false’

Statement (a) is the kind of statement we make in our everyday use of the verb *to mean*. It is part of the notion of meaning something that certain meanings can be excluded (in this case, *z* is excluded) from the equation. Statement (a) thus implicates the truth of statement (b). The very notion of meaning includes the possibility of failure<sup>49</sup>. Failure presupposes the existence of success conditions and those success conditions are rules. All this is, no doubt, possible within a broad notion of meaning. However, despite its attractiveness, the twofold normative character of meaning is by no means uncontentious<sup>50</sup>.

The bare concept of interpretation has no need for an account of meaning as appropriateness. It need not rely on an account of the normativity of meaning in order to identify meaning as the kernel of interpretation across borders. The minimalist account of interpretation only needs a conception of meaning as *intelligibility*<sup>51</sup>. Under this modest notion, meaning is that which is *comprehensible*, i.e. capable of being apprehended by the human intellect. The meaning of an object is the way in which the object can be understood against a certain background of conditions, institutions, attitudes, practices, standards, and expectations. When one interprets an object, one advances a way in which it *may* be understood. If ‘meaning’ is univocal, so can ‘interpretation’ be<sup>52</sup>.

So what can reasoning about the meaning of an object be said to consist in?

**[IR] x interprets y if x weighs reasons for why y means *p* rather than *q***

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<sup>49</sup> It could be added that the kind of defeasibility at stake is not necessarily linked to failure in identifying the intentions of the person who makes use of the meaningful object. The suggested difference between meaning and intention becomes apparent.

<sup>50</sup> For a challenge to the normative view, see Glüer and Pagin’s ‘Rules of Meaning and Practical Reasoning’ (1999), 207. Taking sides in this debate lies beyond the scope of this thesis.

<sup>51</sup> I am grateful to John Finnis for calling my attention to the simple adequacy of the notion of *intelligibility* to this project.

<sup>52</sup> For an account of interpretation that prescind from meaning, see Hershovitz, JI 10-19.

If interpreting is reasoning about meaning, and reasoning consists in searching and weighing reasons for a certain conclusion about meaning, then interpreting always involves weighing reasons<sup>53</sup>. As indicated in section a), conscious reasoning is a necessary (though not sufficient) condition of interpretation. There is no interpretation without conscious reasoning. Contrastingly, although understanding presupposes reasoning, the latter is not a necessary condition of the former:

- a) If understanding depends on the ability to reason, and if the ability to reason depends on reasons, then understanding depends on reasons;
- b) If what defines reasoning is that a conclusion is obtained from a set of premises, and if a premiss is a reason that entails the conclusion, then what defines reasoning is that there are reasons that justify or entail the conclusion;
- c) What makes reasons entail a conclusion is that either the force of a reason was transmitted to another or there were competing reasons being weighed<sup>54</sup>. Reasoning occurs either when the force of a reason is transmitted to another or when contrasting reasons are weighed against one another (i.e. when the reasons entail the conclusion);
- d) If reasoning only occurs when the reasons entail the conclusion, and if there is such a thing as reasons that do not logically entail a conclusion but merely justify it, then there can be reasons without reasoning.
- e) If there can be reasons and conclusions without reasoning, and if [U], then there can be understanding without reasoning (though not without reasons);

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<sup>53</sup> This is not to say that interpretation entails choosing or vice versa. Choosing involves awareness. Interpretation does not. Barnes, OI 155.

<sup>54</sup> I thank John Gardner for calling my attention to this distinction.

f) If there can be understanding without reasoning, then there can be beliefs about meaning without interpretation.

It is possible to reach a sufficiently unified notion of meaning. Meaning as intelligibility is an important part of the bare concept of interpretation. But it must be noted that, as f) and the sequence leading to it show us, meaning can also figure in a non-interpretative understanding of an object. There can be meaning without interpretation and there can be statements and reports of meaning without interpretation. What distinguishes interpretation from other activities in this regard are the conditions under which the relevant activity takes place. It is possible for  $x$  to understand and report the meaning of  $y$  without interpreting  $y$ .

Although there is some affinity between interpretation and explanation<sup>55</sup>, interpreting does not always amount to explaining<sup>56</sup>. There can be interpretation in display, for example. Interpreting can be distinct from explaining. The difference between explanation and display is particularly striking in music and the visual arts<sup>57</sup>. Performances sometimes (often) involve the interpretation of the pieces of music performed. In a performance the piece is presented to the audience as an object with meaning. Its meaning becomes apparent through the work of the musician, through the particular way in which she plays her instrument. And there is always the possibility of failure: a performance may fail as a technically good execution of the work, or as a faithful execution of the work, but it may also fail as an interpretation of the work without failing in other ways: a flawless execution can be a poor interpretation; an excellent interpretation can be technically defective.

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<sup>55</sup> In Part II, I will claim and attempt to argue that legal interpretation is predominantly explanatory.

<sup>56</sup> Raz, BAAI 241.

<sup>57</sup> For illuminating examples from various art forms, see Hospers, *Meaning and Truth in the Arts* (1964).

The distinction between interpreting for oneself and interpreting for others makes the difference clearer. After all, interpreting for oneself does not necessarily amount to explaining something to oneself but does involve reasoning about meaning. The reasoning process is what unites the notions of explanation and display. It is a condition of both. There is no explanation without reasoning and there is no display of meaning without reasoning. Even in abstract music: “This part of the piece is clearly melancholy. How could one play it *staccato* rather than *legato*?” involves reasoning about what is to be conveyed. ‘I shall play it *legato*’ is an interpretative decision, and the performance will display the relevant meaning, i.e. the meaning to be conveyed by playing it *legato* rather than *staccato*.

Furthermore, meaning is often not explicable. And if where there is meaning there is space for interpretation, then there can be interpretation without explanation. And just as explaining is sometimes best done by engaging in the very activity one is trying to explain, so too interpreting an object sometimes amounts to merely displaying it. Although there is a very close relationship between interpreting and explaining, explanation is not always possible and interpretation can occur in the absence of it<sup>58</sup>.

To say that interpretation entails the *ability* to explain is not incompatible with this. What is important to retain is that there is no interpretation without *reasoning*. Reasoning is a necessary (but not sufficient), condition of interpretation. Such reasoning can take various shapes: explaining, displaying, portraying, asserting, claiming, etc. All such activities, however, depend on one and the same process, i.e. a process of reasoning about meaning.

A third formulation of the notion of interpretation [TF] may be put forward before moving on to the last pillar of the bare concept:

**[TF] Interpreting is reasoning about the meaning of an object**

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<sup>58</sup> Ruben (1990).

I have so far been concerned with two distinct aspects of the concept of interpretation. Those aspects can be translated into the following questions: i) *What* is it to interpret? ; ii) *How* does one interpret? Sections *a)* and *b)* offer a sketch of an answer to i), whereas section *c)* mostly deals with ii). However, one cannot fully grasp the bare concept of interpretation without attempting to answer one further question: *why* do we interpret? Such a question might seem problematic in two ways: i) different people might be said to interpret for different reasons ii) different contexts might determine different reasons for interpretation.

There is no space in the bare concept for contingent reasons for interpreting. What I am looking for is an account of what generates a *need* for interpretation. If, as I have noted, interpretation is not a reflexively intentional activity, then there must be something about the position of the interpreter that makes her capable of interpreting. It is time to look at the role of uncertainty in interpretation.

#### 1.2.4. A note on uncertainty

We learn from TF that reasoning about meaning is a necessary condition of interpretation. One interprets if one reasons about the meaning of an object. The idea that certainty excludes the need for interpretation (*in claris non fit interpretatio* or *in certis non est conjecturae locus*) is widespread but mistaken. The distinction between interpreting for oneself and interpreting for others helps us to see why it is a mistake to detach interpretation from certainty or obviousness: something may be obvious for me but not for my interlocutor and, despite its obviousness, I can interpret it *for her*. Additionally, it is important to see that certainty and obviousness are not synonyms. It is possible for me to be certain of something which is not obvious, and uncertain about what is

obvious. Something may be trivially true and widely known without being obvious to me or to my interlocutor<sup>59</sup>.

I shall thus start from a mistaken conception [MC]: interpretation does not occur when the meaning of the object is obvious. According to this view, lack of obviousness is a necessary condition of interpretation: obviousness precludes interpretation<sup>60</sup>:

**[MC]: x interprets y if the meaning of y is not obvious**

MC is problematic, and ultimately mistaken, because<sup>61</sup>:

- $p$  is obvious  $\neq$   $p$  seems obvious
- If  $p$  is obvious, then  $p$  is true
- If  $p$  seems obvious to  $x$ , then  $x$ 's belief that  $p$  may be mistaken
- $p$  is obvious  $\neq$   $p$  is obvious to  $x$
- $x$  interprets for  $x \neq x$  interprets for  $z$

If something *is* obvious, then it is true. But something may be true without being obvious:

'John has a Klimt on his wall'

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<sup>59</sup> See, for example, the opening lines of a statement by Justice Sebastião Póvoas, Representative of Portugal to the Sixth Committee of the 59<sup>th</sup> Session of the United Nations General Assembly (Agenda Item 150: International Convention against the reproductive cloning of human beings), New York, 21 November 2004: 'There is a legal principle that states that a blatantly obvious fact does not need any evidence to support it. The Latins had a similar principle in their "In claris non fit interpretatio". But sometimes, what for some seems obvious and clear becomes so controversial that a full explanation is needed to prove its veracity.'

<sup>60</sup> '(...) statements about the obvious in a work of art are to be classified as descriptions and not as interpretations', Kennick, *Art and Philosophy* (1979), 372.

<sup>61</sup> I roughly follow Barnes (SRAO) here. OI 7-41.

While John may, in fact, have a Klimt on his wall, it may not be obvious that it really is ‘a Klimt’ and not a very good reproduction of a painting by Klimt.

Moreover, something may *seem* obvious but, in fact, not be obvious or true:

It seemed obvious that John had a Klimt on his wall, but I later learned that he did not.

One could also miss the obviousness of something: something is, in fact, obvious but one does not recognise it as such. In that case, it seems reasonable to admit that, because the belief held is, in fact, mistaken, one is interpreting (not describing):

Anna and Vronsky consummate their love

One may miss the obviousness of this aspect of Tolstoy’s novel and make the above statement believing it to be contentious that Anna and Vronsky did, in fact, consummate their love. Or one could be mistaking Anna for Kitty and Vronsky for Levin, which might explain one’s confusion. Be as it may, one would, in such a case, think one was interpreting when, in fact, one was merely describing or stating the obvious.

Here is an attempt to show the place of obviousness within a concept of interpretation:

**If  $p$  is obvious  $\rightarrow$   $x$  does not interpret  $p$  for herself**

Saying of something that it is obvious is different from saying that it is obvious to someone<sup>62</sup>. The former refers to what a ‘normal’ and ‘normally situated’ person would recognise, while the latter refers to a particular person’s epistemological position. As far as interpretation is concerned, what matters is the epistemological position of an observer at a certain time  $t$  or  $u$ :

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<sup>62</sup> Barnes, SRAO 28-29.

**If  $p$  is obvious to  $x$  at  $t$ , then  $x$ 's epistemic position at  $t$  precludes interpretation for herself.**

**$p$  is obvious to  $x$  at  $t \neq p$  is obvious to  $x$  at  $u$**

**If  $p$  is obvious to  $x$  at  $t$ , but  $p$  is not obvious to  $x$  at  $u$ , then while not interpreting for herself at  $t$ ,  $x$  may be interpreting for others at  $t$  and for herself  $u$ .**

There is an important difference between interpreting for oneself and interpreting for others: one may interpret something one has full knowledge of if, for example, one's interlocutor does not share the knowledge one has about the meaning of the object, and is therefore far from certain about it. The Dodo interprets the Caucus Race for Alice (if there is such a possibility in Wonderland) because there is an epistemic gap between him and Alice: the Dodo knows and understands what is happening, Alice does not.

**$x$  interprets  $y$  *for herself* if there is a possibility of mistake about the meaning of  $y$  (i.e. if it is possible for  $x$  to hold a false belief about the meaning of  $y$ )**

**$x$  interprets  $y$  *for  $z$*  if  $z$ 's epistemological position is weaker than  $x$ 's, i.e. if  $z$  can be ignorant of or mistaken about the meaning of  $y$ .**

Musical performances provide good examples of the importance of this distinction and of the difference between interpreting for oneself and explanation or display. A good musician is sensitive to the possible variations in meaning of the pieces she performs and to the ways in which music is received by audiences. Some of the most successful musicians empathise with their audiences and adjust to the demands of the pieces they perform so as to make them as capable as possible to produce certain effects. Musical performance involves a complex combination of interpretative efforts: the musician's activity and the audience's reception of the

performance. Not only are there different possible meanings at stake, there are two different classes of interpreters. But one need look no further than the musician's performance to understand the difference between interpreting for oneself and interpreting for others.

In the case of the musician, there are two interpretative processes. One is the process the musician engages in of interpreting the piece for herself, say when she is first confronted with the score or when she is rehearsing. The other is the performance itself as the process of interpreting the piece for her audience. A performance typically involves interpreting for an audience and not for the musician herself:

Haydn's Andante con Variazione in F minor, Hob XVII/6 begins with one of the simplest but most poignant of melodies; Brendel's understated approach revealed the degree to which Haydn was inspired by Mozart in the twists and turns of chromatic colour. In the increasingly complex elaborations, Brendel kept an astute balance between lyrical line and decorative tracery, but it was in the extraordinary final variation that Haydn's intense passion was given full rein.<sup>63</sup>

The melody, the critic tells us, is both *simple* and *poignant*. Alfred Brendel, the renowned pianist, interprets it for his audience and that interpretation involves astuteness and fidelity. But, at the moment of the performance Brendel, a highly skilled, experienced musician, may no longer be interpreting for himself. It is likely that he knows what his performance is to convey, what balance is to be achieved and how to achieve it. There is something fundamentally strategic to all musical performances. They have certain aims in sight. Those aims are linked to the meaning of the piece, i.e. to what makes it intelligible as the piece of music that it is. Brendel's performance conveyed a meaning of the Haydn piece to his audience, a meaning Brendel himself might have reached interpretatively. But at that moment, Brendel, the pianist, is

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<sup>63</sup> Rian Evans, The Guardian, Wednesday, February 06 2008: <http://www.guardian.co.uk/music/2008/feb/06/classicalmusicandopera1>

interpreting for others. He is supposed to be in a stronger epistemic position than his audience. It is part of his role as a musician that he be capable of playing that role. The fact that he may enjoy it and see it as an exploratory journey is irrelevant. His performance paints a certain picture of how the piece may be received.

The same goes for theatrical performances. It is part of the task of a professional actor to grasp the meaning of the play she is to perform in order to convey it to her audience, not to mention the place of her character in the narrative and the meaning of the particular lines she is to say. Best results are the product of a combination of strategy and creativity. But, as an actor, her task is to convey meaning, it is to interpret her character and her role in the play *for* her audience. And that task presupposes that some background interpretative work has been done by her, and her company of actors working under the vision of a director, before the play is staged.

Such interpretative work, however, need not (and often is not) done by the audience. There is a relevant (definitional) difference between the epistemological position of performer and audience. It shows us that interpretation is necessary when there is an epistemic gap between interpreter and audience.

There may, in such a case, be several possible *acceptable, germane, interesting* interpretations of the object. And the several meanings conveyed by those interpretations may even be incompatible. The fact that an object may have several, incompatible meanings and that there may not be *one* correct interpretation of that object does not forestall interpretation. Interpretation does not eliminate conflict, but feeds on it. The broad notion of epistemic imbalance used here is elastic enough to accommodate these possible variations<sup>64</sup>.

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<sup>64</sup> Note that epistemic deficiency is not the same as indeterminacy. It refers both to the absence of knowledge (in cases of interpreting for oneself) and to a disparity of epistemic positions between interpreter and audience. There is no necessary connection between interpretation and indeterminacy.

I have stated that there is no necessary connection between interpretation and lack of obviousness or clarity<sup>65</sup>. Something may be obvious to x and still x might interpret it for z. Moreover, something may become obvious as a result of interpretation<sup>66</sup>: obviousness can be a consequence of interpretation<sup>67</sup>. The relevant link is between interpretation and the epistemic position of the interpreter and/or her audience. Interpretation occurs whenever there is a possibility of mistake about the meaning of the object. It occurs in virtue of epistemic deficiency on the part of the interpreter (when interpreting for herself) or her audience/interlocutor (when interpreting for others).

Considering what has been said above, what is the role of certainty in interpretation? Is saying that one can interpret the obvious the same as saying that one can always interpret in the presence of certainty? The link between obviousness and certainty is knowledge. As indicated, something *is obvious* if it is true and known to be true. If it is shown not to be true, or if it is not known to be true, then it has never been obvious, but merely *seemed* so. Let us recall Barnes' contentions:

**x *is* obvious if x is true and known to be true**

**x *seems* obvious if x is believed to be true but not known to be true**

Certainty, on the other hand, can either amount to perfect, indefeasible knowledge or to a mental state characterized by the absence of doubt:

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<sup>65</sup> See Mathews, 'Describing and Interpreting a Work of Art' (1977), 5-14. Goldman, 'Interpreting Art and Literature' (1990), 206: 'the proper contrast is not between interpreting and describing (since interpretations, when uniquely correct, are a subclass of descriptions), or between knowing (in a certain way) and not knowing (in that way) (...) The distinction lies first of all between directly perceiving and inferring.'

<sup>66</sup> SRAO 27

<sup>67</sup> Obviousness (SRAO 37) implies knowledge, but not vice-versa.

**x is certain of y if x indefeasibly knows that y is true**

**x is certain of y if x has no doubts about the truth of y**

The difference may be subtle but it is important. While, in the first case, x cannot interpret y for herself, she can still interpret it for others. Though Lorna is certain that Anna and Vronsky consummate their love, she may be interpreting when she tells Clare, who has never read *Anna Karenina*, that they do.

In the second case, however, x can be mistaken about the truth of y and the absence of doubt might be due, not to indefeasible knowledge, but to ignorance. Doubt may be absent in the absence of knowledge. The absence of knowledge may generate certainty. If one assumes that the above mentioned conditions are not cumulative, then there can be certainty in the absence of knowledge. One can *be* certain of something, and not merely *seem* to be certain, if one does not, in fact, know that it is true. One may be convinced of its truth without it in fact being true. One can be mistaken in one's certainty.

David tells Jane that Lisbon is a city in the south of Spain and Jane believes him. She has no reason to doubt him, as he is a well-travelled, knowledgeable person who would not mislead her. When conversing with Mary, she tells her that she would very much like to visit the south of Spain and, particularly, Lisbon. She is certain of the truth of the statement 'Lisbon is a city in the south of Spain'; there are no doubts in her mind as to its truth. And yet it is not true and she cannot be said to know it to be true. She believes it to be so, but her belief is false. There need, however, not be any doubt as to her *certainty*. She can still claim to have been certain after finding out that it was, in fact, not true. It is possible to be certain of a falsehood (although it is not possible to be certain of the truth of something when one is aware that it is false).

If there can be certainty in the absence of knowledge, and not, as with the obvious, a mere appearance of certainty, then one can interpret the certain for oneself. In the second case, unlike in the first one, there are no impediments to interpretation. This leads us to the conclusion that, albeit for different reasons, one can interpret both the certain and the obvious. Epistemic deficiency, rather than uncertainty, is a condition of interpretation.

Having understood what one does when interpreting, how one goes about interpreting and under what conditions one interprets, a clarified notion of interpretation [CN] may finally be advanced:

**[CN] Interpreting is reasoning about the meaning of an object in the presence of epistemic deficiency**

## CHAPTER TWO

### WHY LAW AND MUSIC?

‘This and similar things are called ‘games’. (...) I mean board games, ball games, Olympic games, and so on. What is common to them all? Don’t say: ‘there *must* be something common, or they would not be called ‘games’, but *look and see* whether there is anything common to all.- For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that.’<sup>68</sup>

#### 2.1. Resemblance and asymmetry

The bare concept tells us that interpretation is an activity that needs an object, sometimes but not necessarily a text, and that interpreting is reasoning about an object’s meaning where there is a possibility of mistake. All other features of interpretation, including its relationship with uncertainty and doubt, are contingent and domain-specific. The minimalist view of interpretation this thesis recommends stems from the bare concept but it is useful to ask whether domain-specific accounts of interpretation can be minimal too. The purpose of this chapter (and, indeed, of Part II) is to extend minimalism to domain-specific accounts of interpretation. The two domains chosen are law and music.

Connections between law and music may seem unsuitable as a basis for a plausible account of the role of interpretation in legal reasoning (and in judicial reasoning, in particular). After all,

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<sup>68</sup> Wittgenstein, PI 66

music and law are so different in many (and rather obvious) ways that the simple suggestion that comparing these two domains can be philosophically fruitful may raise eyebrows. I hope to demonstrate that this line of inquiry, albeit relatively unexplored, is far from sterile<sup>69</sup>.

What can sustain the claim that law and music ‘resemble’ each other because they are rich in objects of interpretation? The idea that legal practitioners, artists, audiences, and music critics alike, seek meaning is an intuitive start. Following this intuition, law and music could be said to belong to the same large family- the family of things with meaning. Not much to argue against here, it seems. In fact, this is what the genealogy and history of the concept of interpretation- as understood by legal theorists and philosophers show us. It is also what conventional wisdom about music as a fine art, and law as a social technique<sup>70</sup>, tells us about their role in people’s lives.

But we ought to be more specific. If we unpack the rather compact series of claims above, we find various propositions which call for individual attention: (i) law and music are social practices; (ii) law and music are made up of objects with meaning; (iii) interpretation is an important (central) part of legal and musical practice (or of the various activities we find in the legal and musical domains). These propositions, though interconnected, are clearly independent of one another: to say that X is a social practice is not to say that it is an *interpretative practice* (in a Dworkinian sense). Nor does the claim that a domain is *paradigmatically* interpretative imply that it is interpretative through-and-through. In fact, the centrality of interpretation to a domain may be found not in its *predominance* (*pace* Raz) but in its *relevance* to the pursuit of a series of ends (its instrumental role) and its tight connection with other, possibly more distinctive, activities. This is the case in both law and music.

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<sup>69</sup> Recent contributions to the literature on law and music include Balkin and Levinson (1998-99), Beever (2011); and Balkin (2013)

<sup>70</sup> The expression is Hans Kelsen’s (1961).

Law and music are paradigmatic domains of interpretation. This can be attested by observation of the ways in which different people talk about and practise law and music. They are constituted by things which typically *call for* interpretation. Again, let me be more specific. Legal texts and legally relevant facts are objects of interpretation, as are musical works, because they have (or can be ascribed) meaning. In view of this, it is useful to establish at the outset that by ‘law’ and ‘music’ I here mean ‘legal objects’ (things with legal meaning<sup>71</sup>) and ‘musical works’. The categories are still too vaguely defined but their contours will be sharpened in the process of showing that the symmetry between legal and musical objects is merely apparent.

Their sharpness also depends on the clarification of the two ideas of meaning in play in this part of the thesis. Musical meaning and legal meaning do not have much in common beyond what we find in the general (and necessarily loose) notion of meaning which sustains the bare concept: something has musical meaning if it is intelligible by reference to musical practice and its rules/conventions; something has legal meaning if it is intelligible by reference to a legal system. But intelligibility is traced back and assessed against different criteria in each domain so there is very little to rely on as a theoretically useful common denominator.

An important indicator of the asymmetry between musical and legal interpretation is that, unlike musical artworks, the category ‘legal objects’ (things with legal meaning) is an open category<sup>72</sup>: law can potentially apply to, be concerned with (and regulate) anything. Its range of concerns is wide and varied, the scope of its acts and directives is vast, and its jurisdiction

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<sup>71</sup> By ‘legal meaning’ I mean contextual intelligibility by reference to a legal system. This notion will be developed in Chapter Four.

<sup>72</sup> This is in line, but ought not to be confused, with Raz’s claim in PRAN 150-154 and AL 101-102 and 116-120, that legal systems are both *comprehensive* and *open systems*, i.e. ‘claim authority to regulate any type of behaviour’ and contain ‘norms the purpose of which is to give binding force within the system to norms which do not belong to it’.

potentially far-reaching<sup>73</sup>. Legal texts (and the norms they express, be they duty-imposing or power-conferring<sup>74</sup>) are not the only (or, indeed, the paradigmatic) objects of legal interpretation. Indeed, they are better seen as providing the background against which legal interpretation takes place.

By contrast, works of music are the *only* objects of musical interpretation<sup>75</sup>. Musical interpretation and meaning, by contrast with their legal counterparts, are restricted to a particular kind of object: works of music. This is because only music is capable of musical meaning, which is to say that only music can be understood musically. Like other things, music can be meaningful in many ways: historically, politically, legally, religiously, ritually, and so on. But musical meaning is exclusive to music.

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<sup>73</sup> This is not to say that law claims unlimited authority. *Contra Raz*, Endicott says that law claims *unspecified*, rather than *unlimited*, jurisdiction. See 'Interpretation, Jurisdiction, and the Authority of Law', American Philosophical Association Newsletter, n.6 (2007), 14-19, at 14.

<sup>74</sup> I am using H.L.A. Hart's classification, introduced in *The Concept of Law*, 3<sup>rd</sup>. ed. (Oxford: Oxford University Press, 2012). Norms, in turn, have normative propositions as their content. On the distinction, and for an account of the logic of normative propositions, see Hilpinen (2006). For a contrast, see C. Alchourón and E. Bullygin's defence of the view according to which there is a difference between the logic of norms and that of normative (1971 and 1993). See also R. Hilpinen (1981) 95-124.

<sup>75</sup> See, for example, the Criminal Justice and Public Order Act 1994, c. 33, Part V, Section 63 (1), (b).

### 2.1.1. Relevance v. dominance

When we say that law and music are constituted by objects which typically call for interpretation, we are pointing at three important things: (i) law and music are institutional arrangements (formal and informal, respectively); (ii) they are constituted by objects with meaning; (iii) those objects are interpretable. It should be noted that (iii) is not a restatement of (ii). It tells us that the meaning of musical and legal objects is capable of being explained or displayed<sup>76</sup>. (i) suggests that, as social practices, law and music are made up of social and institutional facts<sup>77</sup>.

This exercise is undertaken in a spirit of minimalism, following the belief (delineated in Part I) that a general account of interpretation must be frugal, based on a notion of meaning as intelligibility in context. If the bare concept is minimal, the various domain-specific concepts will be minimal too. The concepts of interpretative musical performance as display and of judicial interpretation as explanation are instances of the minimalism I recommend.

No suggestion, however, is made here that it be possible to identify and theoretically capture the *essence* or *nature* of music or law. The present inquiry stems from curiosity about how the concept of interpretation is used in relation to law and music. But there is no underlying assumption that there is a set of severally necessary and jointly sufficient conditions for something's being music or law<sup>78</sup> (both law and music are complex social practices<sup>79</sup> or clusters of practices).

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<sup>76</sup> It also tells us that their meanings are often unobvious and can be contested.

<sup>77</sup> See Anscombe (1958) and Searle (1995 and 1999). For an account of rules as institutional facts (in the philosophical sense), and of Jurisprudence as an interdisciplinary enterprise, see McCormick (1974), 129: 'law', even in its purely normative significance, spills over the edges of the valid rules.'

<sup>78</sup> Hart, for example, identifies two necessary and sufficient conditions for the existence of a legal system (CL 116): 'On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and

There are a few more ways in which law and music may be said both to resemble and contrast with each other, and it is to those that I will now turn my attention. The notion of an artefact can be useful both in accommodating intention in the interpretative process and as a device for understanding the connection between intention and meaning. But the fact that both domains are generally thought of as abundant in *occasions of* interpretation is a more promising starting point. Some of the most salient features of law and music are features in which the role of interpretation in the practices they include is highlighted.

Focusing on interpretation does not entail that law is *interpretative* (in the Dworkinian sense). Interpretation enhances law's ability to guide human conduct, it is central to the fulfilment of law's partly self-referential justificatory task<sup>80</sup>. But law cannot be defined by the role interpretation plays in it, which is exactly the role it plays in other domains, including music, namely, to make an object intelligible to an audience by communicating its meaning, in other words, to afford understanding.

So we ought to look elsewhere for the distinctiveness of legal reasoning. Interpretation unites rather than severs: it shows, at first contact, how much alike law and music can be. But they are also clearly in contrast with each other when it comes to the particular demands faced by interpreters when reasoning about the meaning of their objects. And it might just be possible that, when it comes to the role of interpretation in understanding their objects, music and law differ very sharply. But understanding the ways in which they resemble each other sheds light on

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its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.'

<sup>79</sup> Roger Scruton 'The Meaning of Music', series of 8 lectures given at the Philosophy Faculty of the University of Oxford in Hilary term 2008 (January-April), lecture 1. For Scruton, there is a very concrete consequence to the fact that music is a 'social phenomenon', and that is that one must take the 'full social context of its appreciation' into account when *judging* music. When we attempt to do so, Scruton continues, 'We are not setting out to understand music only; we are committing ourselves to examining a social practice, and all that flows from it.'

<sup>80</sup> Legal reasoning is both reasoning *about* the law and reasoning *according to* law. Legal reasoning involves argument and, as such, is justificatory: its conclusions must be justified, partly, by reference to the law in force.

their specificities. Their unsuspected similarities, more than their obvious differences<sup>81</sup>, are worth exploring as part of an inquiry into the role of interpretation in legal reasoning.

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<sup>81</sup> In saying that 'they are alike enough to be worth contrasting', John Gardner (LALOF 56) makes a similar claim about commands and legislative acts.

## 2.2. Identifying relevant shared features

### 2.2.1. Interpreting for others

The first relevant shared feature of musical and legal interpretation is that interpreters within both domains typically interpret for others, not simply for themselves<sup>82</sup>. Interpreting for oneself, we have seen, is a process of reasoning about the meaning of an object. Reasoning about meaning is part of the bare concept of interpretation, i.e. it is a feature of interpretation across domains. Interpreting for others, by contrast, is domain-specific. Musical performance and judicial interpretation are instances of interpreting for others.

To say that musicians and judges interpret for others is not to say, simply, that they happen to do so. My claim is that they do so *necessarily*. Interpreting for others is not a contingent aspect of what musicians and judges do. It is something they are *required* or, at the very least, *expected* to do. It is also, most importantly, something they *purport* to do. Musical performance and judicial interpretation have, as it were, an outward character. Musical performers and judges mediate between an object with meaning and an audience. Their task is to provide a ‘service’<sup>83</sup>: making meaning accessible to an audience by *communicating* it<sup>84</sup>.

Note that the interpreters I have in mind here are a specific class of interpreters. In the musical domain, I am interested in musical performers and not, for the purposes of this thesis, in composers or music critics. In the legal domain, I am interested in judges and not so much in

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<sup>82</sup> This crucial, but simple, distinction is introduced by Barnes, OI 16-20.

<sup>83</sup> It is premature to suggest a link between this mediating service and Joseph Raz’s ‘service conception of authority’. Possible connections between the two may surface in the course of this chapter.

<sup>84</sup> The distinction between understanding and interpretation (introduced in Part I) becomes sharper if one acknowledges the difference between interpreting for oneself and interpreting for others: understanding is *awareness* of meaning; interpretation, in our two domains, is *communication* of meaning. Convincingly purporting to interpret for others involves the ability to communicate meaning to one’s audience/interlocutor.

legislators or legal advisors. Musical performers and judges have parallel but equivalent positions when it comes to interpretation because of their mediating role. As mediators, they have a series of duties to fulfil, and fulfil them they do (when they do) by engaging in interpretation. This makes them paradigmatic interpreters not just because they happen to interpret in the course of their various activities, and as a way of fulfilling their duties, but because, within the practice in which they engage and to which they belong, they purport to, are expected (and required) to interpret *for others*.

Musical performances are good examples of the importance of this distinction. A good musician is sensitive to the possible variations in meaning of the pieces she performs and to the ways in which music is received by audiences. Some of the most successful musicians empathise with their audiences and adjust to the demands of the pieces they perform so as to make them as capable as possible of producing certain effects. Musical performances involve a complex combination of interpretative efforts: the musician's activity and the audience's reception of the performance. Not only are there different possible meanings at stake, there are also two different classes of interpreters (performers and members of the audience). But one need not look further than performance to understand the difference between interpreting for oneself and interpreting for others. Musical performance and judicial argument are paradigmatic instances of interpreting for others.

### 2.2.1.1. The role of texts

Musical performers and judges are required to interpret *for* audiences. It is thus not surprising to see an emphasis on performance in recent contributions to the literature on law and music. Balkin and Levinson, for instance, go as far as advocating the ‘general study of law as a performing art’<sup>85</sup> and claim that both law and music are best understood as ‘the acting out of texts rather than the texts themselves’. Both law and music, they note, typically *require* public performance. Although I do not subscribe to their view of law as a performing art (or, indeed, as the ‘acting out of texts’), I think that, by emphasising the role of performance, they are making a point similar to the one made in the previous section: interpretation in musical performance and judicial argument is, in its central case, interpretation *for others*.

I diverge from Balkin and Levinson in my effort to show that interpreting for others and performing are not the same. Not all performances are interpretative and not every act of interpretation (even of interpreting for others) is a performance. Moreover, if one defines performance (as Balkin and Levinson do) as the ‘acting out of a text’, it is difficult to gather the musician and the judge under the same umbrella: neither necessarily (or even typically) ‘acts out’ particular texts<sup>86</sup>. At best, both may be required or expected to *know* and *understand* texts relevant to the interpretation of a particular object<sup>87</sup>, but their task as interpreters is not to ‘act them out’. It is to take them into consideration and, occasionally, to explain or display their meaning.

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<sup>85</sup> Balkin and Levinson (1998-1999) 1518

<sup>86</sup> Other meanings of ‘performance’ include: accomplishment of something undertaken or commanded; observable and measurable behaviour; execution, discharge, carrying out, fulfilment of purpose or responsibility; the rendering or presentation of something (a work) to an audience.

<sup>87</sup> Balkin’s view on the link between performances and texts has been refined. He concedes, in his 2013 paper, that ‘not all of the performing arts perform written texts, but many of them do’. His reason for electing performance as the focus of his analysis of the connections between legal and musical interpretation continues to rely on a definition of performance as the act of ‘putting a text into action before an audience’ (5).

Indeed, it is doubtful that the very notion of a performing art, under which Balkin and Levinson unite law and music, is correctly understood as a cluster of art forms which involve the ‘acting out’ of texts. This seems too narrow a way of distinguishing the performing arts from other art forms. A more adequate notion of performance is that of *presentation* of something to an audience. Again, the key seems to be the outward character of performance, not its dependence on texts. After all, not all performances are based on texts and not every interpretation is the interpretation of a text. And, while legal interpretation, as an instance of interpreting for others, involves performance in a broad sense, its connection to texts is contingent. In any case, I do not share Balkin and Levinson’s view of law as a performing art. Law is not an art form. It is a social technique<sup>88</sup>.

Fulfilling tasks (both simple and complex) often requires a careful, step-by-step consideration of what must be done in order to reach a certain result. Building a cardboard dolls house, assembling a piece of furniture, installing software, using a domestic appliance or an electronic device for the first time are all tasks which one typically fulfils with the help of instructions. Instructions are helpful guides to action (indeed, following them typically makes us more likely to achieve particular results) and they are typically expressed in written language. Instructions are texts we use as tools in achieving a variety of ends and following them is often a necessary condition for successfully achieving a particular result.

Musical scores are not instruction manuals but they often contain instructions expressed in natural language. *Adagio* (slowly), *grazioso* (gracefully), *cantabile* (in singing style), *affannato* (anguished) are examples of such instructions, each word referring to a particular way of playing,

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<sup>88</sup> One could also call it, more broadly, a social institution. This terminology would pull law and music closer together, since the musical world (composers, performers, administrators, critics, etc.) can also be regarded as an institution. I am not suggesting that art forms and social techniques are mutually exclusive types. All I wish to do here is to clarify that my reason for comparing law and music is not the belief that law, like music, is an art form. This thesis does not address or explore the aesthetic dimension of legal practices. The link between the two is interpretation, not aesthetic value.

a particular mood, which the musician is instructed to express in her delivery of a work. These instructions are, in typical cases, issued by the composer but the very possibility of following them depends on the fact that composer and performer share a language and participate in a common practice made up of rules and conventions. Musical notation is composed of symbols whose meaning is conventionally established and whose role is straightforward. Musical notation is a code, and, as such, a boundary-setter, a frame within whose bounds musical meaning is possible, and, more precisely, within which ‘certain meanings are *permissible*<sup>89</sup>. Musical scores are texts, but they are texts of a particular sort, since they have a normative role: to direct the performer, to tell her which notes to play and how to play them in order to produce certain effects.

When thinking of the role of texts in musical experience and interpretation, it is helpful to keep two distinctions in mind: (i) musical notation v. musical score; (ii) musical score v. musical work. Musical notation is a set of symbols whose use is governed by semantic and syntactic rules, and which can be combined to represent music, while a musical score is a text consisting of these symbols.

But what about musical works: are *score* and *work* synonyms? Is a musical work a text? The answer is ‘no’. A musical work can exist without a score. True, in some musical traditions (including Western art-music, from which most of the examples used in this thesis are taken), the central case of a work of music (which is capable of being performed) includes a score produced by a composer, but there is a conceptual difference between score and work, a difference which will become apparent in the next chapter, when I discuss the nature of musical

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<sup>89</sup> On the distinction (and relationship) between code and language, see Colapierto, Vincent. Glossary of Semiotics. New York, Paragon House, 1993. <http://csmt.uchicago.edu/glossary2004/http://csmt.uchicago.edu/glossary2004/code.htm> ; O. Ducrot and T. Todorov, *Encyclopaedic Dictionary of the Sciences of Language* (Baltimore: The Johns Hopkins University Press, 1972); U. Eco, *A Theory of Semiotics* (Bloomington: Indiana University Press, 1979); F.Saussure, *Course in General Linguistics*. (Chicago: Open Court, 1986).

meaning and interpretation: musical works, not scores, are bearers of musical meaning and, as such, objects of musical interpretation<sup>90</sup>.

When we look at legal interpretation, the picture we encounter in the literature is misleadingly sharp<sup>91</sup>. It is tempting to go with the flow and limit our account to the interpretation of legal texts. Legal rules, after all, indeed, even legal principles, are often articulated in written form. Rules, it is easy to assume, are texts, and legal interpreters are called upon to interpret them, to clarify their meaning. Moreover, a picture of legal interpretation as the elucidation of the meaning of authoritative legal texts seems perfectly compatible- indeed required- by the claim, made in this thesis, that judges are paradigmatic interpreters: after all, judges are required to *apply* the law to the facts of a case. In order to fulfil this task, they must interpret legal texts which, on this popular view, provide the *content* of the law. Judicial interpretation, the narrower focus confirms, cannot but be seen as the interpretation of authoritative legal texts: it is *applicative*.

In Chapter Four (section 4.3.), I will attempt to show why this picture is misleading. For the moment, two brief points are worth making. The first is rather simple: ‘rule’ and ‘text’ are not synonyms. Rules can be *extracted* from texts, but they are not texts. I shall call the position according to which legal texts are the primary object of legal interpretation (a) the ‘texthood myth’.

The second point, albeit less intuitive, is crucial: legal rules are not objects of legal interpretation. Note that this would be defensible even if we were to concede that all rules are

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<sup>90</sup>Lydia Goehr (1992) argues that music isn’t necessarily thought of as parcelled into works. The concept of a musical ‘work’ is an 18<sup>th</sup> Century creation.

<sup>91</sup> For a recent, clear example of a view of legal interpretation as the interpretation *of legal texts* see A. Scalia and Garner (2012).

texts: things other than texts are interpretable. I will refer to the opposite view as (b) the ‘rule-centric view’ of legal interpretation.

Although I will argue that (a) ought to be exposed and (b) rejected, it is important to note that falling prey to the texthood myth does not entail accepting a rule-centric view of legal interpretation. The two positions are separable.

I take the texthood myth to be based on a commonly accepted idea of what a text is: a text is an instance of the use of *written* language. Under a more technical notion of text, a text is something which can be *read*, something constituted by signs with meaning. The broader focus on the use of symbols (including, for instance, social status symbols and traffic lights), rather than on written language, shifts our attention from form to content. Another, yet more technical, definition has as its kernel the twin notions of ‘structured communicative functions’ and ‘rhetorical purpose’<sup>92</sup>. According to this broader notion, any intentionally communicated content is potentially a text.

The absence of consensus as to what a text is does not make my task easier, but it is not a real obstacle. For even if we define ‘text’ as ‘intentionally communicated content’, the texthood of rules remains a myth. On the narrow, commonly held view, it leaves out unwritten rules. On the broad view it leaves out rules that arise spontaneously in practices, or evolve from collective habits, and other kinds of tacit rules. Of course, legal rules, as instances of social rules, are applicable to and shared by social groups. Although all legal rules have propositional content and are thus *capable of* being articulated and expressed in words, not all legal rules are produced by acts of communication and not all are explicit. For these reasons, basing one’s idea of rules as texts on a broad notion of texthood would be uninformative and obsolete, at best, and

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<sup>92</sup> Hatim and Mason (1990), in text-linguistics.

misleading, at worst. But the simplest objection to the texthood myth is the following: a rule can only be *in* a text (as its content), and cannot be identical with it.

The second observation has to do with my reasons for rejecting the rule-centric view of legal interpretation: there is more to law than rules, and 'legal meaning' is not synonymous with 'the content of the law'. Crucially, however, there is more to legal interpretation (and to judicial interpretation in particular) than the elucidation of the meaning *of legal rules*. And, although judges are called upon to *give effect* to the law, judicial interpretation is not to be confused with the *application* of law. Judicial interpretation and adjudication are not the same. Judicial interpretation is better understood as explanation of legal meaning.

### 2.2.1.2. Authoritative interpreters

Interpretation for others takes place when those for whom one interprets are in a position of epistemic deficiency, i.e. when there is a possibility of mistake (on their part) about the meaning of the interpreted object. Interpreters who purport, are expected or required (as the case may be) to interpret for others do so for that reason. Interpreting for others involves a disparity of positions, an imbalance, between interpreter and audience. Such an imbalance is not undesirable, it is not something to be fought against or eliminated. In fact, it seems inevitable- a feature of the world and human interaction- that there be disparities in and variable degrees of knowledge and understanding. The claim I introduce in this section is that interpreting for others entails a claim to theoretical authority over those for whom one interprets.

Two very brief notes about the nature of authority are in order. First, authority is a relational concept. One has authority *over* someone else. The necessary link between interpreting for others and authority stems from the relational character of authority: one does not, except by imagining oneself to be two different people, exercise authority over oneself<sup>93</sup>. Second, claims to authority may not be believable and attempts to exercise authority may fail. Authority is exercised only if the claim of the purported authority is acknowledged and accepted by its addressees, or at least if the addressees acquiesce. To claim authority is not to possess it. A believable claim to legitimate authority entails only that the claimant be *capable* of exercising it. Interpreting for others entails only a sincere claim to authority. Authority must be earned<sup>94</sup>.

But to say that interpretation (or the need for it) involves an epistemic imbalance or deficiency is not to say that interpretation by itself eliminates the epistemic gap. It is doubtful

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<sup>93</sup> Kojève (2004), 58. In the same vein, Leslie Green (AS 40) notes that talk of authority over oneself is ‘parasitic on the standard notion of having authority over others’

<sup>94</sup>Raz, EPD 215- 220.

that it ought to. All that can be said (restated) is that the need to interpret for others arises in virtue of an epistemic imbalance between interpreter and audience (or addressee). If no such imbalance (or gap) exists there is no room for interpretation. In such instances, instead of interpreting for others one would simply state facts about meaning, facts which one's audience already knows or to which they have equal access, without offering reasons as to why an object ought to be thus understood. In the absence of an epistemic gap, there would only be space for preaching to the converted.

This is visible in musical performance as much as in judicial argument, albeit for different reasons. In the case of music, even highly experienced and knowledgeable audiences expect to be offered something they would not be able to produce or have access to without the mediation of a performance, and that expectation would depend, among other things, on a judgment about the performer's particular skills and understanding of the piece (or the genre, in the case of free improvisation), as much as about her talent, originality, imagination, and expressiveness.

Audiences normally assume that a performer is able to convey something to which they do not otherwise have access, or is capable of something of which one is not capable. Performers, by definition, interpret for others. Those for whom they interpret expect them to provide something to which, prior to the performance, they do not have access or which they do not possess. This tells us that audiences are typically in a position of epistemic (imaginative) deficiency in relation to performers, by which I do not mean that they know less than the performer about the work performed. If the performance is in a competition with expert judges, the opposite may be true. The position of epistemic deficiency is a pragmatic presupposition of performance. It applies in a similar way to someone being read a story, which they may know already.

The strong creative component of musical interpretation warrants the conclusion that a performer always has an advantage over her audience. Such an advantage is an advantage in accessing musical meaning, that is, in understanding a work of music and being aware of its meaning. But it is also, of course, an advantage in communicating such a meaning. There is thus a gap between interpreter and audience, a gap in understanding. Interpreters bridge the gap between performer and audience by communicating an otherwise elusive or inaccessible meaning. Musical performers purport to do precisely that and such a purported ability (which also crucially depends on skill and talent) is part of their role as musical performers. Interpretative performance, in other words, is a tool of understanding.

A similar dynamic can be found in the legal domain, more specifically in judicial argument. Like musical performers, judges are required to interpret for an audience. Their audience is, of course, a very different type of audience with very different (at times particular) expectations. Like musical interpreters, judges are expected to interpret for others. They are, more specifically, expected to explain legal meaning in the process of deciding a case. But judges are different from musical performers in that they are also under a *duty* to interpret. Such a duty results from their position in the legal order, from the role they are required to play in the life of the law and in the life of those who rely on and are guided by the law. In the case of judges, it is clear, such a professional duty is also a legal duty, i.e. a duty imposed by the law itself<sup>95</sup>.

The judge's audience is not only constituted by the parties in a particular legal dispute but also by other judges, legal practitioners, and, potentially, all *users* of law. This is a particularity of the judicial sphere: judicial decision-making has the potential to impact other areas of the law (or legal discourse)<sup>96</sup> in a significant way. Such impact can be considerable and, indeed, decisive.

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<sup>95</sup> This point is addressed and developed in chapter 5 (section 5.2.4).

<sup>96</sup> This is Ronald Dworkin's reason for choosing judges as his paradigm in LE, 14-15

But, regardless of the impact of their conclusions on their potential audience, it is clear that judges are, *prima facie*, in a position of epistemic advantage over their addressees. It is from this position that their duty to interpret for others stems.

Judges purport and are reasonably expected to understand the law, what it requires, allows, and precludes. They are expected to be able to convey legal meaning- and successfully conveying legal meaning involves, in typical cases, a sound knowledge and understanding of the workings of a legal system. Such knowledge and understanding, it is assumed, are not typically available to most people. Judges are paradigmatic interpreters not (only) because their interpretative moves and conclusions influence other areas of legal discourse (although it may well be true that they typically do), but because: (i) there is a pragmatic presupposition that they are better placed than their audience to understand and convey legal meaning; and (ii) a sound exercise of their legal authority depends on their ability to justify their decisions by explaining legal meaning.

It is important to note, however, that, although judges are paradigmatic interpreters, they are not paradigmatic in virtue of being uniquely authoritative. Their special position as interpreters results from a combination of two factors: (i) their epistemic advantage over their addressees<sup>97</sup>, and (ii) the fact that they are typically under a *duty* to interpret *for others*. Such a duty is explained by the fact that judges typically exercise legal authority over their audience. This is a distinctive feature of judicial interpretation: musical performers are paradigmatic interpreters because of their purported epistemic advantage in relation to their audience. Judges are

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<sup>97</sup> 'Epistemic advantage' here means being better equipped to understand something, not just having knowledge of something. I do not wish to imply that judges are better at 'spotting' legal meaning (which is already there, so to speak). I am only saying that they are, in principle, better equipped to understand how different valid legal propositions are related to one another, and, by implication, to make judgments as to how a set of facts ought to be understood against the background of a particular legal system. They are better positioned than their audience to understand and explain legal meaning because legal meaning is both systemic and contextual. Such an advantage is not explained by their legal authority. Rather, it helps to explain their claim to epistemic authority. See Raz, *The Practice of Value* (Oxford: Clarendon Press, 2005) [TPOV], 57.

paradigmatic legal interpreters because they combine the exercise (and corresponding legal powers and duties) of two different types of authority: interpretative authority and legal authority.

Musical performers and judges *purport*<sup>98</sup> to be authoritative interpreters. Interpretative acts within both domains are intended and expected to influence how an audience understands the interpreted object. Interpretative statements (or acts) are, as we have seen, statements (or acts) *about* or *of* meaning. A meaning-statement is a statement about how an object may (or ought to) be *understood*, in a particular context.

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<sup>98</sup> I use the word *purport* to refer to a pragmatic presupposition (i.e. a convention), not a defeasible assumption. I am very grateful to John Hyman for calling my attention to this distinction.

#### 2.2.1.2.1. Authority and reasons

The claim of musical performers and judges to authority is a claim to theoretical authority. This means that, as interpreters, they purport to offer their audience reasons for belief. The distinction between theoretical and practical authority seems straightforward: theoretical authorities *advise*, practical authorities *direct*. But, as Raz notes, contrasting reasons for belief and reasons for action is not very helpful in distinguishing authorities from other people who make requests, offer advice, or make sincere assertions<sup>99</sup>: they, too, are capable of giving their interlocutors reasons for belief or action. One must look elsewhere for the mark of authority and include in one's account, both practical and theoretical authorities.

It is tempting to apply considerations about practical reasons to epistemic reasons. After all, acceptance of authority does not entail obedience<sup>100</sup>. It is possible to accept advice on what to think (believe) as authoritative. In such cases, one's acceptance of advice as authoritative does not involve obedience: to obey is to act and since theoretical authorities do not offer us reasons for action, we are logically precluded from obeying them. A first useful distinction to draw, thus, is that between advice on what to do and advice on what to believe. Only the latter is relevant to our discussion here, for there is no doubt that advice on what to do may be a source of exclusionary reasons for action. The crucial question seems to be whether advice on what to believe follows the same logic.

Raz suggests<sup>101</sup> that *all* the elements of his service conception of authority [SC] can be extended to theoretical authorities. According to the service conception, authority mediates

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<sup>99</sup> Raz, PRAN 212

<sup>100</sup> In MF 29, Raz reminds us that reasons for obedience are reasons for action.

<sup>101</sup> Raz, EPD 211-212

between people and the reasons that apply to them. It is meant to help people better conform to reason. The service conception is well known and has been successfully explained, critiqued, and built upon by many. It can succinctly be divided into three main theses which, together, form an account of both the logic (or nature) of authority and the conditions for its legitimacy (or justification):

- a) The dependence thesis [DT]: authoritative directives or advice should be based on ‘dependent reasons’, i.e. reasons which apply to the addressees of such directives or advice and bear on the circumstances they cover.
- b) The normal justification thesis [NJT]: the primary or normal way to establish that X ought to be acknowledged as exercising authority over Y is to show that Y is ‘likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives’ [or advice] as authoritative, ‘and tries to follow them, than if he tries to follow the reasons which apply to him directly.’
- c) The pre-emption thesis [PT]: ‘the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.’<sup>102</sup>

According to Raz, DT and NJT constitute SC, which, in turn, implies PT<sup>103</sup>. It seems clear that NJT can be extended to theoretical authorities: ‘superior expertise’ within the

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<sup>102</sup> Raz, MF 46. Not everyone agrees that law purports to offer us exclusionary reasons for action. For an account of law as demanding to be responded to as if it had (and perhaps claim that it be regarded as having) *overriding normative weight*, see Alexander (2000) 21-37.

<sup>103</sup> On the risk of double-counting reasons, see EPD 215.

authority's jurisdiction is one of the ways in which authority is justified. And superior expertise can impact belief as much as action. The same can be said of DT, which tells us something intuitive about what authorities ought to take into account in making decisions: they ought to base their decisions on reasons which directly apply to their addressees, not introduce new ones. But, Raz notes, DT ought not to be confused with the mistaken idea that authoritative directives do not affect what their addressees ought to do (the 'no difference thesis'): authorities can and do make a difference to what we ought to do, despite basing their decisions on dependent reasons<sup>104</sup>.

What kinds of reasons do authorities give their addressees? Raz tells us that the mark of authority is the power to change what he calls *protected reasons*. These, in turn are both first order reasons for action and *exclusionary reasons*, i.e. reasons not to act on certain other reasons (those which are excluded, i.e. those which fall within the authority's jurisdiction<sup>105</sup>). It seems unproblematic to say that DT and NJT can be extended to (legitimate) theoretical authorities. The unanswered question seems to be whether theoretical authority is covered by the pre-emption thesis. This, in turn, involves asking whether reasons for belief are exclusionary, whether theoretical authorities are capable of changing protected reasons for belief.

Let us take a moment to look at Raz's required combination. Loosely applied to theoretical reasoning, the Razian formula would look something like this: a protected reason for believing X would be both a first-order reason to believe X, and a second-order, exclusionary reason not to believe X for reasons C, D, and E (or to believe X only for reason A). Is it possible for reasons for belief to be protected reasons (in the way reasons for action are)? There

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<sup>104</sup> For Raz's account of why the no difference thesis is not entailed by DT, see MF 30-31, 48-49.

<sup>105</sup> Raz, PRAN 192. See also Endicott (2007), 3: 'The jurisdiction of an authority determines not only whom it can address and what actions it can direct, but also what considerations it can exclude. The scope of a directive is the set of considerations that a particular directive excludes.'

seems to be logical space for this and Raz opens the door to it at several stages. He emphasises the intimate connection between DT and PT and uses the example of the arbitrator to show that the ‘proper way to acknowledge’ authority is to take it to be a reason which *replaces* the reasons on which the decision was meant to be taken. Raz goes as far as saying that the whole point and purpose of authorities is to pre-empt individual judgment on the merits of a case, and this will not be achieved if, in order to establish whether the authoritative determination is binding, individuals have to rely on their own judgment of the merits.<sup>106</sup>

Protected reasons exclude consideration of the merits of  $\varphi$  or believing X. But ‘merit’ and ‘content’ are not synonyms. A reason can be content-independent without being merit-independent, and the crucial notion for our understanding of authority is merit<sup>107</sup>. From where we stand there is space for extending Raz’s SC to theoretical authorities. If one accepts that meaning is normative, i.e. if one accepts that meaning both depends on and results in the acceptance of norms (that meaning-statements are epistemic ought-statements), one must also accept that the reasons given by authoritative interpreters to their addressees are *conclusive* reasons for belief (i.e. mandatory epistemic norms). But fully investigating whether reasons for belief can be exclusionary (i.e. merit-independent) is a task I cannot fulfil here. In any case, settling the question is not essential to this section. Here I simply wish to introduce the idea that musical performers and judges alike purport to be theoretical authorities. In order to be authoritative, they must offer their audience *weighty* reasons for belief.

A brief comparison between Raz’s analysis of authority and H.L.A Hart’s<sup>108</sup> might help us to see why settling the question of the exclusionary character of reasons for belief is not

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<sup>106</sup>Raz, MF 48

<sup>107</sup> See Gardner (2001), 208-209. The notion of content-independence, Gardner says, is useful in distinguishing norms from other reasons but not in showing the distinctiveness of legal reasons.

<sup>108</sup> Hart, EOB 243

necessary here. Hart too stressed the centrality of what he called ‘authoritative legal reasons’ to our understanding of important (salient) features of law such as legal obligation, legal validity, the power-conferring role of constitutional provisions, etc., which Bentham’s analysis had failed to capture. He defined an ‘authoritative legal reason’ as ‘a consideration (which in simple systems may include the giving of a command) which is recognized by at least the Courts of an effective legal system as constituting a reason for action of a certain kind.’ Authoritative legal reasons, for Hart, are ‘content-independent peremptory reasons’. The definition above might suggest, at first sight, that Hart’s aim was to argue that content-independence and peremptoriness are distinctive features of *practical* authority.

However, later passages show us that this is not the case: the two features identified are shared by all sources of law (which, Hart tells us, are all ‘recognized as different forms of content-independent peremptory reasons’) and are not exclusive to practical authority: they are part of the *general* notion of authority<sup>109</sup>. For Hart, thus, content-independence and peremptoriness are the mark of authority (both theoretical and practical). The difference between practical and theoretical authority seems to be that only the former is binding. Theoretical authority does not create an obligation to believe, but the reasons it gives are nevertheless peremptory because they are *accepted as reasons for belief* without the need for further investigation or assessment on the part of the addressee:

So though the statement of an authority on some subject is not regarded as creating an obligation to believe, the reason for belief constituted by a scientific authority’s statement is in a sense peremptory since it is accepted as a reason for belief without independent investigation or assessment of the truth of what is stated.

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<sup>109</sup> Hart, EOB 261

A content-independent reason, according to Hart, is one whose status as a reason does not depend on the meaning of what is asserted (within the scope of the theoretical authority's expertise). Raz sharpens Hart's definition and explains content-independence as the absence of a direct connection between the reason and the action [or belief] for which it is a reason<sup>110</sup>. Although one finds no explicit extension of content-independence to reasons for belief in Raz's work, it is clear that reasons for belief can be content-independent. The truth-relatedness of epistemic reasons for belief<sup>111</sup> does not exclude the possibility of believing X in virtue of the fact that someone whose authority one recognizes has told one that one ought to believe X. One can believe X because one has been authoritatively advised to believe X.

The fact of the authoritative statement can itself be a reason to believe X if one has good reason to believe that the person issuing the advice is an expert on the topic, exceptionally wise, insightful, trustworthy, etc. Advice can, in this sense, offer content-independent reasons for belief. But so can threats and offers, as Raz notes, but making them does not involve theoretical authority (except metaphorically)<sup>112</sup>. Content-independence, thus, is not enough to distinguish reasons for belief offered by authorities and reasons for belief given by people without authority.

This is plausibly why Hart added preemptoriness to the equation: it is not enough to offer reasons whose status does not depend on the meaning of what is asserted. Authorities, the argument goes, give us reasons whose acceptance as reasons does not depend on 'independent investigation or assessment of the truth of what is stated'. Accepting authority, practical or theoretical, involves voluntary suspension of our ability to reason and assess the truth of what is stated or the value of what is recommended. Theoretically authoritative statements, thus,

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<sup>110</sup> Raz, MF 35

<sup>111</sup> Raz, FNR 38- 41, at 38: 'one who believes that there is a conclusive case for the truth of a proposition cannot but believe that proposition (pathological cases apart).'

<sup>112</sup> Raz, MF 36: 'It is only metaphorically that a person is an authority regarding his own intentions.'

outweigh other reasons for belief we may have and the expected attitude is one of belief for the reasons they provide. They give us weighty first-order reasons for belief.

Raz's account of authority is more stringent than Hart's<sup>113</sup>. On his view, the reasons offered by authorities are not simply added to the cluster of reasons which directly apply to their addressees: they *replace* or *exclude* at least some of those reasons<sup>114</sup>. This idea is reinforced by Green, who notes that exclusionary reasons 'exclude those they defeat by kind, not weight'. They are both *categorical* and *prima facie*: categorical because they exclude, not just outweigh, the reasons they defeat; *prima facie* because they do not exclude all contrary reasons<sup>115</sup>. The Razian picture leads to the conclusion that A has authority over B if, and only if, the fact that A requires B to  $\varphi$  (i) gives B a content-independent reason to  $\varphi$  and (ii) excludes some of B's reasons for not  $\varphi$ ing<sup>116</sup>. Content-independence and exclusionary force are, on this view, necessary features of reasons given by legal authorities.

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<sup>113</sup> The stringent view of authority is shared by many authors, including John Finnis who unites 'speculative' and 'practical' authority under the same umbrella: "The foregoing two paragraphs have treated as focal or primary the meaning which the proposition 'X has authority' has when that proposition is asserted by speakers of a kind (S1) who treat X (or X's pronouncements, etc.) as authoritative not merely for others but also *for the speakers themselves* (S1), i.e. as giving anyone (relevant) including themselves (S1) *exclusionary* [my italic] reason for action in accordance with X (or X's pronouncement, etc.)." S2 and S3-type speakers may assert the same proposition 'X has authority' but do not do it in recognition of X's authority. For Finnis, S1 speakers assert the proposition with its focal primary meanings, S2 speakers may assert it truthfully, but both S2 and S3-type statements are parasitic on S1 statements. For Raz, both S1 and S2 are primary, and only S3 is parasitic. For Finnis' position, see NLNR 234-236. For Raz's view, see PRN 171-177 and Raz (1977, p. 227-228).

<sup>114</sup> This is the gist of Raz's PT. In MF 46 and EPD 214, Raz presents PT as an implication of the service conception of authority. Applied to theoretical authorities, the pre-emption thesis states that the fact that an authority has put forward a reason for belief in X is itself a reason for believing X 'which is not to be added to all other relevant reasons when assessing what to believe, but should replace some of them.' (EPD 214).

<sup>115</sup>Green, AS 38-39

<sup>116</sup>Green, AS 41-42

It is true that all authoritative statements purport to be binding. And this entails that they are the kind of thing which is capable of binding. Green links authoritativeness with binding ability and offers us the following test<sup>117</sup>:

B regards the fact that p as a binding reason to  $\varphi$  only if B regards p as providing reason to  $\varphi$  and a reason not to act on some of the reasons for not  $\varphi$ ing.

He concludes that only authorities are capable of binding *others* (anyone can create obligations for himself by making promises or decisions). But is the creation of obligations a necessary feature of authority? Green's account suggests, as does Hart's, that a *belief* in the binding force of a statement by its addressee is sufficient for that statement to qualify as (de facto) authoritative. So directives or advice need not be binding in order to be authoritative, they need not create obligations. They need only be *regarded as* binding by those at whom they are directed. They are authoritative if the reasons they offer are those *for which* their addressees act or believe. This allows us to join theoretical and practical authorities under a general notion without having to prove that reasons given by theoretical authorities are mandatory epistemic norms.

In the case of theoretical authorities, this implies that, although there is a relevant difference between an authoritative directive and a piece of advice, there is no reason to reject the possible authoritativeness of advice<sup>118</sup>, if advice is the usual means by which theoretical authorities offer us reasons for belief<sup>119</sup>. Advice on what to believe can, on the less stringent

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<sup>117</sup> Green, AS 40

<sup>118</sup> Green tells us that theoretical authority (in the form of advice) does not *bind*. On the one hand, he recognises that 'expert advice gives reasons for belief' and can be authoritative in a theoretical sense (AS 26). On the other, he states that the judgments of theoretical authorities claim to be *reliable* rather than binding. Epistemic advantage, it follows, warrants respect for the person who has it, but it does not entail that we are 'bound to attend' to their advice (AS 27). The interesting, but far reaching, question of whether there is such a thing as an obligation to believe cannot be addressed here.

<sup>119</sup> In his summary of the 'focal meaning of authority', John Finnis refers to Raz's category of 'exclusionary reasons' as 'reasons for *judging or acting* [my italics] in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant and would in the absence of the exclusionary reason have sufficed to justify proceeding in some other way.' (NLNR 234 and PRAN 35-48, 58-73). If one includes believing and acting

view, be the source of content-independent peremptory reasons for belief. So to say that authoritative reasons (legal norms among them) are peremptory, in Hart's sense, is not to say that the authorities that issue them change our protected reasons. Hart tells us only that authorities give us content-independent first order reasons to act or believe which *outweigh* or *defeat*, but need not *exclude*, reasons not to act or believe as advised.

In a piece on the role of authority in morals<sup>120</sup>, Anscombe makes a point similar to the one Hart makes in EOB. She considers parental authority as authority to teach and asks, rightly, whether such cases are cases of authority at all if we conceive of them as depending on whether or not the parent (or teacher) is right. Here is the question, as put by Anscombe:

Or does authority to teach, such as a parent has- and which he must have inasmuch as he positively has a duty to teach- *not* after all carry with it a right to be believed? But does it not carry a right to demand belief?

The answer suggested is 'yes', but a crucial distinction is introduced, followed by an explanation of the difference between the two things distinguished:

Nevertheless there is a difference between saying: You did not *do* as I told you, and that is bad, because it was I, whom you *ought to obey*, who told you, and: You did not believe what I *said*, and that is bad, because it was I, whom you *ought to believe*, who told you. [emphasis added]<sup>121</sup>

The explanation of the difference is the following:

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under the umbrella of *proceeding*, as the passage seems to suggest, then it is clear that reasons for belief, as well as reasons for action, can be pre-emptive and exclusionary in the Razian sense. This, in turn, implies that theoretically authoritative pronouncements, as much as their practical counterparts, are sources of exclusionary reasons (and since the reasons they offer are reasons for belief, one may conclude that reasons for belief can be exclusionary).

<sup>120</sup> Anscombe (1962), 180

<sup>121</sup> Anscombe (1962), 180

Someone with authority over what you think is not at liberty, within limits, to decide what you shall think among the range of possible thoughts on a given matter; what makes it *right* [my emphasis] for you to think what you think, given that it is your business to form a judgment at all, is simply that it is true, and no decision can make something a true thing for you to think, as the decision of someone in authority can make something a good thing for you to do.

This explains the difference between theoretical and practical authority and sheds light on the connection I suggest between interpretation for others and authority. On the one hand, it clarifies the idea that a reason can be content-independent and peremptory without being an exclusionary reason. On the other hand, it helps us understand the relation between authority and the creation of an obligation to obey: not all legitimate exercises of authority generate an obligation to obey (this is noted by Raz himself –note 32 above- when reminding us that reasons for obedience are reasons for action).

The claim of theoretical authorities, simply put, is that one ought to believe X because they say so. If asked why, the right answer would be that their saying so ‘is good evidence that the thing (X) is true.’<sup>122</sup> The fact that their saying that X is true does not make X true does not preclude it from being a reason to believe that X is true. It is a content independent reason for belief because it is not directly connected to the belief for which it is a reason: the fact of the statement ‘X is true’ is not directly connected to the belief that X is true. And the fact of the authoritative pronouncement does not affect the truth of the belief for which it is a reason. Theoretical authorities give us reasons for belief but do not necessarily give us reasons for

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<sup>122</sup> Anscombe (1962), 181

obedience. The disconnectedness between reasons for belief and reasons for obedience does not, however, weaken the authoritative character of theoretical advice<sup>123</sup>.

Musical performers and judges alike, as I hope to show in Chapters Four and Five, purport to offer their audiences content-independent peremptory reasons for belief and, as such, claim to exercise theoretical authority over them. I shall call their brand of theoretical authority ‘interpretative authority’. Interpretative authorities offer their audiences content-independent peremptory reasons for belief in the truth/ correctness of the conclusions they advance. In accepting the authority of performers and judges, audiences temporarily surrender their judgement to them<sup>124</sup>. They are justified in accepting their claim to authority, however, if and only if their interpretative conclusions are ‘good evidence’ of the truth of the belief for which they are reasons.

One last point must be made in the context of the claim to authority of certain interpreters. Unlike musical interpreters (who, when interpreting for others, claim theoretical authority over their audience), not all legal interpreters purport to be authoritative. The category *legal interpreter* includes any citizen (let us call her Mary) who tries to understand what the law requires of her or allows her to do. Mary is not a lawyer, she is a freelance translator without any expert knowledge of the law or the workings of her legal system. And yet she can (should be able to) interpret a legal provision for herself in the process of finding out, for instance, how she can start her own business or how much tax she is required to pay. She can also interpret the law

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<sup>123</sup> As noted by Hershovitz, JI 138, compliance (acting *for* the reasons one complies with) and conformity (doing what the reason prescribes) are not synonyms and, in general (as argued by Raz in PRN 179-182), reasons are reasons for conformity, not compliance. Indeed, from the point of view of authority (by contrast with the viewpoint of a moral agent), it matters not why a person does what is prescribed as long as she is ‘on the right side of the argument’ (see Raz, AL 30). If the reason why Aaron visits his grandmother in hospital is to see Michelle (in whom he is interested), then he does not comply with his reason to visit his grandmother in hospital (the fact that she is ill and in hospital is a reason to visit her and Aaron has a reason to comply with that reason: he owes his grandmother respect) but merely conforms with it (I am borrowing Hershovitz example).

<sup>124</sup> Raz, EPD 212

for a friend who is in a similar situation and unsure of what is required of her. She can explain the legal meaning of a document or a relevant act to a friend in a similar situation and, in doing so, interpret the document or act *for her* friend.

But there need be (and, in such cases, there usually is) no claim to interpretative authority on her part. Barristers are a good contrasting example of legal interpreters who purport to be theoretically authoritative on the basis of ‘superior expertise’<sup>125</sup>. Barristers and judges are two examples of purportedly authoritative legal interpreters. But a barrister’s role of advising a client on a specific point is not equivalent to that of a judge in deciding a case. And, although barristers are an important category of legal interpreters, their advice does not *bind* their clients, i.e. they offer them reasons for belief, but not exclusionary reasons for action. Barristers, in sum, are not *legal authorities*. Judges, however, do claim to exercise authority in the realm of their adjudicative competence<sup>126</sup>, over their addressees in a particular case.

As legal interpreters, barristers (or legal advisers in general) are on a par with judges: the reasons for belief they offer as interpreters are meant to outweigh other reasons for belief their addressees may have. This happens if, in virtue of the interpreters’ superior expertise, their addressees can be said to be likely better to comply with the reasons that apply to them if they accept their directives as authoritative than they would if they did not. The difference between barristers and judges is that the authority of judges is both theoretical (interpretative) and practical (adjudicative or legal, *stricto sensu*).

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<sup>125</sup> This is one of the main ways in which one can ‘establish that a person has authority over another’ (Raz, MF 53), cited by Hershovitz, JI 144-145. For other ways in which the NJT can be fulfilled, see MF 53-56 and 75. I wish to suggest, however, that this is the way in which one establishes whether an interpreter’s claim to authority is believable and whether an interpreter is legitimately authoritative. A claim to (legitimate) interpretative authority is always based on a claim to ‘superior expertise’.

<sup>126</sup> Green, AS 28

This thesis, which I call the ‘disjunction thesis’, will be addressed in chapter 5. According to it, the legal authority of judges (their claim to offer their addressees exclusionary reasons for action) is distinct from their interpretative authority (their claim to offer their addressees content-independent preemptory reasons for belief in the truth of the meaning-statements they advance)<sup>127</sup>. As interpreters, judges purport to offer their audience reasons for belief in the correctness of their legal decisions. Interpretation, as a reason-giving process, is a tool of justification. Moreover (as will be shown in Chapter Four), judges have a *duty to interpret* which is subsidiary to the *duty to justify* their legally authoritative decisions.

### 2.2.2 Explanation and display

From among the many, and diverse, notions of interpretation we find in the literature, one stands out for its crispness. It is perhaps a coincidence that it has been advanced by a legal theorist (Joseph Raz) and not by a philosopher of art. On this view, to interpret is to *explain* or *display* an object<sup>128</sup>. Raz’s view of interpretation endorses the following proposition:

**[AN] Interpretation is *an explanation* or (in performance-interpretations) *a display* of its  
object**

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<sup>127</sup> Green reinforces this point when he stresses the practical character of political authority (and of legal authority, by implication). Having briefly mentioned three possible kinds of legal interpreters (barristers, academics, and the parties in a legal dispute), he notes: ‘of all these only the judge can offer an authoritative decision on the case, a decision which is binding *whether or not* it coincides with the best available legal advice.’ I think it sensible to include ‘explanation of legal meaning’ under the heading of ‘legal advice’. My claim is that, in the case of judges, legal advice is purportedly authoritative because judges are *required* to interpret in the process of adjudicating. Their duty to justify their decisions entails a duty to explain legal meaning, i.e. to interpret.

<sup>128</sup> J. Raz, TPOV 55; BAAI 299, 301.

What [AN] tells us is that an interpreter either *explains* or *displays* an object by explaining or displaying its meaning. The attractiveness of Raz's notion lies both in its insightfulness and simplicity. It is insightful because it defines interpretation by reference to processes we encounter in many interpretative domains: display and explanation. More importantly, such activities are, respectively, the mark of the two domains explored in this thesis: musical performers typically display musical meaning, judges typically explain legal meaning.

It is simple because it avoids the pitfalls of including other, more marginal, activities under its umbrella. However, its direct application (and correspondence) to musical performance and judicial reasoning does not suggest that it qualifies as a general account of interpretation. A general account, as shown in Part I, must be sufficiently frugal to avoid gerrymandering interpretation. The most relevant distinction from the point of view of the argument made in this thesis is the one introduced in Part I, and developed in section 3.1.1., between interpreting for oneself and interpreting for others. Raz's notion of interpretation as explanation or display is not a general notion of interpretation because it fails to account for cases where one interprets for oneself. In such cases, one *reasons* about the meaning of an object without either explaining or displaying it to oneself or others.

Interpreting for oneself is relevant only at the level of the bare concept of interpretation beyond which we have now moved. We must now think about what interpreting for others encompasses. For, indeed, as noted at the beginning of this chapter, musical performers and judges *necessarily* interpret for others and this is why their interpretative activity typically takes the form of display or explanation: both, each in its own way, are ways of *communicating* or conveying meaning to others. More specifically, they are activities through which a particular object is *interpreted for an audience*.

The claim according to which explanation and display are the activities engaged in by those who necessarily interpret for others leads us to a slightly modified version of [AN]

**[SM] Interpretation is the explanation or display of *the meaning of an object***

The reason for the slight modification<sup>129</sup> is that, although explaining or displaying an object may, at times, be synonymous with explaining or displaying its meaning, it is not necessarily so. One can provide explanations of certain aspects of an object, aspects which may be unrelated to its meaning. Interpretation is but one kind of explanation to which one may resort. Equally, displaying an object may tell us nothing about its meaning. Display of meaning, unlike object-display, entails a claim on the part of the agent to understanding and being able to convey the meaning of her object. The absence of such a claim from object-display is what makes the slight modification of [AN] into [SM] helpful.

Think of someone putting a painting up on a wall, exhibiting it, putting it on display with no intention of conveying its meaning to others. That person may, indeed, know nothing about the meaning of the painting. She may have been asked to perform this task because she is particularly good at putting paintings up on walls, particularly accurate in her measurements, particularly skilled at using a hammer or choosing the right hooks for picture frames. No doubt, she is displaying an object. Indeed, she is displaying an object which is likely to have meaning (as paintings are likely and expected to). The fact that she puts an interpretable object on display, however, does not entail that she interprets it *by* displaying it. In fact, it does not entail that she interprets it *at all*. There is no necessary (abstract) connection between object-display and

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<sup>129</sup> Which Raz himself introduces (BAAI 301): ‘interpretation *explains* an object by making plain its meaning.’ The implication is that ‘only what has meaning can be interpreted.’ It is not entirely clear whether Raz deliberately excludes display from this passage. SM puts display on a par with explanation in this respect: display, as much as explanation, can make plain the meaning of an object.

interpretation. It is possible to display an object without interpreting it, and interpret an object without displaying it. Not all explanations are interpretative and not every act of display is an act of interpretation.

What [SM] suggests, thus, is that interpretation occurs when we explain or display the *meaning* of an object, not when we explain or display the object itself. But while it is possible to interpret an object without explaining or displaying it, it is not possible to interpret an object without explaining or displaying its *meaning*. If what one explains or displays is not the meaning of the object, one is not interpreting the object.

In musical performance, the link between display and interpretation is particularly tight. When a musician plays a piece for her audience, or an orchestra performs a musical work in a concert hall, the piece (the work) itself is displayed and its meaning is conveyed in virtue of that very display. But what makes the performance an interpretation *of the work* is the fact that it displays its meaning. I could display the *Goldberg Variations* by playing Rubinstein's recorded version on my CD player. But there would be no display *of meaning* (i.e. no interpretation) *in my display* of the work as such.

This could be taken to suggest that both explanation and display are reflexively intentional activities, i.e. that one must intend to explain or display something in order to explain or display it. If true, this would lead to the conclusion that there can be no such thing as *accidental* explanations or displays. Is there a relevant difference, in this respect, between *displaying* and *stating*, or between *explaining* and *reporting*? To display is to open up to view, to exhibit to the eyes, to show. It is also akin to presenting or making manifest. But displaying the meaning of an object involves making choices. To display meaning is to act for reasons.

It seems possible, for example, to unintentionally *state* the meaning of an object. One may be mistaken as to what one is stating. Equally, and as noted in Part One, one can mistake a

description for an interpretation, and vice versa . As noted in Chapter One (note 28), it is possible to mistakenly believe one is interpreting an object when one is, in fact, merely listing relevant features of the object, or historically contextualising it.

Musical interpretation is less likely than legal interpretation to be confused with historical contextualization. But, in musical criticism, the dividing line between interpretation (as explanation of musical meaning) and description may be blurred. Two examples come to mind. The first is the following passage by Charles Rosen on the opening of Mozart's Piano Concerto in E flat, K271<sup>130</sup>:

Once it is accepted that the soloist's role is to be a dramatic one, the ritornello poses a problem, simply... that the audience is waiting for the soloist to enter.(...) the opening tutti always conveys an introductory atmosphere: something is about to happen... This introductory character trivializes the opening, and the material first heard in it tends to lose its importance and its urgency...At the age of twenty, Mozart solved this problem in a manner as brutal and as simple as breaking the neck of a bottle to open it. At the opening of the Concerto... the piano participates as a soloist in the first six measures, and is then silent for the rest of the orchestral exposition. It was a solution so striking that Mozart never uses it again (although it was developed by Beethoven in two famous examples and by Brahms in an expansion of Beethoven's conception). With one stroke, the opening presentation is made more dramatic and the orchestral exposition is given the weight it might have lacked.

Is Rosen interpreting the piece for us or is he merely telling us *how* the structure of the piece is used by Mozart to achieve certain results? He is explaining the link between musical

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<sup>130</sup> Rosen (1976), 197-98. Rosen is cited by Beever (2011), 216.

form and aesthetic impact in this passage but he is not interpreting the opening of the Concerto for us. Rather, he is making us aware of the way in which musical meaning can be found in musical structure by describing and contextualizing a particular musical technique. He is making the composer's choices, not the meaning of the work, intelligible.

A second example may help to make the contrast starker. It is taken from an article on Beethoven's Symphony N.1, in C major, Op. 21<sup>131</sup>. Here is the first passage in which description is dominant:

Beethoven's twelve measure introduction to Symphony No. 1 marks his choice "to begin his career as a symphonist with a mood of heightened expectation and a surprise as rude as it is representative". These few measures serve to build up a dominant tension, relative to the tonal centre of G, which first resolves at the *Allegro con brio*. The dominant tension he creates is an overarching trademark of the entire symphony and plays a role in each movement. The opening C dominant seventh chord, which functions as the secondary dominant of F major, relaxes through the effect of the *fortepiano* into the F major triad, suggesting it as the tonic of the movement.

No doubt, there is an explanation here, but it is not explanation of musical meaning. What Brown explains is the relation between the techniques used by Beethoven and their effects. The passage is mainly descriptive, though punctuated by elements of theoretical analysis. By contrast, the passage below is clearly interpretative:

The importance is instead given to the character of the music in the *Allegro con brio*, jovial, youthful, energetic and teasing. The tempo, in conjunction with the techniques of motivic orchestration and harmonic playfulness, serves to create a happy and joyful mood<sup>132</sup>

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<sup>131</sup> Brown (2010), 6.

Emphasis on explanation or display (or dominance of one or the other) clearly varies across domains. My claim in this section, to be vindicated in the chapters that follow (4 and 5), is that music and law are rival domains of interpretation in this particular respect: in music, meaning is typically displayed whilst in law, it is necessarily explained. Although it is possible for explanation and display to coexist in particular domains of interpretation (an interpretation of a piece of music can be offered in the form of an explanation- this is, in fact, what music critics do-, just as the verdict of a jury displays the legal meaning of the facts in the case)<sup>133</sup>, one of the two forms of interpretation is often dominant. This dominance is not accidental. It results from the particular features of the domain, from the constraints interpreters face within a certain interpretative practice, and from the particular position of the interpreter both in the relevant practice and in relation to her object. Musical meaning is displayed in performance. Legal meaning is explained in judicial argument.

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<sup>132</sup> Brown (2010) at 28.

<sup>133</sup> Levinson (1993) draws a similar distinction. My 'Interpretative display' is equivalent to Levinson's 'performative interpretation'.

### 2.3. Artefacts?

“The notion that artists truly *add* to the world, in company with cake-bakers, house-builders, law-makers, and theory-constructors, is surely a deep rooted idea that merits preservation if at all possible.”<sup>134</sup>

Previous sections suggest that law and music resemble each other in being constituted by *artefacts* whose meaning is capable of explanation or display<sup>135</sup>. The institutional context in which such artefacts are interpreted is a condition of their intelligibility *as* artefacts and, as such, it is a condition of their meaningfulness. There are undoubtedly different aspects to the interpretation of legal artefacts and musical works. Challenges arising from the variety of possible interpreters and objects of interpretation we find in the two domains should not keep us from attesting that interpretation takes place. The purpose of this section is to shed light on the link between artefactuality, authorship, and intention.

#### 2.3.1. Authors and artefacts

It is hardly contentious that interpreting involves two elements: (i) an interpreter, who reasons and sometime communicates his/her conclusions to an interlocutor or audience; and (ii) an object which, in order to be interpreted, must be seen as part (often the product) of an intentional chain of meaningfulness. It has been noted that, although agency and action have been the object of considerable philosophical reflection, the related notion of authorship

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<sup>134</sup> Levinson (1980), 8.

<sup>135</sup> No one seems to deny the man-made character of law. I know of no legal theorist who denies that people make law, that law is the product of human will and action. Greenberg (SPD 40 )

remains relatively unexplored, despite being relevant to the study of interpretation.<sup>136</sup> In order to understand what an author is it is helpful to think about what sorts of things have authors and what sorts of things don't. It is also helpful to understand that what unites certain things under the heading of authorship might not tell us the full story of intention. Things may have authors and yet not have been created<sup>137</sup>. But let us take this step by step.

An author is an agent whose action brings about a certain result<sup>138</sup>. If the result brought about is causally dependent on the agent's action, then that agent is an author. It is not absurd to say that I am the 'author' of the mess I made in the kitchen, even though dinner- and not the mess itself- is the *intended* result of my actions. Here authorship and responsibility are intimately linked: admitting to being the 'author' of this mess amounts to taking responsibility for it, despite it being unintended. The same goes to my daughter's accidental floor colouring: she may not be producing art, but it is not absurd to call her the *author* of that state of affairs. Authors are makers, and making is understood as referring to an action producing both intended and unintended results. An author, more precisely, is an agent who brings a certain object into being.

But there is a useful distinction to be drawn between *making* and *creating*. Creating, as I shall use the word, is deliberate making. In typical cases, the object created is the intended product of its author's intentional action. And since an artefact is necessarily *created*- i.e. it is the result of intentional activity- not all objects brought into existence by authors are artefacts.

In investigating whether an object is an artefact one usually asks three questions: (i) Does the object have an author? (ii) Did the author *intend* to produce an object *of that kind*? (iii) Is the

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<sup>136</sup> Hilpinen (1993), 155.

<sup>137</sup> An interesting view, in this respect, is that of Wolterstorff (1980, p. 89), who claims that composers are not *creators* of musical works. Rather, they select properties that constitute those works. See Martin (1993), at 120.

<sup>138</sup> This is the notion of authorship provided by the OED. As noted by Hilpinen (1993), 155, such a broad definition identifies authorship with 'agent causation': an author is an agent who causes something. That something is the result of his/her action. If the object/event is the *product* of an agent's action, then we can say that the agent is the *author* of the object.

thing produced what its author intended to produce? As we have seen, an object has an author if it has been made. But, confronted with the possibility of accidental making, one could say that, if an object has been *intentionally* produced<sup>139</sup> by its author, then it has been *created*. Artefacts are *created* objects. It is not sufficient to say that artefacts have authors: unintentionally made objects do too. Authorship is not a distinctive trait of artefactuality. An object must have been *created* (not simply *made*) by its author in order to be an artefact. Only created objects are artefacts. Authors, in the broad, common sense of the word, are *makers* but they may not be *creators*.

Examples of created objects abound. A vase is as much an artefact as a performance of *Die Entführung aus dem Serail* or the First Amendment to the US Constitution. A court ruling is as much an artefact as the musical score on which an orchestra bases its performance of a musical work. Sentences are artefacts, and so are words, but the creator of a sentence is not normally the creator of the words of which it is composed. Musical artworks and legal objects, I suggest, are artefacts. Interpreting them invariably involves being aware of an author's intention to produce *a*

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<sup>139</sup> But what does it mean to say that something was 'intentionally produced'? Deliberately made? Deliberately made to fall under a particular description? Made as exactly what is it? Is the intention to make *something* sufficient, or must the author intend to make *this*? Two examples come to mind: a) B wanted to rearrange his book case and ended up making a mess. His actions were intentional. What about the result? Is the relevant intention determined by reference to the action or its result? Following this line of thought, is an artefact something that corresponds to certain intentions or merely something created, *simpliciter* (assuming that the intentionality of creating does not depend on the identification of specific intentions)? b) 'I have made this (unidentified object) for you. Now you may use it as you please.' Let us imagine that the object is a hollow, deep, round, bright coloured clay piece. It could be used as a jug, a vase, a flowerpot, a shaker, as storage for small objects, as a door-stop, a paperweight, a kitchen utensil or merely as a decorative piece. It clearly is an artefact, but what makes it one? Under what description is it an artefact? Something made to be useful? Something made to have *those* features, independently of purpose? Something made to have *those* features with the purpose of being multifunctional? This certainly is more clearly an artefact than a small stone or a piece of driftwood would be. But what makes it paradigmatic? Is it the fact that it is made for a purpose, even if that purpose is to be multifunctional? Is ability to fulfil *a purpose* decisive? Or is it the ability to fulfil *this purpose* (i.e. a particular purpose)? There are contexts in which it is more straightforward to identify something as an artefact. Kitchen or gardening utensils are clearly artefacts because they are *utensils*. Even in more exotic cases such as using a sea shell as a spoon, coconut shells as cups, or palm leaves as plates, it is not too difficult to say that by employing them, and sometimes transforming them, in a certain way, I am turning them into artefacts *of a certain kind*. They could as easily be displayed in a Robinson Crusoe Museum as in the Museum of Everything.

*certain kind* of object<sup>140</sup>. Authorial intention, albeit not always (or necessarily) a source of authority, provides the foundation of the interpretative process: without it there is no object of interpretation<sup>141</sup>. It allows us to identify the object to be interpreted and delineates the scope of our interpretative choices.

But, in law as in music, such a primary intention should not be confused with the meaning of the object. Conclusions about meaning in both domains can only be reached once it is clear which object is being interpreted and that requires answering the question of what makes an object *what it is*. Authorial intention allows us to identify the object but *need not* tell us anything about its meaning. Meaning, rather, is accessed through interpretation<sup>142</sup>.

According to this picture, identifying an object as an artefact depends on establishing not only that it has an author, but also what exactly that author intended when producing it. If an artefact is a created object, and if being a created object consists in being produced with an intention to produce it<sup>143</sup>, then one must investigate whether an object has been created in order to know if it is an artefact. In order to do that, one must look into the intentions of the author. Two tasks are necessary: (i) identifying the author of the object and (ii) clarifying his/her

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<sup>140</sup> The question of what makes a certain label appropriate takes centre stage. One must have made up one's mind about the description under which the object falls. One creates the object with a particular description in mind. But one could be unsuccessful in two ways: (i) by not grasping what constitutes the envisaged description (what music is, or what law is, and, therefore, what a musical work or a legal artefact are), or (ii) by failing to give to the object the traits which make it fall under the envisaged description.

<sup>141</sup> Because both musical and legal interpreters typically deal with artefacts, authorial intention must be located/identified before one can say an object is an artefact. Law and music are different in this respect, though. In the case of law, the relevant object can be artefactualised by an interpreter. In music, even in cases of incorporation, there is always an author in sight.

<sup>142</sup> This seems to be Michael Morris's message when noting that it is not clear that 'merely *thinking* one is producing art, or *intending* to produce art, is enough to guarantee success.' (2008, 6). Identifying an object as an object of a certain kind is different from interpreting it (i.e. explaining or displaying its meaning), even if, as in the case of certain legal objects, to identify the object *as* an object of a certain kind depends on assumptions about its meaning.

<sup>143</sup> von Wright (1971, p. 89) calls our attention to the distinction, rehearsed in Part I, between 'intentional acting' and 'intention to do a certain thing'. He writes: 'Everything which we intend to do and also actually do we do intentionally. But it cannot be said that we intend to do everything we do intentionally. Nor does it seem indisputable that, whenever we do something intentionally, there is also something we intend to do, an object of intention.' Along the same lines, Anscombe (1979), as cited in note 41, p. 26.

intentions and purposes in producing that object. Only then can one begin to draw conclusions about whether or not one is being faced with an artefact and what consequences and challenges follow.

It ought to be noted that the intention being sought may be elusive. A person's particular intentions are, at times, difficult (or even impossible) to determine; it may also happen that an author (let alone her intention) is not identifiable. But, even in such cases, there are ways of determining what kind of object one is faced with, and there are more ways than one in which to understand an object. The important point is that one can only think of an object as an artefact if one knows or assumes that it was made with a certain intention, for a purpose.

If we find a vase in an archaeological excavation site, we assume it was made by someone for a certain purpose. We need not assume it was made to display freshly cut flowers, if such displays were not common or possible in a certain culture (the one to which we have reason to believe the vase belongs), but we necessarily assume that the vase had an artefactual function. It may have been to transport or store water or spices. The important point is that it is an artefact, and artefacts are things made for a purpose.

Such considerations on authorship and intention suggest that identifying something as an artefact is not something one can always do straightforwardly. One's answer is always 'relative to a description'<sup>144</sup>: a diamond becomes an artefact after having been lapidated, but not as an uncut stone found on a river bed. The same can be said of a piece of driftwood found on a beach: one can only call it an artefact under a certain description (say, for example, if it is carved, embellished or even displayed on an empty wall somewhere).

The notion of creation on which I am relying is fluid. It certainly does not require that something be physically made *ex novo*. But it must, I believe, capture the idea that it is by

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<sup>144</sup>Iseminger (2004), 47.

observing states of affairs, rather than simply identifying the object itself (even in the broad sense announced above), that one can determine the artefactual character of an object<sup>145</sup>. One may look at an object and say, without contradicting oneself, that it is both an artefact and not an artefact- for example, that it is an artefact *qua* jewel, but not *qua* stone.

So, it seems clear that both law-makers and artists add to the world because they *create* objects. That is their particular authorial role. Created objects are interpretable if, and only if, they have meaning. But here we are particularly concerned with interpreters. The relevant question, for us, is whether interpreters are authors of artefacts. It is plausible that certain objects are artefactualised by being ascribed a certain meaning.

Thus far, I have been downplaying possible connections between the intention behind creation and the meaning of the created object. I have said nothing about it because it is a delicate connection upon which the substance of this chapter hinges. I will address this point at a later stage, but it is important to say this: the intention I have in mind when I refer to the distinction<sup>146</sup> between artefacts and other objects is the intention to produce *a certain type* of object and commonly the intention to produce an artefact belonging to a certain type of system, such as the art world or a legal system. Under this description, certain interpreters are capable of producing artefacts. When a judge declares an act, document, or event as legally relevant or capable of producing legal effects, she is artefactualising that act, document or event. She is, in short, turning it into an object with legal meaning, i.e. a legal object.

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<sup>145</sup> I find Iseminger's suggestion to replace 'What is an artefact?' with 'Does a certain state of affairs obtain artefactually?' useful, 47.

<sup>146</sup> G. Dickie (1984), 49.

### 2.3.2 The artefactuality condition

My claim, put simply, is that artists create *works of art* and legal authorities (including interpretative authorities) create *legal artefacts*. In this respect, they have an *equivalent* authorial role in that they are the authors of artefacts belonging to a certain system (Dickie likes to use the expression ‘art world’ but there are other possible ways of referring to the fine arts as a background or system, and, as it would happen should an elephant enter a room, most people are able to identify or recognize a legal system even if they can’t define it). The right kind of intention for being the author of an artefact is simply that of producing an object ‘with a view to [a certain] subsequent use’. The kind of ‘subsequent use’ to which the object is put depends on the particular determinations of the system to which it belongs. And it is *as* an artefact *of that system* that it will be understood, and interpreted.

I call the claim that musical works and legal objects are artefacts the ‘artefactuality condition’. There are, of course, additional ways of determining the kind of artefact one is faced with. Artefactuality is not judged only by reference to the broad system (or ‘genre’) to which the object ‘belongs’: there are more restrictive, narrower sub-systems within which an object finds itself and by reference to which it is to be identified and assessed. Take music. It is obvious that there are many different kinds of music and music for different tastes and sensibilities. While some music is made to be listened to (Bach’s *Goldberg Variations*, for instance), other kinds of music (muzak) are meant to be overheard<sup>147</sup>. Others, still, are good at setting the mood for meditation (the Indian Raga), or designed to be danced to (DJ music). Muzak may succeed at providing a relaxing background for dinner with friends but it would most surely fail as dance or concert hall music.

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<sup>147</sup> As noted by Scruton, in his 2009 Oxford lectures.

However, even though the particular intention of an author to create a certain kind of artefact is relevant to the determination of the background against which that artefact is to be understood, such an intention lies beyond what counts for the verification of the artefactuality condition: the intention to create a work of music suffices. All other considerations of authorial intention- including those which relate to particular sub-systems or genres within the relevant broader system- are merely possible elements to be taken into account by an interpreter.

The same cannot be said of legal artefacts to whose identification *qua* artefacts an authorial intention to produce something belonging to a legal system is but a first step. The fact that a legislator *intended* to produce a valid legal rule (i.e. a rule belonging to a particular legal system) does not tell us much about its actual validity, it does not itself tell us that what has been produced is, in fact, a 'legal artefact'. Membership of a legal system is determined by facts, not intentions.

This is so also because calling something an artefact, i.e. a thing made for a purpose, presupposes some notion of what purpose it was meant to fulfil. That, in turn, involves determining the *kind* of thing it is. Determining what does and does not belong to the category 'musical artefacts' is more clear-cut than determining what belongs to the category of 'legal artefacts'. This is because only certain kinds of objects (sound-objects) can have musical meaning. By contrast, legal meaning is not limited to objects with certain inherent characteristics. Legal meaning can be attributed to a much broader variety of things: anything can potentially have legal meaning. Legal rules (a typical product and tool of operating legal systems) are not the only bearers of legal meaning, nor are they the only objects of legal interpretation.

The *artefactuality condition*, suggests that things made with the intention to produce a work of music are, at least potentially, musical artefacts, and things made with the intention of producing legal objects are, at least potentially, legal artefacts. The idea of potentiality may seem

worrying. What if something does not fulfil its potential? Does it then cease to be an artefact of its kind or is it merely deficient? What is the difference between bad music and noise? What distinguishes a defective contract from a void one? These questions are relevant but it is too early to address them.

At this stage, it suffices to say that X is a *good candidate* for the category of ‘work of music’ if its author has created it with view to offering a sound-based aesthetic experience to an audience (though failing to present a work to an audience does not preclude continuing to look at X as a musical artefact); as Y is a *good candidate* to the category of ‘legal object’ if it has been created according to certain established procedures, with view to responding to a social need commonly regulated by the law (though failing to meet such a social need would not necessarily affect its legal validity). In this sense, locating an object within a certain system (by attributing it a purpose or function commonly associated with that system) is an important element of the artefactuality condition. It is sufficient to say that, in order to be an artefact, an object needs to be so regarded by its author (assuming also that to be an artefact is always, and necessarily, to be an artefact of a certain *kind*). Authorial intention to produce something with view to subsequent use is a membership condition for the category of ‘artefacts’. More succinctly:

**[SF1] X is a work of music if and only if X is an artefact of the music world**

**[SF2] Y is a legal object if and only if Y has legal meaning**

What makes something an artefact of the music world? Two elements: (i) the fact that it consists of artistically organised sound; and (ii) the fact that it is created with a view to offering an aesthetic experience to an audience<sup>148</sup>.

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<sup>148</sup> These two elements will be presented and explained in Chapter Three.

What makes something a legal object (i.e. an object with legal meaning)? One of two things: (i) it has been *created* by a legal official invested with authority, following certain established procedures; or (ii) it has been *artefactualised* by a legal interpreter (in most cases, a legal official with interpretative authority). Our notion of legal meaning, to be developed in chapter 5, relies on these two elements. [SF1] and [SF2] make way to the following formulation of the artefactuality condition:

**[AC] All musical artworks and legal objects are artefacts.**

But it is important to note that, unlike legal artefacts, musical artworks are not artefactualised by musical interpretation. They are artefacts *of* the music world. So, it could loosely be said, musical performers interpret artefacts of the music world, and judges interpret objects with legal meaning.

What this means is that their objects of interpretation *are* artefacts and that, as interpreters, they display or explain the meaning of artefacts. But this would involve endorsing propositions which need to be clarified. The first is the following:

**[FP] Legal and musical interpreters interpret artefacts.**

FP does not imply that artefacts are the *only* objects of interpretation in music and law (although this is true of music, it is not true of law). But it does suggest that they are the kernel of interpretation in both domains. This, of course, seems a rather ambitious statement to make, as there are many possible interpreters of the law and of musical artworks, and many possible agendas being served by the various interpretative processes which might take place.

But the point to make might be slightly different: they are either musical or legal interpreters *because* they interpret legal and musical artefacts. Is this message conveyed by [FP]? Only if one stipulated that what distinguishes legal and musical interpreters from other kinds of interpreters is the fact that they interpret legal and musical artefacts, not other kinds of artefacts. This strikes me as incorrect.

One can imagine offering a legal interpretation of a non-legal document, or an aesthetic interpretation of a legal text. A legal interpreter, qua legal interpreter, may be concerned with the meaning of artefacts belonging to systems which have nothing to do with law. Being interpreted ‘for legal purposes’ or ‘according to the law’ does not necessarily turn them into legal artefacts, but the interpreter who searches for their ‘legal meaning’ is, in the course of fulfilling that task, a legal interpreter. Determining the type of artefact interpreted is not an illuminating way of setting legal interpreters apart from other interpreters.

Legal systems<sup>149</sup> are social constructs. They are the product of the will and action of people. Their institutions and mechanisms of operation are the product of human planning and labour. Legal systems do not fall from the sky, they are not found accidentally in the midst of a forest, they are not *given* to societies as something to simply inherit and possess. They exist because they are chosen, planned, built upon and sustained. Their permanence or longevity do not affect their artefactuality<sup>150</sup>.

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<sup>149</sup> It is doubtful, however, that legal systems are the object of legal interpretation. Ronald Dworkin *Law's Empire* famously advances the view that the *practice* of law, as a whole, is a unitary object of interpretation. It has been suggested in Part I that this is not an illuminating way to understand the role of interpretation in law. Despite being pervasive, legal interpretation is fragmentary. It is just as fragmentary as the practice of law itself. The legal equivalent of musical artworks are not legal systems but particular objects interpreted against the background of a particular legal system. As will become clear, the artefactual nature of legal systems is only indirectly related to the artefactuality condition: *pave* Dworkin, legal systems (and legal practice) are not objects of legal interpretation: they provide the background conditions *for* legal interpretation. They are, as it were, the cradle of legal meaning.

<sup>150</sup> Green makes the same point in his introduction to the 3<sup>rd</sup> edition of CL, xvii-xviii: ‘When I say that law is a social construction, I mean that it is one in the way that some things are not. Law is made up of institutional facts like orders and rules, and those are made by people thinking and acting.’ To Hart, Green attributes the view

### 2.3.2.1. Restricting the artefactuality condition [AC]

Not all legal objects are the product of a legal system. There are many examples of legal objects which have not been *created by* the system (as it were) but rather *artefactualised* by legal officials or relevant groups of people. Social customs and the common law are the most obvious examples. As Green notes<sup>151</sup>, rules need to be *applied* and customs need to *emerge*. The application of rules and the emergence of customs are routes to legal artefactualisation as shared practices may become rules, and behaviours may become customs in virtue of people's choices or attitudes to them.

By contrast, however, all musical works are artefacts of the music world.<sup>152</sup> Music is necessarily created and can only be interpreted *as* a created object<sup>153</sup>. Birdsong is music only if regarded as a *creation*, say, of birds or God, although it can *become* music if *presented* as such by an artist, as part of an exhibition or performance, for instance. Relevant intentions may be real or counterfactual but there can be no artworks without a presupposed intention to create a work of art.

This much is agreed upon by philosophers with widely different conceptions of art: proceduralists and institutionalists stress the role of the 'art-world' and its agents in turning an object into a work of art. Functionalists, in turn, underline intended results, i.e. the function or role the object is intended to play. Those who advocate the 'historical' account of arthood claim

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according to which 'anything in the law is there because some person or group put it there, either intentionally or accidentally. It all has a history; it all can be changed; it is all either known or knowable.'

<sup>151</sup> CL xviii-xix

<sup>152</sup> Dickie (1984), 57 (argues that artefactuality is a necessary condition of works of art, performances included). Davies (1991), 120-141 (states that all artworks are necessarily artefacts). D. Lewis, 'Truth in Fiction' in Lewis (1983, p.265), and J. Levinson (1980), apply this idea to musical works.

<sup>153</sup> All art is created. An object must be an artefact in order to be a work of art. All artworks are artefacts.

that placing an object within a ‘tradition’ is decisive. And even so-called ‘recognitionists’ place intention at the core of arthood, albeit from the perspective of the public<sup>154</sup>. Despite their differences, all mainstream theories of art presuppose that an object must be an artefact in order to be a work of art<sup>155</sup>. Not all artefacts are artworks but *only* artefacts are works of art<sup>156</sup>. There must be an intention to produce a certain *kind* of thing, as seen above. What is up for grabs is the nature and direction of associated (i.e. non primary) intentions. As music is an art form<sup>157</sup>, and all works of art are artefacts, there can be no work of music without the appropriate intention<sup>158</sup>.

This seems to lead to a slightly more restrictive proposition:

**[RP] Legal and musical interpreters, qua legal and musical interpreters, interpret *only* artefacts.**

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<sup>154</sup> I am referring to R.P. Sharpe’s distinctions, in *Philosophy of Music. An Introduction* (Acumen, 2004), 36-47.

<sup>155</sup> See Dickie (2008, p. 47): “Despite my reservations about the traditional theories of art, they were, I believe, on the right track about the group of objects they focus on. All of the traditional theories assume that works of art are artefacts, although they differ about the nature of the artefacts.”

<sup>156</sup> As stressed by Dickie (see above), the assumption of artefactuality is a feature of what he calls ‘the traditional theories of art’. There have been attempts to question the role of artefactuality in art. Weitz (1950), for example, used the Wittgensteinian notion of ‘family resemblance’ as a new method for the identification of art objects and rejected the traditional approach which, in his view, was erroneously oriented towards the essentialist question ‘what is art?’ when, in fact, one ought to investigate what kind of concept ‘art’ is. In the same vein, Paul Ziff defended the view that art cannot be defined, using Wittgensteinian/ordinary language tools. Together, they represent what Dickie calls “the new conception of art” which rejects artefactuality, or any other feature for that matter, as a theoretically significant common feature of artworks. The idea that ‘an object becomes a work of art by sufficiently resembling a prior-established work of art.’ (Dickie, 48) does not seem satisfactory. ‘Sufficient resemblance’ seems too vague a criterion to be of any use (see Davies’ (2008). The bottom line, I think, is that accommodating an anti-essentialist view (i.e. the position according to which there are no jointly necessary and sufficient conditions for something’s being an artwork) is not incompatible with disagreeing with his exclusion of artefactuality as an essential property of artworks (see arguments for the insufficiency of the resemblance theory and against Weitz’s conception of ‘essential property’- i.e. perceptible properties intrinsic to artworks).

<sup>157</sup> See Sharpe (2004), 30-48.

<sup>158</sup> It is not entirely clear that this idea generalizes across every art form. For example, compare: ‘As the epic is an art form, and all works of art are artefacts, there can be no epic without an intention to produce and epic’. Arguably, one cannot have the intention to produce X unless one has the concept X. But did Homer have the concept of an epic poem?

A legal interpreter, as we have seen, is not simply an interpreter of the law or, for that matter, an interpreter of law. He or she interprets all sorts of things, some of which not even remotely 'legal'. It is easier to define a 'musical interpreter': an interpreter of music is the interpreter of musical artworks only. In fact, this is an important difference between law and music: the considerations made above about the connection between the type of object one is interpreting and the kind of interpreter one is, though clearly applicable to legal interpreters, cannot be extended to music. It is simply not feasible to sustain that one could offer a musical interpretation of a legal document, an utterance, or a sculpture.

Criteria according to which a musical work is judged when interpreted cannot be extended to non-musical artefacts, except perhaps metaphorically. Only musical artefacts can have musical meaning because music demands the potential for aesthetic impact of a particular medium (organized sound), and this is the particular 'use to which' musical artefacts must be intended to be put by their creators. So in the case of music, [RP] is insufficient. We need to be even more restrictive and say that:

**[MR] Musical interpreters, *qua* musical interpreters, interpret *only* musical artefacts**

So, clearly, while we can reasonably straightforwardly say that musical interpreters interpret *only* works of music, it is not that easy to say what makes a 'legal interpreter'. There seem to be several possible objects of interpretation when we think about law. What do legal interpreters interpret? Do they interpret only 'legal artefacts'? Clearly not- reaching conclusions about legal meaning often involves interpreting objects which are not 'legal artefacts'. For example, judges interpret facts, events, and practices, as well as legal texts. In fact, as noted before, legal interpretation involves clarifying the legal meaning of non-legal objects as much as

explaining the (legal) meaning of the law. ‘Legal meaning of the law’ is not a pleonasm: a legal provision can be understood politically, historically, sociologically, even, according to some, aesthetically. Although legal objects necessarily have legal meaning, they can also be meaningful in other ways. Legal interpreters, as such, explain legal meaning.

But if, as has been suggested, interpretation is best seen as a fragmentary activity, identifying the interpreted object is fundamental. The fact that, in order to understand what the law states or requires, one might have to inquire into the meaning/significance of all sorts of things (from actions to texts, from utterances to facial expressions, from institutions to rituals), should not distract us from what is both evident and complex: one interprets that whose meaning one explains/displays. If what we are explaining/displaying is the meaning of a legal provision, then we are interpreting that provision. The conclusions we reach are about that provision, not about adjacent ones or related facts (even if we had to interpret them in order to understand our object).

If one’s object of interpretation is a statement made by a witness in a criminal trial, does that statement cease to be *a mere statement* and become a legal artefact, i.e. an intentionally produced object with a certain role to play in a particular system? Is the statement not, so to speak, *artefactualised* in the process of being produced within a certain context, by someone who willingly takes part in what is a very specific ‘legal ritual’? How could facts brought to light in the context of a trial, and utterances made in such a context, then not be legal artefacts? They do not need to be legal sources to be imbued with legal meaning. Legal artefacts are objects with legal meaning. The court witness example does not show that [MR] can be extended to legal interpreters.

Be as it may, both musical and legal interpreters seem, at first glance, to be well served by [SP], which states not that musical and legal interpreters interpret only ‘musical’ or ‘legal

artefacts' respectively (which, in the case of music, would be a true proposition), but that they interpret only *created* objects. Even so understood, can [SP] be said to be true? Note that it claims only that musical and legal interpreters, as such, do not typically inquire into the meaning of 'natural objects' such as birdsong, trees, clouds, fossils, the universe, beehives, maritime currents, winds, planetary alignments and words. They are interested in man-made objects created with an intention and that intention forms part of the background against which they reason.

Two questions are identifiable here. The first one is whether or not they inquire into the meaning of 'natural objects', that is, brute facts. The answer must be 'no', for an interpreter of music is, by definition, an interpreter of musical works. And the very idea of a musical work (even if one does not rely on an essentialist notion of *work*) involves a complex interplay of context and intention which cannot be found in brute facts.

The opposite answer must be given if one looks at legal interpretation. Legal interpreters, as such, can and often do interpret non-legal objects. Sometimes, it is required of them to explain the legal meaning of a non-legal (i.e. non-institutional, brute) fact. In doing so, they are undoubtedly reasoning about one possible meaning of that fact which, in the process, becomes the object of their interpretation. But, rather than regarding such objects as 'legal objects' (i.e. facts with a connection to a legal system) interpreters are called upon to *attribute* that quality to the facts they interpret. By engaging with those otherwise brute facts in the way in which they do, interpreters ascribe legal meaning to them. The claim here advanced is that, in doing so, they artefactualise such facts. They turn them into legal objects. Legal interpreters do not interpret only legal artefacts. RP is false as it applies to law.

The second question to be posed is whether or not, as musical or legal interpreters, they are particularly concerned with artefacts. The answer is undoubtedly 'yes' for both domains as, in interpreting both music and law, a process of selection is always undertaken whereby

something is ‘appropriated’ by the enterprise at hand. In the case of music, only works (i.e. musical artefacts) are eligible. In the case of law, any potentially legally meaningful fact qualifies and the transition from potentially to actually meaningful is achieved through the artefactualisation of the interpreted object. From then on, the fact is considered part of the legal system. Thus, interpreters in both domains are either concerned with artefacts of a particular system or with objects which are meaningful within that system.

Does the fact that artefacts are the kernel of both legal and musical interpretation entail that only artefacts are interpretable? No<sup>159</sup>. As shown, legal interpreters interpret brute facts as well as legal artefacts. A volcanic eruption is an example. An eruption is a brute fact with legal meaning (as travel disruptions recently caused by the Icelandic volcano Eyjafjallajökull have shown us). It acquires legal meaning, for example, by being considered relevant to the determination of the extent of insurance coverage or as grounds for an insurance claim.

This example shows us that [MR] is true of music but not of law. Brute facts can be turned into legal objects by legal interpretation. And can then also go on to be interpreted, as legal objects, lawyers and the general population. Legal reasoning involves consideration of a mixture of brute and legal facts. Brute facts become legal objects in virtue of being interpreted according to law.

There is, therefore, an important difference between what we call ‘legal’ and ‘musical’ interpretation: one is interpretation *by reference to a legal system*, the other is interpretation *of musical*

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<sup>159</sup> This, however, does not warrant the conclusion that one can interpret without taking intention into account. As noted by Scruton (AU 15) ‘Even when interpreting someone’s action in a way that makes no reference to his intention, the fact of intentionality will be a premise of interpretation. A person for whom it made no difference whether a sculpture was carved by wind and rain or by human hand would be a person incapable of interpreting, indeed incapable of perceiving sculptures. This is so, even though the interpretation of the sculpture is not the reading of an intention.’ Scruton continues: ‘it is imperative to see that the whole nature of a work of art as an object of aesthetic interest is determined by the fact that it is the product of many and complex intentions.’ So, one could argue, is legal meaning.

*works*<sup>160</sup>. For musical interpretation is not interpretation according to a musical system, and legal interpretation is not confined to *legal objects*. To engage in legal interpretation is to explain or display the *legal meaning* of *any* object, i.e. to establish how an object ought to be understood from the point of view of a legal order, what role it plays within a legal system.

### 2.3.3.. Acts of communication

One of the most salient features of our two domains of interpretation (musical performance and judicial argument) is their dependence on communication. This dependence results from the fact that interpreters of music and legal interpreters necessarily interpret *for others*. In order to interpret for others, by either displaying or explaining the meaning of an object, interpreters of music and legal interpreters must be capable of communicating with those for whom they are interpreting.

The link between interpretation for others and communication forms the background for a link between authority and communication. Of course one can communicate with others, and indeed interpret for others, without claiming to exercise authority over them. But one cannot exercise authority over others without communicating with them<sup>161</sup>. Tables, walls, and

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<sup>160</sup> Finnis (ORA 361) makes a related point when he observes that ‘there is something distracting about [Dworkin’s] appeal to the interpretation of artistic creations as the paradigm of the activity (*let us allow, for the present, that it is interpretative*) [emphasis added] involved in the practice of law and legal argumentation, a practice which, at bottom, seeks to bring order into human choices and actions, present and future.’ The reason why Dworkin’s parallel is distracting is that, contrary to what Dworkin suggests, the creative element of interpretation is not explained in terms of a shared type of object of interpretation: ‘created objects’ (LE 50). On Dworkin’s view, [RP] is a true proposition and [MR] can be adapted and extended to legal interpreters. This, too, is evidence of the idiosyncratic use of the concept of interpretation by Dworkin.

<sup>161</sup> Raz, EPD 217

bicycle wheels are conceptually incapable of exercising authority. Ability to communicate is a necessary condition both of interpreting for others and of exercising authority over them.

There is no necessary connection between interpretation and communication (interpreting for oneself requires no communication)<sup>162</sup>, or between interpretation and authority (one may interpret for oneself, or indeed, for others, without purporting to give them content-independent peremptory reasons for belief or action). But the link between authority and the ability to communicate is conceptual. So, when interpretation involves a claim to authority, as it does in our two examples of interpreting for others, it entails an ability to communicate with those for whom one interprets.

The reasons for which musical performers and judges are called upon to interpret for others are not important, at this stage. They are domain-specific and here I aim to highlight shared features. What must be noted is that both types of interpreters have an *audience* to which they are *expected* to convey (through display or explanation) the meaning of a certain object. Interpreting *for an audience* is what they do, it is part of their job description, albeit for different reasons. The connection between interpreting for others and making them aware of reasons by conveying information of a certain kind makes it clear that our two categories of interpreters must be able to communicate with their audiences.

Of course things can be created for a purpose without involving any intention to communicate. Something can be made for a specific purpose without the author intending that others recognise it as fulfilling that purpose. In fact, something can be made for a purpose by an author who intends others to ignore such a purpose and the existence of her artefact. There is

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<sup>162</sup> *Pace Raz*, for whom talk of communication with oneself can only be metaphorical (MF 36), Hurd (SIS 1008, note 129) thinks that communicating with oneself is only “pragmatically odd”. She notes that, when we give ourselves reasons, as in the case of promising or vowing, we do so through acts which are ‘complete communications’ (in the Gricean sense). Hurd writes: ‘We intend to affect in ourselves a certain response (namely, compliance with the oath or vow), and we intend to do so via the recognition of our intent.’

no necessary connection between the concept of an artefact and the communication of intentions to others by its author. An author can be silent, inconspicuous, invisible. An author will still be an author if no one knows what she has made and what she made it for. An artefact will still be an artefact if it never sees the light of day or if it stays hidden in a prehistoric cave for ever. Artefactuality, dependent as it is on authorship and purposefulness, has no necessary connection to communication intentions.

But acts of communication are artefacts. Utterances are artefacts. And authoritative legal pronouncements, which are central to the interpreter's task of identifying and conveying legal meaning, are utterances. It is one thing to say, as I do here, that identifying and understanding authoritative legal pronouncements is an important part of the legal interpreter's task, and another to suggest, as many do, that legal interpretation is the interpretation of authoritative legal pronouncements. This misleading view of legal interpretation will be addressed and questioned in Chapter Four.

#### 2.3.4. The connection with interpretation

It is the role played by interpreters in the musical and legal domains (not simply the fact that they interpret artefacts) that unites them as communicators. Their interpretative acts are acts of communication. Acts of communication, Grice<sup>163</sup> tells us, involve an intention to convey meaning to an audience or interlocutor via their recognition of such an intention<sup>164</sup>. Grice tells us that the meaning of what is communicated by a speaker to an audience (or interlocutor) is

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<sup>163</sup> Grice (1971 and 1989).

<sup>164</sup> For a summary of the Gricean view of acts of communication see. Ekins (2012), 194-196)

different from what he terms ‘natural meaning’. Unintentional or involuntary signals (signs) are capable of natural meaning: ‘Those spots mean measles.’, ‘Dark clouds mean rain’<sup>165</sup>. In such instances, there is a causal link between the signs and states of affairs that obtain in the world. Meaning conveyed through acts of communication is non-natural<sup>166</sup> and its determination depends on shared conventions between speaker and audience.

On Grice’s model, communication is successful if, and only if, ‘(i) a speaker, seeking to signal others, uses conventional actions because he or she reasonably believes that such actions will be taken by the audience in the manner intended; and (ii) the audience so takes the actions.’<sup>167</sup> In communicating, one intends to produce a response in one’s audience or interlocutor. Such a response is called ‘uptake’<sup>168</sup> and an intention to secure it is an intention to ‘alter the propositional content of others’ beliefs by producing in them an understanding of the locutionary and illocutionary act one performs with an utterance.’<sup>169</sup> Interpretative display and explanation, I have argued, are instances of communication. And exercising interpretative authority depends on successful communication between interpreter and audience.

To say, as I do above, that acts of judicial and musical interpretation are acts of communication is not to say that interpreting objects against the backdrop of a legal system is coextensive with the identification of communicative intentions. It is plausible that the Gricean conditions of successful communication are not always present when legal interpretation

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<sup>165</sup> Grice (1971) 436

<sup>166</sup> Grice (1971) 437: ‘I include under the head of non-natural senses of ‘mean’ any senses of ‘mean’ found in sentences of the patterns ‘A means (meant) something by x’ or ‘A means (meant) by x that ...’. *Apud* Hurd, SIS 954.

<sup>167</sup> Hurd, SIS 954

<sup>168</sup> The term is J.L. Austin (1962, p.116).

<sup>169</sup> Hurd, SIS 958

occurs<sup>170</sup>. Nor are all legal acts by legal authorities acts of communication<sup>171</sup>. The point that I wish to make is that interpreting for others entails successful communication. Nothing in this claim implies that (i) all legal acts are acts of communication, or that (ii) interpretation is retrieval of communication intentions. My point is simply that successful communication, in the Gricean sense, is part of what makes interpretation for others, and through it, the exercise of interpretative authority over an audience, possible.

The picture drawn as the next two chapters progress will highlight the relationship between interpreter and addressee (audience)- not that between author and interpreter, or author and audience. The reason for such emphasis is the assumption- sketched in Part One and developed in the next chapters- that interpreters engage in a distinctive kind of activity and that, in virtue of their particular vocation, position, and duties, they purport to offer something to their audience which no other participant in the relevant practice is as equipped (and thus expected or required) to provide.

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<sup>170</sup> This is Hurd's stance. In SIS, she argues against the 'communicative model of legislation' and rejects both the notion that legislatures are 'speakers' and that citizens qualify as an 'audience', in the Gricean sense. Instead of acts of communication, legislative acts 'describe optimal legal arrangements'. The conclusion is that the authority of law is theoretical, not practical: legislative utterances are 'authoritative reasons for belief in particular deontic descriptions' (1009).

<sup>171</sup> For a recent account of the role of language use and intent in legislation, accompanied by a corresponding view of legislative intent as central to statutory interpretation, see Ekins (2012), especially chapters 7-9.

## PART II

### VESTING INTERPRETATION

#### EXPLANATION AND DISPLAY: TWO PARADIGMS

### CHAPTER THREE

#### DISPLAYING MEANING: MUSIC

‘What does it consist in, following a musical phrase with understanding, or, playing it with understanding? Don’t look inside yourself. Ask yourself rather, what makes you say that’s what someone else is doing.’<sup>172</sup>

#### 3.1. The basics visited

Of the two domains of interpretation on which this thesis focuses, music is the more perplexing. According to some, it is also both the more abstract and the more familiar. Everyone knows what music is. No technical knowledge is, in principle, needed to identify something as a piece of music. Anyone (even the deaf) can detect music and tell whether or not music is being played. Most people are able to respond to music, moving along with it, dancing, attempting to accompany or reproduce a sound sequence they hear. Music is pervasive, instinctive, universal. Alongside paradigmatic examples (those one does not hesitate to call ‘music’), there are, of course, marginal cases of music, instances we find at the fringes of our general notion.

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<sup>172</sup> Wittgenstein (1998, 58e.)

Identifying those as music depends on what we take the central case to be but they have a very important role to play in the process of furnishing our concept of music.

The task at hand is not to trace the origins of music or to investigate people's reactions to it, although it is important to understand how these connect to the concept of music that we know and use. My goal, in this chapter, is to understand what, if anything, makes music meaningful. Does the meaningfulness of music make it interpretable? If so, what does that tell us about interpretation? And does that make what is only residually interpretable<sup>173</sup> less meaningful? I am looking for a notion of music clear enough to provide insight into the nature of interpretation. But such a notion is not based on historical evidence or empirical observation: it is to result from an analysis of our concept of music, i.e. an analysis of what it is we talk about, make and enjoy when we talk about, make and enjoy music. The minimalist account of musical interpretation proposed in this chapter is based on an anti-essentialist view of music. It is in that spirit that the next sections will unfold.

### 3.1.1. Sound

When John Cage released 4'33 in 1952, the concept of a silent piece of music became artistically relevant and 'silent music' officially ceased to be an oxymoron. It seems, however, that the key

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<sup>173</sup> Something is 'residually interpretable' if interpretation is not the primary mode of understanding it. There is, however, no necessary contrast between the residual and the paradigmatic when it comes to interpretation: something residually interpretable may nevertheless be a paradigmatic object of interpretation. The legal domain is a source of good examples of this: legal rules are, in principle, only residually interpretable (i.e. they fulfil their action-guiding role successfully if they are capable of being understood/followed without recourse to interpretation. Indeed, if interpretation were the primary mode of understanding social rules, legal rules among them, their action-guiding role would ultimately be defeated) whilst, at the same time, being paradigmatic examples of interpretable objects. What makes something paradigmatically interpretable is the fact that it has meaning about which one can reason and which, in certain cases, is capable of being explained or displayed to others.

to such a conceptual jump is to be found, not in the removal of a contradiction between ‘music’ and ‘silence’, but in a transformed idea of the way in which sound becomes music. The piece was meant to be heard as constituted by the sounds heard by the audience in the concert hall during 4 minutes and 33 seconds of performance. The mark of the piece, however, is that the sounds heard by the audience are not sounds made by the performer in playing his musical instrument: they are the sounds one hears in a full concert hall when the performer is not playing her instrument and audience is silent. Cage’s claim was thus not that there could be music in the absence of sound, but that there could be music in the sounds we hear around us every day, in the random sounds of nature and in the unintended, accidental sounds made by things and people.

This shows us that not even the idea of silent music removes a first, and most basic, requirement from our minimalist account of music: the fact that it is constituted by sound. Sound is the one and only *medium* of music. There is no other way to hear music than by hearing sound. This, of course, does not exclude the possibility of composing without being able to hear, although it is astonishing that Beethoven could have composed complex works of music without being able to hear at all. It is said that Beethoven removed the legs of his piano and placed it flat on the floor in order to feel the vibration produced by the piano strings, as he

composed. Sound is caused by vibrations, which can be felt by those who cannot hear<sup>174</sup>. But there can be no music without sound<sup>175</sup>. Even Cage would not have disagreed.

Although all music is constituted by sound, not all sounds qualify as music. We do not hear the wind or the sound of flowing water in the way we hear a piano concerto or a waltz by Strauss. Even when we listen to the wind and flowing water with the same attention we devote to a piece of music, something distinguishes one type of experience from the other: the pure sound of the wind and water is not music<sup>176</sup>. Music consists of ‘organized sound’, i.e. sound within which one can detect a *structure*. This is the minimal requirement to which Leibniz seems

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<sup>174</sup> In the case of Beethoven, deafness, albeit severe and relentless, arrived in stages. He was not abruptly left without the ability to hear, nor, of course, had he been deaf since birth. He had been able to hear until he started to progressively lose his hearing due to a labyrinthitis of intestinal origin between 1798 and 1816. He was 28 years old when the actual loss of hearing started, and 46 when he became completely deaf. His musical education was thus not affected by the disease. Beethoven was familiar with sound and his brain was ‘musicalized’ long before he became deaf. It is very likely that he could ‘hear’ music in his head even as he could no longer hear sound. It is much more difficult to imagine how someone who has never heard a sound in his/her life can compose a piece of music. It seems likely that they cannot *hear* music- even in the metaphorical sense in which Beethoven continued to ‘hear’ music in his head after becoming deaf.

<sup>175</sup> ‘It makes as much sense to think about pictures without thinking about colours as it would to think about music without thinking about sound’, Hyman (2006, xvii). Similarities between sound and colour as ‘presented to a single privileged sense-modality’ are noted by Roger Scruton in *The Aesthetics of Music* (Oxford: Clarendon, Press, 1999), 1, sounds ‘are objects of hearing in something like the way that colours are objects of sight, and they are missing from the world of deaf people just as colours are missing from the world of the blind. A deaf person could *recognize* sounds by sensing the vibrations that produce them: this would be a kind of tactile lip-reading. But *sounds* (the sounds of things) would nevertheless be absent from his experience; he could no more gain an acquaintance with sounds by this method than a blind person could become acquainted with colours by reading a Braille spectroscopy. A blind person can know many facts about colours, and know which colour any given object is (for example, by asking those with normal eyes to tell him), while not knowing colour. For the knowledge of colour is a species of ‘knowledge by acquaintance’, a knowledge of ‘what it is like’, which is inseparable from the experience that delivers it. In the same way, a deaf person could know much about sounds, and about the particular sounds emitted by particular objects, while not *knowing* [my emphasis] sound.’ For more reflections on colour and potential parallels with sound, see Wittgenstein (1977).

<sup>176</sup> Except metaphorically. What justifies the use of the metaphor? Metaphor depends on a resemblance and finding the relevant resemblance between natural sounds, like flowing water or the wind, and paradigmatically musical sounds can provide some insight into the nature of music. Where is the resemblance? Surely, it is not sound alone, as sound can as much amount to music as to noise. Calling something music at the fringes normally results from one of two types of consideration: (i) structure (pattern), or (ii) effect on the listener (emotional or aesthetic impact).

to be referring when he compares music to arithmetic<sup>177</sup>: there is something like counting or, at least, ‘ordering’, involved in musical experience.

Organized sound is more complex and potentially more aesthetically powerful than *pure* sound. Although aesthetic impact is not monopolised by artistic production, it is safe to say that works of art are particularly apt to generate aesthetic experiences. Something made with a certain purpose in mind is more likely to achieve that purpose than something not made for such a purpose. A good work of art is one whose appreciation gives rise to a significant aesthetic experience. As an art form, music’s vocation is aesthetic: in order to be music, sound must have the potential to generate an aesthetic experience.<sup>178</sup> In order to do that, *as* music, however, it is usually considered necessary that sound be organized or structured intentionally.

Music is distinctive in the use it makes of sound. It is constituted by ‘acousmatic events’<sup>179</sup> which are characterized by the separateness of sounds and their causes: one hears a sound as music without having to locate its source. Hearing a sound as music does not depend on knowing where it comes from or what produces it. Acousmatic events are distinctive because they are heard by us as something separate, autonomous, worthy of attention. Acousmatic events ‘stand out’, as it were, from other sounds in our everyday life: we are called upon to listen to, rather than simply hear, them. A middle C is not just a sound but a response to a B and a request for an E. Furthermore, as noted by Boghossian<sup>180</sup>, what we detect in musical sound is

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<sup>177</sup> ‘Musica est exercitium arithmeticae occultum nescientis se numerare animi’ (Music is a hidden arithmetic exercise of the soul, which does not know that it is counting), from a letter to Christian Goldbach (April 17, 1712).

<sup>178</sup> An important distinction between purpose and function will be addressed in due course. All I wish to say at this stage is that (i) making music is a purposeful activity recognised as such by those who enjoy it; (ii) because it is produced with a view to affording an aesthetic experience, music is more likely to afford such experience than other activities which do not have aesthetic experience as their purpose; (iii) Musically organized sound is thus more likely to afford aesthetic experience than pure sound.

<sup>179</sup> Scruton (AU19).

<sup>180</sup> Boghossian (2002, p. 49).

not causal order but an ‘order of action: one tone does not merely cause its successor; it creates the conditions under which its successor has is the *right* or *appropriate* response to it.’

### 3.1.2. Intentional ordering

An account of the role of organized sound in music is fundamental to understanding music as a means of expression, as possessing expressive qualities, as being able to express certain states of mind and emotions. Although the expressiveness of music is a rather intuitive idea, it is at the centre of debate among philosophers of music. This discussion belongs to the broader topic of the nature of musical meaning which will be addressed in section 4.3.

At this point, a first distinction comes to light<sup>181</sup>: the distinction between the ‘acoustical experience of sounds’ (e.g. of a lawn-mower, the wind in the trees, the sound of running water) and ‘musical experience’ (of Bach’s *Goldberg Variations*, Chopin’s *Nocturnes*, or an improvised version of *Voi Che Sapete* performed by a child). For my purposes, it suffices to say that music consists in organized sound.

Rhythm, harmony and melody are ways of musically organizing sound. It is common to encounter these concepts in different contexts. For instance, we can speak of the rhythm of life in a rural village and refer to narratives as having a certain rhythm, as ‘moving’ at a certain pace. It is also possible to detect regularities and balance in the way events are narrated or organized, in the way characters are built, in the dialogue sequences we find in novels or plays, and to do it by referring to such regularities as rhythmic or harmonious. But, despite not being exclusive to music, these three elements are intimately associated with musical experience, and are tools in

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<sup>181</sup> Scruton (1999), 19.

distinguishing pure sound from music<sup>182</sup>. Their role in our pre-theoretical notion and experience of music reinforces the point, advanced in Chapter Two, that music is inherently intentional, that music is not just made but created, that musical works are artefacts.

Thus far, we have established that: (i) sound is the only medium of music, and (ii) music is organized sound. A salient aspect of musical sound is that it is both physical and intentional<sup>183</sup>. As noted by Hamilton<sup>184</sup>, the physical aspect of tone is insufficient in characterizing music. ‘Tones’, he says, ‘are not raw musical material’ but ‘are already the product of human intentional action before they form music.’ This duality shows us why birdsong might not be music: ‘Tone is a relational concept which refers not only to the nature of component sounds but also to how they are structured through rhythm, melody and harmony.’<sup>185</sup> So, in hearing music, certain tonal patterns are detected in an identification which involves not only the listener’s own import, but also their recognition of an intentional element in the tones heard, i.e. the presence of a human hand in their production<sup>186</sup>.

One can, of course, imagine birdsong being incorporated into a work of music. This can be achieved in various ways the most likely of which would be recording the sounds in nature and then introducing the recording into a composition or performance. *Blackbird* (1968), by

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<sup>182</sup> As noted by Scruton (UM 57), ‘Sounds become music when organized rhythmically, melodically *or* harmonically. The implication is that each form of organization is sufficient to provide an experience of music.’

<sup>183</sup> ‘All instances of [musical] material, tone itself not excepted, are forms as well, the outcome of some manifestation of human creativeness and intention.’ Lippman (1977, p. 45), *apud* Hamilton (AM 49).

<sup>184</sup> Hamilton, AM 49

<sup>185</sup> Hamilton, AM 49: ‘This structure is evolving and meaningful, the kind that Webern despaired of listeners locating in his own music when he described an unsatisfactory performance as a “high note, a low note, a note in the middle- like the music of a madman”’.

<sup>186</sup> ‘Certainly it is the case that sound phenomena which are not music or sound-art have acousmatic- one might say musical- aspects, such as the rhythm of a train engine or the melody of speech patterns. A heartbeat is a natural rhythm, birdsong is melodic; nature can be musical, even if it is not music. Music has to be an intentional production.’ (AM 103)

Lennon and McCartney, is a good example of this. Another way of incorporating birdsong into a composition would be to give listeners access to a singing bird at the beginning of a performance by opening a window to a garden or having a birdcage on stage or in a recording studio when performing or recording a piece. Or, as happens in the case of Messiaen's *Le Merle Noir*, *La Nativité*, *Quatuor*, *Vingt Regards*, *Réveil des Oiseaux*, *Catalogue D'Oiseaux*, and *La Fouvette des Jardins* (1950s-1970s), one could attempt to *transcribe* birdsong into musical notation. In the case of transcription, however, birdsong *constitutes* music (there is no actual birdsong, only its imitation). Birdsong is, in the case of transcription, the inspiration for (rather than an element of) the piece.

Such examples (real and imaginary) allow us to picture how birdsong could be part of a musical *composition* but note that there is always an intentional element without which one cannot conceive of a musical work. The artefactuality condition (set out in the previous chapter) is satisfied. The same may be said of any sound: all sounds can be *incorporated* into music. But this is not to say that any sound can *constitute* music<sup>187</sup>:

The rejection of 'instrumental puritanism' (a view dominant until the beginning of the 20<sup>th</sup> century, according to which 'only instrumental sounds, or sung vocal sounds of fairly determinate pitch, could be included within music.'<sup>188</sup>) has *clarified*, rather than compromised the artefactual character of music.<sup>189</sup> There seems to be a second-order quality to music: it must not only be *produced* but must be produced *in a certain way*, i.e. artistically, albeit possibly incorporating non-tonal sound elements or, indeed, other acoustic elements (such as speech or ambient

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<sup>187</sup> Hamilton, AM 45

<sup>188</sup> Hamilton, AM 43

<sup>189</sup>Hamilton, AM 45. Hamilton is of the view that music is not only not the only sound-art but that it is also not the only *high* art of sound: 'I believe there is a potential high art of non-musical sound-art. However, music turns out to be on a continuum with non-musical sound-arts, differing from them in the preponderance of tonal material.' (46)

sounds, for example)<sup>190</sup>. This makes it clear that music is inherently intentional, even in its most basic elements. At this stage, it seems possible to formulate a very general notion of music:

**[FA] Music is the practice of organizing sound**

3.1.3. Art

However, an important element is missing from [FA] which ought to be added to our minimal list of salient features of music. The missing element is one which, albeit instinctively present in discourse on music, has not yet been addressed. It can be introduced by the adverb ‘artistically’, suggested by the affirmation that music is a ‘fine art’, i.e. not only a set of skills or a craft but an art whose role is *aesthetic*<sup>191</sup>.

**[FA\*] Music is the practice of artistically organizing sound**

What is it to ‘artistically’ organize sound? It means only that music is normally created intentionally with an aesthetic end in sight. One can, of course, always find instances at the margins.

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<sup>190</sup> Hamilton, AM 48-49: ‘acoustic organization is not a sufficient condition for music; both speech, and the hum of a finely tuned air-conditioning system at a definite pitch, would satisfy the acoustic characterization.’

<sup>191</sup> For essentialist and functionalist definitions of art and artworks see Beardsley(1982, p. 299 and 26) and Gary Iseminger (2004), 5-9. For different versions of anti-essentialism, see Weitz (1956); Cohen (1962, p. 486): “the notion lingers... that if there is no property common to all works of art there may yet be some property or properties common to our proper experience of these works of art...” but there is “no reason to believe that any property is essential to aesthetic experience.” For an overview and analysis of Weitz brand of anti-essentialism, see Davies (2003), 63-68.

The idea that an account of musical practice cannot be separated from the way in which it is experienced and conceptualized by those who make and listen to it<sup>192</sup> makes it necessary to give a brief account of the nature of aesthetic experience. Coined in the 18<sup>th</sup> century by German philosopher Alexander Gottlieb Baumgarten, the term ‘aesthetics’ referred, primarily, to ‘the science of how things are known via the senses’<sup>193</sup>. Although the word was not used in the English language until the beginning of the 19<sup>th</sup> century<sup>194</sup>, David Hume had already introduced a parallel vocabulary into moral philosophy and the philosophy of art (which were then intimately connected) with expressions such as ‘standards of taste’ and ‘judgments of taste’<sup>195</sup>. As a philosophical subject, it includes two types of objects: the arts and all things susceptible to being a source of sensorial, intellectual or emotional experiences.

There can be a philosophical aesthetics of nature<sup>196</sup>, just as there is a philosophical aesthetics of art. Music predictably falls into the latter category but is not completely divorced from the former, as has been noted above, when using birdsong as an example of non-musical, but aesthetically valuable, sound. The mark of the aesthetic is commonly said to be ‘disinterestedness’, that is, the absence of practical or theoretical interest<sup>197</sup>. It is, thus, not to be equated with the ‘artistic’: art is not the only source of aesthetic experience and many things other than artworks have aesthetic value. Equally, artworks serve other purposes, besides offering or communicating aesthetic experiences. The concept of the aesthetic and the concept

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<sup>192</sup> Hamilton, AM 50

<sup>193</sup> Kivy (2004).

<sup>194</sup> With the publication of J.H.Bernard’s translation of Kant’s *Critique of Judgment*, in 1892.

<sup>195</sup> Hume (1985), originally published in 1757.

<sup>196</sup> See, for example, Budd (2005).

<sup>197</sup> Kant (1978), first section, first book, i-xiv. Kant was referring to pleasure in beauty (until the 1960s, the mark of the aesthetic) and, by ‘disinterest’ he meant absence of desire, absence of ‘intentional content’. On the role of the idea of beauty in our concept of art and the aesthetic, see Danto (2003).

of art are distinct and have different genealogies<sup>198</sup>, so there must be a way of understanding the aesthetic independently of the artistic.

One ought to understand the artistic by reference to the aesthetic, not the other way round. It is through its aesthetic vocation that art becomes distinct from other human activities. This is where the idea that a salient feature of music is its *inherently* aesthetic vocation (Hamilton) may be illuminating: it shows us, as Hamilton<sup>199</sup> notes, that music is “an art at least with lowercase ‘a’- a practice involving skill or craft” whose end it is to “enrich and intensify experience”<sup>200</sup>. It is in virtue of that special vocation, and only when it does fulfil it, that music is considered a *fine art*<sup>201</sup>.

#### 3.1.4. Not a functional kind

I pointed out earlier that artworks serve other purposes besides offering or communicating aesthetic experiences, for example, religious, political or commemorative purposes. I also suggested that it is only when we think of music as offering such experiences (as ‘fulfilling its

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<sup>198</sup> Gary Iseminger (2004) 1.

<sup>199</sup> AM 5. Hamilton argues for ‘an aesthetic *conception* of music as art’ and defends the view that ‘an aesthetic conception of music applies throughout its history’, not just since the 18<sup>th</sup> century.

<sup>200</sup> This is not to say that interest in enriching and intensifying experience is not a practical interest. It is plausible that if one’s reason to attend to a work of art is to enrich and intensify one’s own experience then one’s experience of the work is not *purely* aesthetic. In any case, what is suggested in the passage cited is simply that works of art are *typically* produced with the aim of intensifying and enriching aesthetic experience.

<sup>201</sup> The 18<sup>th</sup> century brought in ‘the modern system of the fine arts’ (in Kristeller’s terminology). As summarized by Hamilton (AM 3), ‘The modern system separated fine art from craft, and on a common view defined the crafts as aiming at a merely sensual pleasure or at bare utility, while the fine arts were the object of a higher, contemplative pleasure. Also during the late 18<sup>th</sup> century there occurred other revolutionary developments in the world of the arts, notably the appearance of Romantic ideals of genius and self-expression, and the developing autonomy of associated commodification of art, linked with a developing bourgeois public sphere of taste.’

aesthetic vocation’) that we think of it as art, or as fine art. There is no contradiction between these two ideas. But it may be helpful to distinguish between a *purpose* and a *function*, in order to see how they are related.

One way of explaining the difference between a purpose and a function might be to say, that, while the former is ‘what a person sets out to obtain; an object in view, a determined intention or aim’, the latter refers to the activity or ‘mode of action’ which is proper to anything, and which enables it (i) to fulfil a purpose, or (ii) to contribute to the activity of the whole of which it forms a part.

For example, (i) the function of a lamp is to shed light, and (ii) the function of the heart is to pump blood around the body.<sup>202</sup> In the first kind of case, the function necessarily belongs to an artefact, whereas in the second it belongs either to an artefact (e.g. a carburettor, a spark plug) or to a part of a living body with functionally differentiated parts (e.g. a flower, a leaf, a T cell, a liver, a heart). Because artefacts are the product of someone’s intentional, purposeful action, artefactual function can be defined by reference to purpose.<sup>203</sup>

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<sup>202</sup> The example is used by Green (1998), 117

<sup>203</sup> John Gardner (LALOF, 207, n.37) identifies function with *possible* purpose. He mentions the possibility of ‘accidental law’ and of a discrepancy between the purpose for which law is made and that which it is later used to serve. He writes: ‘I understand a function of something to be a possible purpose of it, a purpose to which it could be put even if that was not the purpose for which it was made, and even if it was not made for any purpose at all.’ The same line of thought could be followed when reflecting about the nature of music: not every work of music is made for a particular purpose and some works end up fulfilling purposes other than those (or that) for which they were created. But the distinction between function and purpose is helpful in understanding that things don’t have purposes. Purposes are imposed on things by people. Functions tell us a ‘how’ story by reference to the ‘what’ story of purposes. And, if something has been made for a particular purpose and successfully achieves that purpose in a certain way, then the way in which it successfully achieves the purpose for which it was made is its artefactual function. A distinction between purpose and function clarifies the central case of artefactual function. Hearts don’t have purposes but they have a function. The distinction between function and purpose helps us to understand the difference between organic and artefactual function.

Thus, music may be produced with many different aims or for various purposes, but, as a fine art, it is sometimes said to have a general *function*: that of ‘promoting aesthetic communication’<sup>204</sup>.

**[GF] The general function of music as an artistic practice is to engage in aesthetic communication.**

This position implies that, although individual works of music (and even musical genres) may be produced for and regarded as serving various different purposes, as a whole, the social practice of music, as an art form, is characterized by aesthetic communication<sup>205</sup>. So, even music produced for non-aesthetic purposes, such as Taizé chant or a politically charged song, can be said to pursue such purposes by aesthetic means, by offering the listener an aesthetic experience, thus belonging to the practice (or world) of music. But this is surely not enough. Engaging in aesthetic communication is not a sufficient condition for something being an instance of music<sup>206</sup>.

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<sup>204</sup> I am referring mostly to Iseminger’s ‘functional thesis’ (F<sup>1</sup>), which is part of a project he calls ‘new aestheticism’ (Iseminger (2004), 23): ‘The function of the artworld and practice of art is to promote aesthetic communication.’ If music is an art form, and if the function of art is to promote aesthetic communication, as an art form music’s function is to promote aesthetic communication.

<sup>205</sup> Iseminger (2004) points out the relation between the function of the practice and the function of particular instances within the practice of art (25): ‘the intuition of a close relation between art and the aesthetic is honoured by (F<sup>1</sup>), but it is important to notice that (F<sup>1</sup>) does not claim that each individual work of art distributively must enter into that relation. For the practice of art and the art world to have an aesthetic function does not entail that each work of art must have an aesthetic function.’

<sup>206</sup> Budd (1985) offers a summary of the basic features I refer to, including the importance of communication in musical experience and meaning, without suggesting that music is a functional kind. His focus, however, is on communication between composer and listener, not between composer and performer or performer and listener: ‘To hear a composition with understanding is to have the experience the composer intends the listener to have; and it is the experience that can be said to be communicated from composer to listener. What is communicated is an experience constituted by the experience of hearing sounds.’(152)

*Function* is also sometimes equated with *effect* or *consequence*<sup>207</sup>, which suggests that there is something we may usefully add to our distinction between *purpose* and *function*. But, of course, not all effects are functions. For instance, research (and personal experience) shows us that the sound of the mother's heartbeat has a calming effect on her baby, both during pregnancy and after birth. But of course soothing babies and children (or making thumping noises, as in Green's example) cannot be said to be the function of the human heart.

It is sometimes crucial to distinguish the function of something from its effects (accidental or intended). But one relevant difference between purpose and function is that, unlike purposes and intentions (mental states or contents) the function of a thing can be attested through observation. Function is a matter of fact: it suffices to look at that whose function one is trying to identify and see what it does and how it goes about doing what it does.

As formulated, [GF] suggests that the practice of art (and music within it) is a functional kind<sup>208</sup>. But in fact art-music is not identified by its function or functions. As an artistic practice, it has the functions that all artistic practices have, including the one we see in [GF]. Two basic elements make music unique: its medium (sound) and its mode of operation (organizing sound as a source of aesthetic experience). Music, in sum, is not a 'functional' kind. It is a 'modal' kind.

The term 'modal kind' was introduced by Les Green, who contrasts 'modal' and 'functional' kinds<sup>209</sup>. A functional kind is a kind defined in terms of function. But Green argues that law cannot be a functional kind because law's social function (if it has *one* function) is probably not unique to law. Morality and custom seem to have similar social functions. What is distinctive of law, he argues, is its mode of operation, in other words, the way in which it

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<sup>207</sup> Green, (1998) 117.

<sup>208</sup> I am following Green's (1998, p.119) terminology. Roger Scruton (2009, p.99), too, holds that art is a functional kind and that works of art have the 'dominant function' of being 'objects of aesthetic interest'.

<sup>209</sup> See Moore (1992), 188-241. For Green's view, see Green (1996), 1686. For a more recent use of the distinction, see Gardner, LALOF 206-208

operates to fulfil its social function. Hence, Green suggests that law may be a ‘modal’ rather than a ‘functional’ kind. I am suggesting that the same is true of music.

Returning to [GF], it is suggested (i) that art-music is a practice and; (ii) as an artistic practice, music has the *general* function of aesthetic communication. Note, however, that this tells us very little about music as such. In fact, all [GF] does is state music’s fine art status. It does not in tell us what, if anything, is distinctive about music. Engaging in aesthetic communication, as far as we learn from [GF], if at all, is a function of all artistic practices, not just of music. As an artistic practice, music has an aesthetic role to play. Music is a source of aesthetic experience. And musical sound is a means to the end of generating the intrinsically valuable experience of appreciating, engaging with or contemplating something meaningful.

In the case of Western art-music, three main elements traditionally take part in the practice of making and enjoying music: a composer, a performer, and an audience. The composer’s choices and the final product of her work are mediated by the performer’s choices in the process of presenting the work to an audience. The most significant acts of communication, from the point of view of interpretation, and as suggested in Chapter Two, are those which take place between musical performers and their audience.

The relationship between composer and audience involves the idea of communication. But communication is just as crucial between performer and audience. Reasons for singling out performance were mentioned in Chapter Two and will continue to feature in the next section. For the moment, it is sufficient to note that music is one possible means of aesthetic communication. Communication is successful if its addressee understands what is being communicated. So affording an aesthetic experience seems to be more than merely one possible

purpose of musical interpreters. It is a special purpose<sup>210</sup>: aesthetic communication is a means to the end of generating an aesthetic experience i.e. an experience of contemplating, enjoying, understanding or perceiving the meaning and artistic value of the work.

Organised sound, social practice, modal kind, aesthetic experience and judgment: these are the basics of a minimalist account of music. Having visited them, it is now time to look at the interpretative role of musical performers.

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<sup>210</sup> A distinction seems to become clearer at this point: while some purposes are *primary*, others are merely *subordinate*. The purpose of a composer in writing a piece of music typically involves having aesthetic impact on an audience. No doubt the composer might, however, also wish to convey a political, religious or moral message, to entertain, to inform, to make a political or conceptual point, or even to influence behaviour. All these aims may be accommodated and fulfilled by a musical work. They are, however, according to the view of music here expressed, subordinate to the primary purpose of enhancing aesthetic experience. That purpose is 'primary' in the sense that it ought to be prioritized in a conception of music as a fine art. How does music go about fulfilling all its possible subordinate purposes? By facilitating and encouraging a dialogue between the composer/ musician and his/her audience, i.e. by creating all conditions for 'aesthetic communication'. Aesthetic communication through an artistic organisation of sound is music's particular vocation.

### 3.2. Performance

“Heard melodies are sweet, but those unheard are sweeter”<sup>211</sup>

Works of music, we have seen in the previous chapter and section, are artefacts. Music is typically produced intentionally. It is performed purposefully. It is intended to be enjoyed willingly and disinterestedly. Performers of a musical work must understand it in order to execute it. Composers offer guidance for execution, but often very little guidance for interpretation. Audiences may or may not be a blank slate. It seems that, from the point of view of interpretation, everything depends on the choices of the executor. Anyone can interpret a work of music but only performers are required to interpret in order to execute a work. They are also expected to display the meaning of the work to the audience, a task which goes beyond competent execution. Competent execution and interpretative success are not the same.

Not all executors are interpreters but all interpreters are executors. This is an important clue as to why performance is central to the vested concept of musical interpretation: performers are paradigmatic interpreters *to the extent that* they are not just executors. Performers, as I argue in Chapter Two, purport to be authoritative interpreters and are expected to interpret a work in the process of executing it.

Musical works *demand* to be performed. This personification restates the artefactuality condition: in Western art-music, musical works are *made* to be performed. This suggests that there is a necessary link between musical interpretation and display. As we have seen, music is necessarily created. In our central case (Western art-music), works of music composed with the intention of offering an audience a certain aesthetic experience by making the audience aware of

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<sup>211</sup> From *Ode on a Grecian Urn*, by John Keats.

the aesthetic properties (unity, grace, power, daring wit, serenity, cleverness, intensity are examples) of the work<sup>212</sup>.

Interpreting for others is possible only if there is the possibility of communicating meaning. Performance plays an instrumental role in musical expression precisely as a means of communicating meaning. Musical meaning is typically communicated through musical performance (although, of course, it can also be communicated, through explanation, in musical criticism or analysis) and the particular way in which musical performers convey meaning is by *displaying* it<sup>213</sup>. Like explanation, display affords understanding. Displaying meaning entails a claim to understanding why an object ought to be understood in a certain way, rather than another. It entails the ability to identify and select the relevant reasons for ‘ascribing one meaning rather than another’ to one’s object<sup>214</sup>.

In the absence of performance, not only would the most brilliant, inspiring of scores not live up to its instrumental function of directing action, but it would not be allowed to fulfil its inherently aesthetic vocation: to move, inspire, startle, perplex *an audience*. Failure to transpose the instructions of a composer from paper to stage necessarily affects a work’s aesthetic value, which is to say, its musicality. An unperformed score is, to most, merely a piece of paper with

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<sup>212</sup> Here, aesthetic experience is being defined in terms of aesthetic properties. For an account of the distinctiveness of aesthetic properties, with a special focus on first-hand perceptual experience and proof as the kernel of aesthetic judgment, see Sibley (2001), 421-450 and 135-159; and, for a more recent contribution to an explanation of aesthetic experience in terms of aesthetic properties, see Hyman (2006), ch.3.

<sup>213</sup> For an account of why and how display differs from explanation, see Chapter Two (2.2.). Musical performers are different from music critics, as interpreters, because they interpret without stating. Display differs from stating in the way it differs from explanation. The fact that displaying is more akin to explaining than to stating confirms the relevance of the distinction, made in chapter 5, between explanation and description. To state a fact is not to interpret (nor is it to display or explain it). Interpretation, in any case, is not the explanation or display *of an object*, but the explanation or display *of its meaning*. It is, however, possible to state a fact by displaying an object. For instance, holding a triangle and showing it to a group of people can have the role of stating ‘This is a triangle’. In this case, display is akin to stating. Interpretative display, however, is the display of meaning, not the stating of facts. It affords understanding, not merely knowledge. It is reason-giving, not descriptive.

<sup>214</sup> See section 2.2.

marks on it. It is the musician's ability to read the score and, through her skill and talent, *transform* such marks into intelligible, aesthetically significant sounds, that brings the composer's instructions to fruition.

Although not essential to the aesthetic appreciation of music *simpliciter*, performance is essential to the aesthetic appreciation of music *by an audience*. Performance is an important vehicle of aesthetic judgment and understanding. Note that this claim about the centrality of (interpretative) performance to music does not entail a similar conclusion about aesthetic experience: it has been said that an unperformed melody may be the source of a powerful aesthetic experience<sup>215</sup>.

### 3.2.1. Three possible objections

Possible objections to the link I make between performance and aesthetic judgment include the following: (i) A piece of music can be understood without its meaning having been communicated to me, and without interpretation; (ii) There is a difference between the realization in sound of a piece of music and an interpretation of it; and (iii) It is possible to appreciate a piece of music without it being realized in sound, simply by looking at the score.

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<sup>215</sup> Shusterman (2006), 219. For Aristotle, performance was not essential to the aesthetic appreciation of tragedy (*Poetics* 14): "That which is fearful and pitiable can arise from spectacle, but it can also arise from the structure of the incidents itself; this is superior and belongs to the better poet. For the plot should be constructed in such a way that, even without seeing it, someone who hears about the incidents will shudder and feel pity at the outcome, as someone may feel upon hearing the plot of the Oedipus. To produce this by means of spectacle is less artful and is the work of the sponsor of the chorus (chorêgias). Those who use spectacle to produce what is only monstrous (to teratôdes) and not fearful have nothing in common with tragedy." (14.1453b1-10). His views on musical performance (*Politics* 8) are similar. Musical performance appears disjointed from the aesthetic (and moral) value of music.

Let me take each objection in turn. Indeed, understanding is possible in the absence of interpretation. As noted in Part I of this thesis, not all understanding is interpretative. This is true even in the complex domain of music. It is also true that not all performances of musical works display the meaning of those works. There are two aspects to objection (i): (a) it points out that, because it is not essential to understanding a musical work, the link between musical performance and aesthetic judgment is weaker than I suggest; and (b) it tells us that not all performances are interpretative.

My response to (a) is that there is no incompatibility between understanding music without interpreting it and identifying musical performers as paradigmatic interpreters of music. Musical performers themselves may understand the work they perform without interpreting it. And their audience, too, may understand a piece without reasoning about its meaning. Musical performers, however, are paradigmatic interpreters of music because they are *expected* to communicate the meaning of the work they perform to their audience, i.e. as performers, they interpret for others. They also, as indicated in section 3.1.2, purport to be authoritative interpreters (I will explain what this means in section 4.4.).

My response to (b) – which tells us that, although we cannot have display (interpretation) without performance, we can have performance without display (interpretation)- is that not all display is display of meaning. Interpretation occurs only where the meaning of a work is displayed (or explained). It is true that not all performances are interpretative: some performances are free improvisations and thus fail to count as instances of musical interpretation (understood as the interpretation of works of music); others simply fail to do what they were meant to do, i.e. they fail to *communicate* anything about the meaning of the work performed. Others, still (think of a pianola concert, for example) do not involve direct human intervention. Be as it may, the intended link between performance and interpretation as display

remains unthreatened: interpretation happens where meaning is displayed (or explained). Because there is no display of musical meaning without performance, performance is a typical medium of musical interpretation. Performances which display meaning (and only those) are interpretative.

Objection (ii) adds an important note to objection (i). It tells us that the connection I accept between sound as the distinctive medium of musical meaning and interpretative performance may not be as straightforward as it seems. The distinction between the realization in sound of a piece or music and an interpretation of it was pointed out at the start of this section, when I stressed the difference between an interpreter and an executor. Performing a piece entails, at a minimum, the ability to execute it. A performer is necessarily an executor (and, indeed, being an executor is a sufficient condition for being a performer): at a minimum, a musical performer must be capable of playing music.

To put it trivially, a musical performer needs to be a musician (although, of course, she need not be a professional musician), defined broadly as someone capable of *execution*<sup>216</sup>. But being able to execute a piece, even flawlessly, is not the same as being able to interpret it. Execution entails knowledge and skill (technical knowledge), interpretation entails understanding (including the ability to engage with the piece imaginatively). Musical meaning is at stake only where such understanding is present and where technical skill (the quality of an executor) is combined with a talent for offering an audience ways of enhancing aesthetic experience. This is achieved by making musical meaning (not just the correct sound sequences) accessible.

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<sup>216</sup> Goodman (1968), 186, indirectly notes this when recognising the problematic implications of his view of works of music as defined by a score: 'since complete compliance with the score is the only requirement for a genuine instance of a work [performances are defined as instances of a work of music], the most miserable performance without actual mistakes does count as an instance, while the most brilliant performance with a single wrong note does not.'

The last of the three objections focuses on a point which is central to this thesis. Despite appearances, it focuses on the distinction between interpreting for oneself and interpreting for others. It is clear that, as the objection notes, one may conceivably enjoy music (aesthetically experience it) without it being realized in sound (performed). A composer's familiarity with music and with the techniques involved in making or playing music may enhance her ability to engage imaginatively with a score just by looking at it. Her experience, no doubt, can be both musical and aesthetic. However, the fact that she can understand and enjoy a score without hearing the music, or, indeed, the fact mentioned in the previous section, that Beethoven was able to compose magnificent works of music without the ability to hear, does not weaken the role of sound and its realization in our concept (and experience) of music.

Such enjoyment, such a possibility, occurs only in special cases of people who are highly attuned to music, highly sensitive to it, highly skilled, and highly aware of sound and the various possible ways of organizing it. They must know what a note sounds like when they see it on paper in order to understand the role it can play in a musical sequence. In order to engage imaginatively with a score, the composer must *know* what the music on paper *would sound like* if she were to play it on the piano, for example. In fact, the imagining taking place is the imagining of sound. It is impossible to sever music from sound. As noted before, music depends on sound, or its deliberate absence.

Apart from being a marginal instance of aesthetically experiencing music (or enjoying it), the case of the lonely, silent score reader (or composer) leaves our point on the relevance of performance unaffected for another, more important, reason: it is an instance of interpreting for oneself. This chapter takes musical performance as its point of reference because it draws attention to a feature shared by musical and legal interpretation: typical interpreters in both domains interpret *for others*. Interpretation in both domains is an outward looking process

involving communication, not a solitary exercise of reasoning about meaning and reaching conclusions for oneself. Interpretation, in both domains, provides a *service* to an audience. Hence its connection with authority.

From the numerous possible objects of aesthetic experience, musical works are among those the understanding of which by others is less likely to be attained without performance. Understanding, as seen, is awareness of meaning and interpretative performance is a typical way of making others aware of musical meaning. Performers who interpret a work communicate its meaning to their audience. That is typically what they do in their role of interpreting for others, and, by implication, in their role of purportedly authoritative interpreters.

Musical performers (as interpreters), we have seen, display the meaning of the work they perform. But their performance can be an object of interpretation in its own right. Their interpretative effort involves a series of elements: (i) the musical score (if there is one); (ii) concepts associated with music-playing; (iii) the intentions of the composer and his/her historical context and style; (iv) what the piece being performed ‘demands’ and conveys; (v) its performance history; (vi) what previous performers have contributed with their particular interpretations; (vii) the audience’s expectations; (viii) the constraints placed upon them as artists, including both explicit and tacit rules and conventions, and (ix) the function of music and of particular musical artworks. Relevant factors also include more mundane, practical considerations such as the acoustic conditions of the venue where the performance is to take place, the specific characteristics of the instruments being used, and even the idiosyncrasies of the other musicians taking part in a performance.

Performers may produce complex objects of interpretation which can be assessed by the audience on their own merits. A performer can have an authorial role on two levels: (i) she can create a work of music in the process of performing (this is notably the case in improvised

music); or (ii) her performance is itself an interpretable object with its own meaning (in which case, the audience is potentially presented with two objects of interpretation: the performed work and the performance itself).

In (i) there is a coincidence between composer and performer. The coincidence is twofold: they are the same person and there is no temporal gap between the creation of the work and its performance (the work is created *through* the performance). This possibility shows us that a performance is not the *performance of* a previously created work. It can also, and just as relevantly, be the *process of* creating a work of music. In (ii), by contrast, although there is an identifiable work being interpreted (one authored by someone else or by the performer at a previous moment in time), the performance is an object of interpretation in its own right.

The reason why the potentially authorial role of performers is not as relevant to this project as their interpretative role is that, as argued in the previous chapter, musicians are mainly interpreters, their authorial role is marginal: it occurs either in non-central cases of free improvisation or in cases where the significance of the performance (either due to the high profile of the musician or to her particular interpretative choices) turns it into an object of interpretation in its own right. This happens, I recall, when there is a possibility of mistake about its meaning, but note that, in such cases, the object of interpretation is not the work being performed but the performance itself (subject to different constraints, standards, and interpretative criteria) . In such cases, there is a shift from the work to the performance as an object of interpretation. And a separate process of interpretation takes place.

However, even in central instances of musical performance, there is no denying that the meaning displayed does not have to be restricted to the meaning of a previously created work. Musical meaning can be displayed *in the process* of performing, even when the performer is freely improvising (of course, in free improvisation there is a coincidence between the work and its

interpretation which we do not encounter in the central case of musical performance) Moreover, a performer's interpretation of a particular work can add to its meaning so as to demand attention by subsequent interpreters (e.g. Wieland Wagner's minimalist post-war productions of *Parsifal*, *Siegfried* and *Die Meistersinger*- without Nuremberg- at the Bayreuth Festival). The fact that a performer can contribute to the meaning of a previously created work of music, however, does not prevent us from drawing a line between displaying musical meaning and creating a work. In Western art-music, a performer does not typically create her object of interpretation. Musical performance displays musical meaning.

As a means to the end of aesthetic understanding by an audience, performance plays a mediating role in the interpretation of works of music: though constrained by the composer's instructions, performances have a unique quality which allows the content of the piece to be realized and communicated to an audience. It is in virtue of each performance (and there may be a very large number) that a piece is assessed by those for whose 'aesthetic taste buds' it was created. It may even be the case that the communicative possibilities of a piece are never exhausted and that each successful performance makes an infinitesimal contribution to that revelation, but as insignificant as such a contribution may be, it is always *a condition of* interpretation.

Without performances audiences would be redundant, as would performances without audiences. Without performances, audiences would have no place in the world of music.

If music is a means of aesthetic communication, its role cannot be fulfilled without an audience (actual or potential). This is demanded by the concept of communication itself: there is no communication without a speaker and an addressee. There can be no musical practice without audiences, and audiences are identified by reference to particular performances. For this reason, too, and although, as mentioned before, unperformed pieces can be interpreted by critics,

musicologists and musicians alike, performance is central to musical interpretation: musical interpreters display meaning to an audience. This is the way in which they fulfil their role of *interpreting for others*.

The fact that performers are expected to interpret for their audience entails that they are in a position of advantage in relation to them. Such a position is primarily one of epistemic advantage, as noted in section 3.1.2. Musicians are likely to know the work they are to perform and to understand its meaning. They are likely to be skilled and talented, in a way that audiences are not, to display the meaning of the piece so as to provide an enhanced experience of the work to others.

Musicians (performers) typically have access to the score (when there is one). Audiences, by contrast, do not, at least not necessarily. The meaning one finds in musical notation or in a score is only a part of the meaning of the work. Musical meaning (what musical works express) exceeds the boundaries of musical notation. Musical notation is as important to musical interpretation as a text is to literary interpretation. Just as a novel is more than its text, a musical work is much more than its score<sup>217</sup>. The relevant object of interpretation in music is not the score but the work, and performers make the work (and its meaning) accessible to their audience. However, they do so in a unique way because of their necessarily creative role. As interpreters, they are required to be creative whilst remaining faithful to the work being performed.

Not all interpretation of music is interpretation for others. But musical performance is a paradigmatic example of interpreting for others and musicians typically interpret for others by displaying the meaning of the work they perform. What does it mean to say of interpretation that it is a creative process? What does it mean to say that it is also necessarily constrained, i.e.

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<sup>217</sup> Davies (1994, p. 80), explains the difference between a musical score and a work of music: 'The score is a specification for the production of an instance of the work and is not itself an instance of the work.'

that to interpret an object is not to create it anew? The next section will explore the balance between compliance, creativity and constraint. This balance is particularly delicate in musical performance which, in its central instances, involves both imaginative engagement (creativity) and fidelity to a work.

### 3.2.2. Compliance, creativity, and constraint

The word ‘compliance’ transports us to the world of rules, of required or compulsory behaviour, and of the sanctions often attached to a failure to observe them. Indeed, it might be said to fit more comfortably into the practically authoritative realm of law than the fluid, inspirational world of music. Not necessarily, though. The notion of compliance is as relevant to music as to legal practice. The word, however, can have rather different meanings in the two domains. Compliance is not necessarily compliance with rules. Does one *comply* if one *follows* a suggestion, *matches* an expectation, or *responds* positively to a request?

As argued in the previous section, musical interpretation is dependent on aesthetic judgment (as well as on the *possibility* of aesthetic appreciation). Although it is possible to aesthetically enjoy music without it being performed, performances, and the evaluation thereof, lie at the centre of musical experience and interpretation for others. But how does one evaluate a performance? Or even before evaluating it *stricto sensu*, how does one distinguish that performance from the performance of another work of music?

Peter Kivy<sup>218</sup> offers a minimal definition of musical performance based on the notion of compliance. He claims that compliance with a score is a requirement of any performance and

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<sup>218</sup> Kivy (2002), 224-225

that such a requirement is not contested across the spectrum of philosophical views on the nature of musical works. It does not matter, he claims, what one thinks a musical work is. Whether one thinks a musical work is a created or discovered type, it is plausible that, in order for a performance to be a performance *of that work*, it will have to be compliant with the relevant score. With such a condition in place, and a working notion of compliance with a score/notation as the ‘production of a sound object in accordance with the instructions for performing that are embodied in the score or notation’, one can start addressing the complex question (whose formulation by Kivy opens the current section) of how (in what way) performances of music can be said to ‘comply’.

It is true that not all musical works have a score, and not all performances are performances of score-based works of music. Furthermore, not all interpretative performances are interpretative of score-based works of music. The existence of a score is, thus, not a necessary condition of interpretation. But, in Western art-music, i.e. in our central case of music and musical performance, there usually is a score and performances are, at a minimum, constrained by a need to comply with the relevant score<sup>219</sup>.

Criteria of compliance vary both across genres and historical contexts. Within a particular genre or sub-genre, the variability of compliance criteria is mainly historical. What qualifies as compliance with a score by J.S. Bach, for example, does not qualify in the case of a work composed by Donizetti (the works are Bach’s Sonata for Flute and Harpsichord (BWV 1034) and Donizetti’s Sonata for Oboe and Piano). Kivy writes<sup>220</sup>:

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<sup>219</sup> For contrasting views on the connection between musical scores and works, see, for example, N. Goodman (1968); and Walton (1977), 3-16.

<sup>220</sup> Kivy (2002), 230-231.

Donizetti tells the pianist exactly what to play in both the right and left hands. Bach, however, merely stipulates what chords the harpsichordist is meant to play with his right hand. And the harpsichordist has great leeway in how he plays those basic chords. He can play all sorts of other notes, at his own discretion, just so long as he does not disobey the ‘numbers’ and the general rules of musical ‘grammar’ that Bach’s period mandates. One accompanist’s rendition will, therefore, sound very different from another’s. The very notes they play will be different. That cannot happen in performances of Donizetti’s sonata. If two pianists play different notes with their right hands, one, or both, are not in compliance with the score. ‘Play only the notes I have written,’ Donizetti’s notation commands us<sup>221</sup>.

Kivy uses the work of these two composers as way to illustrate two important points: (i) compliance with a score is not incompatible with two performers playing different notes at different times; (ii) full determination does not exclude improvisation. In fact, as examples from Baroque music and Mozart, for example, show us, compliance with a score may *require* improvisation. The conclusion, which has an important parallel in the domain of legal interpretation, is that some indeterminacy is not incompatible with compliance.

The questions above are at least partly, questions of interpretation. They are questions about the content of a musical work, made apparent in its performance. Performances are interpretative only if they display the meaning of a work. But their autonomy defies our notion of compliance, as following the instructions in a score is but a part of a performance and, in

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<sup>221</sup>The use of ‘command’ makes one wonder whether the requirements of Donizetti’s notation are held to be categorical (i.e. obligations) or hypothetical (like the requirements to qualify as a chef or speech therapist). Does the command create an *obligation* to act as prescribed?

particular, of a good performance<sup>222</sup>. There is something intangible and autonomous about musical performances, something which makes apparent a distinction between the identification of what is being performed (the musical work) and the display of its meaning.

Compliance, in its various forms (depending on the particular musical tradition at stake) is a very important element of musical interpretation. How is one to understand what one is interpreting- and whether or not one is, in fact, interpreting (rather than creating an object or offering a subjective view of its significance or effect)- if one does not know what the relevant boundaries are? Is the performer (am I) playing that piece or another? Is she (am I) being ironic or naïve? As we have seen, the need to identify one's object of interpretation is one of the pillars of the bare concept of interpretation (Part I). The identification of a work of music, and its recognition as an object of musical interpretation, depends partly on compliance with its score (where there is one). Compliance with a musical score is, the clearest, most straightforward way for a performer (*qua* interpreter) to identify the object she proposes to *interpret for* her audience.

When it comes to the notion of compliance and its role in musical performance, improvisation presents itself as an interesting, if potentially problematic, concept. It is surprising to find it relatively neglected by philosophers of music, since it invites as much attention as other genres of music-making and performance. Is musical improvisation (free improvisation in the extreme) an interpretative genre? No doubt, an audience can interpret a performance, but do performers cease to be interpreters when they freely improvise? In the case of recommended or prescribed improvisation (such as we see in Baroque music and in Mozart, for example) it is clear that the performer is expected to interpret the piece in the process of determining what her contribution through improvisation ought to be: improvisation depends on interpretation, and

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<sup>222</sup> See Kivy's (2002) examples on p. 226-234, as well as Davies (2004), 151-197.

determining what is permissible as an instance of improvisation involves understanding the meaning of the work.

These are cases in which, as the examples above show, compliance *requires* improvisation. Improvisation contains aspects of composition, constraint, creativity and freedom, form, content, authority, and interpretation which one usually encounters when faced with particular musical genres. An improviser may, at once, claim to be fulfilling the true wishes of a composer and playing within clear boundaries created by others (e.g. Robert Levin's take on Mozart's unfinished works and the historical embellishment movement), composing on stage, creating a space for others to express their creativity within a certain frame<sup>223</sup>.

But in all those possible roles, she is always also an interpreter, even in composing on the spot she is interpreting as she goes, making decisions about how it is appropriate to proceed, which note, chord, nuance it is appropriate to add (and why) at which moment, with what emphasis. An important thing to notice is that one can interpret an incomplete work. There is no necessary connection between completeness and interpretation. The improviser makes decisions as she goes along and the decisions she makes about which notes to play, which sound sequences to emphasise, and which patterns to repeat are ways of displaying meaning<sup>224</sup>.

Despite appearances, this does not go against the intuition (confirmed by close analysis) that there is no such thing as unconstrained interpretation. The extreme scenario that of a complete absence of constraint, is a scenario in which there is no space (no need, no conditions) for interpretation. Such a scenario, however, is implausible. The bare concept of interpretation entails constraint (of different types and degrees). What is challenged by improvisation is not the

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<sup>223</sup> For suggestive examples, see Derek Bailey's *On the Edge* (1992), a documentary about musical improvisation: <http://www.ubu.com/film/bailey.html>.

<sup>224</sup> I thank Dominic Lash for familiarising me with musical improvisation and calling my attention to the interpretative elements of freely improvised musical performances.

symbiosis between interpretation and constraint but the kind of constraints faced by the improviser as an interpreter. To put it more precisely, what is challenged is the dividing line between interpretation and creation in musical performance<sup>225</sup>. What makes improvisation especially interesting is not just the multifaceted role the musician plays in it, but the particular sharpness that the notions of constraint and authorship acquire when the question of musical meaning and the possibility of its display are addressed. If one keeps in mind that creativity and authorship are not synonyms, one avoids the trap of denying that interpretation can be creative. Even free improvisers are working within a genre. And of course one can be creative without authoring. Creating a work is not synonymous with being creative in its presentation to others. Constrained creativeness is a necessary feature of interpretation; creation is not.

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<sup>225</sup> 'What kind of a compliant thing is a musical performance? Is it like a house to its blueprint, like a game of chess to the rules, or some other kind of thing entirely?' Kivy (2002), 225.

### 3.3. On musical meaning

“Music articulates forms which language cannot set forth.”<sup>226</sup>

In this section, I shall be concerned with musical meaning: what it is and how it can be distinguished from other kinds of meaning. The problem of musical meaning is not a “general problem of aesthetics”<sup>227</sup>, it is specific to music<sup>228</sup>.

Our emotional response to music can be considered ‘indirect evidence’ that there is such a thing as musical meaning<sup>229</sup>. This happens because our emotional response to music can be rational. We think of music as *justifying* and not merely *causing* an emotional response, but it is difficult to see how this could be so, unless the music had some kind of meaning. Compare drama: tragedy may *justify* an audience in feeling pity and fear<sup>230</sup>. It doesn’t merely cause these emotions, as some drugs cause fear or elation. But if it justifies these emotions, that can only be because of what it represents. Presumably, pure music, must also have some meaning, if it justifies an emotional response in an audience<sup>231</sup>.

Out of the various art forms we could elect as an object of study, music is especially perplexing because it can be meaningful without being representational. Indeed, as seen in the

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<sup>226</sup> Langer (1942), 233.

<sup>227</sup> Scruton UM 33.

<sup>228</sup> Budd (1995), 135-137, appropriates Schopenhauer’s idea that ‘music is a representation of what can never be directly represented.’ He notes that ‘in the experience of music we perceive directly what ordinarily we can perceive only indirectly, namely the ‘inner life’ of emotion.’ See Schopenhauer (1969), Vol. I.

<sup>229</sup> Boghossian (2007), 120. He adds that ‘an inference from the legitimacy of our emotional responses is not the only sort of evidence that we have for the existence of musical meaning.’

<sup>230</sup> But also pleasure. See Nutall (1996).

<sup>231</sup> Malcolm Budd (1995, p.136) refers to a ‘basic and minimal concept of the musical expression of emotion’. He explains that ‘when you hear the music as being expressive of emotion E-when you hear E in the music- you hear the music as sounding like the way E feels; the music is expressive of E if it is correct to hear it in this fashion or a full appreciation of the music requires the listener to hear it in this way.’

previous section, in the paradigmatic case of musical performance, meaning is displayed without being stated. If, as is the case here, the aim is to give more substance to the claim that interpretation is the explanation or display of *meaning*<sup>232</sup> and, as such, a distinctive *activity*, then there is no better choice of point of reference than an art form which both challenges and depends on a notion of meaning and understanding. No puzzle from general aesthetics would be as potentially revealing and challenging of our assumptions about interpretation than the much debated problem of musical understanding<sup>233</sup>.

It is commonly acknowledged that there are many types of music: popular music, techno music, religious music, opera, muzak, ambient music, ballet music, film music, aleatoric music, meditation music, and even, allegedly, silent music. What do they all have in common? Certainly not the fact that they are all equally profound or meaningful. One could readily object, for example, that there is nothing particularly meaningful about musak, that it is bland and that there is nothing to understand when one hears Kenny G in a lift on the way to a dentist's appointment. (Can the same be said of the phenomenally popular *The Four Seasons*, by Vivaldi? Has it become background music because of its popularity or vice-versa<sup>234</sup>?) It might be claimed that such music is meant to be heard, not listened to, and that its instances are not *interesting* objects of interpretation. But, even if so regarded, would they not still be instances of music? Is musak not just mood-setting, uninteresting, background music? It would be odd to deny that

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<sup>232</sup> This is Joseph Raz's definition (BAAI 241).

<sup>233</sup> Susanne Langer (1942, p. 209) mentions another important reason to elect music as an object of special attention and introduced an important caveat: 'Sound is the *easiest* medium to use in a purely artistic way; but to work in the safest medium is not that all the same thing as to achieve the highest aim'. There is no suggestion, in this thesis, that music is the most meaningful and interpretable of the arts.

<sup>234</sup> An interesting reinterpretation of *The Four Seasons* was offered recently by Nigel Kennedy and the Palestine Strings at the BBC Proms (Royal Albert Hall, London, 8 August 2013). The performance of the work was interspersed with jazzy improvisations (double bass and piano) and passages of Arabic music (voice and violin).

musak is music, except perhaps as a way of expressing one's *disapproval* of it. Surely, something can be a *good example of music* without being an *example of good music*.

Reliance on language alone cannot be the key to such judgments. Opera and ballet rely on natural language and other symbols. Words and choreographed dance brought together into a performance by professionals who rely on recognised symbols<sup>235</sup> in their interpretation of a work and expect their audience to be aware of that connection between the music and what is being conveyed. In fact, as noted in Chapter Two, the expected recognition is recognition on the part of the audience, recognition without which the desired aesthetic impact is less likely to be achieved, but what makes them interesting objects of interpretation is what can be achieved beyond the boundaries of literal meaning, by manipulating possible implied meanings. The more equivocal, multivocal, and complex a piece is, the more interpretable it becomes.

As interpretative performance is an object of aesthetic experience: *interpretable*, in the domain of music, is a synonym of *aesthetically valuable*. No one would deny that operas and ballets are interesting objects of interpretation. But they are dramatic works, with the representational properties that belong to all dramatic works, and in this respect they are unlike works of purely instrumental, abstract music. The crucial question<sup>236</sup> is whether the meaning and interpretation of pure music depend on its having representational properties.

Some music relies on rules in expressing what it expresses. It accompanies a text and its meaning cannot but depend (even when used in a rebellious, innovative, idiosyncratic way) on the meaning of the text<sup>237</sup>. This, however, does not make it less interpretable. On the contrary<sup>238</sup>,

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<sup>235</sup> In the case of opera, there seems to be a symbiosis between the words and the music, a necessary connection without which a piece would be emptied of expressiveness (the particular kind of expressiveness deemed appropriate to the genre).

<sup>236</sup> S. Davies (1994), 80.

<sup>237</sup> Note that saying that something is semantically determined does not entail that it is susceptible to more constrained processes of interpretation.

as the *underdetermination thesis*<sup>239</sup> tells us, what a sentence means (its semantic content) underdetermines what its utterer means (or may be taken to mean) in uttering it<sup>240</sup>. The underdetermining role of semantic content may, in fact, turn works of music within these genres into paradigmatic objects of interpretation: objects about which one can make certain assumptions, objects to which a variety of different (even equally acceptable) meanings may be ascribed.<sup>241</sup>

In the domain of musical performance, such meanings are displayed to an audience, and such a display, as noted in section 3.3., is an act of communication. Musical performers communicate with their audience through interpretative display. Musical meaning is communicated by performers to their audiences by being displayed.

One can only interpret Mozart's *Die Schuldigkeit des ersten Gebots* (1767) if one understands the meaning of the words used (either in the original language or in a translation of the piece). Furthermore, one can only interpret that piece *as* an instance of opera rather than oratorio, for example, if one understands the role of the text in the work and of certain elements in the text in the determination of the genre of the work. Ultimately, all this must be done by attending to the

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<sup>238</sup> The role of texts and semantic rules in communication and in the determination of speakers' intentions can be conceived as 'shared knowledge of linguistic information'. As such, such rules are part of the interpreter's 'frame of reasoning' when attempting to identify and infer communicative intentions (see R. Ekins (2012), 205). But identifying communicative intentions, as noted in Chapter Two, does not exhaust interpretation. The meaning of an object, and of musical works and performances, in particular, is often quite independent of the communicative intentions of its author.

<sup>239</sup> K. Bach (2005); Neale (2005).

<sup>240</sup> Ekins (2012), 196

<sup>241</sup> This is what Roger Scruton seems to have in mind when he writes (AU 15) that 'when I ask for the meaning of a work of art, it is no more for the artist to pre-empt my inquiry than it is for the user of an English sentence to determine, Humpty-Dumpty-like, the meaning of his words. The existence of the distinction between what a speaker means and what his sentence means in no way shows that we cannot analyze the second objectively. On the contrary, it suggests that we can and must.' Scruton does, however, make the following caveat: 'Although the meaning of a sentence is not given by the intention with which it is used, it would not have the meaning that it has were it not for its place in the expression of intention.' I consider this caveat specifically in the context of the artefactuality condition.

libretto and to directions given by the composer as to the way in which the piece is to be performed. As the type of intended performance is essential to the distinction between opera, oratorio and even, according to some, 'geistliches Singspiel', one must attend to the text in determining to which particular genre a particular work belongs.

Only after determining a work's genre can one interpret it: the genre provides the frame within which constraint- and, by implication, interpretation- is possible<sup>242</sup>. And such determination, in typical cases, depends on the acknowledgment of and guidance by a set of conventions, expectations, and boundaries which make musical meaning (the contextual intelligibility of a work of music and its performance) possible. Interpreting something is interpreting it *as* the kind of thing it is. The kind of thing it is, in turn, depends on the genre to which it belongs. Determining the genre to which something belongs can itself be an interpretative task. In such cases, however, we do not interpret the thing whose genre we are trying to determine. We interpret the elements which make up a genre, by contrasting them with elements which characterize neighbouring genres.

The important point to make, at this stage, is that semantic content, and its determination, do not tell us the whole story of interpretation<sup>243</sup>. The kind of information one obtains from attending to the semantic-referential elements of a text is not enough to grasp its full meaning. In particular, it is not enough to grasp its musical meaning. This is particularly noticeable in so-called cultural objects (ex: literary texts, operas, film scripts...) whose meaning necessarily stretches beyond their textual or linguistic dimension. Understanding linguistic

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<sup>242</sup> On the concept of genre, see K. Walton (2008)

<sup>243</sup> This continues to be in line with Wittgenstein's view on meaning and understanding: 'experiences of understanding get covered up by the use of (or practice of using) the relevant piece of language, i.e. by behaviour which manifests a mastery of that practice.' (Wittgenstein, RPP, I, 184). Also, notes Mulhall (1990, p. 35-36), 'the meaning-blind would not be incapable of grasping the linguistic technique of which any given word was the bearer simply because they could not experience their meaning.'

cultural objects involves more than following semantic rules. Their intelligibility as cultural objects goes beyond both the semantic content of the text (if there is one) and the communicative intentions of its author.

Following what has been said in Part I about the bare concept of interpretation, one often interprets things which have no relation whatsoever to a text or to a clearly recognised symbol-system. Interpreting involves (at a minimum) reasoning about meaning, it consists of finding an answer to the question ‘What can be made of this?’<sup>244</sup> What is required to answer the question depends on what ‘this’ refers to, it depends on the kind of object one is interpreting. If the question ‘What can be made of this?’ is one we often ask when listening to or performing a piece of music, then it is a particularly appropriate way to respond to a piece of music which does not rely on words or symbols, made more appropriate by the fact that, in such cases, there is more room for puzzlement, mistake, or doubt.

But, as we have seen, the relation between uncertainty about meaning and interpretation is contingent. As argued in Chapter One, it is possible (sometimes even necessary) to interpret the obvious, the known, and the certain. And one can be dispensed from interpreting in the presence of extreme uncertainty. If uncertainty means the absence of a minimal degree of constraint (which is equivalent to the inexistence of an interpretative frame) no interpretation can take place.

This being so, in attempting to understand what is (or can be) especially puzzling and unique about musical meaning, it is helpful to think of instances of music which do not only defy but altogether exclude the use of language as a mode of expression. That is the reason why this chapter focuses mainly on what is often called ‘abstract’ or ‘autonomous’ music, i.e. music whose expressiveness (whose meaning) does not rely on extra-musical elements (words, dance,

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<sup>244</sup> Endicott, PIIP 451.

visual symbols): music, as some might say, at its purest<sup>245</sup>. Its divorce from language makes its interpretative foundations apparently less solid, as how is one to ‘interpret’ something whose meaning cannot result from compliance with semantic rules? That one can and often does interpret such objects is made clear by the thousands of pages written about musical artworks of this kind in the last two centuries. My interest is in knowing how one goes about doing it and whether or not what one does when one conveys an understanding of such works (by performing them, reacting to them, or talking about them) amounts to interpretation (i.e. explanation or display of meaning)<sup>246</sup>.

‘Pure music’ is music devoid of extra-musical elements, it is “stand-alone music, played on musical instruments excluding the human voice, and without words, literary titles, or associated texts connected to it by its composer”<sup>247</sup>. Absolute/pure music, so defined, is a musical *category*. As an *ideal*, however, the absolute in music could be said to demand that music be understood by reference only to itself, without considering any “external purpose” or “subjective state of mind”<sup>248</sup>

This view is often attributed to musical formalism and might seem to lead to the difficult (counter-intuitive) conclusion that music’s value as music is unrelated to its expressive

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<sup>245</sup> Looking at ‘pure’ or ‘abstract’ music allows us to see, as Beever (2001, p. 214-215) notes, that ‘music is not a window through which one sees something else’, and to conclude that ‘The object of musical understanding and appreciation is music itself.’ See also Danto (1986), ch.1.

<sup>246</sup> Theories of meaning in music are often divided into two extreme camps: referentialism and absolute formalism. See Bowman (1991), 41-59. For a more palatable ‘third way’ which recasts formalism in a less radical light, see L.B. Meyer (1961). For an overview of what formalism says about the expressiveness of music, see Davies (1994), chapters 3 and 4.

<sup>247</sup> Davies (2006, p. 179-190) calls it a ‘hard case’, but also notes that it ‘is often regarded as the expressive art *par excellence*’ (179).

<sup>248</sup> AU 39. Scruton notes (AU 38) that, according to some defenders of the ideal of absolute music ‘no music can be absolute if it seeks to be understood in terms of an extra-musical meaning, whether the meaning lies in a reference to external objects or in the expression of the human mind. (...)Its *raison d’être* lies entirely within itself; it must be understood as an abstract structure bearing only accidental relation to the movement of the human soul.’

properties<sup>249</sup>. Attempts to define ‘absolute music’ negatively<sup>250</sup> have made the concept even more slippery: even the most notorious representatives of the absolute ideal (J.P. Richter, E.T.A Hoffmann, and even Hanslick in his vehement criticism of Wagner’s *Gesamtkunstwerk*) were interested in understanding the expressiveness of music<sup>251</sup>. A positive account of absolute music, advanced most notoriously by Schenker and Stravinsky, revolves around the idea that the absolute in music stems from its *objectivity* which, in turn, derives from its *structure*: “absolute music must be understood as pure form, according to canons that are internal to itself.”<sup>252</sup>

According to this view, musical purity is achieved only through appropriate ‘patterns and forms’ which are capable of ‘exemplifying structural relations’. One understands music by intuitively apprehending such relations. Though intuitive, such apprehension is not immediate: it both depends on and results in a form of understanding available only to those who belong to a certain ‘musical culture’<sup>253</sup>.

Scruton and Davies thus seem to be referring to slightly different things when they use the terms ‘pure’ or ‘absolute’<sup>254</sup>. Whilst Scruton flags the problems inherent in a musical ideal of total detachment, in the extreme, from both representation and expression, Davies is more concerned with the philosophical paradoxes of non-representational music and seems to use the

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<sup>249</sup> Some attach meaningfulness to representational content, but this is not the right connection to make. Representation is but one way in which something can be said to be meaningful. Musical meaning is better understood by reference to expressiveness than to representation. Something can have meaning without *representing* anything. Abstract art, and indeed the abstractness of musical form, epitomises this connection.

<sup>250</sup> Scruton, AU 37-38

<sup>251</sup> ‘Music is absolute because it expresses the Absolute’ (Hegel), *apud* Scruton, AU 38

<sup>252</sup> Scruton, AU 38

<sup>253</sup> Scruton, AU 39

<sup>254</sup> The concept was introduced by Wagner (who opposed the ideal) whilst the term ‘absolute’ was coined by J.G. Herder (Scruton, AU 39).

terms ‘pure’ and ‘abstract’ somewhat interchangeably<sup>255</sup>. Both seem to think it more fruitful to address the important philosophical problem of musical expressiveness by reference to the abstract (non-representational) character of absolute music, as defined by Davies, rather than to an ideal not even the most forceful theorists would be willing to take too seriously (even Schoenberg regarded music as an ‘essentially expressive medium’<sup>256</sup>).

The fact that abstract art can be meaningful would be obscured by taking absolute music to be non-expressive. Musical purity can be achieved by relying on the expressive powers of music itself, powers contained in musical structures as well as in what such structures evoke (their effect on listeners). Music is meaningful if it is expressive. Absolute music can be expressive and meaningful<sup>257</sup>. As such, it is interpretable<sup>258</sup>.

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<sup>255</sup> Scruton, AU 179-180: ‘(...) the mechanisms and results of association are not philosophically puzzling. There is a form of musical expressiveness that is so. After taking into account the contribution to the expressiveness of pure instrumental music made by association, a significant residue remains. I observed before that the expressiveness of such music is not semantic or representational; now we can add that nor is it at all associative. The crucial question remains: how can music express emotion when it is abstract and insentient?’

<sup>256</sup> Scruton, AU 39: ‘Absolute music, so defined, means more than ‘abstract’ music. There are other abstract arts, including architecture and some forms of painting. To call them abstract is to say that they are not representational. It is not to imply that they are to be understood by reference to no external purpose and no subjective state of mind. An abstract painting does not have to lack expression. Yet ‘absolute’ music is an idea that will not allow even that measure of impurity.’

<sup>257</sup> Note, however, that ‘expression’ is not synonymous with ‘evocation’ (Scruton, AU 49): ‘To say that a piece of music expresses melancholy is not to say that it evokes (or arouses) melancholy. To describe a piece of music as expressive of melancholy is to give a reason for listening to it; to describe it as arousing or evoking melancholy is to give a reason for avoiding it.’ Abstract music does not evoke anything, but it can be emblematic in its expressiveness, not just as a musical genre but in contrast with other abstract art forms. This is noted by Kivy (2002, p. 91): ‘part of the human appeal of absolute music, as a pure abstract art of pattern, is its emotive properties. (...) it may in fact be, for reasons that I do not fully understand, that sonic patterns, when they are *music*, are richer in emotive properties than abstract visual patterns as a rule are.’

<sup>258</sup> I shall not be attempting to answer the very difficult and contentious question of ‘why’ music, and abstract music in particular, is expressive. For the purpose of this dissertation, I assume that expressiveness is a possible quality of any musical genre, including absolute music. For an account of expressiveness in music, as well as an overview of philosophical writings on this matter, see, for example, Scruton, AU 49-61, 77-100; UM 49-56; AM chapters 3 and 6; Matravers (2007), 95-116; Boghossian (2007), 117-129.

Although emphasis on the autonomy of music, and its potential abstraction (i.e. separation from non-musical symbol systems) is at the root of formalism<sup>259</sup>, it does not necessarily entail an extreme formalist approach to music. Nor does recognition of the centrality of musical form necessarily entail rejecting the possibility of musical meaning<sup>260</sup>. Despite equating aesthetic value with form, formalism does not deny the possibility of musical meaning<sup>261</sup>. In fact, it presupposes that music has meaning by stressing that the meaning of works of music is to be found in its form<sup>262</sup>. Formalism accepts, indeed assumes, that form and meaning (content) are not opposites. It is also compatible with the claim that musical experience can be both emotional and intellectual<sup>263</sup>.

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<sup>259</sup> Aestheticism's 'Art for Art's sake' slogan, for example, is revealing of a reaction to the materialism of Victorian Britain and, most significantly, the rejection of morally sententious art. Autonomy was, for the aesthetes, a key-word. The same can be said of French Symbolism which, according to Max Paddison (1993, p. 69), 'emphasized both the separation of art from life and the process of progressive control over 'material'... which further encouraged the intensive development of the art work as a 'closed world'. See Hamilton, AM 85-86.

<sup>260</sup> For an illuminating account of formalism in music, and an interesting philosophical approach to formalism, see Kivy (2002), especially chapters 5-8. For accounts of the formalist stance on musical expression see Meyer (1956); W.B. Bowman (1991); N. Grimes, S. Donovan, W. Marx (2013). For an extreme formalist view on music, see Stravinsky's *Poétique Musicale* (1942), a collection of his *Charles Eliot Norton Lectures* delivered at Harvard in 1939-40 (published in English, as 'Poetics of Music' in 1947). For an interesting, and rare, connection between music and law through formalism see Beever (2011), 213-239.

<sup>261</sup> If, as suggested throughout this thesis, meaning is 'intelligibility', then recognizing the possibility of musical meaning is recognising that there is a cognitive element to musical experience. Something has meaning if, and only if, it is intelligible, i.e. understandable. To say that all meaning is cognitive, however, is not to say that it is purely intellectual.

<sup>262</sup> Beever notes that the label 'formalism' is often reserved for (and by) those who believe that music is not expressive, that it has no 'content' (F, 215). This, Beever writes, is but the result of formalism's 'victory' over other conceptions of musical meaning: there is no incompatibility between the claim (generally accepted today) that 'music is primarily and almost entirely to be appreciated for its form' and the view that music is capable of expressing emotion. Middle ground between 'heteronomist' (referential) and 'autonomist' (formalist) positions can be found within formalism itself. See also Bowman (1991), at 41: 'Examination of primary sources shows that the formalist conception of music and musical experience does not amount to a coolly cerebral 'study of form', one devoid of feeling (...). This leads to the conclusion that accounts of formalism as severing the link between musical form and meaning/expression are mere caricatures.

<sup>263</sup> See Meyer (1956): 'There is no diametric opposition, no inseparable gulf between the affective and the intellectual responses made to music.' (39) For an analysis of Meyer's work see Bowman (1991) and Budd (1985), ch. VIII.

Although, as noted by Hamilton, the idea of the autonomy of art is a modernist idea<sup>264</sup>, the kind of autonomy at stake here is autonomy from non-art, i.e. the question of the emancipation of music from ‘direct social function’, as approached most notoriously by Theodor Adorno<sup>265</sup>. This is not to be confused with the kind of autonomy sought by proponents of absolute music<sup>266</sup>. After all, ‘the ideal of absolute music is central to musical modernism<sup>267</sup> and modernists are known for ‘using’ art as a way of highlighting the importance of art itself.

There is, in Modernism, a ‘self-conscious attention to the medium itself.’<sup>268</sup> (Stravinsky’s ‘Three Pieces for String Quartet’ is an example of such radical questioning of a particular medium), which one detects in Adorno’s work. For him, autonomous art retains an important social function: social critique, but that function is fulfilled, not through content but through form. Once again, form appears as a vehicle of meaning<sup>269</sup>. Most importantly, though, there is a

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<sup>264</sup> Hamilton, AM 69

<sup>265</sup> Adorno (1988)

<sup>266</sup> Hamilton, AM 69: ‘(...) there are two interrelated senses of autonomy: the autonomy of one art (in this case music) from other arts, and the autonomy of art in general from non-art. Music’s rise in status involved both, but the ideal of absolute music equates primarily with the first- though it is true that the two kinds of autonomy interact, since if one art is subordinate to another, it cannot be high art.’ Hamilton writes of two different post-Romantic tendencies in the philosophy of art: the *aesthetics of form* and the *aesthetics of expression*, Kant being precursor of the former and Hegel of the latter. He adds (AM 70): ‘Although associated with an aesthetics of expression, Schopenhauer was ambivalent in his position, while Nietzsche argues that the material of music is permeated with gestures redolent of meaning and thus fused the aesthetics of expression with that of form.’ Hamilton concludes that ‘Both the aesthetics of form and the aesthetics of expression contributed to the ideal of absolute music.’

<sup>267</sup> Hamilton, AM 85

<sup>268</sup> Hamilton, AM 155

<sup>269</sup> AM 169. Hamilton cites Adorno (1997), 229, 226-27): ‘Art... is social not only because of its mode of production... nor simply because of the social derivation of its thematic material. Much more importantly, art becomes social by its opposition to society, and it occupies this position only as autonomous art. By crystallising in itself as something unique to itself, rather than complying with existing social norms and qualifying as ‘socially useful’, it criticises society by merely existing... through its refusal of society, which is equivalent to sublimation through the law of form, autonomous art makes itself a vehicle of ideology.’ The autonomy of art does thus not conflict with its inherently social character, with its intimate connection with society. In fact, it seems autonomy is, for Adorno, a condition for the fulfilment of art’s social function.

clear effort to blur the dividing lines between the different arts<sup>270</sup>, an effort which recognises an equality between music and other art forms, whilst recognising the autonomy of music from other forms of expression (literary or rhetorical, for example).

There are many examples of instances where the borders between different art forms are blurred. This is clear in Gerhard Richter's *Cage (1)-(6)*, a sequence of 6 paintings inspired by John Cage's inclusion of elements of chance in his music, as well as by his famous words 'I have nothing to say and I am saying it': Richter shares Cage's view of art as a space of complete freedom and believes in its indifference to moral, political and social concerns (perhaps less visible in Richter's work than in Cage's)<sup>271</sup>. But the media of expression used by Richter and Cage are very different and there is no suggestion that they ought to be equated.

Another interesting example is the friendship between Schoenberg and Kandinsky: the latter was so deeply affected by the former's atonal music that (it is said) he tried to transpose what he had heard to a canvas and produced *Impression III (Concert)*. It is also said that their remarkable exchanges led Schoenberg to try to express through painting what he could not express musically.

### 3.3.1 Experiencing, describing, interpreting

Does the non-representational character of musical meaning mean that musical experience is essentially non-cognitive? By 'cognitive', I mean involving the engagement of mental capacities

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<sup>270</sup> Hamilton observes that the growing abstraction of music in the 19<sup>th</sup> century inspired and influenced painting. Kandinsky's *Concerning the Spiritual in Art* is a manifesto for the desired connection between music and the visual arts (AM 155).

<sup>271</sup> It is curious, however, that the intimate connection between music and spirituality found in Schoenberg's music after 1933 is echoed in John Cage's own experimental explorations of silence (*4'33* was initially titled *Silent Prayer*), so Cage, as a composer, did not completely separate music from life.

such as reasoning, decision-making, and understanding or the ability to process information and apply knowledge, so the answer must be negative<sup>272</sup>. A lack of pictorial or representational power is not to be confused with lack of intelligibility (we assume that intelligibility depends on the formation of belief). Music can be understood without representing or depicting anything. Moreover, as noted by Meyer and others, it is plausible that the intellectual and the affective are tightly linked in musical experience.

The conception of meaning as intelligibility endorsed in this thesis raises another question. Does the non-representational character of music entail that experiencing music does not typically lead to the formation of belief but is instead akin to an ‘imaginative experience of ordinary properties’<sup>273</sup>? Roger Scruton, for example, answers in the affirmative<sup>274</sup>. Scruton explains musical experience as the imaginative experience of non-aesthetic concepts. The distinction to consider is that between perceptual experience and aspectual imaginative experience<sup>275</sup>.

For Scruton, there is a relevant difference between ‘hearing in’ and ‘hearing as’<sup>276</sup>. Scruton compares the relation between hearing sounds and hearing music (for example, hearing

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<sup>272</sup> In philosophical aesthetics, cognitivism is an interdisciplinary approach to the study of art. It relies on cognitive psychology in explaining how audiences respond to art. Neuroaesthetics, a recent discipline which studies art from the viewpoint of neuroscience, embraces cognitivism, in this sense. See, for example, Zeki (1999). For a critique see Hyman (2010), 262.

<sup>273</sup> Zangwill (2010), 91

<sup>274</sup> Scruton (1974); Hamilton, AM 88-94. For a similar view of musical experience, see Jerrold Levinson (1996 (i) and (ii) and 2006).

<sup>275</sup> Zangwill (2010), 92: ‘perceptual experiences rationalize beliefs and are not directly subject to the will, whereas imaginative aspect perceptual experiences do not rationalize beliefs and seem in principle to be subject to the will’. See McGinn (2004).

<sup>276</sup> See Scruton’s chapter on Wittgenstein and music (UM 33-42) and Stephen Mulhall (1992). See also, Richard Wollheim’s distinction between ‘seeing in’ and ‘seeing as’ in (1987).

a falling cadence) to that between perceiving shapes and perceiving their figurative content<sup>277</sup>. According to him, when hearing music, one hears movement ‘in’ a sequence of sound (a stream) which one would otherwise merely ‘hear as’ a sequence of sound. It seems reasonably non-contentious that one hears ‘something in sequential sounds, when one hears them as music’<sup>278</sup>, but what determines the shift from merely perceiving sound to hearing it as music?

Certain kinds of concepts are typically associated to our experience of music and become apparent in the way we talk about music<sup>279</sup>. Movement is one, and so is space. Scruton notes that ‘those spatial concepts do not literally apply to the sounds that we hear. Rather they describe what we hear *in* sequential sounds, when we hear them as music.’<sup>280</sup> His view is that musical experience depends on (consists in) a metaphorical transfer. According to Scruton, our experience of music involves a ‘spatial organization of the auditory field in terms of position, movement and distance. These are not applicable to the sounds themselves: they are metaphors’<sup>281</sup>.

A few brief comments are in order. There is a relevant difference between the way in which one *experiences* music and the way in which one articulates one’s experience of music. The former is, Boghossian suggests, essentially naïve, i.e. does not involve awareness, on the part of the listener, that ‘the concepts under which he or she is experiencing sounds are falsely applied

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<sup>277</sup> Scruton, UM 58

<sup>279</sup> Langer (1942, p. 238) tells us that music has “intellectual value”, that is has a “close relation to concepts, not by reason of its difficult academic ‘laws’, but in virtue of its revelations”.

<sup>280</sup> Scruton, UM 58

<sup>281</sup> See Paul Boghossian (2002) for objections. For an analysis of Peter Kivy’s explanation of the way we describe our musical experiences as expressing emotions, see Severin Schroeder ‘Music and Metaphor’, *British Journal of Aesthetics*, vol. 53, n.1 (January 2013), 1-19. Schroeder compares Kivy’s theory with Scruton’s and Peacocke’s and emphasises the role of metaphor in such descriptions.

to them<sup>282</sup>. The latter is comparatively sophisticated, and it is there that metaphorical expression often appears: one does make choices when explaining one's experience metaphorically.

It is also doubtful that metaphor can be equated with aspect perception: one does not perceive musical movement in the way one *sees* a duck rather than a rabbit in a drawing. It is difficult to conceive of metaphorical thinking as involving the double intentionality that aspect perception involves<sup>283</sup>, where we see both the design and the pictorial aspect, the latter *in* the former.

Finally, there seems to be a normative element to metaphors which one does not detect in aspect perception: seeing a platypus instead of a duck in the duck/rabbit picture cannot, in any relevant way, be said to be *wrong*<sup>284</sup>. Metaphors entail a warranted comparison between two different things, which does not typically occur in musical experience. Metaphor, rather, is best understood as an element of our *articulation* of musical experience<sup>285</sup>.

Note that the focus of this chapter is not on musical experience itself. Having narrowed down the scope of my analysis to musical performers as interpreters, my interest is in the way in which performers *interpret* (not experience nor describe) works of music, i.e. *display* their meaning. Focusing exclusively on the nature of musical experience would take us away from philosophical enquiry into the realm of psychology. Dwelling on 'linguistic descriptions', in turn,

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<sup>282</sup> Boghossian (2002) 50

<sup>283</sup> Boghossian (2002) 51

<sup>284</sup> Boghossian (2002) 51: 'Of course, both aspect perception and metaphor application may be causally constrained, so that only certain sorts of reaction are possible, but only metaphor seems normatively constrained. For both of these reasons, I doubt that metaphor can be modelled on aspect perception.'

<sup>285</sup> Boghossian (2002) 52: 'If we are to abandon explicability, we need to be given a reason for thinking that we will never be able to exit the circle of 'metaphors' that constitute musical experience. Scruton does not present such a general argument.'

could make us miss our target of understanding interpretation as explanation or display<sup>286</sup>. After all, neither ‘display’ nor ‘explanation’ are synonyms of ‘description’, and interpretative display in music, in particular, is far from being a linguistic enterprise<sup>287</sup>.

### 3.3.2. Emotion and belief

It is often said that music has the power of arousing emotion. The important role attributed to metaphor in our accounts of musical experience is explained by the fact that such accounts are commonly given in terms of the emotional states we attach to them. Musical meaning, thus, seems to be tightly connected to emotional impact. How do we harmonize this fact with an account of musical meaning as musical intelligibility, particularly in the case of Western art music or abstract music? Does this connection between musical meaning and emotion weaken the role of belief in musical experience?

Severing musical interpretation from the formation of belief would impact our idea of interpretation quite strongly: it would entail a divorce between musical interpretation and the bare concept which, as argued in Part I, is sustained by a notion of meaning as intelligibility. All interpretation is reason-giving (and is intended to result in understanding and the formation of belief). If musical experience were essentially non-cognitive, music would not be interpretable<sup>288</sup>.

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<sup>286</sup> The use of metaphor entails the absence of identity: the things compared do not share all features and the comparison depends only on certain similarities (Schroeder (2013), 16). See also Sibley (2001), 142-53.

<sup>287</sup> For a crucial distinction, which cannot be explored here, between comparisons and interpretative claims, see Schroeder (2013), esp. 17-19.

<sup>288</sup> This does not disregard the fact, noted by Raz (FNR 43-44)- and which reinforces the point made earlier about the cognitive character of imaginative engagement- that there are ‘cognitive-like mental states’ other than belief. It does suggest, however, that beliefs are distinctive because they have truth as a ‘constitutive standard’. This has two main consequences: (i) ‘beliefs are self-correcting, (...) we automatically lose a belief upon becoming convinced that

Such a conclusion would be absurd. Music is known for being eminently interpretable. To interpret music is to display (performance) or explain (criticism) its meaning. To display the meaning of a musical artwork is to make it intelligible to an audience.

Let us look more closely at emotion and belief. If, as I claim, interpretation is reason-giving, then we must understand what kinds of reasons are given to audiences by interpreting performers. After all, they are expected to interpret for others, and, in so doing, to enhance both their understanding of a work and to offer them an aesthetic experience (aesthetic enjoyment is the mark of a *positive* aesthetic experience).

One's emotional reaction to a work of music can be the result of *understanding* the meaning displayed. The adequacy of a notion of meaning as intelligibility to the bare concept of interpretation is confirmed by the possible rationality of musically-generated emotions. Music is eminently interpretable because it is intelligible. Music is intelligible because it is expressive. The connection between intelligibility and representation is a contingent one.

Affect and intellectual engagement (rationalization) are not mutually exclusive. There is no incompatibility between arousal of emotion and the intelligibility of the work performed. But the two should not be confused. And there is such a thing as reasons for emotions: it can be rational to feel a certain emotion as a result of hearing a certain piece of music<sup>289</sup>. Furthermore, there can be a reciprocal influence between emotion and belief: one may feel moved by a particular performance *because* one believes that the work performed ought to be understood as expressing helplessness and disillusion. This is often the case in musical experience. Conversely,

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it is false, and acquire it upon becoming convinced that it is true. (...) We cannot change the criterion for belief; and (ii) 'we do not acquire or change our beliefs at will. (...) we cannot choose not to have the mental state of which belief is the constitutive standard.' Raz also claims that the connection between truth and belief is independent from the question of the value of truth in beliefs (the former does not entail that 'true beliefs have greater value than false ones').

<sup>289</sup> On the fascinating and much debated topic of the rationality (and moral significance) of emotions see, for example, D'Arms and Jacobson (2000); Griffiths (1997). For an account of the links between emotions and excuses, from the viewpoint of a philosopher of law, see Gardner (2008)

one may come to believe that a piece of music expresses joy and hope in virtue of one's emotional reaction to it: I believe it expresses joy and hope *because* I felt joyful and hopeful when they played it in the concert hall.

These two possibilities, however, are symptoms of different processes and only the first, on my view, captures what happens in interpretative musical performance: emotion *may*, but need not, be aroused as a result of a belief held in virtue of the interpretative choices made by the performer. By contrast, inferring meaning (forming a belief) from experienced emotion amounts, at best, to a case of interpreting for oneself: the choices made by the performer are redundant and irrelevant to one's meaning-conclusion.

In a recent contribution to the literature on normative reasons, Joseph Raz introduces a distinction which is central to this thesis: the distinction between practical and adaptive reasons<sup>290</sup>. The crucial role of this distinction in a minimalist account of both musical and legal interpretation will become clearer as we move towards the next section and into chapter 5. But, at this stage, it is important to understand what distinguishes and connects emotion and belief from the point of view of an account of musical interpretation as a reason-giving process. If I am right, musical meaning, as much as legal meaning, can be understood as intelligibility in context, as something towards which belief is an appropriate attitude. If I am wrong, the claim, made in Part I, that meaning is the sustaining pillar of the bare concept of interpretation is defeated.

Raz tells us that standard reasons for belief are *adaptive*. By 'adaptive', he means reasons which 'mark the appropriateness of an attitude in the agent independently of the value of having

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<sup>290</sup> FNR ch. 3. Raz explains that epistemic reasons belong to the class of 'adaptive reasons', whereas reasons for action are an instance of 'practical reasons' (47)

that attitude, its appropriateness to the way things are.<sup>291</sup> He tells us that reasons ‘awareness of which could rationally induce, as well as establish the rationality of an emotion’ are adaptive too. He calls these reasons ‘affect-justifying’. Such reasons show that a certain emotion is an ‘appropriate response to the way things are’. So, on Raz’s analysis, both standard reasons for belief and affect-justifying reasons are adaptive reasons.

No doubt, musical experience involves an interplay of both kinds of adaptive reasons. But understanding the meaning of a work through interpretative display requires immediacy in responding to reasons and we do not find that in emotions: beliefs are more, and more directly, responsive to reasons than emotions<sup>292</sup>. In order to play her mediating role between a work of music and her audience, the musical performer must be *capable* of offering her audience reasons for belief, not just affect-justifying reasons: she is communicating the meaning of the work she is performing, and communicating involves informing. This suggests that, in certain domains, interpretation aspires to truth, not just to appropriateness. Interpretative acts aim at enhancing understanding, but such enhancement depends on knowledge of meaning-facts.

What makes an emotion an ‘appropriate response to how things are’ is different from what determines ‘the way our beliefs should adjust to track how things are’, in as much as beliefs, unlike emotions, can be simply true or false<sup>293</sup>. It is possible that, as Raz suggests, the appropriateness of an emotion to a certain state of affairs is assessed by reference to the truth of certain beliefs<sup>294</sup>. Be as it may, belief and emotion play different roles in musical experience.

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<sup>291</sup> Raz, FNR 47

<sup>292</sup> Raz, FNR 48

<sup>293</sup> On the relation between knowledge and true belief, see Hyman (2010\*). On the question whether belief aims at truth, see Owens (2003) (these are questions which, for obvious reasons, I am not to address here)

<sup>294</sup>Raz, FNR 49: ‘beliefs are part of what makes them the kind of emotions they are’.

And, from the point of view of this thesis, it remains possible to identify belief-formation as the kernel of musical understanding and interpretation.

The conclusion is that, although there is, in musical meaning, an important closeness between emotion and belief, interpretative choices, even when involving (as they often do) choices as to how to express certain emotions, are *reasons for belief*. Emotional states are relevant to the interpreter only if they are part of the content (and of the meaning) of a musical work. If so, they must be *presented* as such by the interpreter. Successful interpretation depends on the interpreter's ability to give her audience reasons for belief, not simply affect-justifying reasons.

The distinction between what is presented as part of the meaning of the work, and that which is not depends on the rules and conventions which define and constitute the relevant musical genre. Such standards are part of the background against which interpretation can take place. In the absence of such a background, which provides adequate constraint, there can be no interpretation.

### 3.4. A few notes on the authority of musical interpreters

In Chapter Two, I suggested that, in typical cases, musical performers purport to be authoritative interpreters. They don't just reason about the meaning of a work of music, they *display* it to an audience. Although there is no necessary link between authority and display, there is a strong link between interpretative display and authority. It is reasonable to assume that audiences expect musical performers to be capable of conveying musical meaning through display. That can explain why they choose to attend a certain performance rather than a rival one.

There is a double element of recognition in the audience-performer relationship: (i) the audience recognise the ability of the performer to understand the work performed<sup>295</sup>; (ii) the audience recognise the performer's ability to *display*<sup>296</sup> that meaning. It is reasonable to assume that there is, on the part of concert-going audiences, a belief in the legitimacy of musicians' claim to their attention. Because a belief may be false, and a claim may not be warranted, not all interpreter-performers exercise authority over their audience.

It is possible to imagine a performer who fails in displaying the meaning of a musical work while knowing what that meaning is. The creative dimension of musical interpretation manifests itself in the performer's ability to convey (through display) the meaning of a musical work. Meaning display, in turn, requires and depends on successful execution. The contrast with

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<sup>295</sup> Here understanding is the same as knowledge of meaning. One understands an object, at least partly, by understanding its meaning.

<sup>296</sup> By displaying the meaning of the work, i.e. by 'getting an audience to hear' the music, musical performers offer their audiences the 'perceptual proof' they need to ground their aesthetic experience and support their aesthetic judgments (in line with Sibley's view of aesthetic properties. See 'Aesthetic Concepts', 442-4). My claim is that display makes first-hand perceptual experience possible. As such, it is particularly apt at making an audience aware of a work's aesthetic properties.

conversational interpretation is visible: there is no need to recover authorial intention- the work is autonomous from its author as an object of interpretation.

It is important to note, however, that creativity in interpretation is not to be confused with the creativity of musicians as artists. Musicians are often required to be creative beyond the boundaries of the meaning of a particular work. So to speak of the creativity of interpreters is not to state the obvious, i.e. that musicians, as artists, are *creators*. To say that interpretation is partly creative, or involves a degree of creativity<sup>297</sup>, is simply to say that, within a certain set of constraints, it is possible (and often necessary) for an interpreter to display or explain a meaning of the object which has never before been considered or articulated. Interpretations can be innovative because interpreters are creative. Finding (good) grounds for a certain interpretative conclusion requires the ability to consider possibilities which may not be obvious, i.e. imagination.

Creativity, in interpretation, results from the need for imaginative engagement with an object. In musical performance, and in musical interpretation in general, such a link is particularly important. But it is not exclusive to the arts. Judges, too, are required to be creative (imaginative in the sense we give it) in their interpretative processes. The potential for creativity is part of the bare concept of interpretation.

My argument in Chapter Two, and in previous sections of this chapter, leads to the conclusion that both interpretative display (musical performance) and explanation (criticism) involve aesthetic judgment. Aesthetic judgment, Levinson tells us, is ‘authoritative’, i.e. it has the ‘pretention to prescribe preferences validly’ and promises to ‘account informatively, if

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<sup>297</sup> As Endicott, for instance, does in his recent LI 1, when he defines interpretation as “a *creative* reasoning process of finding grounds for answering a question as to the meaning of some object.”[my emphasis]

qualifiedly, for preferences actually had<sup>298</sup>. The connection between display (in musical performance) and the authority of musical interpreters is, thus, to be established by aesthetic judgment/reasoning. Musical interpretation depends on aesthetic reasoning, i.e. on reasoning about the aesthetic properties of the work and about the relation between the ‘structure’ of a work and its ‘intended expressive import’<sup>299</sup>.

The claim that there is some kind of authority involved in musical performance (as meaning display) might seem problematic. Are concert-goers expected to follow directives or commands? Are they being told what to do by the artists on stage? Clearly not. The kind of authority involved in aesthetic judgment and interpretative display of musical meaning is not practical. There is no claim, on the part of musical performers, to give their audience reasons *for action*. In the pages that follow, I hope to show briefly that musical interpretation involves a *purported* exercise of *theoretical* authority.

What is suggested here is not that interpreters of music necessarily exercise authority over their audience. It is, rather, that musicians, as interpretative performers, *claim* to exercise such authority over their audience. Their claim to authority derives both from their role of interpreting for others and from the authoritative character of aesthetic judgment. This, of course, means that their claim may be unfounded and that they may, despite the believability of their claim, fail in their purpose of communicating the meaning of a work to their audience. If they fail to do so, they fail in interpreting. If they fail in interpreting, they do not give their audience reasons for belief. Interpreting for others and theoretical authority are intimately connected.

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<sup>298</sup> Levinson (1998), 5. R. Miller (‘Three Versions of Objectivity’, in Levinson (ed.), *Essays in the Intersection* (1998), 27) makes a similar point: ‘Aesthetic judgments, like moral judgments, are claims to appraiser-independent truth that are often rational.’

<sup>299</sup> Ockelford (2005), 74-118, at 74.

My argument has progressed in three steps:

- (i) Although there is no necessary connection between interpretation and authority, a claim to authority is part of the vested concept of musical interpretation.
- (ii) Interpretative authority is not practical. Authoritative interpreters exercise theoretical authority over their audience (theoretical authority gives reasons for belief, not reasons for action).
- (iii) Display of musical meaning entails a normative claim about how the performed musical work *ought* to be understood by an audience.

#### 3.4.1. The claim

In Part I, no reference is made to authority. This is because there is no room for authority in the bare concept of interpretation: because the role played by authority varies across domains and types of interpretation, the connection between interpretation and authority is not a necessary one.

As we move into Part II investigating the role of authority in interpretation becomes crucial. This is due to the fact that the two chosen domains are examples of interpretation *for others*. This, in turn, makes it necessary to acknowledge the role of communication in the interpretative process without, however, losing sight of the bare concept of interpretation as the activity of reasoning about the *meaning of an object*. Because the ability to communicate the meaning of an object to an audience presupposes an epistemic advantage on the part of the interpreter in relation to her audience, musical performers, as interpreters, purport to exercise a

certain kind of authority over their audience. Such a claim to authority involves the ability to offer the audience something they would otherwise not have.

### 3.4.2. Interpretative reasons

Making a case for theoretical authority in interpretative musical performances depends on an account of the kinds of reasons musical performers purport to offer their audience. My claim is that, in their task of interpreting for others (their audience), performers purport to give them reasons for belief. Raz identifies our problem: are available epistemic reasons sufficient to warrant belief, in the case of musical performance?<sup>300</sup>

Musical performers, as interpreters, purport to give their audience reasons for belief in the interpretative conclusions their performances present. This is so even if the reasons for having such beliefs are not articulated, but merely *displayed* in performance: musical display is interpretative if, and only if, it is capable of giving an audience reasons for belief in the interpretative conclusions communicated.

This shows us that the link between aesthetic *communication* and interpretative performance is a tight one: there is no interpreting *for others* without the ability to communicate meaning. My suggestion is that communication of meaning (interpretation)- *the meaning of the work* performed- depends on the ability to give the audience reasons for believing in propositions about the meaning of the work. Such reasons, following Raz's definition, are 'facts that are part of a case for (believing in)' the truth of such propositions. To display the meaning of a work, albeit more indirectly than to explain it, is to offer an audience reasons to believe in certain conclusions about how the work *ought to* be understood.

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<sup>300</sup> Raz, FNR 37

Beliefs, of course, can be true or false. And propositions about the meaning of an object are also falsifiable: their truth or falsity is determined by reference to meaning-determining facts. For example<sup>301</sup>, one of the roles of time (or the ‘time-dimension’) in music is to use the contrast between even and jerky rhythmic movements to express opposite emotional states. The first movement of Beethoven’s Seventh Symphony is an example of the use of ‘dotted rhythms’ to create ‘tension and energy’ (at a fast tempo), whereas ‘It is enough’ (from Mendelssohn’s *Elijah*) and ‘Total eclipse’ (from Handel’s *Samson*) are instances where jerky movements are used softly, at a slow tempo, to ‘give a weary, dragging feeling to the emotional expression’.

The fact that such rules apply in the context of Western art-music is a meaning-determining fact: an informed audience will understand the slow tempo and softness of ‘It is enough’ as an expression of emotional weariness. And the fact that the orchestra plays the piece in that particular way is a reason for believing that weariness is what the piece expresses. The meaning of a work, I recall, is what it expresses.

Another time-effect in music is provided by phrasing. Cooke gives the opening theme of Schubert’s Unfinished Symphony as an example of the effect of *legato*: ‘Played *non-legato*, it would still make sense, but would lose its brooding, withdrawn character.’<sup>302</sup> Similarly, the choice to play the theme *legato* gives the audience a reason to believe that it expresses withdrawal, bleakness or melancholy. These examples show us that interpretative choices, in the context of musical display, purport to give audiences reasons for belief.

But to say that interpretative display gives audiences reasons for belief in certain meaning-conclusions is not to say that the meaning of the work coincides with the emotions experienced by the members of an audience. Indeed, music is often used to express emotion

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<sup>301</sup> Here I rely on Deryck Cooke’s analysis in *The Language of Music* (Oxford: Oxford University Press, 1959), 99-100 and borrow his examples.

<sup>302</sup> Cooke (1959), 101

and, as such, emotional states are often part of its meaning (because they are part of the content of the work), but musical meaning is not synonymous with affect. A work may express the enthusiasm of infatuation, and be understood by the audience as expressing that emotion (in virtue of the interpretative choices of the performer), without arousing that emotion in its members. It is plausible, for example, that certain (perhaps more cynical or bitter) members of the audience are saddened or irritated by the piece. Emotional impact is not to be confused with musical meaning. The emotions expressed through a performance, giving an audience reasons to believe that certain meaning-propositions are true, may be opposite to the emotions the music in fact arouses in the audience. An obvious example is that of fear: a piece of music may arouse fear whilst expressing anguish or loneliness.

The distinction drawn between meaning and affect is particularly relevant because the formation of belief, as suggested in the previous section, can result from an emotional experience. And it is easy to come to believe that a musical piece has a certain meaning *because* of the emotion it is capable of arousing. This, as noted before, is a case of interpreting for oneself. Even if the emotion is generated by a performance of the work, such a conclusion ignores the interpretative role of the performer: in this instance, I am the interpreter, I am reasoning about the meaning of a work and reaching a conclusion which, as far as I am concerned, is unrelated to the performer's interpretative choices. I merely interpret for myself (and am likely to interpret wrongly) if my point of reference for musical meaning is emotional arousal.

The conclusion reached in step (ii) of my argument is that musical performances are interpretative of a work if, and only if, they offer their audiences reasons for belief in the truth of propositions about the meaning of the work performed.

### 3.4.3 Normativity

The topic of the normativity of meaning is complex and I cannot take its analysis further here. My claim in (iii) is simply that interpretative display (and the interpretative choices it involves) is capable of being authoritative in as much as it is capable of giving an audience reasons to believe in the truth of its meaning-conclusions. That being the case, interpretative claims can be expressed in statements about how an object *ought to* be understood. This ought, however, is not a practical ought. It is merely epistemic: it provides an epistemic reason for understanding the object in a certain way.

Let us revisit Cooke's Schubert example:

(S1) *Legato* is used to convey broodiness, melancholy, or sadness (rule)

(S2) The *legato* of the opening theme of the Unfinished Symphony expresses melancholy

(S3) The opening theme of the Unfinished Symphony is melancholy

(S4) Performer p *ought to play* the opening theme of the Unfinished Symphony *legato*

(S5) Performer p's choice of playing the opening theme of the Unfinished Symphony *legato* is a reason for audience a to believe that the theme expresses melancholy

(S6) Audience A *ought to understand* the opening theme of the Unfinished Symphony, as performed by performer p, as melancholy.

S1 informs us of the existence of a convention (perhaps a rule) for the use of *legato* in a certain musical tradition or genre. S2 and S3 are equivalent: they are statements of meaning and tell us what a particular piece means or expresses. S4 is a conditional statement: if the performer

wishes to comply with the score or to be faithful to the work, she *ought to* play the opening theme *legato*. S5 follows from S2 and S3 and expresses meaning-engendered [ME] normativity: performer p's interpretative choices (in this case, the use of *legato*) are *normative reasons* for belief in the melancholy tone of the opening theme or, alternatively, a normative reason to understand the opening theme as melancholy. S4 and S6 clearly contain different *oughts*: although they both are normative statements, the *ought* in S4 is a practical *ought* (veered towards action), whereas the *ought* in S6 is an epistemic *ought* (veered towards belief).

These considerations can hopefully give some substance to the idea that musical performers, as interpreters, display the meaning of the works they perform and, in so doing, typically claim to offer their audience reasons for belief in the truth of the meaning-conclusions they advance.

## *Taking stock*

I have sought to show, in this chapter, is that there are a few basic, true things one can say about music. Let us take stock of them:

- (i) Music is constituted by sound (or by its absence where it was expected)<sup>303</sup>
- (ii) Music is the practice of artistically organising sound
- (iii) Experiencing music is different from describing one's experience of music. Musical experience is not essentially metaphorical.
- (iv) Describing musical experience is different from interpreting music (for oneself or for others).
- (v) Musicians can have many purposes. Their *primary purpose*, as participants in an artistic practice, is to afford aesthetic experience.
- (vi) Music, like law, is not a functional kind. It is identified, not by its function, but by its medium (sound) and its mode of operation (organizing sound as a source of aesthetic experience).
- (vii) An experience is aesthetic if what is experienced is intrinsically valuable (the object of aesthetic experience is not a thing but a state of affairs).
- (viii) Music is interpretable because it is intelligible.
- (ix) Musical interpreters offer their audiences reasons for belief by displaying the meaning of a musical work.

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<sup>303</sup> John Cage once said, when asked what his purpose was in writing music: 'I do not deal in purposes; I deal with sounds. What sounds are those? I make them just as well by sitting quite still looking for mushrooms.' (2009, p. 192)

- (x) Interpretative statements about music are not purely descriptive, though they may depend on description. It is possible to distinguish between description and interpretation in abstract music.

## CHAPTER FOUR

### EXPLAINING MEANING: LAW

‘Art is special in that it is part of its nature – captured by the presumption in favour of interpretations which show the interpreted work to bear on important issues- to be a mirror to our lives and world. History and law are not mirrors; they are there, made by those who forged them, and are merely to be understood by those who interpret them. Or are they?’<sup>304</sup>

#### 4.1. Legal interpretation as explanation

Chapter Two introduces the idea, to be developed here, that legal interpreters are not only interpreters *of law*. Legal interpreters typically *explain* legal meaning, but other things besides the law have legal meaning<sup>305</sup>. Explanations of legal meaning can take various forms, but their distinctive mark is that they rely on *legal reasons*. In the next pages, it will be advanced that explanation and authority are connected in the domain of judicial interpretation. I will begin by clarifying the concept of explanation. This will make it possible to refine the idea, introduced early in Chapter Two, that, whilst musical performers are *expected* to interpret a musical work for their audience, courts (judges) are *required* to explain legal meaning to those at whom their decisions (rulings) are directed.

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<sup>304</sup> Raz, BAAI 264.

<sup>305</sup> Note that this formulation is not intended to exclude display from legal interpretation. I noted in Chapter Two that displays of legal meaning by legal officials are not infrequent: the verdict of a jury and the use of the gavel in American courts are examples. But they are marginal cases of legal interpretation.

#### 4.1.1. Three fine (preliminary) distinctions

##### (i) Explanation and description

To explain something is not to describe it, though an explanation can take the form of a description. Description registers, explanation selects and relates. Description can identify what is *distinctive*. Explanation elucidates and clarifies what is *relevant*. What is described does not necessarily coincide with what is explained. For example, one describes what one *sees* but explains how one *feels*. It is possible to describe the physical manifestations of an emotion but the emotion itself defies description. An emotion may, however, be explained. Metaphor is more commonly used as a form of explanation than as a form of description (music being an important exception). Descriptions can identify<sup>306</sup>:

**[DS] x is rectangular, flat and smooth, 15 cm long, yellow with three black horizontal lines and two asymmetric silver triangles painted on one of its surfaces.**

A typical explanatory statement *relates* an object to another and explanation entails a choice as to what can be *relevantly* said about that object:

**[ES] X is a ruler. Rulers are straightedges. They are used for transcribing straight lines, checking the straightness of lines or measuring distances on flat surfaces.**

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<sup>306</sup> Of course, one can describe something already identified.

Explanation may, but need not, be constituted by description<sup>307</sup>. One need not describe an object in order to offer an explanation of that object. If one's interlocutor knows the object, or if one assumes she does, there is no need for description. But even when description precedes explanation, different objects are at stake in each activity. Description is *of this object*. The more features of the object it includes, the more complete it is as a description. A description can be complete.

Explanation, by contrast, is never the complete explanation of what has been described. It is the elucidation of *a certain aspect of* what has been described. For example, ES is an explanation of what rulers are for. It could be offered as an answer to the question 'What is X?', but also to the question 'Why does X have calibrated lines on one of its surfaces?', or 'Why is X flat?'. If we compare DS and ES, we see that different features of the object are mentioned in each statement. While it is relevant to mention that X is yellow with three black lines and two asymmetric green triangles on one of its surfaces when describing it (DS), no such mention is found in ES.

In order to explain what kind of thing X is, it is important to mention its flatness and straightness, but not its colour or design. Knowing what X looks like is necessary if one's aim is to identify X (my ruler) and distinguish it from Y (John's ruler), for example. In order for both X and Y to be rulers, they must both be flat and have calibrated lines on one surface. What distinguishes X from Y (and allows my addressee to identify X as X) are its bright colours and unique design. DS allows my addressee to identify *my ruler- ruler X-* correctly. ES is not informative in the same way as DS. Of X (my ruler) it says simply that it is a ruler (not a

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<sup>307</sup> *Pace* von Wright (1971), who writes (135): 'Before explanation can begin, its subject- the explanandum- must be described.' I would replace 'described' with 'identified' in the quoted passage. I do, however, agree that 'Any description may be said to tell us what something 'is'. That is why I say description is an identification tool, unlike explanation. Von Wright also notes, relevantly, that '(...) understanding what something is in the sense of *is like* should not be confused with understanding what something is in the sense of *means* or *signifies*. The first is a characteristic preliminary of causal, the second of teleological explanation.'

shoehorn, a spatula, or a knife). What ES does is explain the artefactual function of X as a ruler. Of course, ES is only capable of fulfilling its elucidative role if my interlocutor knows X. But the fact that X is yellow is completely irrelevant to an understanding of its artefactual function. Description and explanation are not the same.

Explanations are fragmentary. They refer only to *relevant*, duly identified aspects of an object, not to all features of that object. Explanation is an instrument of elucidation. To explain something is to answer a ‘wh-x’ question<sup>308</sup>. This means that not all explanations are justifications. One can ‘explain a fugue’<sup>309</sup> without explaining *why* a fugue is as it is. And of course explaining a fugue can either mean explaining *what* a fugue is (i.e. what distinguishes it from other compositional techniques) or explaining *a* particular fugue (i.e. how a specific piece - e.g. J.S. Bach's Prelude and Fugue in E Flat Major BWV 552- is structured and develops).

The former type of explanation focuses on features which are unique to fugues, leaving out other features. The latter type of explanation, in turn, either presupposes that the piece explained is a fugue and proceeds on the assumption that the addressee is aware of that fact (without explaining what makes it a fugue), or gives reasons for calling the piece a fugue- rather than a sonata, a toccata, or a prelude, for example. The fragmentary character of explanation stems from its reliance on reasons. Description lists features<sup>310</sup>. Explanation sometimes adduces reasons<sup>311</sup>

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<sup>308</sup> One can explain what, why, when or how.

<sup>309</sup> I am borrowing Annette Barnes’ example (OI 153). Barnes uses the term narrowly to refer only to ‘why’ questions and concludes that not all interpretation is explanation.

<sup>310</sup> On the differences and similarities between interpreting and describing, see Annette Barnes, OI ch. 8.

<sup>311</sup> Raz (referring to reasons for action), PRAN 17: ‘Reasons can be used for guiding and evaluating only because they can also be used in explanation, and their unique feature as a type of explanation is that they explain behaviour by reference to considerations which guided the agent’s behaviour.’ There are reasons why, but no reasons what or how. So not all explanations adduce reasons.

(ii) Explanation and justification

Explanation may, but need not, *take the form* of justification. A scientist explains data without seeking a *justification* for those data. Causal explanations are non-justificatory.

**[CE] x had an accident *because* he was under the effect of drugs**

Note that [CE] does not involve making normative sense of x's actions (and doesn't offer a description of anything either). The reason invoked (being under the effect of drugs) is not x's own reason for acting in a certain way. It is not even part of x's *motivation* to act in a certain way. It is not a *reason for action*. It is a fact which, in conjunction with other facts, allows us to understand a chain of events. Reasons that explain what we do may fail to justify our actions (and vice-versa)<sup>312</sup>.

Some explanations are justifications. This happens when they explain why something is reasonable or right:

**[JE] x ate a bar of chocolate *because* she was in pain**

((i) Chocolate consumption triggers the release of endorphins, (ii) endorphins are an endogenous opiate, (iii) opiates reduce sensitivity to pain, thus chocolate can reduce sensitivity to pain).

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<sup>312</sup> Stanford Encyclopaedia of Philosophy, on the difference between explanation and justification: <http://plato.stanford.edu/entries/reasons-just-vs-expl/>.

The difference between [CE] and [JE] is easy to see: the fact that chocolate has pain-reducing properties is a reason for eating it if one is in pain. Being in pain is not just x's reason for eating chocolate, it may be a good reason for doing so (although it may be outweighed by other reasons against it- being allergic to cocoa, being lactose-intolerant, or having Paracetamol tablets at hand among them). Being under the influence of drugs, however ([CE]) is not a reason *for* x to have an accident (it is not part of *his* reasons for action nor is it obviously, in any way, commendable). Rather, it is the fact which caused the accident (which, by definition, could not have been x's choice). [CE] does not show us what reasons counted *for* the agent, but rather what it was that *caused* the agent's accident.

To justify is to make a case for reasonableness, necessity or proportionality. An example is self-defence as a (complete defence) justification, rather than an excuse, in cases of assault in English Law. The common law principle is famously expressed in *Palmer v R*, [1971] AC 814<sup>313</sup>:

It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is *reasonably necessary* [my emphasis].<sup>314</sup>

Justifying alleged criminal conduct by invoking the right to self-defence depends on showing that the force used by the defendant was *reasonable*, not excessive and disproportionate in relation to the faced threat. Here, *reasonableness* is the kernel of justification: A is justified in hitting an intruder with an umbrella (and causing him injury) if the intruder was armed and tried to attack her. By contrast, B may not be justified in fatally wounding an unarmed intruder. In order to qualify as an act of self-defence, an act must be a reasonable response to a threat, e.g.

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<sup>313</sup> Approved in *R v McInnes*, 55 Cr App R 551

<sup>314</sup>The principle is relevant to the application of Section 3 of the Criminal Law Act 1967, which reads as follows: "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large." The overlap between the Act and the principle of self-defence and section 3 is partial: unlike the former, the latter does not apply to civil matters (e.g. trespass)

*necessary* and *proportionate* as a way of *preventing harm* to oneself or others. Explanation relates and elucidates. Justification commends and vindicates: it shows something to be reasonable, necessary, or proportionate.

(iii) Explanation and ascription

Although explanation and ascription are intimately related, they are not the same. Explanation either depends on or results from ascription. It is often necessary to ascribe a quality to an object in order to offer an explanation of it, and ascription can be a by-product of explanation. Ascription is synonymous with attribution: a declaration that something belongs to someone or something: ‘This is mine’, ‘That is his hat’, ‘This table is red’, ‘Rulers are flat’. To ascribe is to *assign, attribute, or impute* a quality, characteristic, action, effect, or product to a person or thing.

But ascription can also be understood, more restrictively, as synonymous with *determination, allocation, or stipulation*. This is indicative of the fact that ascription and authority often go hand in hand. A power to ascribe is often coupled with the exercise of practical authority. In contexts where practical authority is exercised, ascription and prescription are intimately connected: when a judge ascribes a right to A in a litigated case, such an act of ascription has *imperative force* which reflects on other legal statements made in the ruling: that B owes A x, or that A cannot be held responsible for y, for example.

Thus ascription can be understood both as mere attribution (‘My car is blue’, ‘B is manipulative’), or as determination (‘A is liable for trespass for what his horse has done on B’s land’<sup>315</sup>). When used in the latter sense, ascription is contrasted with description<sup>316</sup>, but not with prescription.

Explanation can depend on ascription (in both senses), or have it as its effect. While it is not common to explain without ascribing (in the broader sense), it is possible to ascribe without

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<sup>315</sup> This example is used by Hart (1951), 173

<sup>316</sup> As noted by Hart (1951), certain concepts (legal concepts among them) defy description. Even where no exercise of authority or official capacity is involved, ascription is akin to recognition and involves “a blend of fact and rule, if not law” (186).

explaining. Even in the context of more casual ascriptive statements, ascription depends on the existence of commonly accepted rules as applied to a set of relevant facts: ‘This pen is Jane’s’, can be used to state the obvious or inform John, who was mistaken, that the pen is, in fact, Jane’s, not mine. Hart tells us that the same statement can be ascriptive if it involves the use of ‘defeasible concepts’ (the concept of property among them) and is ‘similarly related to supporting facts’. This happens both in the more ‘casual’, ordinary cases of ascription or in those where the use of a sentence is ‘operative’ or ‘performative’<sup>317</sup>. If pronounced by a judge, ‘This pen is Jane’s’ is equivalent to ‘A is liable to pay damages to B’.

Explanations can, but need not, be ascriptive. But authoritative explanations are normally ascriptive (in the narrow sense). The absence of a conceptual connection between explanation and ascription confirms the absence of a necessary connection between interpretation and authority. But explanations offered by authoritative interpreters are always ascriptive of meaning.

#### 4.1.2. Explanation and authority

It has been established that there is no *necessary* connection between interpretation and authority. But to interpret *for others*, as suggested in Chapter Two, is to purport to offer them content-independent preemptory reasons for belief. Does one have to exercise authority over one’s audience in order to *explain* something *to* them? Is having authority a condition for providing a

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<sup>317</sup> J.L. Austin (1961). Austin is cited by Hart (1951), who calls our attention to the similarities between casual and operative uses of certain statement (185-187).

*good* explanation of something? What makes an explanation a good one? Is it possible to explain something to someone without offering them reasons for belief?

An explanation is a statement that makes something intelligible. To explain is to clarify or account for something. To explain legal meaning, as I argue in this thesis, is to make an object *legally intelligible*. To make an object legally intelligible is to place it against a certain background of conditions, practices, procedures, institutions and determine its significance within such a framework. More will be said on this point in due course.

It is important to note that, in order for her claim to authority (both interpretative and legal) to be believable, a legal interpreter must be capable of *explaining* legal meaning. She must be capable of formulating conclusions about the legal intelligibility of an act, fact, or behaviour (whatever the case may be). She must know enough about the law of her jurisdiction to be able to determine the legal relevance of certain acts, facts, or events. Interpretative authority, I recall, depends on epistemic advantage (we may also call it expertise). Such expertise or advantage is a matter of degree: the greater the advantage, the more likely one is to be justified in one's exercise of authority<sup>318</sup>, and the more credible one's claim will be.

A claim to interpretative authority is a claim to offer an audience content-independent peremptory reasons for belief. Such a claim is possible only in the presence of an epistemic gap between interpreter and audience, a gap which, in turn, suggests a certain kind of 'superior expertise' on the part of the interpreter. A purported exercise of theoretical authority, as noted in Chapter Two, is justified only if the requirements of the NJT are met, i.e. if the superior expertise of the interpreter makes her interlocutor or audience more likely better to comply with the reasons that apply to them if they accept the interpretative conclusions as authoritatively

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<sup>318</sup> Note that epistemic advantage is a condition of interpretative, not legal, authority. So judges need not (and often do not) have *greater* expertise than barristers. They are expected to have *sufficient* expertise to discharge their duties. As legal interpreters, judges are no different from barristers: the latter, too, are expected and equipped to explain legal meaning to others.

binding than they would if they followed the reasons (excluding the fact of the authoritative pronouncement) that apply to them directly<sup>319</sup>.

#### 4.1.2.1. The equal standing of explanation and display in relation to authority

The line of argument introduced in Chapter Two (and applied, in Chapter Three, to musical performance) shows us that there is no necessary link between authority and explanation: both explanation and display can be authoritative. They are activities in which one engages only when interpreting for others.

Display of musical meaning, I recall, is authoritative when a musician succeeds in offering her audience the right perceptual proof of the character, content, or meaning of the work performed. As suggested in Chapter Three (section 3.4.), aesthetic experience depends on the perception (by hearing, in the case of music) of the aesthetic properties of the work performed. Similarly, the verdict of a jury (an example used in Chapter Two) is interpretatively authoritative if it succeeds at displaying the legal meaning of the relevant facts in the case.

An explanation of legal (or musical) meaning is authoritative if the interpreter succeeds in offering *weighty* reasons for her interpretative conclusions. Unlike display, explanations are offered in articulated form. The adequacy of explanation or display to a particular domain of interpretation depends on the particular, domain-specific constraints different interpreters face. Musical meaning is more amenable to display because the optimal way to communicate it is by affording a direct aesthetic experience<sup>320</sup>. In music, direct aesthetic experience is possible only

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<sup>319</sup> Raz, MF 53.

<sup>320</sup>See Frank Sibley's works cited in Chapter Three (section 3.2.).

through musical performance (live or recorded, interpretative or not). Musical meaning is such that direct perception of a work's aesthetic properties (disregarding the marginal case of the solitary score reader<sup>321</sup>) is a necessary condition of its aesthetic enjoyment.

By offering an audience the perceptual proof they need to support their aesthetic judgments, musical performers offer them reasons for belief. Reasons offered through display of musical meaning can warrant belief. But, because music is an art form, claims to interpretative authority are compatible with the perpetual reinterpretability of works of music. And display is better suited to convey such reinterpretability. There is no incompatibility between an exercise of interpretative authority through display and the reinterpretability (or openness, if preferred) of musical works (as works of art).

By contrast, explanation is dominant in legal interpretation because the process of selecting and identifying the right legal reasons to support one's interpretative conclusions must rely on verbal articulation. Whilst the result of interpretative display can be and often is (perhaps even, in some cases, ought to be) something which calls for further interpretation, explanation, by its nature, is more likely to afford clarity or elucidation, more likely, that is, to narrow the epistemic gap between interpreter and audience. Narrowing the epistemic gap between the courts and their audience, or, indirectly, between legislation (or other sources of law) and its addressees, is necessary to the fulfilment of the rule of law requirements of clarity and followability<sup>322</sup>. The desideratum of clarity, in particular, is closely connected to the need to

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<sup>321</sup> An example used in Chapter Three, section 3.2.1.

<sup>322</sup> See Fuller (ML 46-91). John Gardner (LALOF, ch.8), has recently questioned the *formal* character of rule-of-law requirements.

identify ‘clear standards of decision’ in judicial decision-making<sup>323</sup> as a way of preventing arbitrariness.

The tight link between judicial interpretation and explanation can be traced back to the desired predictability of government<sup>324</sup>. Unpredictability is a source of arbitrariness, clarity is a condition of followability which, in turn, is a source of predictability. The clear identification of judicial standards is a way of narrowing the epistemic gap that separates judges from those at whom their decisions are directed. Narrowing the epistemic gap is advantageous from a rule-of-law point of view.

Another important implication of my account of the link between explanation/display and authority is an obvious one: it is possible for an interpreter to fail in her attempt to explain or display meaning. Failure to explain or display meaning, i.e. to offer one’s audience good reasons for an interpretative conclusion, leads to a failure in exercising authority. The opposite, however, is not true: failure to exercise interpretative authority (to offer an audience *content-independent peremptory* reasons for belief) does not entail failure in explaining or displaying legal meaning. Legal meaning can be explained or displayed without the intention to give reasons which outweigh (or displace) other reasons for belief in certain interpretative conclusions.

It should now be possible to move safely towards the idea that legal interpretation is *predominantly* explanatory. By this it is meant that legal interpreters primarily *explain* legal meaning. Unlike musical performers, judges do not merely *display* legal meaning but are expected to

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<sup>323</sup> Fuller, ML 65, cited by Gardner, LALOF 199-200, tells us that such standards ‘emerge from a case-by-case treatment of controversies as they arise’. Gardner notes that Fuller was not concerned with the clarity of legal language or with how clearly standards are conveyed to addressees. His concern was, rather, about ‘the clarity of the standard itself. To what extent is it afflicted by indeterminacy, or (...) what are often known as ‘grey areas’?’ (200)

<sup>324</sup> Endicott, VII 186-203. Endicott identifies a possible puzzle: because (i) the rule of law requires judicial control of official decisions, (ii) judges are themselves officials, and (iii) adjudication, the technique for controlling decision-making, is not ruled by law, the rule of law is conceptually impossible. His conclusion, against (i), is that the ideal *forbids* even the potential for judicial control of every official decision (195).

articulate it and to justify their interpretative conclusions by reference to their legal system<sup>325</sup>. Legislators have a different role and are, in this respect, comparable to composers, who typically provide an interpretative framework within which interpreters are allowed to work.

In fact, what legislators and composers do falls squarely into a broad idea of communication: they typically produce texts (musical and linguistic) with view to communicating something to someone. The nature of what is communicated is, of course, very different in the two domains, but the enterprise is essentially the same and, in both cases, presupposes an addressee who is proficient in the relevant language: legislators in a Spanish-speaking country produce legislation for Spanish *speakers* (both at the level of officials and ordinary citizens); composers produce musical notation *for musicians* and audiences with sufficient musical experience and understanding. This, however, does not suggest that musical and legal meaning are reducible to communication intentions. On the contrary, these underdetermine the musical and legal meaning of an object.

The centrality of interpretative *display* to music is contrasted with the centrality of *explanation* to judicial interpretation. In most cases of legal interpretation, display will not suffice as a way of interpreting for others, as happens in musical performance. This happens, as noted in Chapter Two, because display always creates a new object demanding explanation and this tends to delay and complicate practical decision-making. Music will not cease to be music if it is produced through an act of utter self-indulgence. But a judge must find a solution for the case at hand within the frame of meaning of her legal system. She is expected, in her ruling, to explain

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<sup>325</sup> Hans Kelsen (1967, 234) famously held that there is no essential difference between legislation and adjudication from the point of view of the distinction between *application* and *creation* of law, but he seems to have disregarded a very important difference between legislating and judging: unlike the legislator, a judge is required to legally *justify* her decision. Justification is, for a judge, a legal duty. Bulygin (1995), 25: 'Legislators sometimes state the aims they pursue in creating laws, but this is not regarded as part of the law; on the contrary, the justification of a judicial decision is a part and a very essential part of the verdict of a judge. The judge is under an *obligation* [emphasis added] to justify explicitly his decision, i.e. the individual norm issued by him; he must state the reasons for adopting one particular solution to the problem submitted to him. If these reasons are not sufficient his decision is arbitrary and is susceptible to be revised by a higher court.'

the legal meaning of the facts under dispute. If she fails to rely on legal reasons to reach her conclusions, and if her decision is not traceable to the legal meaning of the facts, she acts unlawfully (in breach of duty). Explanation of legal meaning is a desideratum of success in legal interpretation. Successful interpretations are *good* explanations of *legal meaning*.

The reason why explanation is here presented as the central case of legal interpretation, and judicial interpretation as our paradigm, is that legal interpreters claim *interpretative authority* over their addressees and explanation is the medium through which reasons for belief are adduced. In the case of appellate judges, as will be argued in the following sections, interpretative authority is instrumental to the sound exercise of their legal authority which may be undermined by inability to offer their addressees sound reasons for belief in the truth of their interpretative statements.

## 4.2. On the variety of objects of legal interpretation

Legal interpretation is not restricted to legal texts. It is trivially true that things other than texts have meaning. To say that they have meaning, under the bare concept of interpretation, is to say that they are intelligible or capable of being understood. Chapter Three has given us the opportunity to see that, unlike musical interpretation (understood as the interpretation of musical works), legal interpretation is not defined by its object. This translates into two different claims: (i) legal texts are not the only objects of legal interpretation, and (ii) legal rules are not interpretable. Let us look at claim (ii) first and later return to claim (i).

### 4.2.1. Rejecting the rule-centric view

The idea that legal interpretation is not distinguished from other domains of interpretation by its object may seem counter-intuitive. After all, is legal interpretation not the interpretation of law? And is law not an affair of rules<sup>326</sup>? The answer to these two intuitive questions is yes, but with important qualifications to which this section and next will be devoted.

Saying that the concept of a rule is central to our concept of law does not entail that rules are the most important or typical object of legal interpretation. Rules may be central to our concept of law without being central to legal interpretation. The centrality of rules to legal interpretation is what I wish to challenge here. This view is popular and one wonders whether its popularity results from (or, by contrast, explains) the fact that it is generally taken for granted and left unchallenged. It is rather easy to accept the intuitive idea that legal interpretation (and

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<sup>326</sup> From Hart, CL 13, 79-99, 117, 213, 249-50.

judicial interpretation in particular) is the interpretation *of law* and, since law is made up of rules, to interpret law is to interpret legal rules. The rule-centric view I wish to challenge can be expressed as follows:

**[RC] Judicial interpretation is interpretation of legal rules**

As noted earlier in this thesis (Chapter Two), legal interpreters (judges, in particular) are called upon to interpret facts, events, behaviours, utterances, and documents which have legal meaning but are not part of the law. Consequently, law is not best seen as an object of legal interpretation (legal interpretation is not distinguished by its object). Timothy Endicott writes<sup>327</sup>:

There is no room for interpretation if no question arises as to the meaning of the law. (...) Legal interpretation comes into play when there is a possibility of argument as to the meaning of the law.

This is an intuitively attractive idea. After all, without law there is no legal interpretation, and it is obvious that legal meaning must be understood by reference to the law. The label ‘legal’ confirms the logical link between legal meaning and the law and it would be silly to ignore it. Legal meaning is determined by the law of a particular legal system, so why not simplify and say that legal interpretation is the interpretation *of the law*? Despite their harmless appearance, these ideas are misleading for three reasons: (i) legal meaning is not the meaning of the law, (ii) legal meaning is not the only kind of meaning the law is capable of having; (iii) the law does not have a monopoly of legal meaning.

I am not suggesting Endicott has overlooked these distinctions but the passage above does encourage the conclusion that the law is the primary *object* of legal interpretation and that

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<sup>327</sup> Endicott, LI 112

the activity of legal interpreters is distinguished from that of musical interpreters, for example, by the fact that the former, and not the latter, interpret *the law* or try to determine its *meaning*, whatever it may be. Chapter Three helps us to understand that, unlike musical meaning (which is exclusive to music, or musical works), legal meaning is not exclusive to law: anything - from the birth of a baby to a volcanic eruption, from the waving of a hand to a love letter- can potentially have legal meaning.

Furthermore, legal artefacts (statutes, constitutions, directives, provisions) are capable of being interpreted from a variety of viewpoints and within different frameworks: an authoritative legal text can be interpreted by a historian, an anthropologist, an actor, or a theologian. Each of these interpreters may have a considerable amount of interesting (germane, correct) things to say about the text without once referring to its legal significance. Their conclusions are interpretative if they say something about the text's meaning as the kind of thing it is taken to be: a historical document, evidence of certain universal human traits, a source of background information about a fictional character's profession, expectations, convictions, or evidence of the possession of certain religious beliefs by the author of the text, etc.

But none of these examples involve questions about the legal meaning of the text and are thus, not examples of legal interpretation. Of course the different interpreters may know that the text is an authoritative legal text, but legal interpretation occurs only if the meaning they explain is the legal meaning of the text.

So it is more helpful to look at legal rules and other standards (law) as the background against which legal interpretation is possible. Of course, *legal provisions* (discrete valid legal acts) can be, and are, interpreted. Indeed, they are a very important object of attention because understanding their legal meaning is a condition both of *acting in accordance with* the standards they express and *applying* them correctly in the process of resolving legal disputes.

But legal provisions and legal rules are different things. Moreover, not all understanding is interpretative. The insight that interpretation does not determine action in accordance with a rule and that one can follow a rule (and thus understand what it requires) without interpreting is an important lesson we learn from Wittgenstein's rule-following considerations<sup>328</sup>.

Rejecting the rule-centric view of interpretation involves realizing that there is an important difference between *legal provisions* and *rules*. Legal provisions are (normally) texts, rules are not. Legal provisions are typically produced by acts of authority, they are capable of *legal validity*. Legal provisions, or, more precisely, the acts which posit them, are social facts. Rules and norms, by contrast, need not be *produced* by acts of authority. They are not social facts, although the regularities of behaviour which constitute them are facts. They are *standards* of conduct towards which, in the case of social rules, a certain social group can be said to have a certain *attitude*<sup>329</sup>. Legal rules are not primary objects of legal interpretation.

It is also important to note that reference to legal rules *as* objects of legal interpretation is not the same as reference to rules *of* interpretation<sup>330</sup>. Rejecting the rule-centric view does not entail endorsing the claim that interpretation is not rule-governed. Andrei Marmor's account of the role of interpretation in law is decidedly non-rule-centric in the latter sense<sup>331</sup>. He elects 'meaning that' (what an author means by an object) as the appropriate notion of meaning and dismisses two other notions ('meaning of' and 'meaning for') as inadequate because of their correspondence with semantic meaning (rule-governed) and emotional response (too subjective

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<sup>328</sup> Wittgenstein, PI 201: 'There is a way of grasping a rule that is not an interpretation.' PI 198: 'Any interpretation still hangs in the air long with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.'

<sup>329</sup> Hart, CL 9-11, 55-60, 289.

<sup>330</sup> The Literal Rule, the Golden Rule, and the Mischief Rule are examples of rules of statutory interpretation in English Law.

<sup>331</sup> Marmor (1992), 14, 30.

to count). His reason for discarding semantic meaning is the idea that interpretation is not a rule-governed activity.

Endicott's 'simple account' of legal interpretation is presented as an alternative to both Dworkin's interpretivism and Marmor's deflationism<sup>332</sup>. The objections he presents to Marmor's account of legal interpretation, and the way in which they are presented, are successful and there is no need to present them in detail here. The most salient objection, and the most relevant for our purposes, is that restricting the concept of interpretation to pragmatic meaning is to fail to account for all other correct uses of the word we can think of, including instances of natural meaning ('Dark clouds mean rain').

As Endicott notes, Marmor's strategy restricts interpretation (and legal interpretation) to artefacts produced with an intention to communicate. This, as argued in Part One and Chapter Two, is unhelpful and misleading because it ultimately defines interpretation in general, and, by implication, legal interpretation, by reference to a particular type of object (artefacts produced by acts of communication).

In Chapter Three I suggest that this is possible in the domain of musical interpretation but not true of law. Exposing the texthood myth in the next section will allow us to see this even more clearly and to reach the conclusion that the link between authorship and authority is not as tight as some authors (Marmor among them) suggest, and thus that interpretation is not necessarily a matter of determining the intentions of an author. Un-authored objects (practices and conventions) are as interpretable as artefacts.

The disagreement between Marmor and Endicott suggests something of importance: to say that interpretation is not *rule-centred* is not to say that it is not *rule-governed*. The importance of rules, conventions, or directives of interpretation to our understanding of legal meaning is

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<sup>332</sup>Endicott, VII ch. 8, esp. 168-183.

undeniable. The activity of interpreters in different domains is often at least partially rule-governed. Interpretative directives are ‘tools of rationalization’ and not all are imposed by law<sup>333</sup>. Musical performance and judicial interpretation are examples of rule-governed interpretation.

Rules of legal interpretation are typically posited rules. As such, they are legal rules established by legal authorities<sup>334</sup>. The fact of such a rule is itself a reason for action, that is, it is itself a reason for *following* certain guidelines (and not others) in the process of interpreting a statute or a contract. Legal rules of interpretation give interpreters both first order reasons and exclusionary reasons for action<sup>335</sup>. They are there to guide them in their interpretative activity<sup>336</sup>. But their importance to legal interpretation does not warrant the conclusion that legal rules are primary *objects* of interpretation. Legal rules *are* the meaning of their sources, i.e. the acts which express them are sources of legal meaning<sup>337</sup>.

One reason why rules of interpretation are important is that legal authority can be the authority to leave a trail of interpretation<sup>338</sup>. Once a senior judge has interpreted a statute, for

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<sup>333</sup> Wróblewsky (1971), 413.

<sup>334</sup> See *Mason v. Bibby* [1865] 159 ER 365 at 367 per Pollock CB: “The meaning of an act of parliament is a question of law.”

<sup>335</sup> I am assuming that practical authorities (legal authorities among them) have the ability to give their addressees exclusionary reasons for action. This is Joseph Raz’s account of authority and not everyone accepts its tenets. I cannot here address the problem of the nature (logic and justification) of authority and will mostly rely on Raz’s account of practical authority. For an alternative view on legal authority (without exclusionary reasons), see L. Alexander (2000), 21-38.

<sup>336</sup> Following rules of legal interpretation (statutory or otherwise) is to be guided in one’s *activity* of explaining the legal meaning of an object. To let one’s interpretative choices be determined by rules of interpretation is to accept them as reasons for action. Indeed, if issued by legal authorities, following set procedures, rules of interpretation are both first order reasons to do x (attribute meaning m to A) and a second-order exclusionary reason not to do x for reasons B, C, or D.

<sup>337</sup> ‘La norme n’est pas le texte, mais seulement sa signification.’ Troper (1981), 9.

<sup>338</sup> *Goodrich v Paisner* [1957] A.C. 65 at 88 per Lord Reid: ‘I do not think there can be any test of universal application other than the intention of the Act as gathered from its words. No court is entitled to substitute its words for the words of the Act. But a court can and must decide what is the appropriate test in a particular case and, when the Court of Appeal has laid down a test, that test ought to be followed in all cases which do not present substantial relevant differences.’

example, the *mode* of interpretation is settled<sup>339</sup>. Authority to settle how to interpret certain objects in relevantly similar cases is eminently practical. Rules of interpretation can be the result of an interpretative process, but they are a contingent aspect of the activity of interpreters. Such a result occurs only in cases where an interpreter is also a *legal authority* (stricto sensu).

Not all legal interpreters are legal authorities. Legal rules of interpretation are examples of the exercise of legal authority because they aim to be action-guiding rather than merely belief-creating. Their importance (and omnipresence in the legal systems we know) tells us only that legal interpretation is rule-governed, not that legal rules are its primary object.

Hart's practice-theory of rules may express a rule-centric view of law, but it does not express a rule-centric view of legal interpretation. It is, in fact, doubtful whether Hart had a theory of interpretation. He did have a view on adjudication and the role of judicial discretion<sup>340</sup>, but his considerations on what judges do when the law runs out are not necessarily considerations about interpretation. It is often assumed that Hart's account of the 'open texture' of legal language is part of a theory of interpretation. But this is far from obvious. What Hart calls 'open texture' is a feature which makes it impossible for the *application* of legal concepts to be determined by a closed set of conditions<sup>341</sup>.

For example, the list of conditions one can offer for the correct application of 'contract' is always and necessarily incomplete because 'there is an indefinite number of conditions defeating the application'. But note my emphasis on the word 'application': judicial interpretation is *explanation* of legal meaning, and legal concepts *are* meanings. The application of

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<sup>339</sup> Lord Hoffman's judgment in *ICS Ltd v West Bromwich BS* [1997] UKHL 28, (1998) 1 WLR 896 establishes guidelines for the interpretation of contracts.

<sup>340</sup> Hart's views on the topic of legal discretion, in particular, are wider and more detailed than previously thought. An essay on the nature of discretion written by Hart for a Faculty seminar during his 1956-57 visit to Harvard has recently been published in the *Harvard Law Review*.

<sup>341</sup> Stavropoulos (1996), 54.

legal concepts Hart had in mind was not necessarily (or primarily) their use in interpretative conclusions, but, rather, their occurrence in practically authoritative statements, i.e. in judicial decisions.

Judicial discretion is not to be confused with innovative interpretation<sup>342</sup>, and the important role of creativity in interpretation is not to be confused with the discretionary powers of judges. To exercise legal discretion is to decide a case to which the existing law offers no clear answer<sup>343</sup> (this is why judicial discretion is often coupled with the notion of a *hard case*) by reference to extra-legal standards, for example, of natural justice.

Judges exercise discretion, when they do, not *as interpreters* but as *legal officials*: their discretion is not discretion to interpret but discretion to find a solution to the case at hand. Interpretation, the minimalist account suggests, is only a part of the process of finding a solution to a legal dispute<sup>344</sup>. To put it simply, legal discretion begins where interpretation ends. The need for discretion can be the result of interpretation: sometimes, one needs to interpret an object in order to realize that its meaning is too vague to provide a solution to the problem one is trying to solve (i.e. a source of legal indeterminacy). Good interpretations (for others) are good explanations (or successful displays) of the meaning of an object. ‘Explanation’ and ‘determination’ are not synonyms and an explanation of meaning can be a good interpretation of an object even if it shows that the meaning of the object is vague<sup>345</sup>. The distinction between

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<sup>342</sup> For a clarifying account of the difference, see Raz, BAAI 10, 270-2, 303-16, 318-19, 354.

<sup>343</sup> I am referring to the law in force before a case is decided. When a judge makes a decision in accordance with a legal standard which she thereby brings into existence she is not interpreting.

<sup>344</sup> In the same vein, Wróblewski and MacCormick (2003), 425: ‘the interpretative decision is thus one part (a “fractional decision”) of the justification of the decision in the case.’

<sup>345</sup> Timothy Endicott introduces this crucial distinction in LI 112: ‘Determining the undetermined is one of the standard functions of adjudication, and it is not an interpretative function.’

interpretation and determination will resurface in Chapter Five as one of the sustaining pillars of the disjunction thesis.

RC points towards something important. Judges are required to apply the law to sets of facts and to be *guided* in their decision-making process *by legal rules*.<sup>346</sup> But note that this is not to say that legal rules are an object of legal (judicial) interpretation. The rule-centric view of legal interpretation is misleading because it is based on two misconceptions. One is the idea that rules are interpretable. The other is that legal interpretation is primarily the interpretation of rules because it is primarily the interpretation of legal sources.

It is easy to fall prey to the first misconception. The claim that law is made up of rules is not usually challenged. But, despite its intuitive appeal, it is misleading<sup>347</sup>. Strictly speaking, what makes up what we call law is a set of *propositions* which, in typical cases, are issued with a view to guiding conduct. Such propositions can be true or false and what determines whether they are true or false are ultimately particular authoritative acts by legal officials (legislators and judges). We call such acts *legal sources* and legal sources are social facts<sup>348</sup>.

Rules are propositions e.g. that the bishop moves diagonally or that a person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. They are the *content* of legal provisions, not these provisions themselves. The assumption that rules are interpretable is therefore mistaken. For it is not possible to interpret the proposition, as opposed to the provision. It is the provision that

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<sup>346</sup> In 'Ascription' 183, Hart notes that "rules of law even when embodied in statutes are not linguistic or logical rules, but to a great extent rule *for deciding*." [my italic] Similarly, Hart (1983, p.165) states that "This is a valid rule of law' said by a judge is an act of recognition; in saying it, he recognizes the rule in question as one satisfying certain accepted general criteria for admission as a rule of the system and so as a legal standard of behaviour."

<sup>347</sup> Raz (CLS 168) points in this direction when he notes that 'some laws are not norms'. According to Raz, Bentham, Austin, Hart, and Kelsen are united in explaining legal normativity by reference to the (erroneous) idea that every law is a norm.

<sup>348</sup> Hart, CL 95, 97, 101, 106, 264-7, 269, 294; Raz, BAAI 344-7; Finnis, NLNR 290, 472.

has a meaning, and its meaning is sought and explained (or displayed) by interpreters. Hence, if rules are that which legal statements state, then they are not interpretable. But the provisions (statements) and practices (behaviours and attitudes) which express them are. Legal rules are the content of authoritative legal pronouncements. As such, they are not interpretable<sup>349</sup>.

The other misconception on which the rule-centric view of legal interpretation is based is that legal interpretation (and judicial interpretation in particular) ought to be understood as the interpretation of legal sources<sup>350</sup>. This is unhelpful for reasons similar to those adduced above. Although their legal meaning is often disputed and explained by judicial interpreters, legal sources (the acts of those who have legal authority to make law and thus act in an *official* capacity) are not primary objects of interpretation. Their interpretation is necessary only inasmuch as it sheds light on the legal meaning of discrete objects of interpretation.

Our notion of having a legal meaning as being legally intelligible in context makes it clear that acts, events, behaviours, documents, and other *legally relevant* things are primary objects of legal interpretation. Their legal meaning is relevantly, but only partly, determined by the meaning of legal sources.

Legal sources do not exhaustively determine legal meaning. More will be said below about the systemic character of legal meaning. Suffice it to note, at this stage, that legal sources are not the only acts capable of legal meaning: they are acts whose legal meaning makes the interpretation of various objects possible. In fact, their legal meaning is partly determined by reference to other legal propositions and non-positd standards. They are not primary objects of

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<sup>349</sup> The following passage by John Gardner (LALOF 58) distinguishes between rules and provisions, and, by implication, between norms as meanings and the acts that express them as objects of interpretation: 'What one is *looking for* [emphasis added] in interpreting a legislative text are the legal norms that it creates. A common mistake is to confuse a legislated norm with its formulation. Thus a lawyer may refer to 'the words of the rule'. This cannot be taken literally. Rules don't have words. What she really means is the wording of the legislative provision that creates the rule.' Notice the clear distinction between the object of statutory interpretation – the text- and what is sought and explained by the interpreter- the created norm.

<sup>350</sup> Raz, BAAI 223

legal interpretation because the explanation of their legal meaning *typically* occurs in the process of interpreting other objects. Their role in judicial interpretation is that of providing the background against which particular objects can be understood as legally relevant or meaningful. Sources of law are not paradigmatic *objects* of legal interpretation, they are *sources of legal meaning*. This allows us to offer an alternative to RC:

**[MC] Judicial interpretation is *partly* the explanation of the meaning of legal sources**

Having now seen why rules are not objects of interpretation because they are not *interpretable*, and established that legal sources are sources of legal meaning<sup>351</sup>, it is time to look at another common misconception: the idea that legal interpretation (and judicial interpretation in particular) is the interpretation of legal texts.

#### 4.2.2. Exposing the texthood myth

Authoritative legal provisions can be the object of legal interpretation<sup>352</sup>, and what we call law consists, in great part, of authoritative provisions. But law is not the primary object of legal interpretation. MC (above) confirms the idea, introduced in Chapter Two, that judicial interpretation is not defined by its object. The previous section suggests that legal sources are sources of legal meaning, and that determining the content of the authoritative acts that constitute them is a task undertaken with view to providing a framework for the interpretation of other objects. The class of objects with legal meaning is broader than the class of legal

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<sup>351</sup> Raz, AL 65: ‘the relation between the statement of a source and the corresponding legal statement is not identity of meaning but that between ground and consequence.’

<sup>352</sup> On the connection between authorship and authority and its implications for the minimalist account of legal interpretation, see section 5.2.1. below.

sources: as noted in Chapter Two, the category of legal objects (defined as things with legal meaning) is an open category.

The rule-centric view of interpretation is commonly accompanied by a focus on legal texts as the primary objects of legal interpretation. There is no necessary connection between the two, however, and it is possible to fall prey to the texthood myth without endorsing the rule-centric view, since rules are not texts.

In this section, I wish to argue that one ought not to restrict legal interpretation to the interpretation of legal texts: legal meaning, as we will see in section 5.3., is systemic. It is not found in one specific rule or text, taken in isolation. Although judges often interpret legal texts, they typically do so in the process of finding legal reasons for their interpretative conclusions about the meaning of other objects. Authoritative legal texts are sources of legal meaning and legal meaning is intelligibility *in context*.

#### 4.2.2.1. Communication: enthusiasts v sceptics

Accounts of legal interpretation and its role in adjudication are normally implied by certain views about the nature of law. The traditional distinction between natural law theories and legal positivism does not, however, account for theoretical debate on the topics which the minimalist account of legal interpretation addresses. The fact that most scholars focus on texts<sup>353</sup> in their accounts of legal interpretation and its place in adjudication is evidence that very different lines

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<sup>353</sup> Examples of authors who focus on texts as primary objects of legal interpretation, their different theoretical persuasions notwithstanding are Marmor, Raz, Finnis, Greenberg, Waldron, Gardner, Endicott.

of division can be drawn when it comes to theoretical debate on the nature of legal interpretation.

For the sake of clarity, I will divide the literature into two main camps. The views on interpretation endorsed by the two camps presuppose a particular view of legal authority and, by implication, of the role of authority in our concept of law. All views presuppose that there is an important connection between legal interpretation and authority.

On one side are the ‘communication enthusiasts’<sup>354</sup> who believe that legal authority, as a form of practical authority, is exercised through acts of communication. Practical authorities offer their addressees exclusionary reasons for action, and this is possible only through acts of communication, i.e. if their addressees recognize their intention to have their intention to communicate a certain content recognized by them. A pronouncement can only be practically authoritative if its content is *successfully* communicated to its addressees. On this view, such acts of communication are the primary object of legal interpretation and judges are called upon to elucidate the meaning of discrete acts of communication by legal authorities.

Legislation is paradigmatic. Acts of communication by legal authorities are often referred to as ‘legal pronouncements’ or ‘legal provisions’. They are typically issued in written form. They are texts produced by an author. Authority and authorship are, on this view, intimately connected and compatible accounts of interpretation normally involve a special focus on authorial intentions.

In the other camp are the ‘communication sceptics’<sup>355</sup> who believe that, although the law is made up of artefacts (its content is partly determined by the actions, decisions and utterances

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<sup>354</sup> For a very recent contribution to the debate on the nature of legislative intent and its implications for a theory of legal interpretation, see Ekins (2012).

<sup>355</sup> For example, Dworkin, Waldron, Hershovitz, Hurd and Greenberg.

of human beings), there is more to legal interpretation than the determination of the communicative content of authoritative legal pronouncements. Communication sceptics believe that legal meaning is distinct from the linguistic content of legal texts and that legal norms are more than the product of authoritative legal pronouncements to which an ‘ordinary linguistic content’ is associated<sup>356</sup>. For communication sceptics, there is no necessary link between authority and authorship and between authorial intention and interpretation.

In recent contributions to the debate<sup>357</sup>, Mark Greenberg articulates the division described above in terms of two pictures of law. He claims there is a ‘widespread implicit commitment’ to what he calls ‘the standard picture’ [SP] of how law works. As alternatives to SP two positions are identified: Dworkin’s picture of what constitutes the content of the law and the ‘dependence view’ [DV], espoused by Greenberg himself<sup>358</sup>. SP is ramified and affects other points of debate within the philosophy of law.

Here, I shall focus on the implications of SP for judicial interpretation. SP can be described as a view on ‘what constitutively explains the content of the law’. Two points are immediately noticeable: (i) focus is mostly on legislation as both the paradigmatic source of law and an exemplary domain of legal *communication*<sup>359</sup>; and (ii) differences of opinion about the nature of judicial interpretation and its role in legal reasoning hinge on different views about the role of authorial intention in the determination of legal meaning.

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<sup>356</sup> See Greenberg, TSP 39-49.

<sup>357</sup> See TSP, Greenberg 2011 and 2013.

<sup>358</sup> Greenberg, TSP 55-60

<sup>359</sup> For an argument against a view of legislation as a communicative domain (claiming that legislation fails to fulfil the requirements of Gricean communication), coupled with an account of legal authority as a form of theoretical authority see H. Hurd, SIS.

Rejecting the rule-centric view has allowed us to see that legislation need not be the main focus of attention for a minimalist account of judicial interpretation. Considering that legal rules are not interpretable and that legal pronouncements (legal sources) are not the primary objects of interpretation but sources of legal meaning, it is easy to understand why legal texts (legislative acts among them) are less relevant to communication sceptics than to supporters of SP. But acceptance of the texthood myth is visible in the work of both enthusiasts and sceptics.

Let us briefly look at SP. Greenberg tells us it derives from what he calls the ‘command paradigm’. This is a general paradigm of authority according to which ‘Rex’s subjects have an obligation to do what Rex says (commands) simply because Rex, who has the right to be obeyed, says so.’ Adherents to SP accept the following tenets<sup>360</sup>:

- (a) The content of the law is some kind of ordinary linguistic meaning (understood as including both semantic and pragmatic contents) or mental content, but there are different views on exactly which kind of meaning counts.
- (b) The primary way in which law is created is by legal authorities issuing pronouncements;
- (c) Although the core model of legal sources is constituted by statutes and constitutions, there is space in SP for apparently recalcitrant instances of legal sources (custom, for example, and the RR itself<sup>361</sup>)
- (d) A legal norm obtains by being authoritatively pronounced (Explanatory Directness Thesis).

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<sup>360</sup> Greenberg, TSP 40-55.

<sup>361</sup> Greenberg argues that Hart’s rule of recognition is a ‘special case’ and, in fact, a necessary device for adherents to SP, and Hart’s own attempt to explain authority without the circularity of referring to authoritative pronouncements (TSP 43, 55): ‘If you start with the idea that the law is constituted by the contents of authoritative pronouncements, you’ll immediately see that something other than an authoritative pronouncement has to determine what counts as legally authoritative.’ Greenberg usefully distinguishes ‘ordinary custom’ (participants do not understand themselves as following a unique standard of conduct) and ‘customary rule’ (there is a common or canonical understanding of which norm is being followed in engaging in the relevant behaviour) and explains that the RR is a customary rule. Unlike ordinary customs, customary rules can be accommodated by SP by substituting the common understanding of the norm for the content of the authoritative pronouncement (TSP 52).

- (e) The content of a legal norm is what was authoritatively pronounced, i.e. the content of the authoritative pronouncement (Linguistic Content Thesis)
- (f) Individual legal norms are explanatorily prior to the content of the law as a whole (Atomism).
- (g) There is a relevant distinction between authoritative legal pronouncements and other actions by participants in the legal system. Only the content of authoritative legal pronouncements constitutes the content of the law. Other aspects can only count as *evidence* in the interpretation of authoritative pronouncements.

Notice that (e), (f), and (g) are *consequences* of Explanatory Directness. One central question emerges when we try to understand the implications of SP for an account of interpretation: is there a relevant difference between authoritatively explaining legal meaning and identifying the content of the law? As we will see in section 5.3., the answer provided by the minimalist account of legal interpretation is ‘yes’. Legal interpretation is not the determination of the content of the law. It is explanation of legal meaning. Legal meaning and the content of authoritative legal pronouncements are not the same.

Adherents to SP are especially vulnerable to the texhood myth<sup>362</sup>. After all, they endorse the view that law is typically identified by reference to authoritative legal pronouncements. Authoritative legal pronouncements often have written form. Authoritative legal pronouncements, it is often taken for granted, are texts. This view brings to the surface an important distinction: that between the identification of legal texts and the identification of operative legal norms<sup>363</sup>. The constraint introduced by the sources thesis, expressed by Raz as an

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<sup>362</sup> Their vulnerability is accentuated by taking for granted that ‘the content of a statute or text corresponds in a straightforward way to a rule or requirement.’ Greenberg adds that the interchangeable use of ‘statute’ and ‘rule’ is ‘evidence that SP is presupposed.’(TSP 67)

<sup>363</sup> The distinction is introduced by Herschovitz (JI 210) to refer to both Marmor and Raz’s objections to Dworkin’s model of constructive identification of law.

objection to the need to consider what *ought to be* required in order to determine *what is in fact* required, is one of merit-dependence, not content-dependence.

There is no doubt that determining what the law requires is not a matter of identifying a legal text<sup>364</sup>. And, arguably, law is not exhausted by authoritative pronouncements and not all authoritative pronouncements are texts. This, of course, is not to say that not all law is posited. No one denies the positivity of law<sup>365</sup>. If positivity is understood by reference to human involvement, it involves much more than enactment of authoritative pronouncements. *Posited*, on this view, is not a synonym of *expressly posited*<sup>366</sup>.

But even communication sceptics fall prey to the texthood myth in their analyses of interpretation. The shift of focus between the two sides seems to be between an authorship-based and a text-based view of authority. Communication enthusiasts stress the role of authors or speakers in the determination of the meaning of the texts they produce, while sceptics tend to disconnect authorship and authority and propose that texts themselves be capable of being authoritative<sup>367</sup>.

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<sup>364</sup> Hershovitz, JI 210, note 19. See also Raz, EPD 218-219, and Marmor (1992) 105.

<sup>365</sup> Finnis (1990), 12), for instance, tells us that the non-positived principle of fairness demands the positivity of law as a condition of impartiality in judicial decision-making (Natural Law theory requires positivity): 'a set of positive norms identifiable as far as possible simply by their 'source' (i.e. by the fact of their enactment or other constitutive event) and applied *so far as possible* [emphasis added] according to their publicly stipulated meaning, itself elucidated with as little as possible appeal to considerations which, because not controlled by facts about sources (constitutive events), are inherently likely to be appealed to differently by different judges.'

<sup>366</sup> Green, *Introduction* to Hart's CL, notes that the term 'posited law' is 'antique' and covers "things set by human intervention". Hart believed this to be decisive to our understanding of law. Examples of human intervention are 'giving' orders, 'applying' rules, 'taking' decisions, 'endorsing' or 'asserting' justifications, and the 'emergence' of customs (xviii-xix). See also John Gardner, 'Myths' 200.

<sup>367</sup> See R.S. Peters P.G. Winch and A.E. Duncan-Jones (1958), 207 'Of persons artificial, some have their words and actions owned by those whom they represent. And then the person is the actor; and he that owneth his words and actions is the AUTHOR: in which case the actor acteth by authority and as the right of possession, is called dominion; so the right of doing any action, is called AUTHORITY. So that by authority, is always understood a right of doing any act; and done by authority, done by commission, or licence, from him whose right it is.' (Hobbes, *Leviathan*, Ed. Oakeshott, 105-6). Notice that actors (not authors) have authority.

For example Jeremy Waldron<sup>368</sup>, a communication sceptic, accuses enthusiasts of making the mistake of rejecting the possibility of ‘systemic authority’ by establishing too tight a link between authority and authorship. Waldron’s targets are the *enthusiastic* (in the relevant sense) views put forward by both Raz and Marmor, according to whom only persons can exercise authority<sup>369</sup>. It is clear that, although the reasons for focusing on texts as primary objects of legal interpretation are different from those adduced by communication enthusiasts, emphasis on texts remains. This is made clear by looking closely at Waldron’s alternative to Raz’s NJT. Waldron presents his alternative version as a way of expressing the view that emphasis should be shifted from author to text when it comes to understanding authority and its role in interpretation. Waldron’s thesis [J] makes the point that texts can be authoritative (we have reason to regard them as such) without reflecting anyone’s view on what one ought to do<sup>370</sup>:

**[J] A statute (or any text) S has authority over person Y only if person Y is likely better to comply with reasons which apply to him by following the provisions of S, than if he tries to follow those reasons directly.**

The sceptical conclusion to reach, as Hershovitz puts it, is that ‘authorship is not the only possible content-independent reason for believing that a text is legitimately authoritative; we can believe it is legitimate because it is the outcome of a process which we have reason to be

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<sup>368</sup> Waldron (1997) 340.

<sup>369</sup>According to Raz (1985), 303), ‘a directive can be authoritatively binding only if it is, or is at least presented as, someone’s view of how its subjects ought to behave.’ Marmor (1992), 114, n.5) cites Raz.

<sup>370</sup> Hershovitz (JI 212), cites Waldron (2001), 131.

committed to.<sup>371</sup> The upshot of this is that there can be content-independent reasons for believing [J] to be fulfilled<sup>372</sup>. Texts, however, undoubtedly continue to be the centre of attention. Scholars, on both sides, even suggest that texts are paradigmatic objects of interpretation across domains (part of the bare concept of interpretation)<sup>373</sup>.

But, as argued in Part One of this thesis, and exemplified in Chapter Three, the semantic content and communicative intentions of authors underdetermine the meaning of texts. We have seen already that texts are, by definition, both written and intentionally produced. Because not all objects of interpretation have written form and not all are intentionally produced, it must be concluded that texts are but one possible kind of interpretable object and thus not part of the bare concept of interpretation. Recognizing this implies rejecting a very common, and apparently harmless claim that ‘anything we interpret must necessarily be conceived as a product of someone’s intention’<sup>374</sup>.

This objection is specifically applicable to law: not all legal norms are expressed in texts. Some valid norms, as Hart famously argued, are posited by being practised or used<sup>375</sup>. The result

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<sup>371</sup> For a similar position (proposing to substitute intention for commitment in legal and musical interpretation), see Guest (1997), 133-155: ‘We understand Q to have been committed to a course of action in which certain consequences follow and we can read his contribution to the consequences without reference to his mental state. Commitment is transferable, substitutable and transparent; intention and its cognates are opaque.’ (143).

<sup>372</sup> Hershovitz, JI 214, n. 32.

<sup>373</sup> Larry Alexander (1997, p. 361) (an enthusiast): ‘All texts are attempts to communicate, usually to other people, but occasionally to the authors themselves at a later time. Legal texts are attempts by authorities to communicate their determinations of what ought to be done to those they govern. Novels are attempts by novelists to communicate their scientific findings to their intended audience. And so on.’ And Hurd (1995, p. 425): ‘Instead of locating the theoretical authority of law primarily in the mental states of lawmakers, and only derivatively on the texts they produce, we should locate it primarily in the texts produced by lawmakers (...). This, admittedly non-standard, conception invests the law- and not (necessarily) its authors – with theoretical authority. It treats legal texts as moral guides when complying with their language reliably assists us in satisfying our moral obligations.’ The last two sentences suggest that ‘the law’ and ‘legal texts’ are one and the same thing.

<sup>374</sup> Jeremy Waldron(1997, 329-356, at 334) demystifies this false truism.

<sup>375</sup>Hart, CL 113, 149-150. See also John Gardner, ‘Myths’, 218

is that not all legal norms are articulated and not all law-making involves articulation<sup>376</sup>. It is uncontroversial that some legal rules come to be in virtue of collective adherence and acceptance of the relevant pattern of behaviour as a standard for appraisal of conduct. But in addition to the marginal case of customary practices (of which Hart's rule of recognition is a famous example), there are instances of rulings by courts in which judges leave certain steps in their reasoning process unarticulated.<sup>377</sup>

A judge might *imply* that statute x bears indirectly on the case at hand without fully articulating its meaning, she might also simply *state* a previously established and articulated meaning of statute x without *explaining* it. This is possible because such implied relevance of statute x to the case occurs if (and only if) the content of statute x can be said to contribute to the legal meaning of the relevant facts in the case: the reason for its relevance is its participation, as it were, in the legal meaning of the facts.

A judge, notwithstanding her duty of clarity, need not always interpret all the way to bedrock (though it might be argued that a *good* judge would). Articulation is necessarily intentional, and there is such a thing as 'unintentional law-making'<sup>378</sup>. The fact that law can be

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<sup>376</sup>Hart, CL 113, 149-150. As noted by Gardner, 'Myths' 218, it has often been assumed that all legally valid norms are 'posited articulately (in words) and intentionally (with a view to positing a norm)'. I share Gardner's belief that Hart was successful in arguing that 'in all legal systems at least some valid legal norms are posited and hence validated by being practised or used rather than by being articulated, and that the relevant uses of these norms need not be regarded or intended as norm-positing acts by the relevant users.' But Gardner then makes an important point in arguing that legal norms are not the only (or even the paradigmatic) objects of legal interpretation: 'Yet these norms *often* [emphasis added] need to be interpreted too. When that is so, what would it mean to interpret them 'using only the resources of the text itself' or 'according to original intention'? Neither proposal makes sense. So presumably there are other proposals for the interpretation of practice-validated norms that *do* make sense.'

<sup>377</sup> Don Jayasena v R [1970] AC618 at 625 per Lord Devlin: 'The common law is shaped as much by the way in which it is practised as by judicial dicta.' Greenberg makes the same point when he notes that SP does not capture how appellate court decisions impact the law: 'When we look at what contribution a case makes to the law, it is not a general rule that that contribution must be found in any of the court's statements. It is not statistically or normatively out of line for a case to have an impact on the law that is not articulated in the court's opinion. For example, the true significance of the case may lie in a distinction that the court did not articulate. Conversely, it is not unusual for the content of statements in a majority opinion to fail to yield corresponding legal rules. For example, the court's statements may be dicta.' (TSP 73)

both unarticulated<sup>379</sup> and unintentional<sup>380</sup> allows us to conclude that texts are not *primary objects* of legal interpretation<sup>381</sup>. Rather, the content of legal texts *constitutes* legal meaning.

One conclusion reached by some communication enthusiasts<sup>382</sup> is that the meaning of texts coincides with what their authors intend them to mean. This is doubtful for two reasons, noted by Hershovitz: (i) it is possible to fail to say what we intend to say; (ii) what texts express can come apart from what their author intended to express<sup>383</sup>. Interpretation, as constantly reiterated in this thesis, is concerned with meaning. Meaning is intelligibility in context; intention is a mental state or content. The meaning of a text is what it relevantly expresses, how it can be understood by reference to a certain framework of beliefs, rules, conventions, and acts of participants in a certain practice. There is more to law than legal texts. There is more to legal interpretation than the determination of communicative intentions expressed by authors of authoritative legal texts.

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<sup>378</sup> See Waldron (1997) 332: ‘under the conditions of modern legislation, it is often implausible to describe legislative acts as intentional acts, even though they take place in an intentionally organized context.’ Waldron concludes that statutes can be considered authoritative on a plausible version of the Razian view of authority and that the authority of statutes precludes consideration of the intentions of particular legislators by statutory interpreters.

<sup>379</sup> *Quinn v Leatham* [1901] AC 495 at 506 per Lord Halsbury: ‘[E]very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.’ This passage leans towards the notion of legal meaning as contextual intelligibility that endorsed in this thesis.

<sup>380</sup> *In re a Solicitor* [1961] Ch 491 at 502 per Cross J: ‘I cannot escape the conclusion that section 66 of the Act of 1932 contained an unintentional change in the law.’

<sup>381</sup> This is consistent with the claim, made by John Gardner (LALOF 57) that ‘where legislated law is concerned, the legislative text is always the primary object of interpretation.’ For a clarification of the difference between act and text, see note 9 on the same page. What I wish to expose as a myth is the belief that legal texts are primary objects of *legal interpretation*, not that enacted texts are primary objects of *statutory interpretation*.

<sup>382</sup> Alexander (1997), 361: ‘If texts are attempts by their authors to communicate, then texts mean what their authors intend them to mean.’

<sup>383</sup> Hershovitz, JI 164 and 166.

Rules are not interpretable and legal texts are not primary objects of legal interpretation. Having rejected the rule-centric view of legal interpretation and exposed the texthood myth, it is time to devote some attention to legal meaning.

### 4.3. Interpreting within a system

My argument has thus far been that legal interpreters, judges in particular, are identified by reference to *what they do* rather than to the objects they interpret. And what they do is *explain* (or in marginal cases, *display*) *legal meaning* to epistemically disadvantaged addressees. The interpretative authority of judges, I have argued, is the result of their epistemic advantage over those for whom they interpret. As authoritative interpreters, judges purport to give their addressees reasons for belief in the truth of their interpretative conclusions. In this respect, there is little difference between musical performance and judicial interpretation. Interpretation is belief-oriented and, by implication, truth-oriented. Interpretative statements, albeit often dependent upon or resulting in meaning-ascription, are capable of truth or falsity.

In this section, I attempt to show that the epistemic advantage of judges, and thus their interpretative authority, is partly the result of the systemic character of legal meaning. I will offer an explanation of what I mean by ‘systemic’ and show that the minimalist account of legal interpretation as explanation of legal meaning is an alternative to both communication-enthusiastic and communication-sceptical accounts of interpretation (presented in the previous section). In order to do so, I will argue that both legal meaning and legal authority are the product of a system while maintaining that no particular aspect of law’s systematicity is left out of the picture.

#### 4.3.1. System

Legal meaning is legal intelligibility in context. Law, as noted by Neil MacCormick, is a matter of *institutional fact*. This implies that the truth of legal statements does not simply depend on the occurrence of brute facts or events but also on the acceptance and application of certain rules<sup>384</sup>. Explaining legal meaning, thus, involves, but is not exhausted by, understanding the content of legal provisions and the *rules* they express. The important, but often overlooked, difference between provisions and rules or norms has been noted in the previous two sections: legal rules are propositions that legal provisions express<sup>385</sup>. This makes the latter, not the former, capable of being interpreted.

The institutional character and the normativity of law explain our frequently interchangeable use of ‘law’ and ‘legal system’<sup>386</sup>. After all, the idea of a system is very much the kernel of our concept of law<sup>387</sup>. Hart famously noted this<sup>388</sup>. Raz, too, states it explicitly<sup>389</sup> while noting that, despite its centrality to law, systematicity is shared by all institutionalized normative domains and is thus not *unique* to law. Raz defines law’s systematicity as ‘dependent on rules and on interpretation’. Legal systems are by definition, systems *of* rules: law has a systemic nature in

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<sup>384</sup> Mac Cormick(1974, p. 105). What Hart (1951, p.186) calls ‘a blend of fact and law’.

<sup>385</sup> To this one may add that legal acts are *valid*.

<sup>386</sup> Not all theorists claim that laws necessarily belong to legal systems. This, however, is true only as a linguistic observation about how we use the word ‘law’. See, for example, A.M. Honoré (1975), 161; MacCormack (1979), 285; and Eekelaar (1973). These works are cited by Raz in CLS 209, n. 2.

<sup>387</sup> ‘The analysis of the concept of a law depends on the analysis of the concept of a legal system. For the understanding of some types of laws depends on their internal relation with some other laws. They derive their legal relevance from their relations to other laws. The analysis of the structure of legal system is therefore indispensable for the definition of ‘a law’.’ (Raz, CLS 170).

<sup>388</sup> Hart, CL 193-200, for example, but also chapter VI.

<sup>389</sup> Raz, BAAI 204: ‘the law of every country constitutes a system of law’

virtue of the central role rules play in it<sup>390</sup>. Legal rules are social rules. They are artefacts which ‘typically emerge within an institutional structure, and form part of a system of social rules’<sup>391</sup>.

Two accounts of legal systematicity can be identified in the literature. Some theorists emphasize the content-independent character of law’s systematicity<sup>392</sup> while others offer a content-dependent view of legal systems<sup>393</sup>. For the former family of views, legal systems are systems of norms which tell us what to do with other norms (Kelsen) or the union of two distinct kinds of rules- primary and secondary, power-conferring and duty-imposing- (Hart). The latter family of views holds that what turns a collection of norms into a normative system is coherence seen as pressure for norms to be made to hang together. This often requires reaching out to neighbouring norms looking for content (Dworkin).

Let us look closely at a few accounts of law’s systematicity. The first is MacCormick’s who, as indicated above, explains systematicity in terms of institutional facts<sup>394</sup>. He writes:

Law is, in two senses, an institutional phenomenon. It is, in a sociological sense, institutional in that it is in various ways made, sustained, enforced and elaborated by an interacting set of social institutions. (...) In another sense, ‘the law’ means the set of rules and other norms by which these social institutions are supposed to be regulated and which they are supposed to put into effect.

Raz, in turn, summarizes the systemic character of law as follows:

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<sup>390</sup> Raz, BAAI 20

<sup>391</sup> Raz, BAAI 5

<sup>392</sup> Austin (supreme legislator habitually obeyed), Kelsen (efficacy, norms whose validity is made possible by a presupposed basic norm), Hart (union of primary and secondary rules traced back to a rule or rules of recognition), are examples.

<sup>393</sup> Dworkin, TRS 344 and ch.4: law is identified as the ‘institutional morality’ of courts.

<sup>394</sup> ‘Law as Institutional Fact’ 110. MacCormick concludes that ‘It is one objective, perhaps the objective, of analytical legal philosophy to explain the structure of legal systems.’ (121)

The law is the product of many acts of law-making usually over long periods of time, through processes which, far from displaying coherent design, are contributed to by many bodies, only partially aware of each other, often pursuing divergent, even conflicting, ends.<sup>395</sup>

For John Finnis,

(...) ‘the law’ (as in ‘the law of England’) (...) is a vastly complex cultural object, comprising a vocabulary with many artfully designed meanings, rules identifying permitted and excluded arguments and decision, and correspondingly very many technical routines or processes constituted and regulated according to those formulae, their assigned meanings, and the rules of argument and decision.<sup>396</sup>

These authors have different views on the nature of law, but the common denominator seems to be that legal systems are complex institutional arrangements and clusters of norms produced with the purpose of guiding conduct at different levels and for different ends, which are *internally related* to one another. Nothing in the three positions above suggests that content is irrelevant to the concept of a legal system. In fact, Raz suggests that law has a ‘necessary content’: it must be open, comprehensive, and supreme. These features are an important part of what we take a legal system (law) and its role in the political system to be<sup>397</sup>. And all legal systems aspire to and achieve a certain degree of coherence<sup>398</sup>.

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<sup>395</sup> Raz, BAAI 5

<sup>396</sup> Finnis (1990), 141. Finnis adds that law is a means to an end, a ‘technique adopted for a moral purpose’ because of its uniqueness as a means for “pursuing the moral project well’.

<sup>397</sup> Raz, CLS 212, n. 9

<sup>398</sup> For an analysis of the role of coherence in theories of law and adjudication, see Raz EPD, ch 13, and (1985), 295. For the most famous defence of a coherence-based theory of law, see Dworkin LE, esp. chs. 6 and 7. See EPD, Appendix to ch. 13, for Raz’s examination of Dworkin’s stance on coherence.

The working notion of meaning advanced in Part One shows us that the value of coherence, in its ordinary association to intelligibility<sup>399</sup>, is an important element of our concept of law. After all, lawyers and ordinary citizens alike tend to speak about the law as a set of pieces which fit together, which are connected to each other in an intelligible way. So defining legal meaning as intelligibility in context fits comfortably into a loose, familiar notion of coherence. Indeed, such notion is entailed by the systemic nature of law<sup>400</sup>. Nothing more ambitious than intelligibility is suggested by the idea that legal meaning is the product of a system.

These are the features I have in mind when I make the rather modest claim that legal meaning is the product of a legal system<sup>401</sup>. I mean it is the product of the operation and acceptance of a complex set of norms, conventions, and institutional arrangements at different levels with the involvement of different agents. On this view, there is room for content-dependent sources of legal systematicity. ‘Systematicity’ is not a synonym of ‘validity’. Legal validity is often explained in terms of system-membership. The concept of system-membership is logically prior to the notion of ‘valid norm’<sup>402</sup>: to say that a norm is ‘legally valid’ is to say that it *belongs* to a legal system: it is a valid norm of that system because it belongs to it. Systematicity is the quality possessed by a set of internally related (valid) norms.

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<sup>399</sup> Raz, EPD 280

<sup>400</sup> For an recent analysis of the connection between legal validity, legal meaning, and authority see Maris Kopcke Tinturé (2009), chs 4, 5 and 6. Tinturé notes that the complex systemic relations between legal acts are “rendered manageable by the common metric of ‘validity’ (ch. 4, 199).

<sup>401</sup> Joseph Raz sheds light on the notion of legal meaning (despite not using the expression) when he observes (BAAI 8) that ‘it is the law, the legal system as a whole, which pre-empts those background considerations, not any of the legal rules taken singly. What the law requires, what rights it grants, what its conditions of responsibility etc are, depend on the combined effect of all its rules, though in each case only some of them are relevant.’ Legal meaning is, thus, systemic and legal interpretation must be understood beyond the interpretation of discrete legal provisions.

<sup>402</sup> There is, thus, no conflict between the sources thesis (or LP\*, as formulated by Gardner in ‘Myths’ 201) - or legal positivism- and my account of legal meaning as the product of a legal system. The sources thesis excludes system-membership (validity) on the basis of considerations of merit, not of content. It tells us only that whether a given norm is legally valid (part of the law of a particular legal system) depends on its sources, not its merits (where its merits include the merits of its sources). System-membership can depend on content, as much as it does on form (or procedural adequacy).

#### 4.3.2. Legal meaning v the content of the law

One implication of the systemic character of legal meaning is that interpreting is not the same as identifying valid legal norms. Rather, interpretation *presupposes* the ability to identify valid legal norms as relevant to the case at hand, but the two should not be confused. We have noted that one of the reasons for the perpetuation of the texthood myth is the identification of legal norms with the provisions (often texts) that express them. No doubt, understanding and explaining legal meaning involves understanding the content of relevant legal provisions, and that sometimes involves explaining the legal meaning of such provisions. Because legal norms *are* the content of certain legal provisions, identifying the content of legal provisions is akin to identifying the norms which are applicable to the facts in a case. Identifying the content of the law (the standards expressed by relevant legal provisions or, more precisely, legal propositions) often depends on understanding the legal meaning of a cluster of legal provisions.

The identification of legal norms as relevant to a case at hand is often possible only as a result of an interpretative choice: when the text of a legal provision has more than one possible meaning (has more than one norm as its possible content), identifying the norm it expresses is possible only if one interprets it. I have already noted that determining the legal meaning of an authoritative legal text is thus the same as identifying the norm (or legal propositions) it expresses. But legal interpreters do much more than explain the legal meaning of legal provisions (establishing the content of the law). They do so often but they do only because legal norms (the content of the law) *partly* determine legal meaning.

So there is a relevant difference between *legal meaning* and the *content of the law*. Legal meaning, as reiterated throughout this thesis, is legal intelligibility in context. A meaning-statement is a statement of how certain objects ought to be understood by reference to

particular standards. In the case of legal interpretation, such standards are, at least partially, legal standards. The content of the law, by contrast, is the content of legal utterances (the communicative content of authoritative legal pronouncements) and propositions made true by the legal acts that express them<sup>403</sup>.

Interpretative statements *explain* the legal meaning of an object by identifying good reasons for understanding the object in a certain way. Legal meaning is both systemic and contextual. What makes a reason for ascribing a certain meaning to an object a *good reason* depends on the truth of a series of propositions, and on conventions, standards and expectations which, in turn, are specific to the object of interpretation, the purposes of the interpreter, and the constraints that, in context, she faces. The content of the law, in sum, is the content of positive law, the content of authoritative legal pronouncements, i.e. that which is posited by authoritative officials, a set of valid propositions. The content of the law is constituted by the (valid) norms of a particular legal system. Legal meaning is partly determined, but not exhausted, by the content of the law<sup>404</sup>. Legal meaning is relational (systemic) and contextual (depends on the features of the object being interpreted)<sup>405</sup>.

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<sup>403</sup> Finnis CE, Vol. IV: “The law on a subject-matter is not what is stated in some relevant statute or code but rather, what is stated in the relevant code or statute interpreted or understood in the light of all relevant legal principles, written and unwritten, and all other relevant provisions of codes and statutes and the opinions of judges and other learned authorities.” This passage suggests an interchangeable use of ‘content of the law’ and ‘legal meaning’. The important point is that determining what the law is on a given matter is a systemic exercise. Finnis is referring to the question ‘Quid Jus?’ as an interpretative question.

<sup>404</sup> Finnis CE, Vol. IV, 18: “[the] components of a legal system as a “set of rules and other standards” ... must be understood not as the statements found in the texts of constitutions, statutes, and judgments or judicial orders, but as the propositions which are true, as a matter of law, by reason (a) of the authoritative utterance of those statements taken with (b) the bearing on those utterances and statements (and on the propositions those utterances were intended to make valid law) of the legal system’s other, already valid propositions.”

<sup>405</sup> Hart’s discussion of the semantics of legal concepts points towards the systemic, contextual character of legal meaning. See ‘Ascription’ and Baker (1977). For an insightful discussion of Hart’s writings on this topic, see Nicos Stavropoulos, OIL, ch. 3. Hart’s (Wittgensteinian) ‘methodological premise’, Stavropoulos notes, is that ‘specification of conceptual content is only possible in the light of assumptions about the context of the social practices within which the relevant concept is being employed.’ (54)

It has been suggested that the minimalist account of legal interpretation does not take SP for granted. More precisely, it does not endorse SP's claim that the role of interpretation is to determine the content of authoritative legal pronouncements. Although such determination often occurs in the process of explaining legal meaning, interpretation is not defined by reference to it. Legal interpretation (and judicial interpretation in particular), it is suggested, is best understood as the activity of explaining legal meaning and legal meaning is only partly determined by legal norms<sup>406</sup>.

Nor does rejecting SP's notion of interpretation entail that the minimalist account of interpretation endorses the tenets of the most famous and persuasive non-SP view of legal interpretation: Dworkin's theory of law as constructive interpretation of legal practice. According to Dworkin, legal interpretation is the process of *finding* the set of principles which best justify that practice. Such principles (Dworkin calls them *legal principles*) are already part of the law because they justify what has been posited<sup>407</sup>. Distinguishing legal meaning from the content of authoritative pronouncements does not entail endorsing Dworkin's interpretivism. In fact, it makes it necessary to draw a line between the determination of legal content and the moral justification of judicial decisions. But it is consistent with the idea, attributable to Hart's 'model of rules', that although the content of the law is the result of acts of law-making officials, determining and elaborating such content often depends on evaluative reasoning<sup>408</sup>.

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<sup>406</sup> For a recent analysis of the role of non-posited standards in judicial decision-making, see Brady (2012) 75-112, Part III.

<sup>407</sup> Dworkin, TRS 67: 'a principle is a principle of law if it figures in the soundest theory of law that can be provided a justification for the *explicit substantive and institutional rules* [emphasis added] of the jurisdiction in question.'

<sup>408</sup> Endicott (2011), 199-209, at 18.

Interpretative reasoning is often evaluative, in this sense. Minimalism is a third way between SP views and Dworkin's account of legal interpretation<sup>409</sup>.

Acknowledging the pitfalls of the texthood myth makes way for a systemic view of legal meaning. One of the implications of the systemic character of legal meaning is a looser link between authorship and authority. We have seen how some authors<sup>410</sup> have disconnected legal authority from authorship. It is important to note that severing the link between authorship and authority does not entail disconnecting legal authority from its sources. Coupled with a clearer idea of what legal meaning is, the work of those authors is salutary because it makes us take notice of a salient feature of law: legal provisions are themselves authoritative. The fact that such provisions are produced according to certain procedures and with the involvement of certain people (legally invested with the right kind of authority) makes them authoritative.

Legal reasoning is largely the process of determining *what is required* by these provisions, in combination with other legal propositions, and this in turn depends partly on determining what the standards (norms) expressed by the provisions are. This is what we call determining the content of the law. As we have seen, determining the content of the law depends on understanding the *legal meaning* of the relevant provisions (i.e. knowing which norms or legal propositions they express), but understanding the legal meaning of authoritative legal provisions is not the only (or the distinctive) task of judicial interpreters.

Two points must be made at this stage. The first is that *determining what the law requires me to do* is not the same as *determining the legal meaning of legal provisions*. Legal provisions (texts) can have many meanings: they can be historically, politically, sociologically, culturally or even aesthetically significant. Furthermore, their *linguistic meaning* (semantic and pragmatic)

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<sup>409</sup> Dworkin's use of the term 'interpretation' in LE is idiosyncratic.

<sup>410</sup> Waldron, Hurd, Greenberg, and Hershovitz are examples.

underdetermines their *legal meaning*, which depends on other legal propositions of the system. Legal interpreters seek legal meaning and the norms identified as relevant in a litigated case *are* legal meanings. The task of legal interpreters is only *partly* one of determining the legal meaning of legal provisions (determining which norms are expressed by those provisions) but determining the legal meaning of legal provisions (identifying operative legal norms) does not provide an answer to the question of what the law requires in a particular case. Identifying operative legal norms (determining the content of the law or the legal meaning of legal provisions) is a necessary but not sufficient condition of reasoning according to law.

The second point is crucial: *determining legal meaning* is not the same as *explaining legal meaning to others*. The minimalist account of interpretation introduces two important boundaries: (i) judicial interpretation is concerned with *legal meaning* only; (ii) it is the *explanation of legal meaning* to others. So the task of identifying operative legal norms in the process of determining what one ought to do according to law is not *interpretative* in the relevant sense. Although it involves understanding the meaning of legal provisions, it does not necessarily involve the explanation of their legal meaning to others. Judicial interpretation is the explanation of legal meaning to others. Judicial interpretation is a necessary part of the justification of judicial decisions.

#### 4.4. On the authority of judges

Variations among theories notwithstanding, most authors believe that understanding law involves understanding the nature of authority. The concept of authority is intimately connected to the concept of law<sup>411</sup>. So tight is their connection that it might be said that there is no law without authority. But does saying that the notion of authority is deeply relevant to our concept of law the same as claiming that law *is* authoritative? Clearly not.

To say that law is authoritative is to state that it exercises authority over those at whom it is directed, and therefore that it ought to be obeyed by them. This, as has been shown and argued by many, is a step too far- because the recognition of the central role of the concept of authority to the study of law does not entail the legitimacy of all manifestations of legal authority<sup>412</sup>. History- and indeed many recent examples- show us that some legal orders enjoy only *de facto* authority. Joseph Raz's robust theory of authority shows us how understanding the logic of authority can be distinguished from its justification, whilst at the same time underlining the role of legitimacy in the distinction between authority and power<sup>413</sup>.

On Joseph Raz's account of authority<sup>414</sup>, *de facto* authority depends on a *belief* in legitimacy by those at whom authority is directed. A can be said to have *de facto* authority over B if, and only if, B believes A to have a right to be obeyed. Let us imagine that A tells B to  $\varphi$ , and B does,

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<sup>411</sup> Raz and Finnis are examples. So is Hart. Although he did not use the word 'authority' often in CL, his critique of Bentham and Austin suggests an authority-based view of law and legal normativity. See CL 63, 201, 202-3.

<sup>412</sup> Green, AS 60: 'one has *de facto* authority only if one claims or is recognized as having legitimate authority. Obviously, this carries no moral presumption in favour of authority relations.'

<sup>413</sup> It is claimed by some that there is a symbiosis between legitimacy and authority and that there is a real contrast between authority and power. See P. Winch, R.S. Peters (1958). However, Green himself downplays the theoretical interest of such a contrast and recommends investigating the nature of power and its various forms (AS 61-62).

<sup>414</sup>The sources are various, but the main point of reference is MF. For a recent restatement of the service conception by Raz (2006).

in fact,  $\varphi$ . A can be said to have authority over B if, and only if, B  $\varphi$ s because A told her to  $\varphi$ . A's command<sup>415</sup> is itself, in this case, for B, a reason for action. But, as Raz shows us, it is not just *any* reason, not simply *another* reason to be added to the cluster of reasons already applicable to B. It is an *exclusionary reason* which displaces other reasons B may have for and against  $\varphi$ ing<sup>416</sup>. According to this picture, if B does  $\varphi$  because he believes  $\varphi$ ing is convenient, or profitable, or right, B is not *obeying* A. B obeys A if B  $\varphi$ s *because* A told her to  $\varphi$ <sup>417</sup>.

Recognition of authority entails obedience<sup>418</sup>. Raz's analysis of the nature of legal authority does not tell us that law necessarily has legitimate authority over those at whom it is directed. Rather, the conceptual link between law and authority is that law *claims*<sup>419</sup> the right to be obeyed. The exercise of authority depends on acknowledgment<sup>420</sup> of the claim by those over whom law proposes to exercise its authority. This, of course, presupposes that law is the kind of thing which is capable of exercising legitimate authority<sup>421</sup>. Acknowledgment of law's claim to legitimacy by its addressees is sufficient for *de facto* authority. Legitimacy, in turn, depends on the soundness of the claim. Law necessarily *claims* legitimate authority and such a claim is

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<sup>415</sup> Or, more precisely, the fact of the command.

<sup>416</sup> Raz, AL 30: 'The law's claim to legitimate authority (...) includes the claim that rules are exclusionary reasons for disregarding reasons for non-compliance.' See Chapter Two for considerations on the mark of authority.

<sup>417</sup> R.P. Wolff (1970), expresses this idea clearly: 'Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do *because he tells you to do it*. Legitimate authority concerns the grounds and sources of moral obligation. (9). Humouring someone is not the same as obeying them. See Chapter Two for the distinction between compliance and conformity. Obedience applies only to legitimate authority.

<sup>418</sup> Not vice-versa, since B can obey A out of fear, without recognizing A's authority.

<sup>419</sup> T. Endicott (2007), p.6, clarifies that one uses the word 'claim' figuratively but the figure in question is a 'metonymy for an implicature' rather than a personification. It is legal authorities (not the law) that claim authority, and they do it, not by stating the claim, but by acting in ways which 'presuppose its soundness'.

<sup>420</sup> I use the term 'acknowledgment' and not 'recognition' because the exercise of authority is compatible with scepticism about the soundness of law's claim by its addressees. It is possible to follow authority, i.e. to conform to the directives of authorities, without recognizing those authorities as legitimate. Acknowledgment of the claim is sufficient.

<sup>421</sup> Raz, EPD 215

acknowledged at least by some of the members of the relevant political community<sup>422</sup>. Once one understands this connection, the case for the relevance of authority to our understanding of the nature of law has been sketched.

So, asserting the purportedly authoritative nature of law, as Raz does, does not entail that all legal systems enjoy legitimacy. It suffices to say that law enjoys *de facto* authority over those whose behaviour it proposes to guide. The notion of authority is, on this approach, fundamental to our understanding of the nature of law. Raz tells us that one of the most salient features of law is its ability to provide us with protected reasons for action, and that, on his view, is the mark of legal authority<sup>423</sup>.

But law seems to do that in a way that distinguishes it from other domains: its particular brand of authority, its particular way of offering us reasons for action, it seems, is through the institutionally regulated issuing of norms<sup>424</sup>. Such norms<sup>425</sup> are, as Kelsen, Hart, Raz, Finnis and others have stressed, connected to each other in complex ways and form what we call a ‘system’, i.e. a web of internally related norms and institutions. Law is thus characterised by its systemic

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<sup>422</sup>Finnis disagrees with Raz on this point. See Raz, EPD 199-203 and AL 158-9, and Finnis, NLNR 260: law purports to be legally (not morally) legitimate, authoritative and binding.

<sup>423</sup> Raz, BAAI 108-109: ‘The pivotal place of law in the organization of society is precisely in its authoritative nature. (...) while in force, the law resolves the argument and the struggle about how things should be in society.’; ‘(...) there is then a decisive moment in the legal process: the moment in which legal standards come into existence, and provide new reasons for action. Prior to that moment, the legal process, at whatever level, legislative, administrative, or judicial, is a process aiming to influence the content of the law.’ See Chapter Two.

<sup>424</sup> For an explanation of the role of rules in practical reasoning and of how, despite their ‘opaqueness’, man-made, unconditional rules are reasons, see Raz, BAAI 203-219.

<sup>425</sup> Hart famously used the term ‘rules’, but as Gardner (‘Myths’, 214) observes, he used it to signify ‘general norm’ and thus included principles in his notion of ‘rule’.

character. Legal systems are constituted by norm-producing institutions<sup>426</sup>. This gives rise to a particular way of exercising authority, an authority which tends to manifest itself distinctively<sup>427</sup>.

Judges are legal officials and, as such, speak and act on behalf of the law. Their decisions, as legal officials, are purportedly authoritative for those at whom they are directed and, in the case of appellate judges, for other judges in future cases. This is clear and uncontroversial enough but it should not cause us to overlook an important point: the fact that judges are legal officials invested with the authority to adjudicate does not tell us everything about their role as interpreters. Understanding the unique role of judges in the life of the law depends on understanding why they are paradigmatic interpreters. After all, they are not the only type of legal official and not unique in their ability to speak and act on behalf of the law. The practical authority of judges is not theirs uniquely.

The question of the authority of judges deserves its own heading in this thesis only because judges are paradigmatic legal interpreters. What makes them paradigmatic legal interpreters is the fact that they are *required* to explain legal meaning in the process of exercising legal authority (changing their addressees' protected reasons for action). In the next sections, I will attempt to: (i) show that there is a relevant difference between *interpretative authority* and *legal authority*, (ii) argue that, despite the difference between the two, they are intimately connected in judicial decision-making, (iii) explain what *required* above means, and (iv) suggest that, unlike other legal officials (and other authoritative interpreters), judges are under a *duty* to explain legal meaning to others.

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<sup>426</sup> N. MacCormick (2007), ch. 2 and Raz, BAAI 203-204: to the systemic character of law and the fact that it consists of norms/rules, Raz adds that 'applying it and following it require or presuppose interpretation.'

<sup>427</sup> Through the operation of institutions and in accordance with specific, previously established procedures. Green, (AS 43-44). See also MacCormick (1974) and Hart (CL) on the union of primary and secondary rules traced back to a rule of recognition.

#### 4.4.1. The disjunction thesis

It has been noted that what distinguishes judges from other legal interpreters (for example, barristers) is that the authority of judges is two-fold: theoretical and practical. As legal interpreters, they claim theoretical authority over their addressees. As legal officials, they purport to give their addressees reasons for action. I have called the former interpretative authority and have, in Chapters Three and Four, taken steps towards demonstrating that it is a necessary feature of interpreting *for others*. The latter is referred to as legal authority (*stricto sensu*) and is a form of practical authority.

The line drawn between the two types of authority claimed by judges is the backbone of the disjunction thesis. I attempt to sharpen it in this chapter because the disjunction thesis is central to the minimalist account of legal interpretation. The main reason for its centrality is that it allows us to differentiate between interpretative conclusions and legal pronouncements. Differentiating these, in turn, affords clarity as to the role of interpretation in judicial reasoning (and legal reasoning, in general).

The disjunction thesis is based on two central elements: the above mentioned *distinction* between interpretative authority and legal authority and the claim that, despite being distinct, they are *tightly linked* in judicial interpretation. Let us look at each one in turn.

(i) Interpretative authority v legal authority

It is important to note that this distinction is not to be confused with the often overlooked difference between *legal authority* and *law-making* authority. We know that law-making authority is one species of legal authority. Legal authority, however, stretches beyond the ability to produce new law (it is also, for example, authority to apply existing law and to give legal effect to facts, events, relationships, and choices).

My emphasis is on the difference between interpreting (explaining legal meaning) and making authoritative legal decisions (exercising legal authority). Not all authoritative legal decisions are law-making decisions. Adjudicating involves making authoritative legal decisions but it does not necessarily result in the creation of new law. This is important because it equips us to distinguish non-law-creating exercises of legal authority (the issuing of authoritative legal pronouncements entirely based on legal reasons) from making new law.

Interpretative authority is distinct from but intimately connected to legal authority. Interpretative authority is not, as is sometimes suggested, a sub-species of legal authority: it is of an entirely different *kind*. Legal authority is a form of practical authority. Interpretative authority is a form of theoretical authority. There is, thus, no difference between judges and musical performers in this respect: in their role of interpreting *for others*, they purport to offer their addressees content-independent preemptory reasons for *belief*.

This is so independently of the implications of their theoretically authoritative conclusions: in the case of judges, non-interim interpretative conclusions can become reasons for action (their interpretative processes sometimes result in the creation of a legal rule of

interpretation to be followed by other judges<sup>428</sup> in relevantly similar future cases). But, despite appearances, a judge's authority to leave a trail of interpretation is not an instance of interpretative authority. Rather, it is an exercise of legal authority.

One important consequence of the distinction between interpretative and legal authority is that the requirement of superior expertise, as a way of fulfilling the NTJ for legal interpreters, does not apply to the exercise of legal authority by those interpreters. Judges need not be authorities *on* a particular matter in order to *decide* a case authoritatively, in the practical sense<sup>429</sup>.

But judges do have to be authorities on the workings of their legal systems, they have to be able to navigate the legal system and know how to explain legal meaning, in order to make believable claims to interpretative authority. In order to *explain* legal meaning, judges must be capable of making true statements about the legal meaning of objects they interpret. Judges exercise interpretative authority over their addressees if and only if (i) the fact of their statements is for their addressees, reason to believe in the truth of the propositions they express (i.e. the fact that judges make such statements is taken as good evidence of the truth of the legal propositions they state).

What makes them capable of exercising theoretical authority over their audience is being capable of explaining legal meaning by offering *good reasons* for their interpretative conclusions. Such capability is entailed by their duty to justify the decisions they make as legal authorities. They may not be experts on a particular topic, but their *ability* to offer good reasons (even when not challenged to do so) for both their interpretative conclusions and their decisions is presupposed by their claim to legitimate legal authority. There is a tight link between the

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<sup>428</sup> Endicott (LI 110), holds that legal interpretation is 'applicative, not generalizing' because it 'gives a rule for the application of the law.' I agree that legal interpretation is not generalizing, but this does not make it 'applicative'. I am not certain that all interpretative conclusions give a rule for the application of the law.

<sup>429</sup> Green, AS 28

expectation of and claim to superior expertise of authoritative interpreters and their ability to justify their decisions. This link sustains the disjunction thesis by making the distinction between interpretative and legal authority clearer.

*Legal authority* is typically exercised through statements made true by the acts of specific institutions<sup>430</sup> according to certain established procedures. It is to these we refer when we speak of legal sources: sources of law (various as they are) are sources of authority<sup>431</sup>. In fact, the endorsement of standards by legal authorities is *decisive*, as Raz points out, in that it *transforms value into fact*<sup>432</sup>. As a result, we engage in *factual reasoning* in order to *establish the law*<sup>433</sup>. Legal sources are authoritative precisely for this reason: what was once up for grabs becomes a legal fact by virtue of an official act of recognition or endorsement.

Identifying judges as paradigmatic legal interpreters makes the difference between judges and legislators clearer. Although they too are capable of exercising theoretical (interpretative) authority over their addressees, legislators are not under a *legal* duty to interpret. Sometimes, as we know, explaining the meaning of their own creations (pieces of legislation which rely heavily on jargon, for example) is necessary to the fulfilment of their duty of clarity, and a condition for achieving their goal of *communicating* something to their addressees thus allowing them to act upon the reasons they provide. Their ability to do so, however, is not a defining feature of their

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<sup>430</sup> I am grateful to John Finnis for the idea, expressed in his BCL seminars, that *law is made up of propositions directing actions* and that the truth of such legal propositions is determined by authoritative legal acts (by legislatures and courts).

<sup>431</sup> Note that, for Raz, the connection between legitimacy and authority makes a theory of interpretation necessarily “a theory of the interpretation of justified law only.” (BAAI 234). Only justified law can be a source of good reasons for belief in the truth of interpretative statements.

<sup>432</sup> Raz is referring to social facts here. So am I.

<sup>433</sup> BAAI 115. Raz seems to mean content-independent reasoning. All reasoning is factual, under some description.

law-making role: interpreting accompanies the *application* of law but is not a necessary feature of law-making.

It is possible for a legislator to make new law ‘on entirely non-legal grounds’<sup>434</sup>. Judges, by contrast, are called upon to solve legal disputes by *applying* the law to the facts of a case. Although they too are law-making authorities, their role is primarily one of *giving effect* to the law. This is the source of an important constraint which separates judges from legislators: judges cannot make new law on entirely non-legal grounds, they are required to engage in legal reasoning and to rely on legal standards in justifying their decisions. So despite it being true that both judges and legislators may exercise interpretative authority over their addressees, only judges are *legally* required to interpret in the process of fulfilling their primary role of resolving legal disputes *according to law*.

To say that legal interpreters exercise interpretative authority over their addressees is to say that their conclusions are content-independent peremptory reasons for belief. Interpretative authority is a form of theoretical authority. The legal interpreter’s conclusions must be backed by *legal* reasons. Such reasons are found, partly, in discrete legal norms: the fact of the *existence* of a legal norm is itself a legal reason<sup>435</sup> for belief in the truth of an interpretative conclusion. But the systemic character of legal meaning entails that the legal meaning of valid legal acts depends on the legal meaning of other acts. Legal acts are interpretable because they have legal meaning, but, as the product of a system, legal meaning results from an interplay of factors and is not found in isolated legal acts. Legal norms *are* legal meanings.

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<sup>434</sup> This contrast is explained by John Gardner, ‘Myths’ 217-218 (my emphasis): ‘According to LP\* [‘In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)’], norms are made legally valid by someone’s having engaged with them. A judge’s engagement with norms by mounting a defence of them partly in terms of other legal norms is one such type of engagement. It differs in deeply important ways from the legislative engagement that consists in the norm’s straightforward (*legally undefended*) pronouncement.’

<sup>435</sup> Raz. PRAN 51: ‘(...)the fact that there is a rule that p is a reason and not the rule that p itself’

The interpretative authority of judges results from their epistemic *position*, not from their power to change protected reasons for action. Judges need not be authorities on a particular legal issue in order to make a sound legal decision, but they are expected to be able to navigate the legal system to which they belong and to justify their decisions by reference to the law in force. In order to have interpretative authority, they must be *better situated* than their addressees to issue credible statements about how a certain object ought to be understood from the point of view of their legal system, what legal relevance it has, which legal effects it can produce.

Interpretative authority (and the corresponding duty to interpret for others), I recall, is the result of an epistemic gap between interpreter and addressee. The gap gives judges an epistemic advantage over their audience. As authoritative interpreters, judges are better situated than their addressees to understand legal meaning. That is why they are required to interpret *for others* in the exercise of their primary role of applying the law to the facts in a case. Epistemic advantage is a requirement of sound legal decision-making because it is a requirement of legal justification. But it is not sufficient to justify a purported exercise of legal authority.

Thus, one important upshot of the disjunction thesis is that there is a relevant difference between *interpretative statements* and *legal pronouncements* (where ‘legal’ entails a claim to practical authority)<sup>436</sup>. Although both belong to the category of illocutionary acts, interpretative conclusions are *assertions* of meaning to which the right propositional attitude is one of *believing* or *knowing*. Legal pronouncements, on the other hand, are performative speech acts (performative v. constative or, as later preferred by Austin himself, verdictive v. expositive)<sup>437</sup>. True,

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<sup>436</sup>Again, we see this expressed in *Goodrich v Paisner* [1957] A.C. 65 at 88 per Lord Reid: ‘[T]hat does not mean that the words used by the Court of Appeal are to be treated as if they were words in an Act of Parliament. In substantially different circumstances they are only a guide and not a rule. How far they are applicable must be considered in any case where the facts are substantially different in a relevant respect.’

<sup>437</sup> Emphasis on the performative character of legal utterances, whilst found in Hart’s early work, is not present in CL (Stavropoulos notes this in ‘Objectivity’, 54). Interpretative utterances belong to the category ‘legal utterances’ only when issued by a person with legal authority. Because some interpretative utterances are legal utterances, not

interpretative statements can be turned into legal pronouncements if an interpreter also claims practical authority over her addressees. But a believable claim to practical authority is a necessary condition for turning an interpretative conclusion into a legal pronouncement. Since judges are both legal interpreters and legal officials, the disjunction thesis tells us, this is typical of judicial interpretation. But it is a contingent aspect of interpretation, a merely possible outcome of the interpretative process.

Authoritative ascription of legal meaning is possible only if the interpreter exercises practical authority over her addressee. In short, interpretation takes the form of meaning-ascription (in the narrow sense) only in the context of an exercise of *legal authority*.<sup>438</sup>

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all legal utterances are performative: only those which, in Stavropoulos' words, "create a state of affairs". Interpretative utterances do no such thing: they neither merely describe, nor create states of affairs, but *explain* legal meaning. Interpretation, it has been seen, is found somewhere between description and creation. See Hart (1951, 1954 and 1983) and Baker (1977). See MacCormick (2008) for an explanation of the connection between Hart's work and speech-act theory.

<sup>438</sup> It is possible for a judge to endorse an incorrect (or wrong) interpretation authoritatively. See *Re Spectrum Plus* [2005] 2 AC 680 at para 38 per Lord Nicholls: "So, it is said, when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation." Compare para 6 of Lord Nicholls' judgment, in which declaring such a previous decision wrong is classed as 'overruling' and hence as authoritative elimination of legal authority. Compare Kelsen, for whom 'the conformity of a norm to a higher-level material standard does not amount to a *sufficient* condition of its validity. Nor does it generally amount to a *necessary* condition. In fact, the lower-level authority may create a valid norm which is materially unjustified.' with Bobbio and Ferrajoli for whom material justification is a necessary but not sufficient condition of validity (C. Luzzatti, (1995), 95, note 28).

(ii) The link

The other central tenet of the disjunction thesis is that the two forms of authority claimed by judges are tightly linked. Indeed, the role of judges as paradigmatic legal interpreters is defined by this link. The link between interpretative and legal authority in judicial decision-making involves an intimate connection between explanation and justification in judicial interpretation. It involves, more precisely, that judicial interpretation is justificatory<sup>439</sup>. This is so partly because explaining legal meaning involves identifying good reasons for the interpretative conclusions offered.

The interpretative authority claimed by judges is justified if and only if their interpretative statements are good evidence of the truth of the beliefs for which they are reasons. But judicial interpretation is justificatory for another, less obvious, reason: interpreting is often necessary to the identification of operative legal norms relevant (potentially applicable) to the case at hand. I have already noted that determining the content of the law on a particular point (i.e. identifying the norms relevant to the case at hand) often depends on *understanding* the legal meaning of a legal provision (most often, of various, related ones).

I emphasize ‘understanding’ because I wish the distinction between interpreting for oneself and interpreting for others to remain sharp. Judicial interpretation is a form of legal interpretation and, as such, an instance of interpreting for others. Understanding the legal meaning of legal provisions is not a central case of judicial interpretation because it is an instance of interpreting for oneself. The central case of judicial interpretation, as I have said, is explanation of legal meaning to others.

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<sup>439</sup> Wróblewski and MacCormick (2003), 421: interpretative reasoning is a *salient element* of the ‘justificatory reasonings of lawyers and legal systems’.

The need to determine the meaning of legal provisions in the process of identifying relevant legal norms makes the link between interpretation and legal justification particularly tight. Although they are not always called upon to *explain* the meaning of particular legal provisions every time a norm is individuated, the reasoning of judges in deciding a case must be traceable to their reasons for identifying that particular norm (or norms) as applicable (relevant) to the case at hand.

This is the second reason for the tight connection between judicial interpretation and justification: in virtue of their impact on the lives of the people at whom they are directed, judicial decisions must be justified. In order to legally ground (justify) their decisions, judges must be capable of explaining legal meaning. In the following sections, I will argue that, in most legal systems, judges are *legally required* to explain legal meaning in the process of justifying their decisions. This, we will see in due course, involves two levels of justification and two different types of objects of justification. The main point to be made is that judges are under a duty to interpret, subsidiary to their duty to justify their decisions. The link between the interpretative authority of judges and their legal authority is found in their symbiotic duties of justification and interpretation.

#### 4.4.2. Judicial interpretation and justification

“The relation between reasons and rulings can be other than logical. (...) When someone questions a judicial decision or the warrantedness of a judicial interpretation, the answer may be to show him, or to get him to see aspects of the case to which he has been blind; and this need not take the form of supplying him with reasons. It may be a matter of opening his eyes to the importance of something he had not adequately prized.”<sup>440</sup>

Purported exercises of legal authority include acts of purported application of law. Judges are required to resolve legal disputes<sup>441</sup> and to apply valid law in the process of resolving such disputes. Their decisions (a paradigm of legal decision<sup>442</sup>) are *applicative* decisions which must be traced back to identifiable legal standards. This warrants the claim that there is no legal system without rulings, defined as “authoritative legal decisions in particular cases that purport to be applications of the law’s rules.”<sup>443</sup> Their decisions are legally authoritative (de facto) even if contrary to the applicable legal rules<sup>444</sup>.

We know that courts are law-applying bodies<sup>445</sup>. As such, they are also political institutions (in the broad sense): their decisions ‘determine the constitutional landscape of a legal system’. The duty of courts to resolve legal disputes by application of existing law is imposed on

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<sup>440</sup> Zweig (1971), 422-423

<sup>441</sup> Endicott VII.283.

<sup>442</sup> Wróblewsky (1971), 409

<sup>443</sup> Gardner, LALOF 208. Gardner encourages us to notice that rulings need only be purported applications of the law and thus that Fuller’s concern with a possible discrepancy between the law as promulgated and the law as actually administered (ML 81) is justified. The importance of legal justification is explained precisely by the fact that rulings may fail to meet this requirement.

<sup>444</sup> LALOF 209: judges have law-applying authority only if it is possible for their rulings to be ‘erroneous in law.’

<sup>445</sup> Raz calls them ‘the primary law-applying organs of the system’ (PRAN 134-137)

them by the ultimate rules of a legal system, those whose criteria determine the validity of all other rules. Hart famously called them rules of recognition<sup>446</sup>.

It has been advanced that judges claim both interpretative and legal authority over those at whom their rulings are directed. But their duty to apply valid rules in resolving disputes means that their legal authority is two-fold: they have legal authority to *apply* the law but their applications are themselves authoritative and capable of generating new legal norms. They are thus both law-applying and law-making authorities. Not all norms relied upon by judges in the process of deciding a case according to law are authoritatively *applied*. Although judges have the authority to ‘transform’ any standard into law- indeed they can arguably do so by merely *treating them as law-*, they often choose not to, for a variety of reasons. They have the ability to limit their own exercise of legal authority but this does not correspond to a limitation of their interpretative authority<sup>447</sup>.

Previous sections suggest that the duty to apply the law in the process of resolving legal disputes includes a duty of justification of judicial decisions, i.e. a duty to state good reasons for those decisions, at least when challenged to do so<sup>448</sup>. So, judicial decisions are the primary object of legal justification. The link between the justification of judicial decisions and the explanation of legal meaning is often overlooked in discussions of the nature of legal interpretation. The connection is an important one not because, as stressed above, judges must *understand the meaning*

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<sup>446</sup> And they are duty-imposing, not power-conferring, rules. See Gardner (2011), at 175. See also Raz (CLS 198-9), and MacCormick (2008 103-6).

<sup>447</sup> Gardner (2011), 168-169. Gardner uses the example of Dicey’s ‘conventions of the constitution’ which can but need not be authoritatively applied by courts *as law*. See p.169, n.18: the self-denial is itself treated as a customary constitutional rule.

<sup>448</sup> MacCormick and Wróblewsky (2003), 258

of the legal rule or legal text applied<sup>449</sup>, but because authoritatively applying legal standards to the case at hand requires explaining the legal meaning of the relevant facts. Such explanation is justificatory because it identifies reasons for belief in the truth of the propositions stated.

At this point it becomes clear that two different levels of justification (and two corresponding objects of justification) are involved in judicial decision-making. On the one hand, we have the justification of interpretative conclusions (or choices), on the other the justification of the judicial decision itself.

Judicial interpretation is reason-giving but there is a difference between the *justificandum* of judicial interpretation and that of judicial decisions. Different criteria of correctness are at stake because different objects and different justificatory premises give rise to different justificatory reasoning processes. What makes something a good reason for a judicial decision is different from what makes something a good reason for an interpretative conclusion<sup>450</sup>.

Thus judicial interpretation is an intermediate step in the justification of judicial decisions. It involves a relatively self-contained justificatory process, a process of adducing reasons for certain meaning-conclusions. This is what MacCormick and Wróblewsky seem to have in mind when they claim that interpretative decisions are ‘fractional decisions’ which themselves call for justification: they are but ‘one part of the justification of the decision in the case’<sup>451</sup>. Although they have a role to play in the determination of the legal outcome of a case, there is no direct link between the explanation of the legal meaning of the facts and the determination of the rights and duties of the parties. The connection between interpretation and application of the law in the decision of a case is an indirect one.

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<sup>449</sup>Wróblewsky and MacCormick (2003, p.259), too, fall prey to the rule-centric view of interpretation and the texthood myth.

<sup>450</sup>Wróblewsky and MacCormick (2003) 256

<sup>451</sup>Wróblewsky and MacCormick (2003) 425

Distinguishing the justification of interpretative conclusions from the justification of judicial decisions makes the difference between reason-giving and decision-making more apparent. This distinction is connected to the idea that the relation between rules and rulings is often other than logical: understanding the role of justification in judicial decision-making is not a matter of grasping the logic of judicial reason-giving<sup>452</sup>.

One crucial implication of the separateness of interpretative and applicative justification is that the judge's duty to justify their decisions at law entails a duty to explain legal meaning. This implication will be addressed in the next section.

#### 4.4.3. The duty to interpret as a subsidiary duty

The second implication of the disjunction thesis is that the duty of judges to interpret for others is a *subsidiary duty*. The previous section establishes that the duty to interpret is part of the duty judges have to justify their decisions by reference to the law. This means that that they are under a duty to explain the legal meaning of the facts in the case at hand, so their duty to justify decisions involves a duty to interpret. The tight link between the exercise of interpretative and legal authority by judges makes it clear that the duty to interpret is subsidiary to their primary duty to *justify* their authoritative legal decisions. This needs unpacking.

The duty to state reasons for authoritative legal decisions is found in most legal systems. It reflects the values of non-arbitrariness and legality which form part of ideal of the rule of law. One of the desiderata associated with the ideal is that that the law be as clearly formulated and as

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<sup>452</sup> A. Zweig (1971), 421-2. Zweig illustrates his points with an example of interpretative musical display: "Questions of how a musical score has to be interpreted or what the correct tempo for a piece is are often settled in an analogous fashion, not by giving reasons but by humming. A conductor may say, 'It has to go like this!' and shake his fist violently at the cello section. (...) of course: the players must see the point of these gestures." (423-4)

followable, as possible<sup>453</sup>. I have already noted that these two requirements are intimately linked to the legal duty judges have to make their reasoning transparent in the rulings they produce. In order for their rulings to offer the parties, and other officials, reasons for action, they must be capable of being *understood* and *followed* (acted upon) by them.

The practical, action-guiding role of legal provisions and rulings, which is implied by law's claim to legitimate authority<sup>454</sup>, is more likely to be fulfilled by meeting the clarity requirement. Not only is explanation the typical way in which judges exercise their interpretative authority, but the need for explanation (rather than mere display) of legal meaning is itself a rule-of-law requirement<sup>455</sup>. Thus judges, do not only have a professional duty to reach their conclusions by legal reasoning<sup>456</sup>: they also have a duty to explain legal meaning to their addressees (the parties in a particular dispute, other legal officials, and all members of a particular political community or legal order) in the process of justifying their authoritative decisions<sup>457</sup>. Fulfilment of their most distinctive professional duty to *apply* the law in their

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<sup>453</sup>I do not use the adjective 'precise' here because, unlike clarity and explicitness, precision is not necessarily desirable. Endicott notes that "precision is not always useful in regulating communities, and lawmakers know that"; he also observes that 'enactments formulated in precise language do not always make precise law.' (*Law is necessarily vague*, *Legal Theory*, vol. 7, issue 4 (December 2001), 379-385, at 379. Although precision has 'rule-of-law benefits', there is no necessary link between precision and lack of arbitrariness. The virtues of precision are thus, as Endicott argues, 'general reasons to make law precise.' (380). In fact, 'every precise law incurs arbitrariness in virtue of its precision' (380). Sometimes, not always, arbitrariness is justified. But precision (its benefits) always comes at a price and the fact that the price may be excessive explains why 'precision is not generally an aim of legislation' (Endicott, 380)

<sup>454</sup> For a radically different view of the nature of law's authority (denying its practical character and reducing it to theoretical authority), see H. Hurd (SIS and 1999, ch.3). For a more recent defence of a non-communicative theory of legislation (one which better captures and explains how a statute contributes to the content of the law, see Greenberg (2011), ch.9.

<sup>455</sup> It is the ideal according to which it is the law that rules' (John Gardner, LALOF 195). Hart, in turn, had defined them as 'the requirements of justice which lawyers term principles of legality' (CL 207).

<sup>456</sup> Gardner, 'Myths' 215.

<sup>457</sup> See, for example, *Flannery v Halifax Estate Agencies* [2000] 1 WLR 377.

decision-making process is dependent on their ability to exercise interpretative authority. That, in turn, depends on the fulfilment of their duty of clarity through explanation.

Explanation of legal meaning by interpretative authorities typically takes the form of meaning *ascription*. Because judges claim interpretative authority, their interpretative conclusions are not simply indicative of how an object *may* be understood. They are statements about the way in which the object *ought* to be understood by reference to their legal system. This implies a choice among possible competing meanings<sup>458</sup>. Authorities are supposed to be good at making choices *for us*. Theoretical authorities purport to give us weighty reasons to hold certain beliefs, whereas practical authorities give us reasons to do something and to do it for a particular reason (not for other reasons we might have for doing it).

If a respectable historian tells me that there is historical evidence that Jesus existed, her epistemic advantage over me gives me a reason to believe that such evidence exists. I treat her as an authority on the subject if I treat her statements as providing reasons to believe that there is such evidence (in spite of the fact that I have never seen it). If I come to believe that Jesus existed solely in virtue of her telling me that there is evidence to that effect, I take her statements as content-independent peremptory reasons to believe that Jesus existed. They are content-independent in the sense that their status as a reason is not dependent on their content. They are peremptory because I do not need to conduct the necessary research and factually verify and assess the truth of her statements. She has the expertise I lack. So I believe that Jesus existed because she told me so.

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<sup>458</sup> Recall that, while one can interpret without being aware that one is interpreting, one cannot choose without being aware that one is choosing. Interpreting, thus, does not entail choosing. Interpretative explanations, however, do involve choosing (Barnes, OI 155). Not only does the interpreter choose to explain legal meaning (not historical meaning, for example) but, if authoritative, she also often chooses among various possible meanings of the object. The availability of various meanings is a feature of both musical and legal interpretation.

When judges make interpretative statements, they are not telling their addressees what they ought to do. Rather, like the respected historian, they are telling them what to believe and the credibility of their claim to interpretative authority results from the epistemic gap that separates them from their audience: legal knowledge is, in great part, technical knowledge and processing such knowledge involves skill. The greater the epistemic gap between interpreter and addressee, the more likely the former is to exercise theoretical authority over the latter.

Sometimes a judge's saying that A ought to be understood as B makes it *imperative* that A be understood as B. But this is only possible in the context of an exercise of legal authority (*stricto sensu*), that is, it is possible only if the interpreter's conclusion is capable of being taken by an addressee as a reason for action<sup>459</sup>.

The dividing line between meaning ascription and the explanation of meaning is often tenuous and it is tempting to identify the two. But not all explanations of meaning are ascriptive in the narrow sense, i.e. not all involve singling out and stipulating one meaning as *the* meaning of an object. An explanation of the various possible meanings of an object is logically possible (if, in practice, difficult to achieve). But note that even such a comprehensive explanation of meaning would be ascriptive in a broad sense: it would attribute all those meanings (say A, D, and F) to that object and, by implication, exclude other meanings (B, C, and E) from consideration. Ascription entails choice. But it is not necessarily *stipulative* in the sense of purporting to authoritatively establish what the object means.

Only explanations of meaning which purport to be authoritative are ascriptive in the narrow sense. In such cases, meaning ascription is an instrument of stipulation and, in such cases, theoretical authority is exercised in the context of an exercise of practical authority. Non-

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<sup>459</sup> See A. Peczenik's Swedish silver foxes example for an interesting account of the different kinds of reasons we find in the justification of judicial decisions (2003, p.435-443).

interim interpretative conclusions are stipulations<sup>460</sup>. The paradigmatically explanatory character of judicial interpretation results from the power of meaning-ascription judges have. Such power, in turn, comes with a need for *justification*. Thus interpretative authority can be defined as the *justified* (legitimate) *power* of legal meaning ascription. A judge's *duty* to interpret for others implies that she has the power to authoritatively ascribe legal meaning to different objects<sup>461</sup>. This power, however, can only be exercised because judges are legal authorities. The power to stipulate is correlative to the duty to interpret, but the duty to interpret is a *legal* duty, a duty of judges as legal (practical) authorities.

There is something intuitive about the connection between the exercise of authority (any kind of authority) and the requirement of justification. This intuitive association does not imply that every act of authority is reason-giving. It does, however, help us to understand why, in most legal systems, the justification of authoritative legal decisions is a *legal requirement*<sup>462</sup>. Such a requirement can either be imposed by 'strict law' or by convention. For instance, article 205 of the Portuguese Constitution (1976) establishes a duty on judges to state the reasons on which their judgments are based (*dever de fundamentação das decisões dos tribunais*).

This is a clear example of an explicitly established legal duty to justify judicial decisions, a duty so relevant as to deserve constitutional articulation. 'Dever' is the Portuguese word for 'duty', and 'fundamentação' derives from the verb 'fundamentar' (to ground). But the duty may

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<sup>460</sup> Guastini (1997), 287. This, however, does not warrant the conclusion, endorsed by Guastini, that interpretative statements are neither true nor false. The power of stipulation is not inherent to interpretative authority. The power of stipulation is a practical power of judges as legal authorities. Guastini's brand of scepticism will be addressed in Chapter Five.

<sup>461</sup> Note that 'ought' does not always imply 'can'. One may be *unable* to discharge one's duty, e.g. when one has been promoted too rapidly or too far.

<sup>462</sup> Wróblewsky and MacCormick (2003) 258, tell us that it is a 'common feature of modern legal systems' that 'those charged with the function of taking legal decisions (...) are required to give only such decisions as are justifiable in law.' This is a different way of saying that judges are required to engage in legal reasoning in the exercise of their function of *applying* the law to a case. Legal reasoning is justificatory, in this sense.

exist in the absence of such explicit formulations. Indeed, as noted above, it is implicit in the values of legality and non-arbitrariness. Different jurisdictions pursue the ideal of the rule of law in different ways but, despite variations across different legal systems and traditions, the justification of authoritative legal decisions is always a means to both controllability and accountability. The more accountable officials are for their decisions, the more controllable their decisions and the less prone they are to arbitrariness.

If authority were severed from justification, how would one be able to distinguish the former from naked power or, indeed, furnish the concept of legitimate authority? The intimate, almost symbiotic, connection between authority and justification reinforces the idea that legal interpretation is paradigmatically explanatory, where explanation is to be understood as the identification of *good* reasons for the interpretative conclusions advanced.

*\*Taking stock*

The disjunction thesis tells us that, despite the tight link between the two, there is a fundamental difference between interpretation and adjudication. The difference is made apparent by the fact that legal reasoning is not *predominantly* interpretative. We have seen that there are many ways of making new law, and that legislators are not the only law-making authorities in a legal system. Saying that judges can and do make new law is almost trivial<sup>463</sup>. John Gardner reminds us that there is very little moral significance to the distinction between law-making and law-applying powers. The moral weight of the principle of separation of powers is found in the dividing line between legislation and judge-made law. The same goes for the rule-of law limits to retroactivity: they apply only to retroactive *legislation*, not to *legally supported* retroactive changes to legal norms<sup>464</sup>.

Interpretation does not, *by itself*, generate new legal norms. What gives judges the power to create new law is their legal authority, their ability to turn interpretative conclusions into new rules for the application of law. Interpretative authority, in short, is not enough to allow a judge to create legal norms on legal grounds. A sound exercise of interpretative authority gives the judge the ability to *ascribe* legal meaning to a set of facts but not the power to determine legal positions. Interpretation is the process through which legal grounds for the creation of new legal norms are (authoritatively) established. Interpretative conclusions, even non-interim ones, do not directly resolve legal disputes.

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<sup>463</sup> *Pace* Dworkin, who did not accept this fact.

<sup>464</sup> Gardner 'Myths' 217-218

Strictly speaking, thus, there is only one kind of legal interpreter: someone with the authority to *explain*<sup>465</sup> legal meaning (offering a justification for their interpretative conclusions) to others. As such, all legal interpreters claim theoretical authority: the fact that they explain legal meaning to others implies that they are in a position to *justify* rather than merely *describe* or *speculate about*, legal meaning. Explaining and justifying involve a certain kind of *knowledge* or *expertise* which makes the interpreter's claim to *interpretative authority* believable. To have interpretative authority is to be able to provide reasons for belief in the correctness of the advanced meaning-conclusions.

Judges purport to exercise more than one type of authority over their addressees: *interpretative* and *legal authority*. Their decisions are *legal decisions*, they are not simply explanations of legal meaning but also *prescriptions*<sup>466</sup>. Judges have a legal (and professional) duty to reason according to law in concrete cases and to produce legal solutions for disputes by ascribing legal rights and duties to the parties. Ascribing meaning to facts should not be confused with the

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<sup>465</sup> Or display, in certain cases, although it is important to note that judges must be capable of explaining legal meaning all the way to bedrock, even if, at times, they do not feel the need to do it. In any case, display is possible only as part of an explanation of legal meaning (i.e. a judge can display the content of the RR only *in the process of explaining* the legal meaning of the facts in the case she is required to solve). Display of legal meaning is possible only within an *explanatory framework*: articulating the meaning of a discrete legal norm *may* not be required in the process of explaining the legal meaning of the facts in dispute. In certain cases, it suffices to *display* it.

<sup>466</sup>E. Bulygin (1963), 27, usefully adopts von Wright's (1963) distinction between 'norm' and 'norm proposition'. Interpretative conclusions are, according to this model, not norm propositions (they do not merely state facts but place them against the framework which makes them legally relevant and explain *why* they have the legal relevance they are said to have): interpretative statements are statements about how something *ought to* be understood, they are not merely descriptive of fact. Interpretative conclusions are not just normative in the sense that they are often statements *about* norms, they are used to express norms, not just normative propositions (Bulygin 2004). Bulygin argues that norm propositions cannot be major premises in judicial argument because they assert facts and individual norm issued by the judge cannot be justified by reference to facts: 'When a judge sentences Tom to life imprisonment for having killed Peter, he does not only state a fact (that Tom has committed murder), but issues a prescription, i.e. an individual norm to the effect that Tom be sent to prison for life. A norm proposition that states that according to law the judge has the obligation to sentence those who have committed murder, being a mere statement of fact, is not sufficient to justify the prescription (the individual norm) issued by the judge. In order to justify his decision the judge must *use* as a premise of his argument the general norm that punishes murder; it is not enough that he *mention* it. It is from the *norm* which prescribes that for all x, if x has committed murder, x should be sentenced to life imprisonment. It is essential for this argument that its major premise be a norm and not a mere norm proposition.' He adds that the major premise of a justificatory argument must be a *universal normative sentence*. Normative propositions, he notes, are merely *existential*.

ascription of legal powers or duties to the parties in a legal dispute. Legal authority is the authority to determine legal positions, the authority to ascribe rights and duties. As such, and unlike interpretative authority, it is a form of *practical authority*<sup>467</sup>: it gives the parties (legal) reasons for action, not merely reasons for belief.

It is now time to look at minimalism and what it tells us about the role of interpretation in legal reasoning and adjudication.

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<sup>467</sup> Raz (1985). See Finnis on Hart's account of law as practically authoritative. Legal reasons for action are 'content-independent' and 'pre-emptory' (2002), 27: 'Hart's neglected but important later works, notably some of his *Essays on Bentham*, recast his entire theory of law even more firmly as a theory of a particular kind of reason for action—reasons that are peremptorily normative by virtue not of their content but of their relationship to other, authoritative rules. (of change, adjudication, and above all recognition.)'

## CHAPTER FIVE

### MINIMALISM

‘Much of what is commonly called ‘interpretation’ can be done with no interpretation at all.’<sup>468</sup>

There are numerous and far-reaching connections between authority, interpretation and adjudication. None are unimportant and many are instrumental to understanding the nature of law and legal systems. It would be impossible to address them all here. The focus of this chapter is only on points directly related to the disjunction thesis. The disjunction thesis holds that the legal authority of judges (their claim to offer their addressees exclusionary reasons for action) is distinct from their interpretative authority (their claim to offer their addressees content-independent peremptory reasons for belief in the truth of the meaning-statements they advance).

The points identified and addressed in the next three sections are the following: (i) the role of legal reasoning in adjudication, (ii) the distinction between interpretation and application in judicial decision-making, and (iii) the role of interpretation in judicial reasoning. These are the points about which the minimalist account must have something (not everything) to say. What follows is minimal in this sense: more *could* be said, but nothing more *needs* to be said.

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<sup>468</sup> Endicott, LI 111.

## 5.1. Adjudication and legal reasoning

‘Where it seems that the law cannot draw a boundary, it would seem impossible for a human being to identify one. Yet the law trains officials for that very purpose, and appoints them to judge and to regulate that which it leaves undetermined, as rightly as they can.’<sup>469</sup>

### 5.1.1. Resolution, application, justification

Adjudication is the process of resolving a legal dispute. Legal reasoning is reasoning about law or according to law<sup>470</sup>. The previous chapter identified two duties of judges: the first is the duty to apply the law; the second is the duty of justification, the duty to ground their decisions in *legal reasons*. And it was argued that two different objects of justification are involved in adjudication: a judge is expected, indeed required, to justify her interpretative choices as well as her final decision. These are distinct processes, each with its own *justificandum*.

As we turn our attention to the role of legal reasoning in adjudication, and to the place of interpretation in judicial reasoning, one more duty comes to light: the duty of resolution (Endicott). The legitimacy of courts depends on the fulfilment of this duty and fulfil it they do, as Endicott tells us, ‘even when they decide without giving reasons, even when they decide wrongly, and even when they decide corruptly’<sup>471</sup>. ‘Even when they decide corruptly’ may be a step too far, since it is hard to see how judges can be discharging an official duty despite acting

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<sup>469</sup> Aristotle, *Politics* 3.16. Cited by Endicott, VII. 197.

<sup>470</sup> Raz, EPD 377: ‘Legal reasoning is reasoning either about what the law is or about how legal disputes should be settled according to law.’

<sup>471</sup> Endicott, VII. 198-199

unlawfully themselves. Be that as it may, the duty of resolution is not to be confused with their duty to decide justly. Adjudication requires resolution. But the duty of resolution goes beyond the duty of application. Adjudication involves the fulfilment of many duties, but four stand out: the duty of resolution (a rule-of-law requirement), the duty of application (imposed by the ultimate rule of the legal system, Hart's rule of recognition), the duty of justification (divided into justification of interpretative choices and justification of legal decisions), and the duty to do justice according to law<sup>472</sup>.

So, despite appearances, 'application' and 'resolution' are not synonyms. This is evident in the passage from Aristotle's *Politics* quoted above. Resolution often requires judges to go beyond the application of the law to the facts of a case. This happens when the law does not provide a sufficiently clear answer to the ultimate question to be answered by the judge in resolving a dispute: *quid juris?*<sup>473</sup> The possible gap between the duty to apply the law and the duty to impose resolution is made apparent, for example, when we consider the difference between a legal right to 'substantial damages' and a legal right 'to have that right determined in a precise sum'<sup>474</sup>

There is no room for legal (judicial) interpretation where no law is claimed or supposed to be applicable to the facts of a case. Resolving a legal dispute is not the same as applying the law to a set of facts. Simply put, the duty to interpret (to explain legal meaning) is subsidiary to the duty to justify the application of certain legal standards to the case at hand. Application is

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<sup>472</sup> Endicott mentions other, related, judicial duties which can conflict. He notes that the duty of resolution is different from the other duties because it does not normally conflict with them. The duty of resolution, Endicott writes, 'is independent and basic. It implies the duty to resolve incommensurabilities among the other requirements of a good decision.' VII 199.

<sup>473</sup> Endicott, VII 198: 'judges have a duty to give (in fact, to *impose*) resolution.(...) The plaintiff in a libel case may have a legal right to substantial damages- and nothing more determinate. Then we might say that the court would do justice if it ordered the defendant to pay 'substantial damages'. But such an order would be a dereliction of duty because part of the court's duty is to impose resolution.'

<sup>474</sup> Endicott, VII 198.

part of the process of resolution, but does not exhaust it<sup>475</sup>. To adjudicate is not simply to apply the law. To *adjudicate* is to *resolve*<sup>476</sup>.

As noted in Chapter 5, judges have a duty to engage in legal reasoning when resolving legal disputes. This is what it means to say that judges have a duty to *apply* the law in the process of making a decision for a case: applying the law to a set of facts involves both reasoning about the law and being guided by legal standards in one's decision-making process. Adjudication involves a particular kind of legal reasoning which we call judicial reasoning. The duty to engage in legal reasoning implies a duty to interpret for others as an element of justification. Thus, the duty of justification implies both a duty to engage in legal reasoning and a duty to explain legal meaning. Judicial interpretation is the explanation of legal meaning for the purpose of justifying a legal decision. Adjudication is the process of reaching such a decision. Hence they are different activities.

We began this chapter with three main points in mind:

- (i) Legal interpreters are not (just) interpreters *of* law. Their task is to explain *legal meaning*.
- (ii) *Explanation* is akin to elucidation (clarification). It is not to be confused with description (which identifies distinctive features) or determination (which culminates in a practically authoritative decision).<sup>477</sup>

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<sup>475</sup>On this point, Endicott (VIL 202) notes that 'when the law does not answer a question, judges need to act on the considerations that would motivate good legislature'. This, however, does not entail that legislative considerations suffice for resolution: 'When it is unclear what the law requires, it may also be unclear what legislative considerations require. Those considerations may not identify a last defendant who may rightly be prosecuted- and yet the judge needs to resolve the matter.'

<sup>476</sup> Endicott, VIL 200: 'In adjudication the general political need for resolution in decision-making crystallizes into a formal, structural demand. Every judicial dispute is a coordination problem with a special feature (a feature shared by some political decisions, such as elections): it demands that one of two outcomes be given, and the force of that demand is independent of the importance, if any, of the considerations for and against either outcome.'

<sup>477</sup> This does not, in any way, challenge or weaken the claim that interpretation (in general) is both conserving and creative (Raz). The question is 'of what?' As noted in Chapter Two, the use of 'creative' to characterise the activity

- (iii) Adjudication is a process of legal *determination*. As such, it cannot be exhausted by interpretation. Interpretation elucidates legal meaning while adjudication typically *changes* the legal positions of the parties in a dispute. Adjudication involves a specialized form of *legal reasoning*, a form which is broadly referred to as *judicial reasoning*<sup>478</sup>.

The link between legal interpretation and the duty of courts to apply enacted law has encouraged some to make claims as bold as: ‘Adjudication is interpretation.’<sup>479</sup>, or ‘Explaining and changing are the same activities’<sup>480</sup>. Chapter Four gives us reasons to think that such assertions are imprecise and unhelpful. There, I tried to show that the interpretative task of judges is best seen as a modality of interpretation *for others* which typically takes the form of an explanation of meaning. Also, as suggested in Chapter Two and vindicated in Chapter Four, the kind of authority claimed by judges in their interpretative capacity is not the authority to decide what is to be done according to law. Rather, the duty of courts to *interpret for others*, seen as a duty to explain legal meaning (including the legal meaning of legal norms), is subsidiary to their primary duty to authoritatively *apply* enacted law.

The first claim, advanced by Owen Fiss, wrongly suggests that explanation of meaning exhausts the activity of adjudication. Explaining is akin to clarifying whereas adjudicating

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of interpretation is not without its difficulties. Finnis, for instance, points out Dworkin’s equivocation on the word in LE: “Dworkin is clear that the official meaning of ‘creative’ in his use of ‘creative interpretation’ is simply ‘of a created object’” (ORA 361), but there also seems to be an unofficial meaning (“‘creative of...’”) which is suggested by the metaphors of ‘imposing’ and ‘constructing’ meaning and purpose” (ORA 360). The attractiveness of his comparison between law and the arts (and of the many interesting similarities and relevant differences, from the prism of interpretation, between the two domains) should not blind us to the difficulties of applying the artefactuality condition to legal interpretation (see Chapter Two).

<sup>478</sup> Chapter Two introduces the idea, developed in Chapter Three, that judicial reasoning (as a special form of legal reasoning) is the right focus for understanding the conceptual connection between interpretation and legal authority. The disjunction thesis (section 5.4.1. above) shows us why.

<sup>479</sup> Owen M. Fiss (1992), 739.

<sup>480</sup> S. Fish (1992), 562.

involves determining, settling, or awarding something judicially, or by a similar legal or official process. Adjudication, constrained as it is by what is permissible and appropriate by reference to a particular legal system, involves explaining the various relevant legal elements in play in a legal dispute, but must go beyond such clarification and articulation. It depends on powers other than the power of elucidation. Unlike interpreting, adjudicating is a process of authoritative determination of legal *positions*<sup>481</sup>.

Although questions of meaning are central to legal practice, and to judicial reasoning in particular, legal disputes are not, strictly speaking, disputes about meaning. They are disputes about the legal position of the parties (i.e. their legal rights and duties). Explanation of meaning, though instrumental to dispute-settling, is not identical with it.

Explanations of legal meaning are both a prelude to and a complement of adjudication. But, unlike interpretation, which results in conclusions about how something ought to be understood (an epistemic ought), adjudication culminates in a *ruling*<sup>482</sup> which typically involves a set of authoritative statements about the relative legal positions (obligations and entitlements) of the parties in a dispute<sup>483</sup>. This is why one cannot agree with Fiss' definition of adjudication as 'the process by which a judge comes to understand and express the meaning of an authoritative legal

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<sup>481</sup> I use the expression technically to refer to the legal position of *particular* people (case-tokens), not of classes of people (case-types). Adjudication is always authoritative in respect of case-tokens, but not of case-types. This chapter argues that interpretation does not exhaust adjudication because it does not exhaust legal reasoning (see below). Adjudicating is engaging in judicial reasoning (a specialised form, of legal reasoning; resulting in the exercise of legal authority).

<sup>482</sup> John Gardner, (LALOF 74-75) defines it as 'a legally binding decision on the application of a legal rule to what lawyers call a 'case': to a situation-token rather than a situation-type.' He adds, making the double rule v ruling and interpretation v adjudication contrast starker, that "An official who has the power to make such a legal ruling- typically a judge- *also* has the power to *change people's legal positions*.' These assertions support of the disjunction thesis: they confirm that interpretative authority and legal authority (strictly construed), are not one and the same thing.

<sup>483</sup> Conditional/ hypothetical imperatives are still practical (even moral according to some), and so is the attribution of legal powers. Practical here means veered towards *action*. See Gardner, LALOF, ch.8.

text and the values embodied in that text.’ What Fiss describes here is not adjudication but the interpretation of a particular kind of object: a legal text.

Adjudication is much more than what is captured by this definition because, as we learn from the disjunction thesis, (i) not every act of adjudication *necessarily* involves the explanation of the legal meaning of a legal text (although it frequently does), and (ii) even if one concedes that it frequently does, it is easy to see that the activity of explaining legal meaning is distinct from that of determining the legal positions of the parties in a legal dispute.

The second claim, by Stanley Fish, falls into the same trap by suggesting that explaining necessarily involves changing. Even if we leave aside the question ‘changing what?’ we see that explaining consists in accounting for something by producing a set of statements which makes an object intelligible. Of course it could trivially be said that one changes something by making it intelligible: if it was once obscure, it no longer is; if it lacked clarity, it no longer does. But setting this trivial defence of Fish’s comment aside, explaining the meaning of something does not change the meaning of what is explained, and it does not *per se* change the legal positions of parties in a dispute. In short, interpreting *may*, but does *not necessarily*, lead to change, and the only type of change it can bring about is change to a person’s *understanding of an object*.

So, it is reasonable to conclude, there is more to adjudication than the explanation of legal meaning. One thing we know about adjudication is that it involves legal reasoning. Its conclusions are conclusions about what *ought to be done* according to law. This broad understanding of legal reasoning makes a musician, a biologist, or a cobbler as likely to engage in it as High Court judge: any restrictions on one’s ability to engage in legal reasoning are contingent (mainly dependent on whether or not one knows what the law is on a particular issue, and it is obvious that musicians, biologists and cobblers may have this kind of knowledge).

More precisely, relevant restrictions are restrictions of ability, not capability. Anyone with the requisite intellectual capacity is, in principle, *capable* of engaging in legal reasoning but one may, in certain circumstances, lack the *ability* to engage in legal reasoning because one lacks the relevant knowledge of the facts and norms which constitute legal meaning. The epistemic gap between judges and their audience results from their *ability* to do what they have a duty to do. They exercise interpretative authority over their audience if, and only if, they are able to do what they have a duty to do.

## 5.2. Legal interpretation and application

‘Law exists only when there are law-applying officials with the authority to rule on particular matters in purported application of the legal rules.’<sup>484</sup>

‘Legal interpretation and application of what?’ one might ask. The answer provided by the disjunction thesis shows us the difference between interpretation and application: they are different activities involving different objects. In the context of judicial decision-making, ‘application’ is application of law (i.e. of relevant legal provisions and valid legal propositions to the facts in dispute). By contrast, judicial interpretation is not primarily interpretation *of law*. It is interpretation of any pertinent thing with a legal meaning.

Explaining the meaning of an object should not be confused with telling us what we should do with it. As has been noted, interpretive conclusions give us reasons for belief, not reasons for action. Explaining the meaning of an object merely tells us its role in a certain

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<sup>484</sup> LALOF 209.

domain or context, how it is to be understood, where it belongs and why. What we do with that understanding lies beyond interpretation. According to a certain view of understanding and interpretation, a view I rely upon in this thesis, use is the key to meaning: the meaning of a concept is found in the way that concept is used. Correct use, in turn, is evidence of understanding. But Wittgensteinian use should not be confused with practical decision-making.

Let us look at a typical interpretative statement [M]:

**[M] A means A\***

Let us imagine that A has various possible meanings. In that case, uttering [M] establishes the meaning of A as A\*. It involves a choice. Let us ignore for a moment the reason why A is to be understood as A\* and not as A\*\*. The mark of interpretation is that it involves reasoning about the meaning of an object and, in some cases, the explanation or display of that meaning. As such, interpretation will always rely on reasons for the meaning that is ascribed, declared, articulated. But what practical implications does [M] have? Looking at another proposition, [O], might help:

**[O] You ought to do X with A**

[O] is obviously not equivalent to [M]. The only thing one ought to do with A, according to [M], is understand it as A\*. But understanding is not action.

Explaining the meaning of an object, or even ascribing it a meaning, should not be confused with telling someone what ought to be done. Using an object correctly gives us a clue as to its meaning, but explaining or displaying its meaning tells us little about what we should or

should not do. It may hint at what one ought to do with the object *if* one is to use it correctly or properly. But it does not tell one what to do.

In fact, it is imaginable that, although it is proper to use an object in a certain way (e.g. a table spoon to eat soup), someone might be required to use it differently on certain occasions (e.g. in an egg-and-spoon race or as a digging tool). On such occasions, despite what we know about the meaning, purpose or function of the object, it is right to use it in the unusual way. Interpretation facilitates and *makes way for* practical reasoning. But it ought not to be confused with it. Reasoning about meaning (and explaining it) is not reasoning about *what to do*.

I now propose to explore the connection between legal interpretation and authority a bit further. The previous chapter suggests that, though called to the fore in discussions about the nature of legal interpretation and often not contrasted, there are two different types of authority at stake in an analysis of legal interpretation: interpretative authority and legal authority. Only the former is part of the vested concept of legal interpretation: legal interpreters always and necessarily claim interpretative authority (their conclusions provide reasons for belief) over their addressees, but not legal authority (which is practical, i.e. offers both first order and second-order exclusionary reasons for action).

Legal interpreters, *qua* interpreters, do not claim legal authority over their addressees. Although it often happens that legal interpreters speak and act on behalf of the law, such a feature is not part of their role as interpreters: if they claim legal authority, they do so as legal officials, not as legal interpreters. It is possible to produce an authoritative ruling which relies on an incorrect interpretation of the facts in dispute. This possibility shows us that interpretative authority and legal authority are separable.

Whilst all legal officials are legal interpreters, not all legal interpreters are legal officials. Exercising interpretative authority is not synonymous with being a legal authority. This is why

the identification of legal interpretation with adjudication is unwarranted. The unacceptability of such identification is entailed by the practical character of legal authority. We can see this clearly through the lens of Joseph Raz's service conception of authority (SC) According to it, authority mediates between an individual and the reasons that apply to her. SC also entails the natural justification thesis- NJT-, the dependence thesis- DT-, and the identification thesis- IT-, of which the most striking implication, as noted by Kenneth Einar Himma, is that 'inability to identify the existence or content of a directive without recourse to its dependent justification conceptually disqualifies that directive from being authority'.

If, as the minimalist view suggests, legal interpretation is best understood as explanation of legal meaning, adjudicating is distinct from interpreting. Interpretative conclusions point towards what one ought to believe against the background of a certain system, how an object can be understood within that particular system. They depend on knowledge and understanding of the workings of a system (the relevant institutional facts, valid legal propositions, and the relationships among them).

Discerning addressees understand and identify that which makes the interpreter knowledgeable enough to be considered theoretically authoritative. In the case of legal authorities, however, the fact that they are legal authorities is itself a reason for acknowledging their interpretative authority. If interpretative authority depends on the possession of a certain kind of knowledge, i.e. on being in a certain epistemic position in relation to the system within which legal meaning is generated; and if, as Raz notes, legal meaning cannot be explained (or, for that matter, located) without the identification of legal sources and the legal facts they create, then interpretative conclusions are defeasible. Interpretation involves understanding, not just knowledge or belief. Knowledge is knowledge of facts: when putting forward an interpretation,

one assumes that it is an interpretation of a particular object and that it is an explanation (or display) of its meaning.

If interpretative statements are statements about legal meaning and legal meaning is the product of a complex set of (institutional) facts and relationships, it must be possible to assess their correctness by reference to such institutional facts and relationships. It is also possible to assess the warrantedness of the evaluative judgments involved in determining and choosing one particular meaning over other possible meanings of the same object.

Although institutional facts are sources of legal meaning, their identification is not to be confused with interpretation. Legal meaning, explained by interpreters, is the product of a series of warranted connections among institutional facts and valid legal propositions. Such connections are normative in a double sense: (i) they are connections between norms and; (ii) they are themselves norm-creating. Furthermore, as we have seen, legal interpretation can have many objects. The primary object of judicial interpretation is the cluster of facts in a specific legal dispute. Judges interpret those facts when they explain their legal meaning.

In order to explain legal meaning, a judge must identify relevant systemic factors, including discrete legal propositions, and show why and how they are relevantly connected and applicable to the facts at hand. Consequently, an interpretative conclusion cannot be purely descriptive of meaning. Does this lead to the conclusion that acts of legal interpretation are ‘not acts of knowledge but acts of will’<sup>485</sup>? My suggestion is not that this conclusion does not follow. It is, rather, that very little hinges on the distinction it relies upon. Let us look closely at the various distinctions and nuances which underlie interpretative scepticism

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<sup>485</sup> H. Kelsen (1934), 82.

### 5.2.1. A few brief notes on a different brand of scepticism

In Chapter Four, a reference was made to a family of views on legal interpretation I labelled ‘communication-scepticism’. Such views are sceptical about the link between authorship and authority and, by implication, about whether legal meaning can be equated with the content of authoritative legal provisions. I now propose to look at a different form of scepticism found in the literature on the nature of legal interpretation. This is also connected to the texthood myth: it defines interpretation *stricto sensu* as ascription of meaning to legal texts (*in abstracto*).

On this view, the result of interpretation is also always a text ‘purportedly synonymous with the original one’<sup>486</sup>. Interpretation is translation. But the term ‘interpretation’ is also often used to refer to *fact-oriented* interpretation (*in concreto*) defined as a process in which it is decided whether or not a given fact falls within the scope of a given rule. This is also commonly referred to as ‘legal qualification’<sup>487</sup>.

For interpretation-sceptics, interpretation *in concreto* is nothing but application of law. On this view, there is no distinction between the legal interpretation of facts and the application of law. By implication, the theorist interested in understanding legal interpretation ought to look not at fact-oriented interpretation- whose role is simply to ‘determine the scope of rules’ (thus presupposing text-oriented interpretation)- but at the interpretation of legal texts, which allows her to identify the rules themselves. Hart is the target of some sceptics who believe that his open-texture theory applies only to interpretation *in concreto* and has very little to say about the problems of interpretation *in abstracto*<sup>488</sup>.

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<sup>486</sup> Guastini (2005), 142-3.

<sup>487</sup> Guastini (2005) 143.

<sup>488</sup> Guastini (2005) 143.

The focus of this section is mainly on Ricardo Guastini's 'soft scepticism', but his is not the only available version. Guastini's brand of scepticism is a milder version of the more radical view of legal interpretation we find in Hans Kelsen's work. In *The Pure Theory of Law (PTL)*, Kelsen puts forward a view of legal interpretation with two prominent features: (i) Legal interpretation is interpretation of norms (interpreters confer legal character to certain contents); (ii) Acts of interpretation are 'intellectual acts' presupposed by each act of legal application. Two objections immediately come to mind. (i) is an example of a rule-centric view on interpretation which falls prey to the texthood myth. (ii), in turn, is evidence of a view of legal interpretation as an intellectual activity and, as such, a form of interpretation for oneself.

The central tenet of Kelsen's radical scepticism is that it is not possible to distinguish between correct and incorrect interpretations because 'there is no rule of meaning governing operative interpretative activity'. There is, on this view, no difference between a 'decision on the fact to which the norm is to be applied' and a 'decision on the meaning of the norm to be applied'. The validity of both kinds of decision depends solely on the competence of the organ making them and on the conformity of the steps taken to make them with the prescribed procedure. Because only the determination of legal meaning by a legal authority has legal value- and validity (not truth or correctness) is the only specifically legal value- interpretative acts are acts of will with constitutive import<sup>489</sup>.

Guastini's view is milder in tone but relies on some of Kelsen's central distinctions. Apart from the distinction between text-oriented and fact-oriented interpretation, Guastini addresses another dichotomy in Kelsen's work: cognitive v adjudicative interpretation. According to Kelsen, jurists or legal scientists often report, state, or identify possible meanings in application of prevalent linguistic rules and conventions. This task is typical of 'scientific

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<sup>489</sup> E. Diciotti (1995), 62-63. For a critique of Kelsen's position, see Bulygin's contribution to the same volume, 18-24.

commentary' and consists in a 'critical analysis' of the various 'possible meanings of the legal norm undergoing interpretation'

For Kelsen, in fact, the pure legal theorist ought to do no more than: (i) *describe* (the use of linguistic expressions by law-giving authorities), (ii) *speculate* (about how such authorities actually understand a certain linguistic expression), (iii) *state* (interpretative conclusions by other legal interpreters), and (iv) *conjecture* (the way in which the same expressions are likely to be used by the courts in future cases)<sup>490</sup>. This is called by some 'cognitive' or 'meaning-describing' interpretation.

By contrast, 'operative' or 'adjudicative interpretation' is *ascriptive* (in the narrow sense). Unlike its purely cognitive counterpart, it is stipulative and culminates in a choice, an 'act of will', by which the interpreter elects and authoritatively establishes one meaning *as the right meaning*. This is typically what law-applying authorities (judges in particular) are called upon to do: for purely logical reasons, any judicial interpretation whatsoever necessarily amounts to the ascription of a definite meaning to the sentences uttered by the lawgivers<sup>491</sup>.

On Kelsen's radically sceptical view, as noted above, legal interpretation is operative interpretation and his account of 'operative' interpretation is sustained by two pillars: (i) interpretation is not rule-governed, that is, rules of meaning do not guide interpreters in their quest for the meaning of legal norms<sup>492</sup>; (ii) interpretative choices by legal officials are both applicative and *constitutive*, i.e. they create new law<sup>493</sup>.

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<sup>490</sup> Kelsen (1982), 80. Guastini, (1997) 288, n. 23, remarks that activity (iv) does not amount to interpretation but "to describing interpretation, since describing the various meanings of a given text is not logically different from conjecturing the interpretations it is liable to receive or reporting, at a metalinguistic level, the interpretation it already received."

<sup>491</sup> Guastini, (1997) 289

<sup>492</sup> This is Dicciotti's terminology (below). I have rejected the rule-centric view of interpretation in Chapter Four and do not think that norms ought to be referred to as objects of interpretation. Dicciotti clarifies (see below, p. 56) that by 'legal norm' he means both 'norm-formulation' and its meaning. Kelsen's own use of the term 'norm' is

The moderately sceptical thesis merely assumes, Guastini notes, that meaning is dependent on use and understanding (and that no ‘objective’ or ‘proper’ meaning is identifiable beyond use). On this view, it is claimed, interpretative statements are incapable of truth or falsity. Guastini calls theories which have identified linguistic usage or authorial intention as truth criteria of interpretative statements ‘normative’. He also notes that as a matter of fact interpretative disagreement among jurists and judges does occur, and hence that the law must be ‘liable to different and competing interpretations’.

The absence of a truth criterion for interpretative statements makes interpretative decisions depend on a ‘choice between competing possibilities’, a view which is in line with Kelsen’s, as outlined above. If interpretative acts are acts of will, the argument goes, there is always room for discretion<sup>494</sup>. It is in this discretion, exercised in an act of will establishing the meaning of *a legal text*, that the creative aspect of interpretation is found.

Guastini’s conclusion, in line with Kelsen, is that interpretative statements are not constative but ascriptive (in the narrow sense). Because they are stipulative, they cannot be assessed as true or false. Guastini’s theory of interpretation is a version of rule-scepticism: it holds that legal interpretation is the source of legal rules, i.e. that legal rules are the outcome of the interpretative process. This, for Guastini as well as Kelsen, is the mark of legal interpretation (of which judicial interpretation is a paradigm).

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ambiguous (see Guastini (1995), 56, n. 8). On the minimalist account, norm-formulations are interpretable, norms are not.

<sup>493</sup> E. Diciotti (1995), 64.

<sup>494</sup> Luzzatti and Diciotti agree, that ‘Kelsen’s conception of legal interpretation is not that of the linguistic indeterminacy of the norm but that of the discretion which is exercised in applying the norm.’ (‘Operative Interpretation’, 56, n. 9). Guastini’s position is similar.

### 5.2.1.1. Minimalism and scepticism: differences and points of overlap

There seem to be important differences as well as points of overlap between the sceptical and the minimalist views. The first point of overlap between moderate scepticism and minimalism is the idea that legal norms (or rules) are not objects of interpretation. Kelsen spoke of norms as ‘frames’ of meaning. Guastini defines legal interpretation (‘properly so called’) as ‘the ascription of meaning to legal texts’, not norms. He stresses the distinction, addressed in Chapter Four, between rule-formulations (normative sentences) and the rules they express or entail<sup>495</sup>. The former, not the latter, are objects of legal interpretation.

A second point of agreement is that legal sentences typically have a variety of meanings and are thus susceptible to various interpretations. The minimalist account holds that legal meaning is systemic and, by implication, accepts Kelsen’s tenet (adopted by Guastini) that legal statements are ‘meaning frameworks’ within which the interpreter works<sup>496</sup>, in other words, they are part of the framework within which judicial interpretation takes place. The third point of overlap is that the minimalist account accepts, along with scepticism, that judicial interpretation can be stipulative. (Minimalism, however, stops at ‘can’.)

But scepticism and minimalism are worth contrasting. Three main points set them apart: (i) the relationship between interpretation and *stipulation* (i.e. *ascription* in the narrow sense); (ii) the separability of interpretative and legal authority; and (iii) the texthood myth. Let us look at each, in turn.

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<sup>495</sup> Guastini (2011,p. 147, and 1997\*) ‘Rules, Validity, and Statutory Construction’, in M. Jori, and A. Pintore (eds.) *Law and Language: The Italian Analytical School* (Liverpool: Deborah Charles, 1997).

<sup>496</sup> Kelsen, IPLT 80 f. Guastini (2005), 141.

(i) *Interpreting and stipulating*

The first point of contention between scepticism and minimalism starts with the distinction Guastini makes (in line with Kelsen) between ‘interpretation by law-applying organs’ and ‘cognitive interpretation’ (the task of legal scientists). It is claimed that, unlike the former, legal scientists do not choose a definite meaning but list the various possible meanings of the legal text at issue ‘in a descriptive mood’<sup>497</sup>. This suggests that only ‘law-applying organs’ make choices when they interpret and that legal interpretation does not always involve an act of will (a choice): after all, one is interpreting when one merely lists possible meanings.

But a mere list of *possible* meanings is not really an instance of interpretation<sup>498</sup>. On this point, there is no disagreement between scepticism and minimalism, but there is an important difference between the two views: minimalism holds that pure cognition of meaning is not a central case of legal interpretation because it is an instance of interpreting for oneself and legal interpretation is an outward-looking activity. The minimalist view holds that legal interpretation is a form of *interpretation for others* and, as such, consists in explanation or display of the legal meaning of an object. But if no reasons are adduced (or are capable of being adduced) for a certain conclusion, there is no interpretation. And besides, compiling a list falls short of interpretation for others because it does not involve a decision about meaning. It may be a preparatory step, which facilitates interpretation, or limits its range, but it is not itself interpretation as such.

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<sup>497</sup> Guastini (2005)139

<sup>498</sup> Guastini (1997) himself notes this on p. 288, note 23

The person compiling the list may make choices about what to include in and exclude from the list, such choices are not choices about the meaning of the object (they are choices about the object's *possible* meanings) and, most importantly, they do not involve (depend upon) the ascription (in the narrow sense) of meaning to an object. Decisions about to what to put on the list and what to exclude *may*, but need not, entail the attribution of the meanings listed to an object.

As noted in the previous section, Guastini and Kelsen identify 'cognitive interpretation' or 'meaning-describing interpretation' as one of the tasks of the pure legal theorist. But strictly speaking listing possible meanings of a norm-formulation, as a Kelsenian pure theorist might, does not amount to describing either the norm-formulation or its meaning. Hence, what Guastini and Kelsen call 'cognitive interpretation' or 'meaning-describing interpretation' is neither description nor interpretation. As presented, it is merely an act of identifying (and *stating*) possible ways of understanding an object.

So, while I do agree with Guastini's claim that 'An interpretive statement is a meaning-ascribing sentence', I qualify it (above) to draw attention to the contingent connection between legal interpretation and authoritative stipulation of meaning. Minimalism holds, by contrast with scepticism, that there is no necessary connection between legal interpretation and stipulation. 'Operative' interpretation is possible only in the context of an exercise of *legal authority (stricto sensu)*. Not all legal interpretation (indeed, not all judicial interpretation) is 'operative' in Kelsen's sense. And, as we aim to show in this section, legal interpretation and application of law are not the same.

Whenever interpretation involves making a reasoned choice about the meaning of an object it also involves ascription (in the broad sense). In interpreting, one ascribes meaning to one's object. Of course it is possible to conclude that an object has not one but various possible

meanings within a particular interpretative framework. The conclusion reached by an interpreter could be: 'this is the meaning (these are the multiple meanings) of X' (an equivalent of [IS]. above, where X would refer to a cluster of various, equally germane, meanings) possibly accompanied by the presentation of reasons for the ascription.

As noted in section 5.1.1., ascription is different from explanation. Meaning explanations are not always ascriptive. We recall Hart's distinction between two senses of 'ascription': in a broad sense, 'casual' in Hart's terminology, to ascribe is to attribute, assign or impute, however loosely, a quality, effect, action, characteristic or product to a person, fact, event, or thing. In a narrow sense, in contexts of use which Hart calls 'operative' or 'performative', 'ascription' is synonymous with 'determination', 'allocation', 'stipulation'. This suggests an act with imperative force.

Taking this distinction into consideration helps us to see that ascribing legal meaning to an object can either be a condition or a consequence of interpretation. It is a condition of interpretation when taken in the broad sense and a possible consequence of interpretation when taken in the narrow sense. Meaning-ascription is a condition of interpretation because explanation of meaning normally relies on a provisional attribution of one or various meanings to one's object. It is a consequence of interpretation when a meaning has not been considered before, or when competing meanings have dominated in the past, and one is authoritatively chosen, elected, established. But, as one can only interpret an object if that object has a meaning, attribution of meaning is not interpretation: interpretation is possible only if meaning can be attributed to an object.

(ii) *Disjunction*

A second point on which scepticism and minimalist diverge is on the separability of interpretative and legal authority (the disjunction thesis). Indeed, there seems to be no place for the concept of interpretative authority in Kelsen's and Guastini's accounts of legal interpretation. What distinguishes authoritative from non-authoritative legal interpreters?

According to scepticism, the former are legal authorities, i.e. their interpretative conclusions are capable of becoming law (hence the inseparability of interpretation and application)<sup>499</sup>. But this does not explain why judges are paradigmatic interpreters. It implies that judges are law-making authorities and 'authentic interpreters'<sup>500</sup>, but this does not distinguish judges from other law-making authorities, such as legislators, or explain why judges are paradigmatic legal interpreters.

Minimalism relies on the idea that the ability to create law does not coincide with the ability authoritatively apply existing law in the process of creating law. It also stresses that the duty of judges to apply existing law even as they create new law is accompanied by a duty to justify their decisions and a subsidiary duty to explain legal meaning in the process of application. Indeed, judges are different from other legal officials because they are under a legal (and moral) duty to interpret in the process of both applying existing law and making new law.

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<sup>499</sup> C. Luzzatti (1995) notes that, for Kelsen, 'authentic interpretation' and 'legal interpretation' are the same: '...the creation of new law accomplished by the hierarchy of organs (*Stufenbau*) of a given legal system. ... For Kelsen, the main problem is how to draw a sharp line between correctness and finality, between material and formal justification, between the 'possibility'- with reference to the framework of a higher-level standard- of a decision and its validity.' (92-93).

<sup>500</sup> Note that, both in his 1934 writings (*Reine Rechtslehre, Einleitung in die rechtswissenschaftliche Problematik*, 1<sup>st</sup> Edition (Deuticke: Vienna, 1934), ch. VI.) and in his 1960 writings (*Reine Rechtslehre*, 2<sup>nd</sup> Edition (Deuticke: Vienna, 1960), ch. VIII) Kelsen uses the adjective 'authentic' to mean 'law-creating'. It is important to distinguish it from the other, more widespread meaning of 'authentic interpretation' as interpretation by law-makers of their own creations (e.g. a statutory provision containing a general norm for the interpretation of a previously enacted statutory provision). For an analysis of Kelsen's view on authentic interpretation and its implications, see P. Chiassoni (1995), 43-47. Here I shall use the expression 'authentic interpretation' only in Kelsen's sense.

Ascription of meaning, in a narrow sense (stipulation), is possible if, and only if, an interpreter is authoritative. In such cases, meaning-ascription is made possible by interpretation. Meaning ascription (in the broad sense) precedes (is a necessary condition of) interpretation even if (as often is the case) it cannot be detached from the interpretative conclusion.

It is important to understand when and what judges are interpreting. Judges interpret an object when they explain (or display) its legal meaning. Explaining meaning in the presence of multiple possible meanings often involves making a case for identifying *one* meaning as *the* meaning of the object. Of course one may fail in one's interpretative effort. But one fails only to the extent that one fails to identify and explain the meaning of the object.

This is the reason why I claim that explanations of meaning offered by authoritative interpreters are always ascriptive (in the broad sense) of meaning. But, in line with Hart, I suggest that they are authoritatively ascriptive (in the narrow sense) only if produced by interpreters who are also legal authorities (practically authoritative). Ascriptions of meaning have imperative force only when produced in the context of an exercise of legal authority (*stricto sensu*). It is in such cases that interpretative conclusions become legal rules of interpretation.

Of course this is intelligible only if we keep in mind the distinction between meaning-ascription (to facts, events, documents, provisions) and the ascription of rights and duties to the parties in a case. When it comes to interpretation, only the former is relevant. Even when their meaning-ascriptions have imperative force, authoritative interpreters are not ascribing rights and duties. Furthermore, meaning ascription (in the narrow sense) is a consequence of interpretation only when legal interpreters are also legal authorities, the rule thus created is a rule for the application of law in future cases, not an answer to the question 'quid juris?' And, as noted before, an authoritative legal interpreter is not someone who merely *takes stock of* reasons, she is someone whose conclusions are *supported by* certain reasons.

Something must be said about the use of the term ‘statement’ to refer to interpretative conclusions. Guastini uses the expression prolifically but ironically. Statements are, by definition, capable of being true or false. Prescriptions are not statements, descriptions are. Interpretations can, no doubt, have different statuses: they can be statements, hypotheses, prescriptions, or reports<sup>501</sup>. But when they are statements, they are capable of truth or falsity. Guastini speaks of meaning ascription as stipulation and concludes that, because interpretative statements that ascribe meaning are stipulative (ascriptive in the narrow sense), they express an act of will and are therefore *directive* rather than *descriptive*. As such, they are neither true nor false<sup>502</sup>. But stipulations and interpretative conclusions are not the same, and the latter – like any kind of explanation, indeed any kind of statement – can be true or false even though, arguably, the former cannot.

One may agree with Guastini when he clarifies that ‘stipulations do not describe, but are themselves rules’, but to say this is not to say that interpretative statements cannot be true or false. Of course, the act of stating something cannot be true or false. But there is an act/object ambiguity in the use of ‘statement’. A statement can be either an act of stating something or something stated. And while only the former can be foolish or irresponsible, only the latter can be true or false. In a later passage, he makes precisely this point when he notes that judges are in a special position because they must go beyond description:

The judge... must *use* such a meaning in view of deciding the case submitted to him<sup>503</sup>...any judicial interpretation whatsoever necessarily amounts to the ascription of a definite meaning to the sentences uttered by the lawgivers.

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<sup>501</sup> Barnes, OI 144

<sup>502</sup> Guastini (1997) 289

<sup>503</sup> Guastini (1997)289

This last passage makes clear that an interpretative statement is one thing, and its *use* in the process of applying existing law to the facts of the case and resolving the dispute at hand another. If a judge *uses* a meaning-statement in a certain way, to certain effects, she is performing an act which cannot be true nor false. But the truth or falsity of the statement, in the object sense, remains intact.

An interesting point of comparison is Endicott's claim that legal interpretation is 'applicative' rather than generalizing, i.e. that it creates a rule for the application of law. Minimalism shares many of the tenets of Endicott's simple conception, but diverges from it on this particular point. After all, it is not necessarily the case that an interpretative conclusion constitutes a rule of interpretation applicable to interpreters in future cases.

Not all conclusions reached by judges in the process of interpretation are turned into rules of interpretation. Legal interpretation is applicative only when the interpreter is a legal authority. However, even in cases of interpretation by legal authorities with a duty to apply the law in the process of resolving a legal dispute, the connection between the explanation of legal meaning and the creation of a rule of interpretation is a contingent one.

(iii) *Returning to the texthood myth*

Another important point of contention between scepticism and minimalism is that the former is a victim of the texthood myth. By regarding legal interpretation as the interpretation of norm formulations, scepticism falls into the trap of identifying legal interpretation by reference to a particular kind of object (texts). This makes it difficult to distinguish linguistic meaning from legal meaning and to avoid gerrymandering interpretation by restricting it to the interpretation of acts of communication. The minimalist view relies on such a distinction and avoidance.

As for the distinction between text-oriented and fact-oriented interpretation, there is no doubt that Guastini's analysis tells us something true and important about legal interpretation: that it plays a significant role in adjudication, and that both facts and texts are capable of legal meaning and, by implication, are potential objects of interpretation.

However, it seems to me that the distinction between text-oriented and fact-oriented interpretation is not, a distinction between two different kinds of legal interpretation, as Guastini claims. Indeed, he concludes that fact-oriented interpretation is not really legal interpretation (only the text-oriented kind is interpretation *stricto sensu*) but application of law. This is puzzling because there is no relevant difference between what a judge does when she interprets a legal text and what she does when she interprets the facts in a judicial dispute: in both situations, what she does is explain (or, in certain cases display) legal meaning .

The distinction Guastini draws between text and fact-oriented interpretation is thus, not between different kinds of interpretation (there is, for him, in any case only one at stake), but between two types of object of legal interpretation: texts and facts. This is relevant in as much as it reaffirms the principle that interpretation is always interpretation of something. According to the minimalist view, when it comes to legal interpretation, what matters is not what is being

interpreted (a text, a behaviour, a gesture, a ritual, a natural phenomenon, an event) but what kind of meaning is being explained or displayed.

Legal interpreters, qua legal interpreters, are concerned only with legal meaning, wherever it may be found. And judges, as paradigmatic legal interpreters, have a legal duty to explain legal meaning to others in the process of application and resolution.

### *Three final remarks*

The most problematic aspect of scepticism is also its kernel: (i) the idea that interpretation is not rule-governed, and (ii) the claim that interpretative statements are not true or false. I have addressed (i) in the previous chapter and it is clear that rejecting the rule-centric view, as minimalism proposes, does not entail endorsing Marmor's claim that interpretation is not rule-governed. But something must be said about (ii). It is, after all, what scepticism is sceptical about. The topic is complex and its treatment lies beyond the modest scope of this thesis. However, three points can be made:

1. The disjunction thesis holds that authoritative interpreters give their addressees a content-independent preemptory reason to believe that their interpretative conclusions are true. Recall the typical interpretative statement [M]: it states that A means A\* and, in so doing, attributes meaning A\*, rather than meaning A\*\*, to A. The fact that [M] is stated by an authoritative interpreter is itself a reason to believe that A means A\*, and perhaps also a reason not to believe that A means A\*\* (if A\* and A\*\* are incompatible meanings). But the fact that a person states [M] is a good reason to believe that A means A\* only if she is epistemologically

advantaged, i.e. only if her audience or interlocutor does not *know* the meaning of A<sup>504</sup>. [M] may very well be false but I would still have a good reason for believing that it is true if the person making the statement is an expert on the topic. So what makes a reason a good reason for belief is not simply the truth of the belief for which it is a reason, and one can have good reasons for believing in the truth of something which is not true<sup>505</sup>.

2. The minimalist view need only show that authoritative interpreters give their addressees reason to believe that their meaning-statements are true, not that such interpreters cannot propose a mistaken interpretation. Hence, scepticism does not affect the argument, central to the minimalist view, according to which judges, as interpreters, claim theoretical authority (as well as legal authority) over their addressees. As authoritative interpreters, they purport to offer their audience reasons for belief but their authoritative position implies that it be possible to offer their audience reasons for belief in things which are false or, indeed, in things which are neither true nor false<sup>506</sup>.

3. The minimalist view does not deny that judicial interpretation involves an act of will. On the contrary, interpreting for others is always an act of will: it is not a purely intellectual process, it is an explanation or display of legal meaning. But saying this, as Guastini and Kelsen do, does not warrant the conclusion that interpretative statements are not capable of truth or

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<sup>504</sup> I recall another important difference between interpreting for oneself and interpreting for others: while in interpreting A as A\* for oneself one is not required not to know whether A means A\*, it is required that the people for whom one interprets do not know that A means A\*. Absence of knowledge (or possibility of mistake) is a condition of interpreting for others, though not a condition of interpreting for oneself. See A. Barnes, OI 146.

<sup>505</sup> Raz, FNR 43, note 18: “Sometimes there is value in having some belief about whether P, but better to have a false one rather than a true one (winning a bet may turn on it, and the winning may be the weightiest relevant consideration.”

<sup>506</sup> Although, if legal meaning depends on both meaning and value-facts (including social facts which constitute legal sources), then it is plausible that interpretative statements (which, among other things, mention such facts) are at least partly falsifiable. Also, considering that the duty to interpret is subsidiary to a duty to justify judicial decisions, it may be helpful to keep in mind Bulygin’s idea (expressed by Luzzatti) that “ a justificatory argument is essentially a logical inference whose conclusion depends on the *truth* of a set of factual, normative, and analytical premises.” (Kelsen vs. Bulygin’ 87).

falsity. Most utterances are acts of will, perhaps all except involuntary exclamations. What scepticism claims, and minimalism denies, is that interpretative conclusions by authoritative legal interpreters (judges in particular) are practical ought-statements, i.e. prescriptions as to how to act.

On the minimalist view, even if one were to accept that meaning is normative and that meaning-statements are normative statements, they would not necessarily be practical ought-statements: they could be epistemic ought statements. Hence there is no necessary connection between interpreting and prescribing. Stipulations of meaning are not pure interpretative conclusions: they are the result of the exercise of practical authority by authoritative interpreters. Also, and most importantly, stipulation of meaning is not the same as application of existing law or resolution.

As a consequence of defining interpretation as an intellectual activity tantamount to the creation of law, scepticism ultimately fails to distinguish interpretation for oneself from interpretation for others. In so doing, it falls short of offering us an account of judicial interpretation as the outward-looking, authority-based activity that it is. It is therefore not a reliable tool in the clarification of the role of interpretation in legal reasoning, and in judicial reasoning in particular.

### 5.3. Is legal reasoning predominantly interpretative?

‘The authoritative nature of law makes interpretation central to legal reasoning’<sup>507</sup>

Legal reasoning is partly factual, and the central role of interpretation in legal reasoning results, in great part, from the importance of legal sources in the determination of what the law *requires*, *demands*, or *allows*. It should now be clear that what Raz above calls ‘the authoritative nature of law’ should not be confused with the authority of legal interpreters. In this section, my aim is to offer a brief account of the role of interpretation in legal reasoning which reflects and supports the minimalist account of legal interpretation. Such an account relies on two elements: (i) a bare concept of interpretation based on meaning (presented in Part I), and (ii) the claim that legal reasoning is neither predominantly nor distinctively interpretative.

It is important to reiterate at this point that understanding the role of interpretation in legal reasoning involves thinking about the role explanations of legal meaning play in a process of reasoning *about* or *according to law*. In particular, understanding whether or not judicial reasoning is predominantly interpretative involves clarifying, as far as possible, where interpretative creativity ends and the exercise of legal authority begins.

It should now be clear why the minimalist view of legal interpretation requires us to look closely at judicial reasoning (as a specialised form of legal reasoning). I began by distinguishing *legal interpretation* from *adjudication*. *Judicial interpretation* is legal interpretation by judges in the context of adjudication. I have also argued that adjudication is a domain in which interpretation typically takes the form of *explanation*. Judicial interpretation, by contrast with musical performance, is paradigmatically explanatory.

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<sup>507</sup> Raz, BAAI 107

The predominantly explanatory character of judicial interpretation, I claim, makes the link between legal authority and justification more visible. This is the link Raz refers to in the quoted statement that sets the tone of this section. Raz tells us that what makes interpretation central to legal reasoning is the ‘authoritative nature of law’. Whilst appearing straightforwardly true and uncontroversial, Raz’s assertion contains three main claims which deserve attention.

The first (that law is authoritative) has already been addressed and tells us only that law claims legitimate authority over its addressees. In order to correctly locate the connection between legal authority and legal interpretation, a distinction has been drawn between the authority of legal interpreters (a form of theoretical authority) and the authority of legal officials (practical authority). But there are two more claims of Raz’s that I wish to look at closely and qualify here. They are the following: (i) interpretation is central to legal reasoning; (ii) legal reasoning is predominantly interpretative in virtue of the authority of law.

### 5.3.1. Recasting the centrality claim

In order to assess the truth of (i) one has to understand (a) what it is to interpret, and (b) what legal reasoning is. The first clarification was one of the tasks of Part I, and the bare concept of interpretation is its result. But various views of legal reasoning have over the years been advanced from different quadrants.

It is widely known, and often a source of humorous remarks, that lawyers like to think of legal reasoning as a unique, distinctive, autonomous form of reasoning. A form of reasoning which relies on its own resources alone and even depends on a special kind of logic. Lawyers like to believe, some say, that what they do is special and exclusive. Various authors have noted<sup>508</sup>

that this is a mistaken view. What distinguishes legal reasoning from other kinds of reasoning is not the fact that it is based on a distinctive legal logic, but that it involves reliance on legal materials, and includes valid (legal) norms as premises<sup>509</sup>.

Legal reasoning is reasoning *about the law* and reasoning *according to law*. It presupposes the knowledge of legal sources whilst seeking to establish the content of the law. By ‘establishing’ I mean both ‘identifying’ legal content and understanding what is to be done according to law<sup>510</sup>. If legal reasoning consists in reasoning about what the law requires, what can be the role of interpretation in it?

Answering this question takes us back to the need to identify our object of interpretation: legal provisions can be (and often are) interpreted. But, as noted in the previous chapter, the interpretation of legal provisions is not always, and necessarily, *legal interpretation*. Legal interpretation is not the explanation of the meaning of *legal objects*. It is the *explanation* of the *legal meaning* of an object. Because law has many concerns and both permeates and defines the life of political communities, there are indefinitely many potential legal objects<sup>511</sup>.

A personal letter, a gesture, a suicide note, a conversation, a volcanic eruption, a ritual: all these can have legal meaning and thus be the object of legal interpretation. A legal object is always a created object. But the term ‘creation’, as observed earlier, is flexible enough to encompass both deliberate making from scratch (a written constitution, a statute)<sup>512</sup>, and

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<sup>508</sup> See Raz, EPD, ch.14; Larry Alexander (2000), 211.

<sup>509</sup> J. Gardner, ‘Myths’ 215-216. I acknowledge the pleonasm but hope the idea of validity as system-membership has been made clear enough.

<sup>510</sup> Endicott, LI 110.

<sup>511</sup> By ‘legal object’ I mean object with legal meaning, i.e. an object with a role to play in a legal order, or able to produce legal effects. As noted in previous sections, legal objects are artefacts.

<sup>512</sup> I am not excluding unintentional legislation or the common law from the picture. Unintended legal consequences can constitute legal meaning and can, themselves, be interpreted (ascribed legal meaning). Legal artefactualisation can occur through prolonged practice (custom).

ascription of legal meaning (artefactualisation). A volcanic eruption is artefactualised when it is given a legal meaning rather than a sound is artefactualised when it becomes a phoneme, as part of a word.

In ascribing legal meaning to a document or to a conversation between two people, a judge is *creating* a legal object<sup>513</sup>. She does so by bringing it into the domain of law and, because of her position of authority, such meaning becomes established as the way in which the object *ought* to be understood. Of course there might be other (legal) meanings to consider: a disruptive volcanic eruption could be invoked both as the basis for an insurance claim or as the reason for an authorized absence from work, for example. But interpreting an object presupposes a choice has been made as to its meaning. Faced, as often happens, with multiple possible meanings, interpreters make choices and are called upon to justify those choices.

The bare concept of interpretation is the foundation of the concept of legal interpretation endorsed here. The concept of legal interpretation, as any concept of interpretation in any domain (including music), is a vested concept. I call it ‘vested’ because it covers the bare idea of interpretation, the general concept, with distinctive ‘garments’: legal interpretation is the *explanation* of *legal meaning*; its objects are objects (any object) with legal meaning. It involves reasoning about meaning but goes beyond that. Legal interpreters don’t simply reason about legal meaning, they clarify it, put it forward, articulate it, declare it. What primarily distinguishes legal interpretation from interpretation in other domains is that it consists in the *explanation* of *legal* meaning.

Judges are paradigmatic legal interpreters, I have claimed in Chapter Four, because they are under a legal duty to interpret for others. The focus on *explanation* reinforces the authority of legal interpreters: legal reasons must be offered for interpretative conclusions. Consequently,

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<sup>513</sup> Which, it should be noted, should not be confused with making new law. Making new law often involves creating a new legal norm.

interpretations can be assessed objectively as good or bad interpretations, as correct or incorrect interpretations, according to their ability to identify and illuminate the legal meaning of the object<sup>514</sup>. Such ability is the foundation of their success *qua* legal interpretations<sup>515</sup>.

This close connection between legal interpretation and explanation shows why it is useful to distinguish between interpreting for oneself and interpreting for others<sup>516</sup>. Whilst interpreting for oneself may consist only in *reasoning about* the meaning of an object, interpreting for others involves *making meaning accessible* to those for whom one interprets.

Both musical and legal interpretation, it is argued in this thesis, are paradigmatic examples of interpreting for others. And the fact that legal interpreters, *qua* legal interpreters, interpret for others is a consequence of the link between interpretation and practical authority. Interpreting for others involves explaining or displaying meaning. In the case of legal interpretation, explanation (which, in turn, involves justification) is an essential part of the exercise of legal authority.

Explaining the meaning of legal artefacts makes the exercise of (legitimate) legal authority possible. For this reason, judicial decision-making is the right focus for someone who is interested in understanding the link between authority and interpretation. The legal authority of judges manifests itself in their ability to produce legal rulings. These, however, depend on the fulfilment of the judges' duty to *apply* legal rules to the case at hand. The connection between adjudication and interpretation is simply that no *legal application* is possible without interpretation: even in clear cases, identifying the relevant rule(s) is part of the interpretative process.

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<sup>514</sup> Raz, BAAI 226. The 'object' is, here, a 'case', a set of facts. It is what J. Gardner calls a 'situation token' (LALOF 74)

<sup>515</sup> Despite my belief in the non-specialised character of legal reasoning (in its 'banality', using Larry Alexander's (2000, ch.9) expression.

<sup>516</sup> Barnes, OI 16-20.

The connection between interpretation and authority is thus contingent: we may find it in some domains but not in others, and to varying degrees. The symbiotic connection between legal interpretation and the authority of law is, however, quite clear. And there is no better way to see it manifested than through judicial reasoning. Does the gap found between authority and meaning in music suggest a gap between meaning and normativity? No. Ascriptions of meaning (in the narrow sense) are directives as to how to understand an object (be it a word, a musical score, a performance, a legal statement, or a court ruling). Ascribing meaning is establishing where an object belongs, how it *ought* to be understood<sup>517</sup>.

Raz claims that interpretation is *central* to legal reasoning. I call this the ‘centrality claim’. In other parts of the same text, and in other relevant writings on the topic, Raz uses different words to express a similar idea. He writes that interpretation is ‘central to *legal practices*’, and that interpretation ‘plays a *crucial* role in *adjudication*’<sup>518</sup>. Raz seems to move between two different ideas: saying that interpretation is *important*, i.e. relevant to law (which he seems to equate with *legal practice*), and claiming, more ambitiously, that interpretation is predominant in adjudication, without making the distinction clear. I believe we would benefit from clarifying the difference between these two claims. In fact, making the distinction clearer is fundamental to understanding the role of interpretation in legal reasoning.

The first question one must ask, however, is what Raz means by ‘central’. Does he mean ‘predominant’ or merely ‘important’? Other passages of Raz’s text, however, reinforce the centrality claim by affirming the *predominance* of interpretation in legal reasoning: ‘We are so used to the fact that so much legal reasoning is interpretative’, ‘Moral reasoning and other types of

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<sup>517</sup> For illuminating discussions of the normativity of meaning, see note 46, Part I.

<sup>518</sup> Raz, BAAI 223-224.

evaluative reasoning are not interpretive. Why should legal reasoning be so radically different? Why should it be predominantly interpretative?<sup>519</sup>

In fact, Raz states unequivocally that, although legal reasoning cannot be said to be ‘all of a kind’, ‘there is no denying that it is predominantly interpretive’<sup>520</sup>. He explains the predominance of interpretation in legal reasoning as the result of the authoritative nature of law and characterises legal reasoning as continuous between a factual-interpretive aspect and a morally evaluative dimension<sup>521</sup>. The centrality claim, then, must be understood as a claim about the predominantly interpretative character of legal reasoning: it is essentially interpretative.

The minimalist view of interpretation presents a challenge to the centrality claim. In fact, understood in the way outlined above, the centrality claim is incompatible with the role of meaning in the bare concept of interpretation: if meaning is what interpretation seeks, then interpretation only occurs when there is a possibility of mistake about the meaning of an object. As noted by Endicott, interpretation is needed *only* when questions arise ‘as to the meaning of an object’<sup>522</sup>. Beyond the explanation of *meaning* (or display, in some cases) there is no room for interpretation.

One distinction Raz did not dwell on was that between ‘legal practice (s)’ and ‘adjudication’. Perhaps the reason why he did not feel the need to point out the difference between the two is that he was concerned with legal reasoning which, as he clearly states, is not exclusive to legal practitioners or authoritative interpreters of law. By allowing the distinction to

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<sup>519</sup> Raz, BAAI 115-116. My question here is ‘Is it?’

<sup>520</sup> Raz, BAAI 116. Elsewhere (BAAI 224), he reiterates: ‘Interpretation is not essential to morality nor to our moral practices, but it is essential to our legal practices.’

<sup>521</sup> Raz adds that ‘What we can expect of a general account of legal reasoning is not a theory of how to reconcile its two aspects, but rather an explanation of how they merge into a seeming continuity, and why no general theory is either possible or necessary. The key to both is in the interpretive character of much legal reasoning.’ BAAI 117

<sup>522</sup> Endicott, LI 2: ‘Deciding what needs to be done according to law *sometimes* takes interpretation.’ [my emphasis]

remain blurred, he might have been tacitly reiterating his belief in the non-specialised, accessible character of legal reasoning.

But the distinction is important because it is in the context of adjudication that legal reasoning becomes a *condition for* the exercise of legal authority. In this context interpretation becomes particularly relevant. Legal authorities, judges among them, are law-making authorities. But, unlike *enacted* law, in adjudication even law-making must take place through legal reasoning<sup>523</sup>. This does not amount to saying that judges have an obligation to decide cases ‘only by applying valid legal norms to them’<sup>524</sup>: judges are often faced with cases in which (i) a valid legal norm is indeterminate in its application or (ii) more than one norm is applicable and no conflict-solving norm comes to the rescue.<sup>525</sup> It simply means that, because they *must* (are legally required to), even in creating new law, rely on valid legal norms, the exercise of their legal authority depends on the explanation of legal meaning, i.e. on legal interpretation.

To summarise: the fact that, in applying and making law, judges are exercising legal authority makes the role of interpretation in their reasoning particularly relevant and clear. It doesn’t, however, make judicial reasoning predominantly interpretative: because legal reasoning involves interpretation only where there is a possibility of mistake about the legal meaning of an object, explanation (or, in marginal cases, display<sup>526</sup>) is the central case of judicial interpretation.

If we go back to legal reasoning, it becomes clear that it goes a long way beyond the explanation of legal meaning. It goes beyond it because, unlike legal interpretation, its role is to

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<sup>523</sup> J.Gardner, ‘Myths’ 211, 214-215. To say that judges can and do make law (that the distinction between ‘creation’ and ‘application’ does not correspond to the distinction between legislating and adjudicating seems sufficiently clear) does not in any way give them a blank slate to write on. Dworkin’s conflation of law-making with legislating blurs the fundamental role of legal reasoning in judicial law-making. The fact that legislated law is ‘paradigmatic’ should not lead us to deny other types of law-making. See J.Gardner (LALOF, esp. 74-79)

<sup>524</sup> Gardner, STL 211.

<sup>525</sup> These are instances of what Gardner calls ‘gaps’ (‘Myths’, 212).

<sup>526</sup> For example, the identification of a rule as valid *displays* the legal meaning of the RR (Hart, CL)

provide us with reasons for action. Legal reasoning is a form of practical reasoning, it is reasoning about what to do according to law.

Although it does depend on a grasp of legal meaning - for how is one to know what the law requires one to do on a particular occasion if one does not understand what one's legal position is, how one's situation is to be legally understood? -, it is not interpretative through and through. And, whilst, as stated above, legal reasoning ought never to be abandoned by judges (indeed, reaching decisions by legal reasoning is a professional duty judges have), even when the law runs out, it is interpretative only (in the legal sense) so far as it considers, equates, identifies, and explains legal meaning. The scope of legal interpretation, despite its relevance, is much narrower than that of legal reasoning (and, by implication, judicial reasoning).

The only way to subscribe to the centrality thesis would be to interpret it as a thesis about the importance of interpretation to judicial reasoning. Legal interpretation is of great importance to judicial reasoning because it creates the conditions for invoking legal norms as reasons for action, i.e. it makes the legitimate exercise of legal authority possible. It does, not, however, exhaust the process of reasoning according to law, which supplements valid legal norms in light of relevant moral considerations. Thus, judicial reasoning is not predominantly interpretative.

My conclusion is that 'central' should be taken to mean 'important', not 'predominant'. Thus reinterpreted, the centrality claim applies most clearly to judicial decision-making because legal interpretation connects to practical authority only if legal interpreters also exercise legal authority. This happens in the case of judges, but not in the case of legislators, whose exercise of practical authority does not derive nor depend upon interpretative authority. They have no duty to explain legal meaning and are thus not a central example of the connection between legal authority and interpretation. Despite being a paradigm of legal authority, legislators are not

required to engage in legal interpretation when exercising their authority. For judges, interpreting is a duty subsidiary to the duty of justification.

The connection between authority and interpretation is found in the centrality (not predominance) of interpretation to judicial reasoning. The reason for this is that interpretative conclusions logically precede the exercise of practical authority by judges. This does not happen in other contexts of legal reasoning: a solicitor advises a client; a barrister presents a case in court. Both are examples of legal interpreters without legal authority.

This brings us to a decisive reason why what has been said about legal interpretation cannot be extended to legal reasoning. If, as has been noted by many, legal reasoning is a form of *practical reasoning* ('what ought I to do if I am to follow the law?', 'what does the law require?', 'what should be done according to the law?'), then it cannot be wholly, or even predominantly, interpretative.

### 5.3.2. Reformulating the connection thesis

Having challenged Raz's version of the centrality claim, according to which legal reasoning is predominantly interpretative, it seems necessary to reformulate his other claim, which I shall call the 'connection thesis'. According to the connection thesis, legal reasoning is predominantly interpretative in virtue of the authoritative nature of law. I propose to reformulate the connection thesis thus:

**[CN] Interpretation is a condition for the exercise of legal authority by judges**

I agree with Raz that the role interpretation plays in legal reasoning- of explaining and thus clarifying legal meaning- is instrumental to the exercise of legal authority. No doubt, it is the fact that law aims to guide action through the creation and application of norms that makes understanding what the law, and its norms, require from those to whom they are directed so important. Legal acts, including enactment (and other forms of creation) of legal norms, are, at a minimum, meant to be understood.

As noted, interpretation happens only when there is a possibility of mistake about meaning. In complex societies, epistemological deficiencies are frequent (indeed inevitable) and, as legal authorities, judges have the duty to provide as much clarity as the case requires as to what motivates their decisions, for they affect the rights and duties (legal positions, more broadly) of the parties in dispute and of others in similar situations. Clarity as to the meaning of relevant legal objects is a condition of sound judicial decision-making. Interpretation depends on certainty to some degree, at least about the foundations of the decision being made.

The relevance of legal interpretation to legal reasoning is particularly obvious in the context of judicial decision-making not just because it shows how much the law constrains judges in the exercise of their duties, but also, and perhaps more stringently, because it illuminates the difference between interpreting and making law. Despite being a creative process, interpretation is not to be confused with creation. Interpretation, per se, does not create. The most it can do is lead to the artefactualisation of its object. Such artefactualisation, as argued above, occurs through the ascription of legal meaning to an object.

[CN] involves the rejection of two mistaken assumptions mentioned in earlier chapters. The first is the assumption that recognising (with Hart and others after him) that there is such a thing as an easy case in law entails a connection between interpretation and doubt, i.e. that interpretation occurs only when the meaning of an object is not obvious. Albeit frequent and still popular, this view is deeply mistaken. Objects whose meaning is plain or obvious can be, and often are, interpreted. It might happen that, despite being obvious, and despite being obvious to its interpreter, the meaning of an object is not obvious to her audience. Under such conditions, there is a need for interpretation.

What creates the need for interpretation is the possibility of mistake about the meaning of an object. And, if law is a guide to the action of individuals in political communities, then those individuals, those communities, are the audience for whom its officials interpret. Furthermore, interpretation does not resolve unclarity as to what is to be done according to law. It does not result from nor resolve uncertainty beyond meaning. It does not, by itself, resolve legal indeterminacy. All it does is authoritatively establish legal meaning.

The second assumption rejected as a consequence of accepting [CN] is the surprisingly popular view, exposed and questioned in Chapter Four, that legal interpretation is synonymous with interpretation of the law. Of course it partly involves interpreting artefacts of the legal

world, i.e. statutes, rulings, etc., but it is not exhausted by this. The law provides the background of assumptions by reference to which interpretation takes place. Rather than being a depository of objects to be interpreted, it offers the legal interpreter a framework which renders her objects intelligible, whatever they may be.

Consequently, legal interpretation is not best understood as the interpretation of the law. In order to stress the fundamental role of (legal) sources in the law, and through them, the importance of authority to our understanding of the nature of law, Raz has claimed that 'legal interpretation is primarily the interpretation not of the law, but of its sources.' Now one must attend to the word 'primarily'.

It could, of course, be argued that Raz's assertion does not conflict with the idea that the law is not the only possible object of legal interpretation. *Pace* Raz, however, and as argued in Chapters Three and Five, legal interpretation is not best understood as the interpretation of legal sources. It is more illuminating to look at legal interpretation as the explanation of legal meaning. Legal sources are, indeed, sources of legal meaning. But they are not always, and necessarily (primarily) objects of interpretation.

\* Taking stock

My argument in Chapter Four and in previous sections of this chapter has been that judicial interpretation is separate and distinct both from application and adjudication. When resolving a dispute, judges are required to explain the legal meaning of the facts of the case at hand. This does not simply amount to subsuming a set of facts under a rule. The legal meaning of a set of facts (indeed, of a single fact), is never found in a specific rule-formulation. Moreover, the legal meaning of a rule-formulation (or legal provision) does not coincide with the legal meaning of a fact or set of facts to which it may apply.

Explanations of meaning are part of the justification for the decision reached. For that reason, their duty of justification is attached to a duty of interpretation. But, as the disjunction thesis tells us, explaining legal meaning is not sufficient for justifying a legal decision. Hence there is a difference between reasons for attributing meaning and reasons for deciding a case. Interpretative choices and judicial decisions constitute different objects of justification to which different justificatory reasons apply.

Three central claims of the minimalist account have been advanced since Chapter Four: (i) legal meaning is both systemic and contextual; (ii) interpretation is only a small part of the process of resolving a legal dispute; and (iii) interpretation and application are different activities, i.e. there is a gap between the authoritative ascription of legal meaning to the facts in a case and the practical decision in which an adjudicative process culminates.

An important implication of (iii) is that interpretation is not a remedy for legal indeterminacy. This confirms the suggestion made in Part One that there is no necessary connection between interpretation and indeterminacy or, indeed, between interpretation and

uncertainty. The fact that interpretation is often needed in making a case for indeterminacy<sup>527</sup> is particularly visible in legal interpretation, as is the inadequacy of the *in claris* maxim to judicial interpretation<sup>528</sup>. Interpretation can be a tool of diagnosis but it cannot treat the disease (the metaphor should not be taken to imply that vagueness is necessarily pathological).

In this last chapter, an attempt has been made to briefly sketch a connection between legal interpretation, judicial reasoning, and authority. My claim is that this connection, albeit as relevant as noted by Raz, is not relevant for exactly the same reasons. First, law's particular brand of authority is defined by the fact that legal systems are constituted by institutionally established, norm-producing structures which are operated by legal officials.

Accepting Raz's account of authority leads us to accepting law's claim to legitimate authority as the fundamental, conceptual link between law and authority. Legal norms, themselves, have authority. And legal officials exercise authority on law's behalf. However, not all legal interpreters are legal officials. Legal authority which is a form of practical authority and the authority of legal interpreters, qua legal interpreters, is theoretical, not practical.

Second, Raz's 'centrality claim' is too ambitious. Although interpretation is undeniably important in the life of the law, legal reasoning is not predominantly interpretative. Interpretation occurs only when there is a possibility of mistake about the meaning of an object. Legal interpretation is, predominantly, explanation of legal meaning, not (simply) the elucidation of the meaning of an artefact of the legal world. Reasoning about meaning is not practical reasoning. Interpretative conclusions can only provide the interpreter with reasons for belief. Legal reasoning, in turn, is reasoning about what is required by law: it is a form of practical

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<sup>527</sup> Endicott, (LI 111-112) refers to 'indeterminacies as to the content of the law', which can be distinguished from indeterminacy as the absence of a legally determined solution to the case at hand. I use the term 'indeterminacy' loosely and what I say about the role of interpretation applies to both types of indeterminacy: interpreting does not necessarily make an indeterminate content determinate nor does it provide resolution.

<sup>528</sup> Hart CL 126; Marmor (2005), 117; and Endicott, LI 4-7.

reasoning. Affirming the predominance of interpretation in legal reasoning would be to disregard the essentially practical character of legal reasoning, and of adjudication in particular. The centrality claim is acceptable only if one takes 'central' to mean 'important'. As this would clearly be a misinterpretation of Raz's writings, the centrality claim, as formulated by Raz, must be rejected.

Third, challenging the centrality claim requires a reformulation of the 'connection thesis', according to which what justifies the centrality of interpretation to legal reasoning is the authority of law. It is argued that interpretation is central to legal reasoning not because it is predominant but because it makes the sound exercise of legal authority possible. Justification of judicial decisions partly depends on making certain objects intelligible in the context of a legal system. Only in so doing can a judge show that she is applying existing law in the process of resolving a case.

Understanding legal meaning is a condition for determining what the law requires, but judicial interpretation is interpretation for others. Interpretation is an important element in legal reasoning but it does not dominate it. There is much more to legal reasoning than legal interpretation. Deciding what to do, according to law, lies beyond the scope of interpretation which, visibly enough in the legal context, tells the interpreter only how her object ought to be understood from a certain point of view, for a certain purpose or set of purposes.

The link between adjudication and practical authority is such that one must take it into consideration in one's account of the role of interpretation in legal reasoning. Legal reasoning, after all, is concerned as much with (legal) reasons for action as with other reasons one might have to act or refrain from acting in a certain way. A typical outcome or conclusion of legal reasoning is a conclusion as to what the law requires one to do, and not, as some have suggested, a conclusion about what I ought to do all things considered. Answering that question

(the relevant question), as we have seen, is not always made possible through the ‘application’ of legal norms <sup>529</sup>to the relevant facts (the norms are not decisive to the argument), but it should always be an answer in which existing legal norms play a non-redundant role<sup>530</sup>.

What judges add to this picture of legal reasoning is, most notably, their *legal duty* (and corresponding legal power) to solve legally relevant disputes. Legal reasoning engaged in by judges is what we call *judicial reasoning* and it is marked by a duty to produce a solution to the case at hand by *applying* legal norms. Judicial reasoning involves a *duty to reason according to law in the process of deciding a case*. The duty to explain legal meaning is thus entailed by the judges’ duty to resolve legal disputes. Judges, *qua* legal officials, cannot but be legal interpreters.

A paradigmatic legal interpreter, thus, must be someone in a position to know and understand her legal system. Her authority, *qua* legal interpreter, results from occupying such a position. Under this description, legal professionals or, even more restrictively, legal officials (i.e. people who, in virtue of their professional position, are able to act and speak on behalf of the law) are the clearest example of a legal interpreter.

But one should be careful not to jump to the conclusion that ‘legal interpreter’ and ‘legal official’ are synonyms. After all, interpretative authority does not result from one’s ability to *act and speak authoritatively on behalf of* the law but from one’s *knowledge of* the law and a specific legal system.

Acting and speaking on behalf of the law generates shifts in the legal positions of the parties in a dispute. Knowing the law, and explaining legal meaning to others, does not, in and

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<sup>529</sup> A point on which Hart and Dworkin famously diverge. I choose not to use the expression ‘valid legal norms’, *pace* Gardner (‘Myths’ 214). Its use strikes me as pleonastic, for there does not seem to be a way for a norm to be a ‘legal norm’ except by being ‘valid’ (in the relevant, minimal intra-systemic sense). Hart’s rule of recognition, of course, is an exception.

<sup>530</sup>Gardner ‘Myths’ 216: ‘Because the existing law is not decisive, the judge necessarily ends up announcing, practising, invoking, enforcing, or otherwise engaging with some new norm or norms (which may be modifications of existing legal norms)’.

of itself, produce any kind of legal effect. Acting and speaking on behalf of the law, and consequently altering legal positions, involves a different kind of authority than the kind exercised by legal interpreters. It involves what is properly referred to as *legal authority*. *Pace* Guastini, stipulations of legal meaning are exercises of legal authority, not of interpretative authority. But interpretative statements, even when *used to stipulate* meaning, are capable of being true or false.

This distinction between *interpretative authority* and *legal authority* shows us why legal reasoning (and adjudication in particular) stretches beyond legal interpretation: (i) not all ‘legal reasoners’ are legal interpreters (one can engage in legal reasoning without *explaining* legal meaning to others); (ii) even in cases where legal interpretation is legally required (judicial reasoning), adjudicative conclusions are not interpretative (explanations of legal meaning are instrumental to the formulation of authoritative legal rulings) conclusions.

A legal interpreter, as I have argued, makes a believable claim to authority only in virtue of being in a certain epistemic position (knowledge which would include, at a minimum, a certain awareness of how a legal system is structured and what the connections are among its many different parts) She is someone in a position to offer an *explanation* (in the form of justification) of legal meaning<sup>531</sup>. Solving a legal dispute authoritatively is a very different, if intimately related, task; a task fulfilled only through the exercise of practical authority. Legal

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<sup>531</sup> See MacCormick (2007), 284: ‘We may contrast a different kind of ‘What is law?’ question. ‘Mrs Vo has had her pregnancy terminated by wrongful negligence, and seeks a remedy asserting the right to life of her lost child- what is the law on that?’ Here, the questioner seeks an answer to a concrete legal problem in some postulated jurisdiction. This questioner can get a satisfactory answer only from someone who knows or can find out relevant conventions, statutes, precedents, principles, and the like, who can offer a compellingly good or at least reasonably persuasive interpretation of these in relation to the actual *or* (my emphasis) hypothetical case, and put forward as the answer to the question.’ This is, of course, a distinction Dworkin thought uninteresting. Part I of this thesis is in line with MacCormick’s observation that Dworkin’s view of legal reasoning and constructive interpretation is mistaken: “Once I understand what institutional normative order is, I can understand how norms contained within it bear upon concrete practical questions. I can then, indeed, proceed to raising and answering such questions. But the theoretical background to the practical questions is different, and a good answer to the theoretical question neither entails nor is entailed by a good answer to any one of the more or less infinite number of practical questions a life under law can throw up.”

interpretation does not provide solutions to legal disputes. Although it makes such legally bound solutions *possible* and facilitates judicial accountability, it does not answer the paradigmatic legal question ‘Quid juris?’ What makes a judicial ruling authoritative (legally binding) is not the interpretative statements presented by the judge along the way; it is the fact that the judge is a *legal authority*<sup>532</sup>: legally authorised to solve legal disputes.

The minimalist account of legal interpretation recommends that one draw a line (which, in concrete cases is almost never clear) between *legal interpretation* (explanation, or display, of legal meaning) and the *application of law* (i.e. determination of the *practical* implications of interpretative conclusions). The need for this conceptual dividing line derives from the distinction, addressed in earlier pages, between interpretation and legal reasoning (and, by implication, adjudication: if the link between interpretation and legal reasoning is clearer in adjudication than in other domains, so is the need to note the merely instrumental, albeit legally established, role of interpretative conclusions in the judge’s reasoning process).

Most often, however, one finds in the literature a distinction between interpretation and what is called *construction*<sup>533</sup>. Those who define legal interpretation by contrasting it with construction seem to assume that very little of interest can be said about domain-specific interpretation. It is common to see legal interpretation characterised as the activity of interpreting legal texts or, more specifically, of understanding their linguistic meaning. By

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<sup>532</sup> It is important to note, with MacCormick (2007, p. 282), that ‘Open texture is as much a feature of explanatory terms as of the term explained.’ Interpretative statements, as such, are always open to challenge and do not constitute or provide exclusionary reasons for action (only reasons for belief). Legal rulings (the culmination of adjudicative reasoning), by contrast, are an exercise of legal authority.

<sup>533</sup> See Lawrence Solum’s entry on the topic in his Legal Theory Lexicon: [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2008/04/legal-theory-le.html](http://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html). The most famous use of the term is of course Ronald Dworkin’s. But, as pointed out in Part I of this thesis, instead of distinguishing the two concepts, Dworkin explains interpretation *in terms of* construction. His use of the term is more charged and ambitious than the sense I have in mind here.

contrast, construction is shown as the activity of determining the legal effect (or legal content) of a text.

But even those who do not endorse this distinction seem to understand interpretation as an activity whose object is always a text. A few things strike me as problematic about this approach: (i) whilst texts can be objects of interpretation, one can interpret things which are not texts; (ii) understanding what a text *says* should not be confused with understanding what it *means*<sup>534</sup>; (iii) semantic content can be identified without recourse to interpretation: interpretation occurs when meaning is *displayed* or *explained*; (iv) just as texts are not the only objects of interpretation, legal texts are not the only objects of legal interpretation; (v) distinguishing interpretation from construction in this way tells us nothing interesting about legal interpretation. In fact, it precludes us from distinguishing legal interpreters from other interpreters because, *qua* interpreters, they do nothing but determine the meaning of texts (which seems to be what these authors believe all interpreters necessarily do, in any case, across domains).

Construction, on the other hand, is distinct because it consists in the *determination of legal effect*. Note that nothing but legal texts seems, on this view, to be capable of producing legal effects. This is highly questionable because it reduces interpretation to the articulation of linguistic meaning. The modest notion of meaning endorsed in this thesis encourages us to understand interpretation beyond its more traditional, obvious textual dimension. Texts are not

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<sup>534</sup> Strictly speaking, only people are capable of 'saying' things. Texts are ways in which certain people (their authors) might say what they want to say. They are, if you like, an indirect way of saying something: the author does not address her audience directly but does it via a text, which is nothing but a vehicle, a medium. So using the verb 'to say' in relation to texts is to use it metaphorically, meaning that the author of the text, not the text itself, says something. Curiously, this does not apply to the verb 'to mean': texts, as well as people, can mean. Most significantly, when applied to texts, the verb 'to mean' can easily become detached from the particular intentions of an author. A text can have a meaning without anyone 'meaning that' by it. 'The meaning of A (where A is a text) is B' is clearly not synonymous with 'X meant B by A'. So, whilst saying 'A says B' (when A is a text) is a metaphor (and can be equated with what an author has succeeded in communicating), saying 'A means B' refers directly to A as a text, not to its author or what she has communicated successfully or even unintentionally. The historical meaning of a text may have very little to do with what it says, just as the legal meaning of a text may only residually relate to its linguistic content.

the only objects of interpretation precisely because meaning is intelligibility in context, not merely linguistic content. As shown in the previous chapter, non-linguistic objects (chicken entrails, clouds, pebbles on a sandy beach) are as interpretable as texts.

Sketching the distinction between interpretation and construction (or, as I would call it, *application*) in this way also dangerously overlooks the crucial distinction between interpretative and legal authority. It makes it more difficult to understand what distinguishes an act of interpretation from the determination of legal positions or the ascription of rights and duties to the parties in a dispute. True, judges, as paradigmatic legal interpreters, do both, but their legal authority begins, as it were, where their explanations of legal meaning end. On the minimalist account of legal interpretation espoused here, legal effect is part of legal meaning and legal interpretation is the explanation of that meaning. Anything beyond the explanation (or display) of legal meaning is post (praeter)-interpretative or, more specifically, applicative. Anything beyond such explanations of legal meaning (legal interpretation has a myriad of possible objects) does not belong to what legal interpreters do *qua* legal interpreters.

Thus, legal interpreters do not necessarily have legal authority. Legal interpreters, as such, do not ‘mediate between people and the right reasons that apply to them’<sup>535</sup>. Although Mary (a law student) is not a judge, she might explain the legal meaning of a fact, document, or event to a confused, puzzled, or simply uninformed friend. But Mary cannot, except descriptively or speculatively, *attribute* a legal right or duty to someone. A judge, however, ascribes rights and duties to people in a normative sense, i.e. her declarations produce legal effects in a way that Mary’s description could not<sup>536</sup>.

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<sup>535</sup> Raz (1985), 214.

<sup>536</sup> Legal officials’ utterances are performative: utterances are declarations and are susceptible to being true or false (“the successful performance of the speech act is sufficient to bring about the fit between words and world, to make the propositional content true.”).

All legal authority, however, coexists with interpretative authority: in order to determine people's legal positions and solve a dispute, judges must determine and explain legal meaning, i.e. how particular facts and events are to be understood from the point of view of a particular legal system. Determining and justifying the *legal relevance* of such facts and events is part of the task of explaining their legal meaning. Because judges are required to 'reach their decisions by legal reasoning'<sup>537</sup>, they are required to make the legal meaning of the different elements in the dispute at hand sufficiently clear. Explaining legal meaning involves identifying the right legal reasons for the reached conclusion, but the authority of interpreters, *qua* interpreters, ends here. Authority to adjudicate and settle a legal dispute by legal reasoning is what we call *legal authority*<sup>538</sup>.

It is easy to see why judges are paradigmatic legal interpreters. In virtue of their professional position, they are more likely to have the necessary kind of knowledge of the legal system than other people, even other legal officials. Their duty is not only to provide resolution to legal disputes but also to clarify what the law is on certain matters or, said differently, to make legal meaning clear and accessible to their audience. This is, partly, what Dworkin had in mind when he justified his choice of judicial argument as paradigmatic by calling it 'more explicit' and 'influential' than 'other forms of legal discourse'<sup>539</sup>.

The explanatory character of legal interpretation is at the source of this combination of explicitness and influence, and so is the theoretical authoritativeness of interpretive conclusions. Interpretative authority presupposes expertise, in the case of legal interpreters. Expertise comes

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<sup>537</sup> John Gardner, 'Myths' 215.

<sup>538</sup> Despite using a different terminology, Finnis seems to endorse the distinction I draw here between two types of authority typically associated with legal interpreters (ORA 362-363): 'Adjudication and juristic interpretation resist being taken for the constitutive and legislative moments in the life of the law. (...) those moments resist being understood, through and through, as interpretative.'

<sup>539</sup> Dworkin, LE 15

in degrees and, in many cases, purported experts disappoint. But failing in interpreting is different from failing to interpret.

One interprets even if one *fails in* interpreting. And judges, who are only human, sometimes do this. Their duty to interpret is fulfilled, it seems, simply by not failing *to* interpret.

## CONCLUSION

One question stands out among the many formulated in this thesis: what is it to interpret? Addressing this question has not resulted in a theory of legal or musical interpretation. I have attempted only two rather modest things: first, to identify a set of features of interpretation across domains (a bare concept of interpretation); and second, to compare musical performance with adjudication, with the purpose of understanding the role of interpretation in legal reasoning (a vested concept of legal interpretation). The result is minimalism, whose sustaining pillars have been shaped in the last two chapters of this thesis.

But minimalism is itself a tool of clarification. My hope is that it may provide a reliable basis from which to launch a theory of legal interpretation, complete with a set of views on the nature of law and adjudication, on the relationship between practical and theoretical reasoning in law, and, on the dividing line between legal and extra-legal standards in judicial decision-making. The complexity of these questions shows us why this thesis is only the first leg of a long journey. It also explains why the next paragraphs will not provide a summary of *conclusions* reached but a roadmap of what is to follow, identifying three main questions which merit careful treatment in the future.

The first is a question I leave unanswered in Chapter Three: can reasons for belief be exclusionary (second-order reasons not to *believe* for other reasons)? Does Joseph Raz's Service Conception of authority extend to theoretical authority? In order to answer this question, I would like to compare 'exclusion' (Raz) with 'peremptoriness' (Hart) and try to understand whether a reason for belief can be peremptory without being exclusionary. I would also like to address the relationship between emotion and belief and continue using musical experience and

interpretation as a point of reference. A careful analysis of the notions above (taking into account recent contributions to the literature on epistemic value and the normativity of meaning) will help to make the nature of authority and its place in the concept of law clearer. It will also allow me to sharpen my account of the relationship between authority and interpretation.

A second problem in need of special attention and further study is what minimalism offers that other theories do not. This involves taking my contrast with scepticism further and considering the main tenet of Ricardo Guastini's sceptical account of legal interpretation (i.e. that interpretative statements are not capable of truth or falsity) in detail. Sharpening the contrast between scepticism and minimalism will improve our understanding of the difference between interpretative and legal authority, and, in particular, between two related but distinct duties of judges: the duty to explain legal meaning (interpretation) and the duty to impose resolution (adjudication).

One final fundamental question is also worth addressing. It has to do with the place of value judgments both in interpreting and in theorising about interpretation. It is intimately connected to a set of ancient questions which have puzzled and inspired many philosophers throughout the centuries: what separates the legal and the moral? What separates the aesthetic and the moral? Attempting to answer these questions from the prism of interpretation will involve clarifying the role of extra-legal standards in judicial reasoning. The more provocative claim, made in some recent contributions to the literature on law and music, that law and legal practice are not only capable of being morally valuable but also have aesthetic value has not figured in my list of concerns but may appear and provide insight into the role of coherence and consistency in law and judicial practice.

Meanwhile, suffice it to say that the project of showing that the fashionableness of interpretation in legal theory has resulted from an overambitious view of what it means to interpret has been completed. In interpretation, as in life, less is often more.

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