

**Babeş-Bolyai University
Faculty of Law**

DOCTORAL THESIS

Interpretation in Criminal Law

(Table of Contents and Abstract)

Doctoral Supervisor:

Prof. univ. dr. Florin STRETEANU

Doctoral Student:

Cristina Ligia TOMULEŢ

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KEYWORDS: criminal law interpretation; judicial interpretation; natural law; positive law; sources of law; trends of interpretation; legality principle; *lex certa*; *lex stricta*; methods of interpretation; linguistic method of interpretation; historical method of interpretation; logical method of interpretation; systematic method of interpretation; teleological method of interpretation.

ABSTRACT:

This paper deals with a topic that necessarily involves the combined analysis of several branches of law. The interpretation of criminal rules cannot be adequately studied without continuous reference to elements belonging to the branch of legal philosophy or general legal theory.

Taking into account the aforementioned perspective, the reader will have the chance to observe, while reading this paper, that interpretation can only be understood and applied within a predetermined framework of principles and values specific to a particular system of thought. The main purpose of this paper is precisely to emphasise that legal interpretation is decisively influenced by this framework, and not by the text as a mere linguistic manifestation of the legal rule. The very importance attached to the text in democratic systems also stems from the understood need to protect the fundamental value of individual freedom.

Therefore, in approaching the topic of criminal law interpretation, I conducted an analysis from general to specific aspects. The specificities of the criminal law interpretation could not be dealt with without a prior general examination of legal interpretation and even of the object of interpretation - the law, in light of the complex relations that arise between law and interpretation.

This is why in the first part of Chapter I, I carried out a largely theoretical research, specific to the general theory of law, in which I presented all the layers of law - from natural law to the most concrete forms of positive law, in order to underline the importance of each in the process of interpretation.

The second part of the first chapter was devoted to explaining the essential features of judicial interpretation in order to show its importance in defining the concept of law. To this end, I analysed interpretation as an intuitive and rational act, as a source of legal argumentation and as

an act of will. From this perspective, the main idea that I tried to demonstrate throughout this chapter is precisely that in the absence of interpretation there is no law in the true sense of the word, since law has a significant impact on individuals only when it is specifically addressed to them through a binding individual act.

In the first part of the second chapter of this paper, I examined legal interpretation in depth, discussing the main trends of interpretation that influence the legitimate limits between which interpretation is carried out, as well as the way in which the methods of interpretation are applied. From this point of view, understanding the trends of interpretation, as well as opting for a particular theory of interpretation, based on one of the trends or a combination of them, is extremely important for a coherent and informed application of the methods of interpretation. Without taking a clear position on the purpose and limits of judicial interpretation in a state governed by the rule of law, interpretation can only be carried out chaotically, creating countless conflicts between those who consciously or unconsciously adhere to different interpretative trends. This is also the reason why in this paper I promoted a certain theory of interpretation, which I considered appropriate from several points of view, including from the perspective of the requirements of the rule of law.

In the second part of this chapter, I presented the stages of judicial interpretation, in an attempt to delimitate as clearly as possible the operations that take place within this process. Such detailing of the stages of interpretation was necessary both to clarify the process in question and to facilitate the proper application of the steps involved. In this context, I also developed a classification of judicial interpretation, widely discussed in common law systems, into *interpretation*, in the narrow sense, and *construction*. Interpretation has been defined as the activity of identifying the grammatical and semantic meaning of a particular use of language in context¹, while construction has been defined as the activity of translating the semantic content of a text into legal rules². In the light of this classification, I showed that it is not always possible to equate the linguistic meaning of a legal text with its legal meaning. In some cases, reasons relating to the logic and purpose of the criminal norm require that the linguistic meaning of the text be exceeded or restricted, which is acceptable as long as the interpretation remains reasonably foreseeable.

¹ R.E. Barnett, *Interpretation and Construction*, Harvard Journal of Law & Public Policy, Vol. 34, No. 1, 2011, p. 66.

² <https://lsolum.typepad.com/legaltheory/2009/02/legal-theory-lexicon-interpretation-and-construction.html> (site accessed in the 19th of May 2020).

Next, I addressed the specific topic of this paper, starting from the presentation of the two general principles that influence the interpretation of criminal rules: *the principle of effective interpretation* and *the principle of strict interpretation*. In doing so, I showed that the interpreter must strike a balance between the two approaches in such a way as to promote interpretations that are as effective as possible, that contribute to achieving the objectives pursued by the criminal law, but that are also strict enough to remain reasonably foreseeable for the accused person.

I also classified the criminal rules from several points of view, highlighting the relevance of the classifications in question from an interpretative perspective. For example, I differentiated between conduct rules and decision rules. The former are intended to communicate to the public the specific behaviours prohibited by the criminal law, while the rules in the latter category regulate how violations of conduct rules are to be judged, being addressed to the judge rather than to the general public. From the perspective of ensuring respect for the principle of legality in the context of interpretation, the rules in the first category must be interpreted more strictly so that their interpretation can be foreseen by the public, whereas the rules in the second category, such as those relating to causes of non-imputability, can be supplemented by scientific legal works and case law to a greater extent, since they do not need to be known *ex ante* by the public in order to induce it not to commit offences. I also differentiated between technical rules and substantive rules. The rules in the first category mainly comprise inflexible terms whose meaning is unambiguous, such as those governing the calculation of the length of sentences, whereas the rules in the second category comprise more flexible terms describing factual realities or referring to concepts of value. While the application of the linguistic method is in principle sufficient in the case of the rules from the first category, since their interpretation often takes place as an automatic process, in the case of the rules from the second category, the application of the teleological method is often also necessary, since the judge has a margin of appreciation in determining the legal significance of the rule.

The last part of the second chapter of this paper was devoted to analysing the impact of the principle of legality on the interpretation of criminal rules. In this context, I discussed the significance of the *lex certa* and *lex stricta* requirements and the link between them, having regard to the fact that strictness of interpretation should not be a desideratum in itself, but should be based on the reasonably foreseeable nature of the interpretation.

In the section dedicated to the *lex certa* requirement, I contrasted reasonably foreseeable rules and rules lacking foreseeability, also highlighting the causes of lack of foreseeability. I also identified several types of flexible terms and the problems they raise in the context of interpretation. At the same time, I analysed how compliance with the *lex certa* requirement is examined in the case law of the American courts, the European Court of Human Rights and the Romanian Constitutional Court. Last but not least, I presented some techniques for ensuring the foreseeability of criminal rules.

In the section devoted to the *lex stricta* requirement, I mainly tried to establish its actual meaning, beyond its unanimously accepted component prohibiting analogy to the detriment of the accused person. From this point of view, I attempted to answer the question whether the *lex stricta* requirement really requires the most restrictive interpretation to be chosen when several interpretations are possible or whether, in reality, the requirement in question allows even extensive interpretations, insofar as they are reasonably foreseeable for the accused person. On this point, I concluded that if the interpreter were obliged to choose the strictest interpretation at all times, the inherent flexibility of the language could not be used to adapt the rule to various factual situations and to advance its purposes. I therefore considered that in the case of the *lex stricta* requirement, the same standard as in the case of the *lex certa* requirement must be used. Strictness of interpretation must mean that it is reasonably foreseeable to the accused person, as an overly restrictive conception of this requirement would unduly prejudice the effectiveness of criminal rules.

In this section, I also examined the applicability of the *in dubio pro reo* principle to the matter of interpretation or the *rule of lenity*, as it is called in the American system. After reviewing the various opinions on how this rule should be applied, I concluded that the question of uncertainties regarding the interpretation of criminal rules should not be analysed from the perspective of the interpreter's obligation to reach a conclusion, but also from the perspective of the reasonable foreseeability of the interpretation for the accused person. Thus, if the doubts as to the interpretation of the criminal rule are such as to lead to its lack of foreseeability, the chosen solution must be the acquittal of the accused person or the raising of a plea of unconstitutionality, if the latter remedy exists in the system in question. On the other hand, if doubts about the interpretation of the rule do not affect its reasonable foreseeability, the judge must choose an interpretation and apply it in deciding the case.

In the second part of this section, I addressed the issue of analogy in criminal law. After clarifying the concept in question, I analysed two distinct conceptions regarding analogy: a strict one, according to which criminal law can guarantee order and personal liberty only if it is applied in accordance with the original legal-historical meaning of the words, and a broader one, according to which evolutive interpretations are allowed, even when they go beyond the linguistic meaning of the criminal rule, if that interpretation can be reasonably foreseen by the accused person. With regard to the admissibility of evolutive interpretations, I concluded that the interpreter can only go beyond the common meaning of the terms on teleological grounds in cases where the substantial risk of criminal liability is clearly apparent from the text and there are only insignificant differences between the incriminated conduct and the new one.

After an analysis of the legal clauses of analogy to the detriment of the accused person, I also addressed the issue of analogy in favour of the accused person. Even if this type of analogy does not raise problems in terms of the requirement of foreseeability, since it operates in favour of the accused person, it may raise problems from the standpoint of the principle of equality before the law, which is why I tried to clearly establish the conditions that should limit its use. Thus, in the light of the fact that legal certainty and equality of rights are of paramount importance in the criminal field, I considered that it is not sufficient for this type of analogy to meet the classic conditions applicable in other branches of law. From this point of view, in addition to the existence of a legislative gap, a similarity between the regulated and unregulated situation and an identity of *ratio legis*, I considered it necessary that the absence of applying the analogy should result in an obvious absurdity or injustice, whose remediation should be more important than respect for the principle of equality of rights by ensuring uniform case-law.

In the third chapter of this paper, I addressed the broad issue of interpretation methods, presenting the specific rules of each method and how they fit together in practice. Before looking separately at the methods of interpretation, I began by defining them and discussing whether a particular algorithm should be followed when applying them in practice. On this issue, I started from the unanimously accepted idea in scientific legal works that it is impossible to apply the methods of interpretation according to a rigid and binding algorithm, given the variability of the situations to be resolved and the complexity of the law to be applied. Nevertheless, I tried to outline, at a general level, an order of methods that is usually followed in practice. From this point of view, the linguistic method is, in principle, the first to be used by the interpreter, since the

interpreter is primarily confronted with a text, the reading and understanding of which is the starting point in the complex process of interpretation. If the norm is clear, applying the linguistic method will usually be sufficient to establish its meaning. On the other hand, when the rule raises various interpretative problems (flexible terms, contradictions with other rules, ambiguities, etc.), the interpreter will, depending on the nature of the problems in question, resort to one or more of the other interpretative methods.

In the section on the linguistic method of interpretation, I highlighted the special importance of this method in the field of criminal law, in the light of the requirements imposed by the principle of legality. While in other branches of law flexible interpretations may be tolerated under certain conditions, in the context of criminal law the letter of the rule is in most cases the borderline that the interpreter cannot cross.

In the following, I analysed the elements that make up this method, starting from the etymological and semantic analysis of terms and expressions. In this context, I classified the terms used in criminal rules from various perspectives, while presenting the rules for their interpretation according to their nature. Firstly, I discussed the traditional classification into *terms that are part of the technical vocabulary* and *terms that are part of common language*, concluding that the distinction between the two categories is difficult to make and that it is more useful to refer to a classification into *terms that receive an express or implicit definition from the legislator* and *terms that are to be clarified by case law*. As regards the interpretation of terms which are expressly or implicitly defined by the legislator, it is clear that the judge is obliged to implement the definition in question, in some cases being totally absolved of any interpretative activity, and in others being left with a minimum margin of interpretation as to the meaning of the definitions in question. As regards the terms to be clarified by case law, the basic rule in interpreting them is to primarily apply their common meaning. I also distinguished between *natural terms*, which describe physical realities encountered in everyday life and are in principle subject to the ordinary meaning rule, and *theoretical terms*, which do not acquire their meaning from existing natural classifications but from the canons of the theory that uses them. With regard to the latter category of terms, I pointed out that some legal terms which are part of the technical vocabulary are explicitly or implicitly defined by legislation at a certain level, but acquire their full meaning only in light of the scientific theories which inspired the adoption of the criminal law norms which contain them or which are developed after the adoption of the rules in question. The last classification to which I referred is that which

delimits the terms used in criminal rules into *flexible* and *inflexible* terms. Flexible terms are those whose content is variable to a certain extent and can only be fully determined by reference to concrete circumstances, whereas the meaning of inflexible terms can be more easily identified in the abstract. While in the case of inflexible terms it is usually sufficient to apply the linguistic method of interpretation, in the case of flexible terms it is often necessary to resort to the teleological method of interpretation in order to clarify the grey area of their meaning.

In the section on the etymological and semantic analysis of terms and expressions, I also examined the rules governing this form of interpretation, the most important being the *ordinary meaning rule* and the *plain meaning rule*. According to the first rule, which is of a general nature, in interpreting criminal rules, especially those announcing rules of conduct to the public, account must be taken primarily of the way in which they would be interpreted by an ordinary person, bearing in mind the need to provide the public with a fair notice. According to the second rule, when the linguistic formulation of the criminal rule is clear and unambiguous, courts must adhere to it and implement it as such, even if they disagree with the rationale of the criminal rule or the social values it protects. In the following sections, I presented various rules on the grammatical and contextual interpretation of criminal rules.

In the section devoted to the historical method of interpretation, I first discussed the limits regarding the application of the method in question. From this point of view, in the light of the fact that throughout the paper I rejected in principle the intentionalist approach, I argued that an unlimited application of the historical method, by taking into account, in any circumstances, all legislative materials, runs counter to the ordinary meaning doctrine, founded on the requirements of the rule of law. In this regard, I held that the interpreter is not obliged to seek and implement the actual intentions of the legislator if they do not result from the text and context. This position is also in line with the principle of legality, since the public cannot be required to make a difficult foray into the history of the rule in question in order to discover its meaning, since only the text of the criminal rule is publicly available.

However, taking into consideration this principle as a general rule, I nevertheless considered that it allows an application of the historical method under certain restrictive conditions. Thus, in the first place, legislative materials can be used for information purposes by judges, insofar as they are in doubt as to the scope of the criminal rules. However, the information identified can only be implemented within the linguistic limits of the rules in the light of the

requirement of reasonable foreseeability. In addition to the optional use of legislative history for information purposes, I considered that there are also exceptional situations in which the judge is obliged to implement the will of the legislator, as reflected in sources extrinsic to the interpreted text, if the linguistic formulation of the criminal rule is not exceeded and the legislator's intention can be clearly detected without strenuous efforts caused by consulting various legislative materials. For example, if a clear intention of the legislator to aggravate criminal liability for certain acts can be inferred from the preamble of the legislative act, in case of ambiguities or flexible terms, I considered that the judge cannot ignore the will of the legislator without violating the principle of democracy. The same idea also applies when the legislature's intention can be clearly deduced from a notorious fact, such as a catastrophe whose consequences revealed legislative shortcomings or the commission of a serious crime which could not be repressed because of shortcomings of the same nature. In this case, too, I considered that the interpreter must implement the legislator's evident will within the linguistic limits of the legal text, given that, since a notorious fact is involved and the limits of the text are not exceeded, the requirement of reasonable foreseeability is not violated. Last but not least, when legislative amendments are made, the comparison of successive texts may clearly reveal a certain intention on the part of the legislature - for example, to restrict or extend the scope of a legal text. In this case, the comparison of successive texts is a common and useful practice for judges in the process of interpretation, which can even be considered an implicit professional obligation. In the conclusion of this section, I stressed that in all the situations presented above, the legislator's intention can be clearly discerned from elements close to the legal text - the preamble of the law, previous versions of the rule or notorious facts, which excludes a difficult foray into legislative history that would affect the requirement of reasonable foreseeability.

In the section on the logical method of interpretation, I analysed a number of Latin maxims, which, on the basis of rational presumptions, prohibit adding to or modifying the text in the context of interpretation, as well as the application of the main logical arguments: *a pari*, *per a contrario*, *a fortiori* and *ad absurdum*.

In the section on the systematic method of interpretation, I started by presenting the principles underlying its application, namely *lex superior derogat inferiori* ("the higher law derogates from the lower") and *specialia generalibus derogant* ("the special law derogates from the general law"). As regards the first principle, I considered that although it concerns the need for

conformity between lower and higher acts in terms of their linguistic formulation, since interpretation gives meaning to the rules, it is logical that the desire to avoid contradictions between the two types of acts should also extend to their interpretation. Thus, the principle in question can be considered to require the interpreter to avoid interpretations of inferior acts which would be contrary to the superior rules. With regard to the second principle, I tried to clarify the criteria for determining, by way of interpretation, whether a law has a special nature in relation to another law of a general nature. As regards the principle of *lex posterior derogat priori*, I showed that it concerns the application of laws over time rather than their interpretation, which is why I did not analyse it in detail. However, I discussed the problem of implicit and express indirect repeals, since they can raise various interpretative dilemmas, given that in the case of both types of repeal it is necessary to establish accurately, by way of interpretation, the contradictions between the new law and the old law in order to consider as repealed the provisions of the old law which conflict with the new law. At the same time, I clarified the applicability of the principle in question according to the general or special nature of the successive laws.

Next, I analysed the systematic interpretation of criminal rules having the same legal force, starting with the systematic interpretation of the rules of the Criminal Code. In that section, I presented several specific rules governing the contextual interpretation of rules, such as the rule that the interpretation of incriminating rules must not lead to an overlap of their scope of application or the rule that exceptions must be strictly construed. I also examined the importance of the formal organisation of the rules from an interpretative perspective, analysing, for example, the relevance of the sections and their headings in establishing a particular interpretation.

In the following section, I analysed, in light of some examples, the interpretative relationships between the provisions of the Criminal Code and special criminal laws. Among other things, I discussed the "*Related-Statutes Canon*", according to which laws governing the same subject matter must be interpreted together, and the consequences of the general-special relationship between offences in the Criminal Code and some of their particularisations in the special laws in terms of the legal qualification of certain conducts.

I also discussed the interpretation of concepts from other branches of law, concluding that the conceptual autonomy of criminal law, even if it is not an absolute rule, as there are concepts that are taken as such from other branches of law according to the general principle of legislative harmony, is justified in light of the important teleological component that characterises the

interpretation of criminal rules. Thus, whenever a different interpretation of concepts taken from another branch of law is necessary in order to advance the aims of criminal law, I considered that it can and must be adopted, subject, of course, to the linguistic limits of the criminal rule.

In the following section, I analysed the relationship between classic criminal rules, which have the legal force of organic laws, and various acts of lesser legal force, which have the capacity to supplement them under certain conditions. In this respect, I detailed the conditions that must be met in terms of the relationship between the proper blank rule and the complementary rule in order to avoid a violation of the principle of legality. In this context, I also analysed the implications of some decisions of the Constitutional Court with regard to the conditions in question.

Next, I addressed the interpretation of criminal rules by reference to sources of higher legal force, starting with their interpretation in the light of the Constitution. In this context, I analysed the issue of the division of jurisdiction between ordinary courts and the Constitutional Court as regards the interpretation of norms in light of the Constitution. At the same time, I presented the concrete areas in which the interpretation of criminal rules in light of the Constitution may be relevant.

In the next section, I analysed the interpretation of criminal rules in the light of international sources. In this context, I first of all discussed the relationship between national criminal law and international treaties on the protection of human rights as direct sources, with particular reference to the European Convention on Human Rights as the most relevant European act in this field. From this point of view, I detailed the domestic judge's obligation to exclude criminal rules contrary to the Convention from application or to choose an interpretation of the rules in line with the Convention, if more than one interpretation is possible. Secondly, I briefly analysed the relationship between domestic criminal rules and indirect international sources, such as the Rome Statute of the International Criminal Court, trying to establish to what extent is the domestic judge bound by the interpretations given to this Statute or other international acts by international courts when interpreting the domestic criminal rule. Thirdly, I examined the relationship between national criminal rules and the sources of European Union law. After a brief analysis of the elementary principle of the primacy of European Union law over domestic law, I discussed the obligation to interpret domestic criminal rules implementing directives in conformity with them in the light of the relevant case law of the Court of Justice of the European Union. In this context, I examined the role of the preamble of directives in resolving interpretative dilemmas, as well as the

problems raised by the obligation of conforming interpretation where the directive has been wrongly implemented. In this section, I also examined, among other things, the neutralising effect through which the primacy of EU law over national law can manifest itself and the problems it raises from the perspective of the principle of legality when it leads to the invalidation of a national criminal rule favourable to the accused person.

The last section of the third chapter of this paper was devoted to the teleological method of interpretation. I thus showed that, from a certain perspective, the teleological method is the most important method of interpretation, since its application facilitates the practical implementation of the aims pursued by legal rules. I also reiterated the idea already presented that in the field of interpretation one should not operate with the specific and real intention of the legislator, which is almost always impossible to identify, but with an intention presumed from the text and context, which is, in fact, the purpose of the legal rule, being used as a standard in the light of which the various linguistically possible interpretations are tested. I also showed that in the context of the application of the teleological method, one does not always operate with a single purpose of the legal rule, but with a multitude of purposes reflecting certain values, which must be prioritised by the judge in the context of the concrete interpretation of the rule. In the following, I presented the practical way in which the purpose of criminal rules can be identified, as a preliminary step to its use in the interpretative context. With regard to the effects that can be given to the purpose of criminal rules in the context of interpretation, I established that its implementation must not exceed the limits of the text, except in certain special situations. In this respect, I considered that the purpose of the rule may justify going beyond its linguistic limits in the case of scrivener's errors, obvious absurdities and in the case of evolutive interpretations, subject to certain restrictive conditions. As regards the functions performed by the purpose of the criminal rule in interpretative context, I established that it is used as a contextual element for establishing the ordinary meaning of terms, as well as an element that helps to clarify the scope of application of provisions of a general nature, to set limits when exercising discretionary powers and to resolve ambiguities. In the last part of this section, I discussed the interpretation of incriminating rules in the light of the social value protected by the offence, as the typical form of teleological interpretation in criminal matters. With regard to the functions that the social value protected by the offence performs in the context of the interpretation of incriminating rules, I first established that it constitutes an important element in the light of which the scope of application of the rules in question can be limited to

actions or inactions that may harm the respective social value, providing several examples in this regard. On the other hand, I noted that the social value protected by the offence sometimes also plays the opposite role of contributing to an extensive interpretation of the incriminating rule, sometimes even by going beyond its linguistic formulation, situations in which it is important for the requirement of reasonable foreseeability to be respected.

In the last chapter of this paper, I also analysed, from a practical perspective, a series of decisions on appeals in the interest of law and preliminary rulings on clarifying legal issues pronounced by the Supreme Court. In this analysis, I aimed to compare the level of judicial interpretation in criminal matters in Romania with the level of interpretation in other countries, especially those having a common law system. From this point of view, I highlighted the existing deficiencies in national criminal law interpretation and their causes, while highlighting the appropriate theoretical standards that should govern this field.