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Articolo Divulgativo

THE INTERPRETATION OF LAW PROCESS IN ITALIAN AND AUSTRIAN LEGAL SYSTEMS

Questo scritto mira ad analizzare il processo d'interpretazione della legge negli ordinamenti giuridici italiano ed austriaco. Dopo una breve introduzione, si esaminano le scuole metodologiche austriache, per poi passare alla comparazione dei metodi di interpretazione della legge, al processo di riempimento delle lacune involontarie, all'interpretazione conforme a Costituzione. Il contributo si chiude con un agile paragrafo conclusivo.

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Abstract ENG

This written aims to analyse the interpretation of law process in italian and austrian legal systems. Afetr a brief introduction, the austrian methodological schools are examined, then moving on the comparison of interpretation of law methods, on the unintentional gap-filling process, on Constitutional interpretation. The contribution closes with a nimble conclusive paragraph.

Summary: 1. Introduction; 2. Methodological schools in Austria; 3. The methods of interpretation of law in Austria and Italy; 4. Gap-filling; 5. Constitutional interpretation; 6 Conclusion

1. Introduction

Even the most accurate legislative drafting can incur in contradictory, ambiguous or unclear formulations. Upon this premise, Legislators need to establish rules meant to interpret unclear norms or to fill legislative gaps. Adopting a comparative lens, this contribution will examine the subject of interpretation of law in the Austrian and Italian legislative systems.

First of all, it is worth clarifying that neither the Austrian nor the Italian Constitution provide specific principles addressing the interpretation of law. Indeed, the interpretative rules of both legal systems are enshrined at the statutory level: more specifically, in article 12 of preliminary dispositions to the Italian Civil Code of 1942 on one hand, and in articles 6 and 7 of the Allgemeines bürgerliches Gesetzbuch of 1811 (hereafter ABGB) on the other hand. However, since courts' rulings have constantly played a key role in the implementation of such principles, the following analysis will pay due attention to the pertinent jurisprudence alongside the wording of the provisions.

In both legal systems considered, the use of analogy to the detriment of the defendant in criminal law is prohibited, as to guarantee a high level of legal certainty and predictability in that area.

In Austria, it was created a special interpretative methodology for the distribution of competencies between the Federation and the Länder (Kompetenztatbestände).

2. Methodological schools in Austria

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The general development of interpretative methods in Austria has been influenced by the dialectic between two opposing methodological schools: conceptual jurisprudence (Begriffsjurisprudenz) on one side and sociological jurisprudence or of the interests (Interessenjurisprudenz) on the other side. The former limits interpretation to the logical deduction of legal consequences from general rules applied to specific facts; the latter criticizes this approach as being too mechanical, rigid and formal[1]. While logical deduction may be adequate as far as the "core" meaning of legal concepts is concerned, the hard questions arising in the "periphery" of meaning can only be answered by looking at the conflicting interests the rule tries to regulate.

The most recent - and currently prevailing - version of this "jurisprudence of interests", the so-called "value oriented jurisprudence" (Wertungsjurisprudenz), acknowledges the strengths and weaknesses of both these approaches: it does not focus on raw interests of human beings who are affected by a legal rule, but rather on the selection and evaluation of these interests carried out by the Legislator[2]. Such valuations ensue from both a philosophical investigation of the idea of law in abstract sense (Rechtsidee) and a more sociological endeavour to discern the values of the specific legal community in question. A consensus concerning these values develops over time. Typically, conceptions of values are firstly introduced into an academic debate, where they are tested and refined; once having obtained scholars' validation, they become permanent tools for the interpretation and application of norms in the judicial practise. Thus, statutory law is enriched by generally accepted legal decisions and academic reasoning in an interpretative process that reflects value-oriented reasoning, rather than mechanical logical deduction[3].

3. The methods of interpretation of law in Austria and Italy

A number of specific methods of interpretation have been devised in both surveyed countries to facilitate the process: some of them coincide, others do not.

Firstly, literal interpretation is common to both Austrian and Italian systems, and it examines the actual words and grammatical structure of the considered legal text. It can be more ordinary of specific depending on the type of ruled which is examined: for example, the former applied to indeterminate administrative legal concepts (unbestimmte Rechtsbegriffe)[4], the latter to specific sector regulations. Literal interpretation will often suffice when the situation is certain (principle of in claris non fit interpretatio), but it will in any case provide the outer limits of any interpretative process by establishing what could possibly be meant or not by the words at issue.

Moreover, both countries share the systematic-logical interpretation criterion too. It analyses the meaning of a rule by looking at its context within the statute or even the

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entire legal system. In Italy, this principle is much more articulated than in Austria, encompassing the analogia legis, namely the similarity with other comparable cases, and the analogia iuris, i.e. the similarity with the general principles of the legal system.

The historical interpretation, more diffused in the Austrian legal system, considers the original intent of the Legislator when enacting the norm. It may be detected in various sources, such as understandings of legislative drafts and parliamentary debates. Conversely, Italian judges make a widespread use of the evolutionary interpretation, with regard to the political and social development of the Legislator's intent. However, some legal practitioners cast significant doubts on the constitutional legitimacy of such interpretative tool, given its alleged incompatibility with the milestone principle of certainty of law[5].

Objective-teleological interpretation, common to the two countries, explores the objective purpose of a rule in the light of goals to be achieved by the Legislator. This method allows the judge to adjust obsolete rules or valuations to current needs and perceptions.

A method currently used in Austria, but unknown in Italy, is the comparative analysis of similar statutes from other jurisdictions, which may serve as an auxiliary function in identifying possible underlying values, which may have been overlooked in the application of traditional interpretive methods.

There is not a pre-defined ranking order among these methods of interpretation. Subsequently, they must not be applied mechanically according to a certain hierarchical pyramid; on the contrary, they have to be jointly considered and properly pondered on a case-by-case basis[6].

4. Gap-filling

While the Italian legal system prefers literal and logical methods, because of the high degree of compatibility with the principles of certainty and predictability of law, in Austria gaps are generally filled through the use of analogy (iuris and legis in the sense previously described).

Whenever analogy cannot be applied in a specific case, article 7 of ABGB provides for the application of "principles of natural law" (natürliche Rechtsgrundsätze), pointing to the most general values underlying the legal system. There has been a long and arduous scholarly debate on the content, structure and scope of these principles, and judicial reference to them is rare.

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5. Constitutional interpretation

An important variant of systematic-logical interpretation is the one privileging the conformity of the norms to the content of the Constitution. This criterion is applicable both in Italy and Austria. As a result of the implementation of this tool, whenever a provision may be interpreted in different ways, those conflicting with the Constitution get inevitably discarded. The Constitution itself is subject to systematic interpretation in conformity with its "structural principles".[7]

Furthermore, EU law requires that national law has to be interpreted in conformity with European Union law[8].

6. Conclusion

Te main analogies and differences concerning interpretation of law in Italy and Austria have been discussed in this text.

It should be noted that nowadays, the reference to natural law interpretation in Article 7 of ABGB has been progressively set aside, in order to privilege an interpretation process based on positive law, resembling more the model of the Italian legal system. Indeed, notwithstanding the validity of article 7, article 8 of ABGB, reads: "the interpretation of law is a matter for the legislature alone and is obligatory for all". In conclusion, it can be stated that modern natural law culminates in codification, understood as natural law positivized[9].

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Note e riferimenti bibliografici

[1] H. HAUSMANINGER, The Austrian Legal System, fourth edition, 2011, 32.

[2] H. HAUSMANINGER, op cit., 32.

[3] H. HAUSMANINGER, op. cit., 32-33.

[4] For more particulars, see M. CLARICH, Manuale di diritto amministrativo, fourth edition, 2019, 120.

[5] AA.VV., Dieci lezioni introduttive a un corso di diritto privato, fourth edition, 2014, 48-49.

[6] W. WILBURG, Entwicklung eines beweglichen Systems im Bürghelichen Recht, 1950.

[7] In the Italian legal system, the "structural principles" represent the milestone pillars of the Constitutional Charter. Because of their pivotal importance within the system, they cannot suffer any change or derogation through the revision procedure of the Constitution, ex art. 138 of the Italian Constitution of 1948.

[8] H. HAUSMANINGER, op. cit., 33.

[9] R. FERRANTE, Un ruolo per l'interprete: la scienza giuridica italiana tra Code Napoléon e ABGB, par. 13; M. BARBERIS, Filosofia del diritto. Un'introduzione storica, Bologna, Il Mulino, 2000, 34-39.

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