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Problematic Issues with Hermeneutics in Law

This paper deals with problematic understanding of legal texts. Hermeneutic approaches are reflected in various opinions regarding the understanding and interpretation of the text. The interpretation is presented in light of the research from both legal and philosophical sciences. The views of lawyers and philosophers of continental Europe as well as common law systems in relation to hermeneutics are analyzed.

The actuality of the issue is due to the fact that the problem discussed in the jurisprudence is not yet solved. There is no uniform approach to the issue; the principles set out in action are not explicitly defined. There is no unified strategy. All this creates difficulties in the implementation of practical activities.

In the presented work the establishing of principles is given special importance. Understanding the text as the main goal of Hermeneutics is set as the unity of the two processes. First of all, it is the correct understanding of the will expressed, and then the correctly perceived will be passed to whom this norm is directed to. These two processes should be harmoniously interconnected so that an interpretation can be achieved with the desired goal and the text will not add new vagueness.

The article discusses subjective and objective theories of comprehension and their positive sides as well as their shortcomings. The focus is on the goals of Hermeneutics and the tasks that should be carried out by the text interpreter. Hermeneutic activity is presented as a synthetic connection of the three elements that are considered: the author of the text, the text itself, and the subjective subject.

In conclusion, it is suggested that since the importance of the text in the jurisprudence is given special attention, the goal of interpretation must match the goals of the law. The objectives of the law are based on social aspirations and their will, and therefore the principles of interpretation should be determined based on the will of the public.

Keywords: Hermeneutic approach, Law, Jurisprudence.

In the science of law, from antiquity to present, many issues are presented differently by different scholars. Some scholars agree with a certain opinion, while others do not just simply disagree but have diametrically different opinions. All this is due to the fact that justice is not a metaphysically defined subject or event. It is a system of rules defined by the necessity, which means that it must be created. It is artificially created, it is not necessarily the inevitable and logical consequence of the development of events and is not due to cause and effect determinism. If it were so, it would remain unchanged through time and space. Law is logical dynamic rules of communication system. It changes with the demands of the society and with political and economic changes.

The goal of this article is to define the basic principles that enable practitioners or theoretical lawyers to use hermeneutic methods in the interpretation of legal texts. The problem discussed in this paper is not yet resolved in jurisprudence. There is no uniform approach to this issue, because the principles in which the interpretation of the legal texts should be made are not defined clearly. A common strategy around this issue is not clear. This negatively affects the process of practical activity, as the explanations made by lawyers often differ from one another.

A special problem arises in judges' activities, since the judicial law does not establish uniform principles of action. In the science of law, it is of particular importance to understand the contents of legal texts. The legislator cannot always make the text clear and easy to understand for everyone.

Methods of Research

Research methods are not exclusively derived from legal scholars. They should be synthesized by the harmonious combination of hermeneutic and legal methods. Equal importance should be given to both the ontological and the rational, and to target factors. The interpretation of legal texts should be combined to identify the semantic as well as legal significance of words. In addition, determining interpretation only with a normative approach does not give the desired outcome and it is necessary to merge the cognitive and rational and targeted elements that are ontologically conditioned.

In this regard, not only legal researchers (Savigny, Kelzene, Betty, Hart, Dworkin, Barak, etc.) express interesting ideas, but also philosophers. Especially the most visible researchers of hermeneutics: Heidegger and Gadamer.

Main Section

It is not surprising, that in the science of law many questions remain unanswered to date. It is difficult to determine which of them is more important, because there is no hierarchy set out for the problematic issues of law. One thing that is certain is that the norms of the law require an explanation. According to Dworkin, most lawyers share the idea that the law is a matter of interpretation and the necessity of explanation is related to the vagueness of the norm, the term indefinability or the ambiguity of the sentence (Dworkin, 1982, p.529). There is also an opinion that definition is necessary for every norm of law and there is no simple text that does not require interpretation and explanation (Barak, 2005, pp. 3 - 4). This issue will be discussed below, because first of all, it is important to say a few words on the understanding of the text.

The clarification of norms is not exclusively for law. The understanding of written text, or hermeneutics, has been known since ancient times. However, it has much older roots. The term itself is derived from the name of the Hermes the messenger of the gods, who informed humans about the will of the gods. This implies that the will expressed by the subject may be misinterpreted or not understood at all by the recipient, and therefore the will given in the text requires clarification. Today, hermeneutics is of particular importance because it furthers the human potential for understanding the importance of language in order to enhance the endless possibilities of human thought (Palmer, 1969).

Generally speaking text can be presented in two ways: in one case it refers to the text that does not oblige the reader and in the second case the reader is addressee of the text and is obliged to act in accordance with the rules set out in the text. The first is mainly in literary and epistolary texts, and the other is in normative texts.

Understanding artistic literature depends on the reader alone, and can cause practically nothing except for approval or disapproval of the author of the text. However, it is necessary to understand a text containing the normative rules. With normative rules, it is clear that law is not the lone idea. Along with law, such rules include morality, religious dogma, and customs. It is necessary to note that only one of the rules listed here, law, must have implicitly defined text. For others that is not a necessity. More precisely, it is necessary to have written law, for religious dogmas it is desired, while morals and customs require no such thing.

Primitive religions (such as animism, totemic, fetishism and magic) which emerged at an early stage of social development, are totally unfamiliar with written texts for

the simple reason that in that era writing was not yet created. Religion and religious rituals exist and people are successful in following them. After people learn how to write, the records of religious beliefs begin, and most importantly, a problem emerges that has not occurred before. This problem is, letting people know about divine will. With special intensity, this problem was first revealed in the Hebrew religion, where people who have been chosen by God or famous people begin to interpret the divine will. After one millennium, this was addressed by the interpreters of New Testament. The art of interpretation was further improved by the glossators of the XI - XIII Centuries (West, 2000, pp. 1125 - 1165). Even today legal science actively uses different methods of hermeneutics for understanding of texts.

As for morals and habits, they are not provided in writing and do not need any explanation. There is no need for this, because both of them are permanently repeated in public coexistence and are a set of rules and attitudes recognized by each member of the community. They are loud statements of public perception and consciousness, and therefore both of them are created directly from the public domain and are thus a set of implicit rules for the society.

Like religion, justice is not implicit, but a heteronymic will. In religion it is God's will, and in law, the will of the state. That is why both of them ask for explanation, clarification and definition. The nature of religious dogmas and their explanations differ significantly from the methods of law and its interpretation and obviously this is outside the scope of this article. This conversation is only about the interpretation of the law.

First of all, it must be decided how to interpret the norms of the law. What principles should be based on legal hermeneutics and in which case can the desired result be achieved. The problem is that if the explanation of a literary work only explains the will of the author and his statements, in the case of law interpretation, the integrity of the legislation and the law must be interpreted. The issue is furthermore complicated because the legislatures in modern democratic states is not a specific personal subject but is rather provided through the general public's' will. Therefore, it cannot be characterized by human passions, aspirations, and selfish expressions. The will of a single person in a democratic state does not contribute to the contents of the law.

Each person has their own worldview and aspirations. It is not difficult to recognize the individual's will, because studying the person can determine what social layer they belong to, what values are important for them, what is important for them and what is not. What they consider to be important, protected, maintained, and etc. These opinions are not the same for each and every person. These opinions and the public's

worldview in general is determined by which social layer people were raised in and exist in. The legislator has to take into consideration the will and aspirations of people of various social strata and different opinions, and thus he cannot think or act personally. The state government adopts a certain policy as an action plan and establishes legislation in accordance with the elected political course. The adoption of the law is based on the political views that is otherwise called the will lawmaker. It should be noted here that political views are due to certain goals. The goal is often not given in the text. This, however, gives an established norm of independent action, based on the will of the legislator, as well as the will of the law itself. This nature of the norms of law produces different approaches to the interpretation: the subjective will of the author (meaning legislator); Objective, according to which the content of the text is determined directly (Barak, 2005, p. 4) and synthesis which is equally trying to define the will of the legislator will of the law.

The methods of interpretation in hermeneutics can vary greatly from each other. In the understanding of the text, it is important to determine what is the most important value of the ontological and textual content of the text as it is observed in Gadamer's interpretation (Gadamer, 2004) or methodological as it required from Betti (Betti, 2015). According to Betti, for the interpretation of the law, it is necessary to develop a clearly defined methodology where the main aspect of the interpretation of the text is the methodology. In this view, Betti has challenged subjectivism and relativism in the interpretation of the norm (Betti, 2015, Ch 1). According to this view, Betti considers hermeneutics a "moral science", which is accompanied by epistemology and methodology (Pressler, 1996, p. 89).

When determining the contents of the text, two varied opinions arise. According to one, the explanation should be derived from the wishes and aspirations of the author of the text, which means that the interpretation should be based on the thinking of the writer. In contrast, the second view considers that the main thing is not the text's creator but the text itself. In the first theory, the object of knowledge is the determinant; in the second case, the subjective entourage is passed to the foreground, because if the content of the text and the vague wish in it is to be determined, it cannot be done without the attitude of the applicant's text. Everyone has their own view of subjects and events. They often differ significantly from each other. Such differences in attitude is primarily due to social background. The latter is based on societies formed by people living on a certain territorial entity and the established ideas in these societies. For example, in a culture that is characteristic of certain societies, that woman should be obedient to man and be his property, the society is considered to be savage and lacking of development. It is logical that subjects of different cultural representations will give different interpretations of the same text.

Besides that, the implementation of the explanation requires the selection of the correct beginnings and determining the goals correctly. When explaining religious texts, the only purpose is to understand God's will. According to Palmer, the theological interpretation is to confirm the power of God in the process of thinking (Palmer, 1969).

It is acceptable to interpret religious norms so that the explanation is not entirely clear. This can be explained by the reason of theological view that man cannot fully understand God's will because his mental ability cannot understand divine will with accuracy.¹ Religion imposes obligations on a person, which are determined by morality, and thus their understanding is not difficult for anyone. The rest of the issues that are set up in religious dogmas are the subject of judgment, the views and the concepts that the contents of which are a very difficult issue and a regular believer is not required to fully understand them. This should be achieved by faith.

As for the definition of law, the case is altogether different. The law requires accurate clarification. Otherwise, the idea of interpretation loses its sense. Legal norms require the recipients to perform, or abstain from certain actions. Therefore, the recipients of the norm should know exactly what the requirement is in the norm. In addition, the creator of religious norms is quite uncertain and vague for the human being. No one can say that he knows God and knows the divine thoughts. The law creator is known to everyone and it is not only possible to know his requirements, but it is also mandatory. The democratic processes further more closed the gap between legislator and the recipients of the norm. Therefore, the definition requires more specification and transparency. Today no one can argue that "Princeps stands above law."²

Law and jurisprudence are unimaginable without the definition of law. According to Dworkin, legal practice is fully comprised of interpretation (Dworkin, 1982, pp. 229 - 231). As Barak points out, legal interpretation is a rational process by which we come to understand the content of the text and go to its normative significance. This is a process that emphasizes the legal significance of the text from its semantic importance and interpreters translate the "human" language into "legal" language (Barak, 2005, p. 6). To put it simply, according to Barak's explanation, the semantic text is transformed into legal text through the interpretation.

¹ For more information on noted matter see: Aquinas, T. (1914). *The "Summa Theologica"*, Part III, Translated by Fathers of the English Dominican Province, R & T Washbourne, LTD. Paterson Row, London

² Princeps supra legem – Princeps stands above law. The term recognized in the Roman Empire has now been changed by the principle: Nemo est supra leges – nobody stands above law.

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Barak properly develops this discussion, but the issue needs more specification. Because legal interpretation is based on practical activities, it is based on the existing reality and practical activities, therefore it serves practical activities. If the rule of law is not practicable, nobody spends time working on definition, because it is worthless as a dead norm. In practice, legal definition requires not only the will of the legislator but also of the will of private individuals. Consequently, there are two main types of legal interpretations: definition of the agreement of the parties and the definition of legal norms. The main difference is that in the first case it is the legalization of the will of private persons (i.e., transformation of the semantic significance legally), and in the second case, it is to establish the semantic importance of the text compiled in the legal language.

During the interpretation of the agreement it is inadmissible to interfere with the will of the Contracting Parties or their interpretation from their will, because if their will is not enforced, they will not have any desire to make any transaction. In the interpretation of the law, the situation is different. The legal norm is created by an authorized state body or a person authorized by law to exercise this authority. Generally speaking, the creator of the law does not possess the freedom that the Contracting Parties may have. People enjoy their rights, and the state – plenary powers. The rights arise in various ways. Including the grounds that are above the norms of law. The authority is meant to grant the right. Accordingly, the right is granted within certain limits. The rights of the legislator of the act, that is subject to law, are measured by law. The creator of the law itself is limited by public will.

Thus, the interpretation of the text of the contract shall be directly in accordance with the will of the author of the text and the text shall be given a legal form through interpretation. In this case, the interpretation of the semantics is directed towards the normative. The second type of text, or the norm of the law, requires the use of the opposite method, i.e., a semantic explanation of the normative values.

Determining the meaning of the text is presented through the unification of the meanings of words. The meaning of the word requires more attention because it can be used in different texts with different meanings. According to Gadamer, the word gives the name given to a specific object that creates an imaginary reflection on it (Gadamer,

2004, p. 62). Moreover, understanding of the word and the general text is not independent of ontology, it is impossible to determine the meaning of the text by such a method. In modern philosophy and in hermeneutics, Heidegger devotes special attention to ontology. He considers ontology as everyday routine and with associates this existence to hermeneutic discourses. (Heidegger, 2001, pp. 21-37).

In legal science, special importance is given to the rules for interpretation. First of all, it must be determined if there are any rules, which would put interpretation in certain frames? This question was raised by Dworkin. His answer to this question was that the law itself is interpretation (Dworkin, 1982, p.527 - 550). This view was first challenged by Savigny and criticized by scholars who interpreted it as a lawmaking within the delegated authority (Savigny, 2011, p. 389).

In Savigny's opinion, the definition of legal norms resembles the definition of other types of texts (as is done in philology). The difference occurs when the legal definition is broken up into constituent parts. In this case, Savigny separates four, as he calls them, elements: grammatical, logical, historical, and systemic definitions. According to his words, it is possible to understand the content of the law perfectly, but he adds that none of the elements are elected, but rather by combination of all of them we can achieve desired results (Savigny, 2011, pp. 391 - 392). For Savigny, the interpretation is not only dependent on the interpreter's capabilities. In his opinion, the legislature must possess a normative art in order to make the law perfectly established. Thus, success can be achieved if a close connection between the legislator and the interpreter is established. Because one depends on another this guarantees success (Savigny, 2011, p. 392).

The normative school does not even deny the necessity of explaining the legal norms. According to Kelsen, judges' function is not only to find justice, or to track down one of the existing solutions (Kelsen, 1967, p. 237). According to him, the creation of individual norms by judges based on the constitutions and laws implies the renewal of the law from the general (abstract) to the individual (to the concrete) (Kelsen, 1967, p. 237).

Many authors talk about similarities between definitions in legal explanations and philological science. As Barak notes, all interpreters of the law are linguists, but not all linguists are interpreters of the law (Barak, 2005, p. 7). During semantic and grammatical interpretations, philologists use established rules and these rules are based on words and their possible connections. The best measure of compliance with the rules is the language that has been formed over the centuries. As for the science of law, it is quite

difficult to establish the rules, because the legislature is not engaged in this activity, and the problem of their authenticity comes from any other subject defining the rules. That's why lawyers refrain from working out any clearly established rules. In spite of such a problem, it is wrong to leave the question unanswered. Various, often different theories, give future researchers the opportunity to outline certain action rules.

In legal literature there have been a number of times that there is only one definition of interpretation - this is giving rational importance to the text (Barak, 2005, p. 9). Therefore, the question arises: is it necessary to interpret any norm? Some lawyers think this is necessary. They are suspicious of the words of the Romans: *In claris non fit interpretatio* (clear norms do not require interpretation) (Barak, 2005, p. 13. Literature set there). They think that the text, becomes clear as a result of interpretation, and is not easy in of itself because of its simplicity.

To fully understand the issue, first of all, it should be decided what is to be interpreted and what purpose it serves. The interpretation refers to the explanation of the text, its explanation and the provision of it to other subjects or subjects as they are understood. The latter is a necessary element, since if the recipient of the norm cannot understand the importance of the norm, then its implementation will be complicated. The purpose of the interpretation of legal norms can be interpreted in a variety of ways. In some cases, the obscure nature of the norm requires that it be explained. In other cases, the law enforcer explains how the norm should be used and why he used this particular norm in this case. Such interpretation can be defined by the normative nature of the text. In such a case, legislation and the will of the law are synthesized.

A different approach is required when interpreting the text of a private legal agreement. The interpretation here is more concrete, since a contract is separate, and independence of the parties does not have a will of its own (as in the case of the law). Therefore, the wills of the text creator and contracting parties must be defined. The contract has no other purpose than to enforce the wills of the contracting parties. This is why the interpretation cannot be formed in differentiated form than the will of the contracting parties. Often the parties draw the text according to their usual semantic values, and thus, such a text requires additional legal determination. Semantical significance of words in such an interpretation should be transformed into legal significance, which gives the text a normative nature and thus, compulsory force. Nevertheless, the interpretation should be done in the correlation with the agreement with the parties to not violate their rights and interests.

An exception is the occasion when the dominant side forces the other side to agree to

any of the desired conditions and accept the cabal obligations undertaken in the text of the agreement. In such cases the interpretation takes a different form. The authorized interpreter may at any time cancel the expressed will and regard the transaction as unlawful, on which grounds the cabal agreement is invalidated. In the main case, the agreement expressed by the parties in a contract is followed by the legal results. In other words, the will of the contracting parties is the basis of the legal outcome, but the invalidation of the transaction no longer affirms the outcome of the legal effect.

If the text of the agreement is distinguished by its special simplicity and the readiness of the parties to read it clearly, it will have a normative “equipment” that will give the demand for the text compulsory force and therefore no longer require additional interpretation. Interpretation is unnecessary in that case, since the legal force requires the text to be compulsory when the contracting parties, or the recipients of the norm are aware of the content of its request. Otherwise, the meaning of legitimation becomes completely absurd. If laws are written in unfamiliar language, their implementation will be impossible and such norms are not executed. To put it simply, the mandatory power in the legal sense is different from other compulsory forces (such as the armed robber’s request) that the in case of the first both parties recognize and agree to the terms, as for the second case, both the robber and the victim are aware that the obligation is only created through threats and there’s no agreement. Therefore, if the parties’ agreement of the contract is easily understood by the participating subjects, it will not require any further interpretation.

It should be noted that the law does not include only the provisions of the state, it includes norms sanctioned by the state along with ones sanctioned by the authorities. These norms can be taken from customs, religious beliefs, and morals. The latter’s explanation implies individual convergence of conventional perceptions, since interpretation is considered a process where a particular subject assigns the meaning of the other subject to any meaning (Corbin, 1960; Patterson, 1964). It is impossible to present any single person as an author of moral norms; morality is a manifestation of public opinion. Hence, its interpretation refers to public opinion. The interpreter may have a different set of moral values. This will become the basis for incorrect interpretation. And if the emphasis in the existing text as semantic, as well as the normative requirement remains unchanged, then self-explanation is meaningless.

Hermeneutics has long sought to find out the principles that will be based on legal interpretation. Despite such attempts, most scholars do not define their principles at all, or consider them to be beyond concrete. According to Kelsen, it is impossible to determine which version of the many available is the most “correct” one in the inter-

pretation of the norm (Kelsen, 1991, p. 130). For Gadamer, the interpretation, or the understanding of the text is historically defined (Gadamer, 2004, pp. 299 - 305), he is opposed to the objective, neutral reading of the legal text, as he considers interpretation to be ontological, dialectic, and critical analysis (Eskridge, 1990, pp. 609 - 615).

According to Gadamer, guidelines are required which cannot be taught abstractly; they must be practiced in concrete cases and therefore these principles provide ability to judge akin to feelings (Gadamer, 2004, pp. 27-30).

Judges seek to harmonically unite interpretations of lawyers, parties, and witnesses (Arneson, 2015, p. 24). Judges in common law countries try to develop the principles that will be common for solutions of similar cases. But since there are no two absolutely identical cases, the principles developed by them are of general character and are based primarily on fairness and effectiveness (Lindquist, Cross, 2005, pp. 1159 - 1160).

Explanation of two different types of speech are discussed by Schane. He distinguishes the lexical and syntactical ambiguity of the word (Schane, p. 4). In both cases, the meaning of the word is interpreted through context (Corbin, 1965, pp. 161 - 190). The interpretation of the legal meaning of the text does not require only the semantic meaning of the words. The most important thing is the idea, which is imbued into the text. Sometimes words used in a sentence can have multiple different meanings. Sometimes a text of the legal significance gives a narrower or wider meaning to a particular word in the spoken language. For example, in Georgian legislation, the word “fish” means fish, as well as other sea products.

Any text of legal significance seeks to convey a certain requirement or will. Thus, legal interpretation is oriented around the content of the request or the will. The explanation is not limited by the determination of the importance of individual words. The meaning of the word often determines the content of the request. A formal side of interpretation does not actually exist, because sometimes two similar texts may contain different demands. In addition, it may be that the term used in the text is derived from the laws of the legislature. If the law allows fishing to be carried out only using a fishnet, the definition of a fishnet may be different in certain cases and in other countries. The term “enterprise” defined by the Tax Code of Georgia is different from the Definition of the IFRS (International Financial Reporting Standard) as it also considers physical entity as opposed to the Code (Nadaraia, Rogava, Rukhadze, Bolkvadze, 2012, p.61). Such differences are due to the goals that the author of the text wants to achieve. It is therefore clear that legal texts require a synthetic definition of the purpose and will. Both of them are formed as a result of judgment. A judgment is merely the capacity of mind and cannot be understood by other criteria or evaluated by different categories.

Purpose and will are the fruit of the human mind. It is neither a formality nor is it a social sign. That is why they are all related to the power of mind. Therefore, their interpretation is also possible through a rational approach. People have common goals and similar attitudes. That is why one person does not find it difficult to recognize the will of another person. Because a legal text represents the unity of the will and purpose, interpretation can only be made in accordance with basic principles. It is not possible to adjust the appropriate rules for each specific situation. It may be that the purpose of public law and judicial texts differs from one another, but often their goals are coincidental, since both of them are designed to regulate public relations.

The rules for the use of legal interpretations cannot be determined without defining their meaning and purpose. Legal interpretation means transmitting text content to one of the other subjects. In addition, the interpreter is not the author of the text. For example, someone's request must be transmitted in a simplified form. Interpretation necessarily involves reduction because if the text, without any simplification, is clear for the addressees, then such text does not require any further explanation. Reduction is done in two different forms. In one case, from the semantic to the normative values, and on the other, on the contrary, from normative to semantics (Barak, 2005, pp. 5 - 61). Members of the community demand a semantic explanation of normative values, since the latter is clearer to them. The law demands a normative definition for any text because the semantic meaning of words is not enough for it.

The state is not an absolutely independent subject; it is limited to the interests of the public and its will. Hence, there are two expressions of expression in the norms of law. This is the will of the legislator and the will of the law. The will of the legislator may sometimes not coincide with the will of the public and it is due to certain necessity. This happens when the government carries out progressive forces and the society is still unable to understand the expected outcome. The interpreter's function in this situation is to not exceed the will of the legislator. The legislator is not a separate independent subject in this situation. He is still concerned with public welfare. And he is not forced to change the law, it already means that there is a consensus of the interests of the society and the legislature.

As for the law, it cannot be independent of the interests of the public. It must express the desire of the public. Otherwise the existence of the law would not have been possible. The purpose of the law is to regulate public relations in such a way that the society is given the possibility of development and better living. This is possible by harmonizing the law, the goals and will of society.

The conclusion is that legal interpretation is based not on concrete rules but general

principles. In these principles there is no hierarchy, since the principle of which is higher is the evaluative category and establishing the norm in this is fairly problematic. During interpretation of the norms of the law, an interpreter shall be based on public will and its interests. This should be a defining sign of interpretation. That's why the lawyer is required to have not only legal but also general education. The interpretation should not lose touch with life, it should be tailored to reality. The interpreter's function is to give the normative definition of the law its right to act. This can be achieved only when social aspirations are related to reality of its implementation.

The purpose of legal texts is to determine a correct behavior model for the recipients. This is done in accordance with the revealed will. The interpretation of such a text is not limited by the determination of the author's will. Its task is to hand this over to the recipients after recognizing this will. Therefore, legal interpretation is the connection between three subjects: the author of the text, the text addressee, and the interpreter. The purpose of interpretation is to connect the author's will with the consciousness of the reader. This process requires rational and targeted action. Both of them are determined by the objective reality. Hence, interpretation is defined by the public realm and its main pillar is the values that have been formulating in society for centuries and have found place in a particular time and in a particular state.

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