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INTERPRETING INTERPRETATIVE ERRORS

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This article examines the attribution of interpretative errors in judicial decision-making, a recurring yet under-theorised element of legal practice. It highlights how ideologies of legal interpretation and legal decision-making shape the criteria for evaluating interpretative correctness and critiques traditional dichotomies between axiological and epistemic errors. Proposing an integrated approach that merges decision-making and cognition, the study underscores the ideological commitments inherent in interpretative activities and their implications for the principle of legality and judicial accountability. In this light, it explores the dual function of error ascriptions: maintaining interpretative normalcy and driving change within judicial practices.

Key words: *legal interpretation, ideology, legality, epistemic error, axiological error.*

1. INTRODUCTORY SYNOPSIS

This article delves into the ascriptions of interpretative errors in judicial decision-making which is a common feature of legal practice. While the attribution of errors to interpretations is persistent in judicial practices, theoretical discussions often fail to clearly define its functions. The analysis begins by defining interpretation as a core activity for the justification of judicial decisions, emphasising its practical importance and its theoretical relevance for reconstructing judicial reasoning from logical and semantic perspectives.

This study examines how ideologies of legal interpretation and legal decision-making shape the attribution of interpretative errors, arguing that these ideologies significantly determine the evaluation of correctness. It criticises traditional theoretical approaches, cognitive, sceptic, and eclectic, that rely on a dichotomy between axiological and epistemic errors. An alternative approach is proposed, integrating decision and cognition to better explain interpretative practices. According to this view, the dual function of attributions of interpretative error emerges as mechanisms for both controlling interpretative normalcy and fostering changes in judicial practice. In light of this, it distinguishes between "errors in the practice," arising from internal evaluations of adequacy within existing norms, and "errors

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of the practice," reflecting external normative critiques of the practice itself. This distinction permits a better understanding of the ascriptions of interpretative error and their dependence on the ideology of legal decision-making and interpretation, explaining why this is not a threat to the principle of legality.

2. INTRODUCTION

It is common in legal practice to refer to many interpretations as erroneous. In this sense, asserting that erroneous interpretations exist is a proper feature of our interpretative practice. Nevertheless, there is a gap between this feature of interpretative practice and the theoretical discussion about what interpretation entails and whether it is meaningful to speak of interpretative errors. It is unclear what constitutes the attribution of an error made by legal practitioners, whether it always involves the same kind of criticism, and whether an error can occur in all interpretations within judicial processes. This paper addresses precisely these issues, analysing errors in the interpretation of legal sources as a part of judicial decision-making.

Interpretation is one of the activities involved in the justification of judicial decisions, particularly in the justification of their normative premise. This highlights the practical relevance of interpretations for jurists when arguing for or criticising judicial decisions and the theoretical importance of reconstructing those decisions and making explicit, from a logical and semantical perspective, the elements that determine them. For this reason, in this instance, I aim to revisit the justification of the normative premise of judicial decisions and to explore in what sense we claim that specific interpretations are erroneous. Specifically, different understandings of the attributions of errors to the interpretation of legal sources are examined, as well as how such errors depend on the ideology of judicial decision-making present in the relevant legal culture and particularly on the ideology of legal interpretation adopted by those who make a judgement of error. As the relationship between the ideologies of judicial decision-making and of legal interpretation is, at this point, a common place for legal theories, the focus is on the implications of this dependence for the principle of legality.

This paper runs as follows. Section II addresses the ambiguities of *interpretation* and clarifies which kind of interpretation is considered when analysing attributions of errors in the interpretations involved in judicial decision-making. Section III focuses on how error is understood by cognitive, sceptic, and eclectic theories of legal interpretation and how all these theories presuppose the distinction between axiological and epistemic errors. Section IV outlines an alternative understanding of interpretation that merges decision and cognition in our discursive practices, questioning the sharp distinction between axiological and epistemic errors. Section V refers to the ideologies behind judicial decisions and their relationships with the principle of legality. Finally, Section VI explores the functions of ascriptions

of interpretative errors as utterances aiming to control normalcy or promote the practice's change, distinguishing between the ascriptions of *errors in the practice* from the ascriptions of *errors of the practice*.

3. DIFFERENT KINDS OF INTERPRETATION

It is well-known that interpretation suffers from a range of ambiguities[1] that must be addressed to clarify the specific type of interpretation under which the errors to be analysed will be identified. Firstly, we must ask whose interpretations interest us, i.e., the subject of interpretation: who interprets? In the legal field, various actors interpret legal sources: the producers or creators of legal sources, the recipients of legal norms, the parties in a legal proceeding, legal scholars, and those who resolve legal disputes. For the purposes of this paper, of particular interest is focusing on what is known as judicial or operative interpretation, that is, the interpretation judges employ to justify their judicial decisions.

This type of interpretation holds special relevance as it is the one used for the application of Law and is used to settle disputes between particulars and justify the use of force by the state. Not just anyone can produce this "authoritative" interpretation. Only those who meet the specific requirements established by law, who generally represent particular sectors of society, can do so. Legal systems, while adhering to specific requirements, provide for the possibility of reviewing decisions through higher courts. Thus, a central characteristic of these interpretations is that they are subject to strict institutional control of possible errors.

Secondly, the question arises: what is the object of interpretation-that is, what is being interpreted? In this context, the object of interpretation consists of the texts contained within legal sources. Given that this study focuses on judicial interpretation, the analysis will concentrate on legal interpretation, understood as the interpretation of legal sources. More specifically, the object of interpretation refers to the normative provisions found within these legal sources.

Thirdly, in addition to identifying whose interpretation will be analysed and determining the object of interpretation, it is essential to recognise that "legal interpretation" is attributed multiple meanings. Wróblewski distinguishes between a wide sense and a narrow sense of interpretation when referring to legal sources.[2] In a wide sense, interpretation refers to any ascription of meaning to a normative formulation: "...any use of the language implies interpretation, which is thought of as a 'derivation' of some meaning from a linguistic formulation".[3] Conversely, in

[1] Guastini, R., Rule-Scepticism Restated, in Green L., Leiter B. (eds.) Oxford Studies in Philosophy of Law, Oxford University Press, Oxford 2011.

[2] Wróblewski, J., *Legal Language and Legal Interpretation*, Law and Philosophy, Vol. 4, No. 2/1985; Wróblewski, J., *The Judicial Application of Law*, Z. Bańkowski and N. MacCormick (eds.), Springer 1992.

[3] Wróblewski, *Legal Language and Legal Interpretation, op. cit.,* note 2, p. 234; see also, Wróblewski, *The Judicial Application of Law, op. cit.,* note 2, p. 87.

the narrow sense, interpretation arises only when there is doubt about the meaning of a text. The prima facie meaning is "clarified" through interpretation in such cases.[4] Both cases are relevant to analysing errors in the interpretation of legal sources. Therefore, this study adopts the broad sense, which also encompasses instances of interpretation in the narrow sense.

In fourth place, it is helpful to distinguish between text-oriented (or *in abstracto*) interpretation and fact-oriented (or *in concreto*) interpretation. This distinction allows us to distinguish between errors arising from incorrectly identifying existing law and those stemming from improperly applying correctly identified law.[5]

In fifth place, we must consider whether by interpretation we refer exclusively to the interpretation of texts found in the sources of law or whether, on the contrary, we also encompass a broader range of activities, such as resolving contradictions between norms, creating implicit norms to fill legal gaps, or balancing principles-in other words, what Guastini has termed "juristic construction".[6] In this latter case, we could assert that we are dealing with errors in the systematisation of law. As previously indicated in this paper, I refer solely to the interpretation of normative provisions contained in the sources of law, setting aside, for the time being, activities related to legal construction. Nevertheless, the conclusions reached regarding interpretive errors may also extend to these other activities also aimed at justifying the normative premise of judicial syllogism.

Finally, we may ask whether errors pertain to the interpretive activity itself or to the outcome of that interpretation and what type of activity (and consequently what type of outcome) is being addressed. Are we considering errors in the interpretive activity or in the outcome of that activity? The distinction between interpretive activity and the product or result of interpretation is central to analysing interpretive errors. In this regard, we can differentiate between errors in the process by which the interpretive decision is made and errors in the product or outcome of the interpretation. To answer this, we must explore the distinction between the activity and the outcome of interpretation. On the one hand, we can think of interpretation as an activity, a mental process-specifically, the physiological processes that occur when we interpret. The nature of this mental process, whether it is a process of cognition or decision-making, and how these processes are similar or different is a psychological question. However, various normative issues may arise regarding how the interpretive activity should be carried out, understood as cognition or

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[4] Wróblewski, *Legal Language and Legal Interpretation, op. cit.,* note 2, p. 234. For the author, the narrow sense of interpretation refers to a pragmatically oriented form of interpretation.

[5] Guastini, *op. cit.,* note 1, p. 139. This distinction can be observed in the typology of errors proposed by Malem, which differentiates between errors in determining the meaning of the legal provision and errors in the application of the law, i.e., the legal qualification of the facts, which would precisely constitute concrete interpretation. See, Malem Seña, J. F., *El error judicial*, in J.F. Malem Seña, F.J. Ezquiaga Ganuzas, P.A. Ibánez (eds.) *El error judicial. La formación de los jueces*, Fundación Coloquio Jurídico Europeo, Madrid 2009, 11-42.

[6] Guastini, *op. cit.,* note 1, p. 141.

decision-making. For example, the absence of biases or prejudices in interpretation, the correct application of interpretive arguments, etc.

On the other hand, when we speak of interpretation, we refer to the result or product of that activity, which is a statement or a set of interpretive statements. In the legal context, the result or product of interpretation is a statement or a set of interpretive statements that express the meaning of texts from the sources of law, i.e., normative provisions. At this point, we ask whether the interpretive statement produced is correct or, instead, whether we are facing an error. The possibility of error depends on the existence of one or more correct interpretative outcomes. How we understand the logical form of these interpretive statements, results of interpretation, and whether they possess truth values are questions closely related to how we conceive of the interpretive activity.

For these purposes, an interesting distinction is the one presented by Gianformaggio between interpretation as a noetic activity, interpretation as a linguistic act, and interpretation as a dianoetic activity.[7] Interpretation as a noetic activity refers to understanding meaning. When interpretation is considered this way, its product is the meaning we have comprehended. However, while noetic interpretation might often influence how we act and decide, and while we can easily conceive of cases of error in comprehension, this type of interpretation is not the focus of this study. Such interpretation is not always expressed through language and, therefore, is not found in the reasoning behind judicial decisions subject to review. Interpretation as a linguistic act refers specifically to the production of a linguistic act. This involves our discursive agency and, as we will see, requires comprehension and the performance of a speech act-an interpretative statement-which constitutes the product of interpretation. Interpretation as a dianoetic activity, on the other hand, consists in the reasoning undertaken to justify an interpretative statement. In this light, the product of the interpretation is, precisely, an interpretative argument. Moving a little from Gianformaggio's perspective, we can also consider an interpretative argumentation as a product or outcome of interpretation.[8]

[7] Cf. Gianformaggio, L., *Filosofia del diritto e ragionamento giuridico,* Giappichelli, Torino 201, pp. 112-113. Algunas teorías sobre la interpretación que ponen precisamente el acento en el carácter argumentativo de la práctica interpretativa, distanciándose en parte de la tradicional distinción entre teorías cognitivas o decisorias. Estas son las llamadas teorías interpretativas o constructivistas de la interpretación. Para esta posición, si bien la interpretación no es solo un acto de conocimiento, si asumen que existe un enunciado interpretativo correcto al que debe llegarse como resultado de la interpretación. Cf., Lifante Vidal, I., En defensa de una concepción constructivista de la interpretación jurídica, Revus, 39/2019.

[8] For Gianformaggio, the product of dianoetic interpretation is the conclusion of the argumentative interpretatión.

4. ERRORS THROUGH DIVERSE THEORETICAL FRAMEWORKS

4.1. Three groups of theories of interpretation

Multiple theories seek to explain legal interpretation. In contemporary legal theory, it is common to distinguish between cognitive theories, sceptical theories, and mixed or eclectic theories. Each of these theories represents the interpretive activity differently, and therefore, the interpretive statements that result from interpretation also take on various characteristics depending on the interpretation theory considered.[9] Each of these theories also positions itself differently when accounting for errors in legal interpretation.

According to cognitive theories of legal interpretation, the words or phrases present in the sources of law have a meaning that the interpreter must uncover. In this sense, meaning is considered fixed, and interpretation is understood as a cognitive task, an intellectual activity rather than one of will.[10] For these theories, interpretive statements can be true or false; therefore, an error in interpretation occurs when false interpretive statements are made.

In contrast to this position, it has been argued that "One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases".[11] This statement reflects the position of a sceptical theory of legal interpretation, which, although referring to a set of cases, we can extend to a set of texts. According to this view, unlike the cognitivist theory, each text does not have a fixed meaning; rather, the interpreter decides the meaning of a legal text. The words or phrases presented in the sources of law do not have a determined and fixed meaning; the interpreter chooses their meaning on each occasion.[12] This does not mean that the interpreter can choose any meaning; the

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[9] Guastini, R., *Interpretar y argumentar*, Centro de Estudios Políticos y Constitucionales, Madrid 2017, pp. 356-357.

[10] It is possible to associate this vision with the school of exegesis and the historical school of law of the 19th century. Cf. Tarello, G., *Diritto, enunciati, usi. Studi di teoria e metatoria del diritto*, Il Mulino, Bolonia 1974, pp. 477-482. Tarello explains that these schools, while they privileged arguments that sought the continuity of the order, had no specific political orientation.

[11] Llewellyn, K.N., *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statues Are to Be Constructed*, Vanderbilt Law Review, 3/1950, p. 395.

[12] Here, we can identify the position of Genoese realism, which, following in the footsteps of Tarello adopts a sceptical stance on interpretation. It is worth noting that although the positions of Genoese legal theorists are not entirely uniform, they share the central characteristics outlined in the text. See, for instance, Comanducci, P., *La interpretación jurídica*, in *Hacia una teoría analítica del Derecho,* Centro de estudios políticos y constitucionales, Madrid 2010; Guastini, *Rule-Scepticism Restated*, *op. cit.,* note 1; Chiassoni, P., *Interpretation without Truth. A realistic Enquiry,* Springer, Berlin 2019; and Ratti, G.B., *Sets, Separation, and Frames*, Analisi e diritto, 2/2021. Explicitly referring to American realism, Tarello explains that realism emerged as a cultural movement at the end of the 19th century, as a reaction to the crisis of the exegetical schools and the historical school, focusing on the methodology of interpretative activity (Tarello, *Diritto, enunciati, usi. Studi di teoria e metatoria del diritto*, *op. cit*. note 10, pp. 482-484). A more radical version of scepticism can be found in Troper's position. Cf. Troper, M., *Une théorie réaliste de l'interprétation*, Revista Opinião Jurídica, 8/2006.

interpreter chooses from among those possible meanings that would be accepted by the relevant community-those that form the framework of possible interpretations.[13]

However, interpretation is not limited to identifying these possible meanings; it also requires the interpreter to attribute one of them to the text in the sources. In this position, an error can only occur when identifying the meanings that form the framework of possible interpretations but not when choosing the meaning that will be attributed to the text.

Finally, we find the eclectic or mixed theory of interpretation, according to which, in the interpretive task, there are cases of cognition and cases of decision. Following this idea, for those who accept the eclectic theory, in cases where the interpretive activity is cognitive, the result of interpretation will be an interpretive statement that can be true or false. In contrast, in cases where the interpretive activity involves a decision, interpretive statements lack truth value. Thus, while errors in interpretation can be identified in clear cases, this is not possible in difficult cases where the interpreter must make a decision.

At this point, some considerations about the eclectic theory are important. Hart's attempt to find a middle ground between formalism (or conceptualism) and scepticism in legal interpretation is a paradigmatic example of an eclectic theory.[14] While Hart does not explicitly present a theory of legal interpretation, he distinguishes between easy and difficult cases when applying rules; in the former, rules are applied automatically, while in the latter, the interpreter must decide whether the rule applies. However, Guastini warns that this position does not distinguish between the application of rules (*in concreto* interpretation) and the identification of the activity of extracting rules from texts found in the sources of law (*in abstracto* interpretation).[15] For this reason, according to Guastini, this theory seems to presuppose that there is indeed a specific meaning that the interpreter must discover, and it assumes a cognitivist position about *in abstracto* interpretation. Nevertheless, the intermediate position can be reframed as assuming that some texts or provisions convey a clear meaning while others require the interpreter to determine their meaning. As thus reconstructed, the eclectic theory admits interpretive errors only in clear texts.

4.2. Three ways to view ascriptions of error

The possibility of identifying the law presupposes the possibility of error in doing so-that is, the ability to err in identifying it. The attribution of error to an interpretation refers to assigning a meaning to a text that diverges from the proper meaning of the text in the sources of law. Consequently, a theory unable to account for such errors would face difficulty in affirming that the law can be identified and

[13] Guastini, *Interpretar y argumentar*, *op. cit.,* note 9, pp. 74-75.
[14] Hart, H.L.A., *The Concept of Law*, 3rd edn, Oxford University Press, Oxford 2012.
[15] Guastini, *Interpretar y argumentar*, *op. cit.,* note 9, pp. 355-356.

making sense of the practices that presume it. Along these lines, most theorists who adopt eclectic or even sceptical positions on interpretation acknowledge the possibility of such errors. Their strategy is to limit the scope within which error can be ascribed. That is, eclectics argue that there are correct interpretations and, therefore, interpretive errors in clear cases. Alternatively, sceptics propose that errors may only occur when determining the framework of possible interpretations.

In this regard, for example, from an intermediate position, Pino explains that if interpretation is a rule-guided activity, incorrect interpretations are possible. According to him, these would occur in clear cases.[16] The criteria for determining correctness are twofold: on the one hand, the proximity of the meaning of the interpretive statement to the meaning of the statement being interpreted-that is, its closeness to the most obvious meaning-and, on the other hand, whether it is adequately argued.

Ferrer Beltrán argues that even legal realism, which adopts a sceptical stance on interpretation, can accept the possibility of error.[17] He explains that to claim the existence of error, it is necessary to have a standard of correctness independent of the interpretation itself. This standard would not exist if, as realist theories suggest, the law is simply what judges say it is. For Ferrer Beltrán, this position represents a false dilemma, that is that "either there is a correct answer regarding what the rules require, and this answer is independent of what judges think, say, or do" [18], so there can be errors about what a rule express or what the rules require can be established correctly before the judge decision. In that case, there is no correct interpretation and, thus, no erroneous interpretation. Jordi explains that the false presupposition is that realists admit that the meaningful content of a rule depends on each judge's decision. In contrast, a realist position could endorse a conventionalist view on the meaning and accept that what a rule expresses depends on the convergences or the practice of interpretation of the judges as a social group in a particular time and place.

We have seen how these three theories of interpretation occupy different positions when explaining interpretive error. It is clear that for a cognitivist position, which accepts the existence of correct or true interpretations, explaining interpretive error is straightforward, as it arises when the interpreter provides an interpretation that differs from the correct one. If this reasoning is applied linearly, sceptical theories of interpretation, which emphasise that interpretive activity is decisional and does not assume the existence of correct interpretations, would be unable to account for interpretive error. An eclectic position, however, could only explain errors in interpreting clear texts.

[16] Pino, G., *L'interpretazione nel diritto*, Giappichelli, Torino 2021, p. 336.

[17] Ferrer Beltrán, J., *El error judicial y los desacuerdos irrecusables en el derecho*, in P. Luque Sánchez, G. B. Ratti (eds.), *Acordes y desacuerdos*, Marcial Pons, Madrid 2012, p. 259.

[18] *Ibid.*, pp. 204-205.

4.3. Epistemic and axiological error

When one utters an error statement, one expresses that the object of the ascription of error does not fit the standards of correctness the speaker considers. It appears that, for an error to exist, there must be a criterion of correctness. In a series of works on analysing judicial errors, Carbonell explains that correctness is a relationship of alignment between one thing and another. She states:

"When the alignment occurs, or the comparison reveals conformity, the object of comparison is said to be correct; otherwise, it is said to be 'incorrect'. Thus, it functions as a flexible designator of a relationship of alignment of any epistemic or axiological content- that is, a relationship between various things and various parameters- which is positively valued by the person making the judgment".[19]

Now, depending on the criterion of correctness that we must adhere to, the type of errors we can commit will vary. In this regard, Carbonell has proposed distinguishing between epistemic errors and axiological errors. She differentiates between two types of correctness: epistemic correctness and ethical-normative correctness.[20] Thus, we can conceive of epistemic errors as occurring when our statements, formulated for descriptive or cognitive purposes, do not correspond to reality, to what *it is the case*. Conversely, ethical-normative errors arise when our statements, formulated for prescriptive or normative purposes, do not correspond to axiological reality, that is, to what *ought to be*.

By considering both types of errors, our evaluation of interpretive decisions broadens while distinguishing the type of correctness being sought and the type of error that can be identified. As Carbonell points out, this presupposes accepting the distinction between law and morality- that is, between identifying the law and making judgments about its value- and recognising the existence of spaces for interpretive discretion. [21]

At first glance, this distinction fits well with the traditional distinction of theories of legal interpretation between cognition and decision. We can adopt this distinction between epistemic and axiological errors to analyse errors in interpretation, depending on whether interpretation is understood as a cognitive activity or a decisional activity. If interpretation is a cognitive activity, as cognitive theories suggest, an interpretive error would constitute an epistemic error, even if what must be known are objective values that the legal order endorses. Epistemic errors are also considered by the sceptical when identifying the framework of possible

[19] Carbonell Bellolio, F., Sobre la idea de decisión judicial correcta, Analisi e diritto, 2015, p. 13 (my translation).

[20] *Ibid*. Carbonell explains that we can also consider "logical correctness", which refers to the adherence to the rules of the logical syllogism in the progression from premises to conclusion (*Loc. cit.*). In this way, we could identify three types of errors: epistemic, axiological and logical.

[21] Carbonell Bellolio, F., *Los errores del juez. Presupuestos y tipologías*, in García Amado J. A. (dir.), El error judicial. Problemas y regulaciones, Tirant lo Blanch, Valencia 2023, p. 81. We could add that this position also presupposes another idea, which is the distinction between what is and what should be, as two different forms of reality. A distinction that in this work is accepted as two different and opposite forms of using language.

interpretations and by the eclectic theory supporters in clear texts. Similarly, in cases where interpretation constitutes a decision-making activity, the error would not be epistemic but axiological.

5. INTERPRETATION, DISCURSIVE AGENCY, AND ERROR

It is appealing to explain the attribution of errors in judicial interpretations by appealing to epistemic and axiological errors while assuming the indicated premises. However, I believe it partially obscures the complexity of the interpretative activity and the existence of decisions and evaluations that occur in the judicial interpretation of clear cases for the eclectic theory and in determining the frame of possible interpretations for the sceptics. To provide a more comprehensive account, it is necessary to dissolve the cognition/decision dilemma to which traditional theories of legal interpretation have subjected us.

The cognition/decision dilemma can be dissolved if we focus on our discursive agency. It is important to consider that when we engage in interpretation, we are not only understanding the meaning of the texts presented to us but also performing linguistic acts, such as producing interpretative statements or constructing arguments. This implies that we are exercising our agency, and as agents performing voluntary acts, decision-making is possible.

For this purpose, it is helpful to consider the distinction presented in Section II between interpretation as a noetic activity, interpretation as a linguistic act, and interpretation as a dianoetic activity. This distinction allows us to more easily represent the role of knowledge or understanding in the interpretative activity, particularly in interpretation as a noetic activity, and the importance of our discursive agency (and because of that of our decisions) in producing linguistic acts of interpretation and interpretative arguments. In both cases-whether it is an error in the interpretation as a linguistic act or an error in interpretation as a dianoetic activity-we can observe the operation of our discursive agency. In other words, in both instances, the interpretation analysis is not confined to understanding texts but reveals the active role of the interpreting subject.

Indeed, knowledge is always present insofar as, to produce interpretative statements, we must have been previously trained in the practice of interpreting legal sources. We have learned to distinguish between interpretations that fall within normalcy and those considered eccentric interpretations of certain provisions. We have acquired the *know-how* that enables us to interpret legal sources without being consistently criticised by other interpreters. However, interpretations are linguistic acts that inherently involve decision-making, much like any speech act. It is our discursive agency that determines whether to produce these acts and whether to

generate normal interpretations or engage in eccentric ones.[22] As Chiassoni has suggested, the interpreter can adopt a practical attitude of conformity (in which case their interpretation aligns with a "normal" use) or an attitude of non-conformity (in which case their interpretation falls into an eccentric use).[23]

When revisiting the distinction between epistemic error and evaluative or axiological error, this framework appears suitable for distinguishing errors in traditional theories. However, if we accept that the cognition/decision dichotomy is a false dilemma, acknowledging that cognition and decision-making are always intertwined, it becomes challenging to clearly separate cases of epistemic error from those involving axiological error. The issue is that interpretative activity invariably demands that our agency adopt a practical attitude, which can be assessed and deemed erroneous. Yet, we cannot definitively pinpoint when this is merely an epistemic matter. This holds true even when we interpret clear texts and produce normal interpretations, as these involve a practical attitude of conformity, which may constitute an error from an axiological standpoint.

This is another way to highlight that the interpretative activity always involves practical choices and, thus, axiological questions. Conforming and perpetuating normal interpretations over time entails an evaluative dimension. The advantage of this approach lies in its ability to illuminate the dynamic and mutable nature of seemingly clear cases. That is, what is understood as clear and beyond justification can shift over time. For instance, what is initially considered an identification error (failing to ascribe a clear meaning) may cease to be an error and instead become the correct use or interpretation. This indicates that variation is always possible.

However, the transformation of interpretations-those that are unequivocally erroneous at one point but later are no longer regarded as such-depends significantly on the identity of the subject articulating them: the authority and power of the court producing the interpretation and the material conditions of the context. These include verbal and non-verbal aspects of the prevailing legal culture, such as the socio-political circumstances at play. In this sense, not all participants in a linguistic practice may have the same power to change meaning ascriptions from eccentricity to normality. The semantic efficacy may depend on the situation of power of the speaker and the material conditions of the context, i.e., if the practices are more or less institutionalised, if there are control procedures, sanctions against deviation, etc.

This leads us to the conclusion that interpretation does not always involve purely cognition or purely decision-making, nor does it divide neatly into cases of cognition and cases of decision-making. Instead, we always find both elements simultaneously present.

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[22] In this view, I follow Medina, J., *Speaking from Elsewhere*, State University of New York Press, Albany 2006. His work, following Wittgenstein and Dewey's philosophies, seeks to overcome the debate between realists and sceptics about meaning in philosophy of language. As I have argued before, Medina's insights can account for the existence of shared meanings and simultaneously show how there is always an act of choice in our discursive agency, providing, in the legal domain, an explanation of intelligibility without overlooking the complexity of our ever-changing interpretive practices.

[23] Chiassoni*, op. cit.,* note 12.

6. INTERPRETATION AND LEGALITY

6.1. The Ideology behind Judicial Interpretation

How should a judge decide when applying the law? The answer depends on the ideology of the judicial application of the law prevailing in the relevant legal culture. In this sense, "The ideology of law consists of values which it claims the court should implement in its decisions, for example; legality, certainty, objectivity, justice, equity, praxiological values."[24] This ideology, which can be more or less extensive -i.e., more or less comprehensive- depends on various factors that define it, including the opinions of legal doctrine, the decisions of the courts, contributions from legal theory and philosophy, and the legal norms themselves.[25] The fact that decisions and evaluations in the application of the law are guided by an ideology is significant for analysing errors, as this ideology determines the framework within which decision-making errors are identified.

Wróblewski proposes three models of the ideology of judicial application of the law: the ideology of free judicial decision-making, the ideology of bound judicial decision-making, and the ideology of legal and rational judicial decision-making. In his proposal, these models serve explanatory purposes and present a reconstruction of how these ideologies guide and justify decision-making, meaning that the ideology of judicial decision-making will determine the correctness or error of the decision. Currently, the predominant model is that of legal and rational decision-making.[26] According to the ideology underlying this model, a distinction must be made between the creation and application of law, with the principle of legality regarded as a central value. For courts, this principle entails the obligation to apply the law, which presupposes a clear distinction between the creation and application of law. The identification of norms found in legal sources plays a central role for this principle and subjects courts to strict oversight through the possibility of appealing decisions to higher courts.

6.2. Ideology of Interpretation

How should we interpret the legal sources? What interpretative arguments should be used? The answer depends on the directives, interpretative canons, or hermeneutic codes that interpreters must employ to justify their interpretative decisions. This raises the question of the ideology behind interpretation. This ideology represents

[24] Wróblewski, *The Judicial Application of Law, op. cit.,* note 2, p. 266.

[25] For Wróblewski we can attempt to reconstruct this ideology for various reasons depending on the type of research we are interested in conducting, which leads us to consider, for example, how decisions should be made according to the ideology, taking into account judicial decisions in general, or only those made in criminal jurisdiction, or only in civil jurisdiction; or further, how this ideology operates in liberal states or in states with a sovereign-populist orientation, or even within the same state across different historical periods (Wróblewski, *The Judicial Application of Law, op. cit.,* note 2, p. 267)

[26] This approach to understanding the justification of judicial decisions is widespread among legal theorists and is nowadays reflected in the normative requirements of various legal systems.

a collection of principles regarding how interpretation should be conducted and justified. In other words, the set of directives or interpretative canons found in legal sources, followed by courts in their decisions, and endorsed by doctrinal opinion, constitutes the ideology of interpretation.

In this context, it is unsurprising that different ideologies of interpretation may compete within a specific legal practice. These ideologies may prioritise interpretations that promote stability or, conversely, those that encourage change. For instance, they may favour more conservative arguments, such as the *argumentum a contrario*, the legislator's intent or literal interpretations, or more innovative approaches, such as the *argumentum a simili* or appeals to equity.[27]

At this point, we encounter the decisions and evaluations that decision-makers must undertake when interpreting and justifying their interpretations of legal sources. This suggests that, depending on the ideology of interpretation, the type of interpretative argument that should be used to interpret legal sources-or that justifies an interpretative decision as correct-will vary. Conversely, the ideology of interpretation adopted will determine what is regarded as interpretative errors. This stresses the importance of the ideology of interpretation, not only in interpretative argumentation but particularly in analysing criticisms of interpretative decisions. This critical function involves oversight of judicial interpretations, conducted through the attribution of errors by higher courts, as previously noted, and through democratic accountability, ensured by the public accessibility of decisions.[28]

These considerations lead to the question: Is it possible to commit errors in interpretation? At this point is clear that the ideology of interpretation and judicial decision-making we embrace will determine the errors we can recognise. What becomes evident here is that error-or, more precisely, the attribution of an interpretative error-always depends on a specific ideology of interpretation.

7. ON THE FUNCTIONS OF INTERPRETATIVE ERRORS

The fact that interpretative error depends on the ideology of interpretation accepted presents a particularly problematic issue. Just as interpretative activity requires evaluations, determining interpretative error does also. Thus, an attribution of error that is ideologically uncompromised cannot be conceived. In other words, all attributions of error involve an axiological component. While the conclusion may seem trivial, accepting it is uncomfortable due to its feared implication: there may not be purely epistemic errors but only axiological ones.

However, it is essential not to be alarmed by this conclusion and to draw only the necessary consequences from it. Does the dependence of correctness and error on ideology call into question the principle of the possible identification of law, that

[27] Gianformaggio, *ob. cit.,* note 7, cap. III.
[28] *Ibid.*, p. 92.

is, that law can be known, a central element of the rule of law, and the distinction between knowing the law and evaluating it? I believe the answer is no, and the explanation lies in the hybrid nature of our social practices.

Knowing and applying the law is a social practice in which we participate, and as such, we are trained to recognise significant acts and errors, that is, to conform and justify our actions within the practice and to criticise those who do not adhere to it. The social practice of law also includes the ideology of legal and rational decision-making, i.e. the application of the created law in accordance with the ideology of interpretation. For this practice to exist, it is necessary for participants to have learned to follow it, to make certain evaluations, and to take certain decisions considered correct, which requires a certain stability in the practice itself. At the same time, these practices exist through the actions of the individuals who participate in them, implying that we cannot guarantee this stability entirely. Social practices are dynamic and are indeed a product of both stability and constant change. This does not imply that change occurs permanently and throughout the practice, as this would lead to the end of the practice as such. It is the agency of the participants, their linguistic and non-linguistic acts that maintain and modify these practices.

Attributions of error have a dual function. In these practices, attributing errors serves as a tool to ensure stability, specifically to control normality and stable usages, thereby discrediting eccentric usages: we might refer to these as "*errors in the practice*". We see that it is not merely an epistemic error, as it pertains to the outcome of an activity that involves decisions and evaluations. This does not exclude the possibility of this practice being evaluated and criticised from different points of view (which presupposes its knowledge). In this sense, the attribution of error can function as an instrument of change and critique: we might refer to this type of error as "*error of the practice*". The difficulty lies in identifying when the attribution of error is a case of controlling normalcy or critiquing it, and the tentative answer we can provide is that when an error is attributed to normal usage, its function is critical of the practice; thus, we can understand it as a case of *error of the practice*.

In the context of judicial decisions, we can connect the types of errors with the possibility of making eccentric interpretations. As already mentioned, not all interpreters wield the same power to influence the stability and change of interpretative practices. This is particularly relevant when the interpreter offers divergent, that is, eccentric interpretations. The burden of proving their adequacy to the practice[29] and the ability to impose it as the correct interpretation will largely depend on the position the interpreter holds. Likewise, the critical function of error as an error in practice will have greater transformative potential depending on who determines it; indeed, the agency of certain subjects within the practice holds more transformative potential than that of others.

When we learn to identify the law, we not only learn what the sources are but also the interpretive arguments we can use and when we should criticise their

[29] Medina, *ob. cit.* note 22, p. 42.

application. That is to say, the very identification of the law that we are taught is a product of the application of an ideology regarding the identification of the law. The very practice of "objectively" identifying the law is a product of an ideology that we have learned, know how to use, and can also critique from a moral standpoint, thus allowing for eccentric interpretations. In effect, we can easily notice that one of the most changeable aspects of the social practice of law is precisely the ideology of interpretation. Historical and political changes lead to significant alterations in the accepted interpretative canons. Following Tarello, we can argue that the specificity of legal interpretation should not obscure the general context in which the ideologies of interpretation are located.[30] Moreover, as well as interpretations, ascribing error may be more or less efficacious depending on the subject who utters them and the material conditions of the practice. This is to say that not all ascriptions of interpretative error will have the same semantic efficacy in the practice.

8. CONCLUDING REMARKS

Returning to the issue of error, we have sought to demonstrate how interpretative error depends on the ideology from which correctness is evaluated. We have observed that the ideology of interpretation is part of the practice of law itself but that it is not necessarily one of its more stable aspects. This often complicates the distinction between "*errors in the practice*" and "*errors of the practice*." Assuming this distinction is possible, the advantage of adopting an explanation of interpretative activity that comprehensively addresses both its cognitive and decision-making aspects, regardless of whether the cases are clear or not, is that it always allows us to discern the interpreter's ideological commitment (whether aligned with or aimed at changing the prevailing uses in the practice).

In this way, we can advance towards analysing the responsibility of interpreters in maintaining or altering the meanings of texts found in the sources of law. We can contribute from the legal theory perspective by emphasising the importance and responsibility of adopting a critical stance towards all interpretations. This entails constantly revisiting the often-hidden evaluative commitments embedded not only in interpretative judicial decisions but also in legal dogmatics and legal theory itself. Commitments that frequently come to light in judgments of error.

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