LEGAL HERMENEUTICS—NOTES ON THE EARLY MODERN DEVELOPMENT

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1. In the family of sciences, legal science has usually been one of the poor relations—those who take more than they give. It is in the nature of things that lawyers and legal writers should have mainly devoted their efforts to transforming and putting into practical use ideas, principles and solutions originating in other fields of science, whereas the stock of observations, knowledge, and experience which lawyers have acquired for themselves and which is proper to the science of law has rarely been used for scientific purposes in other realms of research. There are, however, exceptions to this general rule. Thus the technical knowledge of lawyers in various domains of public and economic life has been drawn upon by political science and sociology. The analyses devoted by lawyers and legal scholars to the problems of evaluation of evidence both came earlier and for a long time were more highly developed than the methods applied by historians in the critical study of sources. And in another field, that of *hermeneutics*, the lawyers' practical need to cope with difficult texts gave birth to a doctrine of interpretation which was already highly refined a long time before such philosophers as *Dilthey*—to name only one among many—attempted, in the course of the 19th century, to lay the foundations of a theory of science proper to *litterae humaniores* and intended to serve as a reply to and a defence against the rise and claims of the natural sciences and the onslaught of criticism from positivist theories of science.

The lawyers were not alone in elaborating a normative doctrine of interpretation, nor were they the first to make efforts in that sense. There are, mainly, three fields in which bodies of hermeneutic precepts claiming to be—at least in the older sense of the term—"scientific" canons for the treatment of texts were developed already in Antiquity, and although the connections between these three doctrines are far from having been sufficiently investigated, it is hardly subject to doubt that such interrelations, with mutual taking and giving, existed at an early date. The first reasonably well-known framers of a theory of interpretation which claimed to be a coherent "doctrine", or at least an arsenal of elaborate and generally accepted maxims of interpretation, were those Greek philosophers and grammarians who made use of their analytical acumen in the study of early literature, above all of the Homeric poems. The ideas and solutions de-

veloped by these Hellenistic men of science and of letters were adopted, to a large extent, by those Jewish rabbis in the *diasporá* who tried to make the books of the Old Testament the foundation of a theology sufficiently coherent and rational to be acceptable to an educated Hellenistic public.[1] Both directly, in the writings of the philosophically and philologically trained Fathers of the Church, and indirectly, through the intermediary of Jewish writers, and also in connection with the influx of Arabian science in the Middle Ages, this Hellenistic tradition came to exercise a decisive influence upon the second great centre of hermeneutic discussion and system-building: early Christian theology. Indeed, the Hellenistic *ars interpretandi* became once more a source of inspiration both to philologists and theologians. A new wave of ancient influence rose with the Renascence humanists, such as Flacius in Protestant theology and Budé in classical philology.[2]

The third centre of early reflection and construction of theories and solutions is to be found among classical Roman lawyers.[3] That *on a general level* these lawyers were subject to a strong influence from Hellenistic philosophy and grammar would seem to be beyond reasonable doubt.[4] The precise strength, scope, and consequences of that influence are, however, the subject of controversy. That the art of rhetoric, where problems of interpretation were also treated, was known to classical Roman lawyers would seem to be certain—some questions are much debated among the scholars[5]—but at the same time, the usually very laconic maxims of in-

[1] An interesting concrete example of the use of Hellenistic methods of interpretation made by the rabbis is furnished by D. Daube in "Alexandrinian Methods of Interpretation and the Rabbis", *Festschrift Hans Lewald,* Basle 1953, pp. 27 ff. See, in particular, on the use of διαίρεσις in the interpretation of Homer and Virgil, *ibid.*, pp. 41 f.

[2] Ersch and Gruber, *Allgem. Encyklopädie der Wissenschaften und Kunste* (2 Section, publ. by Hassel und Hoffmann, part 6, Leipzig 1829), under the heading "Hermeneutik" (by E. F. Vogel), pp. 300 ff., p. 314; see also Zedler's *Grosses Universal-Lexicon aller Wissenschaften und Künste,* Halle and Leipzig 1735, heading "Hermeneutic", col. 1729. These two learned encyclopaedias from the early 18th and 19th centuries provide a good illustration of the general level of discussion and theories in the periods concerned—before and after the contributions of the "New Humanism", represented in this field above all by Schleiermacher.

[3] For generalities on *interpretatio,* see Pauly-Wissowa, *Real-Encyclopädie der classischen Altertumswissenschaft,* vol. 9 (publ. by Kroll, Stuttgart 1916), article "Interpretatio", pp. 1710 f.

[4] See already Ortloff, *Über den Einfluss der stoischen Philosophie auf die römische Jurisprudenz,* Erlangen 1797. A summary of the modern standpoint in F. Schulz, *Geschichte der römischen Rechtswissenschaft,* Weimar 1961, pp. 73 ff. Convincing criticism in P. Stein, *Regulae juris,* Edinburgh 1966, where the relative independence of the lawyers is stressed and the idea of an early influence is refuted. Cf. also, on the last point, U. Wesel, *Rhetorische Statuslehre und Gesetzesauslegung der römischen Juristen,* Cologne 1967, where the once influential contentions of Stroux (*Summum jus summa iniuria,* 1926), who tried to prove that the Roman lawyers made extensive use of the doctrines of *status* (στάσις) developed in rhetoric, are convincingly attacked.

[5] See Kaser, *Das römische Privatrecht* (*Handbuch der Altertumswissenschaft* X, 3, 4), vol. 1, Munich 1955, pp. 189 ff., 206 ff.; Wesel, *op. cit.* (note 4 above), *passim.*

terpretation which are to be found in the preserved legal material have an unmistakably original and independent character.[6]

2. It seems justifiable, at this juncture, to consider briefly *why* it was precisely in the fields of classical philology, theology and law that *artes interpretandi*—systems aiming at completeness and claiming to be "sciences" in the older sense of a great mass of knowledge, coherence, consistency, and rationality—experienced this early birth and growth. Any reflected and elaborated view of the process of linguistic interpretation presupposes, consciously or unconsciously, certain foundations in the form of at least some ideas concerning theory of knowledge, logic, psychology, linguistic theory in general, and semantics. These foundations, which were very largely—at least before the introduction of new psychological and linguistic theories in the 17th and 18th centuries—a mixture of ancient speculations and generally accepted common-sense observations, must have been common not only to those theoreticians and practitioners who elaborated hermeneutic systems in the three fields just referred to, but also to the learned world at large. Theologians, classical philologists, and lawyers possessed no specialized knowledge of their own in these general matters. However, it was to take a very long time before efforts were made to develop a general theory of hermeneutics without special reference to these three sciences. Traditionally, hermeneutics as such was regarded—to the extent it was discussed at all—as part of theoretical philosophy, or to be more precise, of the logic of probability,[7] but problems of interpretation could also be treated within the growing science of literature, *ars critica*. Attempts to formulate hermeneutic precepts of a general scope can be noted in the Renascence, *inter alia* in the writings of Melanchton,[8] but it was not until the middle of the 18th century that the construction of more general theories commenced outside the three traditional branches of science. The theories which then emerged must be characterized as imprecise and groping and—as might be expected—were heavily dependent upon the maxims of, in particular, classical philology. This remained true until well into the 19th century,[9] when Schleiermacher, who could draw

[6] See Pauly-Wissowa (note 4 above), *loc. cit.* On the term *interpretatio* in the Roman sources, Fuhrmann in *Sympotica Fr. Wieacker,* Göttingen 1970, pp. 80 ff.

[7] Zedner, *Universal-Lexicon, loc. cit.* above (note 2); cf. Pfeiffer, *op. cit.* below (note 9), Prolegomena, § IX.

[8] See examples in Zedner, *loc. cit.* Also A. Plachy, *La teoria della interpretazione, Genesi e storia della ermeneutica moderna,* Milan 1974, pp. 1, 22 ff.

[9] J. Ehrenfried Pfeiffer, *Elementa hermeneuticae universalis,* Jena 1743, an extensive, learned and essentially pragmatic work, which contains, *inter alia,* a chapter X (pp. 201–14) on the interpretation of statutes, wills, and other private documents; G. Friedr. Meier, *Versuch einer allgemeinen Auslegungskunst,* Halle 1757; H. Fr. Ast, *Grundlinien der Grammatik, Hermeneutik und*

upon his theological learning, and a growing number of other scholars with various backgrounds began to lay the foundations of modern hermeneutics.[1]

The most obvious observation, when looking for the reasons why theologians, lawyers and students of ancient philology were the first to elaborate complete and coherent sets of hermeneutic principles, is certainly that these three categories of scholars all had to deal with texts which were considered to be *authoritative*. That this was the case with Roman law and with the Scriptures is a fact that needs no comment. It was also very largely true, however, of the Homeric poems and, further on in the course of development, ancient literature as a whole. With some simplification it can be contended that the scholar's conception of his task in relation to these three groups of texts was for a very long time poles apart from what is likely to be considered today the foremost duty of modern critical science: it was *not* to search for, and demonstrate, contradictions and ambiguities—it was to make loose ends meet, to understand texts which were by definition "true", and to eliminate whatever could be called obscure or ambiguous. The uncontested point of departure was the firm authority of the text; all flaws were laid at the door of the ignorant or impercipient interpreter.

Among the three branches of knowledge, law holds a place of its own, having as it does certain particularities which gave legal hermeneutics its specific character, and still do. From some points of view, the lawyers' task was easier than that of theologians and philologists. They did not have to struggle with those particular problems with which the theologians were confronted by, on the one hand, prevailing ideas on the direct verbal inspiration of those who had formulated the Divine Word and, on the other, theories about a mystical and symbolical hidden meaning; it should be admitted that theological hermeneutics represents, at least from Origenes, a far more complicated, subtle and variegated system than its counterpart in the legal sphere. Nor did the lawyers have to face those questions which are raised, in the work of classical philologists, by the aesthetic and psychological unity of the literary work and by endeavours to achieve psychological understanding on a level above that of strictly cognitive comprehension. To the legal interpreter, language was, and is, a mere

Kritik, Landshut 1808. Ast, who is already under the influence both of German late 18th century and early 19th century "New Humanism" and of the rising Romantic movement, draws essentially upon the hermeneutic tradition of classical philology (cf. the bibliography, *op. cit.*, pp. 212 ff., which comprises only modern works in this line of tradition). On Meier's work, see Plachy, *op. cit.*, (note 8 above), pp. 7 ff.

[1] On Schleiermacher's contributions to the theory of interpretaton, see Plachy, *op. cit.*, pp. 39 ff.

tool, the instrument of an intellect trying to solve practical problems by verbal means.[2]

Yet from other points of view the dilemma of lawyers was the most difficult of all, for they had to translate, as it were, the words of the law into immediate action, and contradictions and ambiguities that might involve crises of conscience for the theologians and present the philologists with intellectual puzzles could result, in the case of lawyers, in tangible and easily ascertainable chaotic conditions in the life of the community. The lawyers' interpretations affected not only souls and minds, but also bodies, estates, and chattels. On these cumbersome physical objects, decisions had sometimes to be passed without delay.

At the same time as legal hermeneutics had, as it still has, to face these practical demands, it has always—almost as much as the theologian's *ars interpretandi*—had to take into account ideological claims and movements. Legal interpretation took place, as it takes place today, in the theatre of the world, on a stage where specific instructions are issued to those taking part in the play. To one was given the right to legislate, to another the task of interpreting and putting into effect, and in most periods and places, if the latter ever indulged in excessive liberties at the expense of the lawgiver, his conduct was severely frowned upon. This is still true today, although the people and their elected representatives have taken the place of the omnipotent legislator. Absolutist and democratic ideologies are alike in calling upon the interpreter always to observe with care where the proper limit goes between legitimate "construction" of existing rules and the creation of new precepts. Moreover, the lawyer's interpreting activity is presided over not only by an old Goddess, *Justitia,* who embodies the difficult claim that the result of interpretation should be in harmony with what is, at the time of the decision, regarded as "justice", but also by younger and more short-lived divinities, who insist on "equity", "humanity", "rationality", "social acceptability" and other good things, measured by yardsticks that are not seldom exchanged for others. If *Justitia* tends to stress, above all, strict regularity and uncompromising faithfulness to the letter (unless the law concerned is, for one reason or another, considered "unjust"), these other divinities may ask for flexibility, due consideration of the atypical odd case, regard to economic and social consequences, and other values which the legislator neither would nor could foresee.

Finally, legal interpretation is also bound to the theatre of the world in a more literal sense: it mostly takes place not in the study but in the

[2] "In legibus sententia totum facit. Non enim Lex est, quod scriptum est, sed quod legislator voluit . . . ." Donellus, *Commentarii de jure civili* (1589; quoted from the 6th ed., publ. by J. Chr. Koenig, Nuremberg 1801), Lib. XIII, § 2 (p. 85).

framework of public proceedings, and to the pressures brought to bear upon the interpreter by ideologies should be added the pressure of time. Directors of consciences and inquisitors have also, in the course of history, had to formulate their decisions in similar conditions, but on the whole, both social pressure and the need for haste have weighed more heavily upon the lawyers.

To sum up: normative doctrines of interpretation were born first, and were elaborated earliest, among those who had to deal with authoritative texts—linguistic utterances which for one reason or another *had to* be coherent. These doctrines express the endeavour to rationalize, but also, if possible, to formalize, and thereby to legitimate intellectual operations which, by virtue of the majesty of the text and the possible consequences of the interpretation, were conceived of as being particularly exalted and important.

In what follows, an attempt will be made to throw some light upon the most characteristic features of the development of legal hermeneutics in an important but rather unknown and neglected period, namely from the Renascence to the beginnings of modern Continental discussion towards the middle of the 19th century; by way of conclusion, we shall summarize briefly the most notable trends of the subsequent development. In this field, as in most others, the output of ideas, suggestions and sources in the last century is so extensive and so difficult to capture in one formula that a rough sketch will have to suffice. The material used is taken from France and, with regard to the later development, from Germany, where the hermeneutic debate produced the greatest wealth of theoretical considerations and has also exercised the strongest influence upon Scandinavian lawyers.

3. The rise of a jurisprudence marked by Renascence Humanism was a lengthy process, which different parts of Europe underwent in different forms and at different times.[3] The leading nations were, in the early days of the movement, France and the Netherlands, where already towards the middle of the 16th century a number of eminent writers tried to transform the Humanist motto "Back to Antiquity" into a practical programme of legal research. We shall deal here with two of the great French Renascence

[3] See Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2nd ed. 1967, pp. 165 ff.; a specialized study from one of the great centres of Humanism, Basle, is G. Kisch, *Humanismus und Jurisprudenz*, Basle 1955 (Basler Studien zur Rechtswissensschaft, vol. 42). For references to individual writers, Stintzing-Landsberg's monumental *Geschichte der deutschen Rechtswissenschaft* (Vols. I–III: 2), Munich and Leipzig 1880–1910, remains the best work of reference. In addition to the two jurists dealt with here, Hotomanus and Donellus, a number of contemporary writers devoted special attention to the doctrine of interpretation. See, *inter alia*, Val. Wilh. Forster (*op. cit.* below), *Praefatio*, § 10 (p. 955 in the edition cited here).

lawyers, Franciscus Hotomanus (François Hotman, d. 1590) and Hugo Donellus (Hugues Doneau, d. 1591).

Hotomanus was the author not only of important contributions to positive law but also of a comprehensive legal encyclopaedia where the terms of Roman law and legal writing are treated in alphabetical order.[4] Hotomanus is also, however, one of the few authors of the period who have devoted a monograph, entitled *Iurisconsultus sive de optimo genere iuris interpretandi*, to the art of interpretation.[5] It is an ambitious and extensive work, where the maxims of interpretation developed in some 200 printed pages are exemplified, in a concluding section of more than a hundred pages, in the form of a commentary on selected Roman statutes.

Hotomanus's treatment of the problems of statutory construction is characterized, on the one hand, by the epistemological concepts of late Scholasticism and, on the other, by the immediate use of ancient authorities; among them we find, naturally, the classical Roman lawyers, and Cicero, but also—more surprisingly—Galenus,[6] better known in medicine but also highly esteemed as a theoretician of science. When Hotomanus proceeds to develop the methods of interpretation, he makes use of a traditional division of sciences working with the human language: "triplicem omnino juris interpretandi rationem invenio: quarum prima Grammaticorum, altera Dialecticorum, tertia Iurisconsultorum propria est."[7] Thus linguistics, logic, and legal science are the branches of science from which the instruments of interpretation are taken. The purpose of interpretation according to the method of the Grammarians is either to clarify obscure expressions or to emendate corrupted texts.[8] The learned author makes no distinction between philological interpretation and textual criticism. Nor does he describe explicitly the art of the grammarian; the grammatical element in interpretation is illustrated by a number of concrete examples from *Corpus juris civilis*. Hotomanus emphasizes—in solemn words which recall the pathos of learning in Robert Browning's "Grammarian's Funeral"—that it is necessary for all would-be lawyers to spend their youth in the study of ancient letters.

The second element, or method, in the art of interpretation, that of dialecticians—or, as we should say today, of logicians—is discussed more extensively. Referring to Galenus, Hotomanus defines the three main

[4] Francisci Hotomani iurisconsulti *Commentarius de verbis iuris antiquitatum rom. elementis amplificatus*, Lyon (Ant. Gryphius) 1569, *in fol.*
[5] Basle, 1559.
[6] Hotomanus, *Iurisconsultus*, p. 62.
[7] *Op. cit.*, p. 60.
[8] *Op. cit.*, p. 61.

analytical procedures, *σύνθεσις, ἀνάλυσις,* and *διαίρεσις,* to which he gives the Latin names *constructio, partitio,* and *divisio* (putting together, dividing, and ordering into classes). After a deep-probing discussion, with several examples of these procedures,[9] Hotomanus arrives at the somewhat astonishing conclusion that, in the art of the dialectician, only the analysis, *partitio,* is useful for juristic purposes.[1] The reason for this conclusion would seem to be that it is only the successive systematic division into smaller and smaller units that gives real knowledge of a matter—it seems justifiable to maintain that the "knowledge" Hotomanus refers to is the practical lawyer's penetration of an actual case at bar.[2]

Without attempting to determine the relationship between the contributions of the three sciences to interpretation as a whole, Hotomanus then goes on to that which is proper to lawyers.[3] Again, he does not define the intellectual operations, or technical devices, to be used. Instead, he chooses to enumerate those problems, *controversiae,* which are specific to legal argument, and to systematize them. Such problems can arise, he contends, *ex jure, ex scripto,* or *ex verbo.* Difficulties of the first kind emerge in case of conflict between *jus,* the law in its strict sense, and *aequitas,* equity, and also between written and unwritten law. Controversies *ex scripto* are due to *ambiguitas,* caused either by the lack of clarity of the text itself, by contradictions between the letter and the spirit of the law, or by the incompatibility of two or more written provisions. Finally, *controversiae ex verbo* are due to the obscurity or vagueness of individual words in the text.

It is not difficult to demonstrate the defects of Hotomanus's choice and systematization of the problems of interpretation; these are particularly obvious with regard to the specifically legal questions. The three main kinds of interpretation—grammatical, dialectical, and legal—are neither coordinated nor well-defined in relation to one another by means of uniform criteria. Generally speaking, there is in Hotomanus's exposition no attempt to find an overall formula for grasping the initial linguistic problems common to all the three *rationes* and the relationship between these problems and those—obviously of another nature—which arise when discussing the contraries *jus strictum* and *aequitas.* Hotomanus's analysis is still groping and unsatisfactory on essential and elementary points.

[9] *Op. cit.,* pp. 62–76.

[1] Analysis is defined thus (at p. 72): "Analysis sive partitio—res ad partes suas revocatur atque dissolvitur: vel, ut planius loquamur, cum totum in partes secatur, deinde in partium partes, sic ut ordine ad minutissimas quasque pervenitur."

[2] "Nam si interpretari nihil aliud est, quam quot quaeque sint cuiusque partes exponere (quia tum demum rem aliquam cognoscimus, cum quot, quaeque sint eius partes, cognoscimus) apparet neque synthesin, neque diairesin instituto huic nostro opportunam esse" (*op. cit.,* p. 74).

[3] *Op. cit.,* pp. 85–136.

4. Against this background, Donellus's treatment of the questions is all the more impressive by reason of its greater logical stringency and energy in reconnoitring the whole field of problems.[4] As a whole Donellus's *Commentarii de iure civili* is one of the greatest works of Renascence jurisprudence. Written in a Latin of unusual vigour, purity, simplicity and elegance, the *Commentarii* became, in the long run, very influential, although their immediate influence would seem to be less conspicuous. Questions of interpretation are treated in chs. XIII–XV; the first of these chapters contains a general introduction and then treats those problems which arise when the sense of the law is narrower than its wording; ch. XIIII deals with such questions as emerge where there are grounds for assuming that the true meaning of the law implies "more than meets the ear"; the problems of obscurity and ambiguity are discussed, finally, in ch. XV.

The point of departure adopted by Donellus is in itself traditional. It is based upon an opposition, well-known from the Roman lawyers, between *scriptum* and *sententia*—letter and spirit.[5] The latter is understood, without any hesitation and any discussion, as the "legislator's will"—an attitude which was natural given the predominant part assigned by earlier and contemporary lawyers to the Justinian codification, with the absolute Monarch's promulgation and introductory words. As in Hotomanus's work, only the *Corpus juris civilis* is dealt with in Donellus's commentaries.

"Sententia a verbis discrepat dupliciter" (The meaning, or spirit, of the law can differ from the words in two ways), says Donellus: either the true meaning can be narrower, or it may have a larger scope than the actual words.[6] In the former case, the law must be interpreted in a way called *restrictive*. There are four different situations in which this method is called for, and Donellus analyses them at some length. First, other provisions in the same law may indicate that a given rule ought to be understood in a narrower sense than results from the actual words; secondly, the known purpose of the enactment may point in that direction; thirdly, *aequitas* may call for a restrictive construction; finally, other laws may provide reasons for this method.[7]

What Donellus does, in this context, is to determine—in modern language—the data of interpretation, or the "bases of supplementing" the text, which are allowed, and his inquiry tends to ascertain and define, as precisely as possible, both the cases where there are grounds for resorting

[4] Hugonis Donelli *Commentarii de iure civili* (1st ed. Frankurt-am-Main 1589). We quote from the 6th ed. publ. by Joh. Christ. Koenig, Nuremberg 1801–05.

[5] "Non enim lex est, quod scriptum est, sed quod legislator voluit ...", *op. cit.*, ch. XIII, § 2 (p. 85).

[6] *Op. cit.*, ch. XIII, § 4 (p. 87).

[7] *Op. cit.*, ch. XIII, § 6 (p. 88).

to these data, and the principles of using them. Grounds for a restrictive interpretation caused by other provisions in the same law are extant when these other provisions are more precise and more carefully framed than the general text subject to interpretation *in casu*. At this juncture, Donellus stresses the importance of the old maxim that, in all administration of legal rules, the *whole law*, not isolated provisions, must be taken into account.[8] It would seem, moreover—but on this point, the exposition is not quite clear—that the four different reasons and principles for rejecting the actual wording are mentioned, and discussed, according to an order which also indicates the priority between them. Thus it is only if the first set of data (other rules in the same law) does not provide a clear solution that *ratio legis consulenda est*. It is from this *ratio*, or *causa*, that the legislative will, and the spirit of the law, can be taken. With regard to using the purpose of an enactment as a corrective to its strictly literal meaning Donellus formulates quite severe requirements: it is not any hypothetical or probable purpose that can be invoked. The learned writer also lays down a couple of concrete interpretation maxims based upon the analysis of the legislative purpose.[9]

The next datum is, as set out above, *aequitas*, or equity. Donellus does not conceal from himself or from the reader that any recourse to equity encounters obstacles difficult to surmount, in particular as a result of Justinian's explicit prohibition against an interpretation which, under the name of equity, sets aside the *jus strictum*. Donellus's arguments on this point are not devoid of subtle sophistry,[1] at the same time as he emphasizes that "corrections" founded upon the claims of equity cannot be tolerated when it is clear that in spite of harsh consequences, a provision is to be applied in all its rigour.

In those sections where Donellus treats the question of when and why other enactments may be invoked in support of an interpretation which differs from the actual wording, he refers to problems which, in the modern reader's eyes, hardly have to do with hermeneutics; they rather concern the relationship between actually or apparently contradictory rules of different ages. The principles proposed for applying the maxim according to which new law takes precedence over old law are, however, both lucid and precise.[2]

[8] *Loc. cit.*, § 7.
[9] *Loc. cit.*, §§ 9–10.
[1] "Nominatim loquitur lex de interpretatione inter aequitatem et ius interposita." However, this prohibition is infringed upon only when "interpretatio constituit se mediam inter haec duo, ut aequitatem a iure separet. Hoc autem tunc solum recte dicitur, cum aequitas toti legi opponitur. Nam, cum lex aequitate temperatur tantum ex parte; ibi non separatur ius ab aequitate ..." (*loc. cit.*, § 13, at p. 97).
[2] *Loc. cit.*, §§ 15 f.

It might be expected that when Donellus sets out, in ch. XIIII of the *Commentarii*, to discuss those situations where an enactment should be given a *wider* scope than follows from the actual wording (*sententia latior est*), or be the object of what is called "extensive interpretation", he would do no more than turn round, as it were, the arguments of the preceding chapter. This is not the case, however. He distinguishes between four new arguments in favour of an extensive interpretation, arguments which at the same time indicate those situations where an extensive interpretation is called for. In the first place, this can be justified by the presence of such other rules in the same law as tend to show that the case under consideration is merely in the nature of an example.[3] Upon this statement, which seems natural enough, follows a course of reasoning which is hard for the modern reader to follow. As another group of situations where the law should be held to mean more than follows from its strict wording, Donellus mentions what he calls extension *ex contrariis*. That kind of interpretation means, he goes on to say, that the legislator's will covers not only that which is explicitly laid down, but also the *contrary* in those cases which are contrarily opposite; this, however, is not explicitly laid down in the text.[4] A modern reader would object that what is known as reasoning *e contrario* implies merely a strictly literal interpretation: the law is considered to give rules about what is explicitly set out in the text, nothing more. However, there is undoubtedly, both logically and semantically, a case for Donellus's view for concluding that a permissive rule of law which implies a prohibition against all those cases that are not permitted *expressis verbis* is indeed an interpretation which goes beyond the letter.

The third form of extensive construction is called interpretation *ex consequentibus*. The idea is that it is possible, e.g., to conclude from a certain statutory prohibition that all those acts which are necessary conditions for the unwanted state of affairs are equally prohibited. The formula used by Donellus is not perfectly clear ("intelligitur velle omnia prohiberi, ex quibus illud sequitur"),[5] but the argument must be that only such necessary prerequisites as *inevitably* lead to the prohibited consequence are covered by the prohibition.

The fourth, and last, element of extensive interpretation refers to situations where modern terminology would have recourse to the concept "analogy", i.e. the use of a provision outside its normal, or extended, area of meaning. Without introducing the concept, however, Donellus provides a clear analysis of the specific problems of analogical reasoning. These

[3] *Op. cit.*, ch. XIIII, § 3 (p. 106).
[4] *Loc. cit.*, § 4.
[5] *Loc. cit.*, § 5.

were, essentially, the same as those an interpreter of the absolute Monarch's legislative will had to face when he wanted to restrict the use of a rule out of considerations of *aequitas*. That an extension could be effected by Imperial or Royal command or even by judicial decision was beyond dispute, but the conditions justifying an extension *privata interpretatione* had to be analysed with precision. The traditional objection was that if the legislator had really wanted to have his provision cover a certain case, he could have set it out explicitly without difficulty. Donellus emphasizes those practical reasons which make a complete legislation impossible. At the same time, however, he insists on the principle that an extension by means of "private" interpretation is permissible if and only if it is proved beyond reasonable doubt that this interpretation is necessary in order to achieve *ratio legis*.[6]

In ch. XV, finally, the learned jurist treats those cases where there are no reasons for a restrictive or an extensive interpretation but where the law is simply *obscure*. The first course of action, in these cases, is to try to find the legislator's intention. It is only if this intention cannot be ascertained that special methods of interpretation should be resorted to.[7] Obscurity, it is argued, appears in three distinct situations: where individual words are unclear, where *obscuritas* is due to the structure of the text as a whole (*compositione orationis*), and finally where vagueness attends the nature of the object to which a statutory rule refers. If obscurity concerns individual words, the first step, according to Donellus, is to consult other provisions in the statute where the doubtful term occurs; if no guidance is obtained by this method, the purpose of the enactment should be considered; if that purpose does not justify a distinction between two equally plausible alternatives of interpretation, recourse should be had, in the first place, to custom and earlier statutory language. As a last way out, that solution of the issue which appears the more clement or beneficent should be adopted: *in dubiis benigniora*. The principles recommended for those cases where obscurity is due to the *compositio orationis* are essentially the same.[8] The third kind of obscurity—that which is due to the nature of the object or state of affairs referred to in the text—obviously concerns questions which have no connection with hermeneutics in the proper sense of the word (e.g. problems relating to unborn children as holders of rights).

The systematics of Donellus's doctrine of interpretation, with its clear delineation between restrictive and extensive interpretation, on the one

[6] *Loc. cit.*, §§ 6–8.
[7] *Op. cit.*, ch. XV, §§ 1 and 2.
[8] *Loc. cit.*, §§ 3–12.

hand, and the removal of obscurities, on the other, may strike a modern reader as both artificial and naïve: the problems are conceived primarily or even exclusively as *linguistic* questions. While using the traditional language and conceptual apparatus, however, the author is clearly aware of the realities and policy problems which have to be faced. A particular merit, from an analytical point of view, is the care with which Donellus tries to define and to clarify the supplementary data of interpretation in those cases where there are reasons for doubting the congruity of statutory language and legislative intentions. The richly nuanced discussion devoted to this task shows that practical policy considerations, although dressed in the traditional linguistic and logical garments of contemporary jurisprudential discourse, exercise a decisive influence on the recommended solutions. In Donellus's writings, legal hermeneutics has already acquired an independence and a particularity determined by its specific purposes and needs. There is, of course, no reason to be astonished at the fact that policy considerations and social needs are referred to under two traditional concepts—on the one hand, the rational will of the omnipotent lawgiver and, on the other, equity. Given the manner in which the legislator is described—impersonal, omniscient and benevolent—it is obvious that most rational and enlightened evaluations and arguments can easily be found and legitimated in the folds of his imperial robes.

5. Leaving Donellus for a typical and highly considered representative of German 17th-century jurisprudence, *Valentin Wilhelm Forster,* involves a departure for another and completely different intellectual province: we leave the classical and severe grandeur of an early Palladian villa for a sumptuous Baroque palace. Upon closer scrutiny, however, it is obvious that the intellectual style represented by Forster is not more *modern* than that of Donellus; on the contrary, the characteristics of late Scholasticism, the indebtedness to, and persisting dependence upon, the glossators and postglossators are the most significant features of Forster's jurisprudential thinking, not only in matters of style, terminology, and composition, but also with regard to contents and substantive solutions.[9] Forster devotes

[9] Val. Guil. Forster's *Interpres sive De interpretatione libri duo,* Wittenberg 1613 (here quoted after the edition in *Thesaurus Juris Romani continens Rariora Meliorum Interpretum opuscula ... cum praefatione Everardi Ottonis,* Tomus I, Editio secunda, Trajecti ad Rhenum, (Utrecht), 1733, *in fol.,* cols. 955–1060). Forster enumerates, at col. 955, the principal authorities used in his work; among these, we find Hotomanus, Donellus but also—in considerable numbers—earlier legal and scholastic writers. In the text, the learned author quotes profusely both glossators and postglossators, above all Bartholus and Baldus. Forster himself is frequently quoted or referred to as a leading authority in 18th and early 19th century writing. Among 17th century writers who have devoted particular attention to hermeneutics, mention

some 100 two-column pages in large folio to the art of interpretation. It is true that he touches upon many topics which are of little immediate importance for hermeneutics, but the main part of his work concerns detailed precepts for the construction of statutes; many of his maxims are taken from Roman and medieval authorities.

It would seem to be a characteristic feature that already in the first chapter, where he discusses what *interpretatio* actually means, Forster takes as his starting point statements by Bartholus de Sassoferrato and some other early writers. His own—rather long-winded—definition is, as could be expected, quite traditional: the purpose is to explain and elucidate, combine and expose.[1] The art of interpretation can be divided, according to Forster, into two large principal sections: interpretation in general (*philologosophica*), and that particular branch which is *jurisconsultorum propria atque domestica*.[2] The relationship between these two branches is not discussed explicitly, but it emerges, as an implicit conclusion, from the exposition that the "general" art of interpretation is regarded, on the one hand, as a kind of preliminary stage in relation to the specifically legal doctrine of interpretation and, on the other, as a common name for what would today be called auxiliary sciences.

The number of "philologosophical", i.e. not specifically legal, manners (*rationes*) of interpretation has increased in a most impressive way if we compare Forster's work with that of Hotomanus, to which the later book bears, in many respects, a close similarity. In accordance with tradition, the so-called grammatical interpretation is dealt with first (Liber I, ch. II), but this section has grown into a fairly extensive discussion of text criticism and of the interpreter's right to emendate corrupt passages. A more succinct treatment is given to what most readers would consider as the main task of grammatical interpretation, namely that of removing obscurity and ambiguity. It should be noted that Forster invokes Bartholus's authority in

should be made of George Frantzke (*Commentarius in viginti et unum libros Pandectarum* ... Strasbourg 1644–48); Vind. Placcius (*De Iurisconsulto perfecto sive interprete atque interpretatione legum*, Stockholm and Hamburg 1693) with extensive references to earlier works, pp. 21–47; Joh. Wolfg. Textor (*Diss. de auctoritate interpretum iuris*, Altorf 1670). — It should be added that in the present footnote, as in the notes below, we mention a number of works which are not dealt with in the text. Our justification is that easily accessible modern bibliographical sources about early specialized writings in the field of legal hermeneutics are almost completely lacking. In a few cases, we have not had access to the works referred to but quote from contemporary sources.

[1] *Op. cit.*, Liber I, ch. 1, § 4 (col. 956): "Nobis interpretari iura nihil est aliud, quam textum juris, qua verbum, aut integram orationem obscurum et ambiguum, aut difficilem et perplexum, non recte lectum vel intellectum, congrue exponere et planum, facilem, justum atque genuinum reddere, causas etiam sive rationes ipsarum constitutionum, et notanda subjicere, verba legum et scripta cum mente sententiaque conferre, verumque sensum earum elicere, quae ad versari videbuntur amoliri, et alia huc pertinentia expedire."

[2] *Op. cit.*, I, I, § 8; II, II, before § 1.

support of the already well-established distinction between *obscuritas* and *ambiguitas,*[3] whereas it is considered necessary to quote Hotomanus with regard to the lawyer's need for classical erudition;[4] in the final enumeration of rules for grammatical interpretation, Forster comes very close to Donellus.[5] However, within the frame of *interpretatio grammatica,* the learned author finds reasons for including an exposition of the tropes of rhetoric and even of irony which, it is said, is not entirely unknown in statutory language.[6]

Like Hotomanus, Forster goes on to develop the dialectical method of interpretation (Liber I, ch. III), where, however, he restricts himself to a division between analysis and synthesis and to general observations concerning the necessity of logic in all learned pursuits. In ch. IV, the rhetorical manner of interpretation is treated as a special method; what is discussed, however, are those questions which Hotomanus treated as elements of the specifically legal doctrine of interpretation, i.e. the manner of handling obscurities arising *ex jure, ex scripto,* and *ex verbo,* and the exposition is substantially identical to that of the French Renascence writer.[7] On the other hand, Forster is well aware that the rhetorical technique is a matter distinct from the principles of interpretation. Rhetoric, he says, has its proper place in arguing nice points rather than in learned writings.[8] Another innovation, which seems to be Forster's own contribution, is the extensive section dealing with *historical* interpretation (ch. V). What is dealt with under this heading, however, is the necessity of historical learning for lawyers—the author displays his erudition, with obvious relish, by introducing a rich *florilegium* of quotations tending to prove the usefulness of historical studies—and it is thus history as an auxiliary discipline rather than any specific method of interpretation which is described in ch. V.

The following chapter, with the heading *De Ethico-politica juris interpretandi ratione,* illustrates with particular clarity both the ambitiously encyclopaedic and the uncritically mechanical character of Forster's doctrine of interpretation. It would appear natural and reasonable that the question of the part played by ethical, social and political considerations in the interpretation of statutes and, more generally, in the administration of justice should be examined in connection with those problems concerning

[3] *Op. cit.,* I, II, § 23 (col. 963).

[4] *Loc. cit.,* § 25 (at p. 964). We cannot refrain from quoting this delightful passage (which could very suitably have been read at Browning's "Grammarian's Funeral"): "... primum in latinae linguae scriptoribus adolescentiam omnem consumsisse oportet" (from Hotomanus, *op. cit.,* above, p. 62).

[5] *Loc. cit.,* §§ 35 ff. (cols. 967 ff.).

[6] *Loc. cit.,* § 31 (col. 966).

[7] Liber I, ch. IV (cols. 969–975).

[8] *Loc. cit.,* §§ 1–3 (cols. 969 f.).

the relation between *jus* and *aequitas* which Forster, faithful to traditional patterns, discusses under the heading of "dialectical interpretation" and that the relationship between both these groups of questions and the last rule of "grammatical" construction (under which doubts due to linguistic obscurity are removed, in the last resort, by recourse to *benigniora*—the most clement or least severe solution) should have been elucidated. However, no attempt at such synthesis is made. Under the heading "ethico-political interpretation" Forster quotes a well-known maxim from the Roman lawyers, viz. that all laws must be interpreted *civiliter*. This is an expression difficult to translate in this context: it covers both such concepts as "professionally competent" and such words as "reasonable", "rational" or even "civilized", or "enlightened". Forster uses two German words—the only ones appearing in his Latin treatise—viz. *höflich und pfleglich*, and adds some brief reflections on the demands of *humanitas* and *urbanitas* upon the interpreter.[9]

In the seventh and eighth chapters, the reader finds himself among the elaborate grotesque ornaments of Forster's Baroque interior. Ch. VII deals with *ratio poetica*, ch. VIII with *ratio interpretandi arithmetica, geometrica, physico-medica et aliae*. However, the contents of the two chapters are not as imaginative as the headings would seem to indicate. It is true that in the introduction of the chapter devoted to "poetic interpretation", the learned writer stresses that private law is a discipline to which no branch of human knowledge is alien, and it is even argued that "*est ... Poeticae cum jurisprudentia summa conjunctio et affinitas*",[1] but the exposition contains only some rather trivial observations intended to illustrate the usefulness of metrical knowledge for purposes of statutory interpretation; similarly, ch. VIII stresses the importance of mathematical, geometrical, and medical learning, and it is also emphasized that lawyers ought to possess practical experience of such matters as the excellence of Campanian wines, as compared to other *crus*;[2] in short, what is given is an extensive programme of all those *realia* that a good lawyer ought to possess, and has nothing to do with hermeneutics even in the widest sense.

Forster's second book on interpretation is devoted to the specifically legal method, which is divided into *vulgaris*, the set of principles used in all kinds of actions and with regard to all statutes, and *magis singularis*, more specialized precepts. Forster's second book is interesting chiefly because it is composed of three almost completely independent sections, the first of which (ch. I) is a short account of the traditional medieval analytical

[9] *Op. cit.*, ch. VI (cols. 984 ff.).
[1] *Op. cit.*, ch. VII, § 1 (col. 986).
[2] *Op. cit.*, ch. VIII, § 4 (col. 988).

technique; the second (chs. II–IV) expounds extensive, restrictive, and "declarative" interpretation, drawing upon Hotomanus and Donellus but even more upon earlier writers from the era of the glossators and postglossators. Finally, the third book contains exactly 100 *Regulae*, i.e. concrete and detailed maxims of interpretation formulated essentially on the basis of the preceding chapters and accompanied by comments.

The starting point of ch. I is the well-known distichon (first formulated, in legal writing, by Matthaeus Gribaldus Mopha):

Praemitto, scindo, summo, casumque figuro
Perlego, do causas, connoto et objicio.[3]

The individual elements of this traditional scholastic programme for the handling of legal problems are discussed successively at considerable length. The following chapters, where we recognize the equally traditional division into extensive, restrictive and "declarative" interpretation (the last-mentioned *ratio* being used for the removal of obscurities), contain no new or original contributions. When comparing Forster's exposition with those of Donellus and Hotomanus, there are two features which should be emphasized. One is the constant endeavour to transform all reasoning into concrete and sharply defined maxims; the other is the tendency to establish distinctions between different kinds of laws and provisions, each of which claims special treatment and special methods of interpretation. Thus when discussing the *interpretatio extensiva,* Forster makes a distinction between *jura correctoria,* i.e. such laws as have been enacted in order to reform earlier provisions, *jura paenalia* (criminal provisions) and *jura communia.*[4] This division is not new, but it expresses an endeavour to take account, as realistically as possible, of the various needs and particularities of the living law. In the two chapters devoted to restrictive and declarative interpretation we find, essentially, the same pieces of advice as appeared in the works of Hotomanus and Donellus. Thus, Forster enumerates, under the heading of "declarative interpretation", a number of intellectual operations which should be resorted to in succession; the last among these is that characteristic maxim which had been, correspondingly, formulated as the *ultima ratio* of grammatical interpretation: *in dubiis benigniora.*[5]

It is not difficult to demonstrate the weaknesses, the inconsistencies and above all the lack of thoroughgoing analyses in Forster's extensive doctrine of interpretation. On the other hand, it must be recognized that in spite of—or perhaps owing to—his uncritical adoption, and concomitant use, of both scholastic and Renascence jurisprudence, the author has established

[3] *Op. cit.*, Liber II, ch. 1, before § 1 (col. 991).
[4] *Loc. cit.*, ch. II, § 2 (cols. 1015 ff.).
[5] *Loc. cit.*, ch. IV, § 22 (col. 1039).

an exceptionally rich inventory of problems and thus laid useful foundations for future discussions.

6. It was to take a long time before an independent critical analysis of the problems of statutory interpretation developed in Continental jurisprudence. It is true that the 17th century saw the composition of a considerable number of works in this field, not to mention shorter methodological introductions to treatises and monographs on private and public law; it is equally true that a number of works, some of which were not unimportant, were produced in the 18th century,[6] but upon the whole, all these contributions represented a very slow development firmly based on the foundations laid by ancient Roman lawyers and by the glossators and postglossators. A plausible explanation of the slowness of the development would seem to be that, throughout the period now referred to, legal science was split into two widely different branches: on the one hand, writers taking a particular interest in jurisprudence and theoretical questions devoted themselves, after such models as Grotius, Pufendorf, Thomasius and Wolf, to the building of large coherent systems of rules in the spirit of rationalism and Natural Law—systems which, as appeared not least in the

[6] Mention should first be made, here, of three general hermeneutical works which are frequently referred to by contemporary writers but which seem to have contributed little to the development of legal hermeneutics: Joh. Mart. Chladenius, *Einleitung zum richtigen Auslegen vernünftiger Reden und Schriften,* Leipzig 1742; Jo. Ehrenfr. Pfeiffer, *Elementa ermeneuticae universalis,* Jena 1743, and G. Friedr. Meier, *Versuch einer allgemeinen Auslegungskunst,* Halle 1757 (see, on this work, Plachy, *La teoria della interpretazione,* Milan 1974, pp. 5ff.). Among contributions by legal writers, the following may be cited: C. G. Peller, *Diss. de interpretatione legum politice,* Altorf 1719; the Italian Fr. Rapolla's *De Iurisconsulto, sive de ratione discendi interpretandique juris civilis libri II* (Naples 1726), translated into German by L. F. Griesinger under the title *Der Rechtsgelehrte oder über die Art und Weise wie das Civilrecht richtig erlernt und erklärt wird,* Stuttgart 1792 (an independent and undogmatic exposition with numerous examples taken from Roman law); C. Horn, *Praelectiones publicae de interpretatione juridica,* Wittenberg 1733; Joh. Laur. Holderrieder, *Diss. de principiis interpretationis legum adaequatis,* Leipzig 1736; C. Aug. Ritter, *Regulae interpretationis juridicae praestantiores ex adaequatis principiis demonstratae,* Leipzig 1741; Ch. Henr. Eckhard, *Hermeneutica juris,* Leipzig 1750—a very extensive work, much praised for its clarity and practical usefulness; it was published in several editions, of which the eighth (ed. C. Friedr. Walch, 1779), is particularly rich in notes and references to earlier and contemporary writings; from an historical point of view, it is a clearly traditional work; I. D. Mellmann, *Comment. de interpret. leg. Rom. praesertim Codicis,* Kiel 1770; A. G. Jordan, *De propriis leges poenales interpretandi principiis,* Göttingen 1799; H. G. Wittich, *Ueber einige Einwürfe gegen die bisherige Eintheilung der logischen Interpretation,* Göttingen 1800; J. G. Sammet, *Hermeneutik des Rechts,* hrsg. v. Fr. Gottl. Born, Leipzig 1801—a well-known work, which stresses in particular the study of bibliographical sources of references and the critical analysis of earlier sources; G. S. Teucher, *De natura et formis interpr. et hermeneutices civilis observationes,* Leipzig 1804; J. H. Zirkler, *Gemeinfassliche Darstellung der philosophischen Interpretation* (in *Revision der wichtigsten Lehren des positiven Rechte,* vol. 2, Giessen and Wetzlar 1807); K. S. Zachariae, *Versuch einer allgemeinen Hermeneutik des Rechts,* Meissen 1805. The last-mentioned work is characterized by the ambition to formulate detailed rules of interpretation for different cases, but the general method of reasoning already expresses the development of the new era. Further references in Gluck's work (see following footnote) and, in particular in W. F. Clossius, *Hermeneutik des römischen Rechts,* Leipzig 1831.

course of the French Revolution, were frequently characterized by naïveté and sweeping generalizations in matters of interpretation—whereas, on the other hand, "normal" legal writers either followed well-trodden paths or slowly adopted the methods of the so-called elegant jurisprudence, of which Donellus was an early representative.

We can take, as a characteristic example of the treatment of hermeneutic questions towards the end of the 18th century, before what has been described above as the "modern breakthrough", the exposition of Christian Friedrich Glück, a Bavarian professor, in his well-known and highly esteemed textbook of Roman law from the last years of the century.[7] Glück's fairly extensive discussion of legal hermeneutics presents, in particular, three salient features. On the one hand, he refrains from using much of the subtle network of divisions, subdivisions and corresponding theoretical concepts which had been elaborated by medieval lawyers and brought forward, systematized, and developed into even nicer ramifications by the Pandectists of the 16th and 17th centuries. In this sense, Glück's work carries the marks of the less rigid approach, more conscious of questions of legislative policy and social considerations, which had grown slowly, side by side with the never abandoned scholastic and exegetic tradition, in the course of the 18th century. On the other hand, Glück is still faithful to tradition to the extent that he systematizes the hermeneutic problems. Finally, Glück's starting point is traditional throughout: the task of the interpreter is to find the legislator's will. That "Sinn des Gesetzes", or *sententia legis* which is the ultimate object of his efforts is nothing but precisely this. The law is, in its entirety, a consistent volition.[8] The point of departure of the intellectual process of interpretation is to ascertain with a maximum of precision the sense of individual words and to find their reference to those underlying concepts which common usage and the linguistic context assign to them. Since, however, men are, as experince shows, unable to say just as much or as little as they want to, this semantic investigation must be completed by an inquiry into the *ratio* of the piece of legislation concerned or into the true intention of the lawgiver; in this process, it is important not to confound the *immediate* intention embodied in the text under consideration with more remote purposes. In other words, as Glück stresses emphatically, the "bases of supplementing" the text must not be too wide and far-reaching; it is only the linguistic context in a narrow sense, other pieces of legislation in related fields of the law, and historical evidence concerning the actual legislative procedure that can

[7] Christian Friedrich Glück, *Ausführliche Erläuterung der Pandecten nach Hellfeld. Ein Commentar.* 1. Theil, 2. Ausg., Erlangen 1797.

[8] *Op. cit.*, § 29 (p. 206).

be consulted.[9] In particular, Glück warns against the perils following from an unlimited resort to what is believed to be "equity", besides the ascertainable purpose of the statute. *True* equity, it is held, consists precisely in searching carefully for the intention, in trying with equal care the nature of individual cases, in considering the character and situation of the persons involved in the case and in adopting, if any doubt remains, the more clement or "benign" of two possible solutions.

Among systematic novelties in relation to earlier hermeneutic writings, we may note one, of small substantive importance, viz. the division of interpretation into two main groups, "legal" and "doctrinal" interpretation.[1] The former expression refers, in the first place, to so-called authentic explanation of the law, i.e. statements by the legislator himself about the true meaning of the law—a form of statutory interpretation which had, as is well known, its roots in the Justinian codification but which had come to play an important part in connection with the rather extensive legislative activity of kings and princes in the era of absolute royal power from the early 17th century onwards; even after the French Revolution, this method was considered a useful remedy against pettifogging and oversubtle judicial or theoretical construction. However, Glück makes the term "legal interpretation" cover also what he calls "usual interpretation", a concept which corresponds closely to what today we call case law. Again, Glück's exposition reflects a development and a set of problems of which the lawyers had become increasingly conscious in the 17th and 18th centuries, when—frequently in connection with reforms and with the establishment of permanent and specialized supreme courts independent of the sovereign's person—the legitimacy and usefulness of precedents had been discussed, although with few clear results.

It is under the heading "Doctrinalerklärung" (doctrinal interpretation) that we find, in Glück's expositon, those questions and that apparatus of concepts which had been developed by earlier writers; to some extent, the terminology has changed. The essential dividing line is drawn between "grammatical", or "philological", interpretation, on the one hand, and "logical", or "philosophical" construction, on the other, although it is stressed that for practical purposes the division cannot be maintained with full clarity, since a purely grammatical interpretation which considers merely words and phrases, and neglects the legislator's intentions, is described as an abuse. Glück rejects the idea—which had been put forward by some earlier writers—of a third form of interpretation, called "political". The purpose of such a method was, according to its advocates—and

[9] *Loc. cit.*, p. 207.
[1] *Op. cit.*, §§ 31–33 (pp. 214 ff.).

we here find a clear expression of the increasingly independent attitude of 18th-century lawyers towards ancient and early medieval authorities—to find out "whether and to what extent those laws which we are making use of are adapted to the situation prevailing today and to the constitution of our own time and are thus capable of being used or whether that is not the case".[2] Such investigations are frequently necessary, Glück admits, and this is true not only of the pagan Roman law but also of, e.g., the Emperor Charles V's penal legislation from the 16th century, but the task remains part of "philosophical" or "logical", interpretation.

With regard to grammatical interpretation, Glück establishes a number of rules, based upon common-sense observations; the basic principle is that what should be determinative is, in the first place, prevailing usage at the time of the actual drafting, in the second place, the technical language of lawyers. In the course of the reasoning leading up to these recommendations, the learned writer expounds upon text criticism and the finding of the oldest, original reading.[3] It would seem that Glück is not fully aware of the dilemma which he creates by recommending, on the one hand, unconditional obedience to the legislator and, on the other, critical studies which, in respect of Roman law, lead beyond Justinian back to the classical *jurisconsulti* or even to earlier stages of development. Nor does he make it clear how the prevailing tendency to secure a maximum of historical authenticity can be reconciled with due consideration of later changes in social conditions and human attitudes. It is true that Glück admits that modifications in the texts introduced by later compilators cannot be simply rejected in those cases where they express inevitable responses to political, legal, and social change,[4] but he offers no answer to the question *how* the conflict should be solved.

The most characteristic element in Glück's discussion of "logical", or "philosophical", interpretation is the persistent endeavour to establish coherence and consistency both within the individual statute and within the legal system at large. In this perspective, the triad of concepts which played a predominant part, in e.g., Forster's writings, viz. extensive, restrictive, and declaratory interpretation, occupies a modest place in the reasoning; these concepts are used, as it were, as secondary heads of classification, used to denote the final results of what is really in substance one unitary process of interpretation, the main feature of which is the effort to maintain the harmony and rationality of the system.[5] In the

[2] *Op. cit.*, § 34 (p. 226).
[3] *Op. cit.*, § 35 (pp. 227–44).
[4] *Loc. cit.*, (p. 238).
[5] *Op. cit.*, § 36 (p. 254).

framework of this informal discussion of the problems involved, the author also deepens the analysis of the concept *ratio legis*; he draws a distinction, on the one hand, between the true and deep social need which a piece of legislation is intended to meet, and the more accidental and superficial immediate reason for legislative intervention, and on the other, between the nearest and essential motives and the more remote or secondary reasons for the legislator's action.[6]

Glück's hermeneutical exposition deserves interest chiefly as a good average specimen of the level reached towards the end of the era of rationalism and natural law, immediately before the philosophy of Kant and the German historical school, headed by Fr. C. von Savigny, led the discussion along new paths, which became decisive for the modern development.

Learned writing in the field of hermeneutics continued to grow in the first decades of the 19th century, and a number of works of some importance were published before Savigny, in the first part of his great *System des heutigen Römischen Rechts* (1840), laid the foundations of all later jurisprudential discussion of the subject on the Continent.[7] From this growing *corpus* of writings, where new tendencies are gradually expressed, we may pick out for a few comments a work by Savigny's most important opponent in matters of legislative policy, the Heidelberg professor A. F. J. Thibaut.[8] This distinguished and influential jurist, who represented the persisting trend of Enlightenment rationalism and who was influenced by the legislative ideas of the French Revolution and the Napoleonic codifications, was critical, indeed contemptuous, of the prevailing theories of interpretation, which lacked, in his view, both true systematic consistency

[6] *Loc. cit.*, (p. 259).

[7] Fr. C. von Savigny, *System des heutigen römischen Rechts*, 1. Band, Berlin 1840 (pp. 206–330 deal with interpretation). Among many other writers (among them Zachariae's writings, mentioned at p. 232, note 6, which are already to some extent representative of the new era), mention should be made of: F. Schoemann, *Handbuch des Civil Rechts*, 1. Bd, Giessen 1806; S. Jordan, *Über die Auslegung der Strafgesetze*, Landshut 1818; J. A. Seuffert, *Erörterungen einzelner Lehren des römischen Privatrechts*, Abth. 1, Würtzburg 1820; F. W. Clossius, *op. cit.* at note 6 *in fine*; G. Hufeland, *Über den eigenthümlichen Geist des römischen Rechts*, Giessen 1815—a valuable survey of some originality and independence; J. F. Kierulff, *Theorie des Gemeinen Civilrechts*, Altona 1823, also an informative and lucid survey; H. T. Schletter, *De subsidiis interpretationis legum*, 1838 without indication of the place of publication; Krug, *Die Grundsätze der Gesetzauslegung*, Leipzig 1848.—Numerous references to earlier German 19th century contributions are given in Enneccerus-Nipperdey, *Lehrbuch des bürgerlichen Rechts* I, 14 ed. 1952, § 51, note 1; also in C. A. Reuterskiöld, *Über Rechtsauslegung*, Uppsala 1899 (Uppsala Universitets Årsskrift 1899, Juridik I). For surveys of the very extensive later writings, see, *inter alia*, K. Engisch, *Einführung in das juristische Denken*, Stuttgart 1956 and later editions, ch. IV, note 57, and K. Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin, Göttingen and Heidelberg 1960 and later editions.

[8] A. F. J. Thibaut, *Theorie der logischen Auslegung des Römischen Rechts*, 2. Aufl., Altona 1806 (we quote from this second edition; the first was published in 1799).

and sufficient completeness.[9] However, in terms of practical results, Thibaut is not far remote from the level, and the ideas, represented by, among others, Glück. He adopts the main division into grammatical and logical interpretation, and goes on to subdivide the latter into two groups: interpretation based upon the legislator's intentions, and interpretation which follows the (objective) *ratio legis*. What is common to both is that they constitute attempts to find, albeit in different ways, the "spirit of the statute" ("Geist des Gesetzes").[1] Unlike his predecessors, Thibaut makes energetic efforts to study the relationship between logical and purely linguistic interpretation, and he points out that it is when logical and linguistic interpretation clash—in other words, when considerations of a substantive character lead away from a *verbatim* reading—that there is reason to speak of "restrictive", or "extensive" interpretation. In cases where the process of "logical" interpretation leads to clear results after the "grammatical" interpretation has failed, the term "declaratory" interpretation is used.[2] Like Glück, Thibaut rejects the idea of a specifically "political" method of construction; moreover, he sharply condemns most of the apparatus of terms and concepts which we found in Forster's work and which still appeared in many later traditional expositions of legal hermeneutics. Against historical methods, which would lead the practising lawyer into useless antiquarian investigations and easily give free play to arbitrary decisions, Thibaut launches vigorous attacks characterized by the irony so efficiently deployed by the sceptics of the Enlightenment.

We need not go into the details of Thibaut's doctrine of interpretation. Its most salient features are a distrust both of free methods and of extensive catalogues of concepts, terms and specific intellectual processes. Thibaut makes use only of the two notions of "interpretation according to the legislator's intentions" and "interpretation according to the *ratio legis*, i.e. a method based upon consideration of the actual consequences of one or the other solution *in casu*. The conclusions of the analysis are presented in an order of priority where the wording of the statute comes first, the *ratio legis* next, and the legislative intentions last.[3]

7. It remains to summarize very briefly the development which was initiated by Savigny and which has resulted in the various theories and doctrines of legal hermeneutics of the 20th century.

As for Savigny's contribution, it is difficult to single out specific concrete

[9] *Op. cit.*, p. 20.
[1] *Op. cit.*, p. 22.
[2] *Op. cit.*, pp. 24 f.
[3] *Op. cit.*, pp. 124 ff.

questions where this writer's treatment of the theory of interpretation constitutes a decisive break with earlier traditions. In the same way as Hugo Grotius came to occupy, in his day, an almost undisputed position as the father of the rationalist school of natural law, even though many if not most of his ideas can be found in earlier writers without a comparable status in the learned world, it seems correct to say, with regard to Savigny, that his discussion of the problems of interpretation assumed its particular importance and gained its particular influence less through original and creative individual features than by virtue of the fact that a universally admired and influential leader in the world of legal science recapitulates, with great learning, good sense and formal brilliance, those ideas and methods which had proved, in the long process of earlier discussion, to be viable and fertile. If any element in Savigny's analysis is to be singled out for particular mention, the most obvious feature is his clear insight into a fact which many earlier, naïve or unimaginative, expounders of Justinian law had overlooked, viz. the historical relativity and the inevitable incompleteness of any set of legislative solutions and, concomitantly, the recognition of the continuous creative work which is performed by courts and practitioners within the framework of the texts. "Interpretation" appears, in Savigny's version, as an element in the continuous growth of the living law, not as a mechanical solution of nice questions within a system claiming to be complete once and for all and in some way withdrawn from the historical process. As our short descriptions of Glück and Thibaut's hermeneutical works would seem to show, these ideas were by no means new, but with Savigny they have the character of fundamental, axiomatic starting points, not only of safety valves reluctantly admitted to avoid unacceptable results. Generally speaking, Savigny stresses repeatedly that interpretation is really an *art,* albeit subject to strict norms. In individual questions, Savigny mostly adopts traditional solutions.

Three elements would seem to deserve attention when attempting to characterize, in a cursory way, the determinative features of hermeneutical discussion in the late 19th century and the present century.

First, there is the pillar upon which, as we have already emphasized, all earlier legal hermeneutics was based, viz. the idea of an ascertainable, consistent and all-pervading "legislator's will". From the French Revolution onwards, and especially after 1848, some kind of representative assembly with an increasing influence upon the process of legislation became a standard element in European constitutions. This meant, obviously, that statutes could no longer be considered the expressions of a single individual's will or even as volitions of a small group of advisers or political leaders; more often than not, the texts expressed political compromises

and were thus, in principle, not "willed" by anyone, even if the ascertaining of individual volitions in the numerous membership of modern Parliaments had been practically feasible. The modern technique of legislation also meant, however, that special formalized texts—commonly referred to as "legislative material", or *travaux préparatoires,* and mostly composed of commission reports, government bills, possibly with comments on the interpretation of the proposed statute, and opinions of parliamentary committees—became available to Continental lawyers as a matter of course; these documents frequently contained not only accounts of the legislative process and of general policy considerations but also fairly detailed comments on the true meaning or indeed the recommended construction of individual provisions.[4] Thus, at the same time as naïve references to the "lawgiver's will" became more and more difficult to justify, well-defined, technically sophisticated, and strictly formalized "supplementing bases" for an interpretation founded upon legislative intentions came into existence. The appearance of modern command papers and parliamentary reports is a *sine qua non* for the controversy between those two schools in modern discussion which are, not very happily, designated as "subjective" and "objective". For practical purposes, the former of these is characterized by the decisive importance attributed to the "preparatory works", whereas the latter insists on the actual social function of the piece of legislation, to the extent this can be ascertained by studying the statute "at work"; in this latter perspective, the *travaux préparatoires* are considered rather as historical evidence without immediate interest for the solution of those individual problems which emerge in the course of time, perhaps decades or even centuries after the "legislator" acted and in such circumstances that it is obvious that the framers of the text had never given them a thought. The opposition between "objective" and "subjective" schools of interpretation would seem to be one of these differences of opinion that will last as long as the present legislative technique prevails.

The second element which—though not until some time after the end of the last century—gradually influenced legal hermeneutics was, naturally enough, on the one hand, the analysis of the notions of "understanding" and "'interpretation" which was initiated and continued by such philosophers as Dilthey, Wach, Cassirer, and Gadamer, and on the other, the theories of modern semantics and psychology on the conditions of linguistic communication and linguistic understanding. The implicit basic assumption of all earlier hermeneutical theories was, in the field of law, not

[4] On the importance of the emergence of modern *travaux préparatoires* in Continental law, see Strömholm, "Legislative Material and Construction of Statutes. Notes on the Continental Approach", 10 *Sc.St.L.*, pp. 175 ff. (1966).

only the idea of a rational legislator but also unlimited faith in the power of expression of natural languages or at least in the possibility of arriving, after various obscurities had been removed, at an absolute and unambiguous meaning, applicable without difficulty to individual cases. In other words, an undoubted starting point was that by a sufficiently energetic and competent process of interpretation one could always find *one* answer, *the* correct answer, to a given problem. Modern hermeneutics represents, on this score, a far less optimistic attitude. "Interpretation" is considered as one among several processes in the administration of legal rules, and lawyers are prepared to accept situations where "interpretation" simply gives no answer and where there is no alternative to going on, within the loose framework furnished by that preliminary intellectual process and by accepted standards of reasoning, to solve the problem, ultimately on the basis of an individual value judgment. This "semantic resignation" has also had the consequence that even those legal writers who advocate a "subjective" method of interpretation are aware, to a greater extent than earlier, that the use of *travaux préparatoires* is less an investigation of a real, historical, "legislative will" than a conscious choice of a set of given, formalized "supplementing bases" for purposes of statutory construction and that these bases can provide certain general guidelines and individual examples, but hardly indications of a "will" in any reasonable psychological sense.

The third and last characteristic element of the modern development—a development which may be said, in short, to imply a "disintellectualization" of interpretation in relation to the hermeneutic views held by scholastics, humanists and rationalists—is the increasing consciousness of the function of laws and statutory texts as purpose-directed social means of governing and controlling among and in addition to other such means. The conception of such texts as *canones,* venerable in themselves, would seem to have been replaced by the attitude that they are essentially *tools,* put to use in the service of specific interests and needs. There is certainly nothing entirely new in this idea; it would be foolish to underestimate the practical wisdom and knowledge of ancient and medieval lawyers on this point (as, in all likelihood, with regard to the insufficiency of language as a means of communication). What is new is rather the fact that the idea has been openly recognized, expressed, and used for the elaboration of more sophisticated theories purporting to analyse and describe the realities of the law and its administration. "Der Zweck ist der Schöpfer des ganzen Rechts", is a well-known dictum of one of the greatest German 19th-century lawyers, Rudolf von Ihering, and this utilitarian outlook has gradually coloured the predominating idea of statutory texts, their authors

and their use. This need not lead to a completely free attitude towards the law or to the wholesale acceptance of *any* method of interpretation. It is obvious, however, that we are far from the pious—in many ways more satisfactory, but now irretrievably lost—idea of the laws as exalted *arcana*, in which wisdom and justice could be found provided the interpreter was in full command of all those learned and subtle processes which made his craft one of the arts.