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Een algemene normtheorie toegepast op open normen in het belastingrecht

Rustenburg, P.

Citation

Rustenburg, P. (2020, May 14). *Een algemene normtheorie toegepast op open normen in het belastingrecht*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/87896>

Version: Publisher's Version

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Note: To cite this publication please use the final published version (if applicable).

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Author: Rustenburg, P.

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Issue Date: 2020-05-14

Summary

A general norm theory applied on open norms in tax law

INTRODUCTION

The aim of this research was to establish the distinction between the different types of norms, in particular between an open norm and a vague norm. The term *open norm* was introduced in Dutch legal practice in 1977 by opponents of the introduction of the new civil law code (NBW). In their opinion, the NBW contained too many open norms, also referred to as vague norms, blanket or undetermined norms. From that moment on the term *open norm* was adopted by the Dutch legislating parliaments and subsequently spread across virtually all legal areas of application.

Since then, the term *open norm* has been used as a synonym for vague norms, as a reference to social norms, as an indication of abstract and indefinite norms, and as an indication of unlimited circumstantial facts. The term *open norm* is also sometimes compared to the German norm Generalklausel, or the Anglo-Saxon term vague norm, but these norms do have different meanings in a legal context. This uncontrolled norm development has led to a terminological confusion and inconsistent use of the term open norm, even to unfounded inferences.

Theory development

The theory was developed from the need to be able to distinguish norms by their content. During this development, theoretical and practical use was made of selected methods from disciplines outside of legal science, in particular the more exact sciences notably amongst others Popper's *Logik der Forschung*. This also allowed to meet the conditions of general applicability of the theory in terms of legal domain and types of norms; furthermore, the requirement for practical feasibility of implementation of the theory in an executable system. Research showed that none of the usual norm theories (such as those by Weinberger, Kelsen, Simon, Hart, Larenz, Raz, etc.) could adequately meet these requirements. This observation led to the development of a norm theory established on norm definitions enabling derivation of the various and different norms. Essential to this theory is a general definition of a norm represented in the symbolic form $\forall \varepsilon \in E' \text{ 'imperatief' } \varphi$. This form represents all the features and characteristics of a norm. The meaning of the components of this norm will be shortly explained:

- ε represents an entity, an entity may be an object or a subject.
- E represents the set of entities that meet the required characteristics in the form of attributes $a_i, i = 1, 2, \dots, n$; n represents the number of attributes that ε has to match in order to $\varepsilon \in E$.
- ‘*Imperative*’ stands for the imperative or an instruction to follow up of the norm, for example ought to, to obey an order, to prohibit, to do or not do, to let. The ‘*imperative*’ is primarily the domain of the so-called deontic norm theories.
- φ represents a general function in algorithmic form for which it generally holds $y = \varphi(\varepsilon)$. The function φ may be a transaction algorithm, a calculation algorithm, a behavioural algorithm, etc.

In normal language, the norm $\forall \varepsilon \in E \text{ 'imperative' } \varphi$ can be read as follows: all entities ε that meet the characteristics of set E are to follow φ .

If an open norm is included in the text of law, reference is made to an external valuation for establishing the content of the norm, a valuation originating from the social system outside the legal system, or generally indicated in this theory as the real system. In the legal text, these types of norms are labelled with a predicate p , for example, $p = \text{value in economic terms}$ refers to a function φ for determining the value in the real system. Other pertinent predicates are *customary, opinionative, unusual, etc.* on the basis of which these norms can generally be traced in a legal text. The open norm is symbolically defined as $\forall \varepsilon \in E \text{ 'imperative' } p\varphi$. If the predicate p refers to a predefined norm in the real system, for example $p = \text{ISO9000}$, then $p = \text{determined}$, but still remains a reference to an open norm as seen from the legal system to its content outside the legal system. If the predicate refers to an undefined but determinable norm, for example $p = \text{usual wage}$, then $p = \text{undetermined}$ as constitutive for determining the function φ .

A vague norm is characterized by the theoretical concept of vagueness. Vagueness refers to an entity ε whose attributes $a_i, i = 1, 2, \dots, n$ do not clearly indicate the boundary. Vagueness can be remedied by a sharper definition of the attributes. The distinction between open norms and vague norms is therefore given in theory: an open norm cannot be a vague norm. Correspondingly, other norms can be distinguished using this theory, e.g. abstract norms, undetermined norms, qualification norms, quantifier norms. Furthermore, delegation norms, behavioural norms and procedural norms could also be defined within this theory. Then it follows from this theory that on the basis thereof all types of norms can be defined unambiguously and coherently into an operational system.

System structure and method

The aforementioned theory provides the norms that constitute the practical implementation of a system. According to system theory, goal, function, structure and method are the most important design characteristics for the

construction of a system. The fiscal system considered in this study is composed of the subsystems legislation, tax administration and judiciary. The primary purpose of the fiscal system is to function as an engine for state income in order to finance public duties. The system operates neutrally with regard to political aspects. This means that the system does not directly contain any ideology in itself but only legitimized norms that serve as the basis for the structure and operation of the system. These norms correspond to norms derived from the aforementioned theory of the form $\forall \varepsilon \in E$ 'imperatief' φ in which φ accommodates the current legal rules in algorithmic form.

The dynamics of the system are based on facts that occur in the real system or are designated by the system as fictional or artificial facts. The system defined facts initiate an activity that must be followed up by men or computers. The definition of a fact is the one formulated by Wittgenstein, represented in this research as $\varepsilon_1 \langle \text{operator} \rangle \varepsilon_2$. The entities ε_1 , ε_2 and $\langle \text{operator} \rangle$ represent the functional connection, which by definition creates a fact. For example, *John owns a house* is by definition a fact. If the system now defines $\forall \varepsilon_{\text{person}} \in E_{\text{houseowner}}$ 'should pay' φ_{tax} then it follows that John has to pay tax as owner of the house. Facts, in this case taxable facts initiate the operation of the system. It does not matter whether John executes the norm physically or has it executed by a computer.

An important part of a legal system are legal opinions from court decisions. Judicial interpretation and construction of law by the court cannot be formalized into a methodology. Therefore, instead of using the syllogism, a general formula is taken as the starting point in this judgement in which φ is assessed for applicability in case c for entity ε . The equation for legal judgement in a particular case is defined as θ_1 : **if** $c = \varphi(\varepsilon)$ **than** r_1 **else** r_2 ; here r_1 and r_2 represent the legal consequences. Judicial interpretation is then regarded as a mental process carried out by a judge in which the usual methods of legal reasoning are applied. Therefore, the judge's method – adherence to the norm and applying (subjective) reasoning – can only be represented in an abstract way by the symbol ω . With $\omega(\theta_1)$ the judge can carry out an iterative thinking process with c , ε , r_1 and r_2 until a legal binding result r_1 or r_2 is obtained to the opinion of the judge

For open norms, the equation θ_2 : **if** $c = p\varphi(\varepsilon)$ **than** r_1 **else** r_2 is defined, with $\omega(\theta_2)$ as the judge's general methodology. Because the substantive development of an open norm has been left to the judge by the legislator, the judge can amend the function $p\varphi$. In fact, this means that the development of an open norm takes place under the direction of and control by the judge.

In addition, the different types of norms as distinguished on the basis of the theory could be subsequently investigated in the implemented system. From this research it could be deduced that the current use of the term *open norm*

and the application of open norms has a rather random and dispersed character. This practice also allowed to classify open norms and vague norms as one type of norm, or to explain a legal phenomenon without any scientific proof by referring to open norms or vague norms.

Main conclusions

It follows from the aforementioned theory that norms can be distinguished by proper definition of the characteristics according to their type. The essential significance of this theory is that the specified components of a norm provide a means to distinguish norms according to their contents. Also, to specify criteria for the classification of all required norms into different types. From this it could be concluded that the term *open texture* (*Porosität*) appears to be of little theoretical and practical use. The scientific and practical applicability of a norm theory is reflected in the unambiguous and coherent use of the different norm types by the legislator, the administration and the judiciary within the prevailing legal system. This also leads to new opportunities for legal science and education. These new opportunity's may include:

- Science: research and simulation of optimal system structures based on norm theory and technology.
- Education: explanation of norm theory and the functioning of a norm in a legal system supported by applications.
- Legislation: unambiguous legislation based on norms defined according to norm theory and standardization of algorithmic functions.
- Judiciary: advanced case-by-case assessment and legal interpretation of norms, both activities interactively supported in accordance with the norm theory accepted by the legislator.

Subsequently the norm theory is generalized to facilitate the applicability to other areas of law. This is represented as a general norm theory in Appendix I. In addition, Appendix II shows that a traditional legal system based on articles can be fully mapped on a normative system with all functions φ in algorithmic form.