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Legal interpretation in Paul Amselek's phenomenology of law — between subjectivism and objectivism

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ABSTRACT

The aim of the article is to characterise and analyse Paul Amselek's research approach to legal hermeneutics. The text provides an outline of Amselek's assumptions and theses about legal interpretation, considered in the broad context of hermeneutics, and in the narrower context of legal logic and argument (including rhetoric and speech act theory). In point of fact, one of the methodological aims of Amselek's philosophical reflection is to harmonise the two indicated contexts for framing interpretation — the wide context of hermeneutics, and the more narrow context of legal logic and argument. Amselek refers to issues in communication theory, reaching beyond the hermeneutic concept of text interpretation and evocation of the original authorial intention. He analyses the legal text-message in its content and argument layers, he also endeavours to specify the methodological possibilities of interpreting the attitudes and motivations of subjects — participants in communication situation (the sender and receiver of the message). He also inquires about the ethical attitudes of jurisdiction authorities, performing the interpretation of a body of law — the subjects responsible for lawmaking and the execution of law. Adopting post-Enlightenment anthropological assumptions, Amselek accepts the primacy of rationality in cognition, decision making, and activity of the human individual. However, in his considerations on interpretation he concurrently underscores the role of affective factors, motivating many choices and actions made by legal subjects.

KEYWORDS

hermeneutics; understanding; intersubjectivity; sense; meaning; intention

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INTRODUCTION

Paul Amselek — a lawyer and a philosopher by education — is above all the author of works in the field of theory and philosophy of law. To a lesser degree, he deals with analysing specific legal cases and discussing particular legal determinations, reached in certain specialised fields of law (for instance, civil or criminal law). However, it is such determinations that constitute the object of legal interpretations, performed within the framework of legal hermeneutics as a distinct method of law (Mootz, 2016). It needs to be stressed that the considerations presented in the article omit the particular research stance of legal interpretivism, that is a philosophical explanation of how institutional practice — the legally significant actions and practices of political institutions — modifies legal rights and obligations (Dworkin, 1985).

It could be said that in his philosophical reflection Amselek focuses on matters methodological (among other things, the methodology of legal proceeding, lawmaking, and case description), and epistemological (among other things, recognition of the rules of law, the limits of their application, clarification of the status of norms, sanctions, and facts), by making ontological assumptions, both the implied and the explicitly declared ones (Amselek, 2017, text *Comment je vois le monde du droit*). His examination of the philosophy of law falls within the context of three research traditions in the humanities and the social sciences: 1) phenomenology (Amselek, 1964), 2) legal hermeneutics, and 3) legal language analyses, which go beyond hermeneutics, as they recognise both the provisions of law, and verdicts passed based thereon as specific speech acts.

It should be underscored that Amselek makes attempts to harmonise the theses of Edmund Husserl's essentialist, idealist phenomenology with the theses posited by Adolf Reinach in his realist phenomenology (Reinach 1969; Reinach, 1983), by predominantly drawing from the late works of Husserl, created in the 1930s. From these works, he adopted the concept of intersubjectivity, conceived of as *Lebenswelt* (lifeworld) — the cultural horizon of meanings and senses specific for human communities, allowing for objectivisation of achievements and cognitive results of individuals. He also refers to John L. Austin's theory of speech acts, which he considers to be a development of Reinach's concept of language-based legal acts. This evocation of a pragmatic notion of linguistic meaning enables Amselek to blend the theses of phenomenology with those of hermeneutics, which opens language-based legal acts to interpretation (Amselek, 1986).

The aim of the text is to characterise and analyse Amselek's research approach (philosophical and legal theoretical) to legal interpretation, and to attempt a further clarification of the said standpoint in the context of recent developments and postulates in legal hermeneutics. The text provides an outline

of Amselek's assumptions and theses about legal interpretation, considered in the broad context of hermeneutics, and in the narrower context of legal logic and argument (including rhetoric and speech act theory). In point of fact, one of the methodological aims of Amselek's philosophical reflection is to harmonise the two indicated contexts for framing interpretation — the wide context of hermeneutics, and the more narrow context of legal logic and argument. Amselek refers to issues in communication theory, reaching beyond the hermeneutic concept of text interpretation and evocation of the original authorial intention. He analyses the legal text-message in its content and argument layers, he also endeavours to specify the methodological possibilities of interpreting the attitudes and motivations of subjects — participants in communication situation (the sender and receiver of the message). He also inquires about the ethical attitudes of jurisdiction authorities, performing the interpretation of a body of law — the subjects responsible for lawmaking and the execution of law. Adopting post-Enlightenment anthropological assumptions, Amselek accepts the primacy of rationality in cognition, decision making, and activity of the human individual. However, in his considerations on interpretation he concurrently underscores the role of affective factors, motivating many choices and actions made by legal subjects.[1]

LEGAL HERMENEUTICS — RESEARCH TRADITION

Particular analyses of general hermeneutics and legal hermeneutics indicate their mutual entanglements. It is understanding that is referred to as the basic hermeneutic notion; though according to Friedrich Schleiermacher the key notion of hermeneutics should rather be framed as interpretation associated with understanding, whereas the main hermeneutic practice would then be translation, in the two meanings: both as rendition and as explication (translation in a broad sense; Schleiermacher, 1998, especially text *General hermeneutics*: 225–268).

Scholars indicate that the common element for hermeneutics and phenomenology is their quest for sense, as they both are methods of constituting, or uncovering the sense; however, the reflection also pertains to the construction thereof. As is well known, Jacques Derrida, who attempted to clarify anew the theses of phenomenology, and of hermeneutics, referred to his practice of interpretation with the term "deconstruction", to some extent following

[1] Legal subjects are defined as subjects of law, that is as the participants in legal relations. One may say that the subject of law would be a necessary element of legal relations in all branches of the law, but its status is specific in each such branch: as physical persons (citizens) and juridical persons (institutional) in civil legal relations, as institutional organs, officials and citizens in administrative law.

in the footsteps of Martin Heidegger. With the development of the critical theory, voices arose to open the texts of culture to an infinite number of interpretations, which resulted in an extremely subjectivist standpoint within the hermeneutics of law. Works by Amselek provide a summary of sorts for the discussions about interpretation waged before the year 2000, and open new perspectives for both general and legal hermeneutics — such renewal of phenomenological and hermeneutic research is presented in his latest book *Cheminements philosophiques dans le monde du droit et des règles en général*, published in 2012 (Amselek, 2012).

The complexity of the hitherto tenets of hermeneutics as a research method, and above all its widespread application in the social sciences and the humanities, commenced with the so-called "interpretive turn" (of the 1970s), enabled scholars to take a fresh look at hermeneutics as the method of law. It was also when the general debates on the potential and limitations of interpretation emerged within legal hermeneutics — including in the works by Amselek, who argued against the critical theory, which opened legal interpretation to subjectively limitless possibilities, akin to literary interpretations (e.g. theses of Richard Rorty; Amselek, 2015: 29).

Legal hermeneutics continuously reverts to the specific considerations of the theory and philosophy of law, initiated by Immanuel Kant and his legalism to meet the needs of modernised communities and states, and later by Georg W.F. Hegel. George H. Taylor underlines that legal hermeneutics ponders "the role of interpretation in law" (Taylor, 2015: 81). He argues:

> My claim is that legal hermeneutics — and hermeneutics more generally — offers four larger insights that each of the examples respectively represents. First, legal hermeneutics offers tools for a very sophisticated reading of a text; it allows us to discern more closely what is at work in the text. This discernment requires hermeneutic training in acts of judgment, an acumen that goes beyond the more formulaic and algorithmic resources of much contemporary education. Second, legal hermeneutics requires analysis of the interrelation between meaning and application over time. Often an existing rule cannot be applied mechanically to a new case; hermeneutics shows how the rule must be creatively extended. Third, legal hermeneutics emphasizes the quality of hearing: an attentiveness to the other that demonstrates the humanistic qualities of the law and of legal understanding. Fourth, legal hermeneutics aims to recover insights into human meaning in contrast to more reductive approaches that limit human aspiration to more confining values such as economics. Legal hermeneutics — and hermeneutics as a broader field — is a wager in favour of meaning (Taylor, 2015: 81–82).

Taylor, who among other things deals with the status of legal texts, defines the hermeneutics of law by referring to philosophical (ontological) hermeneutics and literary hermeneutics. Thus, he is able to evoke the hermeneutic theses developed by Paul Ricoeur, who — much like Hans-Georg Gadamer — places

his reflection on legal interpretation within the broad context of general and philosophical hermeneutics.

It should be added that Ricoeur referred in his publications to and participated in the discussions initiated, among others, by Amselek. Ricoeur, and Taylor following him, return to the assumptions known from the tradition of general hermeneutics, for instance, to framing interpretation as a special kind of translation (Taylor, 2011: 176), particularly a „prototype interpretation" (Ricoeur, 2006: 24–25, 27–28). The latter refers to Ricoeur's theses about the "semantic autonomy of language" and "material" character of language, which could allow for a certain interpretive objectification (Taylor, 2011: 176). One could say that legal hermeneutics is on a search for the conditions of possibility for objectification to be performed in legal proceedings, by referring *inter alia* to the argument about the intersubjective character of language.

Amselek, too, emphasises the objective character of the material signs of language, concurrently considering interpretation as a subjective opening to the diversity of meaning. Hugues Rabault wrote:

> The problem of the interpretation of law places hermeneutics at the centre of legal epistemology. The specificity of legal hermeneutics follows strictly from its pragmatic function, its everyday practice that judges are familiar with. The philosophical hermeneutics of the twentieth century would underscore the subjective aspect of hermeneutics (Heidegger, *Sein und Zeit*, 1927; Hans-Georg Gadamer, *Wahrheit und Methode*, 1960). You could talk about criticism of hermeneutics as a methodology, or about the concept of subjectivist hermeneutics. The trend had been influenced by the existentialism of Kierkegaard (*Either/Or*) and Nietzsche (*On the genealogy of morality*), and it emphasises the subject's participation in interpretation, as opposed to the traditional concept (originated from theology), which posited the primacy of methodology (Schleiermacher). Such a perspective owes much also to the opposition between hermeneutics, as the foundation of the humanities (*Geisteswissenschaften*, particularly Wilhelm Dilthey, *Einleitung in die Geisteswissenschaften*, 1883), and the methodology that emerged within scientific positivism (Rabault, 2005: 1).

In the theory of law, interpretation is applied to legal texts, which are studied in reference to the canons of objectivity, unity, the comparative canon, the genetic *Auslegung*, i.e. statutory, annotating and explicative interpretation, as well as the indications of the "actual meaning". One could say that hermeneutics conceived of as a certain "technique", as strictly a method of law (as opposed to hermeneutics referring to other hermeneutic varieties) would be closer to the tenets of legal positivism, according to which law is identified neither as the norm, nor as the enacted provisions, for these constitute a certain possibility, or rather a certain range of possibilities (Tremblay, 2012). Law is determined in reference to specific, actual practices, meaning that law is something applied and executed. Lawyers assume that the variations of law "emerge

at the moment of its application", therefore it is posited that "there is no such thing as an objective meaning of a legal text". Thus, the meaning is submitted to a certain vocation alongside the provisions of law and their "wording" (signs); however, that always occurs in a certain language of social and intersubjective character, which may be — as believed by the phenomenologists of law in accordance with the theses of Edmund Husserl — a condition for objectification, though not necessarily of objectivity. Objectification is also fostered by the process of lawmaking and the institutional character of the lawgiver (for instance, the legislator). The interpretation of the meaning of a body law may occur in reference to rational premises, intentions of the lawgiver, the motivation of the adjudicating person, or intuition (the concept of "intuitive initial understanding").

Interpretation may be of processual character; however, the rapidity of proceeding favours rather the "initial understanding" than the processual exegesis of a legal text. Nevertheless, the notion of exegesis, besides that of interpretation, is considered to be a certain "theoretical moment" in the hermeneutical procedure. Theorists of law acknowledge that "a proper interpretation requires the performance of an exegesis of the text". Legal interpretation should be "ontologically grounded": 1) in the law as a certain given reality ("law is real", though it also accounts for possibilities), 2) in the facts of actual everyday life, the "lifeworld". Such "ontological grounding" of interpretation "warrants the legitimacy of law". Another element associated with the process of legal interpretation — besides the notion of exegesis — is the concept of statutory interpretation (*Auslegung*). In the hermeneutic method, statutory interpretation is understood as processual, with references to the "interpretive paradigm" serving to organise this process. The interpretive paradigm may be, for instance, "oriented towards the author", i.e., it may recognise the primacy of rational intentions of the author (in the case of law — the legislator, lawmaker, originator of regulations). The paradigm oriented towards the author refers us to two concepts of statutory interpretation — the statical (subjective) one, and the dynamic (objective) one, which may be either regarded as competitive or complementary aspects of hermeneutic interpretation, leading to the understanding of both the text and the primary intentions of the author. Schleiermacher attempted to harmonise the canonical character of religious texts, as well as the ancient works, with the present — but not the present of the readers, but of the language they used. Through the realisation of such demands, it could be possible to avoid subjective allegoresis favoured by subjects involved with the present, in order to turn towards language as a supra-individual instrumentarium, that could guarantee both communal communicability and individual expression. Schleiermacher's theses seem very modern, and they appear to have inspired both Gadamer, and Amselek. To a certain extent, Amselek does follow in Gadamer's footsteps, searching for analogies between legal and literary

hermeneutics. As a matter of fact, Gadamer proceeds in the opposite direction — starting from literary and historical hermeneutics of texts in general, he attempts to clarify legal interpretation.

LEGAL INTERPRETATION — AMSELEK'S RESEARCH ASSUMPTIONS

Legal hermeneutics constitutes one of the methods of law and is in itself a distinct field of reflection within the theory of law. Amselek's consideration of hermeneutics and interpretation pertains, among other things, to the validity and limits of interpretation, whereas understanding — in the case of law — should be based on an agreement, on a community's consensus as to the understanding of the provisions and verdicts within the horizon of meanings and senses of the communal *Lebenswelt*. One can find similar assumptions in Bernhard Waldenfels' works on the issues related to communication, harmonising the theses of phenomenology with those of hermeneutics, but these are of postulatory character (Waldenfels, 2006). Meanwhile, the theses presented by Amselek are concerned with the current practice of law, for he studies how legal acts work, being enacted and executed with the consideration of the community of agreement, to later constitute the community of understanding for further and subsequent determinations and judgments of law.

It is also owing to the references to the hermeneutic tradition (Wilhelm Dilthey) that Amselek is able to underscore the difference between exact sciences, natural sciences, and legal sciences, with the latter having to take into consideration — besides rational postulates — also axiological and ethical premises. Referring further to Immanuel Kant, Amselek outlines the ontological and methodological differences between the status of the laws of nature and the laws defined by, and constituted for the benefit of human communities (much like other phenomenologists of law). The laws discovered as the regularities of nature had been differentiated from the "natural law", whose "natural" character was initially sought for in it having been instituted by a rational God (Thomas Aquinas derived the status of human natural law from the eternal, divine Law, given humans to acknowledge only in limited access). Starting from the seventeenth century, natural laws came to be more often considered as laws not only congruent with reason, but as laws of the very reason and of the rational being, that is, the human being (Luijpen, 1967). One should remember that it is such anthropocentric rationalism in defining natural law that we find in the works of Kant — similar premises of anthropological rationalism could serve as the basis for constituting, being obedient to, and executing law according to Amselek. In his hermeneutic reflection, Amselek considered the entanglement of three elements comprising the normative, and concurrently

axiological determinations within the law. Thus, he asks about the interpretation of: 1) legal rules, 2) the norms of law, and 3) the values which — in his view — constitute a condition and are implicitly posted in the norms, because of the anthropological need of a stable basis, a need resulting, among other things, in idealisation processes (Kant, Simmel, Reinach). At the same time, he adopts ontological assumptions as to the linguistic and mental status of legal acts (regulations, judgements, verdicts, and statutory interpretations). In that way, Amselek finds himself aligned with a long tradition of legal hermeneutics (Lieber, 1893; Kaufmann, 1972).

On numerous occasions, Amselek emphasised that his philosophical foray into the domain of law was initially directed, because of Edmund Husserl's phenomenology, towards legal ontology, that is, "towards studying law's way of being and the way it is given to our consciousness" (Amselek, 2015: 3). He then focused on the pragmatics of law, "having discovered the Anglo-Saxon speech act theory", and later on the "interpretive turn", which emerged in the social sciences and the humanities during the 1970s. Owing to the above, Amselek got involved with studies of legal hermeneutics, heretofore — as he writes — "neglected in the classical theory of law" (Amselek, 2015: 3). Thus, he started from the hermeneutic tradition, not disregarding any of its respective varieties. In his book *Cheminements philosophiques dans le monde du droit et des règles en général* (Amselek, 2012), a summary of his diverse studies, he refers to hermeneutic issues, devoting to them a large part of the publication. He addresses the various types of hermeneutics, as well as the discussions of the twentieth century. He commented on those exchanges before in his articles and lectures on various forms of legal interpretation. Meanwhile in his book he refers to an entire spectrum of the discussion on the status of interpretation within the various types of hermeneutics: the theological, literary, ontological, linguistic and translational ones (interpretation as rendition and translatorial practice, in the tradition of, *inter alia*, Friedrich Schleiermacher). In his book, Amselek follows in the footsteps — one could venture an opinion — of Gadamer, who clarified legal hermeneutics by evoking the conceptions of literary and theological interpretation (Gadamer, 2013: 322, 360–361, particularly chapter *The exemplary significance of legal hermeneutics*: 334–350). He also follows Umberto Eco, who asked about the limits of interpretation within the field of semiotic and semantic research (Eco, 1992a; Vassallo & Bianchi, 2015). Such a broad context for hermeneutics was provided by Amselek in the third part of his books, in its entirety devoted to the issues related to interpretation.

It should be highlighted, however, that his earlier texts focused particularly on the discussion of the status of legal interpretation. Among the questions that Amselek attempted to tackle at that stage was that of what the legal interpretation actually pertains to: whether to the provisions, the facts and events of reality, whether to subjective motivations, or objective empirical data, the very

language acts (Amselek, 1986: 109–163; Ricoeur, 1986: 89–105), or perhaps rather to other legal interpretations, those previously made, prevalent in casuistic practice, i.e., in a law in which verdicts are considered to constitute prescriptive indications (they are regarded as specific cases within the legislation in force). And what if the interpretation pertains solely to other interpretations, as Amselek writes, citing Montaigne (Amselek, 2017: 7)? Where can we recognise the limits for performing legal interpretation, which — contrary to literary interpretation — should not account for subjects' creativity and expression, but merely serve to establish a certain interpretive community — a community grounded in the intersubjective character of *Lebenswelt*, the jointly created social world? The intersubjective objectification performed within the law (an assumption adopted after Husserl's works of the 1930s) is fostered by the fact that Amselek takes a culturalist standpoint on the primacy of cultural contexts and conventions. This particularly involves the conventions of using language, which constitute the starting point for each and every speech act, including provisions and judgments of law, regarded — in the same vein as Reinach and Austin — as speech acts. When considering linguistic issues in the law, Amselek refers to the works of Georges Mounin (Mounin, 1979), whereas the issues of legal interpretation as a particular speech act he analyses in relation to, among other theories, Umberto Eco's semiotics (Eco, 1992b: 15, 369), Roland Barthes' semiology (Amselek, 1995: 17), as well as the hermeneutic analyses by Ricoeur (Ricoeur, 1994: 15–25).

And it is precisely the issues of the respective types of legal utterances that are the object of his analysis, one in which he further specifies the status of notions compared with the status of norms, the status of modal propositions with the status of predications, and normative sentences (descriptions and prescriptions), the status of rules (Amselek, 2015: 9) with the status of actions (acts), and the status of syntactic categories used in legal acts — for interpretation seen in the broad context of hermeneutics and the narrower context of linguistics and semiotics enables one to balance these statuses differently. Amselek's legal and philosophical considerations, stemming from the assumptions of the aforementioned ontology, find certain support in an argument which enables him to go beyond the plentitude of questions and variety of the discussed research positions, particularly with regard to interpretation. For Amselek acknowledges that ultimately it is the reality that is the object of legal interpretation, the reality of facts, events, people's motivations, and intentions of the lawgivers; and only secondarily does it refer to texts. Sentences uttered by legal subjects should therefore be regarded as certain facts about the world, and it is only after one assumes such ontological status for them that they lend themselves to interpretation. Amselek does not frequently quote Ludwig Wittgenstein, as he derived own pragmatic concept of meaning rather from the philosophers of law — Reinach, and his successor, Austin. It may, however,

be recognised that his research standpoint with regard to interpretation seems more akin to Wittgenstein's argument about linguistic facts than the argument presented by Friedrich Nietzsche's followers, who claim that facts are merely a variety or a consequence of interpretation. Amselek also draws from Schleiermacher, who in his theological and translational hermeneutics (translation as intercultural interpretation, and interpretation as interpersonal rendition) saw the meaning of utterences as submitted to interpretation, re-established with every use, that is also with each subsequent interpretation.

According to Amselek, legal hermeneutics has been intensely present in the considerations of law since the 1970s, owing its position to the "interpretive turn": "the interpretation of legal texts — which heretofore interested lawyers only in their technical aspects, from the point of view of dogmatics [as a subfield of law] — came to the fore in their basic theoretical reflection" (Amselek, 2015: 26; cf. Viola, 1992: 334). Amselek stressed the fact that this interpretive turn constituted "a genuine renewal of legal philosophy", opening new research horizons, sparking discussions and meaningful debates. At that juncture, he became interested in two hermeneutic issues: 1) the features of the legal interpretation itself, and 2) the freedom of the interpreter of law (Amselek, 2015: 26). Amselek refers to an American movement Law and Literature, known thanks to the activity, *inter alia*, of Ronald Dworkin. The movement demonstrated that the interpretation of legal texts could benefit from an inspiration drawn from the interpretation of literary texts. However, "such practice proves to be rather artificial. There are certain specific aspects of legal interpretation which cannot be brought down to a general idea of practical interpretation" (Amselek, 2015: 26). That is why Amselek put forth the distinction between: 1) "practical hermeneutics of action" (*herméneutique pratique de l'action*), which pertains *par excellence* to legal interpretation, and 2) "theoretical hermeneutics of reception" (*herméneutique théorique de l'écoute*), which would focus on religious texts and the interpretation thereof (Amselek, 2015: 26). Amselek points to the fact that legal texts are a part of a communication flow, alongside current information, everyday conversations, mail exchange, and they are also — thanks to our activities — placed in relationship with literary texts.

> Practical hermeneutics is aimed at clarifying the application of procedural rules by those at whom these rules are directed, and who are obliged to abide by them: interpretation is aligned here with pragmatic proceeding, taking into consideration the action of interested parties, and being developed thanks to deontic guidelines (Amselek, 2015: 27).

This deontic aspect, stipulated in various codes, is "entirely alien" to the interpretation considered within the framework of theoretical hermeneutics of reception, as it is aimed at making the words addressed to the receivers

understandable, and ensuring their ability to grasp them; its goal is to transmit the message, "to revive the spirit" with the use of views and representations, but not to direct and limit the fulfilment of their will (*encadrer et corseter leur volonté dans ses accomplissements*; Amselek, 2015: 27), as in the instance of provisions and verdicts of law. In the former case, the interpreter must only recognise and understand the informational message, receiving all the data either provided by the text or given to understand therein. Meanwhile in the case of legal texts, the object of the text is a certain practice to which the rules pertain, and it is their content that has to be read, "deciphered".

Thus, as posited by Amselek, legal interpretation would be performed within the framework of the indicated practical hermeneutics. Such an interpretation should possess the four basic qualities:

1) a deontic aspect—its aim is to reveal the limits of possibility for: "can", "must not", "ought to";
2) it would be an inherent part of legal experience; therefore, the interpreter would see himself as a subject that the law affects, as a person practicing a certain profession, for instance that of a judge, or a theorist dealing with the dogmatics of law; Amselek writes that there is no room here for "third parties", disinterested in the text and its interpretation, as the latter does always have certain consequences, whereas the interpreter is strictly connected with the practice within the framework of which she or he acts;
3) furthermore, legal interpretation is embedded in the context of political power and social contract, within which the limits of activity and the authority of interpreters shift, depending on the position they may hold, which influences their interpretive proceeding;
4) legal interpretation is particularly open to an in-depth exegesis, according to practical requirements and the issues demanding resolution (Amselek, 2015: 27–28).

How does Amselek regard the freedom of the interpreter of law? Having traced the debates of the recent decades, he identified two views competing in the debate: the objectivist and the subjectivist stance. According to the adherents of objectivism (Patterson, 2001), the sense of a legal text would be a certain *datum*, which, as it were, requires interpreter's compliance, as it existed prior to his interpretive procedure. It is this *datum* that has to be elucidated and harmonised with intentions of the legislator, lawgiver, embedded in the text and entrusted to it. At the same time, it should be external for other legal subjects and as such it should agree with "the best sense objectively" (Amselek, 2015: 28), for it would thus be most closely reconciled with the legal system, and its basic principles. Amselek stresses the fact that the argument has been supported by Dworkin (Dworkin, 1977), and partly leans towards that position himself, all the more so because the critical attitude towards legal

positivism, essential in Dworkin's works, is equally important in the reflections of Amselek. Meanwhile, the advocates of subjectivism claim that texts as such, submitted to interpretation, constitute certain forms which are empty inside (they seem like "hollow shells"), while the interpreter's task is to provide them with sense — their sense would thus be specified in a free or even random way (Boyle, 1991). Further still, it requires that other legal subjects should be persuaded as to the superiority of a given interpretation over others, perhaps also accompanied by its imposition on social actors operating according to the rule of law (Amselek, 2015: 28). At this point, Amselek indicates the political aspect of the subjectivist view of interpretation, as the interpreter would ultimately have at their disposal the power of autonomous interpretation, thus in a way becoming the originator of regulations, the lawmaker, taking the place of the titular institutional legislator (Amselek, 2015: 29). Subjectivist theses have been developed by the *Legal Criticism* movement, in Europe by Michel Troper (Troper, 2011), and Friedrich Müller (Müller, 1966), who additionally deals with literary works. Amselek identifies the transformations in the legal theoretical reflection which occurred in the 1990s, influenced by the critical theory, whose proponents considered legal texts in a literary theoretical context. In other words, the hermeneutics of law was framed in relation to the hermeneutics of literature (arguments based on Jacques Derrida's concept of writing and interpretative deconstruction, as well as on the relativisation of the notion of truth (Amselek, 2015: 29) — hence also of opinions and evaluations — proposed *inter alia* by Rorty).

Amselek sees the two standpoints as extreme and overlooking both the issues of legal practices, the status of the legislator as juxtaposed with the status of other legal subjects, and the actual challenges faced daily by lawyers and other subjects affected by the law. Therefore, in his considerations of analytical aspects of interpretation, he focuses on the question of literal sense of the provisions and judgements of law, as well as on that of exegesis as an in-depth interpretation (Amselek, 2012: 499). On numerous occasions, he referred in his works to linguistic theses of Georges Mounin, who wrote: "linguistic meaning can be found in the code of law; non-linguistic meaning does not appear in the code, instead it is interpreted by science" (Mounin, 1979: 16). According to Amselek, an "intermediate" stance (Amselek, 2012: 502) is the one to be taken, a moderate position combining both research advantages: 1) the consideration of objectivist aspects of the text in its semiotic (sign-based) autonomy, and 2) the consideration of subjectivist opening of the text to various semantic interpretations of its meanings by the legal subjects — opening with concurrent acknowledgement of the initial state of the objectively given signs, a state that would constitute a frame of sorts to limit the interpretation. As already mentioned, it is precisely the tradition of semiotic research, performed within structuralist thought, that constitutes the fundamental research context

of his analyses pertaining to meaning. Besides the speech act theory, it was the structuralist theses that enabled him to encompass the complex issues of interpretation, reaching beyond the hermeneutic context towards the theories of communication. One should bear in mind that the interpretive turn — important as it is among Amselek's research inspirations — occurred in parallel with the bold claims of structuralists, who, also in the 1970s, posited the theory of communication as the most general domain of research within the social sciences and the humanities. And it is precisely the communication theory that constitutes the context enabling the French philosopher to harmonise the diverse theses of hermeneutics with the detailed, semantic analysis of legal texts.

Much like other theorists and philosophers of law (among them Francis Lieber; cf. Farr, 1992), Amselek inquires about the status of a literal meaning, and about the interpretive possibilities related to a metaphorical, figurative sense. According to Amselek, a literal sense refers strictly to "the meaning of the letter of the text" (*vouloir dire de la lettre du texte*), which is in a way imposed by language rules and conventions, which in turn influence our ability to recognise the plurality of its "quasi-objective" references (Amselek, 2015: 30). Amselek argues that, as opposed to what objectivists claim, the literal sense, which has to be taken into consideration by the interpreter, does not oblige him in any absolute or final manner. For in the interpreter's opinion "the literal sense may turn out to be insufficient to effectively respond to the requirements of practice, be it due to its imprecision, ambiguity, incoherence, or because of the [expected] unreasonable social consequences" (Amselek, 2015: 30). Therefore, Amselek posits that interpreters of legal texts should reach beyond such a literal sense, revealed as though on the surface level of the text on first reading, and proceed to an in-depth exegetical reading in order to unveil the contexts and conditions of the origin of the text (its "background"). It is in such kind of activity that we may discover the liberty and ease of interpretive proceeding. "This liberty is not exercised at the outset, but only, and potentially, at later stages of the research, when the literal sense has proven insufficient" (Amselek, 2015: 30). On such occasions, it constitutes a starting point and at the same time a necessary point of reference for subsequent studies, nevertheless undertaken with the assumed distance from the initial reading. In that new phase, the proceeding of the interpreter is provided with the aforementioned limitation, resulting — among other things — from the objectivity of the very text, its signs, and the context of its creation.

Amselek refers to the investigative, distanced proceeding of the interpreter with regard to the literal sense as "dialectical argumentation", intended to prove and persuade other legal subjects not only that this interpretation is "good", but that it is "the best". He underscores that such concept of interpretation finds support in the analyses performed by Dworkin (Amselek, 2015: 30; Dworkin, 1977). On the other hand, however, an interpreter of legal texts

searching for exegetical depth remains under the supervision of persons who have institutional authority. In such case, "the last word" does not belong to the court, but to all other potential interpreters, that is, ordinary employers, who may participate in the interpretation of texts — the provisions and verdicts of the law (Amselek, 2015: 31). On numerous occasions, Amselek stresses the fact that interpretation is situated at the centre of the legal experience, and its position is strictly associated with the ontology of law, while law and the rules of law constitute certain objects whose status is that of "mental tools" (*des outils mentaux*), which belong to the intelligible world, and not to the sensual world. Their matter, fabric, or texture comprises thoughts and senses (Amselek, 1995: 11). They may be defined as a kind of mental content — the content of thoughts about specified aims, or as an instrumentarium invoked to direct human behaviour, indicate the limits within which human activity is possible. Such content would be

> an instrumentarium of an immaterial texture, purely ideal, which cannot be gripped by hand, nor captured using the sensorial apparatus or physical equipment — they can only be the object of apprehension within ourselves, in our minds, conceived through our mental capacities (Amselek, 1995: 11).

Indicating the communal, intersubjective character of law, Amselek once again argues in favour of stepping outside of the dispute between objectivists and subjectivists about the interpretation of legal texts. At the same time, following late works of Husserl (*Cartesian meditations*), Austin (*How to do things with words*), and structuralists, he clarifies the communicative aspects of legal texts. "Our intersubjective messages are transfers of signs or signals, but not of thoughts and mental objects" (Amselek, 1995: 11). Hence, in order to transmit one's thought, one has to use external signs, and by means of those address other subjects, as well as decipher signs received from them; it consists in "a specific mental activity—the activity of mediation or interpretation", aimed at "decoding the received signs and reconstituting the sense they have been given in their mission to transfer, or rather transport" (Amselek, 1995: 11). Amselek argues:

> The interpretation or reconstruction of the sense communicated by way of signs (as "interpret" may clearly be replaced in English with the word "construe") is thus an indispensable initial condition within the legal experience for internal grasping — understanding — of norms of the law expressed by the lawgiver (*législateur*) in their practice, in their use (Amselek, 1995: 12).

Once again, Amselek emphasises that legal experience occurs within the framework of symbolic exchanges — language exchanges, and it is also there that the processes of interpretation are situated, complex and occurring on

multiple "levels". The initial two levels would mirror what linguists call "double language articulation" (*double articulation linguistique* according to André Martinet), that is, the loading of the mental content onto material signs of language and their subsequent decoding (with the use of the rules of a given language, such as orthography and grammar). The third level of interpretation concerns particularly the domain of law, and practical rules in general — as it involves the recognition of a literal sense, consisting in the development of that "superficial" sense, expressed literally ("the letter of the text", considered in its entirety).

> For any content of thoughts constitutes — and it is the very essence of the intentionality of thought — a certain view of mental character, which opens, much like a photographic film, a perspectival field with the background somewhat distant or concealed, marked behind whatever is shown in the foreground. Exegetical analysis rests on the function of practical needs (*en fonction des besoins pratiques*), which motivates the interpreter, and owing to the resources of logic and reasoning, this analysis actually consists in the procedure of adding depth to the sense, passing from the literal sense to the uncovered depth or other fields that it opens (Amselek, 1995: 12).

It leads to the already mentioned dialectical oscillation — iterative reference to the literal sense in subsequent interpretations proposed by both their author, and other subjects of legislation and law in general. Amselek asks about a narrowly conceived interpretation "properly defined" (*l'interprétation proprement dite*), which would be "the reconstruction of the content of thoughts coded in signs or signals, intentionally destined to be conveyed to others" (Amselek, 1995: 12; cf. Amselek, 1996: 9).

It should be noted that in his works, dating back to the close of the last century, Amselek opposed the dominant position of the hermeneutic current of research ("the paradigmatic imperialism of hermeneutics") with its strong tendency to predominate "model of our theories of the world", our cognition and research — including communication theories, the various theses of semiotics and semantics, some of those of structuralist provenance (Amselek, 1995: 12). Hence, Amselek dismisses the recognition of hermeneutic theses and concepts of interpretation as a sort of paradigmatic model for other theories. In place of that, he submits his own methodological conclusion, which combines hermeneutic theses with the existing linguistic, semiotic and semantic concepts (including speech act theory), finding room for their specific methods and procedures of research, as well as their notions (Rouvière, 2013: 2023), including interpretation "properly defined" in the broad context of hermeneutics harmonised with linguistics.

It is worth adding that the following stage ("level") of legal interpretation are facts, particularly human actions. The interpretation of "deeds" once again refers to the examination of texts (documents), the analysis of their literal

sense, performed in order to establish — in a distanced relationship with it — the possible interpretations and understandings (Amselek, 1995: 13). Amselek underscores the strict connection between interpretation of facts and their explanation (Amselek, 1995: 14), that is, outlining the cause-and-effect relationships, which may be revealed in the background of the reported events. Therefore, the interpretation of facts, including especially human "deeds", ought to encompass unveiling and studying of the motivations and intentions of acting subjects, who become subjects of legal procedures. The interpretive grasping of sense thus involves its reconsideration, framing it in the context of the studied motivations and intentions (Amselek, 1995: 17). Once again, Wittgenstein's problem of "linguistic facts" reemerges here, being implicit in Amselek's reflections, when he endeavours to clarify the status of facts in legal texts and proceedings.

CONCLUSION

One could say that Amselek attempts to combine the essentialist elements of phenomenology, selected aspects of the phenomenology of existence (eventfulness of human life, actuality, and factuality) with selected elements of hermeneutics: the individual, original character of interpretation, stemming from the individual responsibility of personal legal subjects, associated with the intersubjective determinations made by institutional legal subjects, anthropological assumptions regarding the rational capacity of all personal subjects, and the actions of institutional subjects, linked with conceiving interpretation in the context of legal logic and argument (Garcia & Green Werkmäster, 2018: 155). As mentioned, one of the aims of Amselek's philosophical reflection is a methodological harmonisation of the two indicated contexts of recognising interpretation — the broader context of hermeneutics, and the narrower context of legal logic and argument, particularly speech act theory, and — to be more precise — legal act theory. In his attempts to combine these various research contexts, which take legal texts as their object, Amselek cites communication theory with its basic communicative relationship: sender — message (text) — receiver. Thus, he goes beyond the hermeneutic concept of text interpretation and evocation of original authorial intentions. Amselek analyses the text-message in its content and argument, but also attempts to specify the possibility to interpret the attitudes and motivations of subjects-participants in the communicative situation (sender and receiver). He inquires about the methodological (not merely psychological) rules defining the regularities of such interpretive specifications; he also asks about ethical attitudes of the subjects of jurisdiction, who perform the interpretation of a body of law (the subjects of law making and execution).

It has been said that Amselek adopts rationalist anthropological assumptions (following, among others, Kant), that is, he accepts the primacy of rationality of human cognition, choices (will), and activity. However, in his reflection on interpretation he does takes into consideration the role of affective factors, which would co-determine — besides rational thought — the choices and actions of legal subjects: "there can be no doubt that affective evaluation may influence, and often does, the practices associated with ethical and legal rules (in their elaboration, interpretation, and application)" (Amselek, 2014: 17). He refers to such an involvement of the affective factor as "the affective play", which emerges in the experience of subjects providing ethical, as well as legal evaluations.

One could say that in the debates waged by theorists and philosophers of law, Amselek adopts, as he himself acknowledges, an "intermediate" stance (Amselek, 2012: 502), which particularly refers to the ongoing discussion between the adherents of the objectivist and the subjectivist concepts of legal interpretation. Amselek has underscored on numerous occasions that interpretation in law refers not only to texts, but also to actual facts and events, that it includes elements of religious and literary hermeneutics, that the interdisciplinary approach of using the hermeneutic method in law is the result of the complex character of law, as it is simultaneously descriptive in its account of facts, prescriptive in making and executing norms and rules, that it always occurs in the present, but it is oriented towards the evaluation both of the past and of the historical, as well as towards the shaping of the future. That is why the hermeneutics of law goes beyond the historical, retrospective character of general hermeneutics (Schleiermacher, Dilthey), and it proves to be prospective in its design-oriented aspects. For Amselek sees the law as pertaining to the future, but not merely in its moral and remedial aspect, but also in its anthropological facet: it provides guidelines for the lost, it enables them to find themselves, while at the same time safeguarding their freedom of choice and decision, alongside the openness to diverse interpretations.

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