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## Legal and Extra-legal Elements of Motivation in Legislation and Interpretation of Law – a Judge's Thoughts

### 1. General introduction

The law is a large complex system of abstract rules. Finding law is a complicated intellectual hermeneutical activity<sup>1</sup>. Without going into a detailed discussion about the definition, I understand law as the set of rules that effectively make society work. Legal interpretation therefore encompasses not only the legislative texts and prior judgments but also law in general, its factual context, the notion itself of a social reality in which rules must be applied. In the context of the creation of legal rules, every member of the legislative body also needs to understand and, thus, to interpret the bill that is proposed for adoption.

The law lives and is a vibrant part of human society. For example, the form of contracts as they are actually entered into offers interesting insights into the manner in which ordinary people understand rules and act upon them. Very often, contracts are concluded on the basis of outdated or simply incorrect templates, which are contrary to the Civil Code. Nevertheless, nobody protests the situation and the contract is executed. In such a case, where is the law?

To analyse the interpretation and application of a law, a pluridisciplinary approach is necessary. Seen from a wider context, a sociological phenomenon undeniably leads to consequences that are normative while every legal decision is sociologically and psychologically motivated and influenced. Consequently, human behaviour becomes law, for example in the form of a judgement, the judicial interpretation being a part of creation and application of law. Even the political science elements are very important.<sup>2</sup>

As a result, the interpretation and application of law has many components. In every juridical activity, *individual* intellectual activity of cognition and analysis is joined by an *interaction* between many *individuals*. The competence, honesty, attention, emotions,

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<sup>1</sup> GRONDIN, JEAN: *Einführung in die philosophische Hermeneutik*, Dramstadt, 1991, Czech edition Oikumene, Praha, 1997, and the bibliography therein.

<sup>2</sup> FENOUILLET, DOMINIQUE (ed.): *L'argument sociologique en droit. Pluriel et singularité*, Dalloz, 2015; TEFFO, FRÉDÉRIC.: *L'influence des objectifs gouvernementaux sur l'évolution du droit des sociétés*, Dalloz, 2014.

partiality, individual and collective interests of every participant play a role. In every social environment implicated in the creation and application of law, legal concepts are mixed with extra-legal elements.

Obviously, one can try to differentiate the normative elements from the extra-normative ones. Thus, normative elements can be defined as those related strictly to a legal process, separated from any kind of exterior influence. Such a limitation is closely related to the notion of legitimacy, which refers to the direct function of a formally recognized legal rule, thereby excluding every extra-normative element, such as more or less hidden interests or motivations behind the creation or application of a legal rule. At the same time, not every extra-normative element is necessarily illegal, and some influence from exterior is inevitable in practice. In consequence, the notion of legitimacy in itself cannot fully describe the entire process of the creation of a legal rule.

In my reasoning, I try to take a wide view of the context, given that restricting one's thinking only to one narrow question leads to an incomplete and often even distorted picture. Therefore, I endeavour to take into account the maximum number of elements possible. At the same time, while choosing this approach, I'm aware that the potentially infinite and inexhaustible set of relevant elements has to be reduced in the frame of this short contribution.<sup>3</sup> Also, I generally do not distinguish between international or national jurisdictions because in my opinion, they share a lot of common features which I try to identify.

The subject of extra-normative elements gaining normative status goes beyond the problem that has been defined by K. Lenaerts as the "borderline between law and politics".<sup>4</sup> After all, the law had already been defined by classical jurisprudence<sup>5</sup> as a system of enforcement of human interests, and the scale of human interests is wider than politics. We usually understand the politics as a mechanism designed to express group interests, while opportunism and similar motivations also take into consideration very individual interests. My subject concerns, generally, the penetration of legal rules by motives or elements which aren't justified legally. Politics, on the other hand, can and often do penetrate legal rules in a completely legal manner, forming even their explicit content.

It is nonetheless interesting to mention the apparent contradiction in K Lenaerts' argument on the relation between law and politics, highlighted by JHH Weiler.<sup>6</sup> On the one hand, K. Lenaerts restricts the legitimacy of the Court to looking only for law, whilst on the other side he sets out how the European Court of Justice could "overcome the political deadlock".<sup>7</sup>

Politics clearly constitute elements of reasoning existing outside the law. Yet, when the legal rule is not clear or where a lacuna exists, the interpretation necessarily has to

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<sup>3</sup> Compare, e.g., RICOEUR, PAUL: „Le problème de la liberté de l'interprète en herméneutique générale et en herméneutique juridique“ in Amselek, Paul (dir.), *Interprétation et droit*, Bruylant, Bruxelles, 1995, p. 177, where relevant intellectual operations are ordered in the sequence „explanation, comprehension, application“.

<sup>4</sup> Lenaerts, Koen, "The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice" in Adam, Maurice de Waele, Henri Meeusen, Johan and Straetmana, Gert (eds), *Judging of the Case Law of the European Court of Justice*, Hart Publishing, 2013, p. 13.

<sup>5</sup> *Interessenjurisprudenz* of Rudolf von Jhering and Philipp Heck.

<sup>6</sup> Weiler, JHH: Epilogue: Judging the Judges – Apology and Critique, in Adam, Maurice de Waele, Henri Meeusen, Johan and Straetmana, Gert (eds), *Judging of the Case Law of the European Court of Justice*.

<sup>7</sup> *Ibidem.*, p. 241.

rely on extra-legal factual context, which may mean taking into account the political aspects that form the basis of the rule. For the most part, a judge taking into account a political element is aware of this circumstance and is convinced that his choice is justified by the fact that it helps to attain a desirable goal. While this is not necessarily true, it does legitimize the judge's choice and tends to strengthen his integrity.

In practice, for example, the goal of competition law is the protection of competition. This goal is, nevertheless, also a policy of the European Union. If the interpretation follows this goal, it is completely legitimate.

In this case, therefore, the extra-normative element is embraced by the law, and normative and extra-normative elements become inseparable. Thus, K. Lenaerts' analysis is less contradictory than one might imagine.

The situation is more problematic where the creation or interpretation of a legal rule is motivated by opportunism, i.e. where *some political or personal interest is put before the very sense of the law*, with the latter including a legitimate political aspect which cannot be avoided in interpretation, as mentioned above. The relevant personal interest is not necessarily only individual; it can also be an interest of a group, of some institution etc.

Opportunism is a more frequent motivation of the legislation and of the interpretation of law than we often care to admit. This is due to the fact that the evolution of law very clearly reflects human psychology. For every human being it is natural to pursue one's goals. In legal matters, every participant endeavours to achieve his goals through his legal activity.

The dominance of economic considerations over legal ones can be analysed as a specific case of opportunism. In this respect, I cannot but agree with F. Teffo, according to which "as to the upheavals witnessed in the legal sphere, the explanation offered has very soon been that of the considerable increase of the influence, in developed contemporary societies, of economic facts, which ruthlessly exercise their tyranny over law".<sup>8</sup> F. Teffo goes on to quote the important words of Josserand, according to whom "earlier, where an institution or scheme conflicted with morals, its fate was sealed, regardless of the fact that it would present otherwise, and when regarded on the economic level, obvious advantages".<sup>9</sup>

Still, opportunism is not necessarily completely bad. It tends, in fact, to go in the same direction as "effet utile", even though it is more extensive. Therefore, I will distinguish between "bad opportunism", where some action is motivated by egoistical and, at times, illegal elements, and "good opportunism", where the motivation is generally in line with the public interest, even though the dividing line between the two is not always clear or easy to discern.

The importance of extra-legal elements, such as political aspects or opportunism, is not uniform in all branches of law. Hence, we have a scale with, at one end, a strictly normative view clearly separated from every extra-legal element except for a legally justified content of the rule or of the context, and, at the other end, pure personal or collective opportunism. The strictly normative view is more frequent in relationships

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<sup>8</sup> TEFFO, FRÉDÉRIC: *L'influence des objectifs gouvernementaux sur l'évolution du droit des sociétés*, Dalloz, 2014, p. 5; translated from French.

<sup>9</sup> JOSSERAND, LOUIS, „*Un ordre juridique nouveau*“, in *Recueil Dalloz* 1937, Chronique 41, spéc. 42, as quoted by Teffo, F., *L'influence des objectifs gouvernementaux sur l'évolution du droit des sociétés*, p. 5; translated from French.

falling exclusively under private law, such as contract law, and in national law rather than European Union law. For example, the adoption of restrictive measures such as the freezing of assets is a juridical solution to a purely political question. At the same time, consumer litigation based on private law could cover an important political aspect, i.e. the aspect of the consumer protection policy.

When considering the ultimate impact of the extra-legal elements, we shall keep in mind that the law, as it really exists, is the end result of many influences, the only important issue being whether or not the bad ones prevail over the good ones. The criterion permitting to distinguish the good from the bad can hopefully be found in the extensive ethics literature on the subject, as well as in the human law instinct such as that described by von Jhering.<sup>10</sup>

In this context, the importance of the personal qualities of individuals should be stressed. True altruists are a very rare breed. If such an individual can drive the evolution of law, he can leave behind him a very good long-term legacy. The opposite is also true, the negative effects of bad solutions potentially being just as long-lasting and onerous. At times, it can be observed that choosing one particular person rather than another has substantial effect on the evolution of society in general; a person can be very competent but, if he or she is unable to put public interest, the function and context of law above personal or group interests, it can hardly be expected that he or she will adopt the right solutions. The ability to suppress particular interests in favour of the idea of law requires a certain kind of enthusiasm, and supposes that finding the law is not only considered a job, but, in some ways, a mission. However, modern society has not been able to resolve the problem of education and selection of persons satisfactorily. It needs many lawyers, but there are only a few passionate “legal missionaries”. As a result, many of those creating and interpreting law are shaped by political, economic and even opportunistic interests, the aspect of justice becoming secondary, rather than primordial. The situation is further aggravated by the spread of new technologies and the ensuing explosion of the quantity of information, which can be used to manipulate the public, including the lawyers.

As a result of all the foregoing, it would be difficult to deny the existence, to some degree, of extra-legal elements in all kinds of legal activities. Therefore, in the next part, I will examine (1) the legislative procedure, (2) the case-law of the courts, (3) the pleadings of attorneys and also (4) the academia.

## *2. Legal and extra-legal elements in different branches of legal activity*

### *2.1. Legislative procedure*

In the legislative sphere, law is a part of politics and politics embodies law. This means, obviously, that political motivation – arguments of policy – prevails absolutely, as described by R. Dworkin.<sup>11</sup> If we take the example of a legally complex proposal, the individual

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<sup>10</sup> von Jhering, Rudolf, *Der Kampf ums Recht*, Wien, 1872; in Czech as *Boj za právo*, J. Pecl, Praha, 1897.

<sup>11</sup> Dworkin, R., *Taking rights seriously*, Harvard University Press, 1977; in Czech as *Když se práva berou vážně*, Oikumene, Praha 2001, p.113-114, where the author distinguishes between arguments of policy and arguments of principle.

legislators will trust, to a large extent, the professional lawyers drafting the bill. There is a correlation between, on the one side, the length and the nature of a bill and, on the other side, the number of political (or other) external interventions. The longer and more complicated a proposal is, the less external interventions there will be normally in Parliament. For instance, the new Czech Civil Code,<sup>12</sup> with more than 3000 articles, was adopted without substantial modifications, even though it brought in many very important changes of a political nature.

Although the general context of a bill is motivated politically, the detailed solutions are drafted by legal professionals. Other political elements, however, influence the bill more markedly by way of lobbying, or even corruption or opportunism during the legislative procedure. Legislators with limited knowledge of a topic can easily be manipulated and their vote will say nothing about the real legitimacy or propriety of a rule. From the point of view of opportunism, we can observe that, globally, political motivation presented to the public appears more or less correct, but when it comes to the details, the real motivation often can be traced to “bad” opportunism or a lack of knowledge or comprehension. The extent of this penetration is inversely proportionate to the level of both political and legal culture, with the main factor being Dworkin’s “political morality”.<sup>13</sup> Any minor point in a voluminous proposal can be used as a tool of manipulation, in order to approve or dismiss the bill. No rational argument can be presented to those legislators who do not have considerable knowledge of the matter and who, sometimes, do not want to understand. Even a false statement can be decisive for the adoption or refusal of the bill. Communication between law professionals and legislators very frequently fails, leaving the door open for manipulators. As a consequence, many bad rules, with sometimes catastrophic consequences, are adopted, become formally part of the law and are applied in social relations, whilst it is very difficult to allege any illegality. If the level of a political culture is low, the opportunistic motivation of some legislators is not even hidden, such as may be the case with the rejection of a ban on smoking, where any honest justification is hard to find. Similarly, while the precise wording of an adopted law may be, to a large extent, haphazard, the same can be hardly said, for instance, about the omission of the provision granting the right to compensation for antitrust infringements in the Czech Act on the Protection of Competition adopted in 2001.<sup>14</sup>

## 2. 2. *Judiciary*

A judge is a professional lawyer, which should mean fewer problems with understanding, manipulation and communication than can be found in a Parliament. Nevertheless, the judge obviously has to communicate with parties and he must understand their pleas and the facts. He has to identify the relevant rules, interpret them and apply them correctly.

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<sup>12</sup> Act No. 89/2012 Coll., the Civil Code.

<sup>13</sup> DWORKIN, R., *Justice for Hedgehogs*, Harvard University Press, 2011, p. 406. The author treats „law as a part of political morality“, adding that „personal morality may be thought to flow from ethics“ and that „political morality might be seen to flow from personal morality“. In Dworkin’s view, „we can easily place the doctrinal concept of law in that tree structure: law is a branch, a subdivision, of political morality“. The notion of morality is explained by the author on pp.255-270.

<sup>14</sup> Act No. 143/2001 Coll., on the Protection of Competition.

In this respect, it is relevant whether or not the procedure includes an oral hearing. It is true that new technologies bring closer oral and written procedures, with the recordings of oral pleadings becoming standard practice. Still, it is not always evident to understand an attorney's oral pleading, let alone that of the party itself, in cases where representation is not mandatory, especially since parties can lie or distort reality, intentionally or not.

Other important elements are whether the case is decided by a chamber or by a single judge, how many judges are in the composition of the chamber, whether the judge cooperates with assistants, whether the court sends written questions to the parties prior to the hearing etc. Judges working under time constraints may misunderstand and incorrectly appreciate facts or pleas. Also, the professional level of attorneys plays a very important role. Usually, attorneys do not have a thorough knowledge of the file and written questions provide better results.

Apart from these internal factors, the problem of extra-legal elements, be they politics or opportunism, emerges here too.

One frequent example is the case where a judge reviews an administrative decision and concludes that, while it is perfectly correct as to the substance, it is vitiated by some formal mistake, such as an absence of reasons, contradictory reasoning or a contradiction between the reasons given and the operative part of the decision. The judge might be tempted not to annul the decision, knowing that an annulment will only lengthen the procedure, prolonging the parties' uncertainty about the outcome and increasing their costs, while in the end, the administrative authority will have to adopt a new decision with a similar content. Obviously, in this situation we are confronted with "good" opportunism and there is no political aspect. The judge's thinking tends to emphasize the practical consequences of his decision, going in the direction of "effet utile" but beyond the limit of this principle, while the law stipulates formal requirements for the sake of the principle of the rights of defence. We might ask which approach is better in a situation where different legal principles – the certainty of law, the rights of defence and the principle of good administration – come into conflict. Nevertheless, any decision other than annulment goes against the law. Therefore, the judge should comply with the prevailing legal principle, even though the outcome may not satisfy the parties.

Let us imagine another example where two institutions, acting each within its own competencies, adopt two contradictory decisions concerning the legality of a certain practice, based partly on the same facts and legal criteria. The situation is complicated by the fact that the first institution adopted its decision on the basis of a formal proposal by the second, which, at that time, chose not to exercise its power to object to the practice in question by presenting a different proposal. A first-instance judge tasked with assessing the legality of the second decision may annul it, preferring the principle of coherency of law. However, he may be overturned by the appellate judge, who may give more weight to the independence of the respective competences of the two institutions. While both judges take into consideration the context, they each stress a different element of that context. Which of the two judicial decisions is objectively legal?

Another current example from Czech practice raises the question of whether a judicial decision can directly contradict a legislative text. Article 441 of the new Czech Civil Code provides that a formal condition applicable to the signing of an act – such as the requirement of a notarial record – must also be respected where a power of attorney is granted with

respect to the same act. The granting of powers of attorney being common, such an obligation leads to enormous problems in practice, generating significant costs and administrative burdens. In reaction, the Czech Supreme Court has ruled that the formal condition does not have to be respected where the identity of the person granting the power of attorney is undisputable.<sup>15</sup> This interpretation is, of course, simply *contra legem*; however, given that it is reasonable, such a characterisation is not sufficient per se. On the other hand, the intention of the legislator was clearly opposite. Does a clear expression of the legislator's will constitute the limit which the judiciary can never overstep? When the Supreme Court crosses that limit, what does that mean for the legislative rule in question and its legitimacy? Was the relevant article of the Civil Code abrogated in this manner? Here, the motivation of the decision is neither political nor moral, but simply practical with regard to the comfort of the users of law, thus being similar to the first example above. At the same time, by enacting the rule in question, the legislator explicitly intended to strengthen the protection of the party represented, unfortunately ignoring or underestimating the practical consequences. If the case-law is maintained by the Supreme Court, it will prevail over the legislative text and become part of the effective law.

Similar examples can of course be found in the case-law of the European Court of Justice. As demonstrated by JHH Weiler, in the *Sturgeon*<sup>16</sup> judgment the Court went farther than the legislator, who provided for compensation only in case of the cancellation of a flight, by deciding the same right could be claimed in case of delay. Here also, the judge intentionally creates a new and different rule in the law.

Therefore, even in European continental law, case-law can become stronger than statutory law.

My final, and rather complicated, example pertains to competition law, and specifically to a case where a competition authority decides that several companies that formerly belonged to the same undertaking shall be held jointly and severally liable for the payment of the amount of the fine, without determining the proportion according to which they shall ultimately share the amount of the fine among themselves. In this situation, the first judge might consider that such an omission is inappropriate and decide, within its full jurisdiction to review fines, to apply a rule inspired by private law according to which, unless specified otherwise, the shares of the different companies shall be equal. On appeal, the second judge might disagree, considering that the question of the settlement among the companies is of no interest to the competition authority, the joint and several liability having for sole objective to guarantee the effectiveness of the recovery of fines imposed for the infringement and, therefore, the deterrent effect of those fines, by stemming the risk of insolvency of one of the co-debtors. From this point of view, the settlement to be arranged among the companies once the fine has been paid to the authority is simply their own problem.

In this case, the judicial interpretation could be analysed as having several levels of abstract reasoning. The first judge stressed the function of competition law and the administrative (or quasi-penal) nature of the fine, excluding a private law agreement between companies. According to this reasoning, firstly, competition law makes an

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<sup>15</sup> Order of the Czech Supreme Court of 27 November 2014, file no. 29 Cdo 3919/2014.

<sup>16</sup> Joined Cases C-402/07 *Sturgeon and Others* and *Böck v Air France* [2009] ECR I-10923.

effort to protect competition, and, secondly, it individually punishes guilty companies which formed part the undertaking liable for the infringement. As a consequence, the budgetary considerations related to the recovery of the fine are only secondary.

The second judge, instead, favours a reasoning based on the function of the specific legal rule providing for joint and several liability, focusing on the fact that the recovered fines become part of the public resources. His approach can be understood as an effort to stop the application of the rules of competition law at the undertaking's level, without reaching to the individual companies that it comprises. It is a priori motivated by purely legal elements, since, in competition law, legislative texts are concerned with undertakings rather than companies. Thus, the second judge could be seen as interpreting and applying the notion of undertaking, as provided for by the law, in a very strict and faithful manner.

However, that approach is not without its problems. We should keep in mind that the notion of undertaking was created as a description of an economic reality, rather than a precisely defined legal category, and this inherent issue has not been resolved, despite it being used ever more frequently, to the point of creating a certain fashion. As a consequence, the legislative text comes at odds with formal legal reasoning, since it imposes a responsibility for illegal conduct on an entity which is not precisely defined and which is devoid of legal personality according to the case-law. How can an entity be made responsible when in law it has no capacity in this respect? Unfortunately, the problem cannot be resolved pragmatically, since an undertaking consisting of a group of companies lacks not only legal personality, but also any specific bodies, property, stability or will. Thus, while an undertaking has certain economic functions, it is missing both a traditional legal personality recognised by law and the qualities which could provide it with some level of autonomy and, therefore, personality on the factual level. The only entity with a legal personality, property, and ability to pay fines is the company.

This case illustrates a whole scale of issues related to the role of legal and extra-legal elements in the creation and interpretation of law. In the first place, the creation of the notion of undertaking reflected an extra-legal, policy-driven motivation, with the legislator wishing to regulate a situation not covered by traditional legal constructs. Once the legislator reflected his policy in specific rules, the judge must then conciliate them with existing legal mechanisms, which poses challenges with respect to their interpretation following the formal principles of logic and their function. This underscores the usefulness and necessity of the parallel development of both legal and economic notions: while rules able to replace or complement a legal text may evolve in practice, judicial decisions need to be precise, profound and consistent in order to cause as few problems as possible in everyday life.

Similar examples abound in other domains. In the fundamentally different matter of restrictive measures adopted under the common foreign and security policy, asset freezes are often applied to entities without legal personality, while, as mentioned above, the political aspect, typically aiming at exercising pressure on a foreign government, prevails over the legal aspect. The courts systematically declare entities devoid of legal personality admissible to contest the relevant decisions on the basis of the right to effective judicial protection, remarking, quite logically, that, if the entity was considered to be sufficiently autonomous for it to be subject to the restrictive



measures, it must be accepted, on grounds of consistency and justice, that the same conclusion must be reached as to its ability to contest them.

Is there any common lesson that the above cases can teach us?

In each example, the judge had to choose one of the several aspects of a case, which comprised not only specific rules and law principles, but also general objectives pursued by the legislation, specific circumstances of every case, his personal preferences etc. The judge had, in every case, a legitimate reason for his choice, which can nevertheless be contested on other grounds. In this sense, a legal text is indeed, as mentioned by Hart, an “open texture”, because every general term is open in its concretisation.<sup>17</sup> At the same time, whenever the judge takes one of the many possible aspects of interpretation as the basis of his decision, his specific concretisation tends to be “cast in stone”, especially where it is confirmed by further case-law; this is without prejudice of the fact that it is sometimes difficult to maintain a consistent case-law, a foreseeable legal interpretation, or even the legal text in effect.

Another point that has to be kept in mind is that the true motivation underlying the decision will not be always discovered. The outside analysis is based only on the text of the judgement, which ultimately constitutes only a part of the story. Specifically, in some instances, it cannot be excluded that the final outcome is, to a certain limit, influenced by random factors and, therefore, haphazard in part. Still, this randomness does not affect the authority of the resulting decision as part of the law effectively governing the society.

As a final remark regarding the judiciary, it should be noted that questions of legitimacy and of opportunism bear particular weight in the Court of Justice of the European Union. This is not simply because it is an international jurisdiction, but because it is one of the European institutions whose cases it decides. As a consequence, the Court of Justice may appear as both the judge and a party to the case, which means that the public must be particularly convinced of its impartiality and objectivity if it is to resist the tendency to euroscepticism.

### 2. 3. *Attorneys*

An attorney can be partial and must be so. It is his job. Of course, his partiality should remain within the framework of legality. Often, this depends on his morality and honesty. His interpretation of law should be based on case-law and academic works, not only because it adds weight to his reasoning, but also because it contributes to the legality of his pleadings. Nevertheless, if there is no pre-existing case-law and no jurisprudence, an attorney’s interpretation can play an important role. As a consequence, if the attorney’s interpretation is excessively partial and is not identified as such, it can distort the comprehension of a legal rule by the judge, who may be lead to believe that the interpretation in question is made in good faith. This issue is compounded by the fact that attorneys often contribute to academia, the partiality of their position becoming even more important and influent. At other times, an attorney’s interpretation could misrepresent and distort the correct meaning of the rule, thereby manipulating its understanding by the general public. Also, attorneys can and very often do influence legislation by way of lobbyism.

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<sup>17</sup> ATRIA, FERNANDO: *On Law and Legal Reasoning*, Hart, 2001, pp. 89–91.

The attorney's approach is often superficial, since he has many clients and works under tight time constraints. The attorney seeks mainly his goal and is less interested in the correct comprehension of law. Obviously, the result of the analysis of a legal problem is dependent on a detailed examination all of its relevant aspects, and the greater the number of cases handled by the attorney, the lesser the achievable level of detail. On the other hand, an attorney seeking a viable solution for his client can identify the appropriate logic allowing the understanding of a legal rule. Therefore, an attorney can be a part of a self-regulating law system, provided that the results of his analysis are subsequently verified by a properly working judicial checking system. Unfortunately, another corrective element of the attorney's work is very often absent: that of the client who would seek compensation for his attorney's malpractice. In the majority of cases, the client is, in fact, not able to discover that the attorney has committed an error.

#### *2. 4. Academia*

In theory, scholarship is impartial, independent and seeks the truth. From this point of view, the academia may be viewed as a real guarantee of the discovery of every error in the creation, comprehension or application of law and of every mistake or partial interpretation arising in practice. In reality, unfortunately, the frequent professional conjunction of attorneys, judges and academics leads to an incomplete or partial analysis. On the other hand, where an academic works exclusively in the theoretical field, a high level of abstraction is required in order to deeply understand the practical functioning of a legal rule. A large and growing amount of information gives rise to the superficiality of analysis. Commentaries of case-law are more descriptive than critical and analytical, and the academics tend to examine a relatively narrow scope of questions, leaving many important ones aside. In this respect, the motivations behind the selection itself of a given question as a theoretical topic could make the subject of a separate – and difficult – analysis. Therefore, academia as an element of the self-regulatory system is far from perfect.

#### *3. Conclusion*

The law, its creation and functioning form a very complicated system. Within this mechanism, many elements of very different nature interact. On the one side, there are sociological, psychological and political influences; on the other side, elements of legal interpretation, including, beyond the rules themselves, the comprehension of context, the aspects of formal logic, the object of rules, legal principles etc. Furthermore, we have to add technical elements, such as the precise level of knowledge of facts and law texts resulting from the cognitive activity of the person interpreting the rule. While, in some instances, legal interpretation or creation based on extra-legal elements and motivated by a legitimate goal of reducing logical or textual contradictions can be accepted, the same does not hold true for efforts contrary to this goal, motivated by opportunism and pursuing an illegitimate, purely personal or group objective. While the boundary is clear in theory, the social reality is different. Sometimes, the real goal is easy to discover or to guess but difficult or impossible to prove, so that it has no bearing on the final outcome. In this

manner, defective rules are introduced in law and the whole legal system is deformed as a consequence. Due to the hierarchy of the rules that form the system, a final judgment or an adopted bill of law become part of law and are respected as such, including the defective rules they eventually contain. This phenomenon is constantly exacerbated by the growing complexity of legal regulation and the volume of case-law. Against this backdrop, how can one explain that the law as a whole still has the capacity to act, to an extent, as a guarantee of justice in an open society?

Some authors have tried to answer this question by applying the notion of autopoiesis, i.e. the ability of a system to reproduce and maintain itself, to law.<sup>18</sup> In simpler terms, in their view, the system of law as whole has an enormous capacity for absorption and correction of unfair decisions or wrong rules.

In the current world, we are overwhelmed by information. Paradoxically, this overabundance limits the effectiveness of communication within the system and, thereby, the functioning of autopoiesis. Indeed, the latter supposes that every solution to every legal problem be examined by all components of the legal system, i.e. by the judiciary, the legal practice, the academia and the legislation.

Yet, despite so many individual failures, wrong judgments, bad laws, incorrect academic analysis, we observe that, globally, the legal order still works. We find failures at every level of the mechanism of law. Besides all that has been mentioned above, there are poor lawyers inside every jurisdiction and bar association, as well as many bad law teachers and weak law students. It may be feared that these failures will collectively threaten the functioning of the whole legal system, and thereby the legal certainty and justice. The idea of autopoiesis can explain how the social regulation system that is law works in general, and how it is able to absorb many errors, or, alternatively to correct them. At the same time, if the sum of errors or their extent exceed a certain limit, the system will fail. In all probability, the situation is not critical under normal conditions and the functioning of the system is merely slower or less perfect. Nevertheless, it is important to consider the relationship between these weaknesses and their repercussions on the functioning of the whole system and its constituent parts.

Thus, for example, were the Court of Justice of the European Union to render a logically unsound judgment, its verdict would affect many other legal notions and national law systems, normally prompting the need to repair the initial problem. Nevertheless, frequently, a problem in legislation or case-law is unaddressed and the application of law continues, despite some contradiction and inconsistency. For example, the confusion in European Union law between the notions of “company” and “undertaking” is common and has not been rectified in the course of interpretation. This shows that the legal system has an enormous capacity for auto-correction. More important than the individual errors is the state of society in general, its “immunity system”. Nevertheless, partial failures may still threaten the democratic system as a whole, leaving, at times, the impression that we are not far from the critical limit.

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<sup>18</sup> See Teubner, Gunther, “Autopoiesis in Law and Society: A Rejoinder to Blankenburg” in *Law & Society Review*, Vol. 18, No. 2 (1984), pp. 291-301; Teubner, Gunther, *Autopoietic Law - A New Approach to Law and Society*, Walter de Gruyter, 1988; Michailakis, Dimitris, “Law as an Autopoietic System” in *Acta Sociologica*, Vol. 38, No. 4 (1995), pp. 323-337.

If I look for a practical conclusion deriving from my observations above, I am afraid that the reply is quite banal: we simply need to strengthen every part of the autopoietic legal system. The effort must start in the universities, but not only there. To control the problem of the intrusion of opportunism in law, we need lawyers – judges, legislators and so on – with high moral integrity. I have the impression that this is the main issue. Structured *curricula vitae* do not contain evidence of morality and honesty and nobody looks at the moral profile of a trainee judge or a candidate for Parliament. While this profile is no doubt known to the environment of the person concerned, it rarely plays a role in the appointment or election process. In this respect, we tend to be very passive, which is perhaps the root cause of many of the problems described above.

Another related aspect lies in the fact that, in our stable modern society, there are very few critical moments which could shed light on the deepest traits of human character. Indeed, situations such as wars, occupations, or resistance against injustice are completely absent from the experience of our younger generations.

It is also necessary to admit that law failures do not arise only from lack of honesty, but also from lack of knowledge and understanding. This issue points, once again, to the complexity of modern law and to the efficiency of the educational system in general.

To conclude, I believe that the improvement of the functioning of the legal system as a whole is highly dependent on the level of education and professional knowledge, as well as on the moral code of every single participant in each of its constituent parts mentioned above.

IRENA PELIKÁNOVÁ

LEGAL AND EXTRA-LEGAL ELEMENTS OF MOTIVATION IN  
LEGISLATION AND INTERPRETATION OF LAW  
– A JUDGE'S THOUGHTS

(Summary)

The article describes the different legal and, in particular, extra-legal elements which underlie the creation and interpretation of legal rules, as well as the interaction of these elements and the tensions and conflicts which arise between them. Specific attention is paid to the role of political considerations and opportunistic personal or group interests, in the context of the legislative procedure, the case-law of the courts, the pleadings of attorneys and the academia. The ability of the legal system to absorb and correct defective rules resulting from undue influence of extra-legal elements during the creation and interpretation of law is assessed from the perspective of autopoiesis. In conclusion, the fundamental importance of the competence and integrity of the individuals participating in the functioning of the legal system is stressed.