

Dworkin's Constructive Interpretation as a Method of Legal Research

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1. Introduction

Legal-dogmatic research conducted by legal scholars seems to have decreased in popularity in recent years (Vranken 2014, p. 5). It is said that more attention should instead be paid to interdisciplinary or multidisciplinary aspects, thus allowing other fields of expertise, such as sociology or psychology, to play an important role in legal research. Consequently, an 'old-fashioned' legal-dogmatic research that does not involve other disciplines or even a legal comparison may be considered irrelevant in a journal about legal research methodologies. However, traditional legal research can show similarities to Dworkin's theory of constructive interpretation that, from a methodological point of view, are worth researching. Constructive interpretation is a process of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong (Dworkin 1986, p. 52). Dworkin developed his theory as a method to be used by a judge to determine the right interpretation of a rule in hard cases. This contribution aims to explore the opportunities for using constructive interpretation as a method of legal-dogmatic research and to ascertain whether it is possible to transfer Dworkin's theory from a method of applying law for a judge to a method of researching law for a legal scholar. I will use the subject of my PhD research – multiple liability in criminal law – as an illustration because the set-up and (partly tentative) conclusions of this research serve to illustrate how Dworkin's theory can be used as a research methodology.

I will begin with a sketch of some key elements of Dworkin's theory on constructive interpretation. I intend neither to give a full view of Dworkin's theory nor to investigate in depth the discussions that have since arisen in legal philosophy. The purpose of outlining Dworkin's theory here is to be able to use his ideas as the basis for conducting legal-dogmatic research. Therefore, I will deal with his theory and critical reflections only insofar as they are relevant to this contribution. As the Dutch legal scholar Scholten devised a method for interpreting Dutch private law that shows striking similarities to Dworkin's theory on constructive interpretation, I will also mention his ideas, although my main source will be Dworkin. I will then discuss the main elements of my research to illustrate the opportunities for using Dworkin's theory as a method of legal research. When applying this theory to my topic, I will examine certain difficulties that can arise. I will

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conclude by demonstrating the extent to which Dworkin's theory of constructive interpretation can be used as a method of legal-dogmatic research.

2. Dworkin and constructive interpretation

2.1. *Constructive interpretation*

Dworkin set out his theory on constructive interpretation in *Law's Empire* (1986),² mainly as a reaction to positivist conceptions of law, in particular to the one of Hart (Hart 1994). Lawsuits can raise three different issues: issues of facts, issues of law and issues of political morality and fidelity (Dworkin 1986, p. 3). The first category refers to what actually happened, the second to what the pertinent law is and the third to what a just outcome should be. According to positivists, there can be no theoretical disagreements about what the law *is* because law is a matter of what legal institutions have decided in the past and what is written down in records (Dworkin 1986, p. 7). Unwritten – moral – principles are not, therefore, part of law. If a disagreement appears to be of a theoretical nature, it is actually, according to positivists, a disagreement about what the law *should be*. Dworkin does not agree with this and suggests that positivists suffer from a 'semantic sting' because they assume that every lawyer uses the same (linguistic) criteria to assess whether propositions of law are true or false (Dworkin 1986, p. 32-33). This, Dworkin insists, is not the case. He mentions a couple of actual hard cases where the disagreement between the judges clearly did concern the question of what the law actually *was*, and not whether the law should be followed.³

Having dismissed the positivist idea of law as plain historical facts, Dworkin puts forward his thesis that law and legal practice are, by their very nature, interpretative concepts. In order to find the best interpretation of a legal practice or rule, the judge should try to construct the value behind the practice by describing a scheme of interests, goals or principles that the practice can be taken to serve (Dworkin 1986, p. 52). If certain rules or practices lead to questions ('hard cases'), developing an interpretative attitude can help to find the best possible answer. This attitude consists of two components. The first is the assumption that a practice does not simply exist, but also has a certain value, meaning that it serves some interest or purpose or enforces some principle that exists independently of the rule itself (Dworkin 1986, p. 47; Rozemond 1998, p. 38-39); the second is the assumption that the rule as it exists now does not *per se* serve the underlying interest, purpose or principle (Dworkin 1986, p. 47) and thus may have to be interpreted differently. When an interpretative attitude is adopted towards a certain rule or practice, the rule or practice is no longer applied automatically; instead, its content becomes more dependent on the values underlying it. In this

2 This builds on earlier work (see, for example, *Taking Rights Seriously* (1977)).

3 See, for example, the *Elmer* case, concerning the question of whether the legatee was still legally entitled to the inheritance after being convicted of murdering his legator (Dworkin 1986, p. 16-20).

way, interpretation leads to entanglement of the content of a practice and the values behind it (Dworkin 1986, p. 48).

A constructive interpretation is carried out to establish the meaning of a certain practice, without indicating (or at least not indicating solely) the intentions attached to the practice by its author. The practice in itself is central, and the interpreter has to take into account the history and shape of the practice to see which interpretations of the practice are possible (Dworkin 1986, p. 52). Three stages of interpretation can be distinguished (Dworkin 1986, p. 65-69). In the pre-interpretative stage, the rules and standards that form part of the practice to be interpreted have to be listed. In the subsequent interpretative stage, the interpreter has to settle on a general justification for the main elements of the practice that has been identified. The post-interpretative stage then offers scope for critical reflection: how does the rule really have to be interpreted so as to better serve the justification found in the previous stage? These stages can, however, get mixed up, with actual interpretation being much less deliberate and structured than this analytical structure suggests (Dworkin 1986, p. 66).

2.2. *Law as integrity*

A pivotal aspect of Dworkin's theory of constructive interpretation is his notion of 'law as integrity' (Crowe 2007, p. 167). The conception of law as integrity is an intrinsic political value (Dworkin 1986, p. 176) that requires lawmakers to make laws morally coherent (Dworkin 1986, p. 176) and judges 'to treat our present system of public standards as expressing and respecting a coherent set of principles' (Dworkin 1986, p. 217). According to Dworkin, integrity is valuable in and of itself because our intuition rejects legal practices that do not propagate integrity.⁴ Interpreting law as a coherent and normative unity is an important aspect of Dworkin's conception of law. Law as integrity is an ideal that judges have to keep in mind every time they decide on a hard case. Scholten also views law as a coherent unity. As a consequence, every rule has to be interpreted in connection with other rules (Scholten 1974, p. 45).

Viewing law as integrity indicates that one has to combine backward- and forward-looking elements when interpreting legal practices (Dworkin 1986, p. 225): the interpreter has to make sure his decision fits earlier decisions (Rozemond 1998, p. 42; Scholten 1974, p. 49), as well as the current legal landscape. Therefore 'law as integrity [...] pursues the past only so far as and in the way its contemporary focus dictates' (Dworkin 1986, p. 227).⁵ If several interpretations fit earlier decisions, the interpreter has to choose the one that is most justified, assuming that the law is structured by a coherent set of principles about fairness, justice, procedural due process and integrity (Dworkin 1986, p. 230-231, p. 239 and

4 See his examples concerning 'checkerboard' law (Dworkin 1986, p. 178-184). On law as an *inherent* or *instrumental* political value, see Crowe 2007.

5 Scholten also stresses that the legal system is an open and dynamic system that has to be interpreted with the current social developments at the back of one's mind (Scholten 1974, p. 76 and Rozemond 1998, p. 44, 52-53).

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p. 243). Central to all interpretations is the principle that all people should be treated with equal concern and respect (Dworkin 1977, p. 182 and p. 227), while Scholten also states that every constructive interpretation has to comply with the ideal of justice that expects us to treat equals equally and unequals unequally (Scholten 1974, p. 55).

There are thus two dimensions that the interpreter has to take into account when deciding on a hard case: the dimension of fit and the dimension of justification. Assessing a constructive interpretation in accordance with these dimensions should result in the (one) right answer to a hard case being found. Constructively speaking, this is the answer that follows from the argumentative debate on the subject (Dworkin 1985, p. 119; Dworkin 1986, p. 231; Rozemond 1998, p. 64). In *Taking Rights Seriously*, Dworkin also speaks of a 'dimension of weight' when describing the difference between principles and rules: unlike rules, principles are not either applicable or inapplicable, but instead have to be weighed against each other: 'When principles intersect [...] one who must resolve the conflict has to take into account the relative weight of each' (Dworkin 1977, p. 26). What has to be decided is how important a certain principle is in relation to other principles. A good example of this is the principle that a repeat offender deserves a higher sentence, against the background of the principle of *ne bis in idem*. Some people claim that imposing a higher sentence because of an offender's criminal record goes against this principle. The question of the relative weight of each of these principles, and whether they can be reconciled with each other, is answered in section 4.

3. Multiple liability in criminal law

Now that I have explained some key elements of Dworkin's theory on constructive interpretation, it is time to see whether constructive interpretation can be applied as a research methodology in legal-dogmatic research. Even though constructivism has been developed as a method of finding or inventing law for the judge, it can also be used as a method of legal research. Constructive interpretation is a method of interpreting legal rules and practices that can be carried out by both judges and legal scholars. After all, when interpreting law from an internal perspective, the judge and the legal scholar use the same methods (Vranken 2014, p. 130-131). The question of *how* this constructive interpretation should be performed is examined in the next part of this contribution. To that end, I will first elaborate on my research topic.

The goal of my PhD research is to map and connect all the rules and principles in Dutch criminal law that concern the subject matter of multiple liability. This term is a stepping stone that I use to research various legal rules and principles that have one common denominator: they all have something to do with the situation in which a legal subject is held liable for one criminal offence in multiple respects, or for multiple criminal offences. These rules and principles can be divided into three groups or categories. The first involves rules on repeat offending or recidivism that can lead to the imposition of a higher sentence than would be imposed

on a first offender committing the same offence, while the second consists of rules that prevent multiple liability from arising (such as the principle of *ne bis in idem*). The third group contains rules on the concurrence of criminal offences. These are applicable when a person is sentenced for more offences in the same criminal procedure (or when he *could have been* sentenced for the offences in one criminal procedure, but is prosecuted for them in different procedures). The main idea of my research is to investigate all these rules in connection with each other and to try and fit them into one coherent system of rules regarding multiple liability. This research has never been conducted before, or only on a small scale (see, for example, De Hullu 2003 and Keulen 2003). I believe that researching the different rules concerning multiple liability against the background of comparable – or very different – rules regarding multiple liability can provide interesting new insight into their interpretation. If the interpretation of rule one differs from that of rule two, even though they have the same underlying values and background, one could wonder why this is the case and whether a similar interpretation of the two rules would be more logical.

4. Applicability of Dworkin's constructive interpretation to multiple liability

4.1. Introduction

This section applies the following three main aspects of constructive research to my research:

1. Legal scholars can gain a better understanding of certain rules by conducting a constructive interpretation of them; in other words, by looking for the best interpretation of those rules, bearing in mind the dimensions of 'fit' and 'justification';
2. Dworkin considers the principle of equal concern and respect as the leading notion that rules should always have to comply with. This principle can be seen as the foundation of all legal rules. The legal scholar should therefore keep this notion in mind when interpreting a certain legal practice;
3. When interpreting the relevant rules, the legal scholar must bear in mind the conception of law as integrity. This not only indicates that law has to be seen as a consistent and coherent set of rules, but also implies that the interpreter has to view legal rules against the background of the current legal system so that the interpretation fits with the principles implied in the existing legal system.

4.2. Constructive interpretation

Constructive interpretation is a method of legal interpretation that aims to find a normative unity in the diversity of rules that characterize a legal system (Rozemond 1998, p. 424). It is about finding the interpretation of a rule that fits in with the current legal system and is most justified according to ideals of fair-

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ness, justice, procedural due process and integrity. For this purpose I conduct a constructive interpretation of the rules on multiple liability in criminal law on the basis of these principles and follow the three stages of interpretation referred to above, even though – as will become clear – these stages sometimes get mixed up (Dworkin 1986, p. 66).

In the pre-interpretative stage, the rules and standards forming part of the practice to be interpreted (rules concerning multiple liability) have to be listed. The pre-interpretative stage mainly took place when I was writing my research proposal. During that period I searched for rules having something to do with multiple liability and incorporated them into a preliminary scheme. The rules I found turned out to be aspects of or variations on three rules or principles: the principle that repeat offending leads to higher sentences (rules regarding recidivism), the principle of *ne bis in idem* and the rules on concurrence, whereby the defendant is tried for multiple offences in the same criminal procedure and this has consequences for the maximum penalty that can be imposed. Some of the relevant rules have features in common with more than one of these categories, such as the fact that certain habitual offences (*gewoontedelicten*) that criminalize the recommitting of the same offence (for example, habitual money laundering; see Article 420^{ter} of the Dutch Criminal Code) are similar to certain rules on recidivism; i.e. the fact that a person has committed the same kind of offence more than once means that a higher maximum penalty can be imposed. There is, however, an important difference: no previous convictions for money laundering are needed in order to be liable under Article 420^{ter} of the Dutch Criminal Code. It suffices for the prosecution to prove that the defendant has committed the offence of money laundering more than once. In this respect, habitual offences are more similar to the rules on concurrence: the defendant is tried for multiple offences at the same time. A search into the background of these rules – which is part of the interpretative stage that follows – should provide more insight into the justification of these habitual offences and their place in a coherent system of rules on multiple liability.

During the pre-interpretative stage I also found some common principles regarding the above rules that just about everyone would agree on. The principle of *ne bis in idem* protects a person from being prosecuted a second time for the same set of facts with the same qualification. A person can be called a recidivist only when committing an offence *after* a final conviction for another offence. And rules concerning concurrence have to be applied not only when a defendant is tried for multiple offences at the same time, but also if he *could have been* tried for these offences in the same criminal procedure. Here, too, however, certain questions arise. What happens, for example, if someone commits an offence *before* a previous conviction becomes final? Should this be regarded as a situation of concurrence, or of repeat offending/recidivism?

In the interpretative stage that follows, the interpreter has to settle on a general justification for the main elements of the practice that has been identified. I studied every rule identified in order to establish the interests, goals or principles it served. While interpreting these rules, I also came across rules I had not previously identified as rules regarding multiple liability. The pre-interpretative stage

had, therefore, not yet been completely finished when I started interpreting the rules identified earlier. I found a few offences that combine two offences in one, such as theft combined with violence (Article 312 of the Dutch Criminal Code). Although these offences look like the rules on concurrence, because the defendant is in fact prosecuted for multiple offences at the same time, they differ from these rules in the sense that the specific combination of these offences makes them too serious for the application of the 'normal' rules of concurrence. Thus, special offences with higher maximum penalties are created. During the interpretative stage I extensively investigated a number of hard cases among the rules and principles identified in order to identify the primary 'ties' between the rules. It is possible, for example, for a judge to take offences into consideration that the defendant has admitted but with which he has not been charged (*voeging ad informandum*). This practice makes it easier for the prosecutor to deal with multiple offences that are very similar. If the defendant is suspected of and admits to committing twenty cases of shoplifting, he may be charged with only, say, five of them, while the judge will take the other cases into consideration when deciding on the sentence to be imposed for the five cases. The defendant is then protected against being charged with the other fifteen offences in another procedure (*ne bis in idem*). This practice shows some resemblance to the rules on concurrence: multiple offences are tried at the same time, with the difference being that the defendant has not been charged with them all. It is also reminiscent of the rules on repeat offending: in both cases the judge takes into account offences the defendant has not been charged with, and in both cases this leads to higher sentences. An important difference is that the defendant has not been previously convicted of the offences taken into consideration; in other words, it is the first time that these offences have played a role in a criminal procedure. This practice shows that it is sometimes hard to distinguish between rules regarding concurrence and rules regarding repeat offending, and that there are rules that are somehow 'in between'. Later on in my research, I will explain whether this has any legal consequences for the interpretation of this practice and its potential codification in the Criminal Code.

The post-interpretative stage offers some scope for critical reflection: how does a rule really have to be interpreted so as to better serve the justification found in the previous stage? This stage consists of two related questions: first, it is important to consider how each individual rule is best interpreted in order to serve its justification. This question is partly answered in the interpretative stage. Second, the question has to be answered how the rule has to be interpreted so as to fit in with a coherent system of rules regarding multiple liability. These questions are addressed in the synthesis. I expect the answers to both questions to be closely related since the best interpretation of an individual rule probably *is* the interpretation that fits in with and is most justified in a coherent system of rules regarding multiple liability. One of the questions coming into play at this stage is how the rules on recidivism can be justified against the background of the *ne bis in idem* principle. I answer this question in section 4.4.3 by illustrating how both rules can fit into a coherent system of rules regarding multiple liability.

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My ultimate aim is to create a coherent and consistent system of rules regarding multiple liability. I believe that if these rules form a single, coherent system, their content and scope will become more obvious. It will then be easier to decide which rule is applicable in which case. These conclusions can be drawn in the post-interpretative stage, when I map all the legal rules regarding multiple liability. I conclude, for instance, that the rules concerning concurrence, which consist of three separate rules, can be reduced to two rules. One of them – the rule on a continuous offence (*voortgezette handeling*), which determines the maximum prison sentence applying when more offences follow from the same criminal intent – is hard to distinguish from the other two rules. Research into jurisprudence on the continuous offence shows that this rule is applied rather randomly. Indeed, the rule no longer has much reason for existence, given that every situation that may constitute a continuous offence can easily be interpreted as one of the other rules of concurrence, without any detrimental consequences for the offender. In addition, there are no other rules concerning multiple liability – such as the *ne bis in idem* principle – that are somehow connected to the continuous offence and that would consequently make its continued existence necessary. In a coherent system of rules on multiple liability, therefore, there is no need for the continuous offence.

4.3. 'Equal concern and respect' as an overarching principle?

According to Dworkin, the principle of 'equal concern and respect' is the overarching principle that every interpretation of a hard case has to comply with. It is quite hard, however, to use this principle as a leading notion in legal research since it is a rather broad concept. Does it offer anything for the legal scholar to hold on to, or is it merely an abstract concept without any concrete leads? The question arises, especially when conducting research into a specific area of law, as to whether 'equal concern and respect' is a useful guideline when interpreting the relevant rules. Would it perhaps be possible to derive a more concrete notion from this principle and to use this as a leading principle? Since I am searching for coherence in the rules regarding multiple liability, the overarching principle laying the foundations of the topic could be proportionality. In my view, the principle of proportionality consists of two aspects: first, the sentence imposed has to be proportionate to the offences the person has committed, while, second, the legal qualification applied to the person's criminal behaviour has to represent his wrongdoing fairly (Ashworth 1981, p. 53). The Dutch legislator agrees with legal practitioners and scholars that proportionality is a basic principle the judge has to keep in mind when deciding on the sentence. This principle is deeply rooted in the Dutch criminal justice system. It is admittedly difficult to decide on the degree of retribution that is proportionate in absolute terms, and the question of what is proportionate cannot be answered in a mathematical formula. However, proportionality does have an important relative value that can be used in general research into multiple liability: sentences imposed in comparable cases guide the judge in deciding what the sentence should be in the case to be ruled on (cf. Von Hirsch 1992). This relative value of proportionality can be derived from the principle of equal concern and respect, whereby treating people with equal concern

and respect implies ensuring that equally severe criminal sanctions are imposed on cases that are equal. It would be against the principle of proportionality, and that of equal concern and respect, to impose a custodial sentence of four years on a first offender who had stolen one hundred euros, whereas a first offence involving this sum of money would normally result in a fine.

The principle of proportionality not only has a function in determining a concrete sentence in a concrete case, but is also an important principle when systemizing the various rules on multiple liability: in other words, the sentences (and maximum sentences) applying in cases of concurrence, recidivism and other rules of multiple liability should be proportionate in relation to *each other*. The rules regarding concurrence and recidivism, for instance, can both play a role when someone is tried consecutively for multiple offences. The moment when the previous judgment becomes final is crucial for determining the applicable rule. If the previous judgment becomes final before the second offence is committed, the offender will be considered a recidivist; if it does not, the rules on concurrence have to be applied (Article 63 of the Dutch Criminal Code). In legal practice, the rules regarding concurrence and recidivism sometimes seem to get mixed up, with concurrence leading to a higher sentence for the new offence.⁶ However, research into the scope of and values behind the two rules shows that they have different backgrounds and that the offender should be punished more harshly only if he commits a second offence after a final conviction for a prior offence. It is only when a conviction is final that the offender is warned not to commit the offence again and so only in cases of repeat offending that the sentence can be increased. Otherwise, the principle of proportionality (and thus equal concern and respect) would be violated: an offender who has committed multiple offences without being warned by an earlier final conviction would face the same censure as a repeat offender, who *has* been warned.

4.4. Consistent and coherent unity of rules regarding multiple liability?

4.4.1. Law as integrity or law as a patchwork of rules?

Dworkin has been criticized by supporters of *Critical Legal Studies* for his notion of law as integrity. As the process of lawmaking often involves compromising conflicts of interest and vision (Unger 1983, p. 571) and forms a random walk rather than a structured process (Balkin 1987, p. 15), law as integrity cannot be said to exist. As soon as a hard case appears and multiple legal solutions seem possible, judges will eventually base their judgment on their own political ideology. This means that legal reasoning in hard cases cannot be distinguished from moral or political argument (Klare 1982, p. 340), given that, depending on which of the

6 HR [Dutch Supreme Court] 19 May 2015, ECLI:NL:HR:2015:1245; HR 1 October 2013, ECLI:NL:HR:2013:824; HR 6 June 2006, ECLI:NL:HR:2006:AV7970 and HR 26 April 2011, ECLI:NL:HR:2011:BP9344. The courts do not literally say that concurrence leads to increased sentences, but mention that 'previous convictions are taken into account'; i.e., it would seem that they are taken into account in a way that is not favourable for the offender.

contradictory legal norms they rely on, lawyers and judges can argue equally well for either side of most legal cases (Altman 1990, p. 15; Balkin 1987, p. 427). Is this indeed the case? If so, is it sound, from a methodological point of view, to use Dworkin's ideas on law as integrity as a starting point in legal research?

It cannot be denied that the law is not an entirely coherent system. It consists of so many different rules and sometimes ambiguous underlying principles that it can be hard to find the one correct interpretation of a rule that fits into a coherent whole of rules and can be justified. However, law cannot be seen as a patchwork of rules either. Even though it is an imperfect system of rules, it is a system. Legal practitioners and scholars strive for a more coherent system through an interpretative debate. They have agreed to try to convince each other of the best possible interpretation of a legal practice, considering the principles that underlie that practice (Dworkin 1986, p. 13). The correct answer in a hard case is not the answer that is irrefutably right ('a claim of physics', Dworkin 1986, p. 80), but instead it is a constructive claim made in legal practice by one of its participants. Every question about law is an interpretative question. I agree with Soeteman that the right answer to a case is the best possible answer or, in other words, the answer that can best be substantiated with arguments. This answer could be controversial and could, therefore, be challenged. That does not mean, however, that it is impossible to find the right meaning of a rule and that it is not important for jurists to seek to find the best interpretation (Soeteman 2009, p. 232-233). This can be seen very clearly in the process of lawmaking, where legislators cannot make up rules that do not comply with other rules and fundamental principles. The same goes for judges, who cannot simply choose the solution they think is best; they have to formulate their judgments on the basis of arguments put forward by the parties and the existing paradigms of law (Rozemond 1998, p. 70). It would be against the fundamental idea of the rule of law if judges were not to interpret rules in a way that was consistent with law as integrity (cf. Smith 2009, p. 218).⁷ In the next section, I give two examples of cases concerning multiple liability where the judges interpreted rules constructively. After that, I will seek to identify coherence between two seemingly irreconcilable principles that are also part of my research.

4.4.2. *Interpreting rules concerning multiple liability constructively – the judge*

The first case discussed is a case in which one of the rules concerning concurrence (*meerdaadse samenloop*) had to be applied. The District Court of Amsterdam concluded that applying this rule would have the unjustifiable consequence that the accused (a serial rapist) could be sent to prison for a maximum of only four years and three months. The court ruled that application of this rule would not be in line with the principle of proportionality and the interests of the victim, with the latter criterion having become increasingly important over the years. The court

7 In this respect, I agree with Crowe that integrity not only holds inherent value because legal practices that reject integrity are deemed to be undesirable in themselves, but that it also has instrumental value: integrity is instrumental to respecting a particular set of basic principles that are taken to ground the entire system of law (Crowe 2007, p. 174).

consequently imposed a prison sentence of ten years, even though the rules of concurrence did not provide for this. The Supreme Court subsequently, however, overturned the decision and stated that since new legislation on the rule was in preparation, it was up to the legislator to decide which interpretation of the rule would fit best.⁸ Until the law was formally changed, the Supreme Court wanted to stick with the interpretation of the rule of concurrence it had given in earlier judgments. One could argue that the principle of legality – whereby legal rules, including those regarding the maximum sentence that can be imposed, must have been declared beforehand – prevented the Supreme Court from interpreting the rule of concurrence constructively. Another view is that the interpretation of the Supreme Court *was* a constructive interpretation. The Supreme Court ruled that the principle of legality outweighed the principle of proportionality and the interests of victims.⁹ The interpretation of the District Court, as well as that of the Supreme Court, can be seen as interpretative claims substantiated with arguments, based on the thesis that law is a construct of different rules and principles. Ultimately, however, the principle of legality is decisive, and this corresponds to Dworkin's view that it is part of the goal of integrity that criminal law is dominated by legality.¹⁰

The second example of constructive interpretation by a judge involved a case concerning the imposition of both an administrative sanction in the form of an ignition interlock programme (*alcoholslotprogramma*) and a criminal procedure for the offence of driving under the influence of alcohol.¹¹ As none of the written *ne bis in idem* rules are applicable to this specific situation, the accumulation of these procedures and corresponding sentences occurred on a daily basis. In March 2015, however, the Supreme Court decided that this practice violated the principle of *ne bis in idem*. In reaching this decision, the Supreme Court considered the unwritten principle that no one can be prosecuted and punished twice for the same act to be existent, given that it is recorded in Dutch law, as well as in international treaties and the EU Charter of Fundamental Rights. Even though the *ne bis in idem* principle as laid down in the law could not be applied, the underlying principle still prevented the person from being prosecuted and punished twice for the same offence. Adopting a different view on this would lead to disproportionate sentencing.

4.4.3. Repeat offending and the *ne bis in idem* principle

From a methodological point of view, constructivism and its presumption of law as integrity provide a good research method for investigating several – somehow related – legal rules. Nevertheless, finding coherence is not always easy. Some-

8 For both rulings, see District Court of Amsterdam, 14 October 2011, ECLI:NL:RBAMS:2011:BT7651 and HR 19 February 2013, ECLI:NL:HR:2013:BX9407, NJ 2013, 436 and notation by N. Keijzer.

9 Compare the 'dimension of weight' mentioned in section 2.2.

10 Van Dijk 2009, p. 337, where he quotes from a lecture of Dworkin: 'Criminal cases should be narrowly interpreted in favor of the accused'.

11 HR 3 March 2015, ECLI:NL:HR:2015:434.

times, two principles seem to be irreconcilable: the one cannot be applied without rejecting the other. A good example of this in my research is the relationship between rules regarding recidivism and the *ne bis in idem* principle. Some say that imposing a higher sentence because someone has been convicted before goes against the principle that one cannot be punished twice for the same offence. In this section, I will show – using this example – that the interpretative debate that follows from constructivism makes it possible to find a coherent system of rules regarding multiple liability. In Dworkin's words: two principles may be competing, but they will probably not be contradictory (Dworkin 1986, p. 444). The principles do not necessarily outweigh each other completely, but can be applied at the same time.

It is a popularly held and widespread view that repeat offenders deserve a higher sentence than first offenders for the same offence (Roberts 2008). From a retributivist point of view, however, the question arises as to how this principle can be justified.¹² A common objection against increased sentences for repeat offenders is that they undermine the principle that the punishment should be proportional to the crime committed. Connected to the argument about proportionality is the objection that a person should not be punished twice for the same offence. An offender who has been punished for earlier crimes has paid his debt to society. Increasing the punishment on the basis of his criminal history results in double jeopardy (Lee 2009, p. 575). Bagaric speaks in this respect of a 'clash' of two important principles: 'According to the first, it is unjust to punish a person twice for the same offence. To do so not only violates the rule of law virtues of certainty and finality, but also prevents defendants from moving on with their lives. The second, counter principle is the intuitively appealing ideal that people who break the law for the first time should be treated less severely than repeat offenders' (Bagaric 2000, p. 13). He contends that the tension between these principles has been resolved firmly in favour of the latter and concludes that there is no sound doctrinal basis for giving weight to prior convictions (Bagaric 2000, p. 23). Are these statements true? Is there no justification for harsher sentences when someone repeats an offence? And is it not possible to reconcile these principles through interpretation so that they fit into a coherent system of rules on multiple liability? The argument that taking previous convictions into account goes against the principle of proportionality follows from a narrow model of culpability that can be assigned to the offender: a model that is tightly focused on the offence of the conviction (Robert 2008, p. 474). However, one can also subscribe to a broader model of culpability that encompasses more factors, such as the person's state of mind before and after the offence. This broader model of culpability is the most

12 From a utilitarian point of view, the increased sentence could be justified by saying that the good consequences of the harsher sentence, such as incapacitation and deterrence, outweigh the hardship the recidivist has to endure (Bagaric 2000, p. 18). Lack of proportionality between the offence and the sentence is not a problem for utilitarians. However, there is no empirical evidence that suggests a linear connection between the crime rate and the penalty level, thus prompting Bagaric to conclude that utilitarian arguments are 'empirically flawed' (Bagaric 2003, p. 23).

convincing. If factors such as being remorseful can result in leniency in sentencing, why can previous convictions not lead to an increased sentence? As long as previous offences do not shift the focus of sentencing away from the offence and to the offender, variables such as the presence of a criminal record may influence the sentence (Roberts 2008, p. 476). Von Hirsch has come up with a theory of *progressive loss of mitigation*, which basically implies that a degree of mitigation should be given to first offenders. 'After the offender has been before the courts on several occasions, the 'ceiling' for the offence is reached and all such mitigation is used up' (Von Hirsch 1991, Von Hirsch and Wasik 1994, p. 410). The mitigation is justified by the idea that every person's inhibitions can fail in a moment of weakness. When confronted with censure, an offender should be able to reflect on what he has done and desist from it. If he does commit crimes again, he no longer has any right to a discount. In this theory, too, the principle of proportionality should not be sacrificed: in other words, sentences cannot increase indefinitely after each repetition. The seriousness of the crime should still be central when courts decide on the sentence.

The thesis that a repeat offender is more culpable than a first offender can be well supported with arguments, such as those given above. In the end, they all come down to the general conclusion that someone who has been warned by the imposition of a first conviction and does not refrain from reoffending is more culpable or blameworthy and should therefore be given an increased sentence. Culpability should not be seen as something that is strictly related to the offence the defendant is charged with. Other circumstances, such as remorse, age and previous convictions, may also play a role in determining how culpable the offender is. As long as we do not lose sight of the principle that the offence committed is central to the sentencing process, the fact that someone has 'done it again' should be borne in mind. However, this does not resolve the issue completely. Even if – from the perspective of the principle of proportionality – taking account of previous convictions can be justified, one can still consider this to be a violation of the *ne bis in idem* principle: someone is sentenced again for the same offence. Although this thesis contains some grain of truth, it can be contested: it is not the offence for which the defendant has been previously convicted that is being reconsidered, but account is instead being taken of the fact that the defendant has a criminal history. This history can consist of one, two, four or twenty previous convictions. Whatever the case, the judge will take into account the fact that the defendant has a criminal record and will not try the defendant again for the offences underlying those previous convictions. Furthermore, the criminal record will be taken into account only insofar as compatible with the principle of proportionality. In this way, the core of the *ne bis in idem* principle – facts for which the offender has been convicted and cannot be reconsidered – is not violated and can be reconciled with the principle that repeat offending leads to increased sentences.

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5. Conclusion

This article explores the possibility of using Dworkin's theory on constructive interpretation as a method of legal research, taking my PhD research as an illustration. Dworkin developed his theory as a method of interpretation to be performed by a judge, whereas my aim is to conduct a constructive interpretation as a legal scholar. The idea of finding the best possible interpretation of a rule in the light of its underlying interests, goals and principles, keeping in mind the idea of law as integrity, constitutes a workable research method. Although Dworkin's overarching principle of 'equal concern and respect' could turn out to be too vague to serve as a concrete leading notion, principles that are derived from this principle, such as – in my case – the principle of proportionality, can also serve as a leading notion.

Coherence is not something that is always there, but rather something that should be strived for. Law is a system, albeit an imperfect system. That does not mean that it is impossible to make law more coherent through interpretation. By taking the clash of the principle of *ne bis in idem* and the principle of increased sentences for repeat offenders, I have shown that interpretative claims, substantiated with arguments, can show the existence of coherence in the system of multiple liability. This thesis can be challenged only if one takes part in the interpretative debate started in this contribution.

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