COGNITIVE INTENT DE *LEGE LATA*?

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Abstract
This study aims to analyze whether the legal concept of intent in Brazil prevents the adoption, de *lege lata*, of a cognitive notion of intent. The study is relevant because if it is understood that the legislator literally decided the issue definitively, judicial interpretation will be predetermined, and scientific debates on the topic will be reduced to a sense de *lege ferenda*. From a structural perspective, the study initially and briefly presents the reasons for cognitive theories of intent, then analyzes the distinction between rules of conduct and rules of imputation, in order to conclude whether the principle of legality applies, with full force, to the norms set forth in the General Part of the Penal Code. Subsequently, the work outlines how to conceive a concept of intent and then examines the use of the definition technique by the Brazilian legislator, ultimately evaluating whether, literally and based on other traditional hermeneutic canons, there are formal limits to the internalization of a concept of intent without will. In the end, the study answers negatively to the formulated research question.

Keywords
Legality. Criminal interpretation. Literalism. Imputation. Intent.

Summary

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1 INTRODUCTION

It is common in Brazilian doctrine to define intent as awareness and the will to carry out the objective type.[2] However, more recently, an outline of a redefinition has been developed, and voices have emerged that begin to dispense with the will[3] from the understanding of intent[4].

[2] For all: HUNGRIA; FRAGOSO 1978, 109.

[3] Among them, see: VIANA 2017; MARTELETO FILHO 2019; GRECO 2009, 885-905. It is undeniable that the issue has been addressed in traditional manuals. The point is that the discussion did not develop at a verticalized level, and it was common to merely mention the past existence of a conflict between the theories of will and the theories of representation, with most indicating that the issue had been overcome with the prevalence of a volitional understanding of intent. For all: GARCIA 1954, 249 et seq; MARQUES 1965, 196 et seq.

[4] The correct translation of the term "dolo" into English comes up against the problem of the lack of a category that corresponds to the term "dolo" in the Roman-Germanic tradition. In the categorization of the Model Penal Code, for example, the different manifestations of mens rea could be broken down into the concepts of purpose, knowledge, recklessness and negligence. However, in the binary systems of subjective imputation, according to the traditional conception, "dolo" includes not only will, but also knowledge. One possible translation would be to use the Latin term "dolus", which is also problematic since the term "dolus" is not really part of English grammar. So we opted for "intent", without ignoring the fact that this term may suffer from some imprecision. Noting this problem: AMARAL 2021, 397, note 1. Addressing the models of personal responsibility in the two traditions mentioned, with references: DUFF 2021, 47-77.

In this space, with modest pretensions,[5] we intend to address only one of the obstacles to the internalization of a cognitive notion of intent, namely the text of the law, so that the problem question can be posed as follows: does the reference to "*wanting*" or "*assuming the risk*" in art. 18, I, of the Penal Code constitute an insurmountable obstacle to the adoption of a concept of intent without will? Although there is a predominant interpretation pointing to an exclusive compatibility with the volitional theories of intent,[6] the existence of studies[7] that answer this question in the negative, coupled with the realization that the grammatical-literal dimension does not answer all problems of interpretation, indicate that the matter is worthy of some scientific confrontation. If the answer is positive, the conceptual discussion only makes sense *lege ferenda*, with the direct application conditioned on legislative change.

2 WHY COGNITIVE INTENT?

The theoretical discussion around the necessary components of intent has practical relevance. Starting from a *base case*,[8] variations in the

[5] For reasons of space, the bibliographical references will be reduced in this work.

[6] For all: TAVARES 2018, 265-266.

[7] Cf.: VIANA 2017, 284; GRECO 2004, 17; AMARAL 2021.

[8] In this sense, consider that "X" had comorbidities that made it inadvisable to perform tooth extraction surgery. "Y", his dentist, despite being aware of "X's" medical history, performs the procedure to extract five upper teeth. As a result of complications from the surgical procedure, "X" dies. Assuming that the objective type is fulfilled, what is the subjective liability of "Y"? Based on: BRASIL 2020. Given

volitional and cognitive theories can provide different solutions for calibrating subjective liability in borderline cases. In any case, whoever suggests abandoning the volitional element must have good reasons, considering the historical relevance of the will in the imputation judgment. Since the introduction of the word *imputation* into the vocabulary of natural law, it has been said that the main property of human actions produced and directed by the understanding and the will is their susceptibility to imputation.[9] Even when imputation was replaced by the concept of *causality,*[10] the will soon regained its position as the centrality of evaluative judgment, regaining its prominence with finalism by occupying the role of "backbone of the final action"[11] so as not to relegate the typical action

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the case, a theory of representation that adopts the *possibility of knowledge of the typical result* as a reference would tend to affirm intent, because, as there was a negative recommendation, death resulting from the extraction of multiple teeth was easily foreseen as possible. If, however, the parameter is the high *probability of* the result, perhaps another theory of representation would deny intent. On the other hand, an understanding of cognitive intent based on the *representation of a risk* could affirm criminal intent, since the extraction created a high quality risk to the patient's life. Finally, a theory of will or consent could deny intent, given the lack of evidence of *approval* or *indifference* to the result. The latter was even adopted by the Superior Court of Justice (STJ) in the real case that inspired the example developed. All theories have been reduced to a minimum. For a complete overview, see: VIANA 2017.

[9] Therefore, the agent "the strongest and closest reason why a Man cannot complain of being made responsible for a certain Action is the fact that he produced it with knowledge and will, in a mediated or immediate way". Cf.: MENDES 2007, 36-37.

[10] MIR PUIG 2003, 2.

[11] WELZEL 1964. 59-60.

to mere blind causality. Likewise, for moral accountability, the will was the object of intense philosophical investigation, also receiving attention from the *psy* sciences, ethics, theology and the social sciences.[12]

Given this scenario, the cognitivist proposals justify the abandonment of volition based on the search for greater rationality in subjective imputation, with the aim of "situating intentional conduct in its proper place" and offering more convincing answers in doubtful cases.[13] This is because, in addition to the lack of definition of the content of the volitional state, it is argued that if the will of the person acting is considered decisive for intent, the agent himself would be given the power to decide the subjective quality of his behavior. In addition, the pessimism about proving mental states would also reinforce the usefulness of abandoning it, since it is difficult to prove the existence of the will of the agent who denies it in a way that is compatible with the presumption of innocence. Finally, it is argued that it is not the fact that the action is desired or assumed that makes it more dangerous, but the way in which the behavior itself is carried out,[14] the only relevant factor for a criminal law of the fact.

In the Brazilian context, it is possible to identify the existence of at least two major cognitivist groups. On the one hand, there are authors

[12] Nilo Batista has made substantial inroads into works of this nature. Cf.: BATISTA 2023, 144 et seq. Also covering philosophical studies: TAVARES 2018, 253 et seq.
[13] VIANA 2017, 288.
[14] All the arguments are by Luís Greco. Cf.: GRECO 2009, 885-905.

who argue that intent depends on the effective assessment of knowledge, since this is the indispensable element to generate *mastery* over the behavior so that the State can reproach the individual more severely.[15] On the other hand, it is argued that it is not relevant whether the subject was aware of the typical elements, but whether, due to the circumstances in which he found himself, he *should have known* what was happening in order to avoid the action prohibited by the Law, dispensing with factual data in order to assess intentional imputation based on a relationship of communication between the subject's conduct and the norm.[16]

3 STARTING ASSUMPTIONS

In order to answer the problem-question, three assumptions must first be made. Firstly, the study starts by differentiating between *rules of conduct* and *rules of imputation*, given the logical and pragmatic distinction between them.[17] On the one hand, *rules of conduct* spell out the universe of criminally prohibited behavior, functioning both *ex ante* - to guide the lives of the citizens to whom the rules are addressed - and *ex post* - to provide measurement parameters for the

[15] Understanding thus: GRECO 2009, 885-905; VIANA 2017.

[16] Adopting this position, as I see it: MARTELETO FILHO 2020, 128 e 149. The author, however, states that one can only speak of a 'partial normativization' because the *epistemic principle* prevails, de *lege lata*, in the realm of subjective attribution, which prevents equating *'effective ignorance'* (i.e., lack of awareness of the typical circumstances) with intent.

[17] MOURA 2019, 82-83.

judge to assess the social disvalue of the behavior in question. On the other hand, the *rules of imputation* establish the conditions under which a conduct can be attributed to someone as an expression of the exercise of their freedom, functioning only *ex post* and addressed only to judges.[18] Thus, intent is situated at a later analytical level than the verification of the violation of the norm of behavior, serving as the *basis* for imputation, because once it is affirmed, it is concluded that the subject deserves greater subjective disapproval.

Secondly, the paper takes legality in a *deontological* sense.[19] Because of this unconditioned nature, legality is not at the service of any of its stated foundations, but only for the protection of the individual. For this reason, if the decisive thing is that the law affects freedom by considering a certain behavior punishable, it doesn't matter, for the purposes of prohibiting arbitrariness, whether the punishment stems from the expansion of a criminal type or the shortening of a rule excluding imputation. As punishability is only perfected through this combination, the rules of imputation underpin punishment, so that the rules of the General Part must also be covered by the guaranteeing notion of legality.

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[18] MOURA 2019,87-88. Similarly, José de Faria Costa distinguishes the elements of the type from the conceptual *instrumentarium of* the General Part. Cf.: FARIA COSTA 1993, 364-365.

[19] On the emergence and role of legality as the starting point of scientific criminal law: BRANDÃO 2014, 72. On the foundations of *nullum crimen, nulla poena sine lege*: MOURA 2025, 322-324; VIANA 2021, 104; COSTA ANDRADE 2001, 76. On the deontological character defended here: MOURA 2015, 344-348.

Thirdly, it is understood that intent *itself* is a legal term, with no real or ontological existence. Thus, between understanding intent as something that *is* and conceiving of intent as a *quality of* action, the second position is more accurate, so that intent, as a legal term, is a theoretical construction for interpreting human behavior, with the meaning attributed contextually by the interpreter.[20] In the end, any conceptualization of intent, no matter how perfect or prestigious, is only one of several possible ones.[21] For this reason, there is no *correct* concept that must be *discovered* by criminal dogmatics, since it is the legal-penal doctrine that must *attribute* to the term "intent" the meaning that seems preferable to it, in accordance with the needs and objectives of criminal law.[22]

4 THE USE OF THE DEFINITION TECHNIQUE BY THE BRAZILIAN LEGISLATOR

[20] For these reasons, it is said that the idea of *imputation* lies at the basis of interpretative activity, since, from the interpretation of words, *meaning* is imputed to things, which is done at each of the levels where language is used. MIR PUIG 2003, 6 et seq. Behind this question lies a philosophical controversy about whether concepts adhere to ontologies or not (realism *versus* nominalism), which seems to have some relation to another principiological divergence, namely finalist ontologism *versus* normativism. On this last question and the extent to which it is neglected in discussions of intent: SCHÜNEMANN 2013, 128.

[21] QUEIROZ 2023, 33.

[22] The same applies to other terms, such as "kill", because "the mission of doctrine and jurisprudence is to *impute* to the verb kill the preferable meaning for the purposes of criminal law". MIR PUIG 2003, 5 et seq.

In Brazil, recent works that have directly criticized the understanding of cognitive intent have mentioned the legislator's choice of a concept with a double psychological reference.[23] It remains to be seen whether the legal definition prevents the imputation of a different meaning or whether the linguistic-legal convention itself admits a meaning such as that attributed by cognitive theories.

According to the prevailing opinion in the literature, the principle of legality requires that the interpretation of *legal types* and the *legal rules on which imputation is based* be limited to the literal content of the terms used by the legislator.[24]

Faced with this apparent prohibition, a first counter-argument that could be raised would be the construction of the legal concept of *conscious negligence*. In this sense, the Brazilian legislator, in article 18, item II, of the Penal Code, establishes the types of negligence, without, however, indicating express parameters that authorize the development of a *conscious* notion. In view of this, a cognitivist could

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[23] TAVARES 2018, 265-266. It is stated that "intent without will violates the first Iheringuian rule of dogmatics, which is the prohibition of denial, a rule responsible for the very name 'dogmatics': the law is a dogma; interpretable, but never deniable." BATISTA 2023, 140. Likewise, it is concluded that "although the doctrine has ample freedom to propose whatever it wants in terms of intent and other issues, criminal cases cannot be resolved outside the law and the Constitution, under penalty of violating the principle of legality". QUEIROZ 2023, 46.

[24] MOURA 2015, 338.

point out that, in the same way that conscious negligence was developed doctrinally, *intent without will* could also be developed doctrinally, since it is a question of attributing meaning to a concept that is defined according to the purposes chosen by the legal system.

However, this argument is flawed, as it would only be correct if, eventually, the attribution of a different meaning to the original implied the same practical results, considering the individual guarantee function of the penal norm. Analyzing intent, however, it can be seen that an interpretation that disregards an element of its legal configuration would reduce the onus on the prosecutor to demonstrate the fulfillment of a criterion that underlies imputation, namely volition, and would also prevent the accused from resorting to this trait to claim a different criminal reproach. On the other hand, in the case of negligence, an interpretation that broadens its scope has different practical results, since it broadens a figure that reduces the space of another more serious one, considering the substantial difference in reproach. This difference in results would prevent the use of the same grounds.

A conscious construction of negligence is admissible because the principle of legality does not prevent changing the common meaning of the words used by the criminal law if this *restricts* the scope of what is punishable and better serves the purposes of criminal law.[25] Thus, typicality provides a limit that is solely negative and protective of the

[25] BRANDÃO 2014, 85.

individual, and does not represent an obstacle when the conclusion is favorable to the individual. This teleological opening stems from an analysis of the *purpose of* legality: to protect man *through* criminal law, but also *through* criminal law, increasing his freedom.[26] This means that negligence does not obey a rigid limitation if, with it, we want to restrict the space of the most burdensome type of subjective imputation. However, if there is no obvious restriction on punitive power, the best interpretative work cannot depart from legality in order to construct a dogmatic concept, otherwise the *deontological character of* legality defended here would be broken. Therefore, if the law has already ruled otherwise, it is not with this argument that the incorporation of a cognitive intent is authorized.

4.1 A POSSIBLE LEGALITY OF COGNITIVISM IN THE LITERAL CONTENT OF ART. 18, I, CP?

Recognizing the *deontological nature of* the principle of legality depends on analyzing its methodological application in the interpretation of criminal laws. In terms of hermeneutics, it has already been said that there is *legality* outside of *literality*, as well as that there is *material legality* beyond *mere legality.*[27] This first

[26] ROXIN; GRECO 2024, 302. It is because of their liberal and guarantor content that the prohibitions of *nullum crimen, nulla poena sine lege* (*stricta*) bind interpretation "only when the prohibition contained therein is used to the detriment of the perpetrator, as a way of justifying or extending punishability". MOURA 2015, 319.

[27] It is claimed that the Enlightenment assumptions were overcome with the distinction between law and juridicity, which is based on: *(i)* a new understanding

observation is necessary, because before claiming that the grammatical-literal dimension answers all questions, it is necessary to take into account that *words/signifiers* are interpretable and that the *sense/significance* is attributed by the community of speakers.[28] Thus, conceptual stabilization is not achieved exclusively through what is *stated linguistically*, but from the arguments established with speech, so that the normative text only provides the *form*, whose content is the result of a *discursive process of concretization*, in which, in order to convince or persuade, the interested parties can offer and request reasons. In the end, the most important function of literality is to provide a *limit* value, demarcating the universe of possible meanings, at which point the semantic framework opens up to discourse.[29]

In this study, the *form to* be *grammatically* interpreted and *discursively concretized* translates into the following formula: "took the risk of producing it". Once the object of analysis is isolated, it can be seen that, unlike its precursor,[30] *literally*, the verb "to assume" does

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of the problem of sources; *(ii)* recognition of the transcendence of mere legality towards material juridicity (or the opening up of the former to the latter); *(iii)* and the normative insufficiency of the formal criterion of the law to take on concrete juridicity. CASTANHEIRA NEVES, 1984, 350-351 and 356. On the relationship and differences between legality and literality, see: CASTRO JÚNIOR 2013, 122.

[28] In this sense, it is said that man's only environment is language. Cf.: ADEODATO 2017, 19.

[29] MOURA 2015, 338.

[30] So said Nelson Hungria, with the weight of being the authority responsible for drafting the Penal Code of 1940, whose wording on intent was maintained by the legislator in 1984. Cf.: HUNGRIA; FRAGOSO 1978, 114.

not necessarily designate a *volitional* element. In its definitional reading, "to assume" *means* "to call forth or call to oneself; to take to oneself"[31] or "to come to present (air, appearance); to take, display".[32] For that reason, on a literal level, one cannot object to the statement that "assuming the risk" is not exactly *synonymous* with internally consenting to the result.[33] What remains is a dispute over meaning.

On the other hand, on a deeper level, open to argument, there is also no obstacle to attributing a meaning that understands that "assumes the risk", e.g., a person who represents a danger of a certain quality and, even without wanting to in a psychological sense, proceeds with the criminal plan. If this is a sense of language established between the participants in the dialog, the legal text provides no literal obstacle.

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[31] Michaelis online dictionary. Available at: <https://michaelis.uol.com.br/moderno-portugues/busca/portugues-brasileiro/assumir/>. Accessed on: 28 Jan. 2024.

[32] Houaiss online dictionary. Available at: <https://houaiss.uol.com.br/corporativo/apps/uol_www/v6-1/html/index.php#1>. Accessed on: 30 Jan. 2024. Other possible definitions, according to the same dictionary: *(i)* to come to have; to reach, to attain; *(ii*) to enter into the role of; *to* reveal oneself, to declare oneself; *(iii) to* put oneself in an upright position; *to* stand up straight; *(iv)* to be invested with the exercise of; *(v)* to admit.

[33] Thus, it cannot be concluded that the legislator adopted the consent theory at all: AMARAL 2024. Similarly: "Indeed, contrary to what Brazilian doctrine still often believes, *the law has not resolved anything*. This is because the words used by the law – *'assuming the risk* of producing the result' – are *ambiguous*; they can be understood both in the sense of a merely cognitive theory, which works solely with the awareness of any danger, and in the sense of a theory of will, which could be the theory of acquiescence, as well as any other." (GRECO 2004, 17)

It is true that the meanings of words are not entirely at the disposal of the legal community. In some cases, it is necessary to accept the meaning they have in shared use.[34] However, this requirement does not bind the interpreter to an exclusively volitional understanding of intent, as "assuming the risk" can allow for an interpretation in the opposite sense in any analytical parameter, including at the level of everyday psychology.

Even so, it is necessary to assess the compatibility of a cognitive intent with the other interpretative canons, since the definition of the literal framework of possible meanings also involves other hermeneutic canons - teleological, systematic and historical criteria.[35] In relation to the teleological criterion, the normative intention does not bind a specific concept of intent, since the formula used is broad and does not exclude the conclusion that it actually suggests that the legislator did not intend to excessively limit the possibilities of interpretation, given the lack of doctrinal consensus on the subject.

On a *systematic* interpretative level, it is claimed that the will, although discarded in the imputative judgment, would subsist in other strata of the crime, which would contradict the cognitivist pretensions of relegating the will to the "garbage can".[36] This objection seems to be

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[34] MIR PUIG 2003, 7-8.

[35] In any case, it should be borne in mind that the literal test assumes a *stop* or *limit* value.

[36] For this reason, it is pointed out that attempt or desistance depends on the visitation of the agent's will (arts. 14, II, and 15 of the CP), just as repentance depends on a "voluntary act" (art. 16 of the CP). In the same way, the danger removed by someone acting in a state of necessity cannot have been caused "by their will" (art.

a heavy burden for cognitivists to face. However, this is purely an *argumentative* issue. From the point of view of legality, the provision of will in any of these institutes does not, in itself, hinder an understanding of intent without will. This is because, as the critic explained, in all these provisions, will is allocated to "other strata of the crime". Precisely for this reason, one cannot confuse the planes of analysis, determining the admissibility or otherwise *of* intent based on a shallow analogy between different dogmatic-analytical planes.[37] From a strictly formal point of view, it is not possible to ascertain that, systematically, there are legal limits to the incorporation of an entirely cognitive notion of intent.

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24 of the Code), in the same way that impotence comes from a lack of will (art. 26 of the Code) and the delimitation of minor participation also depends on the lack of will to adhere to the improvised expansion of the plan (art. 29, § 2, of the Code). Furthermore, the affirmation of imperfect formal competition requires consultation of the agent's "autonomous intentions" (art. 70 of the Code), just as the error of execution can only be ascertained by analyzing whether the author "intended to offend" (art. 73 of the Code). Finally, bodily injury followed by death is only imputed to the perpetrator if the circumstances show that he "did not intend the result, nor did he assume the risk of producing it" (art. 129, § 3, of the Criminal Code). Cf.: BATISTA 2023, 147-148.

[37] In another discussion - *in this case,* analyzing the transposition of the dogma of intent to culpability in order to determine the exculpation of the error of prohibition in case of doubt - we have already been alerted to the care that must be taken when equating the judgment of illicitness with the judgment of culpability. With this, it was concluded that "different plans, with different contents and recipients, cannot have their contours determined in the same way by means of a shallow analogy". LEITE 2013, 90.

Finally, from a *historical perspective*, one could assert that the original inclination towards finalism would prohibit the cognitivist claims of lege lata. This would reflect the spirit of the legislator of 1984, who would have embraced a theory of action that has will as its backbone.[38] Therefore, if the Penal Code has a finalist orientation and if finalism has volition as the characteristic mark of intent, then, in the context of editing the law, the legislator, influenced by the finalist hegemony, put in place a concept that necessarily presupposes the volitional element in intent.

However, an interpretation of this nature also does not in any way hinder a cognitive understanding of intent, *firstly*, because the legislator does not make theoretical commitments[39] , and *secondly,* because the fact that the legislator has, at a given historical moment, favored a theory, does not prevent its re-signification or make it the *correct* theoretical construction.

[38] "Human action is the exercise of a final activity. [...] The 'finality', the final character of action, is based on the fact that man, thanks to his causal knowledge, can foresee, within certain limits, the possible consequences of his action, and therefore set himself various goals and direct his activity, according to a plan, towards the achievement of these goals. [...] Purpose is therefore - to put it graphically - 'seer', causality 'blind'. [...] the backbone of the final action is will, conscious of the end, rector of the causal event". WELZEL 1964, 41-42.

[39] This is what is stated in the Explanatory Memorandum of 1940: "In line with almost all modern codifications, the project does not follow orthodox primers, nor does it assume irretractable or unconditional commitments to any of the schools or doctrinal currents that are vying for the right to solve criminal problems".

Therefore, even passing through the filter of all the other interpretative canons, it can be concluded that the formula used by the legislator to conceptualize intent has not put an end to its theoretical discussion. Thus, if it is understood that the cognitive conception of intent is not compatible with the aims of criminal law or does not have the desired dogmatic yield, it is not by resorting to the literal content of the law that a theoretical internalization of this understanding will be prevented.

In any case, a dogmatic elaboration cannot disregard the real circumstances of the environment in which it will be applied. Disregarding reality could lead to theorizing without considering the real social effects, which could mean that the legal method, instead of making judicial decisions predictable, rationalizes *any* decision. In addition, removing oneself from reality in such a way could discredit legal knowledge and be harmful to the rational containment of punitive power. This could lead to the total disregard of dogma, falling into irrationality and pure political discourse without technical mediation,[40] which is pernicious for strategies to effectively contain punitive power.

5 CONCLUSION

The formula "assume the risk" is not exhaustive enough to admit only the theory of consent for eventual intent. Both from the semantic-grammatical analysis and from the process of imputing meaning to the

[40] ZAFFARONI 2005, 72.

signs used by the legal-penal language, literalness does not absolutely prohibit an exclusively cognitive discursive concretization of the legal formula under analysis. Nor do the other interpretative canons offer formal limits to the adoption of an exclusively cognitive concept of intent.

If the problem question is answered in the negative, it does not mean that the concept of cognitive intent is *correct*. The only conclusion that can be reached is that the legislator has not made *a theoretical judgment* on the subject, and the dogmatist cannot take refuge in the text of the law to put an end to the controversy by invoking its normative authority. In any case, the *formal possibility of* incorporating a theory does not absolutely imply the existence of a *material justification* for its application, and there is a high argumentative burden to overcome the entire legal tradition surrounding the will set in motion at national level.

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