

Modern Legal Interpretation

Modern Legal Interpretation:

Legalism or Beyond

Edited by

Marko Novak and Vojko Strahovnik

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Marko Novak, Vojko Strahovnik

Ljubljana, February 2018

INTRODUCTION

MARKO NOVAK AND VOJKO STRAHOVNIK

Legalism or legal formalism usually depicts judges who apply cases by allegedly merely applying pre-existing legal rules. They do not seem to legislate, exercise discretion, balance or pursue policies and definitely do not look outside conventional legal texts for guidance in deciding new cases. For them law is an autonomous domain of knowledge and technique. What they really follow are the maxims of clarity, determinacy, and coherence of law. This perception of law and adjudication, with its relevance for interpretation and argumentation, can sometimes be even designated as “orthodox lawyering”. Moreover, at least in certain (clear) cases it is very difficult to say that legalism is not an inappropriate theory or at least a method of legal interpretation.

However, an abundance of different theories has proved that legal interpretation is much more than just legalism, which modestly speaking in certain (hard) cases appears to be naïve. When the two approaches to legal interpretation are juxtaposed in the framework of modern legal interpretation, the following questions can for example be posed: Is it possible to integrate legalism and beyond in a coherent theory of legal interpretation? Is legalism as a distinctive theory of legal interpretation still a feasible theory of interpretation? Has it been even reiterated again today? How can its formalist approach withstand a critique from Dworkinian (moral) interpretivism or accusations of being a myth masking political preferences from legal realists? What light do new findings in neuroscience shed on legalism as an interpretative approach? What do other theories such as, e.g., psychological, psychoanalytic, sociological, economic, pragmatist, or phenomenological theories of adjudication and interpretation have to say about the legalist methods of interpretation?

These and some other issues concerning legal interpretation were discussed in length at the legal argumentation conference in Ljubljana in November, 2016. The conference was attended by a number of legal scholars and philosophers mostly from European but also other countries. Some of them decided to contribute their presentations and were asked to

develop them into essays to reflect on the modern state-of-the art of legalism and legal interpretation at least how it is perceived by certain European legal philosophers and legal theorists.

In their contribution entitled “Identifying ‘Purely’ Interpretative Issues and Activities,” **Bruce Anderson** and **Michael Shute** criticise lawyers’ and legal theorists’ inclination to wrap as interpretation “just about everything that they do from the meaning of texts to the application of law”. Referring to Pat Brown’s distinctions, there are a few issues related to interpretation that are not interpretative issues. What they are interested in are ‘purely’ interpretative issues and activities. To explicate those, they relied on Bernard Lonergan’s cognitional analysis by defining the relations between insights and expressions. **Seppo Sajama** contributes to this volume a paper entitled “Beyond the Four Corners: The Fate of Formalism in Contract Interpretation”. He compares the civil law approach to contractual interpretation, being based on seeming precedence of the intentional canon of interpretation over the textual one, with the English common law formalist Parole Evidence Rule. Although he does not agree that formalism is a satisfactory theory of contract interpretation, he warns the reader of a danger to depart too quickly from the textual canon of interpretation to embrace the intentional one, since the first remains to be the cornerstone while the second its supplement.

Maija Aalto-Heinilä’s contribution “The Role of Theory in Legal Theory: Weinrib’s Formalism and Wittgenstein” presents the legal theory of Ernest Weinrib as an interpretative theory of private law, whose form is to be based on its internal logic. In that she finds many similarities between Weinrib’s and early Wittgenstein’s (*Tractatus Logico-Philosophicus*) general methodological approaches. However, with the aim to defend the theory of legal formalism, she claims that the criticism that the later Wittgenstein (*Philosophical Investigations*) mounts against his earlier work might also be relevant for Weinrib’s theory. In the contribution titled “Interpreting Defeasible Principles and Rules”, **Vojko Strahovnik** discusses the notion of defeasibility in general and defeasible norms in particular. He begins by outlining a relationship between defeasible norms and the notion of an exception. Then he further focuses on attempts that relate defeasible norms to some sort of normalcy condition, i.e. to defeasible norms as holding in normal circumstances only. By investigating this proposal he addresses a question whether such a model allows for defeasibility to go “all the way down” in the normative domain, or is it merely a feature of some sort of mid-level norms. He ends up arguing for the latter conclusion.

Marko Novak's contribution with the title "Rhetorical Legal Argumentation through a Multimodal Dimension" deals with legal interpretation's counterpart that is legal argumentation. He discusses it from a rhetorical perspective in which legal arguments are not viewed merely as products as such, but results of a process in the framework of which arguers and audiences with all varieties of psychological characteristics shape them in (ir)rational manners. Such a rhetorical approach to legal argumentation is studied from a multimodal dimension including the logical, emotional, sensory, and intuitive modes. In his contribution entitled "Reinventing Systematic Interpretation: Criteria and Uses of the Tripartition into Public, Private and Social Law," relying on policy-oriented jurisprudence, **Ivan Padjen** argues against the exhaustive division of major fields of law into two large groups, i.e. private and public law. In addition to the established two groups, he considers another one, i.e. social law. By reconstructing a crucial aspect of the continental European conceptions of legal system, he strives to re-systemize the tripartition of law into public law, private law, and social law on the basis of criteria derived from Aristotle's analysis of justice.

Federico Puppo's contribution, "Realism, Truth and Meinongianism. A Metaphysical Conception of Law and Legal Discourses," deals with the problem of truth in legal argumentation. In questioning truth, he wants to examine the meeting point of different but converging axes, such as: the ontological axe (about the nature of reality), the epistemological (about the knowledge of reality), the logical (about discourse and reasoning that involve reality) and the methodological one (about the need to refer to reality in our activities). By discussing truth, he would like to posit the need to look at it from an Aristotelian philosophical point of view. **Maurizio Manzin** contributed a paper entitled "Are There 'Non-Euclidean Geometries' for Judicial Reasoning? Epistemological Pluralism Facing the Crisis of Legal Formalism". By emphasizing that the so-called Euclidian privilege (i.e. the "geometrical clarity" of knowledge) has been lost, Manzin points out that the contemporary crisis of formalistic legal positivism together with the success of Dworkinian interpretivism suggest that we are at a turning point: a point in which it is not under discussion the shift of jurisprudence from science to the humanities, but rather the concept of science itself. Last but not least, **Ivana Tucak** concludes the volume with her contribution titled "Hohfeld's Analytical Scheme and Constitutional Economic and Social Rights". Building on Wesley Newcomb Hohfeld's analytical approach developing the concepts of right and duty much further, she wants to clarify some of the relevant misunderstandings relating to the application of Hohfeld's analysis to contemporary constitutional rights,

particularly constitutional economic and social rights. In such a manner she discusses and joins those attempts which supported the use of Hohfeld's analysis in constitutional law.

CHAPTER ONE

IDENTIFYING “PURELY” INTERPRETATIVE ISSUES AND ACTIVITIES

BRUCE ANDERSON AND MICHAEL SHUTE

We begin this chapter by noting that interpretation operates in almost everything that lawyers do. Next, we consider the work of Patrick Brown to make the point that interpreting the text written by a single author is different from efforts to grasp the meaning of historical documents and events which, in turn, is different from the task of reinterpreting legal doctrine and principles. Then we perform a cognitional analysis of interpretation in order to identify ‘purely’ interpretive issues and activities. Finally, we consider the implications of treating interpretation as a distinct activity.

Introduction

We begin with a consideration of how the word ‘interpretation’ is used in the legal profession. A brief survey reveals various uses. We call the meaning lawyers and judges give to legislation interpretation. We refer to judicial decisions in constitutional law as constitutional interpretations. We take it for granted that judicial decisions are interpretations of the law. And we talk about lawyers offering competing interpretations of precedents to support their arguments. Regardless of the context, when someone talks about legal interpretation every legal professional seems to know what they are talking about. In a short article I made the point that “interpretation is rich and varied”¹ and that “interpretation covers just about everything that everyone in the legal profession does.”² The

¹ B. Anderson, ‘Nine Lives of Legal Interpretation,’ *Journal of Macrodynamic Analysis*, Volume 5, 2010, 32.

² *Ibid.*, 32.

meaning of legal texts, the application of law, and the decision-making process itself are entwined and unified as legal interpretation.

Moreover, this portrait of legal interpretation is manifest in legal theory. Consider Ronald Dworkin's view. Law is an interpretive concept. Both the discovery of law and its application involve interpretation. This notion of interpretation sits beside other accounts in which legal justification and legal reasoning are aspects of interpretation.³ For centuries the legal profession has been successfully interpreting the law. Likewise, an industry of legal scholars, law teachers, lawyers, judges, legal theorists, political scientists, politicians, sociologists, journalists, and talking heads who interpret these initial legal interpretations is also thriving.

We might conclude that, whatever it is, legal interpretation works. For lawyers and judges interpretation in its various contexts is part of a normal working day. For legal theorists, law conceived as an interpretive concept is strikingly sensible. Apparently, there is no pressing need to move beyond these common-sense notions of legal interpretation to pin down more precisely what interpretation entails.

But what, exactly, is a legal interpretation? How is it accomplished? And when we have interpreted a legal text, is there a difference between the meaning of the interpreted text and how it should be applied?

Identifying 'Purely' Interpretive Issues

In a recent article Patrick Brown showed that our seemingly unproblematic notion of legal interpretation could benefit from some untangling.⁴ Brown focused his attention on the 'establishment' clause of the American Constitution that stipulated that Congress not make any law "respecting an establishment of religion" and the subsequent constitutional doctrine of the 'separation of church and state.' He sharply distinguished between the need for interpreting what the 'separation of church and state' meant for a particular individual such as Thomas Jefferson and determining what the

³ For instance, see N. MacCormick, *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1994; N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford University Press, Oxford, 2005; A. Amaya, *The Tapestry of Reason: An Inquiry into the Nature of Coherence and its Role in Legal Argument*, Hart, Oxford, 2015.

⁴ P. Brown, 'Functional Specialization and the Methodical Division of Labor in Legal Studies,' *Method: Journal of Lonergan Studies*, Volume 2.1, 2011, 45-64.

‘establishment’ clause meant to the framers of the Constitution. He argued that interpreting what the ‘separation of church and state’ means for a single person involves a process akin to interpreting the text written by a single author such as Betty Friedan’s *The Feminine Mystique*, Martin Luther King’s *Letter from a Birmingham Jail*, or the first question of Thomas Aquinas’ *Summa Theologica*. Here the task is in each case to express what the writer means with respect to the particular question asked.

By contrast, Brown explains that understanding what the framers of the Constitution meant by the ‘establishment’ clause is a distinctly different activity demanding the skills of historians. He pointed out that what the framers of the Constitution meant by the ‘establishment’ clause is beyond the intentions and plans of individual participants. Rather, understanding what the clause meant to its framers is akin to coming up with a good account of a battle, a story neither told from a general’s point of view nor from a private’s point of view. Such an account would express ‘what was going forward’, that is how things unfolded and developed over the course of the battle. Brown’s point is that this Constitutional document “has the complex intelligibility characteristic of an historical event”⁵ and must be treated appropriately. The task is not a simple matter of attributing shared intentions and then saying that is what it means.

Brown also drew attention to an additional unnoticed aspect of constitutional interpretation, namely reinterpretation. He began by noting that the interpretation of the law in judicial decisions is part of an ongoing process in the development of law. Of course, we are all familiar with, and embrace, forms of legal argumentation that line up previous cases to show how they ‘naturally’ lead to a particular decision. The array of cases preceding *Donoghue v Stevenson*, and *Donoghue v Stevenson* itself, and subsequent cases applying and developing the ‘neighbour principle’ come to mind.⁶ Brown refers to this process as reinterpretation because there is a creative forward-looking element to it. New problems or questions will emerge requiring both the re-examination of the original expression and the layered history of relevant interpretations since the original expression. In fact, he claims that reinterpreting the ‘establishment’ clause in the American Constitution is more like the development of religious doctrine than understanding a text written by an individual author or working out

⁵ Ibid., 55.

⁶ For instance, see W.R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950*, Sweet and Maxwell, London, 1989, 486-511.

the meaning of historical events. His point is that “the legal interpretation involved in determining the meaning of a constitutional doctrine or provision in light of a particular case or controversy”⁷ should be distinguished from interpreting texts written by individuals and from understanding ‘what was going forward’ in a particular place at a particular time. Reinterpretation involves both past and present configurations of various constitutional doctrines and expresses what the doctrine *should* mean in the future in the light of a particular concern. To be clear, reinterpretation expresses what a legal doctrine or legal principle *should* mean.

To recap, Brown points out that the tasks of expressing the meaning of a single author, expressing what was going forward at particular times and places, and the reinterpretation of legal doctrines and principles need to be explicitly distinguished from each other. The danger is that by not adequately distinguishing them we conflate and neglect important issues. This leads to sloppy thinking and decision making. Our view is that if we have a better understanding of what interpretation entails we can do it, and other distinct activities, better. For instance, we generally do not acknowledge in any serious way the historical contexts of legislation or judicial decisions. Legislation, for instance, has a social history, economic history, political history, legislative history, and presumably it was passed because it was judged to be an intelligent and reasonable solution to some type of recurring problem. Judicial decisions and legal doctrines and principles also have histories. In this light, lawyers’ and judges’ moves to express the ratio of a particular case without adequately understanding its historical context mask important influences. However, because, judicial decisions do not emerge out of the blue, pronouncements on what a legal doctrine should be cannot be simply reduced to debates about the meaning of words. The upshot is that different types of interpretive problems call for different kinds of solutions.

Brown also identified other issues that we currently treat as interpretive. He notes, the inability of legal scholars to effectively handle disagreements among interpreters, illustrated by the near impossibility of settling disputes about what the framers of the American Constitution meant, and the need to find suitable grounds (likely to be extra-legal) for choosing one particular formulation of the doctrine over another. His point is that these issues cannot be adequately handled unless they are treated as distinct issues. These issues are not simply interpretive. They cannot be resolved

⁷ Brown, 56.

in the same manner as the interpretation of the meaning of what one person said or wrote.

In the Introduction we suggested that determining the meaning of legal texts and judicial decision making are conflated by lawyers and legal theorists when they treat both tasks as interpretive issues. The crux of the criticism is that understanding the meaning of a text is a quite different task from deciding the outcome of a case. Casting judicial decision making solely or primarily as an interpretive issue masks the important role of correctly understanding the full context, deliberation, judgments of value, and choice in the judging process and instead portrays decision making as simply a search for the meaning of a text. Further, this conflation obscures what the interpretation of texts actually entails. I may now have a good idea what a text means but there remains the further question as how it is related to the deliberation I now have to do.

Perhaps an introspective analysis of the interpretation of a single author’s text will help us better understand what interpretation entails. The type of analysis we propose involves identifying the relations among cognitional activities, particularly direct and practical insights, and expression. By homing in on ‘purely’ interpretive issues and activities we hope to communicate the complexity of interpreting the meaning of a single author. This complexity will reveal why the process of interpreting the meaning of a text should be kept separate from other distinct issues such as determining what was going forward in particular places at particular times, settling conflicts between competing interpretations, histories, and doctrines, taking a stand on what values are important, and reinterpreting legal doctrine and principles.⁸ Other specialized methods must be used to address these matters. Hence our focus is not constitutional interpretation that requires the skills of historians or the skills required for reinterpreting legal doctrines and principles. Rather, our focus is restricted to issues and activities that are ‘purely’ interpretive. Our key question is what exactly is an interpretation?

⁸ See B. Anderson, *Discovery in Legal Decision Making*, Kluwer, Dordrecht, 1996 for more on the need to distinguish these matters. See P. Brown ‘Functional Specialization and the Methodical Division of Labor in Legal Studies,’ *Method: Journal of Lonergan Studies*, Volume 2:1, 2011 on the eight functional specialties.

Identifying ‘Purely’ Interpretive Activities

Consider the seemingly straight-forward statement that “An interpretation is the expression of the meaning of another expression.”⁹ What does this mean?

We begin with Bernard Lonergan’s explanation of the difference between an original expression and an interpretation. The key to understanding interpretation is grasping the relationship between insight and expression. Obviously, an interpreter needs oral statements or a written text to interpret. We call these raw materials an *original expression*.

The speaker’s or writer’s expression depends on a *principal insight*, that is the speaker’s or author’s grasp of how some data (memories, experiences, events, situations, insights, facts, values, or decisions for instance) are connected, or related, or fit together as some sort of unity in light of a particular question or series of questions. It is one thing to have an idea; and it is another thing to state it or to write it down. The principal insight corresponds to the idea, the practical insight to how it is expressed.

Oral statements and written texts (a speaker’s words or an author’s text) are governed by a *practical insight* regarding how to express the idea the speaker or writer wants to communicate. Expression is spontaneous when a person knows exactly what they want to say and how to say it. But expression can be deliberate and prolonged when an idea is complex or a person has to work out how to say or write what they mean.

If you are a teacher, politician, writer, or parent you know that you have to consider your audience if you want to communicate effectively. So, the speaker or writer’s practical insight regarding the question of how to express an idea, in turn, depends on the speaker’s or author’s grasp of their audience’s knowledge and also on the speaker or author’s grasp of their audience’s deficiencies in knowledge that have to be overcome in order to communicate the principal insight, the idea. Think of a teacher deliberating about the best way to arrange topics to take students step by step through an unfamiliar topic or a lawyer preparing oral arguments that will appeal to a particular jury.

To recap, the raw materials for an interpretation is a speaker or author’s *original expression*. And this original expression – something said or written – depends on a principle insight formulated by the speaker

⁹ B. Lonergan, *Insight: A Study of Human Understanding*, University of Toronto Press, Toronto, 1992, 608.

or author and a practical insight regarding how to express it in light of the questions asked.

What, then, is an interpretation? An *interpretation* is a second expression addressed to a different audience. The aim of the interpreter is to express what the original speaker’s or author’s expression means. It is not to evaluate it or to correct it. It is not to stipulate what action should be taken. It is simply to express what the sounds or the marks on the paper mean.

This second expression – the interpretation – is guided by the interpreter’s *practical insight* regarding how to express his understanding of the original speech or text. Because the interpreter’s audience is different from the original speaker’s or author’s audience the interpreter’s practical insight differs from the practical insight that governed the original expression. Hence the original expression and the interpretation are different. Also, since the original audience and the interpreter’s audience are different the interpretation depends on the interpreter’s grasp of his audience’s knowledge and also on the interpreter’s grasp of the deficiencies in his audience’s knowledge that must be overcome in order to communicate the interpreter’s *principal insight*, that is the interpreter’s understanding of the original expression.

An interpretation, then, depends on a *principal insight* that the interpreter wants to communicate to his audience. But that principal insight is the interpreter’s principal insight – the interpreter’s understanding of the original expression. The interpreter’s principal insight is not the same as the speaker’s or writer’s principal insight. In many cases, the speaker or writer will know much more about the topic than the interpreter. Of course, interpreters want their interpretations to be correct, not mistaken. To be a correct interpretation the interpreter’s principal insight must correspond to the principal insight that grounded the original expression.

Bernard Lonergan sets out the proper procedure for an interpreter. He breaks the interpretive task into three basic operations.¹⁰ We will summarize them.

The first basic operation requires the interpreter to understand the subject matter referred to in the text, understand the author’s words in the text, understand the author’s nation, language, life and times, culture, and cast of mind. In many situations, the interpreter may have to learn more

¹⁰ B. Lonergan, *Method in Theology*, Darton, Longman, and Todd, London, 1971, 153-196.

about the subject matter, the meaning of the words used in the text, and more about the author in order to understand the text.

The aim of the second basic operation an interpreter is to correctly understand the text. The interpreter must judge how correct his understanding of the text is, the extent to which his principal insight corresponds to the principal insight of the original speaker or author. The judgment can range from doubt to certainty.

To complete the procedure the third basic operation is that the interpreter states what they judge to be the correct understanding, the meaning, of the text.

Implications of the Cognitional Analysis

We have been able to pin down the aim of interpretation as correctly understanding and expressing the meaning of an original expression. This is important because it helps us grasp what an interpretation is not. Interpretation is not a reconstruction of exactly what happened. Interpretation does not discern 'what was going forward'. Interpretation does not settle disagreements among competing interpretations, histories, or doctrines. Interpretation does not state what a legal doctrine of principle *should be*. Interpretation is not the application of a text to a particular concrete situation. Interpretation does not identify, evaluate, and decide what should be done in a legal decision process.

We also have a more precise understanding of the criterion for judging the correctness of an interpretation. An interpretation is correct when the principal insight of the interpreter corresponds with the principal insight of the original speaker or author. It is evident that interpretation is not simply about the meaning of words and that competing interpretations cannot be reduced to debates about language-usage. At the centre of interpretation is the positive role of the interpreter. There is no reason to think this is not the case in law.

An interpretation is correct insofar as the speaker's or writer's principal insight corresponds to the interpreter's principal insight. A judgment on this issue is called for. The essential role of the experience, intelligence, and reasonableness of interpreters is recognized, affirmed, and demanded. An interpretation is objective if it is intelligent and

reasonable.¹¹ In fact, free reign must be given to intelligence and reasonableness to reach correct and unbiased interpretations.

By contrast, for legal theorists the problem to be overcome is framed negatively in terms of arbitrary and irrational hunches and subjective moral values that must be constrained, controlled, and suppressed by a rational, objective, impartial, logical process of legal justification.¹² Legal rules, deductive logic and tests of coherence and consistency plus consequences are employed. The aim is to express the outcome in a form accepted by the legal profession. Judicial decisions are legally justified if they can be cast in the form of a major premise (the law), a minor premise (the relevant facts), and a conclusion (the decision or outcome of the case). And when interpretations of a law compete for acceptance the possible and probable consequences of each competing interpretation, the extent of their consistency with other judicial decisions and laws, and their consistency and coherence with case law and the legal system have to be demonstrated.

The cognitional analysis of interpretation helps us understand why an interpretation is different from the original expression. Both the original expression and an interpretation are relative to their audience. In an effort to address differences in the knowledge and lack of knowledge of their particular audiences, interpreters offer different interpretations of original expressions.

Different interpretations of the same text can be explained. Not only are they due to different audiences but they are also due to different interpreters. Interpretations differ due to the experiences and lack of experiences, the level of understanding and lack of understanding, and the past reasonable judgments and the failures to judge of particular interpreters.¹³ In other words, interpretations differ due to the differing horizons of interpreters. Interpretations depend on the limits of what an interpreter knows, what an interpreter knows about, and what an interpreter has never heard of and hence knows nothing about.

For some people their reasoning has become specialized. They have learned to use specialized methods and achieved specialized knowledge.

¹¹ For more on objectivity see B. Anderson and M. Shute, ‘The Procedural and Contextual Aspects of Objectivity in Legal Reasoning,’ *Truth and Objectivity in Law and Morals*, ed. H. Yoshino, A. Santacoloma Santacoloma, G. Villa Rosa, Archives for Philosophy of Law and Social Philosophy, Beiheft, 148, 2016, 83-98.

¹² For instance, N. MacCormick, *Legal Reasoning and Legal Theory*.

¹³ B. Lonergan, *Insight: A Theory of Human Understanding*, 576-595.

Hence, we distinguish among commonsense, science, art, scholarly/history, mystical, and philosophic differentiations of consciousness. A scientific explanation of blood cells by a hematologist will be very different from an artwork dealing with blood. And hopefully it is becoming evident in this paper that a philosopher's cognitional analysis of interpretation differs from the commonsense thinking of lawyers, judges, and many legal theorists. Hence interpretations vary due to differences in specialized knowledge.

The analysis above highlights a neglected source of meaning. We are familiar with the external source of meaning – talk and texts. The legal profession is especially prone to thinking that the only source of meaning is their texts. But the primary source of meaning is not texts. Meaning does not refer to sensible data only – patterned sounds and “spatially ordered marks on paper.”¹⁴ Ideas are communicated through the sensible, through marks on paper, but what is intelligible is not in the marks. It is in minds. To interpret the marks, we must figure them out in light of the particular questions we ask.

The legal profession is obsessed with their texts and believes that meaning resides within their texts – in statutes, regulations, and case reports. For them the aim of interpretation is to find the meaning in the text. In easy cases the text speaks for itself. But in hard cases it is necessary to look harder. Rules of interpretation (literal rule, golden rule, intention, purpose) are brought to bear in the search for the correct interpretation of a text. If enough words could be defined clearly and exactly they could arrive at the exact meaning of a text. Nevertheless, the meaning is regarded as being out there lurking in the text, not in the experience, intelligence, and reasonableness of an interpreter.

The primary source of meaning is the interpreter, the interpreter's experience, understanding, judgment, and values. Lonergan claims that we must pay attention to this immanent source and openly acknowledge it. If an interpreter assigns meanings to marks on paper then the experiential component is derived from the interpreter's experience, the intellectual component is derived from the interpreter's intelligence, and the rational component is derived from the interpreter's critical reflection on the critical reflection of another person.¹⁵ It is this open acknowledgement of the interpreter's experience, understanding, judgment and values that counter inattention, obtuseness, unreasonableness, and bias in interpreters.

¹⁴ Ibid., 605.

¹⁵ Ibid., 590.

Interpretations can differ due to the bias of interpreters. Individual bias distorts interpretation to the extent that an interpretation becomes self-serving, serving the self-interest of the interpreter. Lawyers presenting interpretations of cases or legislation that favour their clients comes readily to mind. Group bias, a group's concern with its own interests to the exclusion of others, skews interpretation toward benefitting members of a particular group. The general bias of common sense distorts interpretation and practical problem solving insofar as relevant theoretical issues and long-term perspectives are brushed aside by an interpreter. Although the strength of common sense practical reasoning – which is the dominant form of reasoning in law – is its specialized knowledge of particular concrete events, situations, and problems that call for immediate practical results, this mode of reasoning cannot analyze itself, is incapable of criticizing itself, and is unable to handle theoretical issues and situations that call for a long-term perspective. Nevertheless, commonsense reasoning considers itself omniscient in matters in which it has no competence whatsoever. When it treats complex theoretical issues as simple practical problems it reduces and distorts the theoretical issues and in so doing it also distorts its capacity to correctly understand and wisely solve particular concrete problems. The danger is that legal problem solving is treated simply as an interpretive matter, previous judicial decisions are used indiscriminately, and legal doctrines and principles are developed haphazardly.

Loneragan believes that confusions and misconceptions about the goal of interpretation and blunders about the procedures of interpreters result from presuming meaning refers to sensible data only, not knowing that the goal of interpretation is to correctly understand and express the meaning of another expression, mistakenly believing that objectivity is taking a good look, seeing what is there and not seeing what is not there, and letting things speak for themselves rather than understanding that the criteria of objectivity is intelligent and critical inquiry. By presuming that meaning is ‘already out there’ rather than what is grasped intelligently and affirmed rationally the primary source of meaning is obscured. The key point is that texts do not speak for themselves and knowledge is not a look prior to all questions.

Conclusion

We began by drawing attention to the fact that for lawyers and legal theorists, interpretation covers just about everything that they do from the meaning of texts to the application of law. Pat Brown called out this

perspective by sharply distinguishing between the interpretation of a text written by a single author, the interpretation of historical documents such as constitutions, and the reinterpretation of legal doctrines and principles. We noted that other issues such as resolving disputes between conflicting interpretations, conflicting histories, and conflicting doctrines; stipulating the grounds for evaluating legal doctrines and principles; the task of formulating legal doctrines; the challenge of translating doctrines into viable plans, and the job of deciding what to do in particular situations are not interpretive issues.

We restricted our attention to ‘purely’ interpretive issues and activities. The rationale was that if we could better understand interpretation perhaps it could be performed better and that it would help to distinguish interpretation from other tasks. To that end, we offered an answer to the question, ‘What exactly is interpretation?’ While drawing on the work of Bernard Lonergan we performed a cognitional analysis. The short answer to our question was that “an interpretation is the expression of the meaning of another expression.”¹⁶ Other important aspects of interpretation were identified: its basic operations, its aim, the criterion of correctness, explanations of why interpretations differ, the primary role of the interpreter, and bias. We ended by suggesting that the confusions and misconceptions about interpretation that bedevil lawyers and legal theorists can be traced to neglecting the cognitional activities of interpreters and mistaken views on objectivity.

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¹⁶ Ibid., 608.

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CHAPTER TWO

BEYOND THE FOUR CORNERS: THE FATE OF FORMALISM IN CONTRACT INTERPRETATION

SEPPO SAJAMA

It is argued that formalism, understood as the practice of using the textual canon (literal interpretation) is part and parcel of contract law. However, the textual canon cannot be the only canon, as certain textualists argue. But neither does the intentional canon have precedence over the textual one, although certain Continental civil codes seem to say so. The Parol Evidence Rule, a unique English version of formalism in contract law, is also considered. Although it has been declared dead, it lives on in Lord Hoffmann's new rules of contract interpretation. It is concluded that formalism is not a satisfactory theory of contract interpretation, although we will always need its cornerstone, the textual canon of interpretation.

1. Formalism and Legalism in Contract Law

The words 'legalism' and 'formalism' mean the same doctrine. They both hold that literal (or textual) interpretation has precedence over other kinds of interpretation, especially intentional interpretation. This understanding of 'formalism' is confirmed by a dictionary: "Formalism is a style, especially in art, in which great attention is paid to the outward form or appearance rather than to the inner reality or significance of things." This meaning of 'formalism' comes close to that of 'legalism', "strict adherence to the law, esp. the stressing of the letter of the law rather than its spirit."¹ In contractual interpretation, 'formalism' means the attitude described in the *Flateyjarbók*. Merchant Hroa the Simple bought a "house and everything inside it". The careless seller signed the document

¹ *Collins English Dictionary*.

inside the house and thereby became Hroa's slave. After that, Hroa was called Hroa the Wise.²

A more accurate definition of 'formalism' can be given by means of the four canons or rules of interpretation put forward in the 19th century by the German legal scholar Friedrich Carl von Savigny. He is said to have put forward four canons of legal interpretation: TeXTual, INTentional, SYStematic and TELeological.³ Their ideas can be expressed as follows:

TXT: Follow the literal meaning of the document.

INT: Follow the intention of the author of the document.

SYS: Choose the interpretation that avoids contradiction.

TEL: Choose the economically efficient interpretation.⁴

The idea of formalism can now be expressed as the commandment 'Use only the TXT canon'. In this chapter, I consider how far formalism can take us in contract interpretation. Is it conceivable that the TXT canon could be the *only* canon of contract interpretation? It seems that we cannot do without some formalism, because *legal certainty* requires a fair amount of it. Roughly, legal certainty means that that people's legitimate expectations are to be protected and that it is not permissible to change the rules during the game. Thus, the interpreter should stick to the literal meaning of the contractual document because people are supposed to use words in their ordinary meaning. That is the default rule, and deviations from it – i.e., the use of other canons – must be justified. So, I am not asking whether we need the TXT canon, for we absolutely do; I am asking whether it is conceivable that the remaining three canons – INT, SYS and TEL – are dispensable.

There seems to be a difference between the Continent and England in their attitudes to formalism in contract interpretation. Several Continental civil codes contain a rule saying that the INT canon has precedence over the TXT canon, whereas in England the Parol Evidence Rule (PER, for short) says that the interpreter must stick to the text of the contractual meaning and ignore the presumed common meaning of the parties – unless it is expressed in the document itself.

² Hov 1999, p. 73.

³ Savigny 1840, pp. 212-216.

⁴ This is not Savigny's original set of rules for statutory interpretation. His logical canon is nowadays replaced by the TEL canon.

The Pan-European *Draft Common Frame of Reference* says that the INT canon is more important than the TXT one: “A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.”⁵ Italy’s Civil Code says that one should look for the common intention of the parties, rather than the literal meaning of their words: “That which was the common intent of the parties, not limited to the literal meaning of the words, shall be sought in interpreting the contract”.⁶ Spain’s Civil Code also lets the intention prevail over the words: “If the words seem contrary to the evident intention of the contracting parties, the latter shall prevail over the former.”⁷ The same is true of Germany’s Civil Code, too, as we will see later.

But in England, the PER requires that the interpreter stick to the text of the document and not take into account any external (‘parol’) evidence about the parties’ intentions. As Guenter Treitel puts it: “The parol evidence rule states that [extrinsic] evidence cannot be admitted ... to *add to, vary or contradict* a written [contractual document]”.⁸

It would seem, then, that formalism is doing rather well in England but not so well on the Continent. But let’s have a closer look.

2. Continental Anti-formalism?

The Italian *Codice civile* gives a generous list of ten rules of contractual interpretation. The titles ‘subjective interpretation’ and ‘objective interpretation’ do not occur in the code but they regularly occur in the literature, although there is no consensus as to which rules belong to which kind of interpretation. These are the rules (in a slightly abbreviated and simplified form):

[SUBJECTIVE INTERPRETATION]

Art. 1362: Common intention should prevail over literal meaning.

Art. 1363: Interpretation should be holistic.

Art. 1364: Intention should determine the scope of the clauses.

Art. 1365: Examples should always be taken to exemplify general rules.

⁵ DCFR II. – 8:101: (1).

⁶ *Codice civile* art. 1362(1). “Nell’interpretare il contratto si deve indagare quale sia stata la comune intenzione delle parti e non limitarsi al senso letterale delle parole.”

⁷ *Código civil*, art. 1281 (2). “Si las palabras parecieren contrarias a la intención evidente de los contratantes, prevalecerá ésta sobre aquéllas.”

⁸ Treitel 1999, p. 175, emphasis added.

[OBJECTIVE INTERPRETATION]

Art. 1366: Interpretation should be guided by good faith.

Art. 1367: After interpretation, clauses should have some effect.

Art. 1368: Unclear clauses should be harmonized with local business usage.

Art. 1369: Ambiguous expressions should be given their natural meaning.

Art. 1370: Ambiguous clauses should be interpreted against their author.

[IF BOTH FAIL]

Art. 1371: If none of the above apply, the interests of the parties should be balanced.

The fundamental idea of the Italian doctrine seems to be as follows: (1) Start with the subjective interpretation, i.e., with the search of the common intention of the parties (art. 1362-1365). (2) If a common intention cannot be found, move on to the objective interpretation, i.e., to the reconstruction of what must have been, from a reasonable person's point of view, the common intention of the parties (art. 1366-1370). (3) If the reconstruction fails, the interests of the parties are to be balanced.⁹

In any case, these rules give special emphasis to the INT canon. The TXT canon is not mentioned at all, nor is the ideal of legal certainty, unless it is seen to be part of art. 1366 (enjoining good faith). Iudica and Zatti regard this article as the basic principle (*regola-base*) of interpretation, not classifiable either as subjective or objective because it guides both kinds of interpretation.¹⁰ The same could be said of art. 1363 enjoining coherence and non-contradiction, which are valid ideals in both objective and subjective interpretation, and indeed in all rational thinking.¹¹

The first rule, art. 1362, is the most important. It says that the common intention of the parties prevails over the literal meaning of the document. The same intentional bias can be seen also in Germany's Civil Code (*Bürgerliches Gesetzbuch*). Its rather minimal rules of contractual interpretation – only two or three rules as compared to Italy's and Spain's ten or so – show a clear tendency to anti-formalism. Section 133 emphasizes

⁹ Declaring the contract inexistent seems not to be an option in Italy. In the US, it is. See § 201 of *Restatement (Second) Contracts*.

¹⁰ Iudica & Zatti 2003, p. 312.

¹¹ The absence – or secondary role – of the TXT canon could perhaps be explained by the fact that the distinction between subjective and objective interpretation does not apply to it: (i) If there is something that is really “objective” in a contract, then it is the text. (ii) But the text is also “subjective”, since it is – in most cases – the expression of the common intention.

the intention over the text: “When a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration.”¹² This is the general rule for the interpretation of *any* declaration of intent. A little later comes section 157 dealing with the interpretation of *contracts*: “Interpretation of contracts. Contracts are to be interpreted as required by good faith, taking customary practice into consideration.”^{13, 14}

In practice, the primacy of the common intention over the text has never been absolute. An absolute version of the doctrine ‘intention prevails over text’ would even be dangerous. A judge who has an overly high opinion of his or her own ability to gauge the common intention of the parties is a potential threat to legal certainty. If this is true, how can the popularity of the ‘intention prevails over text’ doctrine be explained? Why is this rule of interpretation present in all European civil codes?¹⁵ A speculative explanation of this intentional bias can be given in historical terms. In the past, people were so attached to literal interpretation that the legislator thought that they need to be reminded of the importance of the INT canon. Therefore, the ‘intention prevails over text’ doctrine was taken into the European civil codes. But the old literalist tendency lingered on: the judges took this new doctrine too literally. The result was a decline in legal certainty. That is why, for example, the Italian Supreme Court was obliged to remind the judges that the TXT canon is still the default canon

¹² “Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.”

¹³ “Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.” It is noteworthy that the common intention is not mentioned here. ‘Good faith’ is not meant to replace the ‘true intention’ of the parties.

¹⁴ When the German doctrine of contract interpretation is discussed, often a third rule from the BGB is mentioned: “Section 242 Performance in good faith. An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.” It can be asked whether this is really a rule of *interpretation* at all. The performance of a contract happens later than the conclusion of a contract. If behaviour *posterior* to the conclusion of a contract is essential in determining its content, then sec. 242 is a rule of interpretation. But it might still be asked: How is it possible that something that happens in the *future* can determine the content of the parties’ *present* intention? The answer is simply that present acts can serve as evidence for past intentions – as well as future acts for present intentions.

¹⁵ Scandinavian countries have neither a civil code nor other *codified* rules of contract interpretation – nor a Nordic counterpart of Lord Hoffmann.