Marta Andruszkiewicz
University of Białystok

POST-STRUCTURALIST INSPIRATIONS IN LEGAL DISCOURSE

The questions implicated in problems of language and discourse in law can be reinterpreted in the light of changes occurring in humanities and induced by post-structuralist trends. The post-structuralist tendencies affecting the theory of law are visible in the light of opposition structuralism with post-structuralism. The backdrop for their studies can also be antinomies: structuralism – post-structuralism, modernism – postmodernism, positivism – postpositivism or naturalism – antinaturalism. The views of Stanley Fish are representative of post-structuralist thinking. In the Polish theory of law changes generated by departing from analytical and positivistic thinking are noticeable in the shaping of a juricentric model of legal practice and understanding law as participating in culture.[1] The aim of this

[1] A. Kozak, *Trzy modele praktyki prawniczej*, (in:) *Studia z filozofii prawa 2*, ed. J. Stelmach, Kraków 2003, pp. 143–158, M. Zirk-Sadowski, *Pozytywizm prawniczy a filozoficzna opozycja podmiotu i przedmiotu poznania*, (in:) *Studia z filozofii prawa 1*, ed. J. Stelmach, Kraków 2001, pp. 83–95. It should also be added that the justification for taking up the problems of the influence of marked poststructuralist tendencies in humanities on theoretical and legal studies can be the multi-planar study of law and tendencies currently present as part of the so called external jurisprudence integration. See for example J. Wróblewski, *Zagadnienia wielopłaszczyznowości w metodologii współczesnej teorii prawa*, "Studia Prawnicze" 1969, vol. 21, pp. 3–24, K. Opałek, *Interdyscyplinarne związki prawoznawstwa*, "Studia Filozoficzne" 1985, no. 2–3. On the subject of the problems of integration (and its disruption) in the light of post-modernity see J. Łakomy, *Interdyscyplinarność i integracja zewnętrzna nauk prawnych w świetle postmodernistycznej krytyki*, "Archiwum Filozofii Prawa i Filozofii Społecznej, 2011, no. 1. It seems that, in the light of postmodern changes, it is the integration of sciences which emerges as an inspiring prospect because of the existence of discourse in many fields, as well as the overlapping of the humanistic disciplines touched by "the expressions", and the fading of the clear boundaries between them. We must agree with the observation made by Michał P. Markowski, who while analyzing the tendencies caused by postmodern trends states: "In this situation, it seems, that the more promising view is shown not by the inter-studies, but transdiscipline studies: they are heading on the one hand to the identification of subject-problem relationship going across (above, below) the existing discipline boundaries, on the other hand, however, to grasp the historic processes forming and transforming of arts and sciences, processes leading

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article is the portrayal of these post-structuralist changes which concern the problems of meaning, peculiarity of legal discourse, relationships between the subject being studied (law) and the researcher (lawyer), as well as the essence of law itself. These changes bring about the transformation of the paradigm of legal interpretation in the direction of accenting the role of cultural context and interpretive community. This is evident in the pluralism of discourse practices (which was written about by Habermas), reformulation of the idea of the meaning of text as open (but not free) to interpretation, determining the interpretation by the interpretive community, which is simultaneously the source of meaning (which is stressed by Fish), coexistence of local discourses in the common cultural space. The result of these changes may be the formation of a cultural stage in legal theory – similar to literary theory.

[POST-STRUCTURALIST INCLINATIONS IN LEGAL THEORY] The post-structuralist trends written into postmodernity exerted significant influence on those disciplines whose subject of interest is text, putting special emphasis on the communication and discursive aspect of the activity of man within the public domain. The problem of discourse is located in the frame of perception of language in the domain of communication. It is understood as a network of connected texts with similar subject matter, created by subjects which are a part of communication. The subjects of language analysis are texts – elements of the practice of discourse. Characteristic to post-structuralism watersheds or turns – linguistic and political[2] – caused a number of consequences not only in the sphere of literary theory but also in political theory and legal theory. The first is the anti-positivist turning point within the framework of which the linguistic turn[3] established itself, resulting in understanding text as an autonomic object. It prompted the transition from positivistic expression in legal analysis to using hermeneutic and discursive methods. The other is a post-sturcturalist turning point connected with the turns: pragmatistic, ethical-political, expressing law as

today to the slow emergence of outlines of not only new disciplines, but to the gradual discipline reconfiguration of the divisions of the entire field of humanistic knowledge. Idem, *Kulturowa natura, słaby profesjonalizm. Kilka uwag o przedmiocie poznania literackiego i statusie dyskursu literaturoznawczego*, (in:) *Kulturowa teoria literatury. Główne pojęcia i problemy*, ed. M. P. Markowski, R. Nycz, Kraków 2006, p. 30.

[2] Other turns which had an effect on the formation of significant tendencies in the humanities, including cultural literary theory are being pointed to in science. Among them are the narrational or the interpretational turns. A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *Teorie literatury XX wieku*, Kraków 2007, p. 26.

[3] On the subject see among others M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa*, Kraków 2000, p. 96 and following, A. Burzyńska, *ibidem*, p. 39.

an interpretive fact, and socio-cultural, allowing to look at law as a cultural fact. The turns mentioned accented the discursive aspect of linguistic creations (texts). The linguistic turn permits the highlighting of two issues in language study: constructivist theory of language and discarding of nomenclatural thought. Language is becoming a priority tool with whose help the social reality is being arranged and is being shown within social context as independent from the subject and object.[4] This facilitates the use of tools from different language theories (text theory, discourse theory) for analysis of social reality.[5] The ethical-political trend caused the entanglement of the acts of creation and interpretation into ideological threads.[6] Drawing attention to the affiliations of philosophy and literary theory with politics, which is taken as an element of public cultural domain heavily influencing the condition of modern man, is symptomatic of post-structuralism. The discursive and rhetorical aspect of man's creativity is especially stressed. Stanley Fish, who has pragmatic leanings, shares the conviction that political processes affect not only scientific theory but also the results of humanistic interpretation. The advocates of the contextual perspective, Richard Rorty among others, attribute a particular role to literature, which could replace science and philosophy as a discipline which "recognizes the accidental nature of language and self"[7] to the greatest degree. These changes concern literary knowledge and all humanities, including legal theory. The directions of study which played a key role in this are on the one hand communication theories, revealing the discursive aspect of language creations, and on the other hand interpretationism and contextualism. The common denominator of the different disciplines of post-structuralism is the interpretive approach to studying text.[8] What that means is that counted among the most important problems upon which twentieth century humanities concentrate are the issues of interpretation and the quest for answers to questions about what it is, what its boundaries are, what its meaning and function in the

[4] F. de Saussure and L. Wittgenstein, who employed the game metaphor in describing language, an established set of conventions, rules which decide about the meaning of individual elements, played a significant role in this thought on language (the departure from nomenclatural or representative expressions). See L. Rasiński, *„Reguły" i „gry" świata społecznego – Wittgenstein, de Sausure and linguistic expression in social philosophy*, (in:) *Język, dyskurs, społeczeństwo*, ed. L. Rasiński, Warszawa 2009, p. 11.

[5] *Ibidem*, p. 13.

[6] A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *Teorie literatury...*, *op. cit.*, p. 26, 32.

[7] M. P. Markowski, *Pragmatyzm*, (in:) A. Burzyńska, M. P. Markowski, *ibidem*, p. 487.

[8] A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *ibidem*, p. 32.

new cultural, ethical or political contexts[9] are in interpretive practices. The structural-analytical study approach was characterized by cognitive fundamentalism[10] and the conviction of the virtues of theoretical studies, which caused the "disappearance of" the subject being studied within theory. Similarly, in the positivistically oriented legal theory interpreting the study subject as a given, ready to use object can divert attention from the internal complexity and dynamism of law as a subject of analysis. The answer to this "theoretical orthodoxy" was the anti-scientistic and anti-theoretical post-structuralism. This resulted in a change of approach to interpretative practices and a new look at the question of interpretation and the source of meaning.[11]

Post-structuralistic turns caused a change in orientation to the study of law as a collection of texts in a defined network of discourse, which are a consequence of acceptance of the speech act theory and the theory of communicative action. Law, which is a system of social control, is a center of discourse.[12] The discourse is connected with the introduction of certain ethical requirements into communication.[13] Practical discourse, characteristic of law, uses arguments based on selection of assessments and norms.[14] The levels of meaning reveal themselves on different planes. Post-structuralism highlighted the fact that discourse(s) reflects contemplation of reality. Institutionalized discourses hold authority over thinking. Law is a system of discourses involved in knowledge and power in such a way that it is "simultaneously constantly participating in the execution of power – knowledge accumulation and being subject to that power/knowledge."[15] Stressing of these elements of language (discourse) which may be useful in analysis of legal discourse is found in the post-structuralist-stage opinions of Michel

[9] *Ibidem*, p. 39.

[10] *Ibidem*, p. 23.

[11] The sense of the theory itself was questioned. It was reflected in the discussion carried on by American scientists centered around the subject of "Against theory", and in the arguments about the boundaries of interpretation. *Ibidem*, p. 24. See also U. Eco, R. Rorty, J. Culler, Ch. Brooke-Rose, *Interpretation and Overinterpretation*, New York 1992.

[12] S. Gajda, *Prestiż w dyskursie prawnym*, (in:) *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, ed. A. Choduń, S. Czepita, Szczecin 2010, p. 820.

[13] M. Zirk-Sadowski, *Dyskurs jako mowa regulowana wymogami moralnymi*, (in:) *Prawo w zmieniającym się społeczeństwie. Księga jubileuszowa Profesor Marii Boruckiej-Arctowej*, ed. G. Skąpska, J. Czapska, K. Daniel, J. Górski, K. Pałecki, Kraków 1992, p. 191.

[14] *Ibidem*, p. 192.

[15] A. Sulikowski, *O ponowoczesnej filozofii prawa*, (in:) *Z zagadnień teorii i filozofii prawa. W poszukiwaniu podstaw prawa*, ed., idem, Wrocław 2006, p. 252.

Foucault.[16] He draws attention to the connection of linguistic constructions with the paralinguistic domain. The hidden internal orders of discourses cause the linguistic mechanisms, so to speak, "go outside" discourse. Such analysis permits the detection of hidden dimensions in language of the law including other mechanisms of authority "hidden" in the order of discourse, which inspired the political and ethical turn in humanities.[17] Along with the formation of the theory of discourse appeared points of view stressing language as having a dominant role in the thinking – acting – language relationship.[18] There is a departure from thinking within the framework of the pattern inclined in the direction from culture (reality social, system) to language, to the direction of thinking along the pattern: from language to culture. Here the subject of study becomes the social dimension of language and its reflection in the political domain.[19] The three planes of discourse of the law distinguished in connection to the distinction done by discourse theorist Teun A. van Dijk, upon which the post-structuralist changes can be analyzed, are: cognitive (problem of subject), interactive (problem of interpretation), and expressive (problem of meaning).

[SUBJECT-OBJECT-MEANING-INTERPRETATION] The differentiating factor of the post-structuralist trends was the departure from the Cartesian distinction of cognizing subject and cognized object which existed in structuralism. Attention was drawn to the active and the creative role of the subject and to striving toward objectivism in perceiving phenomena, which caused that "humanity here understands itself as an active subject, conferring meaning to the surrounding reality and creating a new, personal environment."[20] Objectivism is replaced by conferring meaning to objects through human activity. The problem of this modern subjectivity, stripped of its Kantian relationship of the subject to an abstracted object, is described by Jürgen Habermas as an "unfinished project of the Age of Reason." The concept of the subject, who is the originator of the text, is

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[16] See M. Foucault, *L'archéologie du savoir (English: The Archaeology of Knowledge)*, Paris 1969, idem, *L'ordre du discours (English: Discourse on Language)*, Paris 1971.

[17] This is evident in the structuralist conviction of C. Lévi-Strauss that the appearance of writing in culture is characteristic of those societies in which existed a hierarchy and institutionalization of authority. It also aimed at controlling the natural order through sanctioning of knowledge and gaining control and authority. See C. Charbonnier, *Entretiens Avec Claude Lévi-Strauss*, Plon 1961.

[18] S. Gajda, *Prestiż w dyskursie prawnym*, (in:) *W poszukiwaniu dobra wspólnego...*, *op. cit.*, p. 818.

[19] L. Rasiński, *„Reguły" i „gry" świata społecznego...*, (in:) *Język, dyskurs, społeczeństwo*, *op. cit.*, p. 13.

[20] Z. Kuderowicz, *Dilthey*, Warszawa 1987, p. 81.

reformulated. Structuralism used a distinction in the relationship: linguistic element – system, which originated from the idea of Ferdinand de Saussure, and which could be transferred to the relationship subject – structure. In this comparison the subject is not the holder of meanings/senses. A sign means something by the place which it occupies in the system-structure. The subject, and its role as the originator, is designated through its place within the structure. Post-structuralism brought about changes in the perception of the subject and a depersonalization of the subject who was the originator (author). This kind of abstraction, a conventionality of the originator's construction, can also be connected with the concept of Foucault formulated in the article *Who is the author?* (in which we find reference to the Roland Barthes' concept of "the death of the author"). In his depiction the author is not a real originator (giver) of discourse, but its construction and function. The way a text functions within the social context is dependent upon this transmission instance. The author of the discourse, in the context of language of the law – the originator of the text – is the subject whose intention determines the way of deciphering the meaning of the text (also the sphere of interpretation). He becomes "one of possible instances of order",[21] "a backup of cohesion" of the statement.

Within the scope of these changes the questions of the status of the subject himself, his relationship to the object studied, the autonomy of the object and formulation of its meaning by the interpreter, understanding the meaning as an open category, and the relation to context remain. Reformulated are then "all subjective roles involved into the structure of the work."[22] Language and discourse become tools used by the *Sollen* legislator who creates the world. He is not, as in structuralism, a positioned in the network of relationships and the system structure subject accepting imposed conditions and cultural patterns and rituals. Language does not symbolize social phenomena but can create, change, and abolish them. We are dealing here with a certain turning point in the condition of subject-originator (author) as a creator of meaning and determinant of the interpretation and the administer of the text (work), in the direction of change of understanding interpretation. There is a transition to interpretation determined not through the originator but the context of its accomplishing. This assumption finds grounds for phenomenologically oriented interpretations or based on the theory of literary communication, according to which it is assumed

[21] A. Burzyńska, *Poststrukturalizm*, (in:) idem, M. P. Markowski, *Teorie literatury...*, *op. cit.*, p. 326.

[22] A. Burzyńska, *Wprowadzenie*, (in:) *ibidem*, p. 39.

that the role of the recipient in discerning meaning of the text is creative. In accordance with this assumption in the intention of the originator (author) a certain pattern of the correct reading of the text, and at the same time of an expected recipient, is shaped.

These tendencies are evident in the opposition of positivisim-nonpositivism. The consequences of positivistic thinking, based on Cartesian dualism of the subject and object of cognition[23], is the conviction of an unambiguous determining by law of a judicial decision and the exclusion of the creative role of the lawyer. The nonpositivistic assumption permits the acceptance of the conviction that the law is not a finished objective and that its interpretation is creative.[24] There is an "opening up" of the legal system to the norms and values accepted by the normative system of culture. The method of thinking about law is changed by factors from the "outside". This permits the treatment of legal text interpretation as a creative procedure, which is in accordance with the convictions of Ronald Dworkin that legal norms, having the nature of principles, are not "applied" but "balanced." Justification of this interpretation resides not only in the kinship of disciplines dealing with interpretation but also in the drawing closer of legal systems as a result of processes of globalization, as well as due to tendencies of different systems to permeate and convergence on each other within the frame of the processes of international integration and the formation of a multicentric legal systems.[25]

The dynamism and activity of the interpreter as a subject studying law is revealed. In the post-structuralistic perspective the interpreter is not only a recipient (reader) of the text. Differentiation of these two receiving instances permits grasping the substance of changes to thinking which opposes structuralism. The recipient is the person who "receives" (accepts the given content, which is sent to him as something that is finished). The interpreter is the person who creates meanings (extracts that which is hidden, clarifies[26]). As Marek Zirk-Sadowski notices the conviction accepted within Polish practice which says that lawyers have the ability to reveal the "objective" meaning of text contradicts the fact that judges realize a creative

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[23] M. Zirk-Sadowski, *Pozytiwizm prawniczy...*, (in:) *Studia z filozofii prawa 1*, *op. cit.*, p. 88.

[24] *Ibidem*, p. 92.

[25] E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, "Państwo i Prawo" 2005, no. 4.

[26] According to the Latin interpretatio – explanation, interpretation, translation, *Słownik łacińsko-polski, według słownika Hermana Mengego i Henryka Kopii*, compiled by K. Kumaniecki, Warszawa 1986, p. 274.

practice having "authority over meaning of law" expressed discretionarily.[27] There is a shift from the petrified construction of the rational (or perfect) legislator to the discretional role of the judge making interpretations and decisions. Departure from positivistic thinking showed that not only language influences meaning. The source of meaning is not only the language system but a widely understood context – situational and cultural. Contextualism is trying to argue that the law is not a finished petrified object (the legal system "is opening up" to other normative systems), but is established with the participation of social, cultural and historical factors.

From the perspective of legal theory the question about meaning becomes an ontological question (what the law is) and an epistemological question (how it is studied). We can notice this in the opinions of Fish according to whom interpretation at all times is an act of discerning meaning, which is never literal (determined by characteristics of language), but dependent on context and the aim for which it is done. The interpreter in reconstructing the meaning reaches for paralinguistic but also non-system guidelines (other than strictly resulting from the letter of the law). Being part of the interpretive community designates borders for interpretation which, through it, is not arbitrary, even if the meaning of text is not constant or specified. This depiction allows for interpreting texts many times and, through this, to search for and continually create their meaning. This is reflected in the conviction which is promoted by the pragmatist Paul de Man, who claims that a given interpretation of a work can be one of many ways of reading it, as well as that of Umberto Eco who underlines the open character of interpretation, or that of Fish who stresses locality and situational nature of interpretation. A significant role in interpretation is played by situational nature, which is "taken as a literal meaning of some literary or legal text."[28] Situational conditioning of interpretation is justified by the assumption that there does not exist a primary, single established, or assumed in advance meaning or one intention inscribed into a text. This conforms to the opinion of Fish regarding the influence of the act of interpretation and not language characteristics on meaning.[29] That which conditions interpretation is imbedded in the broadly understood situational context, also in

[27] M. Zirk-Sadowski, *Pozytywizm prawniczy...*, *op. cit.*, p. 89.

[28] R. Rorty, *Wstęp do polskiego wydania wyboru esejów Stanleya Fisha*, (in:) S. Fish, *Interpretacja, retoryka, polityka. Eseje wybrane*, ed. A. Szahaj, introduction R. Rorty, foreword A. Szahaj, Kraków 2002, p. 10.

[29] S. Fish, *Introduction: Going Down the Anti-Formalist Road*, (in:) idem, *Doing What Comes Naturally. Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*, Dyrham – London 1989, p. 12.

predispositions and norms of the method of deciphering content of a statement accepted by a given group of language users, combining to a certain "collective wisdom" of the interpretive community.[30]

Post-structuralist thought on language and interpretation opened a way to revise the concept of meaning, the role of the recipient, and the essence of interpretation itself, the text as a subject of interpretation. This is based on the conviction about the situation of the subject described as "interpretive location" and on determining meaning (interpretation) through context. Under these conditions the conventions acknowledged as a condition of the effectiveness of the statement are not an adequately convincing premise of influencing with the use of language. The mechanisms of persuasion and rhetoric functioning within the framework of the widely understood political domain have a growing influence on social reality. The influence of the last one (politics) on social reality seems to be strong enough that it determines language and interpretation not only in those domains which are in obvious ways connected with public life (such as law) but also those areas which are seemingly politically neutral (among which is literature). The thought on language and literature influences law and politics and politics influences literature. Changes in thinking about language and literature condition changes in thinking about law. Post-structuralistic tendencies put a legal theorist against new challenges.

[THE CULTURAL PHASE OF LEGAL THEORY?] Post-structuralistic understanding of discourses refers to a certain cultural-institutional domain (also the legal) in which there are connections between knowledge and authority. Cognitive-oriented thinking against structuralism, relying on juxtaposing individual factors with non-individual ones (where the structure is the subject of study), is reflected in methodological individualism defined by Max Weber. Social phenomena are explained by "showing them as results of individual action", through creation of "imaginary" space – deliberative and conditional.[31] In accordance to the convictions of Jürgen Habermas, the public space is a domain of the communicative rationality, within which the public debate occurs.[32] Such reference to cultural space connected to social institutions, which generate styles and discourses, create communicative institutions – "local" discourses (cafe, church, parliament,

[30] M. Dąbrowski, *Etyczny wygłos interpretacji. Rozumienie, warunki, sens*, (in:) *Filozofia i etyka interpretacji*, ed. A. F. Kola, A. Szahaj, Kraków 2007, p. 228.

[31] J. Płóciennik, *Literatura, głupcze! Laboratoria nowoczesnej kultury literackiej*, Kraków 2009, p. 201.

[32] See J. Habermas, *Die Moderne – Ein unvollendetes Projekt*, (in:) idem, *Kleine politische Schriften I–IV*, Frankfurt am Main 1981.

prison) is based on conventional regulations and assumptions. Multiplicity of discourses relies on striving toward the coexistence of "diverse discourses based on the rules of the type of communication which could become free of dogmatisms conversation between various, equal traditions and points of view."[33] Understanding the products of human activity as a plane of pluralistic dialogues/discourses is reflected in the theory of law. It is especially visible in the American philosophy of law, where individual cases and precedents and not an established abstract system can decide about the character of a certain order.[34] The humanistic disciplines, especially those whose subject of study is text and its interpretation (such as law and literature) are based on "various discursive practices which co-create (...) that unique time and space of the discursive reality."[35] The instilment of discursive activity in culture is accomplished with the use of language.[36] In the face of these changes the law becomes a product, a creation of argumentation "within a culturally defined discourse". It is characteristic that this "involvement" in culture is stressed by structuralists as well as by post-structualists.[37] On the other hand, however, from the perspective of the form of language use, a defined "discursive formation", an unconscious general (universal) constructions of thought defined by Foucault as *Épistémé*, referring to the "structures of the mind" of Lévi-Strauss, can be deciphered (extracted). Legal text can be then viewed as an object in which certain structure and cultural order in which that language functions is reflected.

Referring to the cultural space of the coexistence of local discourses is the essence of cultural theory of literature and poetics[38] created on the basis of postmodern theory. A substantial influence on its formation was made

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[33] A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *Teorie literatury...*, *op. cit.*, p. 36.

[34] J. Płóciennik, *Literatura...*, *op. cit.*, p. 17. Noticing the ability to study the whole by studying individual threads is confirmed by the popularity of the so called case studies. See R. Nycz, *Antropologia literatury – kulturowa teoria literatury – poetyka doświadczenia*, "Teksty Drugie" 2007, no. 6, p. 45.

[35] M. P. Markowski, *Kulturowa natura, słaby profesjonalizm...*, (in:) *Kulturowa teoria literatury...*, *op. cit.*, p. 33.

[36] The law seen as a subject of meaning is an interpretational and textual entity. See L. Rasiński, *„Reguły" i „gry" świata społecznego...*, *op. cit.* This corresponds to the conviction of Jerzy Leszczyński that it is "the textuality of law visibly separates it from life". Idem, *The problem in discerning law from life*, (in:) *W poszukiwaniu dobra wspólnego...*, *op. cit.*, p. 919.

[37] It is worth underlining that the contextuality of the meaning of text (similarly to cultural associations) is a phenomenon already seen in the works of the "Prague School" which is the quintessence of structuralist thought.

[38] J. Płóciennik, *ibidem*, p. 198.

by the pragmatic turn, through which "questions about the essence of literature decidedly gave way to questions about the way it worked."[39] It is inspired by various discourses, such as cognitive science, history of ideas, philosophy of the mind.[40] Pluralism of discourses existing within a certain cultural space makes it possible to use interdisciplinary (or transdisciplinary – as Markowski would say) research tools. The mixing of discourses gives rise to the mixing of disciplines within humanities and formation of a tendency which the above mentioned author defines as a cultural inclusion of theoretical discourse.[41] In the context of post-structuralist changes the view of the role of cultural context and its influence on social phenomena, including law, has been modified. Influential tendencies in the development of linguistic sciences and literary theory have also been reflected in theory and philosophy of law, which detected the role of "the cultural foundation of language."[42] Interpretive activity of man is rooted in culture. This is connected with the rise in interest within humanities, present since the end of the last century, in generally understood theory of culture and theory of politics. From this results the importance and need of conducting studies in politics, law, literature in the context of reflection on the processes occurring in culture.[43] Artur Kozak, stressing the connections between language, law and culture, claims that "law functions through the socially formed institutional structure which creates unique, professional semantics. Thanks to these semantics it can attribute specific cultural meanings to other elements of the social world and with this generate an intra-institutional reality with its own discourses. It is impossible not to agree with the opinion that "the point of reference of the reality of law is then the reality of culture generated by society."[44] Seeing the law as a semantic subject which is not a "finished" object given to the subject studying it is supported by the fact that law is

[39] A. Burzyńska, *Wprowadzenie*, (in:) idem, M. P. Markowski, *Teorie literatury...*, *op. cit.*, p. 31.

[40] *Ibidem*, p. 9. See *Kulturowa teoria literatury...*, *op. cit.*, S. Greenblatt, *Towards a Poetics of Culture – text of a lecture given at the University of Western Australia*, 4 September 1986, "Southern Review" 1987, vol. 20, no. 1, p. 3–15.

[41] M. P. Markowski, *ibidem*, p. 31.

[42] Por. A. Kozak, *Myślenie analityczne w nauce prawa i praktyce prawniczej*, Wrocław 2010, p. 104 and following.

[43] Jarosław Płóciennik shows several threads within post-modernity which permeated scientific theories involved in culture. These are: analytical nature, impartiality (multi-partiality and comparatistic nature), self-reference, localness and peripherality, autonomy, rationality. See idem, *Literatura...*, *op. cit.*, p. 20 and following.

[44] A. Kozak, *Myślenie analityczne w nauce prawa...*, *op. cit.*, pp. 103–104.

also a way to participate in culture.[45] The picture of the "reality of law" is changing. "External" justification of this fact is embedded in the changes of tendencies in social sciences to which belong the turns present in humanities. In turn the "internal" factors are the changes occurring in the paradigm of law conditioned by integration processes (changes in the legal system toward a multicentric system), formation of non-positivistic concepts of law. During interpretation of a legal text the modern lawyer takes into consideration contextual factors, which determine the method of interpretation adopted for a desired outcome. In every interpretation situational determinants deciding about the validity of choosing not the literal, or ordinary, as it would be termed by Fish, meaning, but of that which is justified by the requirements of that particular instance of reading the text. Stanley Fish notices changes in the understanding of law stressing the importance during understanding of a text of the reconstruction of the aim of statement formulation and the author's intention. The phenomena mentioned can be seen as tendencies of the formation of a cultural phase in the theory of law. The cultural theory of law can be the answer in the search for points of reference to the pluralistic concepts of meaning, openness of interpretation, and through seeing its virtues of localness, situational aspect and context. Stressing the role of contextual determinants of interpretation allows also for the reconstruction of the rule *omnia sunt interpretanda*. Because it is not *clara*, when it is *interpretanda*.[46]

The postmodern and post-structuralist trends convince us about changes in perception of the role of law and the lawyer in social reality. The consequence of this is on the one hand a certain universalization of the problems tackled within humanities, but on the other hand the mutual permeation of methodologies of different disciplines studying the same subject treated as a complicated product of a social character. This facilitates referral to the cultural space of coexisting discourses. It is conditional upon the changes taking place not only in the processes of social communication but also on tendencies occurring in scientific disciplines responding to these changes. Along with these modifications occurring within the domain of

[45] M. Zirk-Sadowski, *Prawo a uczestniczenie w kulturze*, Łódź 1998, p. 6, 128. The author notices that the processes of integration (including the harmonization of Polish Law and European Law) influence the perception of law as a creation of the communication act. As a result of these phenomena a concept of law as a cultural subject – "a set of certain meanings" – forms.

[46] See *„Omnia sunt interpretanda", czyli... o języku prawników"*, interview with professor Jerzy Bralczyk, text available at http://www.edukacjaprawnicza.pl/index.php?mod=m_artykuly&cid=2&id=488.

social communication the perception of law changes. There is a transition to post-structuralist thinking about theory, interpretation or law itself. We are convinced of this by such phenomena as postmodernist subject crisis, reformulation (or crisis) of the concept of authority, creation of the languages of persuasion[47], changes defined as heading in the direction of the dehumanizing of civilization[48], and especially the growing influence of the genre of authority and politics on social life, including scientific theory and interpretational practices.

Researches who explore the law, theory-oriented or practitioners should not ignore the changes occurring in the context of humanities of which theory of law is a part of. Post-structuralist tendencies influence not only our thinking but also the subjects being studied. All *-isms* connected with postmodernity are a certain attempt of refering to and understanding of the transformations which affect the modern world – the omnipresence of narration, the "death of the author" along with the "reactivation" of the interpreter, openness of meanings, reinterpretation of subject and object, the crisis of theory. It is a prospect which the theory of law will confront in the face of changes of the paradigm of interpretation and law itself. Transfer of predominant feature to the creative and constructive role of the subject doing the studying convinces of this and reflects on the localization of the studied object not within the structure (as desired by the structuralists) but within culture with its determinants – localness, situationality, and contextuality.

S U M M A R Y

Locating our considerations in the context of post-structuralist tendencies permits the perception of the permeation of problems of such disciplines as the theory of law and literary theory. This is determined by the dominant thinking trends in post-structuralism: linguistic turn, interpretationism, the reformulation of the problem of meaning, revision of the idea of originator (concept of "the death of the author") and recipient (creative role of the interpreter). These tendencies were especially stressed by the representatives of American neo-pragmatism, including

[47] In an extreme case this phenomenon leads to the formation of the so called impersonal languages whose primary aim is the persuasiveness of the communicated statement. See H. Marcuse, *One-Dimensional Man. Studies in the Ideology of Advanced Industrial Society*, Boston 1964.

[48] See C. Charbonnier, *Entretiens Avec Claude Lévi-Strauss*, Plon 1961.

Stanley Fish. Post-structuralist changes relate to categories fundamental to the theory of law: the subject doing the studying, the object being studied, change of the paradigm of interpretation in the direction of stressing the role of context, as well as changes in the understanding of the essence of law itself. This is reflected in the juricentric model of legal practice, the concept of law as participation in culture, reactivation of hermeneutics and the stressing of discourse. The influence of postmodern and post-structuralist tendencies on the theory of law (pluralism of discourses, situationality and contextualism of interpretation) allows us to ascertain that there are changes within it – similarly to the theory of literature – in the direction of the phase of "cultural theory of law."