THE LIMITED ROLE OF HERMENEUTICS IN LAW

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ABSTRACT

My main claim in this article is that lawyers should make less use of the hermeneutical method than they do. The reasons that I will adduce to support this claim are the following:

Law (tout court) is first and foremost an answer to the question of how to act, and more in particular, the question of which rules to enforce by collective means. As such, law does not coincide with positive law. Nevertheless, positive law determines the content of the law to a large extent. It does so for two reasons. The first reason is that positive law contributes to legal certainty, and that legal certainty is very important for the question concerning which rules should be enforced by collective means. The second reason is that respect for the positive law, which was created by democratic bodies, implies respect for democracy.

However, positive law can only contribute to legal certainty if its application is predictable. If the positive law can be interpreted in more than one way, its application will not be predictable. In that case the positive law is not relevant for the content of the law tout court. Theories about the interpretation of positive law (hermeneutical theories) are particularly relevant where positive law can be interpreted in different ways, that is: where positive law is not relevant for the content of the law tout court. Therefore, hermeneutical theories are not relevant for the content of the law and lawyers should not waste their time on them. A similar argument can be given for the democratic legitimation of positive law.

Keywords: democracy, hermeneutics, legal certainty, positive law, practical reason

1. Introduction and overview

Hermeneutics, the theory and practice of interpretation, has played an important role in law for many centuries, and can be traced back to at least the 11th century AD.[1] [2] Following the theologian Schleiermacher, Von Savigny formulated in the 19th century general guidelines for the interpretation of legislative texts: grammatical (literal), logical, historical and systematic interpretation.[3] Following Gadamer, Esser emphasized the important role of the 'hermeneutical circle' in legal interpretation.[4] This hermeneutical circle displays the necessity to have at least some understanding of what a text

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[1] At the end of the 11th century, legal scholars in Bologna created a text-critical version of the Justinian Digest. This version was based on the comparison and interpretation of several sources. (Wieacker 1967, p. 46)

[2] Stelmach and Brožek 2006, pp. 167-209.

[3] Von Savigny, *System des heutigen Römischen Rechts*, Bd 1 (1840), §33. Quoted after Röhl and Röhl 2008, p. 118.

[4] Gadamer 1960; Esser 1970.

means in order to be able to read the text and to further determine the text's content This leads to a new and better understanding, which may function as precondition for an even better understanding.[5] Hermeneutics may have started as a theory about understanding texts, but soon it became a general theory about finding the meanings of entities in social reality.[6] Reality consists of meaningful entities and hermeneutics is a method to find these meanings.

Although the hermeneutical approach to legal reasoning may have its strongest basis in the German *Rechtswissenschaft*, it has also become popular in France[7], the Netherlands[8], Finland[9], and Sweden.[10] However, perhaps the most influential single proponent of a hermeneutical approach in law has been the American legal philosopher Ronald Dworkin. In *Law's empire*, Dworkin writes that his '... book takes up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice ...'[11] Differently stated, Dworkin aims to find the meaning that participants in the practice of law assign to their own practice, on the implicit assumption that the meaning of a social practice is, at least in first instance, the meaning that the participants themselves assign to their practice. Moreover, from such a theory we may expect guidance in distinguishing good legal arguments from bad ones. The hermeneutical theory of law is not only descriptive, but also normative. Legal reasoning should make the best of legal practice as it actually is.

In his first book, *Taking rights seriously,* Dworkin gave us an elaborated example of how to interpret legal practice.[12] He introduces the mythical judge Hercules who must develop a theory of legal rights - correct outcomes of cases - based on a comprehensive theory of law. This theory must account for the roles of legislation, including the constitution, and of case law. Hercules must identify the set of principles that provides a coherent justification for all common law precedents, and all constitutional and statutory provisions, to the extent that these are to be justified on principle (rather than on policies). Moreover, this set of principles must also fit with the political morality underlying law. Clearly, this is a task which exceeds the powers of ordinary human beings, which explains why the judge is named 'Hercules'.

My main claim in this article is that lawyers should make less use of the hermeneutical method than they do, or than it is claimed that they should. The reasons that I will adduce to support this claim can be summarized in two paragraphs:

Law (*tout court*) is first and foremost an answer to the question of how to act, and more in particular, the question of which rules to enforce by collective means. As such, law does not coincide with positive law. Nevertheless, positive law determines the content of the law to a large extent. It does so for two reasons. The first reason is that positive law contributes to legal certainty, and that legal certainty is very important for the question concerning which rules should be enforced by collective means. The second reason is that respect for the positive law, which was created by democratic bodies, implies respect for democracy.

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5 Röhl and Röhl 2008, pp. 116/7.
6 Palmer 1969, p. 33. See also Taekema 2011.
7 Troper 2003, pp. 103-105; Terré 2006, §541.
8 Asser-Scholten 1974; Smith 1998, pp. 23-69.
9 Aarnio 1987, pp. 77-107.
10 Peczenik 2008, pp. 307-345.
11 Dworkin 1986, p. 14.
12 Dworkin 1978, pp. 105-123.

However, positive law can only contribute to legal certainty if its application is predictable. If the positive law can be interpreted in more than one way, its application will not be predictable. In that case the positive law is not relevant for the content of the law *tout court*. Theories about the interpretation of positive law (hermeneutical theories) are particularly relevant where positive law can be interpreted in different ways, that is: where positive law is not relevant for the content of the law *tout court*. Therefore, hermeneutical theories are not relevant for the content of the law and lawyers should not waste their time on them. A similar argument can be given for the democratic legitimation of positive law.

I will elaborate my argument in the following sections.

2. Two views of law

It would be a misconception to think that the law exclusively consists of norms that prescribe behaviour. Firstly, law is just as much a complex social practice as a collection of norms; the emphasis on only rules would give a one-sided view of the law. Secondly, the vast majority of legal rules do not prescribe behaviour at all.[13] There are also rules that permit behaviour (permissive rules), rules that provide legal subjects with the competence to perform certain juridical acts, and rules which define terms that are used in other rules. There are many more types of rules and then I have not even talked about the different types of subjective rights, or about legal principles or legal values. Yet, it can be argued that all those other rules exist to support the rules that prescribe behaviour. Law is aimed at influencing human behaviour by making it mandatory.[14] In this way it provides agents with reasons for behaviour.

Legal rules are not the only rules that give reasons for behaviour by making this behaviour obligatory; moral rules do the same. Further, there are moral and other values that also give reasons for behaviour, without necessarily making this behaviour obligatory. Finally, self-interest also provides reasons for behaviour. This raises the question of how legal rules relate to other reasons for behaviour. Answering this question is a risky business because there are two radically different types of answers possible. Moreover, there is no neutral way to decide which of these two types of answers is the best.

The one type of answer presupposes that law is a kind of social phenomenon. Given this presupposition, the next questions become what kind of social phenomenon law is, and how this should be determined. According to Hart, the method to be followed is that of descriptive sociology and the answer is that law consists of a combination of primary and secondary rules.[15] According to Dworkin, who shares Hart's basic assumption that the law is a social phenomenon, the method consists of interpreting the phenomenon of 'law'. His answer is that the law corresponds to the best possible theory on the content of the law; a coherent mix of existing legal materials (case law and

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[13] In my book *Foundations and Building Blocks of Law* (Hage 2018), I even argue that strictly speaking not a single rule prescribes behaviour. Some rules create deontic facts, and these facts, not the rules on which they are based, prescribe.

[14] Cf. in this connection Fuller's description of law as 'the enterprise of subjecting human conduct to the governance of rules'. (Fuller 1963, pp. 46 and 96) The same suggestion is made by Hart, who characterized the rules that prescribe behaviour (rules of obligation) as 'primary rules'. (Hart 1994, p. 94)

[15] See Hart 1994, p. vi and chapter V.

regulations) and substantive correctness.[16] The advantage of this approach, which Hart and Dworkin share, is that it ties in with the experience of many that the law is actually there, in the form of a social practice. The disadvantage is that it is at first sight not clear why the law provides a reason to act.

The other type of answer is that law deals with the question 'What shall I do?'. We find this approach in the work of various legal philosophers such as Thomas Aquinas, Thomas Hobbes and Robert Alexy.[17] All these philosophers place law in the realm of practical reason, and as such the reason-giving force of law is immediately clear. However, it is still not evident that positive 'law' - law as social phenomenon - is law indeed.

The normative questions which law aims to answer, differ in more than one single way from the questions which morality and prudence seek to answer. Nevertheless, it is my opinion that it is best to see one particular practical question as defining the law. This is the question 'Which rules should be enforced by collective means?'.[18] However, although the rest of my argument depends on the view that *some* practical question defines law, it does not depend on *this particular* question.

3. Law as practical reason

There are two fundamentally different views on the nature of law: law as a social phenomenon and law as practical reason. To determine which view on the nature of the law is the best, one needs a standard to comparatively evaluate the two views. However, whatever standard is used in making this determination, it is always biased towards one of the two answers. For example, one might look at how the law functions in practice. Do legal reasoners focus on reasons that have actually been accepted by the legislator or courts? Or do they try to determine what would be the best possible outcome for a case? If one answers the question after the nature of law by looking at legal practice, one seeks the answer in social reality. This would only be justified on the assumption that law is a social phenomenon. One could also determine what law is by thinking about how human behaviour should be guided. But if one does, one seeks to answer the question of the nature of law in the sphere of practical reason, and that is only justified on the assumption that law is an answer to the question of how to behave.

Despite this fundamental difficulty, the view that justice belongs to the sphere of practical reason seems the better one. This view, in combination with the associated method to determine the nature of the law, is more coherent with the rest of our knowledge than the view that the law is a social phenomenon together with its corresponding method. The crucial issue in this respect is how reasoning based on positive law, the law that exists as a social phenomenon, is combined with practical reasoning.

Assuming that law is a special part of practical reason that deals with the collective enforcement of behaviour, it is easy to explain that positive law plays an important role in legal reasoning. This explanation is that it is often more important *that* a certain type of problem situation has a clear and

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16 Dworkin 1986, chapters 3 and 7.

17 Alexy 1994, p. 263.

18 This is in agreement with Dworkin's view that law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past (Dworkin 1986, p. 97).

knowable solution, than *what* that solution exactly means. This is especially the case if there are more solutions that are not unreasonable in terms of content.[19] In that case, legal certainty and positive law determine the content of the law *tout court*.

However, it is also possible that the positive law does not offer a clear answer to a legal question, or that the answer provided by positive law is so bad from a substantive point of view, that considerations of legal certainty must be set aside.[20] In that case, legal reasoning should continue in terms of what would be a desirable legal arrangement for the issue at stake. It may seem that this is a transfer from the question of what the law is to what the law should be. This appearance would be deceptive, however. The argument in this section, which deals with law as practical reason, deals from the beginning with the question of what the best possible legal arrangement is. Most often, the answer to this question can be based on considerations of legal certainty. However, when that is not the case, the style of the argument moves from the formal reason of legal certainty to substantive reasons, for answering the question of which standards must be collectively enforced. This is not a change of question, from what the law is to what the law should be, but merely a change in the kind of reasons used to answer the question of what the law, as part of practical reason, is.

Another possible reason why positive law is important, even if one sees law *tout court* as part of practical reason, is that positive law is often democratically legitimized and that it is therefore desirable that it is also enforced collectively. Even if it is not simply assumed that democracy is good, there are several ways to argue that democratic legitimacy is a reason to enforce rules collectively. One argument is that the fact that a regulation was created democratically is an indication that it is substantively correct.[21] Another argument reads that the democratic origin shows that the regulation reflects the will of the people and that it is good that the will of the people is collectively enforced. A third argument reads that it desirable for a society to be governed democratically and that democratic government also means that rules are which are created by means of democratic procedures are collectively enforced, because otherwise democracy would be undermined.

We see that there are at least two reasons why positive law plays an important role in determining which rules should be collectively enforced, namely legal certainty and the democratic legitimacy of the positive law created through democratic procedures. In the view that law is a special variant of practical reason, it is therefore possible to explain in a natural way the unity of, on the one hand, legal reasoning on the basis of positive law and, on the other hand, purely evaluative reasoning.

4. Law *tout court* is not a social phenomenon

We have seen that positive law plays an important role in determining the content of the law if one sees law as a part of practical reason. Now it is time to consider the view that law is identical to positive law, that law *tout court* is a mere social phenomenon. I will offer two reasons why positive law, although highly relevant for the content of law *tout court*, does not coincide with it.

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[19] From a Law and Economics perspective, this could be formulated in terms of the transaction costs for conflict resolution. These costs are sometimes higher than the difference between a favourable and an unfavourable outcome of the conflict. E.g. the costs of the lawyer are higher than the difference between winning and losing the case.

[20] The same holds for considerations based on democracy, which will be discussed later.

[21] Cf. Raz 1986, pp. 70/1.

The first reason has to do with the practical nature of legal judgments. The point of law - or at least one of its main purposes – is to guide human behaviour. This means that participants in the social practice of law must by-and-large be willing to have their behaviour guided by law. The internal perspective on law is essential for law's existence. This perspective can only exist if legal reasons are, again by-and-large, seen as practical reasons. It is not possible that most participants in a 'legal' system consider legal judgments in a detached way. They cannot often, or even most of the time argue 'This is what I ought to do according to the law, but why should I care?'. 'Legal' duties and obligations can only exist as full-blown legal duties and obligations if they play most of the time a role in the practical reasoning of most of the participants in a legal system.

However, even if most participants in the system adopt the internal perspective on legal duties and obligations, this does not suffice, because the fact that most people *are* motivated by law does not justify that legal duties and obligations *should* motivate. For instance, a legal subject should not comply with a speed limitation only for the reason that most legal subjects consider the existence of a law to this effect as a reason to limit their speed. There must be an independent reason, which is perhaps also recognized by these other legal subjects. Therefore, if law is a purely social phenomenon, this does not account for the role that law should play in practical reasoning, even if this role – as the internal perspective on law - is part of the fact that law exists as a social phenomenon.

The second reason has to do with the unity of legal reasoning. Legal rules can exist as a social phenomenon in two ways, namely - to put it in Hartian terminology - as social rules and as institutional rules. Legal rules exist as social rules within a certain group if sufficiently numerous members of that group recognize the existence of these norms, and if they think that the other group members also recognize their existence. They can do so by complying with the rules and by applying them to others when applicable. Customary law falls within this category of social rules, as well as case law in legal systems where *stare decisis* is not mandatory. Legal rules exist as institutional rules if other rules indicate that they count as legal rules.[22] This holds for law that has been made in the form of regulations and treaties, and arguably also for duties and obligations that have been created by means of juridical acts (contracts, wills, permit conditions), as well as for the common law. Insofar as law is a social phenomenon, it is essential that there is an existing social practice, which means that that the participants in this practice must be aware of it. It is not possible that there is a social practice within a group when a large part of the group is not aware of its existence. To anticipate a crucial step in my argument: this means that rules based on unexpected interpretations of legislation or precedents do not exist as a social phenomenon.

If all legal rules exist as a social phenomenon, there will be a number of cases that are not covered by legal rules. The law does not provide a solution for these cases and a legal decision-maker who is confronted with them and who is obligated to decide them, has to create new law.[23] This would imply that arguments of legal decision-makers consist of two parts. It is first necessary to establish whether there is law in this case and what its content is. If it turns out that there is no law, new law has to be made. In that case, the argumentation is not aimed at finding existing law, but at indicating

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[22] Cf. Hart's theory about 'rules of recognition' (Hart 1994, chapters V and VI), and Searle's views on 'counts-as rules' and the mode of existence of social reality (Searle 1995, chapters 4 and 5 and Searle 2010, chapters 3 and 5).

[23] Cf. Kelsen 1960, p. 249, Dworkin 1978, p. 34 and Brouwer 2008, p. 162.

what is desirable as a new law. This dichotomy is seldom recognizable in legal practice. Apparently, the dichotomy does not exist, and this pleads against the view that law *tout court* – as opposed to positive law – is a social phenomenon.

7 . Legal certainty

Let us assume for the rest of the argument that the law is the answer to a question of the type 'What should we do?' and more specifically the question 'What standards should we collectively enforce?'. Given this practical question, it is not self-evident that the positive law contributes to the answer, but we have also seen that there are at least two kinds of reasons why the positive law is important for the content of the law *tout court* . The one reason has to do with legal certainty. It is important for legal subjects to be able to predict the consequences of their behaviour. Since these consequences partly exist of the behaviour of other people, legal subjects should also to be able to predict the behaviour of other people. That is why legal subjects must be able to know which behaviour will be enforced. Since positive law is - or at least should be - more easily known than the substantively correct rules, this makes the positive law *prima facie* part of the law. The second reason has to do with the desirability of democracy. If we want democracy, we must also be prepared to accept democratically established rules. This acceptance may imply that these rules should be enforced by collective means. Since both regulations in their various forms and precedents have their basis in a democratic system - at least in democratic societies - this is also a reason why the positive law is prima facie law *tout court*.

What do these two reasons to regard positive law as law, mean for a hermeneutical approach to law? To begin with, let us observe that interpretation is inevitable as soon as the law is based on texts or other symbols. Symbols are only symbols if they have a conventional meaning. The determination of this meaning in concrete terms is a form of interpretation. Since this interpretation is concerned with determining the meaning of symbols, and since symbols are bearers of conventional meaning, the determination of this meaning will be little else than the conscious or unconscious application of the convention. The meaning of symbols is usually not controversial, because otherwise the symbols would no longer be carriers of conventional meaning. This is attractive from the perspective of legal certainty and therefore positive law in the form of symbols (regulations, precedents) is also attractive from the perspective of legal certainty.

However, if determining the meaning of the positive law requires more than the mere application of conventions that lead to unambiguous outcomes, there is little reason from the perspective of legal certainty to regard the positive law as (part of the) law *tout court*. This means that the application of special forms of legal reasoning, such as reasoning *a fortiori*, by analogy and *e contrario*, does not lead to law in the sense of practical reason.[24] The same applies in principle to other forms of interpretation than the determination of the literal meaning of texts. Particularly if the results of these methods of interpretation are not predictable, either individually, or because it is unclear which method of interpretation leads to law *tout court*, no argument can be derived from legal

[24] Obviously, it is not excluded that these special forms of legal reasoning lead to substantively just law, but if they do, this is coincidental.

certainty why the positive 'law', thus interpreted, would be law. This could, by way of exception, be different if a certain non-literal interpretation is so obvious that there is hardly any doubt that this is the correct interpretation. However, as soon as any serious doubt is possible, no legal arguments can be derived from legal certainty to consider this positive 'law' as a law.

8 . Democracy

The argument with regard to democracy does not differ very much from the argument with regard to legal certainty. Out of respect for democracy, both for the rules that (indirectly) would be made by the people and for the institutions such as the judiciary, which function in a democratic setting, there is reason to enforce the law made by democratically legitimized institutions, if necessary by collective means. But this presupposes that there is a direct link between this positive law and the institutions that are democratically legitimized. If this connection is not recognizable, the collective enforcement of the positive law cannot be seen as support for democracy.

For example, one could argue that the literal interpretation of a regulation, or a legal-historical interpretation, leads to an application range of a regulation for which there is democratic support. But this does not apply to, for example, teleological or systematic interpretation, or to reasoning by analogy or *e contrario*, because in these cases there is no link between the adopted interpretations and the democratic origins of the regulations. Moreover, democratic support becomes dubious if the literal interpretation and the legal history lead to incompatible results.

In short, the democracy-argument offers no support for the use of an extensive palette of hermeneutical techniques. At most it supports the use of literal and legal-historical interpretation and then only if these lead to unambiguous results and do not contradict each other. This is not essentially different from what we already saw in the legal certainty-argument.

9. Conclusion

There is a lot to be said for considering law as the answer to a question of the type 'What should I / what should we do?'. If we see law this way, it is no longer evident that positive law- both the positive law that has been laid down such as regulations and jurisprudence law, and the positive law that has not been laid down but that exists through acceptance within a social group -is law *tout court*. Special arguments are then needed as to why it is desirable to comply with, or enforce, this law.

It is quite possible to find such arguments; an appeal to legal certainty and to the democratic legitimacy of (much of) the positive law provides excellent reasons why positive law is law *tout court*. The status of positive law as law becomes dubious, however, if arguments such as legal certainty and democratic legitimacy no longer apply. That is the case where the content of positive law is controversial or - and this largely boils down to the same thing - where democratic legitimacy is no longer recognizable, or only with much good will. Then it is no longer clear why we should obey or enforce the positive law and the fundamental doubt about the legal character of the positive law arises.

It is no coincidence that this area of doubt lies where the hermeneutics as a doctrine of interpretation aims to play an important role. Interpretation is inevitable if law is made using

symbols such as natural language. However, then a form of interpretation is at stake that is often not even experienced as interpretation. But legal interpretation often boils down to determining the desirable scope of application of a rule. The interpreter is then engaged in reasoning about how to act. But if the positive law does not provide unambiguous answers, there seems to be little reason to even use the positive law at all. Then normative reasoning can be free, to the extent that this is possible. All the wonderful techniques developed in hermeneutics can then be stored in the museum of the history of ideas. Maybe hermeneutical methods do not completely disappear, but the reasons to keep them are essentially the same as why we want to preserve industrial heritage: that's how we used to do it, and it is good to remember that, but now we can do better.

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