

THE BANKRUPTCY
OF THE INTENTIONAL CANON
OF INTERPRETATION

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I. Introduction

This paper is about canons of legal interpretation. Canons are rules for interpreting texts.¹ Different scholars and traditions identify different sets of canons, but the most common is probably the following quartet:

- 1) Textual canon: interpret the legal text according to its plain meaning, don't go outside it.
- 2) Intentional canon: interpret the legal text according to its author's intention.
- 3) Systematic canon: interpret the legal text so that it coherently fits with other legal texts.
- 4) Teleological canon: interpret the legal text by considering the purposes why it was adopted and how those purposes are best realized.²

In this paper we argue that the intentional canon fails to function as an independent rule of interpretation. This may sound preposterous: isn't it precisely the intention of the legislator that law-apppliers should strive to find if they want to respect the rules of democratic government, especially the principle of legislative supremacy? When interpreting contracts, our claim sounds even more preposterous: in many countries, the rules for the interpre-

¹ It is also possible to understand "canon" as a set of rules of interpretation, as *Häberle* does in saying: "El canon de los métodos de interpretación es un 'armazón flexible de argumentación', que puede ser descrito básicamente como una estructura de principios y raramente como un sistema de reglas." <http://www.ugr.es/~redce/REDCE13/articulos/Haeberle.htm> [accessed 16th March 2021].

² This list is freely based on the following recent German textbooks of legal theory. They all take Savigny as their starting-point but differ from Savigny and from each other in some details. See *Peter Koller*, *Theorie des Rechts – Eine Einführung*, Wien 1997; *Werner F. König*, *Juristische Methoden für Dummies*, Weinheim 2016; *Karl Larenz*, *Methodenlehre der Rechtswissenschaft*, 2nd ed., Berlin 1992; *Philippe Mastronardi*, *Juristisches Denken*, Bern 2001; *Michael Potacs*, *Rechtstheorie*, Wien 2015; *Ingeborg Puppe*, *Kleine Schule des juristischen Denkens*, Göttingen 2008; *Bernd Rüthers*, *Rechtstheorie*, München 1999; *Reinhold Zippelius*, *Introduction to German Legal Methods*, Durham 2008.