LISBOA SCHOOL OF ECONOMICS & MANAGEMENT

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Chapter VI

Interpretation, Integration and Application of Juridical Rules

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1. Juridical interpretation

1.1. Notion of interpretation

It is the determination of the meaning and scope of the juridical rule, with a view of its application to concrete cases. All juridical rules need to be interpreted, even the most clear ones, in search of its spirit or content, unlike it is mentioned by Roman maxim *in claris non fit interpretatio*. The technique of interpretation is called hermeneutics.

1.2. Subjects of interpretation

1.2.1. Self-interpretation and Hetero-interpretation

- Self-interpretation (*"auto-interpretação"*): interpretation made by the organ that drafted the interpreted rule, in order to clarify its meaning and scope (it occurs after publication of the rule).
- Hetero-interpretation *("hetero-interpretação"*): interpretation made by organ or entity other than the one that created the interpreted rule, in order to clarify its meaning and scope (it occurs after publication of the rule.

1.2.2. Authentic Interpretation and Official Interpretation

- Authentic or non Official - whether the interpretive rule bears equivalent form or more solemn than the interpreted rule (a decree-law which interprets another decree-law; a law that interprets a decree-law; a law that interprets regional legislative decree).
- Official or non Authentic - if the interpretive rule has lower value than the interpreted rule (interpretation of a legislative act by dispatch *("despacho"*); an ordinance (*"portaria"*) that interprets a decree-law).

1.2.3. Public interpretation and Private interpretation

- Public Interpretation – it can be carried out by legislative-political organs entitled to do it, as defined in CRP (political and legislative interpretation); by Courts, through their rulings (*"sentenças"*) or judgments (*"acordãos"*) (judicial interpretation) or by Public Administration, through its regulations and its administrative acts (administrative interpretation);
- Private interpretation – when is executed by an individual, a common citizen, in his everyday live – art.6 of the CC (private interpretation), or by a qualified lawyer, through studies and opinions (doctrinal interpretation).

1.3. Methods of interpretation

They are not quite unanimous and raise, essentially, two problems:

1st Problem – One should seek to ascertain the will of the lawmaker (*mens legislatoris*), or the will of the law (*mens legis*) at the time of interpretation?

The Subjectivist School of Thought defends *mens legislatoris* based on three arguments:

i. The law is the product of someone's will, and such will should be decisive in the drafting and interpretation of the law;

ii. The objectivism generates uncertainty in the law, because more options are likely to stay open in the interpretation of rule of law;

iii. The objectivism leaves with the judge, the power to determine the use of the law, giving him specific powers which lead to several potential ways of interpretation.

The Objectivist School of Thought defends *mens legis* based on three arguments:

i. Often it is not possible to ascertain the will of the legislator;

ii. The law is never the will of A, B or C, but the product of the will of the State;

iii. In Objectivism there is no uncertainty in the law, nor excessive powers granted to judges, because art.9, no.2, of the CC puts a brake and limits those powers.

Objectivist consecration and *mens legis* on art.9, no.1, of the CC, because:

i. Democracy urge for the rights of laws, not for the rights of men;

ii. If one would adopt subjectivism, it would not be possible to interpret Customs and Jurisprudence, as sources of law;

iii. Objectivism gives more power to judges because, despite having attention to the intentions of the legislator, they are not forced to a blind obedience.

2nd Problem – one should integrate the meaning and reach of the law at the time of preparation (historicism) or at the time of application (current interpretation)?

The Historicist School defends the meaning and scope of law at the time of preparation, based on three arguments:

i. The original meaning of the law is the only true one, all others are fiction;

ii. If a law is of old age and inadequate from reality, then it should be revoked, instead of giving it a different meaning from the one it had at the beginning;

iii. It is true that if one considers the law always in its initial direction, it will not cover the new situations of life. So, in such cases, there will be lacunae requiring integration.

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The Current Interpretation School of Thought defends the meaning and scope of the law on the time of its application, based on three arguments:

i. Laws should update to the new realities of society;

ii. Current as the law itself is the *ratio legis*. This one refers to the law as a living and present force, given the circumstances of the moment, in which we want to interpret it;

iii. The law is current. Its reason or determining purpose is analyzed with reference to the time when the interpretation is performed: this is, therefore, the purpose or reason that seems more reasonable to the interpreter, depending on the constraints of the time.

Current interpretation consecration and of the meaning and scope of the law, on the time of its application, in art.9, no.1, of the CC, because:

i. Attentive to the vocation of durability of laws, and of their exercise and application;

ii. Assumes that a law is a reality that has to take into account the changing conditions of the community that is directed to;

iii. The juridical analysis of the law should be understood as a project of continued implementation, and a repository of collective transformations (which is being constantly updated).

1.4. Elements of Interpretation

A law combines in itself the word (*"letra"*) (words of the law) and the spirit (*"espírito"*) (the meaning of those words), being these elements complementary to each other.

To make a good interpretation of the law it is necessary to meet its words (word), as well as to its true meaning (spirit) - art.9, no.1, of the CC. We find two kinds of interpretations:

i. Literal interpretation (grammatical or textual – *"interpretação literal"*) – interpretation of the word of the law, of the meaning of the several words that compose it, in its syntactic combination through binding elements. One reads the law and sees what words say, in their immediate significance (art.9, §1, 2 and 3, of the CC).

ii. Logical interpretation (*"interpretação lógica"*) – it constitutes the interpretation with recourse to various types of reasoning, in order to reach the spirit of the law. It searches for the counter-proof or the complement of the literal meaning of the legislative formula, through a set of elements:

a) Historical element (*"elemento histórico"*) – appeals to past elements referring to the rule that is being interpreted, in order to enrich and complete the interpretive process. This element comprises:

- Legislative, jurisprudential and doctrinal background – rules, court decisions and texts that were in effect at the time of formation of the law, and in which the legislator was inspired to make the law that is to be interpreted;
- "*Occasio legis*" – set of social, economic or political circumstances surrounding the process of making the law - "circumstances in which the law was elaborated"(art.9, no.1, of the CC);

- Preparatory work (*"trabalhos preparatórios"*) – pre-projects, projects, minutes which record the discussions in committees and in parliamentary sessions. They precede the law and can be helpful to clarify its meaning and scope;
- Parliamentary debates and unofficial notes from the Government – registered work of legislative preparation which help to clarify the meaning of the law;
- Preamble (*"preâmbulo"*) or explanation of the purposes of the legal diploma – where the legislator puts in context its purposes, the *ratio* of its options, and the purpose of the new law.

b) Rational Element (Teleological) – is what the Romans called "*ratio legis*" or "*ratio juris*". It ascertains the purpose, the objectives, the reason of being of the law which is being interpreted. One interprets the underlying reason of the law. This element is not mentioned by art.9, no.1, of the CC, therefore, is a lacuna that needs to be filled.

c) Conjunctural Element – is the moment in which one lives, relating to specific conditions of the time when the law is applied. The environment influences the interpretation of the laws, as noted in art.9, no.1, of the CC.

d) Systematic Element – each rule must be interpreted in the light of the whole to which it belongs and from which receives its meaning. It considers the rule as part of a cohesive whole, a coherent and unitary system (legal system) - art.9, no.1, of the CC. To interpret a rule is necessary to know all other rules with which it combines or it is in conflict. This element comprises the following components:

- Insertion of the rule on the plan of the diploma - systematic insertion in parts, chapters and sections;
- Epigraph of the rule - subject or title in which the rule is integrated;
- Antecedent and subsequent rules – to know in which context is the rule integrated, because it may happen that it only makes sense considering antecedent or subsequent rules, or both;

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- Rules to which it relies (remissive or devolutive) – they can complement the rule that we are interpreting. Often, without remission, is impossible to have a true meaning of the rule;
- Parallel places (*"lugares paralelos"*) - Comparison of similar rules, i.e., which regulate related issues;
- Rules in contradiction - harmonization of contradictory rules at an interpretative level, based on articulation or preference criteria;
- Horizontal connection of rules - connection between rules that are on the same hierarchical level;
- Vertical connection of rules - connection between rules that are located on different hierarchical levels.

1.5. Interpretive processes

Interpretive processes are logical and legal operations that the interpreter undertakes in order to achieve certain results, given the relationship of the letter of the law with his spirit, that is, the greater or lesser correspondence between the literal and the real sense.

Types of interpretative processes:

a) Declaratory Interpretation (*"Interpretação Declarativa"*) – interpretative process that leads to the conclusion that the word and spirit of the rule coincide, so the "legislative thought" corresponds entirely to the text. It occurs when the literal meaning is ambiguous and indeterminate and the interpreter limits himself in clarifying and fixing one meaning. The declarative interpretation can be broad or restricted if the fixed literal meaning is, respectively, broader or more restrict.

E.g.: the word "man" can mean "human male" (restrict meaning) or "human being", regardless of gender (broadly defined); the verb "to alienate" can mean the total disposal of something (broadly defined) or partial (restrict sense).

b) Extensive Interpretation (*"Interpretação Extensiva"*) – interpretative process which leads to the conclusion that the spirit of the law is broader than its word (the legislator said less than what he meant: *minus dixit quam voluit*), so that the scope of the rule should be extended, in order to cover all cases included in their spirit. It occurs when the spirit of the law is not in harmony with the word, which is considered poor (*"deficiente"*), and its extension exceeds its common meaning.

E.g.: the user (*"usufrutuário"*) is obliged to replace, with new foals, the heads that, for whatever reason, come to miss (art.1462, no.1, of the CC). The expression "new foals" should be submitted to a broad interpretation, so that if there are foals missing for reasons attributable to the user, this should replace them with other foals or heads.

c) Restrictive Interpretation (*"Interpretação Restritiva"*) – interpretative process that leads to the conclusion that the letter of the law is broader than its spirit (the legislator said more than he wanted to say: *magis dixit quam voluit*), so that the scope of the rule should be reduced to cover only the cases included in its spirit. It occurs when the legislator was betrayed by his words and said more than he wanted to say (*potius dixit quam voluit*).

E.g.: the law only becomes binding after publication on the Official Gazette (art.5, no.1, of the CC). The word "law" has a meaning that lacks restriction: it is not just any law, but only the one that should be published on the Official Gazette, under art.119 of the CRP.

d) Corrective Interpretation (*"Interpretação Correctiva"*) – interpretative process that leads the interpreter to amend the manifest errors contained in the law. The result of the interpretation is here to rectify the word of the law, to put it according to the spirit. (e.g. typographical errors; references to wrong articles).

e) *"Abrogante"* interpretation (*"Interpretação Abrogante"*) – interpretive process that leads the interpreter to consider the non existence of a rule which is so absurd that it can not exist (because: it is meaningless, it is unintelligible; or is in irreconcilable contradiction with another).

f) Enunciative interpretation (*"Interpretação Enunciativa"*) – interpretive process that allows the interpreter to extract from the content of a rule everything that is implied in it, and all that can be deduced from it. The law that permits the most, also permits the least. The law prohibiting the least also prohibits the most.

g) Optative interpretation (*"Interpretação Optativa"*) – interpretive process that leads the interpreter to choose, before two equally plausible and possible interpretations, the one that corresponds to the most correct solution, i.e., the one that best reconciles the purposes of Law (by application of art.9, no.3, of the CC).

2. Integration of Laws

2.1. Lacunae

Juridical lacuna, or lacuna in Law, or omitted cases – these are the cases that the rule does not set forth, but should be legally regulated by Law.

2.2. Types of Lacunae

a) Intentional Lacunae and Non Intentional Lacunae

- Intentional Lacunae (voluntary) – when the absence of legal regulation translates a conscious choice of the legislator in relation to extra-juridical situations, whose regulation is ensured by other regulatory orders;
- Non Intentional Lacunae (not involuntary) – when there is a legal vacuum (*"vazio jurídico"*) regarding a situation that calls for a legal discipline (the science of Law takes care of this category of lacunae, in search for integration criteria).

b) Regulatory Lacunae and Regulation Lacunae

- Regulation Lacunae (forecasting) – refer to the omission of a regime applicable to a particular factual situation or institute;
- Regulatory Lacunae (*"estatuição"*) – result from the incomplete nature of a law, by the lack of consequences that Law gives to the verification of a certain factual situation.

c) Evident Lacunae, Hidden Lacunae and Collision Lacunae

- Evident Lacunae (obvious) – occur in the absence of a rule or a statutory scheme to regulate a particular situation in life;
- Hidden Lacunae (*"lacunas ocultas"*) – when a rule exists but, following its interpretation, one concludes that its meaning is inconsistent with the due or appropriate legal solution for the case;
- Collision Lacunae – arise when several contradictory juridical rules govern a given situation and, in the absence of a discretion to solve the conflict, none applies.

2.3. Integration (*"Integração"*)

Integration of lacunae – is the legal-logical operation which consists in finding a juridical rule (by the one that applies Law) which, although not directly applicable, can resolve the ignored case.

The integration of lacunae is necessary because a judge can not refrain from judging on the basis of lack or obscurity of the law (art.8, no.1, of the CC).

What is the difference between the interpretation of the law and the integration of lacunae?

i. In interpreting one seeks to determine the meaning and scope the law.

ii. Integration is sought to create a rule which will fill a lacuna in objective Law.

What is the difference between the Extensive Interpretation (*"Interpretação Extensiva"*) and the integration of lacunae?

i. In the Extensive Interpretation there is a text of law, although the direction and the scope of the law go beyond its word, and, therefore, you have to extend the word in order to cover the meaning and scope (spirit);

ii. In Integration there is no law governing the case, i.e., the case that must be regulated is not set forth by law (neither in word nor in spirit).

2.4. Intra-systematic integration processes

a) Analogy (*"Analogia"*)

Notion of analogy – integration process of lacunae whereby, in regulating a case ignored by law, the same reasons that justify certain regulations given by law to another similar case apply (art.10, no.1 and 2, CC).

Fundamentals of Analogy:

a. The similarity between the ignored case and the regulated case;

b. Identity of justifying reasons of the legislative regulation of the two cases: "*ubi eaden ratio legis*, *ibi eadem juris disposito*", i.e., there is an analogy whenever the reasoning of the ignored and the expected case is the same;

Procedures of analogical integration:

i. *Legis* Analogy (of the law) – hat mental operation which, starting from a concrete legal rule, drawn from a legal diploma of the same branch of Law or from a different branch of Law (more restrictive), fills the existing lacuna, by analogy.

ii. *Juris* Analogy (of Law) – that mental operation which, starting from a plurality of legal rules, uses a rule arising from general or common legal principles, because it is not possible to identify, in the legislative order, a law that is applicable to the analogous case, which fills the lacuna.

Limits – the use of analogue integration is forbidden in the following situations:

i. Exceptional rules (art.11 of the CC);

ii. Criminal incriminating rules (art.29, no.1, 3 and 4, of the CRP; and art.1, no.3, of the Penal Code);

iii. Tax rules and rules that define the safeguards of taxpayers – Tax Law (art.103, no.2 and 3, of the CRP);

iv. Rules of complete definition – "*numerus clausus*" (art.1306, no.1, of the CC);

v. Rules restricting rights, freedoms and guarantees (art.18, no.2, of the CRP).

b) Creating an *"ad hoc"* juridical rule

Legal basis – art.10, no.3, of the CC;

Nature – when integration by analogy is not possible, and given the duty to judge (art.8, no.1, of the CC), the applicator of Law creates a juridical rule "*ad hoc*", in general and abstract terms, and then applies it to the solution of that specific case. The applicator stands here as "if it were a legislator", but must remain "within the spirit of the system" (art.10, no.3, of the CC). The "system", here referred, is the national legal system, as a whole.

Efficacy (*"Eficácia"*) – in principle, the "*ad hoc*" rule expires in the resolution of the specific ignored case, persisting the lacuna. However, nothing prevents that, in similar circumstances, the same applicator of Law or any other person will, eventually, apply the "*ad hoc*" created rule, to resolve the ignored case.

What is the difference between an "*ad hoc*" rule, created under art.10, no.3, of the CC, and the use of equity?

i. "*ad hoc*" rule, created under art.10, no.3, of the CC – a general juridical rule is drawn up, and the specific case is solved;

ii. Recourse to equity – the circumstances of the specific case are directly taken in consideration.

c) General Principles of Law

The generic directives or broad lines of the legal system, which can either be translated into expressed rules, as not having positive expression in any rule.

Ex: "*In dubio pro reu*", "*nula pena sine lege*".

2.5. Extra-systematic Integration Processes

I. Normative – verified the existence of a lacuna, the judge announces the legislator that he approves the missing rule. The principle of the separation of powers, constitutionally set forth in art.111, no.1, of the CRP, is, therefore, respected.

II. Discretionary – the law recognizes the administrative authorities the jurisdiction to decide concrete cases, based on convenience or opportunity. Under the discretionary powers, the administrative authorities make the adequate decisions, relating the specific cases.

III. Equitable – besides other functions (humanization of the law, easing of rules, correction of laws), equity also plays an integrative function: to consider the circumstances of the ignored case which claims for a legal solution.

3. Application of the Juridical Rule

Application of the juridical rule – to match a particular case with a legal rule that predicts and regulates it.

Subsumption (*"Subsunção"*) – is the juridical-logical operation in which a situation in real life fits in the prediction of a legal rule.

Types of application of juridical rules:

- Declarative Application *("Aplicação Declarativa")* – consisting on the declaration and application of the existing Law, by the applicator organ, without creating a new law. Application *secundum legem*.
- Constitutive Application *("Aplicação Constitutiva")* – consisting on creating new Law, by the applicator organ, in order to solve the specific case. Application *praeter legem*.

3.1. Application of laws in time

Laws are not eternal. Whenever a law is replaced by another, the problem of succession of laws in time arises, i.e., knowing which law should apply to a case: the old law (LA) or the new law (LN).

Criterion-rule: principle of non-retroactivity of the law – it signifies that the law is not valid for the past (cover past situations).

Degrees of retroactivity:

i. Extreme retroactivity *("Retroactividade Extrema")* – application of the new law (LN) on the past, without any limitation (to all situations with origin in the past), not even the *"res judicata"* (forbidden by the Portuguese Law, unless *in mitius* retroactivity in Criminal Law, i.e., the application of the most favorable law to the defendant, even if it affects the final decision *"res judicata"* (art.2, no.2 and 4, of the Criminal Code).

ii. Aggravated retroactivity *("Retroactividade Agravada")* – the new law (LN) is applied to the past, but it must respect the effects already produced by the performance of obligations, by final judgment *("res judicata")*, per transaction, not yet homologated, or by other similar acts (art.13, no.1, of the CC - regime applicable to the interpretative law).

iii. Common retroactivity *("Retroactividade Ordinária")* – the new law (LN) applies to the past, but it respects all effects, already produced by the facts which aims to regulate, under the old law (LA) (regime stated in art.12, no.1, of the CC).

3.1.1. Civil Law

The old law (LA) regulates the past, while the new law (LN) regulates the future (art.12, no.1, of the CC).

Operating concept of retroactivity – doctrine of the past fact (*"facto passado"*) – the new law (LN) that applies to events prior to the beginning of its entering into force is considered retroactive (art.12 of the CC).

When the new law (LN) is retroactively applied, i.e., when a retroactive effect is attributed to it, it is assumed that the effects already produced by the facts that the new law (LN) is intended to regulate, are kept safe. Ex: if a new law (LN) establishes a minimum or maximum wage, it is presumed that it does not affect the wages paid and received in the past; if the new law sets a new interest rate, it is assumed that it does not affect the interest already accrued in the past.

Art.12, no.2, of the CC, distinguishes two situations:

i. When the new law disposes about the conditions of substantial or formal validity of any facts, or about their effects, it is understood that it only applies for new facts. The applicable law is the law in force at the date of occurrence of the facts, that is, the old law (no retroactivity - art.12, no.2, 1st part, of the CC).

Ex: If the new law (LN) establishes a new formality for marriage or any other contracts – e.g.: requiring notarial deed to assure the validity of contracts which were, until then, executed by a private document - (purchase & sale, donation, work, mandate, lease, …); a change in the consented age for marriage; a new compensation regime, for example, for traffic accidents; it only applies to future events (accidents).

ii. When the new law disposes over the content of certain legal relations (*"conteúdo de certas relações jurídicas"*) which, coming from the past, continue after the entry into force of the new law, the new law applies (no retroactivity – art.12, no.2, 2nd section, of the CC).

E.g.: If the new law (LN) were to regulate the content of the Law of private property; the regime of working force (changing the maximum working week time of 42 hours); the obligations of landlords (installation of electricity, water, gas); the duties of the spouses (applies to all couples, married either before or after the entry into force of the new law).

Interpretative Law – art.13 of the CC:

- Concept – an interpretative law is the one that constitutes authentic interpretation (the legislator interprets an old law through a new law).
- Requirements – the interpretative law must fulfill, cumulatively, the following requirements:
  i. Time – the interpretative law must occur after the interpreted law;
  ii. Purpose – interpretative law must bear, expressly or implied, the interpretative purpose (and not innovative), in respect of a certain law;
  iii. Source – the interpretative law can not be hierarchically inferior to the interpreted law.

Regime – the interpretative law is retroactive, because it integrates in the interpreted law. The interpreted law takes effect according to the meaning and scope that results from the interpretative law.

To the retroactivity of the interpretative law the following effects are excluded, for the sake of juridical certainty:

i. Relating to the fulfillment of an obligation;

ii. Relating to a final judgment (*"res judicata*");

iii. Relating to a transaction (a settlement made out of court, or litigation, between the parties);

iv. Relative to other similar acts (e.g.: compensation - art.847 of the CC).

3.1.2. Criminal Law

Principle of legality – it can only be punished an act that is described and declared as criminally punishable, by a law prior to the moment of its occurrence (art.1, no.1, of the Criminal Code, and art.29, no.1, of the CRP).

General principles:

i. The law in effect at the time of the practice of the fact is the adequate law to determine the applicable penalties or safety measures (art.2, no.1, of the Criminal Code);

ii. Principle of non-retroactivity of Criminal Law, unless the new law has a more favorable content to the defendant (art.29, no.3 and 4, of the CRP);

iii. The fact that is punishable under the law in force at the time of its practice ceases to be punishable, if a new law eliminate it from the available modalities of offenses; in this case, if there has been condemnation, even if *res judicata*, the execution and its penal effects cease (art.2, no.2, of the Criminal Code);

iv. When the criminal provisions, in force at the time of the practice of the criminal offense, are different from those established in later laws, it is always the most favorable regime that is applied to the agent ; if there has been condemnation, even if *res judicata*, the execution and its effects cease, once the fulfilled criminal part of the penalty reaches the maximum limit stated in the subsequent law (art.2, no.4, of the Criminal Code).

3.1.3. Constitutional Law

Laws restricting rights, freedoms and guarantees can not have retroactive effect (art.18, no.3, of the CRP).

3.1.4. Tax Law

Nobody can be forced to pay taxes with retroactive nature (art.103, no.3, of the CRP, and art.12 of the General Tax Law).

3.1.5. Procedural Law

The new law (LN) applies immediately, passing, therefore, to regulate the pending proceedings, based on the assumption that it contains more perfect criteria.

3.2. Application of laws in space

In principle, the State Law only takes effect within the State borders (principle of territoriality).

The question is whether there will be situations that, by virtue of cross-border and transnational relations, justify the internal application of juridical rules and regimes defined by decision centers that lay outside the state political power.

The internal application of juridical rules of foreign Law depends on its acceptance by mechanisms of:

i. Formal Reception - foreign Law is received as proper Law (*"Direito Próprio"*) of a particular State, using the sense which it holds in its land of origin;

ii. Material Reception - foreign Law is upheld in its content, with abstraction of form and relevance it enjoyed in its land of origin; its application and interpretation will be made in line with the principles prevailing in the host land juridical system.

Example: A is a Portuguese citizen, married to B, which is a Brazilian citizen; a contract of buy and sale of a property located in Cape Verde is celebrated in France with C, an English citizen. What is the most appropriate law to regulate this contract conflict situation?

- The legal situations that are in contact with various State jurisdictions, resulting in a conflict of laws in space, are governed by rules or conflict rules that constitute the Private International Law.

In the Portuguese legal system, and regarding Civil Law, conflict rules are provided in arts.15 to 65 of the CC.

By force of art.23, no.1, of the CC, Portuguese law operates a formal reception of foreign Law.

The mechanism of reception of foreign Law is conditioned by the overriding requirement of public order, i.e., the provisions of the foreign Law designated by the conflict rule will not apply, when that application involves the offense of fundamental principles of international public policy of the Portuguese State (art.22, CC).