

PUTTING A LEASH ON THE COURT OF JUSTICE? PRECONCEPTIONS IN NATIONAL METHODOLOGY V *EFFET UTILE* AS A META-RULE

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The Court of Justice has time and again come under criticism for alleged methodological shortcomings and its dynamic approach towards interpretation. But who determines the boundaries between interpretation and admissible or inadmissible (ultra vires) creation of law? And where does the dividing line lie, given that the Member States have by and large accepted the most obvious creations of the Court of Justice (e.g. direct effect of directives, state liability etc.)? Any answer depends on our understanding of (a) the concept of interpretation as such and (b) the principle of effet utile – in a way the Court’s interpretive leitmotif and as I will argue, a meta-rule of interpretation (and as such a small contribution to a genuine European methodology).

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I. INTRODUCTION

[W]hoever hath an absolute authority to interpret any written, or spoken Laws; it is He who is truly the Law-giver to all intents and purposes; and not the Person who first wrote or spoke them.¹

Time and again, the Court of Justice has been harshly criticised for its dynamic approach towards ensuring ‘that in the interpretation and application of the Treaties the law is observed’.³ In German and Austrian doctrine this criticism mainly concerns alleged methodological shortcomings: Instead of *constructing*, the Court of Justice is said to be *creating* law.

Is such criticism tenable? Some theorists have argued, that it lies in the nature of language as such and of (general and abstract⁴) legal provisions in particular, that legal texts *always* require interpretation. Accordingly, their

¹ Benjamin Hoadly Lord Bishop of Bangor, *The Nature of the Kingdom or Church of Christ. A Sermon preach’d before the King 31 March 1717* (accessed via google.books) 12.

² Art 19 (1) Consolidated Version of the Treaty on European Union [2010] OJ C83/13 (TEU).

³ Eg Roman Herzog and Lüder Gerken, ‘Stoppt den Europäischen Gerichtshof FAZ (Frankfurt, 9 September 2008) <<http://www.cep.eu/presse/cep-in-den-medien/pressearchiv-2008/>> accessed 1 September 2012. For further details: Marco Laudacher, ‘Methodenlehre und Rechtsfindung im Gemeinschaftsrecht’ [2010] UFSjournal 85, 90; Leslie Manthey and Christopher Unseld, ‘Grundrechte vs. „effet utile“ – Vom Umgang des EuGH mit seiner Doppelrolle als Fach- und Verfassungsgericht’ [2011] ZEuS 323, 324; sceptical against such criticism Bernhard W Wegener, Art 19 EUV, in Christian Calliess and Matthias Ruffert (eds) *EUV/AEUV* (4th edn, CH Beck 2011) para 17.

⁴ ‘Generality’ in this context is not to be mistaken for vagueness: Max Black, ‘Vagueness. An Exercise in Logical Analysis’ (1937) 4 *Philosophy of Science* 427, 432.

meaning – and hence, their normative content (ie the norm⁵) – would solely depend on their interpretation.⁶ If so, the prevailing opinion in German and Austrian doctrine – assuming that the ‘wording’ or the ‘potential meaning’ of the legal text determines the boundary between interpretation (*Auslegung*) and creation of law (*Rechtsfortbildung*) – would be based on circular reasoning, limiting interpretation to the potential meaning of a legal text, which in itself depends on interpretation. However, this sceptical view, which will be referred to as ‘realist approach’, is highly contentious. Part of the (counter-)criticism is based on Ludwig Wittgenstein’s later language philosophy. According to Wittgenstein, ‘[i]nterpretations by themselves do not determine meaning’⁷; to the contrary, any such attempt would result in the paradox of infinite regress.⁸

Hence, who can determine the boundaries between interpretation and admissible or inadmissible (*ultra vires*) creation of law? And where could the dividing line lie, given that the Member States have by and large accepted the most obvious creations of the Court of Justice (e.g. direct effect of directives⁹, state liability¹⁰ etc)?

Clearly, any assessment of the Court’s case law depends on (and more or less openly expresses) an underlying methodological position. Finding an

⁵ According to Hans Kelsen, *Pure Theory of Law* (University of California Press 1978) 5, “Norm“ is the meaning of an act by which a certain behavior is commanded, permitted, or authorized’.

⁶ cf Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange 2009) 146; but also Karl Larenz, *Methodenlehre der Rechtswissenschaft* (2nd edn, Springer 1992) 93: ‘Es wäre ein Irrtum, anzunehmen, Rechtstexte bedürften nur dort der Auslegung, wo sie besonders ‚dunkel‘, ‚unklar‘ oder ‚widersprüchlich‘ erscheinen; vielmehr sind grundsätzlich alle Rechtstexte der Auslegung sowohl fähig wie bedürftig.’ Jochen Anweiler, *Die Auslegungsmethoden des Gerichtshofs der Europäischen Gemeinschaften* (Peter Lang 1996) 26 f describes interpretation as a process of translation which is a very graphic image with a view to the large number of official languages in EU law.

⁷ Ludwig Wittgenstein, *Philosophical Investigations* (3rd edn, Basil Blackwell 1986) para 198; cf Stefan Griller, ‘Gibt es eine intersubjektiv überprüfbare Bedeutung von Normtexten?’ in Stefan Griller, Karl Korinek and Michael Potacs (eds), *Grundfragen und aktuelle Probleme des öffentlichen Rechts: Festschrift für Heinz Peter Rill zum 60. Geburtstag* (LexisNexis 1995) 543 (550).

⁸ Wittgenstein (n 7) para 201; cf James Tully, ‘Wittgenstein and Political Philosophy’ in Cressida J Heyes (ed), *The Grammar of Politics* (Cornell University Press 2003) 17, 38.

⁹ Starting with Case 41/74 *Yvonne van Duyn v Home Office* [1974] ECR 1337.

¹⁰ Starting with Joined Cases C-6/90 and 9/90 *Andrea Francovich and Danila Bonifazi and others v Italian Republic* [1991] ECR I-5357; for state liability in connection with the judiciary cf Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

orthodox understanding of interpretation not tenable, a (modified) realist approach will bear significant consequences on our further understanding of the Court's interpretive practice in general and the *effet utile* principle – in a way the Court's interpretive leitmotif – in particular.

This paper will focus on sketching out a theoretical and methodological framework which will allow us to re-conceptualise *effet utile* as a meta-rule of interpretation. As such, *effet utile* can enhance the systematic assessment of EU law and be a fragment of a developing genuine European methodology.

II. PRELIMINARY CONSIDERATIONS AND TERMINOLOGY

I. *The Role of the Court of Justice*

According to art 19 (1) TEU, the Court of Justice¹¹ 'shall ensure that in the interpretation and application of the Treaties the law is observed'. Therefore, it not only decides upon the validity of EU law but also interprets it authoritatively and finally.¹² Moreover, the Court also regards it as its duty to grant comprehensive legal protection, even where it requires going beyond the black letter law of the Treaties.¹³ Arguably, the broad concept of 'law' in art 19 TEU (in contrast to the narrower notion of 'the Treaties') and the dynamic approach towards integration reflected in the Preamble of the TFEU¹⁴ justify such creation of law – at least to a certain extent.

In principle the Court of Justice and national (constitutional) courts use

¹¹ I will only consider the Court of Justice, not the General Court or any specialised courts and will therefore refer to it as the Court of Justice or simply the Court.

¹² cf Franz C Mayer, 'Multilevel Constitutional Jurisdiction' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2011) 399, 401 ff.

¹³ cf eg Joined cases 7/56, 3/57 to 7/57 *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community* [1957] ECR 39 para 55: 'The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.'

¹⁴ Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47. Just like the Preambles of the TEEC and the TEC it expresses the wish of the contracting parties 'to lay the foundations of an ever closer union'; cf Michael Potacs, 'Effet utile als Auslegungsgrundsatz' [2009] EuR 465, 474 ff.

similar methods of interpretation.¹⁵ According to the Court's settled case law 'it is necessary to consider not only [a provision's] wording but also the context in which it occurs and the objects of the rules of which it is part'¹⁶. However, strikingly, the Court by stressing *effet utile* considerations often goes beyond an isolated purposive interpretation of a specific provision (eg of secondary law) and draws on the aims or purpose of the Treaties as such instead.¹⁷ This openness inherent in the concept of *effet utile* evidently bears a considerable potential for conflict.¹⁸

2. *The Notion and Concept of Effet Utile*

Although the concept of *effet utile* plays a particularly prominent role in its case law, the Court of Justice has not 'invented' it. Quite the contrary – *effet utile* considerations can be traced back to Roman law (*ut res magis valeat quam pereat*) and have been explicitly codified in numerous modern legal orders.¹⁹

Also in international law, *effet utile* is regarded as 'one of the fundamental principles of interpretation of treaties'²⁰. However, effectiveness considerations are here sometimes counterbalanced by another interpretive rule (*in dubio mitius*), prescribing the 'restrictive interpretation of treaty obligations in deference to the sovereignty of states'²¹.

¹⁵ Christian Calliess, 'Grundlagen, Grenzen und Perspektiven europäischen Richterrechts' (2005) 58 NJW 929, 929.

¹⁶ Case C-223/98 *Adidas AG* [1999] ECR I-7099 para 23; Case 76/06 P *Britannia Alloys & Chemicals Ltd v Commission of the European Communities* [2007] ECR I-4443 para 21; with regard to primary law: Case C-156/98 *Germany v Commission* [2000] ECR I-6882.

¹⁷ Case 13/72 *Netherlands v Commission* [1973] ECR 27 paras 29 ff.

¹⁸ Utility considerations aside, it has to be borne in mind that the Treaties also contain 'counterweights' such as the principles of conferral, subsidiarity or proportionality (art 5 TEU) which may also have a certain influence on the interpretation of EU law. cf Potacs (n 14) 476 ff.

¹⁹ Eg art 1157 of the French Code Civil: 'Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui avec lequel elle peut avoir quelque effet, que dans le sens avec lequel elle n'en pourrait produire aucun.' For numerous further examples: Anna von Oettingen, *Effet utile und individuelle Rechte im Recht der Europäischen Union* (Nomos 2010) 41.

²⁰ Eg *Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Judgment)* [1994] ICJ Rep 1994, 6, para 51: 'Toute autre lecture de ces textes serait contraire à l'un des principes fondamentaux d'interprétation des traités, constamment admis dans la jurisprudence internationale, celui de l'effet utile' (references omitted).

²¹ At length Christophe J Larouer, 'In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts' [2009] Cornell Law School Inter-University Graduate Student Conference Papers <http://scholarship.law.cornell.edu/lps_clacp/22> accessed 1 September 2012.

In translations of early decisions of the Court of Justice, the French expression '*effet utile*' appeared in parentheses.²² English translations now frequently use the terms 'effectiveness'²³ or 'full effectiveness'²⁴, more rarely also 'full force and effect'²⁵ or 'practical effect'²⁶. In practice, however, these different terms refer to the same concept and lead to the same results.²⁷

Whereas distinguishing between *effet utile* in a narrow and broad sense²⁸ or a weak and strong *effet utile* may be useful, it is also important to keep in mind that it is *one* concept, a continuum between these poles. We do not have to push the idea of *effet utile* far to exclude an absurd interpretation or one that would render certain guaranteed rights 'meaningless'²⁹. Similarly the Court argues quite often that adopting a different interpretation 'would be tantamount to rendering [a certain right] ineffective and nugatory'³⁰. But *effet utile* in an increasingly stronger (or wider) sense also prevents that a legal act or provision is 'deprived of a not insignificant aspect of its effectiveness'³¹, or that its effectiveness is 'severely undermined'³² or even (just) 'impaired'³³.

III. METHODOLOGICAL (RE-)CONCEPTION OF THE PRINCIPLE OF EFFET UTILE

²² Eg Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825 para 5.

²³ Eg Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 para 20; Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53 para 23.

²⁴ Eg *Francovich* (n 10) para 33; *Simmenthal II* (n 23) para 23; Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433 para 21.

²⁵ Eg *Factortame* (n 24) para 20.

²⁶ Eg Case 70/72 *Commission v Germany* [1973] ECR 813 para 13.

²⁷ cf the *Simmenthal II* case (n 23) where the Court uses 'effectiveness' and 'full effectiveness' interchangeably.

²⁸ *Potacs* (n 14) 467.

²⁹ Case C-438/05 *Internatinoal Transport Workers' Federation and Finish Seamen's Union v Viking Line ABP and ÖU Viking Line Eesti* [2007] ECR I-10779 para 65. This would be a case where a weak *effet utile* 'suffices'.

³⁰ Case 157/86 *Mary Murphy and others v An Bord Telecom Eireann* [1988] ECR 673 para 10.

³¹ Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities* [1998] ECR I-1375 para 171.

³² Case C-450/06 *Varec SA v État belge* [2008] ECR I-581 para 39.

³³ *Simmenthal II* (n 23) para 20; *Factortame* (n 24) para 21.

While the flexibility of the concept of *effet utile* has become obvious from what has been said so far, its methodological nature remains somewhat unclear. The prevailing (German and Austrian) opinion regards *effet utile* as an aspect of teleological interpretation³⁴, a conception that will be challenged subsequently. Critically assessing an orthodox perception of interpretation in the light of a realist approach will bear significant consequences on the further understanding of the *effet utile* principle.

1. *Key Elements of an Orthodox Perception of Interpretation*

a. A Function of Knowledge – Focus on the Text

From a traditional (also referred to as orthodox) point of view, interpretation is a function of knowledge (not the will) and can be described as the text-based and text-bound finding of the correct meaning of a norm. Binding the exercise of state power to a published and accessible text is essential for the underlying understanding of the rule of law (*Rechtsstaat*). Paradigmatically Karl Larenz assumes, that interpretation means to neither add nor omit anything and just make the text speak for itself (by asking the *right* questions).³⁵ Consequently, proponents of this view argue, that the limits to interpretation can be determined by the meaning of the text itself.³⁶

b. Legislator's Intention

Intended deference to the legislator often leads to the question 'What was the legislator's intention?' This question is certainly prone to misapprehension. However, it has been argued quite convincingly that this question should not be understood as aiming at ascertaining any 'psychological' intention. Much more, it should be understood as an attempt to determine, what can be imputed to the legislator according to the general rules and habits of communication and the general linguistic usage.³⁷

³⁴ For an overview: Sibylle Seyr, *Der effet utile in der Rechtsprechung des EuGH* (Duncker & Humblot 2008) 103.

³⁵ Larenz (n 6) 255.

³⁶ *ibid* 210; Anweiler (n 6) 29; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn, Springer 1991) 423; Wegener (n 3) para 12. According to Arthur Meier-Hayoz the wording serves a double purpose 'Er ist Ausgangspunkt für die richterliche Sinnermittlung und steckt zugleich die Grenzen seiner Auslegungstätigkeit ab.' *Der Richter als Gesetzgeber* 42, quote from Larenz (n 6) 210.

³⁷ Heinz Peter Rill, 'Juristische Methodenlehre und Rechtsbegriff' [1985] ZfV 461, 577; Michael Potacs, *Auslegung im öffentlichen Recht* (Nomos 1994) 24.

These rules can be distinguished into semantics (meaning of words) and pragmatics (context, purpose) which are normally closely interlinked. Still, a purely pragmatic transgression of the semantic meaning can be methodologically admissible (eg analogy, teleological reduction).³⁸ This shows that the weighting of these methods varies and therefore does not follow a strict rule. Much more, all these criteria for interpretation form a flexible system³⁹, inevitably open to multiple (value) judgments of the interpreting individual.

c. Creation of Law

According to common opinion, the (admissible) creation of law is regarded less exceptional in EU law due to its gaps and its integrative and dynamic function.⁴⁰ Nevertheless the Court of Justice is not to be seen as a ‘substitute legislator’⁴¹ and has time and again been harshly criticised in this regard. Even though German doctrine sporadically questions the usefulness of the attempt to draw a line between interpretation and creation of law⁴², the practical effect of such scepticism exhausts itself in terminological sophistry. The result remains the same: One can and has to distinguish between admissible and inadmissible (*ultra vires*) creation of law. The latter comprises any interpretation *contra legem* and any acts in which the Court fails to maintain political neutrality and strictly refrains from policy making.⁴³

2. Critical Assessment – Positivism Revisited?

The orthodox view of interpretation described above seems to be rooted in a rather formalistic understanding of law. Contrasting this view with Hans Kelsen’s theory of law and Michel Troper’s ‘*théorie réaliste de l’interprétation*’⁴⁴ produces some fruitful contradictions, which challenge a

³⁸ Potacs, *Auslegung* (n 37) 34 ff.

³⁹ ‘*Bewegliches System*’, *ibid* 40.

⁴⁰ Ulrich Everling, ‘*Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft*’ [2000] JZ 217, 220.

⁴¹ cf Anweiler (n 6) 54.

⁴² Eg Larenz finds interpretation and creation of law ‘*nicht als wesensverschieden*’ (n 6 at 254), only the ‘*kreative Anteil des Subjekts*’ (*ibid* 255) varies. See also Seyr (n 34) 334 ff who coins creation of law as ‘*Weiterentwicklung*’ (development), but basically argues for the well known traditional limits to the CJEU’s jurisdiction; *ibid* 337 ff.

⁴³ Calliess (n 15) 932.

⁴⁴ cf Michel Troper, ‘*Constitutional Justice and Democracy*’ (1995-96) 17 *Cardozo L Rev* 273, 282 ff; cf also the critical assessment of Otto Pfersmann, ‘*Contre le neo-réalisme juridique. Pour un débat sur l’interprétation*’ (2000) 52 *Revue Française de Droit Constitutionnel* 789 ff.

widespread preconception of legal ‘interpretation’. Moreover, finding a considerable dose of realism in Kelsen’s pure positivism also challenges the formalistic narrative which is still widely spread e.g. in traditional Austrian legal thinking.⁴⁵

a. Kelsen – ‘[T]he court is always a legislator’

For Kelsen ‘the court is always a legislator’.⁴⁶ It ‘will always add something new’⁴⁷, no matter how detailed a general norm may be. Moreover, insofar as decisions of a court are binding upon future decisions in similar cases (precedents⁴⁸), courts create general norms and are ‘legislative organs in exactly the same sense as the organ which is called the legislator’⁴⁹.

However, this has nothing to do with any gaps in the legal order. Kelsen finds it logically impossible that the legal order has gaps. For him, the legislator (probably unconsciously) uses the ‘fiction of “gaps of law”’ to authorise e.g. courts to create new norms to avoid unjust or inequitable results in cases not previously considered (and therefore not covered by any general norm).⁵⁰ However, at the same time this fiction restricts the role of courts (as legislators) by creating an artificial pressure of justification.

To make things clearer: According to art 20 III of the German Basic Law, the judiciary is bound ‘by law and justice’ (*Recht und Gesetz*). The difference between interpretation and creation of law in the German context is clear: The consequences of interpretation are accepted as consequences of the legal provision itself, whereas any creation of law requires thorough justification.⁵¹

⁴⁵ cf more generally and most insightful John Gardner, ‘Legal Positivism: 5 ½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199.

⁴⁶ Kelsen, *General Theory* (n 6) 146; Hans Kelsen, *Reine Rechtslehre* (2nd edn, Österreichische Staatsdruckerei 1992) 252 ff.

⁴⁷ Kelsen, *General Theory* (n 6) 146; Larenz (n 6) insinuates quite the same: „Dabei ist für den Vorgang der Auslegung daß der Ausleger nur den Text selbst zum Sprechen bringen will, ohne etwas hinzuzufügen oder wegzulassen. *Wir wissen freilich, daß sich der Ausleger dabei niemals nur rein passiv verhält (...)*.“ at 201 (emphasis added).

⁴⁸ In this connection it seems noteworthy that an analysis of the ECJ’s case law for the year 1999 found that the most frequent method of interpretation was the reference to previous case law (ie precedents). Mariele Dederichs, ‘Die Methodik des Gerichtshofes der Europäischen Gemeinschaften’ [2004] *EuR* 345, 347.

⁴⁹ Kelsen, *General Theory* (n 6) 150.

⁵⁰ *ibid* 147.

⁵¹ cf Larenz (n 6) 257.

The Court of Justice is endowed with the authentic and final interpretation of EU law and therefore a veritable lawmaker, creating general norms. Moreover, it is a court of last resort and therefore – according to Kelsen – its decision ‘cannot be considered illegal, as long as it has to be considered a court decision at all’⁵². However, like the national courts, the Court of Justice depends on the willingness of the legal community to accept its decisions as binding and authoritative (and act accordingly). As a consequence, applying the yardstick of national methodology increases the (political) pressure of justification for the Court of Justice.

Interestingly, national constitutional courts, and in particular the German *Bundesverfassungsgericht*, still seem to enjoy greater trust in their respective legal communities than the Court of Justice.⁵³

b. Troper – Théorie Réaliste de l’Interprétation

At a first glance, the quintessence of Troper’s *théorie réaliste* appears quite provocative:

According to [the realist theory of interpretation] the legal system empowers some authority to produce an interpretation of the text. This authority [...] is free to give any meaning to the text, which therefore has no meaning of its own prior to the interpretation.⁵⁴

Troper’s theory is descriptive; its cognitive interest lies in the process of interpretation by legal authorities (‘authentic interpretation’), not the outcome or method used in any particular case. His main assumptions – which fundamentally challenge the cognitive (and normative) potential of legal science as such – are that interpretation is a function of the will (not knowledge) and that a legal text does not bear any objective meaning (due to the vagueness of language as a medium for communication).⁵⁵

⁵² Kelsen, General Theory (n 6) 155.

⁵³ It is noteworthy in this regard, that according to art 79 III GG not even the legislator could ‘correct’ certain decisions of the BVerfG; cf Manthey and Unseld (n 3) 324; Everling (n 40) 217 f.

⁵⁴ Michel Troper, ‘Constitutional Interpretation’ (2006) 39 Israel LRev 35, 36. However, Troper notes: ‘Of course, the fact that this opportunity exists does not mean that the courts always use it unreservedly.’ (n 44) 288.

⁵⁵ See also Michel Troper, ‘Marshall, Kelsen, Barak and the constitutionalist fallacy’ (2005) 3 Int’l J Const L (I.CON) 24, 34 f. A third assumption challenges the equation of meaning and intention. This question is dealt with above 3.1.2. It has to be mentioned however, that the variety of languages and cultures represented in the EU

Surprisingly, and even more remarkably, similar realist ideas have by and large been anticipated by Kelsen:

Traditional theory will have us believe, that the statute, applied to the concrete case, can always supply only one correct decision and that the positive-legal “correctness” of this decision is based on the statute itself. This theory describes the interpretive procedure as if it consisted merely in an intellectual act of clarifying or understanding; as if the law-applying organ had to use only his reason but not his will, and as if by a purely intellectual activity, among the various existing possibilities only one correct choice could be made in accordance with positive law.⁵⁶

Kelsen insinuates interpretation as a function of the will as well as the absence of any objective meaning.⁵⁷ For him the indeterminacy of a legal act can be intentional or unintended. Unintended indeterminacy stems from the immanent vagueness of language as a medium.⁵⁸

In order to guard against misunderstandings, a caveat is in place: The realist approach is largely based on the vagueness of language as a medium for (legal) communication. However, ‘[w]e cannot know that a word is vague, unless we know something about its use.’⁵⁹ According to Wittgenstein, ‘[f]or a *large* class of cases – though not for all – in which we employ the word “meaning” it can be defined thus: the meaning of a word is its use in the language.’⁶⁰ However, this use (or meaning) is not equivalent with the orthodox idea of a correct and objectively cognisable meaning of a legal text⁶¹, against which the realist approach outlined above, argues. It is important to differentiate the basic (yet truly fundamental) question of how words can have meanings from the question to what extent such meanings prescribe the outcomes of an authentic interpretation. Arguably legal interpretation presupposes a deep

legislation considerably complicates our finding of rules and habits of communication and the general linguistic usage.

⁵⁶ Kelsen, *Pure Theory* (n 5) 351.

⁵⁷ For the opposite opinion prominently Larenz (n 6): ‘Gegenstand der Auslegung ist der Gesetzestext als “Träger“ des in ihm niedergelegten Sinnes, um dessen *Verständnis* es in der Auslegung geht.’ 201 (emphasis added).

⁵⁸ Kelsen, *Pure Theory* (n 5) 350.

⁵⁹ Jeremy Waldron, ‘Vagueness in Law and Language: Some Philosophical Issues’ (1994) 82 *California LR* 509, 511.

⁶⁰ Wittgenstein (n 7) para 43.

⁶¹ Griller (n 7) 560.

understanding of the use of the legal language.⁶² ‘It is only in normal cases that the use of a word is clearly prescribed’⁶³; ‘interpretation begins when our conventional self-understandings break down and we do not know how to go on.’⁶⁴ Arguably courts of last instance which decide complex cases and apply indeterminate (‘contestable’⁶⁵) normative standards (like *effet utile*, proportionality etc.) are thus – as the realist approach suggests – relatively free in giving *specific* meaning to legal texts.

Frequently there will exist a number of ‘arguable norm-hypotheses’⁶⁶. In the absence of one correct meaning, there can also be no right decision⁶⁷, but only a decision taken by an authority granted jurisdiction by the legal order.⁶⁸ Consistently, the Court of Justice rejects any limitation to its interpretive competence:

It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.⁶⁹

⁶² Tully (n 8) 39 ‘Understanding grounds interpretation’; on the issue of infinite regress: According to Wittgenstein (n 7), ‘any interpretation still hangs in the air along with what it interprets and cannot give it any support. Interpretations by themselves do not determine meaning’ (para 198), much more there is always another interpretation standing behind it, which leads to the paradox of infinite regress (para 201). It should therefore be possible to disrupt the chain of infinite regress by substituting one expression of the rule for another (ie interpretation according to Wittgenstein, para 201), reaching a point where we can *imagine* a doubt, without actually doubting the meaning (cf para 84).

⁶³ Wittgenstein (n 7) para 142.

⁶⁴ Tully (n 8) 38 f.

⁶⁵ Waldron (n 59) 526: ‘different users disagree about the detailed contents of that normative standard’. In fact Waldron argues that these contestable terms, by inviting us to make value judgments do not ‘undermine the determinacy of their meanings. On the contrary, it is part of the meaning of these words to indicate that a value judgment is required ...’ 527. Contestable terms thereby become ‘a verbal arena in which we fight out our disagreements ...’ 530.

⁶⁶ Adamovich and others (eds), *Österreichisches Staatsrecht*, vol 1 (2nd edn, Springer 2011) para 03.009.

⁶⁷ Again Larenz (n 6): ‘Die Absicht, nur das auszusprechen, was der „richtig verstandene“ Text von sich aus be-sagt, macht die typische Haltung des Interpreteten aus.’ (255).

⁶⁸ In this sense ‘Creation of law is always application of law’ and vice versa, Kelsen, *General Theory* (n 6) 133, 149.

⁶⁹ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 3415 para 19.

Again, this corresponds with Kelsen's understanding of 'authentic [ie law-creating] interpretation'⁷⁰ which is strictly limited to law-applying organs.⁷¹ Legal science is much more limited: 'Jurisprudential interpretation can do no more than exhibit all possible meanings of a legal norm. Jurisprudence as cognition of law cannot decide between the possibilities exhibited by it but must leave the decision to the legal organ who, according to the legal order, is authorized to apply the law.'⁷²

c. In a Nutshell

Legal science (which is no legal authority) lacks the criteria to evaluate whether an authentic interpretation is right or wrong, whether e.g. the Court of Justice has taken 'the right decision'. This is merely a question of legal policy, not science or theory.⁷³

Authentic interpretation is then less of a 'theoretical-cognitive' process but much more the exercise of 'practical power', factually limited (to some extent!) by the acceptance within the legal community, therefore requiring sound reasoning and the adherence to certain argumentative standards.⁷⁴ Its validity depends on the authority of the organ, not the content of this result. Once a decision has become final (*res iudicata*), the validity of the created norm can no longer be rescinded. Therefore Kelsen notes: 'It is well known that much new law is created by way of such authentic interpretation, especially by courts of last resort.'⁷⁵

However, there is a second side to it: whereas (almost) any interpretation by a court of last instance may be valid⁷⁶, its effectiveness depends on the acceptance within the legal community. Hence there is a certain pressure to actually stick to general rules and habits of communication and the general linguistic usage.

3. Consequences – *Effet Utile as an Interpretive Meta-Rule*

If we accept the above established conception of interpretation, ie that there is virtually no grey area between interpretation and (inadmissible)

⁷⁰ Kelsen, Pure Theory (n 5) 354.

⁷¹ *ibid* 354 ff.

⁷² *ibid* 355. cf Adamovich and others (n 66) para 03.010.

⁷³ Kelsen, Pure Theory (n 5) 352 eg reminds us that there exists no legal criterion to decide whether to apply an *argumentum e contrario* or an analogy.

⁷⁴ At length Ralph Christensen and Markus Böhme, 'Europas Auslegungsgrenzen' [2009] *Rechtstheorie* 285, 294 ff.

⁷⁵ Kelsen, Pure Theory (n 5) 355.

⁷⁶ Apart from *ultra vires* or non-existent acts.

creation of law, the latter appears as a catchword, aiming at constraining the Court of Justice substantially – but in a methodological (and seemingly objective) *disguise*. If the threat is serious enough, the Court may even change its interpretation – however for political, not legal reasons.

Similarly, *effet utile* might serve as a political slogan, aiming at convincing the legal (or much more political) community of the Court's rationality.

However, if we can derive interpretive meta-rules from the Court's argumentative patterns we can assess the *process* against the standards of such meta-rules and the Court's consistency (or arbitrary deviance) in their application.

Arguably *effet utile* is one of these meta-rules. It is not a rule of general linguistic usage and neither part of semantics nor pragmatics but logically comes into play, once potential meanings (or norm-hypotheses) have been established. It serves as a guideline without being an interpretive method itself.⁷⁷ As mentioned above it is a flexible concept, varying gradually but not qualitatively.⁷⁸ An absurd interpretation undermines the utility of a norm fundamentally. Hence preserving the validity of a provision can be understood as a very basic expression of furthering its utility.

Effet utile functions as a rule of choice and therefore logically presupposes a variety of arguable norm-hypotheses.⁷⁹ It cannot be applied in the absence of any doubt or alternatives. Even the avoidance of an absurd interpretation presupposes at least one arguable alternative (not absurd) meaning. Exceptionally this may not be the case: 'The law simply prescribes something nonsensical. Since laws are man-made, this is not impossible.'⁸⁰

In a situation where the Court has to choose from alternative arguable norm-hypotheses, *effet utile* emphasises or even prioritises the teleological aspects. Among alternative meanings, it favours those furthering the effectiveness of EU law, putting a twofold emphasis on teleological aspects (with a view to the provision but also EU law in its entirety). It functions as an exclusionary rule of choice between tentative interpretive results.

This may sound rather trivial but the added value of this conception lies in an enhanced rationalisation:

⁷⁷ Marcus Mosiek, *Effet utile und Rechtsgemeinschaft* (LIT 2003) 7.

⁷⁸ Differently von Oettingen (n 19) 34 f.

⁷⁹ cf von Oettingen (n 19) 91.

⁸⁰ Kelsen, *Pure Theory* (n 5) 250.

According to the prevailing opinion a result that – semantics and pragmatics considered – cannot convincingly be found as consistent with the intention of the legislator, amounts to creation of law.⁸¹ What may be considered ‘convincing’ has to be decided on a case by case basis with regard to the result of this interpretive act, ie the meaning, hence the norm itself. However, according to the view advanced here, legal science – lacking any legal authority – can develop norm hypotheses but not *decide* which result may be regarded as convincing.

What legal science can offer instead is an evaluation of the process of interpretation. Assuming that the traditional methods of interpretation form a flexible system, their relative weight in a specific case is governed by meta-rules of interpretation.⁸² Hence, the admissibility of a certain interpretation depends on the plausibility of this weighing process. According to the opinion put forward here, any result that is arguable within a given set of meta-rules must be considered ‘convincing’. Contrariwise, an inadmissible creation of law is one that violates (ie transgresses) these meta-rules *in toto*.

IV. EFFET UTILE IN THE CASE LAW OF THE COURT OF JUSTICE

1. *Obvious Creations of Law*

Due to the vast number of judgments referring to *effet utile*, the following section can only present a very small selection of relevant cases. It has been mentioned in the beginning that the Member States have by and large accepted the most obvious creations of law, many of them can be seen as cornerstones of the EU legal order.⁸³ In accepting these decisions, the Member states have accepted arguments based on weak and strong *effet utile* considerations alike. However, this shows that the Court’s own effectiveness strongly depends on the acceptance of its reasoning in the legal community and some authors argue that only this acceptance can

⁸¹ Potacs, *Auslegung* (n 37) 41. Either the result cannot be established at all or *better* reasons indicate a different result: *ibid* 277.

⁸² Another meta-rule was formulated by the Court of Justice in the CILFIT decision (n 69), namely ‘that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States’ (para 19).

⁸³ Rather obvious creations of law can also be found in other fields, concerning eg questions of residence and access to social benefits and have been criticised particularly harshly; cf Case C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 and the criticism of Calliess (n 15) 932 and below.

prove the Court right or wrong.⁸⁴

The direct effect of directives⁸⁵ serves as a prime example: The Court found it ‘incompatible with the binding effect attributed to a directive by [art 288 TFEU] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the *useful effect* of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.’⁸⁶ Once the Court’s argument had been accepted it dropped the reference to *effet utile*⁸⁷ and applied direct effect without reiterating a detailed reasoning.⁸⁸

Subsequently some of the more contentious decisions will be discussed. These borderline cases show argumentative shortcomings but may also serve as departure points for future considerations on refining *effet utile* as an interpretive meta-rule.

2. *Borderline Cases*

a. Non-Discrimination on the Grounds of Age

At the time the Court’s *Mangold* decision⁸⁹ was among the particularly sharply criticised decisions.⁹⁰ The Grand Chamber held that the principle of non-discrimination on grounds of age constitutes a (directly effective) general principle of EU law. The difficulty with its reasoning was that the Treaty of Amsterdam had actually introduced the prohibition of discrimination on the grounds of age (Art 13 TEC), but only as a provision authorising the enactment of secondary law. The critics argued that such an authorisation implies that the Member States particularly did not want to introduce any directly effective prohibition of discrimination on grounds of age. However, recalling Kelsen’s view, this is a typical situation where the Court *has to* take a policy decision. There exists no legal criterion to decide between an *argumentum e contrario* and an analogy.⁹¹

⁸⁴ cf Everling (n 40) 227.

⁸⁵ *van Duyn* (n 9).

⁸⁶ *van Duyn* (n 9) para 12 (emphasis added).

⁸⁷ Eg Case 152/84 *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723 para 47.

⁸⁸ Eg *Becker* (n 23); cf von Oettingen (n 19) 133 ff.

⁸⁹ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

⁹⁰ Most prominently Herzog and Gerken (n 3).

⁹¹ Kelsen, Pure Theory (n 5) 352.

b. Fundamental Freedoms and European Citizenship

The Court of Justice regularly relies on *effet utile* in cases involving Fundamental Freedoms, often broadening their scope or limiting exceptions⁹² and other restrictions which obstruct the exercise of a Fundamental Freedom or simply make it less attractive⁹³. Finally, it also constructs potential justifications for exceptions narrowly.⁹⁴

Interestingly the Court takes a similar approach towards European Citizenship. The Grand Chamber decision in Ruiz Zambrano⁹⁵ is quite illustrative in this regard: The Court held that ‘Article 20 TFEU precludes national measures which have the effect of depriving [minor, and dependent] citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.’⁹⁶ The ‘genuine enjoyment of the substance of the [citizen] rights’ arguably means the full effectiveness, the *effet utile*, of these rights. The refusal to grant a right of residence but also a work permit to a third country national with such ‘dependent minor children in the Member State where those children are nationals and reside’⁹⁷ is likely to produce exactly this effect:

It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.⁹⁸

⁹² Eg Case 2/74 *Jean Reyners v Belgian State* [1974] ECR 631 concerning the right to establishment (and exceptions thereto) with regard to the profession of lawyers.

⁹³ cf Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, with regard to the freedom to provide services.

⁹⁴ cf Case C-355/98 *Commission v Belgium* [2000] ECR I-1221 paras 28 ff with regard to public policy and security.

⁹⁵ Case C-34/09 *Gerardo Ruiz Zambrano v Office nationale de l'emploi (ONEm)* [2009] (ECJ 8 March 2011).

⁹⁶ *ibid* para 42.

⁹⁷ *ibid* para 43.

⁹⁸ *ibid* para 44.

Already in *Zhu and Chen*⁹⁹ the Court argued that the refusal to grant a right of residence to the carer would deprive a child's right of residence of any useful effect, ie *effet utile*. Terminological differences aside, the *Ruiz Zambrano* judgment increases this *effet utile* in two regards: Firstly, third party nationals with dependent minor children who are Union Citizens gain unrestricted access to the European labour market. Secondly, the Court deduces this right from the status of the children as Union Citizens, regardless of any cross boarder reference and independently from the exercise of any Fundamental Freedom.¹⁰⁰

Indeed, the Court first acknowledges that Directive 2004/38¹⁰¹ explicitly limits its scope to Union Citizens 'who move to or reside in a Member State other than that of which they are a national'¹⁰². However the Court subsequently bases its decision directly on Art 20 TFEU, without mentioning, that these rights of Union Citizens 'shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder [ie Directive 2004/38!]'^{103 104}.

With a view to methodological stringency, the failure to mention this clause is a regrettable weakness. The Court's extremely short, if not erratic reasoning does not contribute to any further development of *effet utile* as a meta-rule. However, such contentious cases fuel the discourse and may therefore serve as points of departure for further considerations on *effet utile*.

V. CONCLUSION

The fiction of *the one* correct meaning of a legal provision serves at least two purposes. On the one hand, it is a basic pre-condition for (the ideal or illusion of) legal certainty. On the other hand it legitimises (political) value

⁹⁹ Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925 para 45.

¹⁰⁰ cf Krzysztof Chmielewski, 'Das Aufenthaltsrecht von drittstaatsangehörigen Familienangehörigen von Unionsbürgern nach dem Urteil des EuGH C-34/09' [2011] *migralex* 74, 77.

¹⁰¹ Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

¹⁰² *ibid* art 3 (1).

¹⁰³ Art 20 (2) TFEU.

¹⁰⁴ Loic Azoulai, "Euro-Bonds" The *Ruiz Zambrano* judgment or the Real Invention of EU Citizenship' (2011) 3 *Perspectives on Federalism* 31, 35.

judgments as scientific truth or legal necessity.¹⁰⁵ It is definitely more sophisticated – yet similarly flawed – to translate value judgments into methodological necessities.

A realistic approach towards interpretation fruitfully challenges widespread (more orthodox) beliefs concerning the process of interpretation but also the self-conception of law as a science (and legal scholars as scientists). What is more, a close reading of Kelsen – the proto-positivist – finds that he anticipates a lot of the realistic input and therefore also challenges the formalistic-positivistic narrative (e.g. in traditional Austrian legal thinking). Keeping in mind that language as a medium for law is vague but also based on conventions, I argued for a moderate realistic point of view. Even in the absence of an objective meaning a law-applying organ cannot arbitrarily ascribe *any* meaning to a norm. What is more the Court of Justice depends on the acceptance of its decisions within the legal community – not in terms of validity but in terms of effectiveness. Provocatively it could be argued that a decision which lacks such acceptance may be valid but *wrong*.

What does this mean for the (re-)conception of *effet utile*?

With a view to the Court of Justice as a court of last resort, the particularities of interpretation in the context of EU law and the sheer amount of case law referring to *effet utile* the analysis of argumentative patterns proves somewhat intricate. *Effet utile* could then merely be the leitmotif in the re-narration of a never-ending story – case by case. *Effet utile* can also be regarded as a political slogan aiming at convincing the legal (or much more political) community of the Court's rationality.

And finally, to the extent that the Court of Justice enters into a discourse and makes its understanding of *effet utile* and the aims and purposes of the Treaties transparent, we can derive meta-rules of interpretation from these argumentative patterns. Recalling that the Court ultimately depends on the acceptance of its decisions in the legal community, it has to be said that some of the Court's decisions, like *Ruiz Zambrano*, are disappointing in terms of argumentative style.

Whereas it appears untenable to criticise the Court of Justice on grounds of national methodological preconceptions, a re-conception of *effet utile* as a meta-rule of interpretation may enhance the systematic assessment of EU law and be a small fragment of a developing genuine European methodology.

¹⁰⁵ Kelsen, *Pure Theory* (n 5) 356.