Part 2: Objectivity and Legal Interpretation

§ 2 Subjectivism, Objectivism, and Intuitionism in Legal Reasoning: Avoiding the Pseudos

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I. Introduction

While the topic of our conference refers to the contrast of objectivity and power, my contribution will focus on what one may qualify as objectivity and its relations to what I will – for the purposes of this presentation – call subjectivism. I will use the latter term to describe two directions of legal arguments which play a crucial role basically in all legal systems:

The first direction is referring to the intention of one or more parties in private law. The second form of subjectivism reaches beyond the borderlines of private law. It relates to the interpretation of all 'authoritative' legal sources (statutes, precedents et al), which are prescribed by an institutional body (parliament; court et al) or individual person empowered to enact law. In this second respect, this paper uses the term subjectivism for any argument that aims at the intention of the legislator (parliament; court et al).

On this definition basis, I will try – in a synoptic manner, by presenting 12 statements – to sketch out some limits of subjectivism, to define some potentials of what may be established as the contrast criterion of objectivism and, finally, to establish intuitionism as a complementary and in the context meaningful third category.

II. Underlying Contextual Assumptions

To specify the context, one should clearly distinguish the reference points of subjectivism, objectivism, and intuitionism (see 1. – statement 1). Furthermore, it makes sense to orientate the distinction of subjectivism, objectivism, and intuitionism at the postulate of methodical accuracy (see 2. – statement 2).

1. Distinguishing reference points of subjectivism, objectivism, and intuitionism

Statement 1: In order to approach issues of subjectivism, objectivism, and intuitionism, one should distinguish three reference points:

(i) The relevance of the parties' intention in Private Law. It is characteristic for this sort of subjectivism that the subjective sphere of private individuals is the legitimizing factor in legal reasoning. Such subjectivism is omnipresent as a means to interpret individual declarations and contracts in private law where private autonomy (still) is the dominating principle.

(ii) The relevance of the legislator's intention in legal methodology, in particular when 'authoritative' legal sources (see above I.) are to be interpreted. The characteristic of this second kind of subjectivism is the reference to the subjective sphere of the legislators (or the judges). It is fair to say that such subjectivism universally plays a dominant – while not exclusive – role in interpreting 'authoritative' legal sources.

(iii) The occurrence of uncertainty in legal reasoning (referred to as the uncertainty issue, see below V. 1.). In this regard, it is crucial whether or not the application of conventional legal methods provides for a coercive solution of the issue at hand. Inasmuch as such a conventional resolution cannot be established unambiguously, objectivism is challenged by intuitionism (psychologism, ideologism, historicism etc.), ie the individual intuition of the person specifying the law overlaps with objective legal methods.

2. The postulate of methodical accuracy – avoiding 'pseudo-subjectivism'

Statement 2: With regard to legal reasoning, it is crucial to be accurate in defining the source of legitimacy for legal solutions. Whenever legal reasoning refers to the 'intention' of the parties or of the legislator, one must carefully distinguish between rightfully establishing such an intention and inferring material reasons that transcend any actual 'intention'. In the latter instance, it is fictitious and inaccurate to claim the legitimacy of 'intention' or of the subjective approach. Therefore, amid an understandable tendency to claim the obvious legitimacy of the parties' or the legislator's authority, one should avoid 'pseudo-subjectivism'. Rather, one should undergo the exercise to meticulously define the relevant 'objective' arguments and establish (or reject) their legitimacy. Moreover, inasmuch as 'objective' arguments are not coercive, one should avoid 'pseudo-objectivism' by dealing with the resulting margin of intuitionism openly and in a professional order.

III. Subjectivism vs Objectivism in Private Law: Referring Legal Solutions to the Parties' Intentions

In private law, the parties' intentions are still the dominant source of legal allocations. This is evident, for example, with regard to dispositions by contracts or by wills and also with respect to the exercise of private rights.

However, the issue of pseudo-subjectivism arises whenever legal solutions involve elements of objective fairness or equity.

Statement 3: Legal rules and doctrines, which refer fairness or equity solutions in private law to the parties' intentions, tend to be fictitious and inaccurate. They are pseudo-subjectivist in the sense that they conceal the relevant 'objective' reasons (above statement 2). In German private law (and many other jurisdictions) one quite illustrative example for such pseudo-subjectivism is the doctrine of constructive interpretation (*ergänzende Vertragsauslegung*), which refers a legal solution to the hypothetical intention of the parties (oriented at unexpected circumstances).[1] It is, in principle, preferable to directly deal with the fairness or equity principles governing the occurrence of unexpected circumstances on the doctrinal basis of an objective standard, like it has been established under section 313 BGB and in many other jurisdictions.[2] A second German law example is the former doctrine for establishing secondary contractual duties (*Schutzpflichten*) by reference to the parties intentions. This pseudo-subjective approach has been overcome by an objective foundation established by scholarly works[3] and by the courts, before the objective justification has been taken over into statutory law (sections 241(2), 311(2) and (3) BGB). Finally, one may mention as the third German law example (of many) for pseudo-subjectivism the doctrine, which suggests to establish the relevance of 'essential mistake' (*Eigenschaftsirrtum*) under section 119(2) BGB by reference to the (implied) intentions of the parties.[4]

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1 See with more detail Claus-Wilhelm Canaris and Hans Christoph Grigoleit 'Interpretation of Contracts' in Arthur S Hartkamp and others (ed), *Towards a European Civil Code* (4th ed, Wolters Kluwer Law & Business 2011), 587, 614 ff – also available under <http://ssrn.com/abstract=1537169> accessed 29 November 2021. Same critique on constructive interpretation by Jörg Neuner 'Vertragsauslegung – Vertragsergänzung – Vertragskorrektur' in Andreas Heldrich, Jürgen Prölss and Ingo Koller (eds), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, vol. I (CH Beck 2007) 902 ff.

2 For an overview see Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge University Press 2011). In contrast see the preference for constructive interpretation by Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, vol II (4th ed, Springer 1992) 494 ff.

3 See Claus-Wilhelm *Canaris* 'Ansprüche wegen "positiver Vertragsverletzung" und "Schutzwirkung für Dritte" bei nichtigen Verträgen: Zugleich ein Beitrag zur Vereinheitlichung der Regeln über die Schutzpflichtverletzungen' [1965] JZ 475 ff.

4 See eg Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, vol II (3rd ed 1979) 472 ff (theory of contractual error in quality – *Theorie des geschäftlichen Eigenschaftsirrtums*). For the opposing view see Karl Larenz, *Allgemeiner Teil des Deutschen Bürgerlichen Rechts* (7th ed, CH Beck 1989), 377 ff.

IV. Dealing with 'Authoritative' Legal Sources – The Legislator's Intention vs Objectivism

When 'authoritative' legal sources (see above I.) need to be interpreted and applied according to certain fact patterns, the legislator's intention naturally comes into view. This is because it is the legitimacy of the respective authority and its determination power that justifies the validity (in the sense of: legal relevance) of the source. However convincing an argument relating to the legislator's intention might appear to be, the scope of its determinative force must be specified with close scrutiny and in consideration of some reservations.

1. General perspective: dependence of the legislator's intention on fairness and reason

The abstract essence of these reservations is that the legislator's intention cannot be established without considering and consulting standards of fairness and reason.

Statement 4: The critical reference point of subjectivism is the legislator's intention. As a source of legal reasoning, this benchmark cannot be established and reasonably applied without consideration of external standards of fairness and reason. In this sense, subjectivism is impossible as an absolute postulate or necessarily incomplete.

2. Details: why the legislator's intention depends upon objective standards

The reservation regarding the standards of fairness and reason can be addressed in more detail if one accounts for certain rationality deficits that occur when the legislator's intention needs to be established: The first deficit – which I call the *personal soft spot* – is the lack of a reliable reference point when it comes to exploring the subjective sphere of a collective body (see a. – statement 5). The second deficit – which I call the *lingual soft spot* – is the requirement for contextualization that is inherent to the linguistic form of 'authoritative' legal sources (above I.), (see b. – statement 6). The third deficit – which I call the *dynamic dimension soft spot* – results from the abstract and general character of any 'authoritative' legal source (see c. – statement 7).

a. The personal soft spot

Statement 5: Whenever the law is prescribed by collective bodies (parliaments or courts), there is no reliable reference point for determining an empirical intention. Consequently, the legislator's intention is a hypothetical construction that cannot be established without the use of objective standards of fairness and reason.

b. The lingual soft spot

Statement 6: An 'authoritative' legal source (see above I.) – be it set by parliaments or courts – is framed in a linguistic form that must be made accessible by the instruments of hermeneutics. This process is by no means (purely) empirical or formal. Rather, it requires contextualization and therefore consideration of standards of fairness and justice. Accordingly, the linguistic form of legal sources requires that the legislator's intention can only be established by objective standards of fairness and reason.

c. The dynamic dimension soft spot

Statement 7: An 'authoritative' legal source (above I.) – be it set by parliaments or courts – has a dynamic dimension, which results from its abstract and general character. In any given context, the legal source must be specified according to the particular factual and normative circumstances of its application. Such circumstances are – from the perspective of the legislator – infinite in number and quality and they cannot be considered exhaustively at the time of the legislative act. This dynamic dimension is further aggravated by the lapse of time between the legislative act and its application and by the resulting change of the factual and normative framework. In this sense, the information basis of the legislator's intention is necessarily fragmentary. To ensure the standard of fairness and reason of 'authoritative' legal sources in the dynamic context of application, the perspective of the legislator must be supplemented in an ongoing and micro-adapted manner by objective standards of fairness and reason.

3. *Impossibility of complete legislative pre-determination by 'authoritative' legal sources*

As a result of the listed reservations regarding the standards of fairness and reason, an application of 'authoritative' legal sources (above I.) can in no instance be exclusively justified by reference to the legislator's intention.

Statement 8: Legal reasoning inevitably involves an element of policy evaluation that cannot be anticipated or predetermined by a legislative act or by any legislator's intent. This holds true even if the application of 'authoritative' legal sources to the fact pattern at hand appears to be clearly consistent with the wording of the source and the legislator's intention. Such a seemingly evident conclusion involves at least the implicit policy evaluation that, under the circumstances, there is no reason to supplement or deviate from the wording of the legal source and the legislator's intention.

4. *The legitimacy of correcting the legislator's intention on the application/court level*

In the light of the postulates set by standards of fairness and reason and of the dynamic dimension of any sort of 'authoritative' legal sources (above I.), it may under exceptional circumstances be methodologically legitimate to correct – and not only to supplement – the seemingly clear wording and underlying legislator's intention of an 'authoritative' legal source.

Statement 9: As a postulate set by standards of fairness and reason and of the dynamic dimension of any sort of 'authoritative' legal sources, any wording of a legal source and any legislator's intention (or policy evaluation) is under the reservation of a future change in the factual or normative framework conditions. Even the potential of an initial 'mistake' in the legislator's intention (or policy evaluation) should be qualified as a reservation of the binding effect of 'authoritative' legal sources. If (and because) there is an 'objective' standard of fairness and reason that must be employed to specify and to supplement the legislator's intention, the same standard can also be employed to correct it. Of course, such corrections can only be legitimate under a strict burden of arguments, ie if the legislator's intention has no relevant plausibility.

V. Objectivism vs Intuitionism (Psychologism, Ideologism, Historicism etc)

The shortcomings of subjectivism and the resulting relevance of objectivism turn the spotlight of critique to the latter and to the issue of how objective – in the sense of: unbiased and therefore reliable – legal reasoning can be. One famous – and quite trendy – answer to this question more or less disregards the objective relevance of legal reasoning while stressing the overriding power of the individual intuition of the person specifying and applying the law. If one observes the practice of the law – even in the most developed legal system – it is obvious that such intuitionism (psychologism, ideologism, historicism etc) has some degree of truth to it.

However, the relevance of intuitionism is, in my view, often overstated (see 1. – statement 10). The tendency to overstate intuitionism might neglect that the alternative to intuitionism is not some sort of absolute objectivity, but intersubjective reliability among a clear majority of legal experts, which one might call 'first degree objectivity' (see 2. – statement 11). Even if such an intersubjective reliability cannot be obtained, objective legal reasoning does not become meaningless as it works as a tool to frame and critically reduce the margin of intuition – a function that can be qualified as 'second degree objectivity' (see 3. – statement 12).

1. Tendency to overstate the uncertainty issue

Statement 10: The widespread reservations against the 'objectivity' of traditional legal reasoning (Legal Realism[5] et al) misunderstand the specific objectivity of legal reasoning and tend to overstate the uncertainty issue. The critical perspective largely stems from the focus on 'tough cases', which naturally are the ones that result in the most celebrated court decisions and that dominate the scholarly discourse.

2. Intersubjective reliability as 'first degree objectivity' of legal reasoning

Statement 11: With respect to legal reasoning, objectivity should not be measured by any absolute or empirical standards. Rather, the demands of

5 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 460 f: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'.

objectivity should be specified according to the character of legal reasoning. On the basis of the comprehensive body of law and of traditional legal methods, most commonplace legal judgements are trivial and uncontroversial. Being uncontroversial among a clear majority of legal experts – and thereby being intersubjectively reliable – can be qualified as 'first degree objectivity of legal reasoning'.

3. *Framing intuition as 'second degree objectivity' of legal reasoning*

Statement 12: While legal methods cannot resolve the uncertainty issue with respect to any judgement, they can frame and critically reduce the margin of intuition, in particular by three features:

Even in cases of uncertainty,

(i) the decision can be broken down into one or at least a few critical criteria,
(ii) the law can provide formal rules on the burden of argumentation,
(iii) the legal decisionmaker (judge) is called upon to neutralize her intuition professionally, ie to reflect in an unbiased way and to only feed the psychological intuition process with the relevant normative sources and with the recognized legal methods.

This framing tendency of legal reasoning can be qualified as 'second degree objectivity of legal reasoning'. It is supplemented in all modern legal systems by procedural safeguards to assure the qualification of judges and an unbiased composition of judicial panels.