

Pitfalls in legal argumentation

Where interpretation overrides the legal text

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Cesare Bartolini

Interdisciplinary Centre for Security, Reliability and Trust (SnT),
University of Luxembourg

① Start

② Easy

③ Medium

④ Hard

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- ▶ Retrieving information such as
 - ▶ Preconditions (when it applies, where...)
 - ▶ Deontic modality (obligation, permission...)
 - ▶ Subjects (obligation bearer...)
 - ▶ Content (what must be done...)
- ▶ Text similarity and other techniques
- ▶ Parsing the legal text and related provisions

- ▶ No law without interpretation (Ehrlich)
- ▶ Interpretation goes beyond the literal meaning
 - ▶ Sometimes drastically
- ▶ Several ways to interpret a provision
 - ▶ Hierarchy of norms
 - ▶ Extensive / restrictive interpretation
 - ▶ *Analogia legis / analogia iuris*
 - ▶ Fundamental principles
- ▶ These **must** suffice

- ▶ Law = interpretation
- ▶ Mining the law \neq mining the legal text
- ▶ But interpretation may be quite confusing
- ▶ Some example from the Italian civil code (and beyond)

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“I would like, if I may, to take you on a strange journey.”

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Let's talk about death

Art. 698 c.c. (*unofficial translation*)

The provision of a will, bequeathing several persons in subsequent order the usufruct [. . .], is valid only for those that, at the time of death of the testator, are the first to benefit from it.

Art. 698 c.c. (*unofficial translation*)

The provision of a will, bequeathing several persons in subsequent order the usufruct [. . .], is valid only for those that, at the time of death of the testator, are the first to benefit from it.

- ▶ Bequeathing the usufruct in successive order is prohibited
- ▶ Within the section on *fideicommissum* (artt. 692–699)
 - ▶ Vespasian's will
- ▶ Within the chapter on **substitutions** (artt. 688–699)

Art. 795 c.c. (*unofficial translation*)

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- ▶ Reference to testament law for substitutions in donations

Art. 796 c.c. (*unofficial translation*)

The donor **may reserve** the usufruct over the donated goods for himself and for another person, or several persons, after himself, but **not further**.

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- ▶ Literally, the provision contains two deontic modalities:
 - ▶ a **permission**
 - ▶ a **prohibition**

- ▶ Art. 795 references all the chapter on substitutions
 - ▶ Including art. 698 on successive usufruct
- ▶ Pursuant to art. 795, successive usufruct is not allowed in donations
- ▶ Art. 796 allows **only one** successive usufruct after the reserve
- ▶ Art. 796 is an **exception** to art. 795
- ▶ Without art. 796, successive usufruct would not be allowed
 - ▶ The prohibition part is irrelevant
 - ▶ Art. 796 contains a **permission**

- ▶ A successive usufruct is **not** a *fideicommissum*
 - ▶ There is no transmission of the right
- ▶ Art. 795 does not reference a chapter, but substitutions
 - ▶ It does **not** reference art. 698
- ▶ Art. 795 does not prohibit successive usufruct in donations
- ▶ Art. 796 allows **only one** successive usufruct after the reserve
- ▶ Art. 796 is not related to art. 795
- ▶ Without art. 796, successive usufruct would be allowed without limits
 - ▶ The permission part is irrelevant
 - ▶ Art. 796 contains a **prohibition**

Deontic modality changes

- ▶ Standalone: permission + prohibition
- ▶ Formal reference: permission
- ▶ Substantive reference: prohibition

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- ▶ Applies to a partnership (with unlimited liability of the owners)
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- ▶ Or is it?

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Why not “the partnership”?

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If the partnership pays

- ▶ Equity = 80K
- ▶ 2 partners with equal shares
- ▶ Each has 40K (1/2) equity

If the others pay

- ▶ Equity = 120K
- ▶ 2 partners with equal shares
- ▶ Each has 60K (1/2) equity

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- ▶ Decision 291/2000
 - ▶ The case started in 1984
- ▶ Art. 2284 is **wrong**
- ▶ The correct formulation is “the partnership”
- ▶ The obligation bearer is changed

Obligation bearer changes

- ▶ Literal: the other owners
- ▶ Systematic: the partnership

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Let's talk about parking

Art. 41-*sexies* l. 1150/1942

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- ▶ Provision directed at public administration (in releasing building licences)
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THEN HELL BROKE LOOSE

What did the Cassation do?

- ▶ At least five decisions in the '80s
 - ▶ Four in United Sections
- ▶ The purpose of this law is to guarantee that every building has suitable parking
- ▶ Building and parking cannot be separated
- ▶ This law **concerns estate sale deeds**
- ▶ Deeds cannot transfer a property without its parking spot
 - ▶ (Or the other way around)

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Bottom line

One can buy a parking lot, but not use it.



SENSE

This picture makes none



Everything changes: deontic modality, bearer, content...

- ▶ Doctrinal:
 - ▶ Obligation
 - ▶ PA (or builder)
 - ▶ Authorization to build
- ▶ Court:
 - ▶ Constitutive statement
 - ▶ Seller / buyer
 - ▶ Real right of use