**Working Paper**

*Revised paper published in:*
Int J Semiot Law (2013) 26:391–423
DOI 10.1007/s11196-012-9288-3

# Law's Capacity for Vagueness

D. Liebwald

d@liebwald.com

**Abstract.** This paper deals with the particularities of vagueness in law. Thereby the question of the law's capacity for vagueness is closely related to the question of the impact of vagueness in law, since exaggerated vagueness combined with the elasticity of legal interpretation methodology may affect the constitutional principles of legal certainty, the division of powers, and the binding force of statute. To represent vagueness and the instability of legal concepts and rules, a Hyperbola of Meaning is introduced, opposing Heck's metaphor of a core and a periphery of meaning. Furthermore, evidence is provided that the use of vague legal concepts and the capability of legal methodology to affect the specific meaning of those concepts, may give rise to astonishing and irrational changes of meaning of the law. Finally the paper sets out in search of an added value of vagueness in law, and weighs several stated pros and contras of vagueness. The paper is written against a background of the German speaking realm.

**Keywords:** Vagueness and arbitrariness in the law, legal interpretation and argumentation, purpose of a norm, indeterminate legal terms and concepts, general clauses, shift in meaning, value judgements, rationality, nature of a thing.

## 1 Introduction

The aim of this paper is to reveal law's capacity for vagueness and to discuss the consequences of vagueness in law. All language terms and concepts are vague or indeterminate to some extent, and law is, at its core, based on text and the power of language. But legal language has to tackle specific challenges, e.g., the need for the use of abstract legal language to build general norms, and the distance between the general rule and the decision taken in an individual case. Consequently, even the best efforts to reach maximal precision will not result in absolute precise legal texts, because language itself is imprecise and requires interpretation. However, there exists some added vagueness in law, or perhaps even deliberate incompleteness or incomprehensibility of legal texts, which does not solely derive from the necessary gap between the general rule and the individual decision, or the inevitable imprecision of language at all. Furthermore, for assessing the impact of vagueness in law it is not sufficient to refer solely to the linguistic vagueness of terms and concepts, it is also necessary to refer to legal methodology and legal argumentation, which provide some flexibility in the assessment of the meaning of a legal text. Vague legal concepts

combined with the elasticity of legal interpretation can lead to astonishing meanings or changes of meaning of legal terms, concepts and rules.

Unlike every day conversation, the impact of vagueness in law is a different one, due to the legally binding force and the associated legal consequences. If law is vague, the legal issue remains at least partially unresolved, law becomes uncertain, and the courts have to substitute to some extent for the legislator. Hence, exaggerated vagueness in law may undermine the state of law (*Rechtsstaat*), in particular with respect to the constitutional principles of legal certainty, the division of powers, and the binding force of statute.

Therefore the paper will start with a short introduction to legal methodology, in particular regarding the arbitrariness of choice of methods. Than it will go further and deal with vagueness of legal terms, concepts and rules. Thereby it will provide some expressive examples for the shift of meaning in law, and propose, in opposition to Heck's model of a core and a periphery of meaning, a Hyperbola of Meaning, which is intended to visualise the vagueness, the conflict of interests, and the corresponding changes of values and meaning in law. Finally, the paper sets out in search of the value of vagueness in law.

## 2 Legal Interpretation: The four *canones*

Within legal methodology four basic methods, also called "elements" or "*canones*", for the interpretation of the text of legal norms are usually distinguished:

1. grammatical (literal) interpretation
2. (logical-) systematic interpretation
3. (subjective) historical interpretation (purpose intended by the legislator)
4. (objective) teleological interpretation (objective purpose of the norm)

These four elements are developed from the four *canones* established by Savigny in the middle of the 19th century, who, in turn, fell back to Roman law.[1] Though there is some disagreement about this classification of interpretative methods, in particular in respect to their order of precedence, and concerning sub-grouping of ancillary interpretation methods, it is those four basic methods, which are regularly referred to by doctrine and by courts, and hence can be considered as valid and effective.[2]

[1] Savigny, System des heutigen römischen Rechts (1840), in particular 213 et seq. Savigny differed between the grammatical, the logical, the historical and the systematic element, which have to merged within the interpretative process (236). However, Savigny's starting point is the basic "healthy" condition of the norm in question.

[2] Cf., e.g., Bydlinsky, Juristische Methodenlehre und Rechtsbegriff (2nd ed. 1991), 436 et seq., and Grundzüge der juristischen Methodenlehre (2005), 11 et seq.; Canaris/Larenz, Methodenlehre der Rechtswissenschaft (3rd ed. 1995), 133 et seq.; Kramer, Juristische Methodenlehre (2nd ed. 2005), 109 et seq.; Vesting, Rechtstheorie (2007), para. 191 et seq.; Zippelius, Juristische Methodenlehre (10th ed. 2006), 42 et seq.

It is an interesting point that those interpretative methods are not enshrined in law; they are result of doctrine and legal practice. For Austria, it has occasionally been claimed that the principles of interpretation have been developed out of the rules to the application of the Austrian Civil Code.[3] These rules are incorporated in article 6 and 7 of the Civil Code, and have been in force without any change since 1812. Article 6 states that, when applying a statutory rule, no other understanding may be given to the rule than the one that shines out from the native meaning of the words in their context and the clear intention of the legislator; article 7 provides that if the decision of a legal case can neither be derived from the words, nor from the natural sense of the statute, account shall be taken of similar cases that are clearly resolved by statutes, and of reasons of other related statutes. Should the legal case still remain doubtful, it shall, with regards to the carefully collected and well considered circumstances, be decided in accordance with the principles of natural law.[4] However, as the following discussion will show, the ranking of methods, which was indicated by those rules, is supported neither by doctrine nor by practise; nevertheless, this claim might explain some still existing entanglement with natural law.

### 2.1 Grammatical or Literal Interpretation

Grammatical or literal interpretation refers to the wording and the rules of language. It examines the words and the grammatical structure of the text of the norm in question in order to assess its possible meanings. Literature often refers in this respect to general language use. This is, however, not sufficient. First of all, language use can in fact be only a more or less predominant one and, considering regional, social-cultural, etc. differences, is not easy to assess. Secondly, language is dynamic, and language usage may vary over time. Thirdly, the legal language is a technical language, many words and concepts have a specific legal meaning which differs from everyday language. Furthermore, legal texts often refer to other technical languages, e.g. within speciality laws such as building law. Which meaning is decisive? Already at his point it becomes clear, that the four interpretation methods should not be applied in isolation, but should support and supplement each other. It is necessary not only to consider the wording but also the context, the history of origins, and the purpose or the norm.

---

[3] Cf., Hausmaninger, The Austrian Legal System (3rd ed. 2003), 32. Detailed and with reference to case law Forgo, Recht Sprechen (1997), 69 et seq.

[4] See also the (deviant) article 1 of the Swiss Civil Code (1912), which states that the statute applies to all legal questions, for which it contains a provision in its wording or by its interpretation. When no rule can be gathered from the statute, the court shall decide in accordance with customary law; when customary law is missing, in accordance with the rule which it as a legislator would adopt. For Germany a specific positive law in regards to interpretation does not exist; for the recognition of the four (modified) *canones* of Savigny by the German Constitutional Court cf., in particular, BVerfG. 11, 126 (130) of 17th May 1960. Nevertheless, the presented *canones* are at top level about the same in Germany, Austria, and Switzerland.

## 2.2 (Logical-) Systematic Interpretation

Systematic or logical-systematic interpretation enquires into the contextual meaning of the legal norm in question within the respective statute, in relation to other relevant statutes or even to the whole legal system. This also includes the application of the well known conflict rules such as the lex posterior and lex specialis, and the interpretation in conformity with constitutional law or with European Union law. Thereby the systematic interpretation refers the conception of the unity and consistency of the legal order,[5] which is of course only an idealized vision. Hence, also systematic interpretation does not necessarily provide a convincing solution, but may often lead to different interpretation variants.

Let's take the example of a statutory rule which states that a testament has to be signed by "genuine signature". Now there is a hand-written signed testament presented, though signed only by first name, or by using a nickname, or the phrase "your father". Is the testament valid? In such constellations literal interpretation may provide arguments, but will probably not clearly resolve the problem. By having a look at related provisions within the same statute, or at contract law, or at law of family naming, etc., systematic interpretation may provide further arguments. Nevertheless, it might be useful also to ask for the purpose of the rule: is it just a formal requirement, or rather a necessary formal requirement? Is it in order that the testator realises the importance of the act? Is it a matter of identification, or rather to enable reliable authentication? Is it admissible to accept, e.g., a nickname, if there is no reason to doubt the authenticity of the testament? These questions lead to the next two interpretation methods, which both ask for the purpose of a norm.

## 2.3 The Purpose of a Norm

As regards the purpose of a norm, the objective and the subjective interpretation theory are rivals. This paper will, however, not refer to the details of this long-standing dispute,[6] but reduce the following discussion to the dispute over the preference of the subjective (historic; actual purpose and intention of the historic legislator) and the objective (teleological; rational goals or purposes of the rule) theory. The aim of this comparison is to demonstrate the effect of choice of methods to the result of interpretation, and how vagueness of legal concepts and norms are further increased by vague or arbitrarily chosen interpretation rules.

---

[5] See in particular Engisch, Die Einheit der Rechtsordnung (1935).

[6] See in particular Engisch, Einführung in das juristische Denken (1956), 112 et seq., with numerous further references. See also Alexy, Theory of legal argumentation (1989), 236 et seq.; Rüthers, Rechtstheorie (4th ed. 2008), para. 796 et seq.; Larenz, Methodenlehre der Rechtswissenschaft (6th ed. 1991), 316 et seq.; Koch/Rüßmann, Juristische Begründungslehre (1982), 178 et seq.; Kramer, Juristische Methodenlehre (2nd ed. 2005), 92 et seq. Bydlinsky, however, considers the dispute as resolved or at least of minor importance, ibid., Juristische Methodenlehre und Rechtsbegriff (2nd ed. 1991), 428 et seq.

**(Subjective) Historical Interpretation**

Historical interpretation aims to assess the original regulatory intention of the legislator in respect to the norm by referring to the legislative background of the norm. What did the legislator want to achieve, which problem to resolve through the norm in question? What were the background and the originating conditions which induced the legislator to take action? The various legislative materials, e.g., explanatory reports, drafting material, or protocols of parliamentary debates, are the most important sources for those analyses, but also the social and legal situation before enactment of the respective norm may be very revealing.[7]

The main argument against historical interpretation is that the legislator is an institution, but that only natural persons can possess a will and pursue a purpose. Indeed, the legislator is a theoretical construct, but the aim of historical interpretation is not to search for the actual will of all of the persons involved, but to examine the original purpose of the norm as intended by the historic legislator. Also the argument that historic interpretation only plays a minor role due to missing or difficult to access legislative material, fails. Modern legislation and in particular EU legislation regularly reveals its motivation in the form of a prefix attached to the text of the norm, and provides access to further parliamentary materials.[8] And even if legislative material for a specific legislative act is no longer available, this points to neither the general lack of relevance of the method, nor the general impossibility to assess the historic circumstances and the intention of the historic legislator.

**(Objective) Teleological Interpretation**

In contrast to the subjective historical interpretation, the objective teleological interpretation considers the norm as detached from the will of its legislator and aims at identifying the objective purpose of the norm in question. Herewith the teleological interpretation paradoxically implies that the subjective will of the legislator and the objective will of the norm, respectively the intended and the said, may differ, or, as Radbruch proposes, that the norm or statute is wiser than its author.[9] But there is another contradiction: do norms or statutes indeed have an independent and objective purpose, a will on their own? No, most likely not. When applying the law, only two wills can be effective, the will of the legislator, or the will of the one applying the law. And it is questionable, which of them is wiser. Its is an interesting point that, whilst it is argued against historic interpretation that only natural persons are capable to have an own will and to pursue a purpose, the fact that a norm is also not capable

[7] In respect to the subjective theory see in particular Heck, Das Problem der Rechtsgewinnung (1932). See also Rüthers, Rechtstheorie (4th ed. 2008), para. 524 et seq., 778 et seq., with numerous further references.

[8] In respect to EU law see Regulation (EC) No. 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In respect to Austrian Federal legislation see the comprehensive documentation on the Parliament's server at http://www.parlinkom.gv.at.

[9] Radbruch, Rechtsphilosophie (3rd ed. 1932), 111; see also Esser, Vorverständnis und Methodenwahl (2nd ed. 1972), 131 et seq.

of this, and that the objective purpose of a norm is nothing more than the purpose ascribed to it by its interpreter, is frequently ignored. Ultimately the question arises of whether the objective teleological interpretation is not rather subjectivity under the disguise of supposed objectivity. In comparison to the supposed subjective historic interpretation, which is searching for an objective fact, namely the original regulatory intention, it is.[10]

Leaving aside historical interpretation and moving to teleological interpretation, however, creates an opportunity to set aside the intention of the legislature under the banner of interpretation and to introduce, e.g., adapted or new political, legal, or economic purposes, which have not been intended by the legislator and are not enshrined by law, or even to forward spurious and extralegal principles and arguments, like the "nature of a thing", the "idea of law", or "objective rationality". The reference to unwritten legal principles, however, enables one to relativise the content of codified law.[11] Hence, the teleological method facilitates the introduction of personal values and self-justification, and has some potential for interpretive arbitrariness, by allowing for ascribing a meaning to a norm which is not inscribed in the norm.[12] Moreover, to disregard historic interpretation means to disregard the democratic will of the legislator. In any case, applying teleological interpretation without considering the intention of the legislator would mean that the supreme courts substitute for the legislator and create law under the cover of interpretation, and hence conflict with the principle of division of powers and the binding force of statute.

There is, however, one important argument in favour of teleological interpretation; it may apply, if the historical purpose is clearly obsolete, perhaps due to social, economic or political change, and the legislator does not or not in a timely manner react. Teleological interpretation is capable to respond with flexibility to such changes, and to adapt or change the meaning of a rule by assuming an up-to-date purpose. If this shift of meaning is indeed adequate is of course a value decision, and the reasons for this shift must therefore be made transparent. Hence, the argument of obsolescence implies a ranking of historical and objective teleological interpretation, because it needs to assess the historical intention to be able to declare it obsolete. Therefore, the question that inevitably arises is whether there is a ranking or precedence order in respect to those elements of interpretation.

### 2.4 Free Choice of Methods?

So what is the rule, if different interpretation methods lead to different results? This question is not clearly answered by legal methodology. With a simplistic view, legal textbooks commonly note that there is no precedence order of interpretation methods, but they are to be jointly considered and are intended to support and complement each other. However, a more detailed examination reveals that the approach of equivalence

[10] See also Rüthers, Rechtstheorie (4th ed. 2008), para. 814, 820.
[11] Rüthers, Die unbegrenzte Auslegung (6th ed. 2005), 454.
[12] Cf., e.g., Rüthers, Rechtstheorie (4th ed. 2008), para. 724; or Vesting, Rechtstheorie (2007), para. 199.

of methods is not effectively realised. As Bydlinski notes, an equal side-by-side co-existence of the four *canones* is a good argument for jurisprudence to ward off criticism, but does not reflect reality.[13]

As regards the relationship between historical and teleological interpretation, the predominant view in jurisprudence and literature gives clear precedence to the teleological interpretation.[14] Nevertheless, at the same time there also exist recourses to the historical approach in legal practice.[15] Hence there seems to be some arbitrariness, elasticity and adaptability instead of equivalence. There are, however, some explicit statutory restrictions in respect to the application of the teleological approach. This applies to criminal law, to some principles of the constitution, and to a certain extent to administrative law.[16]

Furthermore, the dispute regarding the relevance of historic interpretation is often reduced to an "either-or-question",[17] which does not address the interrelation of historic and teleological interpretation, and ignores the judicial policy effects of such a decision. Bydlinski, for example, even ascertains a natural (*naturgemäß*) shift to the objective-teleological method regarding hard cases, and values this shift inter alia for being able to forward the nature-of-a-thing-argument in respect to legally recognized social living conditions like contract, family, or property.[18] However, the nature-of-the-thing and related arguments are particularly vague, because they conceal their argument, and hence enable to replace rationality by metaphysical objects. Those arguments are most useful if the outcome has already been fixed but a convincing argument to support the result is missing. In respect to highly controversial national- and party-political legal issues, he recommends to give precedence to more formal

---

[13] Bydlinski, Grundzüge der juristischen Methodenlehre (2005), 85.

[14] See in particular Engisch, Einführung in das juristische Denken (1956), 113, with numerous further references. See also Radbruch, Rechtphilosophie (3rd ed. 1932), 65 et seq. (106); Canaris/Larenz, Methodenlehre der Rechtswissenschaft (3rd ed. 1995), 153 et seq.; Jestaedt, Grundrechtsentfaltung im Gesetz (1999), 328 et seq.; for a comparative view see Henninger, Europäisches Privatrecht und Methode (2009); Hager, Rechtsmethoden in Europa (2009). For an overview on the fundamental decisions of the German Constitutional Court in respect to the role of interpretative methods see Rüthers, Rechtstheorie (4th ed. 2008), para. 799.

[15] For evidence and further references see in particular Rüthers, Rechtstheorie (4th ed. 2008), para. 799 et seq.; Seiler, Höchstrichterliche Entscheidungsbegründung (1990), 182 et seq. (192). See also Bydlinski, Methodenlehre und Rechtsbegriff (2nd ed. 1991), 428 et seq.

[16] In particular the principle *nullum crimen, nulla poena sine lege* (ban of analogy and teleological restriction of a norm's range of application to the defendant's detriment) in criminal law; the *Ewigkeitsklausel* (eternity clause) in the German and the *Versteinerungstheorie* (petrification theory) in the Austrian Constitution; and the *Vorbehalt des Gesetzes* (provisio of the law) in Germany and the *Legalitätsprinzip* (principle of legacy) in Austria (no administrative action may take place without a legal basis). Critically in respect to the efficiency of such restrictions Hassemer, Strafrechtsdogmatik (1974), 39 et seq.

[17] Cf. Engisch, Einführung in das juristische Denken (1956), 112; Kramer, Juristische Methodenlehre (2nd ed. 2005), 104.

[18] Bydlinski, Grundzüge der juristischen Methodenlehre (2005), 34, 45. See also ibid., Juristische Methodenlehre und Rechtsbegriff (1991), 553 et seq. For critics on Bydlinski's (natural) idea of law, cf. Rill, Juristische Methodenlehre, ZfV 10/1985, 461-473, and 577-590.

criteria such as literal interpretation and historical arguments, because those criteria are less likely to be suspected of manipulation.[19] But why establish a rule of minimise risk of manipulation only in respect to volatile and usually media-driven national- and party-political controversies? Are lack of transparency and hidden manipulation not the greater threat to democracy and the rule of law?

As regards legal practice, in some areas of law the intensive use of teleological interpretation – in particular under the banner of the economic approach – is pushed, e.g., in tax law, or in anti-trust law. The same can be said of the *effet utile* (useful effect) principle as established by the Court of Justice of the EU (CJEU). Though against the background of the conflict of interests between sovereignty of Member States and European integration, the objective-teleological approach as used by the CJEU is much more contested than its use on national level.[20] Hence, the appraisal of methods is again a different one, if it is the national government which is subject to the law. Bydlinski, for example, recognizes a natural precedence of the objective-teleological method on the one hand, but on the other hand calls its use by the CJEU as excessive, unilateral, and centralist,[21] and Kirchner warns of the danger of tautologous argumentation as a deficit of objective-teleological interpretation.[22] Correspondingly, the doctrine that historic interpretation is irrelevant and worthless in respect to EU law, seems no more durable today,[23] and in view of the shift of legislative power to the CJEU, legal theorists (as well as national politicians) seem to fall back to the arguments of the historic approach.[24] In other areas of law, the objective-teleological approach is of minor importance, for instance, in respect to labour law and related social security law provisions, which are static in legislation as well as in interpretation – notwithstanding the changing demands of the labour market and the changing economical and social conditions.

In the end it must be stated that a consistent hierarchy of interpretative methods does not exist in legal practice; in one instance the teleological may be used and in another the historic approach predominates. Thereby uncertainty of legal interpretation is further increased. On the one hand, the less formal and non-rational objective teleological interpretation opens a way to write in subjectively formed legal objectives and moral concepts, or even individual will. On the other hand, the missing ranking order allows for arbitrariness of choice of interpretation methods, at least as long as the method chosen offers arguments which are rationally verifiable. Rüthers as well as Kranenpol document interviews, in which judges clearly state the arbitrariness and the

[19] Bydlinski, Grundzüge der juristischen Methodenlehre (2005), 8.

[20] In respect to the CJEU's specific form for teleological interpretation (dynamic interpretation) cf. Buck, Über die Auslegungsmethoden des EuGH (1998), in particular 213 et seq. See also Müller/Christensen, Juristische Methodik II (2003).

[21] Bydlinski, Grundzüge der juristischen Methodenlehre (2005), 9, 42.

[22] Kirchner, Die ökonomische Theorie, in Riesenhuber (2nd ed. 2010), 132-158 (140).

[23] See in particular the statistics provided by Dederichs/Christensen, Inhaltsanalyse, in Burr/Müller (2004), 287-327.

[24] See in particular Leisner, Die subjektiv-historische Auslegung, EuR 6/2007, 689-706, with further references; see also Baldus, Gesetzesbindung, in Riesenhuber (2nd ed. 2010), 26-111 (109 et seq.); and Koch/Rüssmann, Juristische Begründungslehre (1982), 176 et seq.

lack of clear policy in respect to interpretation methods, with the consequences that interpretation and application of law is not predictable, that the courts substitute to some extent for the legislator, and hence that the principles of legal certainty, division of powers, and the binding force of statute are undermined.[25] According to Larenz, in contrast, it is precisely the arbitrariness of choice of methods, which guarantees single case justice.[26] However, it is questionable whether justice derives from arbitrariness. Ultimately one must conclude that the choice of methods is free, and follow Radbruch, who postulates that the choice of methods takes place after the outcome has already been fixed, hence, that the methods are chosen to support the intended result.[27] Indeed, legal methodology is about giving reasons for a decision, and not about finding a decision. This part is usually left to legal hermeneutics. Thereby, as Hassemer states, the compliance of the aspects of justification with the binding force of statute is verifiable, but in respect to the finding itself the binding force of the statute is only a postulate.[28]

### 2.5 A Counter-Proposal

Hence, even if rarely acknowledged, there exist strong criticism and counter-proposals in respect to the prevailing theories and the current practice in legal interpretation. Presented briefly in the following is the proposal of Rüthers, which is convincing in its clarity and simplicity, preserves the general principles of law and eliminates the ranking problem.[29]

Contrary to the prevailing view in legal interpretative methodology, for Rüthers it is the purpose of the norm, which is the ultimate objective of any interpretation of law. By doing that he distinguishes between the goal and the means of interpretation. Any interpretation must intend to realize the normative purpose of the norm, and the other interpretation criteria must be subordinate to this goal, as they are auxiliary means, which support the interpret by recognizing the purpose of the norm:

1. *Primary goal of interpretation*: identification and realization of the purpose of the norm
2. *Means of interpretation*: wording, systematic interpretation, historical interpretation

If and insofar as there should be a conflict between the norm text and the identifiable purpose, as a general rule, the identifiable purpose takes precedence within this model. The principle of protection of legitimate expectations of the norm addressee may,

[25] Rüthers, Rechtsdogmatik und Rechtspolitik (2003), 32 et seq.; Kranenpohl, Hinter dem Schleier des Beratungsgeheimnisses (2010), Interview 27; See also Hotz, Richterrecht (2008); Ballweg, Analytische Rhetorik (2009); Hager, Rechtsmethoden in Europa (2009), 36 et seq.

[26] Larenz, Aufgabe und Eigenart der Jurisprudenz, JuS 11/1971, 449-455 (450).

[27] Radbruch, Einführung in die Rechtswissenschaft (12th ed. 1969), 169. In respect to the division of finding and justification of a decision see also Schneider, Information und Entscheidung (1980), 77 et seq.

[28] Hassemer, Rechtssystem und Kodifikation, in Kaufmann et al. (7th ed. 2004), 251-269 (268).

[29] Rüthers, Rechtstheorie (4th ed. 2008), para. 725 et seq.

however, lead to a different result, in particular in respect to criminal law or in the context of public law.

Even though the three auxiliary means of interpretation are intended to initially identify the original, historic purpose of a norm, this does not mean, that the court may in no way differ from the valuation of the legislator, but that such derogation must be made explicit and well-founded. Hence, also within this model the court may substitute for the legislator, if it considers the historic purpose of a norm to be obsolete. But by having to refer to the original purpose of a legislative act, it becomes transparent that the norm text and its formal interpretation have been left, and that the value decision shifted from the legislator to the judge. More importantly, this transparency opens room for discussion, and forces the courts to disclose its methodology and to duly explain and justify why it differs from the original purpose.

At the same time it becomes clear that historical interpretation has some capability to reveal sham legislation and pretended purposes as well as to prevent self-justification of subjective value judgements. This is, following Rüthers, exactly the task of legal science: while legal doctrine has proven to be suitable only to a limited extent for restricting the freedom of dealing with the applicable law or the elasticity of legal interpretation,[30] it is the task and part of the freedom of legal science, to recognize contradictions and spurious arguments, and to force the disclosure of values and structuring objectives hidden by legal policy.[31] Finally, legal methodology only determines the quality of application of law, in respect to the quality of the law itself it is largely neutral, since it is missing appropriate benchmarks of values.[32]

## 3 The Vagueness of Legal Terms and Concepts

Having given a framework by discussing the vagueness of legal interpretation from a general point of view in the first chapter, this chapter will focus on the vagueness of terms and concepts in law.[33] By deliberately using vague concepts, the legislator may extend the scope for decision-making for those who apply the law, and hence further lower legal certainty and the binding force of statute. Therefore a closer inspection of vague legal terms and concepts seems to be advisable.

However, all language terms and concepts are vague or indeterminate to some extent, and open for interpretation. This is to be considered as an unavoidable feature of verbal language. The relation between the signifier and the signified is unmotivated, arbitrary and dynamic;[34] the meaning of concepts is passed on conventionally.[35] Law

[30] Rüthers, Rechtsdogmatik und Rechtspolitik (2003), 29.
[31] Rüthers, Rechtsdogmatik und Rechtspolitik (2003), 30.
[32] Rüthers, Die unbegrenzte Auslegung (6th ed. 2005), 494.
[33] However, the details of the dispute as to whether a legal decision, e.g., a court decision, is to be understood as substantiation of the law, as application of the law, or as creation of law, can be left open for the analysis presented here. For an overview with further references see, e.g., Vesting, Rechtstheorie (2007), 99 et seq.
[34] Saussure, Cours de linguistique générale (1916).

is, once again, based on text and the power of language, and the legal language has to tackle specific challenges, e.g., the need for the use of abstract legal language to build general norms, and the distance between a general rule and the decision taken in an individual case. Consequently, even if the lawmaker is anxious to reach maximal precision in legal texts and concepts, she or he will never reach absolute precision, because language itself is imprecise and requires interpretation.[36]

But there also exists some exaggerated vagueness in respect to rules and legal concepts, or perhaps even deliberately calculated incompleteness or incomprehensibility of legal texts. Reasons for this could be to cover future, not yet predictable circumstances, to cover at least all typical cases, to leave space for more specific rules, judicial discretion and interpretation, or, quite simply, that more "accurate" political consent is missing, or that political will to tackle a specific issue is lacking. This added vagueness is precisely the issue to be addressed here, and this is because in the legal field the determination of concepts is particularly sensitive. In everyday language the precise meaning is usually not so important or may be negotiated in conversation, but in law it is important. The impact of vagueness in law is, due to the legally binding force and the associated legal consequences, a different one.[37]

Already general language is judgemental, e.g., by deciding what to signify and what to omit, and by categorising and classifying reality. This applies a fortiori to the legal language. Each legal rule is to some extent arbitrary, because each legal rule carries a value judgment within.[38] The textbook example to demonstrate this arbitrariness is the choice of the legislator between left hand and the right hand traffic. In this example, however, the fact that there is a rule is more important than its actual nature. But in most cases the legislator takes a significant value decision in order to shape and control society.[39] There is usually more than one variant to resolve, e.g., a socio-political conflict, or to balance the various views, notions and interests.[40] And it is up to the legislator to decide which specific behaviour, which social problem, etc. to rule,

---

[35] Kutschera, Sprachphilosophie (2nd ed. 1975), 34 et seq.; Simon, Sprachphilosophie (1981), 72 et seq.; Koch/Rüßmann, Juristische Begründungslehre (1982), 159 et seq. For recent works with a stronger focus on semiotics see in particular Kevelson, The Law as a System of Signs (1988); Jackson, Semiotics and Legal Theory (1985); Wagner/Broekman (eds.), Prospects of Legal Semiotics (2011).

[36] Philosophical and legal hermeneutics stresses this necessary interpretative character of the law. Most prominent Heidegger, Sein und Zeit (1927); Gadamer, Wahrheit und Methode (3rd ed. 1972). See also Forsthoff, Recht und Sprache (1940); Esser, Vorverständnis und Methodenwahl (2nd ed. 1972); Kaufmann, Beiträge zur juristischen Hermeneutik (2nd ed. 1993).

[37] Cf., e.g., Rüthers, Rechtstheorie (4th ed. 2008), 106 et seq.; Herberger/Koch, Juristische Methodenlehre, JuS 1978, 810-817; Neumann, Juristische Fachsprache, in Grewendorf (1992), 110-121.

[38] Cf., Rüthers, Rechtsordnung und Wertordnung (1986), 19 et seq; Rensmann, Wertordnung und Verfassung (2007); Büllesbach, Rechtswissenschaft und Sozialwissenschaft, in Kaufmann et al. (7th ed. 2004), 401-427; Stoll, Begriff und Konstruktion (1931), 67.

[39] Cf., e.g., Rüthers, Rechtstheorie (4th ed. 2008), para. 72 et seq.

[40] See in particular Jhering, Der Kampf ums Recht (1872); Heck, Interessenjurisprudenz (1933); Luhmann, Konflikt und Recht, in ibid. (1981), 92-112.

or not to rule, and also how to rule it. It may certainly happen, for example, that a legislator regulates and re-regulates the very same issue within a given time frame in different ways, maybe even within the same governmental period. The question of values also becomes evident when, for instance, scientific doctrine and legal literature provide contradictory but nevertheless rationally verifiable legal opinions, or the decision of a panel of judges lacks unanimity. Additionally, the meaning and hence the application area of literally unaltered legal concepts and rules may change over time. It is, for example, quite possible that a supreme court changes its own previous adjudication, or is at least very creative in establishing exceptions of the own rule, or even in developing exceptions of the own exception. The judgemental process becomes even more visible if one undertakes a comparison of different legal systems, or takes a look at legal history and legal development. Such analyses reveal that values and systems of values differ, that values may change over the course of time, and that values are frequently not rational, but emotionally or ideologically charged. Revaluations and changes of meaning in law usually become more obvious in times of economic, political, and social change. But there is, however, regularly also some more or less creeping re-interpretation, which may take place gradually and largely unnoticed in the background. Prominent and contemporary examples are, e.g., the principle of equal treatment, the equality of opportunity, the controversial topics security and privacy, or the differentiation between the public and the private.

When considering legal rules as (variable) value judgments it also becomes clear, that law cannot be "true" or "false". They may be judged differently by the diverse interest groups to be better or worse, and may be discussed as being more or less adequate, reasonable, or appropriate in terms of time and system, etc. Hence, there may be a considerable number of variants to formulate as well as to reasonable interpret a legal norm. A statute or a judgment may be attached a "formal" true (valid) or false (void) value perhaps, e.g., in terms of being formally unlawful implemented or passed by an incompetent authority, but the finding of the only and true law is a sophism.[41] One might consider that also within classical logic the values true and false are not more than the binary logic result, which is not "true" and "false" in the narrower sense but could also be called "red" and "blue".[42]

---

[41] See also Ballweg, Analytische Rhetorik (2009); Christensen/Kudlich, Richterliches Begründen (2001); Hotz, Richterrecht (2008); Rüthers, Rechtsdogmatik und Rechtspolitik (2003), 15 et seq., 22; Rüthers, Rechtstheorie (4th ed. 2008), para. 343 et seq. See also Gadamer, Wahrheit und Methode (3rd ed. 1972), 272, who claims that the assessment of the "true" sense is a never-ending process. Still prominent: the metaphor of the hermeneutic circle, most probably attributable to Ast, Grundlinien der Grammatik, Hermeneutik und Kritik (1808). For a short but excellent overview on theory of legal argumentation see Kreuzbauer, Kleine Einführung, in Kreuzbauer/Augeneder (2004), 9-25.

[42] In regards to the old value judgment dispute (*Werturteilsstreit*), a controversy over "value-laden" and "value-free" social and cultural sciences, which was in its beginnings mainly driven by Gustav Schmoller, Max Weber, and Werner Sombart, cf., e.g., Albert/Topitsch (eds.), Werturteilsstreit (3rd ed. 1990), with further references; for the more recent discussion see, e.g., Adorno, The Positivist dispute (1976). See also Rüthers, Rechtstheorie (4th ed.

Yet, in the end a judicial, administrative, or legislative decision reasons either in favour or to the detriment of the respective applicant, interest group, etc. But this bivalence is forced by the duty to decide and hence deceptive, neither the outcome must be "true", nor must there be just one reasonable argumentation line. Or as Endicott states, "the need for a decision cannot support an argument that the requirements of the law are determinate."[43] On the contrary, by choosing one argument out of several reasonable arguments, the scope for legal and political realization in respect to subsequent actions and decisions is shaped. Hence, while it is still contested whether the legal system is a set of values of all those individual norms, or whether the legal system is based on a common set of "higher" or "extralegal" values, in the end it is, in any case, language, society and policy, which define the plausibility of values and norms.

### 3.1 Core and Periphery of Meaning: The Approach of Heck

As regards the description and explanation of vague legal concepts, textbooks of legal theory usually refer to Heck's model of a core of meaning (*Begriffskern*) and a periphery of meaning (*Begriffshof*) of a concept, on which different theories are built.[44]

According to this model, the core of meaning encircles all those objects, to which a concept is clearly assigned (the clearly positive candidates; the facts to which a rule clearly applies). The periphery of meaning covers those objects, which are unclear (penumbra, or neutral candidates; the application of the rule is questionable). Outside of the periphery of meaning lie the objects, to which a concept is clearly not assigned (the clearly negative candidates; the facts which are clearly not covered by the wording of a rule).

---

2008), para. 294 et seq., 579 et seq.; Haft, Recht und Sprache, in Kaufmann/Hassemer (6th ed. 1994), 281 et seq.

[43] Endicott, Vagueness in Law (2000), 167.

[44] Cf., Heck, Gesetzesauslegung und Interessenjurisprudenz (1914), AcP 112/1914, 1 et seq. (173); or Heck, Begriffsbildung und Interessensjurisprudenz (1932), 60 et seq.; similarly, Jellinek, Gesetz (1913), 37. Later on, the metaphor of the core and the penumbra was frequently credited to Hart, who anyway popularized its use. See Hart, Positivism, Harvard Law Review 71/1958, 593-629; or ibid., The Concept of Law (1961), 12, 119. Establishing the approach of Heck in legal doctrine of the German speaking realm Jesch, Unbestimmter Rechtsbegriff, AöR 82/1957, 163 et seq. Koch adapted the approach of Heck by replacing the core and the periphery of meaning by three spheres: the neutral, the positive and the negative candidates, in Koch/Rüßmann, Juristische Begründungslehre (1982), 195. See also Engisch, Einführung in das juristische Denken (1956), 188 et seq.

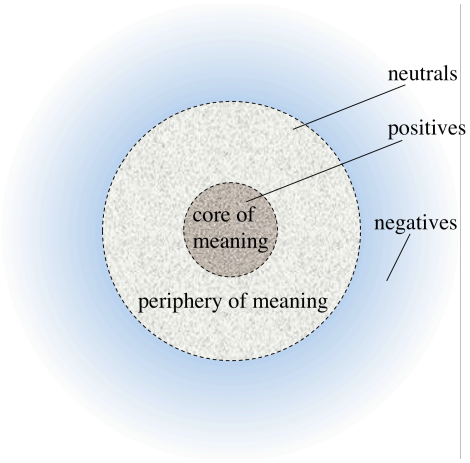


**Fig. 1** Core and periphery of meaning

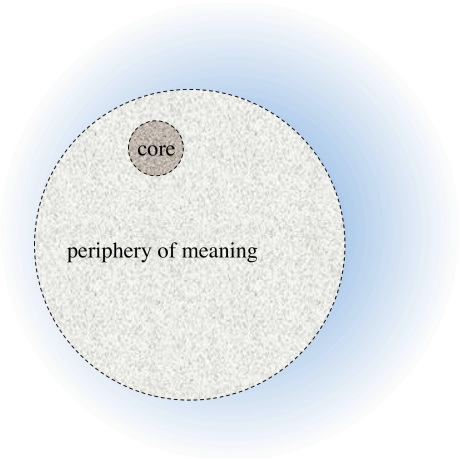


**Fig. 2** Shift of meaning

However, this model (fig. 1) has some shortfalls. First of all, there are no clear borders. Rather, the separation of the clear from the unclear candidates is blurred. Where exactly does the core of meaning end? And where do the clearly negatives begin? The statement that the periphery begins where the clearness ends is lacking in content, for it is exactly the problem of interpretation. Furthermore the changes in meaning in the course of time and circumstances remain hidden. Staying with Heck, the circles may grow, shrink, and/or relocate their positions against each other while still remaining blurred (fig. 2). The same is true in respect to other linguistic boundary models which use linear and gradual representation.[45] Adding additional areas, containers, or segments on a scale, does not help the underlying problems of fuzziness and dynamics and hence the problem of ambivalence of allocation.[46] Finally also the question whether there is a clear but for humans hitherto not accessible borderline, or whether it is a failure of language not to provide a clear borderline, does not lead any further when actually having to tackle a vague legal concept or rule.[47] Yet, this detachment of the language from its author recalls the detachment of the norm from the intention of the legislator within teleological interpretation. In the end it must be stated that the model of Heck is simply not satisfactory.

### 3.2 A Hyperbola of Meaning

In search of a more adequate representation of the ongoing competition between the different notions, interests, and views, this chapter proposes a Hyperbola of Meaning. Contrary to Heck's model, the hyperbola just respects the fact of vagueness and change. Furthermore, the hyperbola has some capability to visualize the conflict of

[45] See also Endicott, Vagueness in Law (2000), 137 et seq.

[46] A very interesting psycholinguistic approach is, however, taken by the "Semantic Differential" of Osgood et al., Measurement of Meaning (1957).

[47] Cf., e.g., Soames, Vagueness and the Law (2010).

interest and the associated discrepancies and shifts in values and meaning, which might be better called a semantic battle, a battle for the right in the space of language.[48]

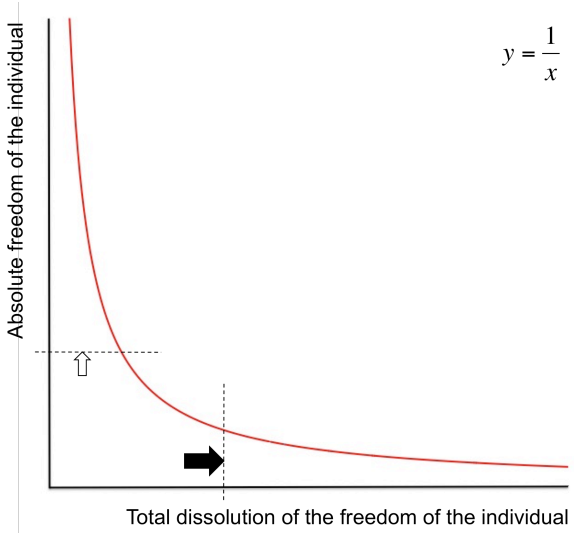


**Fig. 3** Hyperbola of Meaning

For the graphic representation (fig. 3) the simplest form of an equilateral hyperbola y=1/x was chosen. The axes indicate opposite terms or concepts, in the example the vertical axis the absolute freedom of the individual, and the horizontal axis the total dissolution of the freedom of the individual. Like Heck's model, the hyperbola works for opposite pairs only. It is not capable to visualise the various features which influence concept formation, therefore, e.g., a multidimensional vector space model would be suitable, maybe enriched by some fuzzy logic to represent lack of conceptual clarity, and by game theory to tackle the vagueness of legal methodology. However, models of this kind are usually not very descriptive when visualised. Therefore a simple hyperbola seems to be better suited for exemplification, and moreover, it reflects the one-dimensionality and linearity of verbal language, which requires to simplify and to categorize reality.

The hyperbola illustrates two important things. Firstly, the hyperbola will never actually touch the axes. Just as we will never exactly know what absolute freedom, and, respectively, total abrogation of freedom means. We can approximate, but we will never absolutely reach it, neither absolute freedom, nor maximal security, or absolute legal certainty, full equality, etc. Categorisation is an effective communication technique, a means to force complex reality into linear language. Those verbal categories, however, do not exist in reality, and hence cannot be clearly grasped but are blurred and variable.

Secondly, we are not able to objectively identify the ideal state, the state of minimum contradiction, which is somewhere on the curve. What we can approximately

[48] Cf., Müller et al. (1997), Rechtstext und Textarbeit, 69.

determine is the meaning of a concept at a given point in time and within a given value system. The dashed horizontal line in the graphic is used to mark roughly the actual limitations of freedom in this system, the dashed vertical line to mark the actual limitations of intervention in freedom. That section of the graph of the hyperbola, which lies in between the two dashed lines, represents what is actually agreed to be freedom. It represents the currently socially accepted compromise between individual freedom and its necessary limitations, respectively the approximate range in which the persons subject to the law are actually allowed to move.

Though, the dashed lines are not static. To visualise the shift of meaning, two arrows of forces are used. The smaller, empty arrow tries to push the dashed horizontal line and hence to extend freedom. The forces behind this arrow are perhaps the individuals, or groups of individuals. The larger, filled arrow indicates those forces, perhaps governments, powerful lobbies, or trusts, which exert opposed pressure and try to extend the possibilities of intervention in freedom of the individual. Within this power struggle, the arrows of forces are not proportional, which means, e.g., that if one force loses terrain, the other force neither gains terrain to the same extent nor necessarily gains terrain at all. Respectively, the dashed lines may move independently of one another and are variable in both directions. Vagueness, however, makes it easier to influence the shift of meaning to their advantage for those who have the power.

### 3.3 The Question of Applying or Making the Law: How Vague is Vague?

The entries on the axes of the Hyperbola of Meaning can now optionally be changed, e.g., by the terms vague and precise. As a result, we cannot accurately determine where precision ends and vagueness begins, and we cannot reach absolute vagueness or absolute precision. That also implies a clear rejection of the theory of a borderline of meaning of words (*Wortlautgrenze* or *Wortsinngrenze*, maximal literal meaning), which is actually, although this is not uncontroversial, the prevailing theory for the distinction between interpretation of law and development of law by the interpreter (*Rechtsfortbildung*).[49] According to this theory, the interpreter advances to a lawmaker when the borderline of meaning of a word is crossed. Contrary to legal interpretation, judicial lawmaking, however, requires the existence of a gap in the law.[50] This is because if there is a gap there is no binding force of statute, and therefore the court may fill the gap by law making. Nevertheless, also the identification of a gap is regularly a value decision. How vague must a concept or a rule be to be a gap? How to

[49] For the dispute see in particular Rüthers, Rechtstheorie (4th ed. 2008), para. 796 et seq.; Koch/Rüßmann, Juristische Begründungslehre (1982), 253 et seq.; Röhl/Röhl, Allgemeine Rechtslehre (3rd ed. 2008), 633 et seq. See also Schramm, "Richterrecht" und Gesetzesrecht, Rechtstheorie 2/2005, 185-208; and Baldus, Gesetzesbindung, in Riesenhuber (2nd ed. 2010), 26-111. Firmly defending the borderline of meaning Klatt, Theorie der Wortlautgrenze (2004).

[50] Detailed in regards to the various kinds of gaps and judicial law making, e.g., Rüthers, Rechtstheorie (4th ed. 2008), para. 822 et seq., with numerous further references. See also fn. 33.

assess the maximal literal meaning, if it is exactly the meaning of a word, which is called into question? The line between interpretation and development of law as well as between vagueness and gaps in the law is blurred and, in any case, a matter of definition and acceptance. Apart from that, if a supreme court illegitimately crosses the supposed and in any case fuzzy borderline of meaning, or exaggerates its competency for gap filling, the decision is nevertheless legally binding.

Just as we cannot clearly identify where precision ends and vagueness begins, we cannot clearly identify when vague is too vague, and, respectively, where necessary vagueness ends and exaggerated vagueness begins. Endicott concludes that "[*v*]agueness is a deficit when it lends itself to arbitrariness […] – to abandoning the reason of the law [*by government officials*]."[51] At the same time he is aware that it is not clear what the reason of law is, and that the reason of law may differ over time and across systems.[52] This is just as the effects of vagueness may differ over time and across systems. Finally it appears to be more appropriate not only to refer to the wording, but also to be vigilant in regards to the division and balance of powers, and to be alerted in case of a fundamental shift in power. In this respect the will of the historical legislator might be a suitable measure, and the interpretative power the key issue.

### 3.4 Indeterminate Legal Concepts and General Clauses

As regards the classification of vague terms and concepts, legal textbooks usually differ between indeterminate legal concepts (*unbestimmte Rechtsbegriffe*) and general clauses (*Generalklauseln*). Nevertheless, it remains unclear, what indeterminate concepts and general clauses are. Analysing the various attempts to devise definitions, one can conclude that it is regularly the degree of vagueness which is decisive.[53] While it is – with reference to Jesch – generally recognized that nearly all legal concepts are indeterminate and hence law is uncertain to some extent,[54] put simply, indeterminate legal concepts are more vague than determinate concepts (*bestimmte Rechtsbegriffe*), and general clauses are particularly vague. General clauses are according to the prevailing doctrines not gaps in the law, but accessible for interpretation.[55] Common examples of general clauses are, e.g., public morals (*gute Sitten*),

[51] Endicott, Vagueness in Law (2000), 203 (187).

[52] Ibid., 196 et seq.

[53] Rüthers, Die unbegrenzte Auslegung (6th ed. 2005), 210 et seq.; Engisch, Einführung in das juristische Denken (1956), 188 et seq.; Koch, Unbestimmte Rechtsbegriffe (1979); Ehmke, "Ermessen" und "unbestimmter Rechtsbegriff" (1960); Hedemann, Die Flucht in die Generalklausel (1933); Herberger/Simon, Wissenschaftstheorie für Juristen (1980), 243 et seq.; Röthel, Die Normkonkretisierung im Privatrecht (2004); Lücke, Die (Un-)Zumutbarkeit als Grenze (1973); Erichsen, Die sogenannten unbestimmten Rechtsbegriffe, DVBl. 1/1985, 22-29; Heinrich, Formale Freiheit und materiale Gerechtigkeit (2000). See also fn. 44, 56.

[54] Jesch, Unbestimmter Rechtsbegriff, AöR 82/1957, 163 et seq. (168).

[55] Dissenting, e.g., Rüthers, Rechtstheorie (4th ed. 2008), para. 836 et seq., with reference to Hedemann, Die Flucht in die Generalklausel (1933), 58; and Heck, Grundriss des Schuldrechts (1929), § 4, 1. See also Teubner, Standards und Direktiven in Generalklauseln (1971), 52 et seq.; Röthel, Die Normkonkretisierung im Privatrecht (2004), 25 et seq.; Ellscheid,

good faith (*Treu und Glauben*), or *bona fides*; common examples of indeterminate legal concepts are, e.g., good reasons (*wichtige Gründe*), interests of the child (*Wohl des Kindes*), extraordinary circumstances (*außergewöhnliche Umstände*), disproportionate burden (*unbillige Härte*), appropriateness (*Angemessenheit*), fairness and propriety (*Billigkeit und Redlichkeit*), or reasonable discretion (*billiges Ermessen*). Determinate legal concepts, on the other hand, are concepts with fixed content, e.g., measurable or numerable factors (legal deadlines, age of majority, emission limits, speed limits, minimum cocoa content of chocolate, etc.), exhaustive enumerations, concepts referring to natural sciences (e.g., copyright expires 70 years after death), or precisely defined concepts (e.g., the legal definitions of property, contract, money, etc.). However, on closer analysis even those so-called determinate concepts are not clear-cut in all respects, and in particular legal definitions sometimes pose more questions than they resolve. Finally, as it has already been demonstrated by the Hyperbola of Meaning, the distinction between determinate concepts, indeterminate concepts and general clauses is blurred, and absolute precision is not achievable.

Furthermore, legal theory differs between descriptive and normative concepts.[56] This differentiation is not tied to the differentiation described above. Descriptive concepts are regarded to reflect and sort reality (e.g., human nature, death or injury, property damage) and hence to tend to be less vague, whereas normative concepts are considered to be value terms (e.g., foreign, dishonourable, good faith, inner reservation, knew or ought to have known) which have to be filled by value judgments (normative order, morals, customs, etc.) and therefore to tend to be far more vague. Hardly surprising, also the exact distinction between descriptive and normative concepts proves to be difficult.[57]

Ambiguity and vagueness are not always distinguished in legal theory, but are frequently assigned to indeterminacy.[58] Since those distinctions are nevertheless blurred, this paper also forgoes a further differentiation and subsumes all kinds of ambiguity and indeterminacy under the single category of vagueness. In general, ambiguity of terms and concepts is considered to be less relevant in legal interpretation, because most ambiguous concepts can be resolved by context. This is, however, not to state in respect to ambiguous sentences, rules or whole legal norms, which frequently pose a challenge to legal interpretation, even if not expressly referred to as such.[59]

The human rights clauses provide illustrative examples for the use of vague concepts. For example, article 11 of the UDHR[60], article 10 of the ECHR[61], and article 11 of the CFREU[62], all of which establish a – from the first point of view – almost iden-

---

Strukturen naturrechtlichen Denkens, in Kaufmann et al. (7th ed. 2004), 148-213 (150); Auer, Materialisierung, Flexibilisierung, Richterfreiheit (2005).

[56] Detailed, e.g., Rüthers, Rechtstheorie (4th ed. 2008), para. 176 et seq.

[57] Cf., Kramer, Juristische Methodenlehre (2nd ed. 2005), 44 et seq.; Engisch, Einführung in das juristische Denken (1956), 143 et seq.

[58] Distinguishing, e.g., Koch/Rüßmann, Juristische Begründungslehre (1982), 191 et seq.

[59] But see, e.g., Thaler, Mehrdeutigkeit und juristische Auslegung (1982).

[60] Universal Declaration of Human Rights (United Nations, 1948).

[61] European Convention of Human Rights (Council of Europe, 1950).

[62] Charta of Fundamental Rights of the European Union (European Convention, 2000).

tical right to freedom of opinion and expression, including the freedom to hold opinions, and to receive and impart information and ideas regardless of frontiers. However, the limitations of these rights differ. The limitations drawn by the UDHR (article 29) are the just requirements of morality, public order and the general welfare in a democratic society. In respect to the ECHR (article 10), the exercise of this right may be subject to restrictions that are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Finally, according to the CFREU (article 52), limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union. In regards to the common values the Charta refers in its preamble to the Union's spiritual and moral heritage. Given the textual differences, the many open concepts which have to be filled with values, and the different ways in which this valuation may be understood by different societies, generations and governments, it can be stated, that the right to freedom of expression is highly vague and changeable.

Vague concepts presuppose a single consciousness of values, which certainly does not exist in a pluralistic society. Hence, vague concepts force the courts to answer a question of legal policy, which, however, cannot be answered by legal interpretation, but gives courts reasons to refer to extralegal values.[63]

### 3.5 Vagueness and Changeableness: The Marriage Act of 1938

Vague legal concepts, combined with elasticity of legal interpretation and its capability to affect the specific meaning of concepts, can lead to astonishing changes of meaning, completely without modification of the wording of the respective text. A very telling and still topical example is the one given – among many others – by Rüthers in respect to the interpretation of the general clause "essence of marriage" (*Wesen der Ehe*), which is summarised in the following.[64]

The starting point is a piece of NS-legislation, the Marriage Act 1938.[65] This Marriage Act was – with minor amendments besides the deletion of some typical NS-provisions – re-enacted by the Allied Control Council in 1946[66] and therefore valid and binding in the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR). This allows the analysis of the judicial interpretation of the essentially unchanged provisions relating to divorce within three different constitutional systems. The Marriage Act of 1938 used the vague concept "essence of marriage" as a value measure for the assessment if a divorce or annulment of marriage is morally

[63] Cf., Rüthers, Die unbegrenzte Auslegung (6th ed. 2005), 422.

[64] Cf., Rüthers, Wir denken die Rechtsbegriffe um (1987), 45-58; and ibid., Die unbegrenzte Auslegung (6th ed. 2005), 400-429. For the numerous sources and references, which have been omitted for reasons of space, refer to one of the original texts.

[65] Ehegesetz (EheG), dRGBl. I S 807/1938 of 6th July 1938.

[66] Kontrollratsgesetz No. 16 of 20th March 1946 (ABl AK 77, 294); in regards to Austria StGBl. 31/1945 of 28th June 1945.

justified (§§ 37, 38, 49, 50, 55). Generally spoken, an application for divorce was admissible, if it was, based on the correct assessment (*richtige Würdigung*) of the essence of marriage (*Wesen der Ehe*), morally justified (*sittlich gerechtfertigt*). In case of irremediable disorder in marriage (§ 55), e.g., each of the spouses was entitled to seek a divorce. An objection of the spouse not at fault for disorder in marriage was irrelevant, if the maintenance of marriage was, once again based on the correct assessments of its essence, not morally justified.[67]

During the NS-era, the essence of marriage was a folkish-political one. Hence, divorce of mixed marriages between Aryan and non-Aryan spouses was particularly easy. But also economic factors were derived from the essence of marriage. A marriage was considered to be an economic loss, when it affected the workforce of the male spouse (note that jobs were to be reserved for male "national comrades" (*Volksgenossen*)), e.g., because of quarrels, or because of feeling unhappy in marriage. The objection of the spouse not at fault was in this respect nearly never relevant. Furthermore, marriages where the female spouse was older than the male one were regarded to threaten society. According to the German *Reichsgericht*, an age difference of three years was against nature (*naturwidrig*) and a priori a threat to marriage (*von vornherein ehegefährdend*). Not least also the still-to-be-expected number of children within marriage in comparison to the to-be-expected number within new marriage was relevant.

The corresponding provisions of the Marriage Act 1946 were interpreted in a very different way. In the FRG, after initial reluctance, hostility against divorce appeared. Now the objection of the spouse not at fault was regularly relevant, due to the reinterpretation of marriage as an absolute, predetermined moral order, which is part of an intangible higher purpose. Indissolubility of marriage as a principle, derived from the essence of marriage, was the result. In 1961, the respective articles of the Marriage Act have been revised in accordance with the case law. Again this is interesting, since according to the supreme court the interpretation before this amendment was already required by the wording of the old version of the respective norm. After several further amendments, the Marriage Act was abrogated and re-integrated into the Civil Code in 1998.[68]

Conversely, a different approach was taken in the GDR. Based on the antifascist-democratic order, the essence of marriage was once again not to be solely a private matter but to serve social ideals, not least the desire to work. The economic effect of employment of women, in particular of the wife and mother, was emphasised. To obstruct the spouse in the course of carrying out societal responsibilities and functions was considered to be a grave matrimonial offence. In 1965, the Marriage Act was finally replaced by the new, more explicitly ideological Family Code.

---

[67] The historic text versions (dRGBl. I S 807/1938, and StGBl. 31/1945) are freely available at http://alex.onb.ac.at/ (Österreichische Nationalbibliothek). The Legal Information System of the Republic of Austria RIS (http://www.ris.bka.gv.at/) does not retrieve the correct historic versions of the Marriage Act when using Bundesrecht konsolidiert / Fassung vom [Date].

[68] However, where deceit is used to force marriage, the correct assessment of the essence of marriage is still the measure for admissibility of annulment; see § 1314 (1) 3 BGB.

However, the concept or essence of marriage is still a contested and current one, and Rüthers example can be extended to present, for instance, by analysing the essence of marriage in Austria, where the Marriage Act of 1938 is still valid. Although amended several times, the Austrian Marriage Act still refers to the conception of the correct assessment of the essence of marriage (§§ 37, 38, 49, 50, 55).[69] According to the Austrian Constitutional Court, the current essence of marriage is the basic possibility of parenthood, which is not affected by the fact that divorce is possible, and by the fact that it is up to the spouses if they indeed want or are able to have children.[70] To reveal the argumentation: The basic possibility to do/be X is not affected by the factual not being able to do/be X. The target and final result of this argumentation: same-sex couples must not marry.

Eventually it is quite disconcerting, how many different interpretative results may be produced on the very same wording and by applying the very same interpretation methods. Which of the many interpretations of the essence of marriage is now the "true" one? It could be argued that there are multiple possible "true" and "false" values, or, as the hyperbola indicates, that we neither know for certain what true and false is, nor where true ends and false starts. This example proves once again that value decisions do not follow binary logic, and that the legal system is not strictly a bivalent one. Moreover, value decisions are not enacted inter-subjectively, but they are embedded in ideology and based on ideological preconceptions and prejudices. What the many interpretive views have in common is, as Rüthers summarises, that they are all based on the assumption of a higher, extralegal "institution" of marriage, and that the meaning and function of this "institution" is derived from an overarching, metaphysical context.[71] Vague legal concepts, however, open a fruitful door for reinterpretation and for hiding the actual reasons and values behind a veil of spurious pretexts.

### 3.6 The "Nature of a Thing" and the Metaphysical "Essence"

As the examples of the last chapter show, arguments such as the nature of a thing (*Natur der Sache*) or the essence of a matter (*Wesensargument*) provide an excellent opportunity for the "development" of law.[72] The terms "thing" and "matter" within these conceptions are variables, and may be replaced by any object of knowledge. Prominent examples are the essence of marriage (or other legal institutions), the nature of the human being, the nature of the woman, the essence of the idea of law, etc.

---

[69] Ehegesetz (EheG), dRGBl. I S 807/1938, as last amended by BGBl. I Nr. 2009/135 of 30th Dec. 2009.

[70] VfGH B777/03 of 12th Dec. 2003, VfSlg. 17098.

[71] Cf., Rüthers, Wir denken die Rechtsbegriffe um (1987), 56.

[72] Cf. in particular Rüthers, Rechtstheorie (4th ed. 2008), para. 913 et. seq.; very revealing also Dreier, Zum Begriff der "Natur der Sache" (1965). See also Ellscheid, Strukturen naturrechtlichen Denkens, in Kaufmann et al. (7th ed. 2004), 148-213. For prominent proponents, cf. Radbruch, Die Natur der Sache (1948); Larenz, Wegweiser zu richterlicher Rechtsschöpfung (1958), Kaufmann, Analogie und Natur der Sache (2nd ed. 1982); Bydlinski (1991, 2005), cf. fn. 18.

The potential of such arguments lies in their capability to provide arguments, which conceal that the sumption is missing, hence which are a pretext. As it will be demonstrated in the following, such arguments are either a pretext, or redundant and hence not necessary. In the German language, however, the *Wesensargument*, which might best be translated with "essence of a matter", is rather inappropriate to be connected with facts and hence always an indicator for pretext.

To state, e.g., that it is in the nature of asbestos to be harmful, is redundant.[73] It is completely sufficient to state that asbestos (A) is harmful (H). Hence, the sentence can be reduced to A is H. This will apply to all statements with reference to respectively agreed facts. But such a statement, e.g., that asbestos is harmful, is not a normative sentence. Yet if we build the normative sentence that it is in the nature of asbestos that it must not be used in buildings (because it is harmful), the component "nature of the thing" has no independent normative meaning but is redundant.

This is contrary to those sentences, which derive a normative statement (S) directly from the nature or the *Wesen*. This is the case, e.g., when it is derived from the essence of marriage that marriage is indissoluble (because …), or that an age difference of three years is against nature (because …). This is true for all those sentences which derive a legal duty, a legal order, a legal obligation, a binding conduct, etc. directly from the nature or *Wesen* of something, and can be described by the sentence that it is in the *Wesen* of something, that S shall be.[74] In this sentence, however, the premise is concealed. There is a blank space to be filled by the interpreter. As Scheuerle puts it, the *Wesen* of the *Wesen* (the essence of the essence) is of cryptological character; the essence is not named and has therefore still to be decrypted.[75]

What is commanded by the nature or the *Wesen* is indeed not a scientific but a political decision. Exactly at this point rationality is most frequently abandoned and replaced by metaphysical objects like natural law principles, biologisms, the divine or ideological order, practical reason, or other extralegal higher orders and values. At the same time, the reference to the nature or to the essence feigns that there would be some rationality. Hence, the nature of the thing and other related figures of thinking are particularly useful where a rational argument is not available, or not suitable to be disclosed. By deducing what ought to be from an assumed what is, the system can be maintained in an unquestionable manner. At this point it also becomes clear, that the valuation precedes the reasoning, and that the reasoning is self-justification.[76] Already Mill recognized that this rejection of rationality is very common where tradition, general feeling, established customs, or social conventions are involved, and cautioned against arbitrariness in insisting and rejecting rationality.[77] However, more than a century later, Bydlinski, for example, still recommends in his textbook to make use of the nature-of-a-thing-argument in particularly in respect to legally recognized social

[73] The example is taken from Bydlinski, Grundzüge der juristischen Methodenlehre (2005), 33.
[74] The picture is derived from Dreier, Zum Begriff der "Natur der Sache" (1965), 117 et seq.
[75] Scheuerle, Das Wesen des Wesens (1964), 429-471 (446).
[76] See also Brecher, Scheinbegründung und Methodenehrlichkeit im Zivilrecht, in FS Nikisch (1958), 227-247.
[77] Mill, The Subjection of Women (1869), chapter 1.

living conditions like contract, family, or property, exactly because this argument allows to inscribe naturalistic values and to differ between normal and abnormal.[78]

Reference is made to Rüthers, who argues that if there is consensus about the meaning of a word, a reason is not necessary; but if consensus is missing, it must be disclosed as to which "nature" it is, where it is coming from, and to whom the power of definition of the "nature of the thing" is.[79] Also Dreier claims to call the "nature" by its name, but moreover proposes to refrain entirely from using such conceptions, because they are imprecise and neither purposeful nor necessary.[80] Nevertheless, arguments like the nature of the thing, the *Wesensargument*, and other equivalent ideological figures of thought are still popular in legal interpretation.

## 4 The Value of Vagueness in Law

To answer the question for the value or non-value of vagueness in law, the question as to the effect of vagueness has to be posed. Vagueness of legislative texts leaves the legal issue at least partially unresolved, and delegates the task of specification and determination of concepts and norms from the legislator to the courts. This has several implications, in particular in respect to legal certainty, the division of powers, and the binding force of statute.

One may question, of course, whether a division of powers into an executive, a legislature, and a judiciary is indeed a necessary precondition for due process. Many, and nevertheless, functioning democracies forgo this principle; for example, the EU Institutions are not based on a separation of powers principle, but on a system of checks and balances. One may also question how strong the binding force of statute must or should be. Also, one will find many of arguments for and against and probably, in the end, raise the question of who is more trustworthy, the judge or the politician.

It might be argued, e.g., that it is preferable to trust in the independence of the judiciary because the legislator is fickle, lazy, partisan, opportunistic, misuses the legislative power for the purposes of politics of the day, is unwilling in resolving a current social, economic, or other legal policy issue, maybe for reasons of power politics or fearing the loss of votes, or because legal agreement of the government parties is missing. Such arguments are not without any substance; in fact, there is some evidence. It is quite common, e.g., to enact a considerable amount of norms and amendments a few weeks prior to elections. There are also examples for the unsteadiness of the legislator, e.g., the tuition fees in Austria, which have been enacted and set aside as well as amended several times during the last years, or the paradigm shift of privacy from the EU Directive on Privacy of Electronic Communication 2002/58/EC of 12th July 2002 to the EU Data Retention Directive 2006/24/EC of 15th March 2006.[81] The EU Services Directive 2006/123/EC and its transposition in Austria are once

[78] Bydlinski, Grundzüge der juristischen Methodenlehre (2005), 32 et seq.
[79] Rüthers, Rechtstheorie (4th ed. 2008), para. 920.
[80] Dreier, Zum Begriff der "Natur der Sache" (1965), 127.
[81] Cf., Liebwald, Rechtsetzung im Spannungsfeld, in Klatt et al. (2012), 341-362 (343 et seq.); and ibid., The New Data Retention Directive, MR-Int 1/2006, 49-56.

again examples for vagueness and empty promises caused by missing political agreement and implementation drive.[82] Examples for lack of remedy or enforceability of statutory rules can be found, e.g., in the area of data privacy[83] or anti-discrimination law[84], but the most prominent current example is probably the debt-brake, which, in Austria, is only a sub-constitutional one.[85] However, there are also examples for extraordinary tenacity of the legislator. This was the case, for instance, when the Austrian Constitutional Court decided, that the tax exemption of income of specific activities of workers abroad, a rule that applies primarily to assembly and service works abroad, violates the principle of equality.[86] Following this decision, the Austrian legislator initially stipulated by January 2011 the gradually elimination of this tax exemption till 2013.[87] However, by August 2011 the legislator re-established the tax exemption, but reduced to 66% of the income, and by setting the vague requirement of work which is predominantly performed under aggravating circumstances.[88]

On the other hand it might be argued that there is also reason to doubt in the independence and impartiality of the judge. Also these arguments are not without any substance. Rüthers, for example, gives evidence and criticises the political struggle for appointment to the highest judicial positions in Germany.[89] The most recent Austrian example, which may raise serious doubts in the independence of the judge as well as in the division of powers, is the prominent trial of the Chief Executive Officer Elsner and eight others for fraud in the BAWAG bank case. This case was of political relevance as well as media driven; the loss due to fraud was estimated by the Supreme Court at about 1,7 billion €. In the proceedings at first instance all the nine accused were convicted.[90] Yet shortly later the judge of these proceedings, Bandion-Ortner, was appointed as Minister of Justice, and formally sworn in two weeks after the decision was issued in writing, on 15th of January 2009. Moreover, the new Minister of Justice appointed the public prosecutor Krakow of the BAWAG bank case as her head of cabinet. In December 2010, the Supreme Court annulled seven of the nine convictions of the court of first instance, mainly due to missing or deficient statements, and referred them back to that court.[91] Those proceedings are still pending, but no longer in the headlines, and following a reshuffling of the government in spring 2011, Bandion-Ortner resigned from office prematurely. For the time being she is once again attached to the Ministry of Justice as a judge, but working for the International Anti-Corruption Academy (IACA). It should also be added that in Austria the judges of the

[82] Cf., Liebwald, Rechtsetzung im Spannungsfeld, ibid., 349 et seq.; and ibid., Das Österreichische Dienstleistungsgesetz, LNI vol. P-162 (2009), 167-179.
[83] Cf., e.g., Thorben et al., A Study on the Lack of Enforcement, in Sideridis/Patrikakis (2009), 3-12; Kühling et al., Das datenschutzrechtliche Vollzugsdefizit, DuD 33/2009, 335-342.
[84] Cf., e.g., Liebwald, Geschlechterquoten (2011), 64, 68, 79 et seq., 84 et seq.
[85] Bundeshaftungsobergrenzengesetz (BHOG), BGBl. I Nr. 2011/149 of 29th Dec. 2011.
[86] VfGH GZ 29/10 (et al.) of 30th Sept. 2010, VfSlg. 19184.
[87] BGBl. I Nr. 2010/111 of 30th Dec. 2010.
[88] BGBl. I Nr. 2011/76 of 1st Aug. 2011.
[89] Rüthers, Demokratischer Rechtsstaat, JZ 2002, 365-371.
[90] Landesgericht für Strafsachen Wien GZ 122 Hv 31/07h-1933 of 4th July 2008.
[91] OGH GZ 14 Os 143/09z of 22nd Dec. 2010, and 14 Os 143/09z of 23rd Dec. 2010.

Supreme Court of Justice, which is responsible for final appeals in civil and criminal proceedings, are appointed by the Minister of Justice from a shortlist of three candidates proposed by the personnel chamber for judges of the Supreme Court itself.

As regards the Austrian Constitutional Court, its members are appointed by the Federal President, from a shortlist of three candidates proposed by other state organs, in particular the Government.[92] The Austrian daily "Die Presse" most recently summed this procedure up in a nutshell and reported that the newly nominated judge Kucsko-Stadlmayer was supported by the Austrian Social-Democratic Party (SPÖ), but that notwithstanding the 8:6 - "majority" the (conservative) Austrian People's Party (ÖVP) will be allowed to occupy the next vacant post with the judge Achatz. This is followed by a sorted list of the currently active judges, ordered by being "nominated" by the SPÖ, respectively the ÖVP.[93] Hence, the independence of judges is reduced to the fact that judges may not be directly replaced when parliamentary majorities or political powers change.

Once doubts in the independence of the judge arise, one might promptly shift to the democratic principle and argue that social, economic, and political decisions should not be delegated to the judiciary, because, moreover, a judge is not a representative of the people. An opponent might perhaps argue that it is the democratic willingness of the legislator which has to be doubted, because the individual members of parliament in general owe their function their party, and that this dependency more strongly characterizes the self-understanding of the parliamentarian than their constitutional task of being a representative of the people.[94] Furthermore, it is in general the relevant ministry which drafts the law, not the parliament. An interesting approach is taken by Stein. He argues that it is neither the will of the legislator, nor the purely idealistic will of the norm, but the democratic will of the people that is relevant for the interpretation of a norm.[95] This view, on the one hand, seems to bypass the dispute between historical and teleological interpretation, but on the other hand poses a new question: How does a court assess the respective will of the people?[96] By opinion survey or electronic voting? By predicting or feigning the fictitious will of the people? However, if for reasons of democracy the will of the people is no longer represented by the parliament but has to be investigated by the courts, it is at this point, at the latest, that democracy bites its own tail.

### 4.1 The Dilatory Formal Compromise

It is evident that there is some reason to question the status of the binding force of statute and the division of powers, but a refinement or rearrangement of those consti-

[92] The government in respect to the president, the vice-president, 6 members, and 2 substitute members; the national council in respect to 3 members and 2 substitute members; and finally the federal council (*Bundesrat*) in respect to 3 members and 1 substitute member.

[93] "Die Presse" of 12th June 2012, 1.

[94] Öhlinger, Methodik der Gesetzgebung (1982), 9.

[95] Stein in Stein/Frank, Staatsrecht (20th ed. 2007), 37.

[96] See also Rüthers, Rechtstheorie (4th ed. 2008), para. 803 et seq.

tutional principles should be done in a transparent and consistent way, by taking an overall view and by having a strong focus as to the effects of shifting legislative power from the legislature to the judiciary. Poscher, for example, identifies the reduction of decision costs as the main value of vagueness in law. What is meant is the reduction of decision costs during the legislative process by using vague concepts and leaving it "to the courts to take care of drawing the exact borderlines, to save time for more important legislative acts."[97] Admittedly, this supposed value may indeed explain "why we find much more vague than precise general concepts in language and law."[98] By the way, more costs could be saved by merely flipping a coin. However, the categorisation of more and less important legal acts, which is assumedly a one-sided and party-political value decision, as well as the justification for the existence of less important acts should be questioned. Furthermore, if the postponing of decisions is considered to be a virtue from the point of view of the legislature, the question as to the effects has to be posed. Yet, the use of vague concepts allows for postponing decisions, but then there is no "true" answer to be found in the legislative act, and vagueness may even be misused to pretend that there is an agreement, or to hide that there is no decision and no rule. The outcome is not predictable, verifiable or otherwise calculable. Schmitt calls such tactics a dilatory formal compromise:

> "When the 'intention of the statute' should be certain, and when there is actually no intention other than not to have one […], thereby postponing a decision, then all the semantic artistry […] always only leads to the result that one word of the statutory text is played out and emphasized against another, as is one clause against another, all without a persuasive demonstration being possible – that is to say, assuming it proceeds in an intellectually conscientious manner. […] when it comes to the execution of the formal compromise, not through jurstic interpretation […]. Where no will or determination is at hand, then even the greatest legal acumen has lost its justification. All 'normative' consideration ends in a miserable linguistic manipulation."[99]

Hence, as far as vagueness is used to contribute to an alleviation of the workload in parliament, and maybe also in courts due to the trial risk, it seems more proper to call it a non-value, because it renders the legal system only an apparent one, or at least very flimsy and thin. However, when referring to Schmitt one has to be aware that his intention was to reject liberal constitutionalism, which is, of course, not the intention of this paper. Nevertheless, Schmitt notes some tenuous points which, seen in reverse, can be considered as pointing to dangers for the *Rechtsstaat*. Many arguments of Schmitt are built on discrepancies between his interpretations of idealistic theory of liberal constitutionalism and reality, and his rash assumption that those contradictions cannot be resolved within liberal legalism's own theory. Schmitt locates the guiding principle of the *Rechtsstaat* in the protection of the bourgeois freedom against state power. State intervention in the freedom of individuals is the exception and must be justified. This distributive principle is to be guaranteed by an organizational principle,

[97] Poscher, Ambiguity and Vagueness, in Tiersma/Solan (2012), 128-144 (143).
[98] Ibid., 144.
[99] Schmitt, Constitutional Theory (1922), 87.

which limits and controls state power. This is in particular the principle of separation of powers and the associated principle of legality, which defines the competencies and requires state intervention to be based on law.[100]

Based on this, Schmitt argues, inter alia, that the presupposed dualism between state and society, public and private, does, in fact, not exist. On the contrary, modern state interferes in nearly all aspects of social and private life. Moreover, he insists, the law becomes more and more complex and vague and therefore allows for highly subjective and politicized discretionary decisions, which are concealed by denying the distance between the rule and the decision. Furthermore, he claims that the liberal thought ignores political reality, which is in fact not ruled by abstract orders and normative systems but by actual people and associations. This is closely connected to Schmitt's considerations of all political concepts and ideas to be polemic and based on friend-enemy-groupings, his decisionist stance, and his call for homogeneity of the *Staatsvolk*. From this, Schmitt concludes that legitimacy is ultimately always a question of power, that referring to the normative order is nothing more but a means to conceal the underlying power struggle and irrational decisions, and that normativity and its belief in legal certainty, accuracy and predictability of law is a positivistic fiction.[101]

Schmitt's final conclusion that the only real solution is to abandon constitutionalism and to establish totalitarian state power was, however, a fatal error. Race, folk customs, leadership, and the national party platform became the new sources of law, social homogeneity was ensured by the *Führer*. Large parts of the law were reinterpreted and re-valuated according to this new idea of law. This reinterpretation was supported by prominent legal theorists, among many others, Ernst Forsthoff, Philipp Heck, Justus W. Hedemann, Heinrich Stoll, and Wolfgang Siebert.[102] Schmitt, as well as Larenz, offered most helpful tools for adapting the legal order for the National Socialist needs: the concrete order theory (*konkretes Ordnungsdenken*) of Schmitt,[103] and the concretely general concepts (*konkret-allgemeine Begriffe*) of Larenz.[104] Both took advantage of the vagueness and elasticity of legal terms, concepts and values, and gave rise to the wild proliferation of *Wesensargumente* and other bogus arguments, supporting the profound renewal of legal order, thus without having to call upon the legislator. Hence, Schmitt does exactly what he has previously criticized with respect to liberal constitutionalism. He disregards the intention of the legis-

[100] See in particular Schmitt, Constitutional Theory (1922).

[101] See in particular Schmitt, Constitutional Theory (1922); ibid., The Concept of the Political (1st ed. 1927, and modified 2nd ed. 1932); ibid., On the three Types of Juristic Thought (1934). For recent discussion on Schmitt's critique of liberalism see, e.g., Slagstad, Liberal Constitutionalism and Its Critics, in Elster/Slagstad (1988), 103-129; Scheuerman, Carl Schmitt's Critique of Liberal constitutionalism (1996); Dyzenhaus (ed.), Law as Politics (1998).

[102] C.f., Rüthers, Die unbegrenzte Auslegung (6th ed. 2005).

[103] Schmitt, On the three Types of Juristic Thought (1934); ibid., Nationalsozialistisches Rechtsdenken (1934).

[104] Larenz, Zur Logik des konkreten Begriffs (1940); ibid. Methodenlehre der Rechtswissenschaft (1st ed. 1960).

lator and the fidelity of juristic interpretation, and constructs an authentic and consistent meaning of general clauses, which is once again only an apparent one. Thereby, however, he leaves his decisionist stance behind and legitimates the national socialistic idea of law as being derived from the very nature.

The lesson we can draw from this is that the implication of vagueness in law is a serious topic, as well as the structure and the shift of powers. Furthermore, we should be aware that political reality has implications for the *Rechtsstaat*, and that "the political" must not be built on a friend-enemy distinction. It is not pluralism, but rather an identity policy which is based on exclusiveness and on a normal-abnormal contradistinction, creating its values on a shared concept of the enemy, which constitutes a threat to liberal constitutionalism.

### 4.2 Who has to Pay the Price for Vagueness?

A doubled-edged but therefore particularly illustrative example on the value of vagueness in law is drawn by Poscher. With reference to Endicott he argues that "a value to which vagueness is thought to contribute is the avoidance of the arbitrariness that comes with precision". However, Endicott is indeed more cautious and uses the conditional when stating that "[*i*]ncreasing precision can *increase* arbitrariness", and that "[*a*] more precise law could conceivably be farther from *or* closer to the ideal, or neither."[105] Furthermore Endicott indicates a few sentences before "that precise laws stimulate the interpretative ingenuity of lawyers and judges – and interpretive ingenuity can give extravagant pragmatic vagueness to precisely formulated laws."[106]

Poscher draws upon the fixed age limits for physicians as an example for the arbitrariness of precision. He argues that "with increasing awareness of age discrimination […], [*a*]ge limits have been replaced with more flexible standards such as 'sufficient capacities', that can do greater justice to individual cases, but that are also more vague." Poscher proceeds that the precise standard "goes against our intention" since "we know that an age limit of 65 for physicians discriminates against doctors who are still competent." In respect to the quality and the purpose of the rule Poscher finally concludes, that "vagueness is the price we have to pay, not a value we pursue."[107]

This sound pretty convincing, but is the more vague concept "sufficient capacity" indeed capable to resolve the discriminatory problem? Furthermore, it seems to be appropriate to refer to the proposal of Rüthers[108] and to ask for the original intention of the legislator when establishing and setting aside an age limit for physicians. Are those rules indeed about justice and prevention of age discrimination? Or are they also or even primarily or exclusively about the protection of patients, or about economic aspects like contracting with health insurance funds, or labour market policies? Was it, perhaps, a shortage of physicians, which prompted the amendment? In Germany that was indeed the case. Though the German author Poscher did not explicitly refer

[105] Endicott, Vagueness in Law (2000), 192.
[106] Ibid., 191.
[107] Poscher, Ambiguity and Vagueness, in Tiersma/Solan (2012), 128-144 (143).
[108] Chapter 2.5.

to the situation in Germany, it is nevertheless an interesting point that the German legislature established in 1999 an age limit of 68 for physicians. According to the legislative material, this age limit was enacted on the ground that there is a need to limit the number of contracted physicians in order to reduce the increasing expenditures.[109] By the year 2008, the German legislature withdrew the age limit because of a shortage of physicians.[110] The German legislature, however, did not introduce a vague concept like "sufficient capacity" instead of the prior age limit, and there might be several reasons for this.

First of all, if it is adequate to leave the decision of sufficient competency exclusively to the self-assessment of each physician, the use of a concept like "sufficient capacity" is redundant. It would simply pretend, e.g. for patients, that there would be some specific control of the competency of elderly physicians, that does, in fact, not exist. Yet, there already exist general admission rules as well as liability rules for medical misconduct and errors, which apply to all physicians, irrelevant of age.

Secondly, if it is not adequate to leave the decision of sufficient competency to the self-assessment of physicians, rules on how to assess the competency of elderly physicians have to be established. It is worth mentioning that Austrian supreme courts have repeatedly found, not exclusively in respect to anti-discrimination law, that it is impossible to generally assess the meaning of "professional competence", particularly in retrospect.[111] Due to the rules on the burden of proof, this finding means that the plaintiff has lost the game, and hence that, as a consequence of a vague concept, people may be deprived of invoking their rights. But who is the plaintiff in our example? Is it a physician discriminated against, or an injured patient, or a health insurance fund? Placing the blame on the burden of proof rules instead of the vagueness for this does not change the result. Hence, there is also arbitrariness which comes with vagueness, but this arbitrariness seems to be less obvious, which might mislead those who are subject to the law. Consequently, in order to give legal standing and enforceability, a vague concept like "sufficient capacity" causes the need to specify fair and enforceable evaluation criteria, and to evaluate each physician individually. This, however, introduces further questions, like the objectivity of evaluation criteria and of their application, or at which age to start and in what time intervals to carry out the review, etc., thus calling once again for more precise value decisions. Thereby it becomes evident, that also the question of administrability and enforceability are crucial in law.

The question as to who has to pay the price for vagueness leads to another important aspect. Though, while the focus of legal methodology is on the interpretation of legal texts by judges, it may not be overlooked that the legal system is not just a two-player power game between the legislator and the judiciary. There are different bodies and institutions which may struggle with the implementation or application of

[109] Deutscher Bundestag Drucksache 12/3608 of 5th Nov. 1992, 93 (Gesundheits-Strukturgesetz 1993).

[110] Deutscher Bundestag Drucksache 16/10609 of 15th Oct. 2008, 55 (GKV-OrgWG).

[111] See in particular VfGH B 11/78 of 22nd June 1978, VfSlg. 8320. For further details cf., e.g., Liebwald, Geschlechterquoten (2011), 79 et seq.

vague law, e.g., administrative bodies or tribunals, or even private individuals or corporations, e.g. an employer in respect to social and labour law, or an IT-service-provider in respect to data security or data retention. However, it is extremely unlikely that, e.g., a police officer while hunting a suspect, or a mayor who grants a building permission, or the IT-service-provider apply legal methodology according to textbook. And which of the many textbooks? Hence, the implementation and application of vague law may further enhance legal uncertainty. But who bears this risk? The missing link is the legal position of those who are subject to the law. This important link is often neglected. The freehanded delegation of legislative powers by vagueness further reduces clarity, assessment and predictability of law, and therewith conflicts with constitutional legality and certainty of law. It leaves conduct unregulated and deprives persons subject to the law the opportunity to recognize their rights and duties, to align their behaviour, and to invoke their rights. As a result, confidence in the legal system evaporates, and it proves to be the chilling effect of law which is valued.

The process of bringing a case to a high court usually requires many years and is costly and risky. Many people subject to the law are just not capable to bear this risk, in other cases the expected returns will not or only morally compensate for the procedural risk, or the answer will be simply too late and not helpful any longer, even if decided in favour of the plaintiff. Additionally, courts have only the power to decide on those specific legal questions, which are in fact raised by the individual case. Statements of the court "said in passing", known as *obiter dicta*, which are not necessarily part of a court's decision, are not legally binding. Hence, in many cases it needs more than one judgement to sufficiently clarify the actual legal situation. The long debate on the classification of a dynamic IP-address in Austria is an excellent example of this. It left IT-providers as well as its customers and third parties in a situation of legal uncertainty for many years. Depending on the classification of a dynamic IP-address of whether it is master data or traffic data within the meaning of the Austrian Telecommunication Act, the service provider was or was not under obligation to provide information about the respective user of the IP-address within the meaning of other statutes. Hence, apart from the legal uncertainty caused for the provider's customers and the third parties, the service provider had to risk a legal action either for having violated the information duty, or for having violated the user's privacy. For a long period of time neither the legislator was willing to resolve this question, nor a case which put the exactly fitting legal questions, without giving room for a finding which gets along without this classification, was forwarded to the competent high court.[112]

A supreme court, however, cannot further relegate the decision, but is forced into action, because it may not deny justice, irrespective of how unclear the statutory provision is. Eventually, even a judge cannot be expected to be omniscient and a specialist in each and every field, but must issue a decision on the many and varied cases within appropriate procedural timeframe, thereby applying vague legal rules to contestable and diverse interpretations of "facts". As another consequence, certain fields

[112] Cf., Schanda, Auskunftsanspruch, MR 1/2005, 18-21; Stomper, Zur Auskunftspflicht, MR 2/2005, 118-122; Einzinger et al., Wer ist 217.204.27.214? MR 2/2005, 113-118.

of law, e.g. building law or medical law, are already referred to be battles of the findings of the judicially appointed experts.[113] Ultimately, we must arrive at the conclusion that it might sometimes be more helpful for all the parties to have a clear rule, whatever the rule is.

## 5 Conclusions

Rüthers' proposal to place the primary focus of legal interpretation on the intention of the legislator, Dreier's claim to call "nature" by its name, as well as the visualization of the instability of legal concepts by the Hyperbola of Meaning, share the same motive: the call for disclosure of values, intentions, arguments, and their reasons. This call for more clarity and transparency is a very legitimate one, because the fidelity of methods and the demand to disclose and explain are important elements for the effective functioning of the *Rechtsstaat*. This paper extensively demonstrated that vagueness can have severe implications. By deliberately using vague concepts, the legislator extends the scope for those who apply the law. If the law is too vague, it loses its predictability and verifiability, and persons subject to the law are deprived to align their behaviour, and to invoke their rights. At the same time, vagueness may be misused to conceal that there is a no rational argument, no clear decision, or no clear rule. Furthermore, it has been proven that legal doctrine does not provide clear and consistent answers to vague concepts and rules, or elsewhere preserves the rule of law out of itself. On the contrary, elasticity of legal methodology may even add vagueness. At this point another reference is made to Rüthers, who emphasizes that methodological questions are constitutional issues, namely questions as to the distribution of power and the shifting competences. It is recalled that legal methodology is the result of doctrine and legal practice, and is neither part of the constitution, nor enshrined in sub-constitutional law. Vague legal concepts present an open door for legal interpretation to invoke justice, the nature, the metaphysical, or perhaps even the ideology of eminent legal theorists, which can be an excellent way to shortcut discussions, to give rise to subjective valuations, to arbitrariness, and for not having to bother with detailed analysis and rational arguments. Hence, if the legal system is exaggeratedly vague, legal certainty and the binding force of statute become affected, and the separation of powers becomes blurred.

The two main arguments which have been identified as being used to justify vagueness, are the (cost) advantage of the dilatory formal compromise, and the interpretative flexibility provided by vague law. As regards the dilatory formal compromise, to deliberately enact a law for the reason of postponing a decision and pretending that there is a rule, is, even if technically possible, a contradiction in itself, and, once again, renders the legal system to be very spurious and thin. This leads to a related topic, which also concerns constitutional issues but is not treated as such: the theory of law making (*Gesetzgebungslehre*). The art of legislative techniques seems

[113] See, e.g., Staudinger/Thöni (eds.), Das Medizinische Gutachten (2010), and in particular the paper of Hellbert therein (45-90).

to have plunged into a crisis, it is neither part of obligatory legal education, nor does the legislator feel bound by practical guides for the drafting of legislative texts. Those guidelines[114] deal with important issues with respect to legal language, the clarity and illegibility of law, and provide rules for legislative drafting and formalisation. However, these rules are of nonbinding character, compliance with which depends on political willingness. Legislative culture and the quality of the law are, however, crucial for legal interpretation and for the coherence of the legal system as a whole.

Finally, as regards the flexibility of vague law and the claim that vagueness "can do greater justice to individual cases", it is to question if flexibility supports justice in the first place, and justice for whom? Furthermore it is to question if there is a difference between the terms of arbitrariness and flexibility altogether, apart from the positive connotation of the latter. This is because, if justice is derived from arbitrariness, justice contradicts the reason for law in the first place.

**Acknowledgments**

This paper was written under a Marie Curie Intra-European Fellowship (FP7), supported by the European Commission.

**References**

1. Adorno, Th. W. et al. 1976. The Positivist dispute in German sociology. London: Heinemann.
2. Albert, H., E. Topitsch. 1990. Werturteilsstreit (3rd ed.). Darmstadt: Wissenschaftliche Buchgesellschaft.
3. Alexy, R. 1989. Theory of legal argumentation: The Theory of Rational Discourse as Theory of Legal Justification. Oxford: Clarendon Press.
4. Ast, F. 1808. Grundlinien der Grammatik, Hermeneutik und Kritik. Landshut: Thomann.
5. Auer, M. 2005. Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens. Tübingen: Mohr Siebeck.
6. Baldus, C. 2010. Gesetzesbindung, Auslegung und Analogie: Römische Grundlagen und Bedeutung des 19. Jahrhunderts. In Riesenhuber, 26-111. Ibid.
7. Ballweg, O. 2009. Analytische Rhetorik. Recht und Rhetorik vol. 1. Frankfurt a. M. et al.: Peter Lang.
8. Brecher, F. 1958. Scheinbegründung und Methodenehrlichkeit im Zivilrecht. In Festschrift für A. Nikisch, 227-247. Tübingen: Mohr Siebeck.
9. Buck, C. 1998. Über die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaft. Frankfurt a. M. et al.: Peter Lang.

[114] See, e.g., the Handbuch der Rechtsetzungstechnik (Legistische Richtlinien 1990 and EU-Addendum 1998), issued by the Austrian Chancellery (available at http://www.bka.gv.at/site/3513/default.aspx); the Handbuch der Rechtsförmlichkeit, issued by the German Ministry of Justice (available at http://hdr.bmj.de/); or The joint Practical Guide of the European Parliament, the Council and the Commission (available at http://eur-lex.europa.eu/en/techleg/index.htm).

10. Büllesbach, A. 2004. Rechtswissenschaft und Sozialwissenschaft. In Kaufmann et al., 401-427. Ibid.
11. Bydlinski, F. 1991. Juristische Methodenlehre und Rechtsbegriff (2nd ed.). Wien: Springer.
12. Bydlinski, F. 2005. Grundzüge der juristischen Methodenlehre. Wien: WUV.
13. Canaris, C.-W., K. Larenz. 1995. Methodenlehre der Rechtswissenschaft (3rd ed.). Berlin et al.: Springer.
14. Christensen, R., H. Kudlich. 2001. Theorie richterlichen Begründens. Berlin: Duncker & Humblot.
15. Dederichs, M., R. Christensen. 2004. Inhaltsanalyse als methodisches Instrument zur Untersuchung von Gerichtsentscheidungen, vorgeführt am Beispiel der Rechtsprechung des EuGH. In Rechtssprache Europas, ed. Burr/Müller, 287-327. Berlin: Duncker & Humblot.
16. Dreier, R. 1965. Zum Begriff der "Natur der Sache". Berlin et al.: De Gruyter.
17. Dyzenhaus, D. (ed.). 1998. Law as Politics. Duke University Press.
18. Ehmke, H. 1960. "Ermessen" und "unbestimmter Rechtsbegriff" im Verwaltungsrecht. Tübingen: Mohr Siebeck.
19. Einzinger, K. et al. 2005. Wer ist 217.204.27.214? Access-Provider im Spannungsfeld zwischen Auskunftsbegehr(lichkeit)en der Rechteinhaber und Datenschutz. MR (Medien und Recht) 2/2005: 113-118. Wien: Verlag Medien & Recht.
20. Ellscheid, G. 2004. Strukturen naturrechtlichen Denkens. In Kaufmann et al., 148-213. Ibid.
21. Endicott, T. A. O. 2000. Vagueness in Law. Oxford University Press.
22. Engisch, K. 1935. Die Einheit der Rechtsordnung. Heidelberg: Winters Universitätsbuchhandlung.
23. Engisch, K. 1956. Einführung in das juristische Denken. Reprint Stuttgart: Kohlhammer, 10th ed. 2005.
24. Erichsen, H.-U. 1985. Die sogenannten unbestimmten Rechtsbegriffe als Steuerungs- und Kontrollmaßgaben im Verhältnis von Gesetzgebung, Verwaltung und Rechtsprechung. DVBl. (Deutsches Verwaltungsblatt) 1/1985: 22-29. Köln: Carl Heymanns Verlag.
25. Esser, J. 1972. Vorverständnis und Methodenwahl (2nd ed.). Frankfurt a. M.: Athenäum Verlag.
26. Forgo, N. 1997. Recht sprechen: Zur Theorie der Sprachlichkeit des Rechts. Wien: WUV-Universitätsverlag.
27. Forsthoff, E. 1940. Recht und Sprache. Prolegomena zu einer richterlichen Hermeneutik. Halle: Niemeyer.
28. Gadamer, H.G. 1972. Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik (3rd ed.). Tübingen: Mohr Siebeck.
29. Haft, F. 1994. Recht und Sprache. In Kaufmann/Hassemer, 269-291. Ibid.
30. Hager, G. 2009. Rechtsmethoden in Europa. Tübingen: Mohr Siebeck.
31. Hart, H.L.A. 1958. Positivism and the Separation of Law and Morals. Harvard Law Review 71/4: 593-629. Cambridge: Harvard Law Review.
32. Hart, H.L.A. 1961. The Concept of Law. Oxford: Clarendon Press.
33. Hassemer, W. 1974. Strafrechtsdogmatik und Kriminalpolitik. Reinbek: Westdeutscher Verlag.
34. Hassemer, W. 2004. Rechtssystem und Kodifikation: Die Bindung des Richters an das Gesetz. In Kaufmann et al., 251-269. Ibid.
35. Hassold, G. 1983. Strukturen der Gesetzesauslegung. In Festschrift für Karl Larenz zum 80. Geburtstag, ed. Diederichsen/Canaris, 211-240. München: Beck.
36. Hausmaninger, H. 2003. The Austrian Legal System (3rd ed.). Wien: Manz.
37. Heck, Ph. 1912. Das Problem der Rechtsgewinnung. Tübingen: Mohr Siebeck.

38. Heck, Ph. 1914. Gesetzesauslegung und Interessenjurisprudenz. AcP (Archiv für die civilistische Praxis) 112/1914: 1 et seq. Tübingen: Mohr Siebeck.
39. Heck, Ph. 1929. Grundriss des Schuldrechts. Tübingen: Mohr Siebeck.
40. Heck, Ph. 1932. Begriffsbildung und Interessensjurisprudenz. Tübingen: Mohr Siebeck.
41. Heck, Ph. 1933. Interessensjurisprudenz. Tübingen: Mohr Siebeck.
42. Hedemann, J. W. 1933. Die Flucht in die Generalklausel. Tübingen: Mohr Siebeck.
43. Heidegger, M. 1927. Sein und Zeit. Tübingen: Niemeyer.
44. Heinrich, C. 2000. Formale Freiheit und Materiale Gerechtigkeit: Die Grundlagen der Vertragsfreiheit und Vertragskontrolle am Beispiel ausgewählter Probleme des Arbeitsrechts. Tübingen: Mohr Siebeck.
45. Henninger, T. 2009. Europäisches Privatrecht und Methode. Tübingen: Mohr Siebeck.
46. Herberger, M., D. Simon. 1980. Wissenschaftstheorie für Juristen. Logik- Semiotik- Erfahrungswissenschaften. Frankfurt a. M.: Metzner.
47. Herberger, M., H.-J. Koch. 1978. Juristische Methodenlehre und Sprachphilosophie. JuS (Juristische Schulung): 810-817. München: Beck.
48. Höpfner, C. 2008. Die systemkonforme Auslegung. Tübingen: Mohr Siebeck.
49. Hotz, K. 2008. Richterrecht zwischen methodischer Bindung und Beliebigkeit? Zürich: DIKE.
50. Jackson, B. S.1985. Semiotics and Legal Theory. London et al.: Routledge & Kegan Paul.
51. Jellinek, W. 1913. Gesetz, Gesetzesanwendung und Zweckmäßigkeitserwägung. Tübingen: Mohr Siebeck.
52. Jesch, D. 1957. Unbestimmter Rechtsbegriff. AöR (Archiv des öffentlichen Rechts) 82: 163 et seq. Tübingen: Mohr Siebeck.
53. Jestaedt, M. 1999. Grundrechtsentfaltung im Gesetz. Tübingen: Mohr Siebeck.
54. Jhering, R. von. 1872. Der Kampf ums Recht. Wien: Wiener Juristische Gesellschaft.
55. Kaufmann, A. 1982. Analogie und Natur der Sache, zugleich ein Beitrag zur Lehre vom Typus (2nd ed.). Heidelberg: C. F. Müller.
56. Kaufmann, A. 1993. Beiträge zur juristischen Hermeneutik sowie weitere rechtsphilosophische Abhandlungen (2nd ed.). Köln et al.: Heymanns.
57. Kaufmann, A. et al. (ed.). 2004. Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart (7th ed.). Heidelberg: C. F. Müller.
58. Kaufmann, A., W. Hassemer (ed.). 1994. Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart (6th ed.). Heidelberg: C. F. Müller.
59. Kevelson, R. 1988. The Law as a System of Signs. Springer. New York: Plenum Press.
60. Kirchner, C. 2010. Die ökonomische Theorie. In Riesenhuber, 132-158. Ibid.
61. Klatt, M. 2004. Theorie der Wortlautgrenze. Baden-Baden: Nomos.
62. Koch, H.-J. 1979. Unbestimmte Rechtsbegriffe und Ermessensermächtigungen im Verwaltungsrecht. Frankfurt a. M.: Metzner.
63. Koch, H.-J., H. Rüßmann. 1982. Juristische Begründungslehre. München: Beck.
64. Kramer, E. A. 2005. Juristische Methodenlehre (2nd ed.). Basel: Stämpfli et al.
65. Kranenpohl, U. 2010. Hinter dem Schleier des Beratungsgeheimnisses. Wiesbaden: VS-Verlag.
66. Kreuzbauer, G. 2004. Kleine Einführung in die Forschungsgeschichte der juristischen Argumentationstheorie. In Der juristische Streit (ARSP-Beiheft 99), ed. Kreuzbauer/Augender, 9-25. Stuttgart: Franz Steiner Verlag.
67. Kühling, J. et al. 2009. Das datenschutzrechtliche Vollzugsdefizit im Bereich der Telemedien – ein Schreckensbericht. DuD (Datenschutz und Datensicherheit), 33/6: 335-342. Wiesbaden: Springer/Gabler.
68. Kutschera, F. von. 1975. Sprachphilosophie (2nd ed.). München: Fink.

69. Larenz, K. 1940. Zur Logik des konkreten Begriffs. Deutsche Rechtswissenschaft vol. 9/1940: 279-299. München: Akademie für Deutsches Recht.
70. Larenz, K. 1958. Wegweiser zu richterlicher Rechtsschöpfung. In Festschrift für A. Nikisch, 275-305. Tübingen: Mohr Siebeck.
71. Larenz, K. 1960/1991. Methodenlehre der Rechtswissenschaft (1st ed./6th ed.). Berlin et al.: Springer.
72. Larenz, K. 1971. Aufgabe und Eigenart der Jurisprudenz. JuS (Juristische Schulung) 11/1971: 449-455. München: Beck.
73. Leisner, W. G. 2007. Die subjektiv-historische Auslegung des Gemeinschaftsrechts. Der "Wille des Gesetzgebers" in der Judikatur des EuGH. EuR (Zeitschrift Europarecht) 6/2007: 689-706. Baden-Baden. Nomos.
74. Liebwald, D. 2001. Geschlechterquoten. Regelungen in Österreich und in der EU mit Fokus auf Österreichs Universitäten. Wien/Graz: Neuer Wissenschaftlicher Verlag.
75. Liebwald, D. 2006. The New Data Retention Directive. MR-Int (European Media, IP & IT Law Review) 1/2006: 49-56. Wien: Verlag Medien & Recht.
76. Liebwald, D. 2009. Das Österreichische Dienstleistungsgesetz. LIN (GI Lecture Notes in Informatics) vol. P-162: 167-179. Bonn: Gesellschaft für Informatik.
77. Liebwald, D. 2012. Rechtsetzung im Spannungsfeld von politischem Willen und sprachlicher Divergenz. In Sprache – Recht – Gesellschaft, ed. Klatt et al., 341-362. Tübingen: Mohr Siebeck.
78. Lücke, J. 1973. Die (Un-)Zumutbarkeit als Grenze öffentlichrechtlicher Pflichten des Bürgers. Schriften zum Öffentlichen Recht vol. 227. Berlin: Duncker & Humblot.
79. Luhmann, N. 1981. Konflikt und Recht. In Ausdifferenzierung des Rechts, ed. ibid., 92-112. Frankfurt a. M.: Suhrkamp.
80. Mill, J. S. 1869. The Subjection of Women. London: Longmans et al.
81. Müller, F. et al. 1997. Rechtstext und Textarbeit. Schriften zur Rechtstheorie Heft 179. Berlin: Duncker & Humblot.
82. Müller, F., R. Christensen. 2003. Juristische Methodik. Band II: Europarecht. Berlin: Duncker & Humblot.
83. Neumann, U. 1992. Juristische Fachsprache und Umgangssprache. In Rechtskultur als Sprachkultur, ed. Grewendorf, 110-121. Frankfurt a. M.: Suhrkamp.
84. Öhlinger, T. 1982. Methodik der Gesetzgebung. Legistische Richtlinien in Theorie und Praxis. Forschungen aus Staat und Recht vol. 57. Wien/New York: Springer.
85. Osgood, C. E. et al. 1957. The Measurement of Meaning. Urbana: University of Illinois.
86. Poscher, R. 2012. Ambiguity and Vagueness in Legal Interpretation. In The Oxford Handbook of Language and Law, ed. Tiersma/Solan, 128-144. Oxford University Press.
87. Radbruch, G. 1932. Rechtsphilosophie (3rd ed.). Leipzig: Quelle & Meyer.
88. Radbruch, G. 1948. Die Natur der Sache als juristische Denkform. Darmstadt: Wissenschaftliche Buchgesellschaft.
89. Radbruch, G. 1969. Einführung in die Rechtswissenschaft (12th ed.). Stuttgart: K. F. Koehler.
90. Rensmann, T. 2007. Wertordnung und Verfassung. Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung. Tübingen: Mohr Siebeck.
91. Riesenhuber, K. (ed.). 2010. Europäische Methodenlehre (2nd ed.). Berlin et al.: De Gruyter.
92. Rill, H. P. 1985. Juristische Methodenlehre und Rechtsbegriff. Gedanken zum gleichnamigen Buch von Franz Bydlinski. ZfV (Zeitschrift für Verwaltung) 10/1985: 461-473, and 577-590. Wien: LexisNexis.

93. Röhl, K.F., H.C. Röhl. 2008. Allgemeine Rechtslehre (3rd ed.). Köln/München: Carl Heymanns Verlag.
94. Röthel, A. 2004. Die Normkonkretisierung im Privatrecht. Tübingen: Mohr Siebeck.
95. Rüthers, B. 1986. Rechtsordnung und Wertordnung. Universitätsverlag Konstanz.
96. Rüthers, B. 1987. Wir denken die Rechtsbegriffe um ...: Weltanschauung als Auslegungsprinzip. Zürich: Edition Interform.
97. Rüthers, B. 2002. Demokratischer Rechtsstaat oder oligarchischer Richterstaat? JZ (JuristenZeitung) 2002: 365-371. Tübingen: Mohr Siebeck.
98. Rüthers, B. 2003. Rechtsdogmatik und Rechtspolitik unter dem Einfluss des Richterrechts. Rechtspolitisches Forum no. 15 (2003). Universität Trier: IRP.
99. Rüthers, B. 2005. Die unbegrenzte Auslegung (6th ed.). Tübingen: Mohr Siebeck.
100. Rüthers, B. 2008. Rechtstheorie (4th ed.). München: Beck.
101. Saussure, F. de. 1916. Cours de linguistique générale (ed. posthumously by Bally/Sechehaye). Lausanne/Paris: Payot.
102. Savigny, F.C. von. 1840. System des heutigen römischen Rechts (vol. I). Berlin: Veit & Comp.
103. Schanda, R. 2005. Auskunftsanspruch gegen Access-Provider über die IP-Adressen von Urheberrechtsverletzern. MR (Medien und Recht) 1/2005: 18-21. Wien: Verlag Medien & Recht.
104. Scheuerle, W. 1964. Das Wesen des Wesens – Studien über das sogenannte Wesensargument im juristischen Begründen. AcP (Archiv für die civilistische Praxis) 163: 429-471. Tübingen: Mohr Siebeck.
105. Scheuerman, W. E. 1996. Carl Schmitt's Critique of Liberal constitutionalism. The Review of Politics 58/2: 299-322. Cambridge University Press.
106. Schmitt, C. 1922/1928. Constitutional Theory. München/Leipzig: Duncker & Humblot. Firstly published in German in 1922, trans. 1928. Reprint Durham: Duke University Press, 2008.
107. Schmitt, C. 1927/1932. The Concept of the Political (1st ed./2nd ed.). Piscataway: Rutgers University Press.
108. Schmitt, C. 1934. Nationalsozialistisches Rechtsdenken. Deutsches Recht: Zentral-Organ des Bundes Nationalsozialistischer Deutscher Juristen, vol. 4/10: 225-229. Berlin: Deutsche Rechts- und Wirtschaftswissenschaft Verlagsgesellschaft.
109. Schmitt, C. 1934. On the three Types of Juristic Thought. Trans. Westport: Praeger, 2004.
110. Schneider, J. 1980. Information und Entscheidung des Richters: zu einer juristischen Entscheidungs- und Kommunikationstheorie automatischer Informationssysteme im Recht. Ebelsbach: Gremer.
111. Schramm, A. 2005. "Richterrecht" und Gesetzesrecht. Eine rechtsvergleichende Analyse anhand von Merkls Rechtsnormenlehre. Rechtstheorie 2/2005 (vol. 36): 185-208. Berlin: Duncker & Humblot.
112. Seiler, W. 1992. Höchstrichterliche Entscheidungsbegründung und Methode im Zivilrecht. Baden-Baden: Nomos.
113. Simon, J. 1981. Sprachphilosophie. Freiburg-München: Alber.
114. Slagstad, R. 1988. Liberal Constitutionalism and Its Critics. In Constitutionalism and Democracy, ed. Elster/Slagstad, 103-129. Cambridge University Press.
115. Soames, S. 2010. Vagueness and the Law. London: PhilPapers Ltd. (http://philpapers.org/rec/SOAVAT).
116. Staudinger, R., M. Thöni (eds.). 2010. Das Medizinische Gutachten im Verfahren. Wien: Verlag Österreich.
117. Stein, E., G. Frank. 2007. Staatsrecht (20th ed.). Tübingen: Mohr Siebeck.

118. Stoll, H. 1931. Begriff und Konstruktion in der Lehre der Interessenjurisprudenz. Tübingen: Mohr Siebeck.
119. Stomper, B. 2005. Zur Auskunftspflicht von Internet-Providern. MR (Medien und Recht) 2/2005: 118-122. Wien: Verlag Medien & Recht.
120. Teubner, G. 1971. Standards und Direktiven in Generalklauseln. Möglichkeiten und Grenzen der empirischen Sozialforschung bei der Präzisierung der Gute-Sitten-Klauseln im Privatrecht. Frankfurt: Athenäum.
121. Thaler, M. 1982. Mehrdeutigkeit und juristische Auslegung. Forschungen aus Staat und Recht vol. 59. Wien/New York: Springer.
122. Thorben, B. et al. 2009. A Study on the Lack of Enforcement of Data Protection Acts. In Next Generation Society, Proc. of the 3rd e-Democracy 2009, ed. Sideridis/Patrikakis, 3-12. Berlin et al.: Springer.
123. Vesting, T. 2007. Rechtstheorie. München: Beck.
124. Wagner, A., J. M. Broekman (eds.). 2011. Prospects of Legal Semiotics. Dordrecht: Springer Science+Business Media B.V.
125. Zippelius, R. 2006. Juristische Methodenlehre (10th ed.). München: Beck.