General Aspects of Interpretation in Law

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Abstract

The interpretation of texts is one of the main forms of science and culture. Juridical reasoning appears more often than not under the form of the application of a rule, of a case, in general from the perspective of the judge, to obtain a contestation or to make a decision. When the rule appears in a text, this reasoning requires the use of an interpretation. Juridical interpretation, in its literal sense, consists in determining the meaning of the text in order to clarify the significance of the rule in the context of its application. In a broader sense, the interpretation designates any form of juridical reasoning that leads to solving a case or discovering a rule, regardless of the reference to a context or the lack of it. Interpretation is, therefore, the central issue of juridical reasoning (B. Frydman, 2011, p. 19).

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Introduction

The juridical science has recently come, after a long period of time, with a much-awaited definition of the methods and techniques, establishing or criticizing their rational and legitimate character, and evaluating their contribution to the knowledge of law. At the intersection between will and power, between tradition and its criticism, juridical interpretation models determine the relations, very variable in time, between a society and the norms organizing it and the authorities publishing them (Idem).

The pragmatic criticism of the clear sense is important to the extent to which it overcomes the double issue of the unique meaning and its corrolary, the unity of the legitimate interpretation method, which had both been imposed to the juridical interpretation, in the name of modern science. The acknowledgement of the plurality of the interpretation methods, actually applied by the jurisdictions, and of its legitimacy, is actually the most important trait of the contemporary law doctrine and theory in interpretation (Ibidem, p. 599).

To understand interpretation adequately in philology and, more generally, in all the human sciences (H. Gadamer, 1976, pp. 152-153, p. 307), it is absolutely necessary to start once again from juridical hermeneutics:

"The case of juridical hermeneutics is not a special case, therefore; yet it can restore historical hermeneutics to its original dimensions and thus reestablish the initial unity of hermeneutics, where the lawyer and the theologian meet the philologist." (Ibidem, p. 311).

The interpretation of the rule can only be operated in relation to the acts, yet the actual situation can only be determined depending on the rule. This dialectic tension between interpretation of law and statement of acts is well-known for lawyers. Hans Georg Gadamer sees in this necessary mediation between general and particular, where the ancient practical wisdom exhibited its qualities, the juridical version of the hermeneutical circle (B. Frydman, 2011, pp. 646-647).

Hermeneutics and interpretation

H. Gadamer and J. Habermas' debate, and the closeness it reaches, adds a corner stone to the edifice of the contemporary theory of interpretation. First, the debate authorizes a combination of the paradigms of Gadamer's new hermeneutics and Perelman's new rhetoric, which had appeared, at least at first, as divergent and even competing. The contemporary practical reason will be both hermeneutics, at the same time, to the extent to which it necessarily relies on a certain state of the tradition it inteprets, and dialectics, as soon as the choice of the best interpretation shall be the result of a well-argued debate. More concretely, the reasoning will take its substance from the interpretation of a text, yet it will continue by a contradictory discussion that will determine its sense. The gradual approach of hermeneutics and criticism allows overcoming the radical separation between text and reason, instated by modernity, whose destructive effects on juridical interpretation are well known. For contemporary law, which sees itself as "positive law", it really is impossible to imagine a reasonable science or at least practice of law that would not reconcile one way or the other, the authority of an obligatory text and the realization of a free reasoning. One of the merits of the intense contemporary debate around interpretation is precisely the fact that it has opened this possibility conceptually. This theoretical possibility needed a concretization in the juridical domain. Here, the American law theorist R. Dworkin was to play an important role (Ibidem, pp. 656-657).

Law and interpretation

At the beginning of this description it is important to analyze the distinctive elements of judicial interpretation in the model of law as integrity. First, Dworkin proposes a conception on law and the judicial activity pervaded by interpretation from one end to the other and at all levels. He considers that law consists, in essence, of interpretations (R. Dworkin, 1994; R. Dworkin, 1996, p. 4). The general theory of law is nothing else, itself, but an interpretation, at a superior level of generality and abstractization, of the juridical institution as a whole. (R. Dworkin, 1994, p. 446; *apud* B. Frydman, 2011, pp. 660-661).

"The tribunal of reason" no longer has its home in the subject's conscience, but in language, or rather in communication. The "justness" or, in a broader sense, the validity of an interpretation is no longer measured, therefore, using the Cartesian criterion of

"certainty" and "obviousness", but using the result of a discussion based on arguments and directed according to certain rules (B. Frydman, 2011, p. 671).

Overcoming the monologism of the judge's conscience to resituate interpretation within this process and in a broader sense in the operation of the judicial institution, the pragmatic model brings back the procedure at the heart of these preoccupations. In the pragmatic model, the normative constraints no longer have the same overwhelming prevailance over the interpretation methods, which are recognized as plural and often compete in a contradictory discussion; the prevailance goes rather to the very modalities of this discussion. The rules refer less to the content of the arguments but rather to the conditions in which these arguments are produced and expressed in dialogue (Ibidem, p. 673).

Competing contemporary models of interpretation

The present situation witnesses the confrontation, on the level of the constructive theories of juridical reasoning: on the one hand, the pragmatic model, and on the other, the sociologic and economic models. While the pragmatic model trusts the resources of argumentation and interpretation to determine a progress in the judicial practice, considered as a learning process, the socio-economic model prefers to base the judicial decisions on the calculation or determination of the pertinent interests involved. Each of these models is actually supported by an important critical trend: on the one hand, the school of deconstruction and on the other hand the *Critical Legal Studies* and, more generally, those that, according to Marx, see in law a tool legitimating the dominant interests. These two critical trends merge to denounce the violence of the dominion exerted by law and its ideological character. These critical trends are essential to recall law to respect of the demands of justitice. The judicial practice calls however for the power to implement positive interpretation models. From this perspective, the method of the scales of interests seems in fashion, being considered by some practitioners as a universal solution. However, it has the disadvantage of seeing every judicial decision as a solution case by case, motivated by particular circumstances specific of each case in turn. By doing so, it overlooks the fact that every judgement needs to rely on a rule, and justice calls for an equal application of these rules. In positive law, rules are formulated via obligatory texts. The use of interpretation, in the litteral sense of the term, appears therefore indispensable, as the pragmatic model suggests, for the integration of the particular decisions in the juridical order and in the fundamental principles it relies on. Interpretation permits at the same time to justify a part of the validity of the decision made and enrich with its teachings the juridical order as a whole. This makes it necessary for the judges to be recalled to the order of law, namely to have to motivate their decisions, notwithstanding the consideration of the particular interests at stake, by reference to the rules and principles of the juridical order (Ibidem, pp. 681-682).

Conclusions

This contemporary epistemological return obliges us to forget about the modern exaggerated ambition to found an exact science of law on a formalization of juridical

reasoning or a univocal method of application of the rules of law. Without falling into the trap of skepticism, in which the disappointed dogmatism often falls, the pragmatic model explains the rationality operating in the practice of law and imposing its requirements of validity on it. Unlike the modern models, the pragmatic model takes its resources from the very heart of juridical reasoning, from its genius and its history. The pragmatic model proves the epistemological value of interpretation as logic of discovery and learning process, and restores its rank of reference model to the juridical interpretation, the rank which it actually occupies in the contemporary debate. However, the pragmatic model does not claim that it reveals the ultimate secret of solving law matters. Thus, the contemporary debate constrains jurists to forget about an official interpretation technique that could come and fill in the gap left behind by the exegesis doctrine (Ibidem, p. 682).

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