# The Problem of Objectivity in Legal Interpretation. Between philosophic theory and legal practice

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RECEBIDO 30/05/2018
APROVADO 17/06/2018
PUBLICADO 06/07/2018
Editor Responsável: Carla Caldas
Método de Avaliação: Double Blind Review
E-ISSN: 2316-8080
DOI:10.16928

**Resumo:**

O artigo investiga o problema da objetividade na interpretação legal. Em referência à teoria da interpretação legal estabelecida por Ronald Dworkin analisa as relações entre as categorias da verdade e objetividade no contexto do raciocínio legal. Além disso, a aparente semelhança entre a noção de Dworkin da chamada "lei como integridade" e o convencionalismo legal e o pragmatismo estão sendo examinados. Na última etapa a análise considera as conseqüências práticas da matéria discutida para o raciocínio legal.

**Palavras-chave:** Dworkin. Convencionalismo. Interpretação. Lei como integridade. Objetividade. Pragmatismo. Verdade

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**Abstract:**

The article investigates the problem of objectivity in legal interpretation. In reference to the theory of legal interpretation established by Ronald Dworkin it analyses the relationships between the categories of the truth and objectivity in context of legal reasoning. Further, the seeming resemblance between Dworkin's notion of so called "Law as Integrity" and legal conventionalism and pragmatism is being examined. In the last step the analysis considers the practical consequences of the discussed matter for the legal reasoning.

**Key Words:** Dworkin. Conventionalism. Interpretation. Law as Integrity. Objectivity. Pragmatism. Truth

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**Abstrakt:**

In dem Aufsatz wird das Problem der Objektivität in der juristischen Interpretation analysiert. Im Bezug auf die von Ronald Dworkin etablierten Theorie der juristischen Interpretation, es werden die Relationen zwischen den Kategorien der Wahrheit und Objektivität untersucht. Weiterhin es wird die angebliche Ähnlichkeit zwischen Dworkin's Theorie der „Recht als Integrität" und die Theorien des juristischen Konventionalismus und Pragmatismus. Im Fokus der letzten Schritte der Analyse stehen die praktische Konsequenzen der diskutierten Problematik für die Rechtsprechungspraxis.

**Key Words:** Dworkin. Interpretation. Konventionalismus. Objektivität. Pragmatismus. Recht als Integrität. Wahrheit

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The main reason to start a discussion concerning the title question is a common confusion in the legal philosophy: At first glance it may seem that the legal interpretation can easily lead to relativisation of the legal rules. It seems that the object that is interpreted cannot be fixed, so if the content of the law can be an object of interpretation, its interpretation could possibly lead to different results of legal reasoning. Thus one could assume that the legal interpretation excludes the possibility of assuming any objectivity and – if one would like go one step further – it could preclude talking about justice. Is there any solution that one can offer?

The goal of the following investigation is to show that the idea of legal interpretation corresponds with the assumption of the real and objective existence of the law.[1] Furthermore, it will be shown, that the interpretative praxis is not only compatible with the assumption concerning the objectivity of the law, but it can be even understood as a method of discovering the objective dimension of its existence. Although the matters discussed in the presentation

[1] I am referring to my article „Wahre Existenz oder objektive Geltung? Die Existenz des Rechts und Wahrheitsfähigkeit seiner Urteile in der interpretativen Rechtsprechungspraxis bei Dworkin", which was published in the Journal "Rechtsphilosophie. Zeitschrift für Grundlagen des Rechts". In the article I presented my analysis of the connection between the categories of truth and objectivity. In this paper I will refer to some remarks presented there. See: Anna Szyrwińska, „Wahre Existenz oder objektive Geltung? Die Existenz des Rechts und Wahrheitsfähigkeit seiner Urteile in der interpretativen Rechtsprechungspraxis bei Dworkin". In: Rechtsphilosophie. Zeitschrift für Grundlagen des Rechts 2/2015, 155-169.

mostly refer to the tradition of the common law, in which the named questions seem to be most problematic, I believe that the topic is related to the dimension of legal reasoning in general.

**How does the law exist?**

The first matter, that should be taken into account, is the general problem of the metaphysical status of the law. It can be reduced to the question, if the law really does exist. In the 20th Century Anglo-American philosophy one can differentiate two dominating notions concerning the metaphysical status of the law.[2] The first notion is the so called legal realism. According to the most radical realists the law does not exist in the real sense. The only dimension of the law that exists are its codified rules. The way to discover what corresponds with the law for the people would thus not be taking into account the positive dimension of the universal rules, but rather predicting the consequences of someone's intended action and trying to act in a way that allows to avoid sanctions. The second dominating notion was the legal positivism. The feature of the legal positivism, which is the most interesting in the discussed context is the separation between the morality and law. According to legal positivists, the existence of the law is independent of the existence of moral principles. They build two separate domains.

Those two notions dominating in the tradition of the common law established a basis for formation of a new legal doctrine, which is the theory of legal interpretation. In the following paper it will be shown how the idea of legal interpretativism has been developed. Furthermore, the essential systematic innovations, which were necessary for the formation of the new doctrine will be discussed. In order to envision the process of establishing of the legal interpretativism, I will refer to the version of interpretative theory formulated by Ronald Dworkin.[3] Dworkin's contribution can be doubtlessly acknowledged as turning point in the formation of the doctrine of legal interpretation. Hence, Dworkin belongs to forerunners of this notion, about whom one can say that he established the new paradigm in the philosophy of law.[4]

Dworkin established his theory in opposition to the two doctrines named above. He could not agree with the crucial aspects of legal realism and legal positivism. What differs his

[2] Ibid.
[3] The main representatives of this notion was for instance Oliver Wendell Holmes Junior or one generation later Karl Llewelyn.
[4] Nevertheless it can be asked in how far the notion developed by Dworkin can be treated as exemplary for the whole doctrine of legal interpretation. The notion of legal interpretativism has undergone some changes and there exist various versions of it. I leave this question aside.

theory of legal interpretation from the realist view is his assumption about the real existence of the law. According to Dworkin the law is not only a set of optional rules depending on the actual situation of the society, which can be optionally reformulated by the judges, but it has an objective and universal character. The law cannot be changed due to actual needs or preferences of the society. Dworkin's criticism of the legal realism is systematically connected with his critical attitude towards legal positivism, namely towards the positivistic account of the connection between morality and the law.

The main difference between Dworkin's theory and the positivist view was his conviction about the close relationship between the law and morality. According to Dworkin the codified legal rules are nothing less as the expression of moral principles. This implies that the law is fixed – its content is not relative and it does not depend in any way on the actual situation of the society, neither financial nor political. The law is thus independent of the individual decisions of the judges. This aspect gains importance in the tradition of the common law, particularly in a situation, which requires from the judge the qualification of hard cases, in which no concrete rule exists, which could be applied. According to Dworkin, the judge, who needs to make decision concerning some problematic case, can neither rely on his own intuition nor can he relate only to the codified legal rules – as they are not relevant in hard cases. What he needs to keep in mind is the set of moral principles, that are not codified and relate to them in his legal qualification of the hard case.

## Truth and falsehood of legal propositions in the context of legal interpretation

The assumption about the real existence of the law and of its close connection to the dimension of universal moral principles in the theory by Dworkin brought some significant consequences for his notion of the juridical practice. Namely, the existence of the law implies the possibility of the qualification of the logical value of legal propositions in accordance to the classical notion of truth.

The classical definition of truth was expressed by Aristotle in a following way: "To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, or of what is not that it is not, is true."[5] Later on this understanding was reformulated into so called correspondence theory of truth, which is: "The truth of a sentence consists in its agreement with

[5] Aristotle, Metaphysics 1011b25.

reality."[6] According to both definitions, the law can be treated as a kind of reality, and if it is the case, then it is possible to qualify its propositions from the point of view of logic. The legal proposition is then true if it corresponds with the existing law. The legal proposition is false if it is not true. In case of a hard case it is not possible to confront the legal proposition with the already codified legal rules, so one must say, that this legal proposition would be true if it corresponded with moral principles. It would be false if it would not correspond with them.

This aspect may seem obvious, however it influences the whole understanding of the process of legal reasoning. It refers especially to the situation of judges, who need to search for a proper application of a legal rule in a specific case. As the existence of the law and the truth of the legal propositions are not relative, the judge cannot make an interpretation of the law in an optional way. [7]

According to this, the judge is not free in the interpretation of the case. His task is to figure out if the legal proposition relating to the case is true or false. That means, he needs to find out, if it corresponds with the existing law. And as the law is an expression of morality, what he needs to do is to find a point of reference in the dimension of moral principles. To enable envisioning the described situation one could use the following example: The proposition "killing people without reason is wrong from the point of view of the law" is true if it corresponds with the objective moral reality according to which killing without reason was wrong.

One can clearly see, that the work the judge has to do, is to compare the content of the legal proposition describing the analysed case with the content of moral principles, which exist in a real way – that means to find a reference point to the legal proposition in the dimension of morals.[8] If one takes into account only such general description, the procedure may seem not very complicated to perform. However as soon as one starts asking, what should the confrontation of the rules with principles actually mean in specific cases and how it is to proceed, he cannot overlook a serious difficulty with the application of such method. There

[6] Cf. Alfred Tarski, Truth and Proof. In: Scientific American Vol. 220, Nr. 6. (1969), 63-77.

[7] Dworkin wanted to stress this aspect delivering a striking example of a judge, who ministered capital punishment claiming, that other interpretations of the law being in force in this case would be correct too. He presents this example i.a. in "Justice for Hegdehogs": "*Imagine a judge sending an accused criminal to jail, perhaps to death, or awarding a huge verdict against a civil defendant, and then conceding in the course his opinion that other interpretations of the law that would have required contrary decisions are just as valid as his own."* Ronald Dworkin, Justice for Hedgehogs, London 2011, 125-126.

[8] Szyrwińska, Wahre Existenz oder objektive Geltung?, 163.

arises a serious problem with the verification of the logical value of legal propositions, as no direct access to the dimension of moral principles can be achieved. The reason of the difficulty lies in the fact, that the morality is not a physical entity, which could be measured in any way in order to be compared with the dimension of empirical occurrences. The question arises: how can one compare any empirical facts with something that is not empirically known? Or in other words: how can one learn anything about the moral principles without having no direct access to it?

## Truth and Objectivity

The solution of this difficulty is the innovative aspect of the interpretative theory by Dworkin.[9] The method to solve the trouble is replacing the category of truth with the category of objectivity. Dworkin does not say explicitly that he understands the truth as objectivity, however one can find several passages in his writings, where he is talking about "objective truth". This expression is confusing, as the categories of truth and objectivity are not comparable. In the everyday life people tend to spontaneously assume that every truth is objective, however the truth in its classical understanding means the correspondence with the reality, while objectivity means rather independence of any subjective influence.[10]

However, the replacement of the term "truth" with the term "objectivity" or even the usage of the expression "objective truth" brings some very information. Namely, one can see, that whereas it is not possible to prove the correspondence of the legal proposition with the truth, there is no problem with proving its correspondence with the objectivity. Thus, replacing the truth with objectivity opens a new perspective for the qualification of legal propositions.[11]

The reason of why it is so much easier to find access to the dimension of moral principles by analysing its objectivity, is that one can differentiate between several dimensions of what objectivity is. The truth has only one dimension, but there are three kinds of objectivity. Which are: the metaphysical, the epistemological and the semantic objectivity. Brian Leiter in his

[9] Ibid.
[10] Ibid. 164.
[11] Ibid. 164 ff.

Article "Law and Objectivity" published in the "Oxford Handbook of Jurisprudence and Philosophy of Law" described those types I the following way:

*„The metaphysical objectivity concerns the extent to which the existence and the character of some class of entities depends on the states of mind of persons (…). Epistemological objectivity concerns the extent to which we are capable of archiving knowledge about those things that are metaphysically objective. Many philosophers (…) also worry about semantic objectivity, that is, about whether or not the propositions in some realm of discourse (…) can be evaluated in the terms of their truth or falsity."*[12]

It is to stress too, that there is a conditional relationship between the named three kinds of objectivity. The metaphysical objectivity is namely a necessary condition for the epistemological objectivity. And the epistemological objectivity is a necessary condition for the semantic objectivity. According to the words by Leiter, it is to say, that the law is objective in a metaphysical sense, if its existence does not depend on the existence of any other entity. It is then objective in an epistemological sense, when it can be learned and discovered in a way, which is not influenced by individual cognitive qualities. And finally it is objective in a semantic sense, if one can talk about it in a way, which would be understood by everybody.[13]

**Legal interpretation as a way to objectivity**

The observation presented above brings us to the crucial point of the analysis. If we take into account the presented considerations in context of the analysis of Dworkin's idea of interpretative theory, we can notice that Dworkin's notion of legal interpretation relates exactly to the types of objectivity named by Leiter. According to Dworkin the process of legal interpretation consist of three steps. The first one is the so called pre-interpretative practice. At this stage the judge is taking into account the general social practices to compare them with the analysed case in order to see, if some action or practice is permitted according to the general social attitude or intuition. The next step is more specific, as it relates to the exact evaluation of the case. At this stage the judge not only needs to refer to the general social attitude, but also to make justification of the examined case. The last step is to set up the legal decision made in the discussed case to enrich the already codified set of legal rules. If one compares the stages of

[12] Brain Leiter, Law and Objectivity, in: Coleman/Shapiro (eds.) The Oxford Handbook of Jurisprudence and Philosophy of Law, 2002, 969. Cf. Szyrwińska, Wahre Existenz oder objektive Geltung?, 165-167.
[13] Brain Leiter, Law and Objectivity, 969. Cf. Szyrwińska, Wahre Existenz oder objektive Geltung?, 165.

interpretation with the kinds of objectivity named by Leiter, he can notice that those stages relate exactly to the three stages of legal interpretation presented by Dworkin.[14] The first, pre-interpretative phase is about the qualification of a proposition in context of its semantic objectivity. The question the judge is asking here is: if all society members tend to acknowledge a proposition as true or false? The second stage would be the interpretation itself. The judge needs to qualify a proposition in context of its epistemological objectivity – which means to figure out, if a proposition can be understood and qualified as true or false by all society members. If it is the case, it implies that they are able to recognize the moral rule behind the proposition. It gives him a reason to qualify an action or practice as permitted or not. And finally, the last stage is the verdict and the final evaluation of the practice or action. That would mean the qualification of a proposition in context of its metaphysical objectivity – the fact that the rule behind the proposition can be recognized as true or false, implies that it exists or not.

The category of truth, which is one-dimensional as it refers to the dimension of logical values only – unlike the multi-dimensional category of objectivity referring to various modes of independence of an object from the subjective influence – seems not to be relevant to use in the context of practice of legal interpretation. The truth of legal propositions is factual, however it stays out of reach of a judge's cognitive abilities. Due to the lack of direct access to the dimension of moral principles, nobody is able to compare the exact legal propositions with the content of morality. However, this could be achieved by setting the reference point for the propositions in the objectivity, that can be found in the general social practices and the language used by society members. Thus, taking into account the objective validity of the language enables the verification of the logical values of legal propositions.[15]

**Interpretativism, Pragmatism and Conventionalism**

The replacement of the category of truth with the category of objectivity can be treated as an innovative way of overcoming the difficulties with discerning the logical value of legal propositions. However, it still could be criticised. Namely, one could say that taking into account society's members actual beliefs about the rules being in force as a criteria of the objectivity of those rules, excludes the possibility of discussion about the real existence of the law. Both - society and the language they speak - evaluate, so it is plausible to ask, whether

[14] Ibid. 165-167.
[15] At this point one could argue, that Dworkin's theory can be acknowledged as a form of constructivism. Cf. Szyrwińska, Wahre Existenz oder objektive Geltung?, 167-169.

such evolution could have any impact on their notion of moral principles and legal principles. As according to Dworkin, these rules were independent of any kind of subjective influence, such changeability of rules and principles would lead to a systematic contradiction: The conviction about the dependence of the law on the actual situation implies the relativism regarding the existence of the rules of law.

Dworkin himself was aware of such difficulty. He delivered an explanation, which enables us to figure out why in his theory it is not the case. He presents two legal theories, about which one could say that, regarding the procedure of jurisdiction, they resemble his own. The first one is legal pragmatism, the second one the legal conventionalism. To understand the main point in his argumentation strategy it may be helpful to focus on the specifics of those theories. Let us focus on the notion of legal conventionalism first.

As its name suggests conventionalism is a theory according to which the major role in interpretation of legal principles plays a set of criteria of proper behaviour, which are actually accepted by a society. In the treatise "Law, Truth and Reason" Ramo Siltala defines what a convention is:

*"A convention refers to a well-settled societal practice or usage that is commonly observed by the members of community and utilized as a criterion of a normative judgement, because it is accepted or recognized as having such a status by them."*[16]

Legal pragmatism is based on similar assumption as it denies the real existence of fixed legal principles. Its significant feature in this context is that it emphasizes the role of the actual context in the process of legal reasoning.[17] Richard Posner points out that historic and systematic origins of legal pragmatism are to be found in the legal realism.[18] This explains the specific attitude towards the idea of truth of legal principles.

*"(…) Truth has been a problematic concept for many pragmatists. The essential meaning of the word is observer independence, which pragmatist is inclined to question or even deny. It is no surprise, therefore, that the pragmatists' stabs at defining truth – truth is what is fated to be believed, or what is good to believe, or what survives in the competition among ideas, or what*

[16] Raimo Siltala, Law, Truth and Reason. A Treatise on Legal Argumentation, 2011, 165.
[17] Richard Posner, Overcoming Law, 1995, 390.
[18] Ibid., 388.

*the relevant community agrees on – are riven by paradox. The pragmatist's real interest is not in truth at all, but in social grounds of belief ("warranted assertability").*"[19]

Neither conventionalism nor pragmatism treat the real and objective legal rules as a fixed point of reference in the legal reasoning. Instead, the major role plays either the actual and conventional dimension of circumstances, in which the rules are being acknowledged and interpreted (conventionalism) or the result of the legal interpretation, which should be as profitable for the society as possible. The assumption about the absolute universality and atemporality of the legal principles loses its relevance in this context. The source of the normativity of the law in conventionalism cannot be universal if it depends on the actual situation in a specific group. Similarly, according to the pragmatist notion the advantages for the society, which can be achieved by legal decisions overmatch the past of the legal rules being actually in force, for instance the legal or political decisions underlying them, is not taken into account.

It is easy to notice that both conventionalism and pragmatism are not compatible with Dworkin's assumptions concerning the real and objective existence of moral rules and thus of the assumption of such legal principles. Nevertheless, it is hard to deny that the understanding of convention and of the pragmatist notion of truth presented above on the first glance may resemble the postulate of analysing the usage of language spoken by members of a society in order to discover their intuitions regarding the generally accepted moral rules. Namely, in Dworkin's theory as well as in pragmatism and conventionalism, it is the reflection concerning the social context and the social understanding of the principles, which is taken into account by the start of the process of legal reasoning. And this postulate already seems to fully correspond with Dworkin's notion. Therefore the following questions arise: Were Dworkin's views concerning objectivity of the law coherent or does his theory contain relativistic points? And if so, how was it systematically possible to assure their coherence?

Dworkin indirectly provides answers to both questions. He discusses the seeming resemblance between his views and both conventionalism and pragmatism in *Law's Empire*. His attitude toward the understanding of the law in both notions was critical.[20] He denied conventionalism and pragmatism for the reasons named above: both theories are based on assumptions excluding the possibility of adjudication related to the law existing in the real and

[19] Ibid., 390.
[20] Dworkin, Law's Empire, 1986, 225.

objective sense. Dworkin presented, however, an alternative notion, which describes the properly functioning process of legal reasoning. Dworkin calls this notion "Law as Integrity". The procedure of legal reasoning suggested by Dworkin indeed is based on the postulate to focus on the social understanding of the content of legal principles, which can be discovered by the analysis of the language spoken by society members. It does not mean that Dworkin's notion implies relativism. The significant feature of his theory is that the suggested analysis concerning the language spoken corresponds with the first pre-interpretative phase of legal interpretation. It is significant, that the pre-interpretative stage is only the beginning of the process of interpretation, during which the deeper contents behind the social context indicated by the language are being discovered. The main goal of legal interpretation is to find out the matter behind the language, which are the objective legal principles related to moral rules existing in the real sense. In *Law's Empire* Dworkin says explicitly:

*"The adjudicative principle of integrity instruct judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness. (…) According to law as integrity, propositions of law are true if the figure in or follow from the principles of justice, fairness, and procedural due process of facts and moral considerations."*[21]

Dworkin's theory is based on the assumption that the social context is rooted in the dimension of objective values. Thus, the attempt to analyse the social and linguistic dimension of the law does not imply his relativistic attitude. On the contrary: according to the conviction about the existence of the law, the connection between the dimension of actual social context and of the metaphysical principles must be assumed.

## Consequences for the legal praxis

At the first glance semantic intuitions connected with the term "legal interpretation" may suggest understanding flexibility in reference to the set of codified legal rules. This is the main reason of the confusion in the philosophy of law, which I mentioned at the beginning of the article. The confusion concerns not only the theoretical legal discourse, but also some

[21] Ibid., 225.

practical dimensions of the law, especially legal reasoning practice. It does not seem to be probable to find a final solution of the debates between adherents of presented legal notions. For instance, it seems neither possible nor necessary to convince the judges that the notion of moral realism was true and that moral values existed in the independent way. Neither it seems to be possible or necessary to convince them that there were no fixed moral principles behind the codified legal rules. Discussions between adherents of moral universalism and moral relativism are not only a part of legal debates in a public discourse, but they are rooted in the dimension of theoretical philosophy.

Moreover, the law relates to many dimensions of human existence and it needs to be applied under everyday life conditions, hence the postulate to always take into account the philosophic legal theories in legal practice may seem to be superfluous. Nevertheless it of big significance, to keep in mind the proper understanding of the idea of legal interpretation. The interpretation should not be reduced to the relativisation, but rather treated as the attempt to discover the moral principles behind the legal rules, or in other words: the general moral convictions of the society. The reflexion concerning Dworkin's notion allows it to notice exactly this problematic aspect of legal interpretation. Even if his theory of the law is based on an abstract philosophic notion of morality, it can be still acknowledge as a very useful tool for the development of the legal culture. It provides solid reasons for denying the relativism or at least to regard it with a certain degree of scepticism. Thus, dealing with the notion of interpretativism formulated by Dworkin can be acknowledged as an opportunity to rethink the actually applied legal practices.