INTERPRETATIVENESS OF THE CONSTITUTION AND OF LAWS

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Abstract: *It is in the nature of any legal act and particularly of the constitution that there exists a difference between the law as a text and the law as a process of interpretation and implementation of this text. This antinomy was already brought to the attention of the audience on 15 April 1920 by Leonid Pitamic in his opening lecture Pravo in revolucija (Law and Revolution), starting the lectures at the Faculty of Law of the University of Ljubljana. The mentioned antinomy clearly shows that, behind the text, there is always a man making decisions i.e. a man who is also a moral person. It is true that law and morality are not identical, even radical differences exist between them, but they are also so closely tied that the law loses its legitimacy if the basic constitutional and legal values are forgotten. When interpreting the constitution and the statutes and making decisions, one eventually has to rely only upon himself. This makes the lawyer's work attractive and challenging, but at the same time assigns to him a burden and a responsibility. The text partly corresponds to the festive speech held by the author in the Constitutional Court of the Republic of Slovenia on 17 December 2015, marking the Day of Constitutionality.*

«[A]n antinomy lies at the heart of any legal system. It is caused by a dualism between law as a text and law as the process of interpretation and the application of such texts. Because of this antinomy we must conclude that every legal order will at a certain point negate itself; accordingly we reach one law-applying authority which, by virtue of having the right to interpret a formal question possesses the right to revolutionise the foundations of positive law. (…) This authority's ethical attributes and moral sense shall determine whether or not it will use this immense power to protect the formal continuity of legal order that is invaluable to the steady development of a nation. The moral qualities of all citizens, however, will determine who is entrusted to exercise this right and what sacrifices they are prepared to suffer in order to ensure the continuity of law in general.»[1]

These words were uttered on 15 April 1920 by Leonid Pitamic in his opening lecture *Pravo in revolucija* (Law and Revolution), whereby the lectures started at the Faculty of Law of the University of Ljubljana.

Pitamic's opening lecture raised a number of issues that are fundamental to law and can even today be considered of central importance. The cited passage also asks which authority should be the one to interpret the constitution in the final analysis. The responsible authority, in a certain manner, holds power over the constitution.

The constitutional court was actually introduced in Europe by the constitution of the Republic of Austria of 1920. The draft of the constitution was prepared by Hans Kelsen. The concept of constitutional judiciary is also reflected in Pitamic's opening lecture. It is pervaded by the idea that it should be the judge and not the

[1] Leonid Pitamic, Pravo in revolucija (Law and Revolution), Ljubljana 1920, p. 23.

parliament to have «the last word on constitutional interpretation.»[2] This is even more important today as also constitutional complaints about violations of basic (human) rights by individual acts of state authorities come within the competence of the constitutional court.

The constitution is not only the basic contentual legal act regulating the basic (human) rights, the fundamental legal principles and the organisation of the state. It is also important that it is the starting process act enabling the working of any state- and legally organised community. It is in the nature of any legal act, and especially of a constitution, that its content is not automatically expressed in such a definite manner that it could just be applied. Before a legal act, and especially a constitution, is applied, it has to be understood.

The ideal situation would be if the key to understanding the constitution were completely given in the constitution itself. Legal hermeneutics, however, says that legal understanding is co-decided by the interpreter's prior knowledge, the cultural and legal-civilisatory space within which and for which the constitution is valid and, last but not least, by ever new life cases; these are often much more varied than the ones aimed at by the lawgiver.

The key for unlocking the constitution and the dimensions of its meaning lies, at least partly, in the general and special methodologies of legal reasoning. The Constitutional Court has said several times that a statute is all right if it can be understood by using established interpretation canons and if its content is in conformity with the constitution. The constitution should be treated similarly. Its content should be accessible by means of established interpretation canons.

This sounds well but it is by no means a mathematical formula producing a certain and reliable result. Is it completely clear which are the established interpretation canons? The most evident way is to start from Friedrich Carl von Savigny's classical analysis, according to which the interpretation canons are grammatical, logical, historical, systematic and teleological elements. Which of these elements is the leading one and what are the relations between them? There are about as many answers as there are theoreticians dealing with these issues. A common denominator may be the response that the solution must lie within the linguistically possible meaning of the legal text and that among several linguistically possible meanings of a legal text, one must choose the one corresponding best to the intention and the sense of the norm, i.e. to *ratio legis*. The result is convergent if the same meaning of the norm is obtained by using several methods. And it is no secret that single interpretation elements are open as to their meaning. Thus, the interpretation arguments are solely directions and more or less concise instructions how to act in concrete cases. «Even at their best», Aulis Aarnio says, «they only tell us: go in this direction.»[3] For somebody seeking his way out of the woods this means much and is welcome, in hard cases this may mean even very much and be of decisive importance.

The real power of the constitutional court are not only the decisions concisely expressed in the pronouncements of the decisions. Its power are primarily the arguments supporting the decisions. Quality decisions are only the ones that are also well thought-out from the interpretative aspect, polished and, on top of everything, witty (if the context of the case allows it).

The interpretation arguments used by the courts to substantiate their legal decision and the ways of their mutual connection are not something arbitrary. In an ideal situation the statutes and especially the constitution are interpretatively foreseeable since their intention, structure, and system make their understanding easier.

A quality interpretative explanation is open as to its arguments, consistent from the point of view of formal logic and convincing in its content when it mutually connects its arguments. A quality explanation does not hide its interpretative doubts; if it admits them because they really exist, it is considerably more convincing than an explanation giving the appearance of unambiguousness. Even more: if the balance oscillates between

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2 See ibidem, pp. 20–21.

3 Aulis Aarnio, Reasoning Legal Decisions, in: Rechtsnorm und Wirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag, Berlin 1993, p. 644. – The cited cases are taken from the practice of the Constitutional Court of the Republic of Slovenia.

two or more solutions, the key role goes to the decisive argument. An explanation explicitly admitting it only gains weight.

Since the introduction of the constitutional complaint, the Constitutional Court has, by several decisions, added to the importance of a permanent court practice and also said when deviating from it is arbitrary. Analogously, this also applies to the constitutional court itself. Court practice would ossify if the courts did not – in the long run – continuously develop their practice in harmony with the life that the law is intended for. It is permitted to depart from permanent court practice whenever life demands it and the reasons for the deviation are newer and better than the ones on which the former practice has been based.

Lawyers, professors, judges, also judges in the supreme and constitutional courts, are fallible like all mortals. The difference between judges and other mortals is – as wittily remarked by Bernd Rüthers (the author of the classic book *Die unbegrenzte Auslegung*[4]) – that the judges' errors may be unappealable.[5] Unappealability is an absolutely necessary institution of the legal system and has its own rules that have to be respected if the law is to also guarantee legal safety. Unappealable fallibility cannot be escaped, but it can be reduced if one is strong enough to admit it. It can be reduced if the court by a new standpoint departs from its earlier (erroneous) one. Thus, the court in a new case, which does not violate the principle *ne bis in idem* but whose problem is identical to the unappealable, already decided one, decides so as to suitably correct its error.

The constitution offers several possibilities of interpretation and is sufficiently open as to its meaning that the constitutional court can develop it further. A further development is especially enabled by the legal principles that can be found in the general provisions and by the group of basic (human) rights that also contain several definitions having the character of legal principles. The late German professor and highly respected constitutional judge Winfried Hassemer well-foundedly emphasizes that the basic (human) rights are the natural law part of the constitution. The lists of basic (human) rights contained in modern constitutions are the fruit of rationalist natural law; within the scope in which they entered the constitution[6], they form an important contentual frame that may be a source of the development of the basic (human) rights and at the same time a source inspiring and fecundating legislation.

The interpretation of legal acts and especially of the constitution may not overstep the linguistic boundaries of the legal message. The looser these boundaries are, the more it is necessary to remain true to the semantic core of the legal norm. The certainty and the right measure of interpretation increase if accompanied by elaborate constitutional-law dogmatics, also by dogmatics of individual fields of law, and if the decisions, particularly the fundamental and the most delicate ones, form a part of the reflections of legal philosophy and legal theory. At the same time, the constitutional-law decisions should be the object of a critical and committed, upright and honest professional discourse.

The measure of interpreting the constitution and the statutes should seek, as Aristotle would say, the middle way and a balance between too much and too little. This is a very difficult task, which requires a person of restrained and sober judgement. The measure of interpreting and deciding seems to be particularly sensitive when it is judged *ex post facto* whether the deeds and acts of several decades ago, e.g. at the time of World War II and in the first years thereafter, were constitutional and legal. The Constitutional Court addressed this issue in several decisions concerned with the so-called argument of unlawfulness. Probably best known is the one dealing with the Decree on Military Courts of 1944. It has to be conceded that the Court did not get carried away and remained true to the standpoint that it can only be considered as unlawfulness what

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4 Bernd Rüthers, Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus, 7th ed., Tübingen 2012.

5 See Bernd Rüthers, Die heimliche Revolution vom Rechtsstaat zum Richterstaat, Tübingen 2014, p. 78; see also Bernd Rüthers/Christian Fischer/Axel Birk, Rechtstheorie mit Juristischer Methodenlehre, 8th ed., München 2015, p. 199.

6 See Winfried Hassemer, Naturrecht im Verfassungsrecht, in: Andreas Donatsch/Marc Forster/Christian Schwarzenegger (eds.), Strafrecht, Strafprozessrecht und Menschenrechte, Festschrift für Stefan Trechsel zum 65. Geburtstag, Zürich 2002, pp. 135–150.

already at the time «conflicted with the general legal principles recognised by civilised nations.»[7] Similar, even more elaborate insights were gained by Gustav Radbruch with his formula of intolerability and by Leonid Pitamic. The latter expressly stated that it is not sufficient that there is some kind of inhumanity in the content of the legal norm (e.g. high taxes which are unjust); there has to be «a conspicuous, obvious, severe case of inhumanity»[8] (such as the mass slaughter of helpless people). There has to be a «crude disturbance» (for instance, the extermination of the members of another race) which interferes so intensely with law that its nature is negated.[9]

Constitutional-court thinking is the main task of the constitutional court, but it must also be a concern of everybody dealing with law in general and particularly with the basic (human) rights. The constitutional-law thought and discourse should pervade all fields of law. Matters are changing, yet still too many legal articles and books are published that are not sufficiently sensitive to constitutional-court and constitutional-law issues. It is very important that, gradually, also the so-called interpretation of statutes in conformity with the constitution is slowly finding its way and that the number of requirements for review of constitutionality i.e. requirements filed by the courts because they believe that the statute they are supposed to apply is unconstitutional, is steadily increasing. Such requirements are particularly welcome because they demand a review of the constitutionality of a statute in view of concrete life cases.

At the beginning I quoted that the court and not the legislator should be the ultimate interpreter of the constitution. The principle of the separation of powers binds the courts to judge and decide. Jutta Limbach, former constitutional judge and former president of the Federal Constitutional Court of Germany, clearly said that the court pronounces what law is, but does not make law.[10] In the relation between the constitutional court and the legislator, the constitutional court judges whether and to which extent a statute is constitutional, but it is certainly not its task that, in the case of abrogating a statute, it dictates to the legislator what the programme of the statute should be. It is the question of the so-called legislative programme, which is – within the boundaries of the constitution – autonomously determined and executed by the legislator. The court may say what the limits of the legislator's margin of appreciation are, but it may not place itself above the legislator and prescribe how he should decide within this margin. If the court acted in such a way, it would violate the principle of separation of powers.

It may not and cannot be expected from the constitutional court that it will act as an omnipotent *deus ex machina*. The constitutional court depends on the suggestions and possibilities offered by the requirements and requests for review of constitutionality and legality of regulations and general acts issued for the exercise

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7 U-I-6/93 [OdlUS (Decisions of the Constitutional Court of the Republic of Slovenia) III, 33]. The fundamental standpoint of the decision is as follows: «All the elements of the provisions of the Decree on Military Courts of May 1944 are contrary to the Constitution that at the time of their issuing and use conflicted with the general legal principles recognised by civilised nations as well as the Constitution of the Republic of Slovenia, particulary: a) all those elements of the provisions which were, and insofar as they were, used in specific criminal proceedings as nude incrimination of status and which did not refer to clearly defined acts of the accused; b) all those elements of the provisions whose lack of clarity served, and insofar as it served, in specific criminal proceedings as grounds for arbitrary decisions by the courts of that time; c) all those elements of the provisions which enabled trials for actions carried out prior to the enactment of the decree, and which were not punishable according to general legal principles recognised by civilised nations. / The current statutory regulation of the criminal procedure conflicts with the constitution since it does not enable the removal of all judicial decisions that are wrongful from the procedural and substantive aspect and which were issued on the basis of regulations (general acts) of the revolutionary war and postwar authorities, and removal of the consequences of these decrees by extraordinary legal remedy».

8 Leonid Pitamic, Die Frage der rechtlichen Grundnorm, in: Völkerrecht und rechtliches Weltbild, Festschrift für Alfred Verdross, Wien 1960, p. 214; Reprint in: Leonid Pitamic, Na robovih čiste teorije prava / An den Grenzen der Reinen Rechtslehre, in: Marijan Pavčnik (ed.), Ljubljana 2009, pp. 315−324.

9 Leonid Pitamic, Naturrecht und Natur des Rechtes, Österreichische Zeitschrift für öffentliches Recht, N. F. 7 (1956), p. 199; Reprint in: Leonid Pitamic, Na robovih čiste teorije prava / An den Grenzen der Reinen Rechtslehre, in: Marijan Pavčnik (ed.), Ljubljana 2009, pp. 297−314.

10 See Jutta Limbach, Das Bundesverfassungsgericht, München 2001, p. 27.

of public authority, as well as by constitutional complaints and some other legal remedies. It would suit my character and my views on the human face of law if the constitutional court had wider possibilities to operationalize the constitutional principle of social state in more detail as it has done for the principle of state governed by the rule of law. Yes, yes, I know, but one has to be careful. One cannot expect from the constitutional court to do what lies in the domain of others. From the constitutional court one can only expect that, as a court, it will listen to the requirements, proposals and requests standing up for human dignity also in the area of social state.

As it has already been said, the constitutional court contentually depends on the legal remedies on which it decides. In spite of this limitation, the interpretative power of the constitutional court is of considerable, sometimes of even very great importance. Already «ordinary» – if I may call them so – interpretations of the constitution are important from the interpretative viewpoint. Very sensitive are certainly the ones where the constitutional court further develops the constitution within the permitted boundaries. Thus, the aspects and subprinciples of the state governed by the rule of law are not expressly stated in the constitution. They were only activated and operationalised by the constitutional court.[11] *Mutatis mutandis* this also has to be said about the dimensions of the basic (human) rights and the relations between them. Likewise, this is valid for quite a few abrogations of statutes. Before a provision of a statute is abrogated, the statute as well as the constitution have to be defined as to their meaning and it has to be stated why the meaning of the statute is contrary to the meaning of the constitution. This preliminary semantic definition of the statutory and the constitutional provisions is the *ratio decidendi* having legal power also for the future i.e. for new cases dealing with essentially similar problems as the already decided ones. The mentioned preliminary semantic definition may also comprise elements of what the court says incidentally or by way of illustration – the so-called *obiter dictum*, which takes effect for the future by its persuasiveness. Special weight can be attached to constitutional-court reinforcements of fundamental principles in single legal fields (e.g. of the principle *lex certa* in criminal law) while these principles are also anchored in the constitution.

Let me conclude where I began – with the antinomy that is aware of the difference between law as text and law as process of interpretation and implementation of this text. The antinomy I am talking about clearly shows that there is always a decision-making man behind the text, a man who is also a moral person. Certainly law and morals are not identical, even radical differences exist between them, but they are also so closely connected that law loses its legitimacy if one forgets the elementary constitutional and legal values.[12] When interpreting the constitution and the statutes and making decisions, at the end of the day, we must just rely on ourselves. This makes the lawyer's work attractive and challenging, but also represents a great burden and responsibility to be borne.

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 the 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 a responsible legal decision-making. It is also very important that Legal Reasoning and Legal Philosophy work hand in hand.

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[11] The typical aspects developed by the Constitutional Court in the course of its practice are the principles of clarity and determinability of the regulations as to their meaning, interpretative predictability, trust in law and proportionability; see Marijan Pavčnik, Das Argument des Rechtsstaates unter besonderer Berücksichtigung der Situation in Slowenien, Zeitschrift für öffentliches Recht, 66 (2011), pp. 85 ff.

[12] Cf. Marijan Pavčnik, Questioning the Moral Understanding of Law, Danube: Law and Economics Review, 8 (2017) 2, pp. 111−116.

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.