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INTERPRETATION AS A VALUE (RE)CONSTRUCTION OF THE LEGAL NORM

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ABSTRACT

In the context of a normative concretisation of the statute, the term "statute" is not synonymous with the law that can be repeated in light of a concrete case. In this context, the interpreter is the one who (1) "reconstructs" the possibilities contained in the statute, (2) articulates more precisely the contents of these possibilities, and (3) chooses the combination of possibilities that corresponds most closely to the legally relevant features of the life case (which also must be interpreted). Thus the interpreter's productivity consists in recognizing a legal provision as referring to a *type* of conduct – for example, as recognizing that the statutory signs "exceeding the speed limit" refer to, *inter alia*, a type of behaviour known as driving a car too fast through a town. Moreover, the decision-maker has decided the case just *this* way, which means it is the decision-maker and not the "statutory text" that has excluded the possibility of any other legal solution (e. g. of driving too fast in a state of emergency). The statute refers to cases that will only occur in the future and are at the present moment, in a more or less defined way, envisaged by the legislator. Irrespective of

the extent and intensiveness of the envisaging, the interpretation must remain true to the core meaning of the norm and to the semantic possibilities of the statute text.

KEYWORDS

Interpretation, value (re)construction of legal norm, dynamic objective interpretation, textualism, teleological interpretation, legal reasoning, legal study

INTRODUCTION

The theory of argumentation gives to the process of "application of law" (that is, legal deciding in concrete cases) the meaning of a historical event with definite coordinates of time and place. As such, what deciding decides—the legal decision as such—is a value synthesis when it creates the normative state of constituent elements out of normative materials and when, on the basis of the factual starting point, it shapes the legally relevant state of facts that corresponds to the normative one. The relative creativity of the decision depends on the extent of ambiguity exhibited by the normative starting point and the life case. Within this scope, the legal decision can be creative; but it also can be obstructive and uncreative if it shapes normative and/or factual states that differ from "accepted" types and standards of conduct.

The starting point of the theory of argumentation is recognized legality and a desire to extend the scope of the legal actor's possibilities. The theory of legal argumentation takes as its object the multihued shades of meaning present in legal deciding, and it offers legal decision-makers a suitable methodology that enables them to give meaning to their actions. Its unique ambition is to deal with legal criteria and arguments that can improve the legal determinability and predictability of the actions of legal decision-makers.

1. VON SAVIGNY'S INTERPRETATION METHODS

Friedrich Karl von Savigny (1779–1861), the pioneer of the modern theory of interpretation and reasoning in law, took the position that interpretation was "a reconstruction of the thought [i.e. the legal norm] inherent in the statute". Von Savigny makes a distinction between grammatical, logical, historical, systematic and teleological elements of interpretation.[1] They are the so-called standard, classical interpretation methods. Modern legal hermeneutics has adopted these methods, analysed them in more detail and supplemented them by numerous new interpretation principles. Von Savigny only considered them as elements of interpretation i.e. as different activities that have to act together if the

[1] It is interesting that von Savigny does not explicitly give the teleological element as one of the elements of interpretation. A more detailed analysis, however, shows that he takes it into account at least in a limited scope. He allows it in the interpretation of uncertain and imprecise expressions. *See* Friedrich Karl von Savigny, *System des heutigen Römischen Rechts*, Band I (Berlin: Veit und Comp., 1840), 213–215, 218, 220, 222–225 and 228–230. *See* also Marijan Pavčnik, *Juristisches Verstehen und Entscheiden* (Wien, New York: Springer Verlag, 1993), 22 ff., and Bernd Rüthers, Christian Fischer, Axel Birk, *Rechtstheorie mit Juristischer Methodenlehre*, 8th ed. (München: Beck, 2015), 423 ff. *Cf*. Pavel Holländer, *Rechtspositivismus versus Naturrechtslehre als Folge des* Legitimitätskonzepts (Berlin: Duncker & Humlot, 2013), 79 ff.

interpretation is to be successful.[2] To express it even more clearly: all aspects of interpretation are of equal value, all have to be taken into account, and only a coordinated evaluation thereof makes it possible to find the right solution. It is a position completely in accordance with the fundamentals of general hermeneutics: no aspect may be disregarded, and the result of interpretation is more reliable the more all aspects agree and lead towards the same solution.

It lies in the nature of legal decision-making in concrete cases that one has to deviate from this ideal as soon as some aspects of interpretation lead to different or even opposite results. This deviation was already allowed by von Savigny when he gave certain precedence to teleological interpretation and thereby dissociated himself from his own statement that the elements of interpretation were acting together at "reconstructing the thought inherent in the statute". It is well known that this is a topical issue especially in practical (operational) interpretation when always such a definite normative constituent element of the statute (Germ. *Tatbestand*) has to be reached, which will allow an (unambiguous) decision in the case that is the subject of the legal decision.

2. UNDERSTANDING OF A STATUTE AND ITS NATURE

It is a matter of convention whether every understanding of a statute is called an "interpretation", or whether this term is used only when the meaning of the linguistic signs of a statute is defined by means of a special interpretive procedure. It is more important whether the interpretation of the statute is taken to be just a "reconstruction of the thought inherent therein", which reconstruction is then "applied" to a concrete case. In the process of normative concretisation,[3] the legally relevant type of conduct is determined in view of the already existing life case, which is unique and cannot be repeated. The uniqueness and unrepeatability – in a word, the individuality – of the life case confronts the types, moulds, and patterns of conduct that are communicated by the legislator by means of the statute. These latter descriptions are left deliberately open as to their contents. That is, in this context *openness with regard to meaning* does not signify a condition that is merely a consequence of a text that cannot avoid ambiguity; rather, the concept of openness as to meaning here names something that lies in the essence of modern law itself. A statute always equalizes anticipated cases by means of typical (and therefore abstract and general) elements, and therefore

[2] Friedrich Karl von Savigny, *supra* note 1, 215.
[3] *Cf*. Friedrich Müller and Ralph Christensen, *Juristische Methodik*, Band I, 11th ed. (Berlin: Duncker & Humblot, 2013); using the notion "Normkonkretisierung" (181 ff.). *Cf*. also Marijan Pavčnik, *Auf dem Weg zum Maß des Rechts. Ausgewählte Schriften zur Rechtstheorie* (Stuttgart: Steiner Verlag, 2011), 124 ff.

foresees as equal what in reality always occurs as a concrete and unrepeatable act. In a nutshell: modern law, at the level of the statute, is read to apply to an open set of *possible* life cases, and not to this or that *particular* life case.[4] A statute that is not general and abstract in this sense is the antithesis of the modern conception of the "Rule of Law".

The opposite poles of the life case and the statute require a legal decision, a synthesis, in order to realize the concept of a statute that is applied; yet neither of them can be defined out of themselves, nor can they completely lean upon one other, because both of them are at least partly open as to their contents. Thus the interpretation of the statute is also a value construction, a final shaping of the "thought"[5] that must lead to the legal decision. The interpretive process is no longer seen to consist in just finding out the content – the sense and aim – of the legal norm that is contained in the statute completely and in advance. Now the legal norm is seen to be the result of the way in which the decision-maker understands the statute, and of the interpretive procedure wherein the legal norm communicated by the legislator is (re)constructed.[6]

3. NORMATIVE CONCRETISATION OF THE STATUTE

In the process of the normative concretisation of the statute an important role is occupied by legal principles on the one hand and by linguistic, logical, systematic, historical and teleological interpretation methods on the other hand. The interpretive messages conveyed by the aforementioned methods give a framework and a content structure to the interpretation of the statute without being able to exhaust its contents. The result of interpretation cannot be completely achieved at any one of the three points of the normative concretisation of the statute: (1) at the level of life cases, whose problems cannot be fully envisaged; (2) at the level of the text of the statute, which cannot be predefined to such an extent as to allow a

[4] *See* Arthur Kaufmann, *Analogie und 'Natur der Sache'. Zugleich ein Beitrag zur Lehre vom Typus*, 2nd ed. (Heidelberg: R. v. Decker & C. F. Müller, 1982), 49–50: "Aber es ist unmöglich, einen Typus genau zu beschreiben; die Beschreibung kann sich dem Typus immer nur annähern, nie wird er bis in die letzten Feinheiten erfasst. Denn der Typus ist stets inhaltlich reicher, geistiger, sinnhafter, anschaulicher als der abstrakt definierte Begriff." *See* also Lothar Philipps, *Endliche Rechtsbegriffe mit unendlichen Grenzen. Rechtslogische Aufsätze* (Bern: Weblaw, 2012), 108: "Mag ein Rechtsbegriff auch nicht grenzenlos sein, so kann es doch nicht gut sein, wenn die Grenze unter dem zerrenden Zugriff von Rechtssprechung und Rechtswissenschaft ihre übersichtlichen Konturen verliert. Darunter leiden die Verständlichkeit und die Lernbarkeit der Normen und damit auch die Plausibilität der Rechtsanwendung. Das sollte vermieden werden, und vermieden lässt es sich dadurch, dass man bei den Fortbildungen eines Rechtsinstituts darauf achtet, dass es selbstähnlich ist, und das heißt: sich selber treu bleibt." *Cf.* Bernd Rüthers, *Die heimliche Revolution vom Rechtstaat zum Richterstaat. Verfassung und Methoden* (Tübingen: Mohr Siebeck, 2014), 163 ff.

[5] *See* Gustav Radbruch, *Rechtsphilosophie*. *Studienausgabe*, Ralf Dreier and Stanley L. Paulson, eds. (Heidelberg: C. F. Müller, 1999), 108: "So ist die juristische Auslegung nicht Nachdenken eines Vorgedachten, sondern Zuendedenken eines Gedachten."

[6] *See* Marijan Pavčnik, "Legal Decisionmaking as a Responsible Intellectual Activity: a Continental Point of View," *Washington Law Review* 72 (1997): 494–495. Reprint in: Marijan Pavčnik, *supra* note 3, 128–129.

deductive interpretation; (3) at the level of the relations between the life case and the text of the statute, which are also the subject of a subsequent mutual evaluation. These are the main reasons which corroborate that any firm sequence of single interpretation methods is unfeasible and, as such, foredoomed to failure.

The theory of argumentation cannot give any distinct instructions about the path the interpreter's thinking process resulting in a legal decision should take. It can only "intervene" in this process by defining the nature of legal decision-making and the arguments, on the basis of which the decision can be verified, made meaningful and which, eventually, can be relied upon in the justification of the legal decision. In this respect, the argument of the purpose of the legal norm (teleological interpretation) certainly plays a very important role. With respect to the theory of argumentation, however, this argument cannot be the only or the continuously privileged one; it is just one of the arguments having a decisive influence when one chooses between two or more possible solutions and when the meaning of the language signs that are uncertain and porous as to their contents is defined. This is the natural advantage of teleological interpretation, which, in itself, is not a metarule governing other interpretation methods, yet – as a measure justifying the choice – it is very similar to such a "rule". It is, however, a question of similarity since a final metarule does not exist: its final representative is always the one making the decision in a concrete case.

Therefore, it is of the utmost importance that the teleological interpretation does not take on a life of its own and is not considered a "noble goal" that can be manipulated as desired. It lies in the legal nature of teleological interpretation that – in spite of its polysemy and different solutions – it also leans on other elements contained in the legal system. The greater the quantity of these elements defining it as to its meaning and the more these elements complement each other or the less they exclude or even oppose each other, the more coherent the teleological interpretation is. It is the task of the interpreter to figure out these criteria, to interconnect them, to evaluate them, and to substantiate the solution he accepts as the most sound and reasonable one.

4. FORESEEABILITY OF THE INTERPRETATION

One of the fundamental insights of the interpretation of the statute is that the statute refers to cases that will only occur in the future and can therefore only be envisage in a more or less defined way. The grade of foreseeability must always take into account the nature of the cases to which the norms refer as well as the

nature of the legal fields in question. The difference is significant as to whether this is the field of yielding law (Lat. *ius dispositivum*) or cogent law (Lat. *ius cogens*).

In the field of yielding law (e.g. contract law) it is of essential importance that the framework of dispositiveness is defined as well as the solutions that are valid when the parties partially or completely lack an agreement about their mutual rights and duties. The framework of dispositiveness can exceptionally be limited by some cogent norms (e.g. by setting the interest rate), yet it is unavoidable for the norms of yielding law to tell the purpose of the norms. This purpose must be more certain, the more uncertain and porous the field of the meaning of the norm to be directed by the core meaning is.

In the field of cogent law, the issue of foreseeability is somehow even more sensitive. The message of the statute has to be empirically based on known cases, for which it can be said with a substantial degree of reliability that they will be repeated. The statute must take into account that life is more varied and mobile that the statute can envisage. It is of special importance for this kind of cases that the norms have a recognizable core meaning and that also other normative elements are more or less certain or at least determinable. If this determinacy does not exist, it is either a legal gap or even an area already in the domain of man's freedom.

In the field of cogent law, criminal law is by far the most subtle. The principle *lex certa* is valid for the elements of criminal offence as well as for the legal consequence.[7] A special feature of criminal law is that expressions that are porous as to their contents are not compatible with the determination of the criminal offence and the elements thereof. It is of special importance that the meaning of the legal norm is derived from the measures contained in the statute, i.e. from the measures that can be activated by established (von Savigny's) methods of interpretation. If the legal text does not contain any support base for how it is to be understood, no interpretation is possible.

5. SUBJECTIVE AND OBJECTIVE INTERPRETATION

Interpretation often treads on rather thin ice and close to the limit beyond which one can already speak about changing and supplementing the statute. It is the task of the classic methods of interpretation to activate what is already contained – explicitly or at least implicitly – in the statute. One of the issues that cannot (and must not) be avoided refers to whether one is allowed to revitalise the statute and to interpret it in the spirit of the time.

[7] *See* e. g. Bernd Schünemann, *Nulla poena sine lege?* (Berlin, New York: Walter de Gruyter, 1978).

It is a majority point of view that the text of a statute – as soon as it has been validly passed and has become law – lives an independent life.[8] This is the *objective method of interpretation*, which does not interpret the text of the statute with regard to the "will of the legislator", but with regard to the *ratio legis* as it is actually evident in the text of the statute. A more moderate school of the objective method of interpretation decidedly rejects any topical adjustment of the interpretation to daily needs and conditions; it is only important that the *ratio legis* is autonomous and that the interpreter seeks answers to the questions that were often neither anticipated not could have been anticipated by the legislator.[9] For this method, the statute is always a part of the cultural and historical context, of which the interpreter is a part as well: the meaning he discerns in the statute is not just the meaning of the statute as such, but also the meaning of the legal system (*ratio iuris*) of the historic period and time when he interprets the statute. This message of the objective method of interpretation was well expressed by Radbruch, who said that "every meaning is just a partial meaning in an endless complex of meanings, and in this complex of meanings it produces effects that cannot be measured in advance."[10]

In this meaning the objective method of interpretation is not static because it is not interested merely in the historical circumstances leading to the emergence of the statute; its reach is longer: it is also interested in the development of the legal institute, which is the subject of interpretation, in its present meaning as well as – as much as possible – in its future meaning, which is important from the point of view of man's behaviour (legal safety). The dynamics of the objective method of interpretation is stretched between the past and the more or less clearly discernible future, between these two "landmarks" that have to be measured and taken into account if it wants to be neither historically clumsy (possibly conservative) nor ideologically visionary (possibly totalitarian). When moving between these two points, it is its task to remain true to the principles of legal safety and the historically established system of values. The text of the statute is not an independent unit to be interpreted arbitrarily; its independent life only means that the interpreter cannot shift the responsibility for the understanding of the statute to the imaginary (and sometimes rather mysterious and omniscient) legislator. The interpreter is bound to the statute; it is, however, his duty to find points of support that give meaning to his interpretation and substantiate it.

[8] *Cf. Goethe:* "Ein ausgesprochenes Wort tritt in den Kreis der übrigen notwendig wirkenden Naturkräfte mit ein". The quotation is taken from Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, 2nd ed. (Tübingen: Mohr Siebeck, 1964), 258.
[9] *See* Hans-Georg Gadamer, *Wahrheit und Methode* (Tübingen: J. C. B. Mohr /Paul Siebeck, 1990), 331 ff.
[10] Gustav Radbruch, "Arten der Interpretation" (1935): 25–26. Reprint in: Arthur Kaufmann, ed., *Gustav Radbruch Gesamtsausegebe*, Volume III (Heidelberg: C. F. Müller, 1990).

Among these points of support is also the "will" of the historical legislator (subjective interpretation). The objective interpretation does not maintain that the purpose that was attributed to the statute by the legislative body is of no importance. Yet this purpose is not obliging by itself but only via the text of the statute if and inasmuch as it expresses it. And it lies in the nature of interpretation that also the legislator's purpose is as subject of interpretation and understanding. It is a majority point of view that this purpose is more important with the relatively younger and the most recent statutes, whereas its power weakens the further we move away from the time when the statute was passed and the more the social conditions bringing it about have changed. The subjective interpretation itself is aware of it and – in its moderate version[11] – it leaves the ground of the historical legislator and accepts, as the starting point of interpretation, the type of the ideal modern (present) legislator: the interpreter is bound by the purpose that the present legislator would attribute to the statute (subjective dynamic interpretation).[12]

The relation between the objective-dynamic and the subjective-static methods of interpretation is very sensitive.[13] The majority point of view accepts the objective-dynamic interpretation of the statute as the dominant one, yet it does not want to separate it one-sidedly from the so-called will of the historical legislator. The legislator's purpose, insofar as it can be established, is certainly an important circumstance co-determining how the objective-dynamic meaning of the statute should be understood. As previously explained, this meaning is especially important with old statutes that are applied in essentially different social conditions.

[11] From the criminal law point of view *see* Ulrich Schroth, *Theorie und Praxis subjektiver Auslegung im Strafrecht* (Berlin: Duncker & Humblot, 1983), 37 ff., 152–153.

[12] A historical overview and the development of the subjective and the dynamic interpretation are given e.g. by Joseph Esser, *supra* 8, 257 ff.; Wolfgang Fikentscher, *Methoden des Rechts*, Band III (Tübingen: J. C. B. Mohr (P. Siebeck), 1976), 662 ff.; Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 5th ed. (Berlin etc.: Springer Verlag, 1983) 32 ff., 301 ff. and 319 ff.; Aharon Barak, *Purposive Interpretation in Law* (New Jersey, Oxford: Princeton University Press, 2007), 120 ff., 148 ff. and 260 ff.; and Ernst A. Kramer, *Juristische Methodenlehre*, 4th ed. (München, Wien, Bern: Beck, Manz, Stämpfli Verlag, 2013), 121 ff., 138 ff., 153 and 165 ff.

[13] *See* e. g. Aharon Barak, *supra* note 12, 182: "We arrive at the decisive stage of the interpretive process. It is the stage that distinguishes purposive interpretation from other systems of interpretation. At this stage, judges must formulate the ultimate purpose of the text. They use that purpose to pinpoint the legal meaning of the text along the range of its semantic meanings. This stage is unique to purposive interpretation. It tries to synthesize and integrate the subjective and objective purposes." *Cf.* Antonin Scalia and Bryan A. Garner, *Reading Law. The Interpretation of Legal Texts* (St. Paul, MN: Thomson, West, 2012) who argue "that words are to be given the meaning they had when they were adopted" (78 ff., 435). *Cf.* also Antonin Scalia, *A Matter of Interpretation* (Princeton, New Yersey: Princeton University Press, 1998), 22: "The text is the law, and it is the text that must be observed".

6. STUDY OF LEGAL REASONING

The insight that the interpretation of a statute is an activity that is allowed sometimes a broader and sometimes a smaller leeway by the statute text, is of special importance of the study of law. No statute is so perfect that it could be applied mechanically. Each application of a statute can be more or less creative. The understanding and the application of a statute are not value-neutral. Legal reasoning (Germ. *Methodenlehre*) must be aware of this characteristic of the legal phenomenon and analyse it.

For the study of law it is of special importance that it contends with all these issues and that it studies legal understanding as the understanding of legal problems. The findings of legal dogmatics are important, yet they cannot solve the value issues of law. These problems are dealt with by Legal Theory and especially by Legal Philosophy. The study of law that would turn a deaf ear to these issues does not offer its students the basis, which is a *conditio sine qua non* for responsible legal decision-making. It is also very important that Legal Reasoning and Legal Philosophy work hand in hand.[14]

It has been proven by experience that – at least in principle – the best lawyers (e.g. judges) are the ones with a broad general knowledge, especially in humanities and social sciences, with a broad legal knowledge and who have learned during their regular and judicial studies how to connect theory and practice. Such lawyers can – especially while still relatively young – move in different fields of law. By being able to think in a comprehensive and versatile manner, they can quickly perceive the subtleties of legal issues.

CONCLUSIONS

In the context of the normative concretisation of a statute, the term "statute" is not synonymous with the law that can be repeated in light of the concrete case. In this context, the interpreter is the one who (1) "reconstructs" the possibilities contained in the statute; (2) articulates more precisely the contents of these possibilities; and (3) chooses the combination of possibilities that corresponds most closely to the legally relevant features of the life case (which also must be interpreted). Thus, the interpreter's productivity consists in recognizing a legal provision as referring to a type of conduct – for example, as recognizing that the statutory signs "exceeding the speed limit" refer to, *inter alia*, a type of behaviour known as driving a car too fast through a town. As the interpreter chooses and

[14] *Cf*. Bernd Rüthers, Christian Fischer, and Axel Birk, *supra* note 1, 583 ff.; and Stephan Kirste, *Einführung in die Rechtsphilosophie* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2010), 44 ff.

values the type of conduct as such, he connects it as the most appropriate type, with regard to its contents, vis-à-vis the characteristics of the concrete life case. Moreover, the decision-maker has decided the case in this particular way, and this means that it is the decision-maker, and not the "statutory text", who has excluded the possibility of any other legal solution (e. g. of driving too fast in a state of emergency).

It is not the task of the theory of argumentation to create or even improve a system of values that would make possible univocal deciding. It can only bring to decisionmakers a vision of the nature and structure of legal deciding, of the elements of which a legal decision consists, and of the merely possible legal arguments that define the context of legal deciding.

It does not lie within its legitimate power to offer answers to questions in particular life cases that have occurred or will occur; but it does offer criteria for saying that a legal decision will be more legally persuasive the more coherent are the connection between the arguments on which it is based. However, the theory of argumentation is also flexible enough to see that sometimes the "best" decision in a case (for example, at the "bordeline," where the decisionmaker confronts two or more contradictory solutions) will not consist of an ordered series of arguments at all. In such a case, the main emphasis will be put on the so-called "decisive" argument that breaks new ground – for example, the decision may give the grounds for damages for an altogether new kind if immaterial loss, and its degree of decisiveness will depend on prevailing social trends, attitudes, and beliefs. If such a decision lies within the legal framework that makes it possible, and is at the same time in accordance with the range of values (taking into account all variations and conflicts) that are accepted in society, its persuasive power will be substantially greater than if it were based on a predetermined and detailed system of values that falsely offers itself as uncontroversial and absolute.[15]

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[15] *See* Marijan Pavčnik, *supra* note 3, 115 ff.

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