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Some Varieties of Linguistic Argumentation

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Abstract. The maxim to understand the law literally (Montesquieu, Voltaire) resembles Holmes' Plain Meaning Approach. But these approaches should not be considered as the expression of a naïve legal epistemology. They rather stress that the law ought to be interpreted as it is understood by the prudent citizen. In this way, the ideal of the rule of law is best guaranteed.

1. Introduction

If we reflect upon the amenities of our legal system, that is, the Dutch legal system, especially in contrast with those in dictatorially governed countries, we will probably mention some principles that most of us consider to be the pillars of Western legal systems, but which are unveiled in legal literature as myths, ideologies, or pious frauds. I allude to legal principles like the Trias Politica, equality, and accessibility. The separation of powers is considered to be extremely important to safeguard the rule of law, but in practice the walls between the legislator, executive and judiciary turn out to be extremely porous. The principle of equality is another principle that is supposed to be at the heart of our legal system, but as feminist analyses of law have shown, sometimes inequality is embedded in the law itself. And although all citizens have equal access to the judiciary, it is not necessary to be a sociologist to realize that all kinds of barriers of a financial and social character exist that account for the phenomenon that, in the republic of equals, some are more equal than others.

In this paper I would like to focus on one aspect of the Trias Politica—the judge's binding to the law. This principle, although self-evident at first sight, turns out to be a highly contested one. Some schools of legal thought, such as Legal Realism or the Critical Legal Studies Movement, consider this principle as a mere myth that serves the interests of the privileged classes; less radical movements take pains to align this principle with the

strong discretion the judge exercises when interpreting the law, so that the judge is said to be bound by the law even when his decision is contrary to its regulations.

2. Binding to the Law: The Words

The binding to the words seems to best guarantee that the judge is tied down to the law. This is, no doubt, the idea of the ambitious codifications of the nineteenth century as much as current legislation. The relevance of the exact wording is indicated by the care with which the laws are usually drafted—in this respect, the adoption of the Dutch Civil Code, which had been labored on for more than 40 years, is exemplary. The legislator seeks to arrive at standards that are as precise as possible, narrowing down the possible wordings in order to offer the citizen legal certainty and the judge clear standards for the adjudication of disputes. Clear, plain, and precise statutes, says Voltaire, reduce the number of cases in which the judge has to interpret—and interpreting, continues Voltaire, is nearly always corrupting (Voltaire 1962). And it was Montesquieu who famously stated that the judges are nothing but the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor (Montesquieu 1979, 301). Their judgments ought to be fixed to such a degree as to always comply with the letter of the law.

The idea is that to be bound by the law is to be bound by the words of the law. This is not the opinion of just two men, not even of two famous philosophers, but the opinion of an era. The political ideas of Montesquieu, especially his doctrine of the Separation of Powers, were rigidly enforced after the French Revolution in 1789. The courts, for example, were not allowed to interpret the law: In case of doubt, they had to refer to the legislator (the *référé législatif*), from 1791 to the *Tribunal de Cassation*, an organ of the legislator. Similar institutions existed in Austria, Prussia, and some other German states.¹

These opinions are, as we know, *passées*. From the critique of legalism, a critique that is nowadays generally accepted, emerges the image of ideologically driven legal theorists and politicians on the one hand, and hopeless naive theorists on the other. Ideologically driven, because the project of the judge as *bouche de la loi* perfectly suited the striving for a liberal state, in which the state's power—the judiciary included—would be confined to the bare minimum. And hopeless naive, because a single

¹ The Constitution of 1791, title III, Ch. V, articles 19 and 21, formally abolished in 1828. See also the Decree of April 14, 1780 of Frederick II of Prussia, which forbade interpretation of the laws; furthermore article 13 of the Code of 1786 of Joseph II of Austria, which introduced a *référé législatif* if the judges were in doubt about the meaning of a law; and the Bavarian Instruction of October 19, 1813, forbidding officials and scholars from writing a commentary on the Bavarian penal code.

reflection on the nature of legal adjudication immediately reveals that a literal application of the law does not make sense at all. Words can only be understood in context—that is, the words of the law in the context of a provision, the provision in connection with the entire statute, and the statute in connection with related regulations, whereas the law itself cannot be comprehended apart from previous and current political and social conditions. Critics of legalism argued that, in order to determine the meaning of the law, we necessarily make use of both the objective and subjective method, that is, we refer to the meaning the words have in common parlance, as well as to legislative intent. Both methods, in turn, refer to different methods of interpretation. But these methods do not possess a clear hierarchy and therefore allow the judge to use discretion—a discretion that the legalists had sought to expel, demanding that the judge literally apply the law (Scholten 1974, 33–6).

This criticism of legalism is widespread and belongs to the common opinion of most academic lawyers nowadays. In *The Problems of Jurisprudence*, Richard Posner equates the ideal of grammatical interpretation or the so-called Plain Meaning Approach with the outdated idea of mechanical jurisprudence (Posner 1990, 262). One of the proponents of the Plain Meaning Approach, Oliver Wendell Holmes, argued that to determine the meaning of a statute, we must not ask what the legislator meant, but what the words of the statute would mean in the mouth of a normal speaker, using them in the circumstances in which they were used.

According to Posner, this device is meaningless, for it is not clear who this “normal speaker” is: Is the normal speaker just an ordinary individual or is it a specific group (e.g., officials, commerce)? Another objection is that the Plain Meaning Approach is unable to solve external ambiguities, that is, ambiguities due to circumstances not taken into account at the time of the legislation. At the time of the enactment, for example, the word “press” referred to print media only, a meaning that seems incongruous in light of modern methods of disseminating news and opinion (Posner 1990, 263). Posner’s objections to the Plain Meaning Approach are so obvious that its proponents must have been desperately naive.

And yet . . . it is difficult to picture the author of the *Lettres persanes* as a naive mind, not to mention the fiery Voltaire. Oliver Wendell Holmes can be criticized for his radical skepticism rather than for intellectual naivety. And commonsensical lawyers of the first rank, like G. J. Wiarda, former president of the Dutch Supreme Court, hold that in the relatively rare cases in which the law is not clear, interpretation starts with disinterestedly listening and asking, that is, comprehending as well as possible the purport of the regulation, something that, according to Wiarda, comes close to linguistic interpretation (Wiarda 1988, 22).

I suspect that this image of the heuristics of the judge corresponds to the image that most non-lawyers hold of the working methods of the judge:

that, if the legislator has applied certain words, the judge has to ask herself which words the normal speaker would have used, if this normal speaker had been in the same position as the legislator. For if the judge is entitled to interpret the law differently from the way an ordinary citizen would understand the words, then why bother about the law at all? The judiciary, then, seems to be allowed to ascribe to the law any purpose whatsoever, which is a different way of saying that the judge is *lui-même la règle* and, therefore, a despot. If the law is binding—and nobody seriously challenges this premise—isn't this primarily by the wording? And if this is correct, why is linguistic interpretation in such disrepute? And why has the Plain Meaning Approach ended up on the shambles of intellectual ideas?

3. Acceptable and Unacceptable Literal Readings of the Law

If the Plain Meaning Approach means that the judge has to take the words of the law *literally*, it is plain that this approach does not make sense at all. For this directive allows for a multitude of possible readings, without a clue about which one should be chosen. A glance at a dictionary suffices to reveal that most words possess different meanings. It is only in the context of a text or provision that it becomes clear in which sense the words have to be understood. Thanks to this context, says Holmes, their meaning is even more refined than any given in the wordbook (Holmes 1992, 297).

To interpret the words “to the letter,” therefore, necessarily refers to systematic interpretation: The individual words take on their meaning from the provision, the provision from the regulation of which it is part, and so on. This is one of the objections against the legalist's claim that linguistic interpretation is supposed to have priority above all others. To refer to one method of interpretation is to refer to many: Just as linguistic interpretation refers to systematic interpretation, systematic interpretation, in turn, refers to others: to legislative intent and legal history, for example, and these to evolutionary interpretation, and so on.

An example from legal practice might evince this thesis. In its ruling of October 19, 1990, the Dutch Supreme Court rejected an alleged literal reading of Article 33 of Book I of the Dutch Civil Code (an article that was repealed some years after the case). The plaintiffs argued that the Civil Code nowhere explicitly states that a marriage between two persons of the same sex is disallowed. Article 33 stated: “A man can only be married with a woman, a woman can only be married with a man.” Up till this case, this article was usually understood to prohibit polygamy, so that it could be read as follows: that a man can only be married with *one* woman, and a woman can only be married with *one* man. In this respect, the plaintiffs

argued, neither this article, nor the Civil Code, excludes a marriage between two persons of the same sex. The Supreme Court nevertheless rejected this interpretation:

[This reading] departs from a literal reading of several sections, a reading that is already contestable as such, and ignores the law's purport as the legislator, taking into account the preceding legislation, had in mind when establishing Book 1 Civil Code. Even when the social developments afterwards advance the opinion that the legal ban on a lawful marriage between two women or two men is no longer justified, this would not legitimize a reading that deviates from the unequivocal tenor of the law, all the more because marriage is a matter of public order and asks for legal certainty.

This paragraph is of interest for two reasons. First of all, it demonstrates that one has to make use of different methods of interpretation in correlation in order to determine the meaning of a provision. The Supreme Court rejects the interpretation of the plaintiffs, based as it is solely on a literal reading, for this interpretation ignores the unmistakable tenor of the law. The law's tenor is inferred from legislative intent ("the law's purport as the legislator envisaged when establishing Book 1 Civil Code"), conceived in light of the preceding legislation. This legislation, in turn, lends itself to several modes of interpretation, because to determine the meaning of obsolete legislation elicits similar modes of interpretation to the interpretation of valid law.

This paragraph is of interest for another reason: The Supreme Court rejects the alleged "literal reading" of the plaintiffs ("It departs from a literal reading of several sections, a reading that is already contestable as such [...]"). But what exactly is meant by a literal reading and why is this contestable *as such*? On close inspection, at least two alleged literal readings of this article are possible. The first one is the reading the plaintiffs contended and the Supreme Court repudiated, and comprehends the article, in accordance with the standard reading, as the expression of the prohibition of polygamy. In this reading, the emphasis is on the numerals: "A man can only be married with *one* woman, a woman can only be married with *one* man." But Article 33 can be read differently "to the letter," a reading that highlights both numerals and the objects of the presupposition: "A man can only be married with *a woman*, a woman can only be married with *a man*." It is this reading of Article 33 that the Supreme Court decided to be the correct one, at least in the case at hand. But this reading is also "to the letter," although one that dissents from its standard interpretation. What is the difference between the first and the second literal reading?

The difference is that the plaintiff's contention rests on just one argument, the argument that the law nowhere explicitly expresses a ban on same-sex marriage, not even in the above-mentioned Article 33. This is correct, the Supreme Court admitted, but the explanation for an existing

ban on same-sex marriage, though not explicitly pronounced, is that, at the time of the enactment, the legislator—and not just the legislator, one may add—considered it self-evident that a marriage could exist between persons of different sex only. The plaintiff's reading of the provision fails to appreciate this basic assumption, as it rests solely on the words and neglects all sorts of counter-indications, like legal history, that challenge this reading.

If this analysis is correct, then an appeal to the letter of the law—linguistic interpretation—is, as a method of legal interpretation, not contestable *as such*. It is contestable as far as it leads to a result, contrary to what is conceived of as the unequivocal tenor of the law.

4. Linguistic Interpretation versus the “Plain Meaning Approach”

It seems that we can distinguish between two varieties of linguistic interpretation, one that results in acceptable interpretations, and one that produces insupportable ones. The plaintiff's reading meets with the conception of what is conceived of as linguistic interpretation in legal theory: a reading of the provision that takes into consideration only the meaning of the words itself, not its legal and social context. If we compare it to the plaintiff's reading of article 33, Book 1 Civil Code, the Supreme Court's reading strongly resembles the “Plain Meaning Approach” of Holmes, though the Court did not invoke the normal speaker as warrant, but the legislator. Holmes would have said that, although the words of the provision do not prohibit a marriage between man and man or between woman and woman, it will not be read as such by the normal speaker.

Posner rightly points out that the law exhibits a multitude of ambiguities that cannot be solved properly without knowledge of the circumstances that account for the form and content of the law at hand, but he mistakenly takes the Plain Meaning Approach to be inadequate in this respect. The Plain Meaning Approach does not demand: “Attribute a meaning to the provision that is conformable to the letter of the law *apart from its social context*,” but requires: “Ask yourself, when interpreting the law, what the normal speaker would have meant, if he would have framed this provision under the same circumstances in which the legislator used those words,” (Holmes 1992, 297), that is: Take into consideration the social opinions, beliefs, and values that resonate in those words when used by the normal speaker at the time of the enactment.

This we know for sure: that the wordings of the provisions concerning marriage in general, and the wordings of Article 33 of Book I Civil Code in particular, would not have been chosen by the normal speaker, if (s)he had intended to state that a marriage between man and man, or woman and woman, should also have been a legal possibility. And we can be sure of this, because legislation, jurisprudence, and social opinions at the time

of the legislation indisputably reveal that the conception of matrimony, construed as an association between man and woman only, was the expression of the dominant ideological discourse of that time. It is this ideology, therefore, that serves as the unequivocal context in light of which the provision has to be understood, excluding the plaintiff's literal reading.

The difference between Holmes and the Supreme Court is a difference of perspective. Holmes focuses on the ordinary citizen, the Supreme Court on the legislator. But in this respect citizen and legislator are interchangeable. In both perspectives it is not a real person or the real legislator that serves as standard, but the prudent citizen or prudent legislator.

5. Methods of Interpretation and the Law's Tenor

That judge's binding to the letter of the law, therefore, does not mean that the judge interprets the law literally—an approach that, as we mentioned before, makes no sense at all. It means that the law has to be understood as it was reasonably understood by the normal speaker at the time of the enactment. To determine the context of the normal speaker, one has to make use of those perspectives that are known in legal theory as methods of interpretation. Used together and in correlation, these methods lead to the alleged tenor of the provision. In order to determine how the provision is understood by the normal speaker, we might make use of linguistic interpretation—admissibility or inadmissibility of the alleged literal reading depends on whether or not the interpretation is supported by different viewpoints on which one may resort to settle the law's meaning. It is this criterion of mutual underpinning that explains why linguistic interpretation sometimes fails, as in the above-mentioned case of a marriage between persons of the same sex, and sometimes succeeds, as in the ruling of the Dutch Supreme Court on the interpretation of the word "finding" in the (legal) provision concerning the legal obligation to assign a finder's reward whenever abandoned property is restituted to the owner (HR 25 October 1996, NJ 1996, 16).

Here are the facts of the case: A stolen car had been found by a company, called Graphé, that professionally tracks down missing cars. As such, Graphé claimed a finder's reward according to section 10, paragraph 2 of Book V Civil Code, which states: "The finder who satisfies his liabilities is entitled to an equitable reward." The insurance company, to which the property of the stolen car had been transferred, contested this claim, arguing among others that the provision does not apply in this situation. According to the insurance company, the word "finder" in the provision has to be conceived as "finder by chance," as the purpose of the provision would be to reward only the true finder. Since Graphé was a company that professionally traces down missing cars, Graphé could not be deemed to

be "true finder" and should not therefore be entitled to the finder's reward. The Supreme Court threw the objection out in two steps:

The tenor of Article 5:5 ff. Civil Code can be summarized this way: that the provision aims to advance the recovery of lost property whenever it is lost, and, in case it turns out that the person who lost it does not show up, to find a solution to facilitate the recurrence or actual use of this property in judicial matters as soon as possible. In this respect, a broad interpretation of the word "finding," corresponding to the linguistic meaning of "finding," squares with the provisional intention.

What makes the Supreme Court think that the tenor of this provision is as stated? The Conclusion of the Advocate-General might provide some elucidation, for the Supreme Court's ruling is published together with the Conclusion of the Advocate-General, the latter serving as a repository of arguments that support or complement the Court's argumentation. In this case, Advocate-General Hartkamp offers some arguments in favor of linguistic interpretation.

After discussing thoroughly the treatment of the case in the previous courts and the claimant's grievances, he considers, first of all, the grievance that interests us here: that professionally tracing down missing cars can never be qualified as "finding" in the context of the provision. This complaint is dismissed by Hartkamp on several grounds. He primarily rejects the complaint with an appeal to legal history, and combines this argument drawing on the ordinary meaning of the word "finding" (linguistic argument) and adding a consequentialist argument. He argues that the original enactment holds a definition of "finder" that does not comprise any clues to the intentions of the finder whatsoever. This viewpoint squares with the ordinary meaning of the word "finding," which also denotes the act of deliberately searching for an object. According to Hartkamp, this viewpoint also corresponds with legislative intent. The provision aims, among others, to permit the person who lost his property, to recover it as far as possible. To withdraw professional findings from the provision would be at variance with the provision's purpose. Therefore, the provision is in need of as wide a range of application as possible.

Hartkamp, then, appeals to a systematic argument. Legal history reveals that this provision can be conceived of as a particularization of caretaking: The finder serves, as it were, as caretaker. If the legal provision concerning finding had not existed, the finder would have been entitled to a reward in his capacity as caretaker. In order to be deemed to be a caretaker, the law requires the caretaker to have acted professionally. Therefore, to exclude the professional finder from the provision, as the claimant contended, would be contrary to the more generic provision of caretaking.

Hartkamp ends his treatment with a linguistic argument. The claimant argued that the decisive element in the concept of finding is the element of chance; therefore, only the true finder, not the professional one, could qualify as finder. This claim was rejected by Hartkamp, because the professional finder is also subject to chance: Even when an object is deliberately looked for, one cannot be certain where it will be found.

If we return to the Court's ruling, the Court simply states the alleged intent of the provision. From this intent, the Court then infers that the word "finding" could well be understood according to common parlance, a reading that is the very interpretation the claimant seeks to contest.

Although the Court legitimizes the reading of this provision with an appeal to linguistic interpretation, it is not because provisions always have to be read "to the letter," but because in this case a literal reading squares with the alleged intent of the provision. That is a different way of saying that the supremacy linguistic interpretation exerts in some cases is intimately connected with other reasons to read a provision that way, and not differently. Here, the role of the other reasons or perspectives is mainly negative: For no reasons from legal history, the law's system, legal principles, or previous rulings could reasonably be advanced in favor of a reading that challenges the reading as it appears from the perspective of legislative intent. If no objections can reasonably be expected, it will not be necessary to determine or justify the tenor of the provision also from these perspectives. The linguistic argument suffices, because the reading squares with the reading the other perspectives would result in.

The same holds for all methods of legal interpretation. Legislative intent, although in this case decisive to determine the law's purport, might be overruled by different perspectives with an appeal to legal certainty, efficiency, or a fundamental change in social opinions in other cases (e.g., HR 21 March 1986, NJ 1986, 585, about the provision concerning parental authority). Neither linguistic interpretation, nor legislative intent or any other variety of legal interpretation, is, as such, decisive in order to determine the law's tenor. In the heuristic phase, the judge passes through the whole range of perspectives that might be relevant, although some of them will be explored in depth and others will be passed over in silence.

6. Conclusion

We are now in a better position to expound why the claimants' reading of the provision of marriage was inadmissible *as such*: Their reading ignores society's traditional opinions on marriage, the institution that makes up the nucleus of family life at the time of the enactment and, therefore, the obvious context to understand this provision. Obvious, because this reading is underpinned by all methods of interpretation, except one: linguistic interpretation.

The plaintiffs' literal reading, then, is not a naive mode of reading, but a sharp witted interpretation, in order to authorize by means of the judge what couldn't yet be found in the law. But this could only be done by neglecting all sorts of counter-indications, or as the Supreme Court put it: by a literal reading of the law that deviates from the unequivocal tenor of the law.

These considerations result in the paradox that the plaintiffs, when appealing to the letter of the law, interpreted the clear, plain and precise provision—and interpreting is, according to Voltaire, nearly always corrupting. By demanding that the judge be bound to the law to such a degree as to always comply with the letter of the law, Montesquieu and Voltaire did not want to express the idea that the law has to be understood literally—whatever this could mean—but that the judge's reading of the law should comply with the reading that the normal speaker would ascribe to it. This is only a slight variation on the Plain Meaning Approach of Holmes and certainly not equivalent to a mere linguistic interpretation of the law.

Actually, I do agree with Holmes' Plain Meaning Approach. It means that the judge, when interpreting the law, takes as a guideline the normal speaker. It does *not* mean that the judge has to decide in accordance with this reading of the law. The existence of compelling reasons sometimes justifies a ruling *contra legem*. But the way to do so, is not by means of a distorted reading of the law—a one-sided reading—but by appeal to genuine reasons. In our case, the plaintiffs also appealed to the European Convention on Human Rights (Rome, 1950) that guarantees the enjoyment of the rights and freedoms set forth in the Convention without discrimination on any ground (Article 14 Convention). This article, together with the right of men and women of marriageable age to marry and to found a family (Article 12 Convention), offer, in my opinion, compelling reasons to suspend the Dutch provision as it applies to same-sex marriage—compelling, that is, as far as these articles are interpreted according to the Plain Meaning Approach.

Interestingly, the Dutch Supreme Court defended a sharp-witted interpretation of the Convention, one that makes it possible to discriminate between sexual preferences. "In this Treaty," the Supreme Court states, "the right of men and women of marriageable age to marry and to start a family concerns the traditional marriage. Therefore, the distinction between heterosexual and homosexual couples is not inadmissible." At the time the Treaty was framed (1950), the states parties doubtless did not envisage a social and moral development that would result in the demand that the sacrosanct institution of marriage be open for homosexuals too. Yet, the states parties expressly committed themselves to the recognition and implementation of the human rights and freedoms, among them the prohibition of discrimination on any ground. This is a mode of binding on

government, *especially* when the exercise of these rights and freedoms leads to results that the government rejects. For what is the relevance of the human rights, if they can be restricted as soon as the government regards their application, for some reason, inconvenient?

"Pacta sunt servanda," "a man a man, a word a word," "to contracting parties, agreements apply as law." Like the plaintiff's linguistic interpretation of Article 33, book I, of the Dutch Civil Code, the Supreme Court's reading of the clear, plain, and precise provisions of the European Convention is a sharp-witted one. One possible explanation for the Court's strained interpretation is that it enabled the Court not to declare itself openly on a matter that was both politically and socially controversial at the time of the ruling. The true reason for dismissing the request might be found in the objection as adduced by the lower courts in this case: The expunction of the ban on same-sex marriage by the judiciary would mean "that the principle of marriage as a bond between man and woman only, a principle firmly-embedded in the Western world for ages, would once and for all be transformed out of democratic deliberation." In so doing, the judge would operate as legislator-deputy in cases that are explicitly political in character. But rather than reach its decision by way of pseudo-interpretation, the Supreme Court should exhibit its true reasons for the decision.

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