(2022) 13 *Jurisprudence* 99-106

Legal Misinterpretation

Timothy Endicott

To be realistic –to face up to the unvarnished facts– a philosophy of human affairs needs the idea of misinterpretation in its tool kit. Sometimes there is conclusive reason to adopt one interpretation of a legal provision rather than any other, and sometimes there is no conclusive reason in favour of one interpretation. But there is *always* room for misinterpretation. I suspect that misinterpretations of legal provisions have shaped every legal system, and misinterpretation ought to be a focus of legal philosophy.

The remarks on misinterpretation that follow are provoked by Pierluigi Chiassoni's sophisticated and challenging book, *Interpretation without Truth*. I cannot offer a theory of legal misinterpretation here, but I want to make a point about it that supports an understanding of interpretation that departs from some important tenets of Chiassoni's sceptical, legal realist approach.

Chiassoni does not expressly offer an account of misinterpretation in law, but here is a conjecture: on a sceptical, legal realist theory, misinterpretation is co-extensional with interpretation. It is all the same. That is, every ascription of meaning to a legal provision can be referred to as an interpretation or a misinterpretation, the 'mis-' being added for ideological purposes by opponents of an interpretation. A misinterpretation, on that approach, is an interpretation toward which the speaker takes a negative attitude. Any interpretation is a 'misinterpretation', in a manner of speaking.

By contrast, I will try to defend the objectivity of misinterpretation. A misinterpretation of a legal provision is a departure from the law. It is so widespread a practice that it seems to vindicate legal realism: it often seems unrealistic to say that the judges' interpretive activity is designed to give legal provisions their true legal effect. But in fact, I think that legal realism wrongly disables itself from recognising misinterpretation for what it is, through an arbitrary disinclination to describe such conduct as departing from the law. That disinclination undermines critique of legal arguments and of judicial decision making because –ironically– it obscures what is *really* going on.

The haunting problem of truth in legal interpretation

Interpretation without Truth makes exciting reading. Chiassoni sets out to refute 'interpretive cognitivism' and to defend 'a non-cognitivist outlook'.[1] I understand that outlook to be the view that no interpretation (at least no interpretation of a legal provision, since we are talking about legal interpretation) can be correct or incorrect, and that no statement of an interpretation can be true or false. On Chiassoni's view, to adopt an interpretation is to ascribe a meaning to a legal provision; that ascription does not reflect the interpreter's knowledge that the ascribed meaning *is* the meaning of the legal provision; instead, the ascription reflects the making of a decision which is bound to be an ideological act. To say that a particular interpretation is the right interpretation is to undertake such an act, and not to make an assertion that is capable of being true or false. Chiassoni addresses what he calls 'the haunting problem':

[1] Pierluigi Chiassoni, *Interpretation without Truth: A Realistic Enquiry* (Springer 2019) 18. Henceforth I will refer to the book with page numbers in brackets in the text. I will steer clear of using the term 'cognitivism', because I feel unsure of its historical baggage- See, e.g., J.O.Urmson's account of the logical positivists' use of the term: '"Cognitive" is used to mean "empirically verifiable or else analytic", and with exclusive laudatory import.' Urmson, *Philosophical Analysis* (Clarendon Press 1956) 171. But it should be clear that in this article I am defending what Chiassoni calls 'moderate cognitivism' about legal interpretation.

> 'Has truth anything to do with legal interpretation? Is there any room for truth in the province of legal interpretation?' (17)

Here is the core of his complex answer to the haunting problem:

> 'The province of proper and practical legal interpretation—the province of judicial and juristic interpretation—is, properly speaking, a province without truth.' (46)

I want to insist that misinterpretations are not uncommon in the province of judicial and juristic interpretation, and misinterpretation is falsity in legal interpretation. And there is so much falsity in the province of legal interpretation only because there is also much truth.

I cannot do justice here to the depth and breadth of philosophical work in Chiassoni's *magnum opus*. I will argue that a legal interpretation can be wrong (although it is very often indeterminate whether a particular interpretation is right or wrong: I adhere to what Chiassoni calls the 'contingent indeterminacy thesis' (264)). An interpretation is wrong when the arguments for it are not as strong as the arguments for a different interpretation. When an interpretation is wrong, it is a misinterpretation. The view that a legal interpretation can be a misinterpretation is a rather modest conclusion, because it does not entail that any one interpretation is right. Umberto Eco came to a similar view, concerning literary interpretation:

> 'it is difficult to say whether an interpretation is a good one, or not. I have however decided that it is possible to establish some limits beyond which it is possible to say that a given interpretation is a bad and far-fetched one.'[2]

It can indeed be difficult to say whether an interpretation is good or bad (and when it comes to legal interpretation, I think that the criteria for the goodness of an interpretation are the same as the criteria for its truth). But I also think that it is possible for every interpretation of a legal provision *but one* to be a misinterpretation. And if that is the case, then it may be possible to arrive at a view that some interpretations are true, from the objectivity of the phenomenon of legal misinterpretation.

And misinterpretations abound. In the UK, for example, it is not all that rare to find sober and highly-educated judges in the highest courts offering an interpretation of an act of Parliament that is patently contrary to its true meaning. How is that even *possible*? You may well find Chiassoni's sceptical account compelling. On that account, a clear-eyed understanding of those judges' conduct reveals interpretive practice for what it is. The judges are acting in pursuit of purposes that they choose to promote, *rather than* making assertions that are true or false.

But in fact, it is precisely my experience in teaching English law that inclines me to dispute Chiassoni's conclusions. In fact, I should confess that I have an emotional investment; you may even consider it to be a bias. I am very anxious to find a way to insist on being able to say (and to say truly!) that a judge has misinterpreted a lawmaking act. When next term comes, I do not want to stand up in a real or virtual lecture theatre, and tell the students how a majority of the Supreme Court interpreted a statute, and how the dissenting judges interpreted it differently, and then shrug and say, 'those were the choices they made, the majority won of course; we cannot say that either side was right or wrong according to law'. I want to be able to say, 'The majority misinterpreted the statute. Here's why….'

[2] Umberto Eco, *Interpretation and overinterpretation*, Stefan Collini ed (1992) Cambridge: Cambridge University Press, p 144. I am grateful to Giovanni Tuzet for pointing this out to me.

Chiassoni's ingenious book shows how difficult it is to hold on to that aspiration. And things are about to get worse, because I am going to agree with some of Chiassoni's tenets –tenets that he thinks undermine the approach that he calls 'cognitive'. First of all, as he says, 'the legally correct meaning is always relative to an interpretive code and to a set of interpretive resources' (23). I agree. And I agree with Chiassoni's argument against the 'container-retrieval' picture of interpretation (113; see also 47): the idea that legal provisions are linguistic entities into which linguistic conventions pour meaning, so that a provision that, e.g., vehicles used on the road must have rubber tires, applies to those things that speakers of the language are disposed to call 'vehicles'. On the container-retrieval view, if there is a regular pattern of applying a term to something, the legal provision objectively applies to that thing. I think that the container-retrieval view is wrong because the interpreter's task is not to see which objects people apply the term to, and then apply the rule in question to those things; the interpretive task is to find grounds for an understanding of what the legislature did, in the context and for the purposes for which it acted.[3]

You see the predicament I am in: I am trying to say that an interpretation can be right or wrong, and capable of being known to be right or wrong, and that statements as to how a legal provision ought to be interpreted are capable of being true or false, but I have agreed to theoretical propositions that, in Chiassoni's view, make it clear that those things are impossible. He says,

> 'Textual interpretation is, and cannot be but, a decision-making, practical, value-laden, ideologically compromised, activity.' (47)

I wholeheartedly agree that the activity is decision-making, practical and value-laden, but I deny that the activity is inevitably *compromised*. No doubt it is sometimes compromised. But interpreters, in my view, would have an excuse for compromised interpretations, if that was inevitable. In fact, they are always responsible for reaching a justified interpretation, by which I mean one that is *not* compromised by their ideology. I do not think that it is impossible for them to carry out that responsibility.

And then the theoretically important point of disagreement arises when Chiassoni says that, according to 'pragmatic realism', the decision-making, practical, value-laden nature of legal interpretation means that the activity of determining the meaning of a legal provision 'never amounts to an act of cognition' (141). By an 'act of cognition', I take it that Chiassoni means an act of understanding something that the agent in question can know to be true. But all it takes for the interpreter to know that an interpretation is the one that ought to be adopted (and that it is true that it ought to be adopted) is for the interpreter to know that the arguments in favour of it are stronger than the arguments in favour of any other interpretation. I will try to persuade you that that can be the case, by pointing out the converse: that sometimes there are conclusive reasons *against* a choice of interpretation. In fact, the amplitude of interpretive practices (that is, the abundant creativity with which people act on the latitude that the notion of interpretation affords them) involves frequent and serious misinterpretations. Chiassoni's theory denies interpreters the capacity to do one of the things that they are prone to do: to misinterpret the act of a lawmaker.

Clear cases

[3] I defend this view in Endicott, Timothy, "Law and Language", The Stanford Encyclopedia of Philosophy (Summer 2016 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/sum2016/entries/law-language/, section 2.2 'Language and legal interpretation'.

Refutations of scepticism about interpretation have often proceeded by pointing out that there are cases in which everyone knows how a piece of legislation applies.[4] Let me very briefly set out the clear cases argument, so that we can get to the point that seems to undermine it: sometimes, in cases that *ought* to be clear, clever advocates have persuaded courts to depart from the obvious.

There is a tax of 20% in England on annual income from £12,571 to £50,270.[5] There may be room for doubt and for disagreement as to whether some financial gains count as 'income' for this purpose, and as to the availability of potential deductions, and so on. But there is no room for doubt or disagreement, and no latitude for interpretation, as to whether a salary counts as income, or as to what amount of tax, according to English law, is to be paid on it. That is the case because Parliament enacted the tax, in the lawful exercise of its authority to legislate. Salary earners can *calculate* the resulting legal obligation. Therefore, there is sometimes one right interpretation of a legal provision.

At this stage, the points on which I agree with Chiassoni become important. An interpretation on which a salary earner need not pay 20% tax on that band of salary (a 'rogue interpretation') would be a misinterpretation not simply because of social facts as to language use, or because there is a consensus. Chiassoni says,

> 'the rules of the judicial statutory interpretation game ultimately depend on value judgements about the ethically correct way of interpreting statutes and the ethically proper role of judges vis à vis the legislature—where correctness and appropriateness are ethical properties...' (72)

I almost agree with that, but with one very significant reservation. I think that the right way to interpret the tax legislation does not depend on value judgments; it depends on which value judgments are sound. Law is capable of regulating the interpretation of its own provisions, by giving legal effect to the interpretations (and thereby, to the underlying value judgments) of those who are given authority to make binding determinations as to the effect of the tax legislation. So the law may give legal force to the value judgments on which its authorities have acted. A misinterpretation is either based on misjudgments as to the relevant questions of value, or on a departure by the interpreter from judgments that the law requires the interpreter to treat as sound. The law on any point depends on the best judgment as to what the law's own reason requires. Clear cases (such as a salary earner's legal liability to income tax in the United Kingdom) are clear only if it is clear what that reflexive form of reason requires.

Now we reach the obvious objection to the notion that the existence of clear cases vindicates the idea that an interpretive statement can be true. It is that courts sometimes *depart* from clear legislation, or from interpretations to which the law has given authority. Even a clear rule, it seems, is only something that is capable of being reinterpreted, so that the rule may become unclear, or a court may even hold that the law clearly requires the contrary. And then nothing really counts as a misinterpretation.

Unclear cases that should have been clear

[4] Especially in the 1990s: e.g., Frederick Schauer, *Playing by the Rules* (OUP 1991) 213, Andrei Marmor, *Interpretation and Legal Theory* (OUP 1992) 124-54, Brian Bix, *Law, Language, and Legal Determinacy* (OUP 1993) 63-70. In fact, I think Andrei Marmor was right to say that 'Interpretation is required only when the formulation of the rule leaves doubts as to its applicability in a given set of circumstances' (*Interpretation and Legal Theory* 154). For present purposes, though, I will talk as Chiassoni does, as if every application of legislation depends on an interpretation.

[5] For the tax year 2020-21, the tax was imposed by Finance Act 2020 s 2, which set the 20% basic rate, and Income Tax Act 2007 s 10(5) and s 35(1), which set the bands of income to which the basic rate applies.

In a famous UK administrative law decision in 1969, Parliament had set up a compensation fund for companies that had lost property in the Suez crisis. The legislation provided that applications for compensation would be decided by a commission, and that 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law' (Foreign Compensation Act 1950 s 4(4)).[6] When the Commission rejected an application for compensation from Anisminic Ltd, the company went to court to challenge the Commission's determination. There is a clear case for you, if any case is clear! The sovereign Parliament had enacted that such a determination should not be called in question. Yet by a majority of 3-2 the highest court, the House of Lords, called the Commission's determination of Anisminic's application in question, and overruled it.

The fact that the House of Lords could do such a thing seems to suggest that the amplitude of interpretation encompasses clear cases, so that we should agree with Chiassoni's scepticism about interpretation. So how can we law teachers stand up for the intelligibility of saying that the House of Lords misinterpreted the Foreign Compensation Act in the *Anisminic* case?

Well, first of all, notice that it is intelligible to say that the majority was *interpreting* the Act, rather than merely defying it, because of the grain of truth in the decision. Here is the grain of truth: the action of the Commission did not count as a 'determination' under a true interpretation of the Act just because the Commission called it their 'determination'. As Lord Reid said, the word 'determination' in the statute does not include 'everything which purports to be a determination but which is in fact no determination at all' (*Anisminic* 170). Lord Reid quite rightly said that a forged 'determination' would *not* be a determination. On its true interpretation, the statute did not stop courts from calling into question a 'determination' that was only a nullity. That is true; but then Lord Reid overstretched that truth. He interpreted the compensation rules differently from the way the Commission interpreted them, and came to an absurd conclusion: that because of the Commissioners' understanding of the rules they were applying, 'they based their decision on a matter which they had no right to take into account' (*Anisminic* 174), so that their determination was not a determination, but a nullity.[7]

It is not because of the facts of the conventional use of the word 'determination' that Lord Reid's approach involved a misinterpretation of the Act. It is because it makes nonsense of the Act to interpret it as allowing the judges to quash a determination of the Commission for an error by the Commissioners in interpreting the rules that they were responsible for applying, when Parliament had enacted that the determination of an application by the Commission should not be questioned in a court.

The resulting radical misinterpretation of the Act of Parliament has shaped modern English administrative law, weaving a strand of pretence into its fabric. It is the sort of misinterpretation that makes scepticism about interpretation look attractive. For the purpose of either a philosopher or a doctrinal lawyer in attaining understanding, I think that it is very important to be able to describe the decision in *Anisminic* as a misinterpretation (and no, I have not forgotten that it is controversial to do so!). If a theory of interpretation provides no conceptual space to describe the decision as based on a misinterpretation, it is liable to obscure what actually went on.

The decision is best understood as an interpretation and not *merely* as a judicial abandonment of the law, because of the grain of truth in Lord Reid's interpretation of the Act. And it is best

[6] See *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

[7] In the reasons of Lord Morris of Borth-y-Gest, dissenting, at 184, there is a forthright explanation of why the majority's interpretation of the Foreign Compensation Act was a misinterpretation.

understood as a misinterpretation because of the conclusive reasons for not understanding the Act in the way that Lord Reid understood it. The clever lawyers for Anisminic were able to talk Lord Reid into that misinterpretation because of the grain of truth. An interpretation is a misinterpretation when there is reason to reject it; what makes it still an interpretation is the grain of truth in the arguments that can be made in support of it. Even misinterpretations depend on the soundness of arguments for and against interpretations.

There is an irony here: the vaunted sovereignty of the UK Parliament consists in the fact that the courts can only depart from statutes of Parliament when they are able present the departure (to themselves, and to the public) as if it were no departure from the statute, but a true interpretation of it. I think that this feature of legal practice in the UK is enough to support the view that there is a grain of truth in legal interpretation. It should be, in fact, a central doctrine in a theory of legal misinterpretation: *even when courts misinterpret a legal provision*, a sound understanding of their action depends on the grain of truth on which they may be able to rely in defending it as a true interpretation.[8] The grain of truth makes it an interpretation (and is an element in an analytical account of the difference between interpretation and mere defiance of the law). And then a sound understanding of their action also depends on a grasp of the considerations that made it wrong for them to adopt the interpretation they adopted –the considerations that justify (that is, give sufficient grounds for) the conclusion that their interpretation was a misinterpretation.

Now, if you are with me so far (agreeing with Chiassoni that legal interpretation is a practical choice based on values, and wanting to say that such a choice can be right or wrong), Chiassoni still has one putatively conclusive reason for a sceptical answer to the haunting problem of whether truth has anything to do with legal interpretation. We had better face up to it: he thinks that evaluative and normative statements are not apt to be true or false, or not apt for the same sort of truth or falsity as empirical statements. I think that there is no ground for such general scepticism about norms and values. I cannot refute all the brilliant sceptical philosophers' scepticism about the objectivity of right and wrong in a few words, but I can explain why I think it should be refuted.

Against general scepticism about values and norms

It is just before supper and a three-year-old child is playing in her family's back yard. She is bored. Looking for something interesting to do, she squashes her baby brother, and he howls. Their mother comes out of the house like a storm. She says, 'Did you hit your brother?' The girl says, 'No, but I did squash him.' The mother picks up the baby and cuddles him and says, 'Well DON'T squash your brother! Now wash your hands and come to the table.'

Of what truths does the child have cognition? In just a few fleeting months, she has come to know so many things– for example, that there is a table in the kitchen, that her mother sings beautifully, and that squashing her brother is wrong (I will call that last thing 'the norm against destruction'). When I say that she knows these things, of course, I imply that they are true. There is a pluralism in meaning and in logical form among the statements by which these various truths could be asserted: one is an empirical statement and one is evaluative and one is normative. But I think that we should ascribe to all of them the form of truth identified in Aristotle's schema for truth: it is true to say that there is a table in the kitchen, or that her mother sings beautifully, or that squashing her brother is wrong if, and only if, things are as those statements assert them to be (there *is* a table in the kitchen, her mother *does* sing beautifully, squashing her brother *is* wrong…). So I am denying 'alethic pluralism' (43-5). Chiassoni, while not choosing among forms of alethic pluralism, admits Aristotle's schema only for the truth of statements of empirical facts (36). His reason is that such statements have

[8] I say '…on which they may be able to rely…' because I do not want to exclude the possibility that a court might act on a merely gratuitous, capricious misinterpretation that the judge does not even pretend to justify.

'truth-makers that do exist independently of beliefs, preferences and interpretations of those who make descriptive sentences' (36). He says that the 'practical sentences' of normative ethics, by contrast, are apt for 'pragmatic truth', which is 'utility in practice' (37). In my view, utility in practice is not truth in any sense, and alethic pluralism amounts to a general claim that only empirical statements can be true.

Now it seems to me that a philosophy is unrealistic if it asserts as a general tenet that it cannot be true or false that it is wrong for the child to squash her brother, or if it asserts that she cannot know it to be true. Such a philosophy is unresponsive to the reality of human experience, and of the human response to experience. It involves a philosophical commitment to disregard the actual condition of the child's mind and heart. I am not being idealistic: she is human, and she may well squash her brother again next week. But in that case, the character of the act will be partly constituted by its wrongness, and by her knowledge (an instance of knowledge in which there is no element of doubt) that it is wrong.

A philosophy that faces up to the reality of human life would apply Aristotle's schema, I think, to all of the statements I mentioned. The truthmaker for the evaluative statement that her mother's singing is beautiful is, of course, the beauty of her singing; it is entirely independent of the child's preferences and beliefs (it is, in fact, a phenomenon that formed the child's earliest realisation that something could be beautiful). The truthmaker for the normative statement that squashing her brother is wrong (we could also say: the thing that makes the norm against destruction valid) is the value of her brother. The value of her brother is independent of her beliefs and preferences (she knows that value very sensitively and acutely, by the way– so acutely that she loves him very deeply, while occasionally resenting him, since he is so exasperating).

If we say that the statement that there is a table in the kitchen is apt for truth but the statement that it is wrong for the child to squash her brother is not apt for truth, we draw an arbitrary, unmotivated philosophical distinction among things that the child knows perfectly well. Her knowledge that it is wrong to squash her brother is not less certain or less well justified than her knowledge that there is a table in the kitchen. She does not have better reason to believe that there is a table in the kitchen, than that it is wrong to squash her brother. She needs no philosophy of morality to grasp the norm against destruction. She is not answerable to our theories; they are answerable to her experience. The task of moral philosophy is to work out what meaning is to be ascribed to her experience (i.e., to interpret her experience). For these reasons, it seems to me to be a mistake to assert as a general theoretical tenet that values and norms are not capable of being known to her. Or even to lawyers.

Conclusion

We law teachers ought to defend to the death the intelligibility –the potential truth– of our main stock in trade: saying that the judges misinterpreted a legal provision. The only reason I can think of to give up the defence would be a generalised view that no normative statement can be true, and I think we should reject that idea. If we reject that idea, any law teacher can see much falsity in legal interpretation, and that implies that there is a grain of truth in legal interpretation.

This defence of the potential rationality, objectivity, and truthfulness of interpretation may seem curiously equivocal, as it relies on the reality of legal misinterpretation. But you see, I agree with Chiassoni that legal philosophy should proceed 'by bringing to the fore how the law really is and works' (258). And here, it seems to me, is how it really works: interpreters sometimes come up with good reasons for adopting an interpretation. When they do, their statements of the meaning of the

provision are true. And even their misinterpretations can be understood as interpretations because of the grain of truth in the arguments for them.