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THE AMBIGUITY OF LAW INTERPRETATION

1. The concept of law interpretation

When analysing the issue of law interpretation, two theories of the meaning of law will be recalled. This will allow for showing the origins of law interpretation as well as explaining the purpose of law interpretation. L. L. Fuller claimed that law is not only a system of norms, but an enterprise whose aim is to subject human conduct to the governance of rules.[1] The essence of law in this understanding is to create a system of norms which will guarantee observance of law on account of its procedural features and moral references. Then society would obey the law not in fear of sanctions for non-observance, but as a result of legal awareness. This system of norms would be the basis of the idea of legality. L. L. Fuller sets out eight principles the system should possess; that is, generality of rules, publicizing them, non-retroactivity, clarity, non-contradiction, not setting obligations impossible to be fulfilled, stability, and no divergence between adjudication/administration and legislation.[2] Therefore, he assumed that law should be moral internally. R. M. Dworkin notices, however, that even law created according to these principles is not flawless since it is not always possible to apply it automatically. Moreover, he draws attention to the fact that by making law in a general way, norms are not fully adjusted to factual states, and thus become imprecise and need interpretation. Creating general legal conditions leads to legal loopholes and inconsistencies resulting

[1] L. L. Fuller, Moralność prawa, PIW, Warszawa 1978, p. 153.
[2] L. L. Fuller, ..., op. cit., p. 74.

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from the lack of direct reference to specific situations.[3] R. M. Dworkin in his polemics with L. L. Fuller interprets law as an integral whole composed of, apart from the norms of conduct (rules), principles, political directives (policies), and other types of standards.[4] When a rule (norm) is possible to be applied automatically, principles and policies are values which should be considered concurrently with others, and in the case of concurrence, an adequate balance between them should be sought. In consequence norms should be applied with varied intensity and in fact always partially. According to R. M. Dworkin, the principles of law are not a criterion for the law obligation. Legal principles are a tool which, for instance, a judge can use within the framework of legal rules to come to a proper decision in a given case, and there is always one decision of this kind. In line with this concept, principles do not eliminate rules, but support them. When applying the law, it should be interpreted in such a way that it is possible to pass a judgment adequate to the legal and factual state.

Our today's reality makes us aware that the theory of one proper decision adopted by R. M. Dworkin is not fully reflected in administrative or court proceedings. The situation where in the same factual state, with the use of the same provisions of law, two different judgments will be given, is possible. This is a consequence of interpreting law. Whether the interpretation was accurate or not remains irrelevant. It is important that it could be referred to the provisions of law and not go beyond the statutory rights. The purpose of interpretation of law is to establish the meaning of a specific legal provision or its excerpt. However, determining the meaning consists in defining which situations or entities a given norm refers to.[5] This view is commonly accepted both in Poland and worldwide. The Polish Constitutional Tribunal was of a similar opinion in the judgment of 26 March, 1996, file ref. no. W 12/95, OTK 1996/2/16, where it held that the "essence of (...) interpretation (...) is always to establish (explain) the meaning of a specific legal provision giving rise to doubts in the sphere of law application for a number of reasons". However, in the judgment of 11 January, 2011, file ref. IV SA/GI 467/10 the Provincial Administrative Court in Gliwice ruled that "(...) the need for further extralinguistic interpretation methods of the recalled (...) legal norms provides that the purpose of its activity is

[3] R. M. Dworkin, A Matter of Principle, Oxford University Press, Oxford 1985, p. 119–122.

[4] R. M. Dworkin, "The Model of Rules", in: *Philosophy of Law*, J. Feinberg, H. Gross, Wadsworth Pub. Co. Belmont, California 1986, p. 23.

[5] L. Morawski, Zasady wykładni prawa, Dom Organizatora, Toruń 2010, p. 15.

not to create new legal norms or modify them, but establish the content of norms expressed in the analysed provisions. It transpires from the nature of interpretation that it cannot lead to a modifying or creating of new legal norms".

Interpretation of law is significant for resolving a given issue. The consequences resulting from its effect have an influence on the situation of the person they concern. However, depending on the adopted interpretive rules, the meaning of a provision of law may be understood differently and applied to different legal circumstances.

Just like in the case of specifying a definition of law, a lot of law interpretation theories are created.

In the pragmatic sense, the "interpretation of law" is composed of a set of actions referring to some expressions. In the pragmatic sense, the term is understood as a result of acts done in reference to these expressions and consisting in the meanings attributed to these phrases. It is assumed that depending on the context of a situation in which the term "interpretation of law" is used, the phrase may have different meanings. If the term "interpretation of law" emerges in the context of selecting a type of interpretation by the court, i.e. the court adopts linguistic rules of interpretation, the interpretation of law has a pragmatic meaning. However, in a situation where the court gives a judgment based on the adopted interpretation, the interpretation has an anti-pragmatic sense.[6]

Pragmatic "law interpretation" is doing acts which have as their aim the choice of interpretive rules, or application of adequate collision norms in such a way that it is possible to interpret the meaning of a provision correctly. As a consequence of making interpretive acts, it is possible for instance to pass judgment in a given factual state, but based on interpretation rules. Then, passing judgment is preceded by analysis of the factual state in reference to the evidence in the case.

L. Morawski recalls declarative and constitutive theory, and this distinction is very important in the law application. According to the declarative theory, the aim of the interpreter is to recreate the sense of a legal provision. It is not possible to create this sense.[7] The theory of constitutive interpretation is and may be creative in character.[8] The main issue in the case of both theories is to determine an admissible interpretation and its border.

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[6] M. Zieliński, Wykładnia prawa. Zasady, reguły, wskazówki, LexisNexis, Warszawa 2010, p. 43.

[7] L. Morawski, ..., op. cit., p. 18.

[8] L. Morawski, Precedens a wykładnia, "Państwo i Prawo" 1996/10.

The declarative theory is a commonly respected view as it does not pose the risk of adjusting the law to the factual state, which is abusing the function of interpretation. The Polish Constitutional Tribunal in its Resolution of 7 March, 1995, file ref. no. W 9/94, OTK 1995/1/20 declared that the "interpretation established by the Polish Constitutional Tribunal is not and may not be creating legal norms but establishing the correct interpretation of legal norms contained in statutory provisions. (...) The Constitution Tribunal does not take away or add anything to the system of binding legal norms, but only specifies the content of these norms". The position taken by the Constitutional Tribunal inspires a lot of controversy.[9]

M. Safjan notices that there is a major difference between court judgments and judgments of the Constitutional Tribunal. In the first place, what makes them different from court judgments is they are commonly binding in character, deciding not only about individual legal relations between parties to the proceeding or shaping a situation of a specific entity whose rights and obligations are referred to in a specific court judgment. They contain information whose recipients are abstract and undefined, just like in the case of each legal norm. This feature concerns not only the abstract, but also specific control over the constitutional character of law, exercised in the case of legal queries and in reference to the abstract undefined circle of recipients – just like in the case of each legal norm. This feature concerns both abstract and specific control over the constitutional character of law kept in the case of legal queries and in reference to a constitutional complaint. Secondly, judgments of the Constitutional Tribunal are commonly binding, have abstract recipients, and normative content (although in the negative sense); through this they are close to a normative regulation in all the cases where a decision is aimed to eliminate the unconstitutional norm fully or partially. Judgments of the Constitutional Tribunal declaring directly that provisions of law are unconstitutional, or determining the scope of provisions colliding with the Constitution, should be attributed a creative character. This also pertains to so-called positive and negative interpretive judgments. Their aim is to eliminate the unconstitutional content which may be attributed to the examined regulation by way of the adopted rules of law interpretation.[10]

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[9] compare L. Morawski, ... op. cit., p. 19.

[10] Legal consequences of the judgments passed by the Polish Constitution Tribunal, text of statement made by the President of the Polish Constitutional Tribunal, prof. M. Safjan in the Committee of Legal Sciences of the Polish Academy of Sciences on 6 January, 2003.

Acts of creative interpretation are indispensable. They result from such features of legal language as imprecision, general or chaotic character, lack of coherence, or semantic openness. Also, the variation of economic, political, and moral process is influential[11].

2. Types of law interpretation

Types of law interpretation may be classified according to subject, method, and result.

The law interpretation with respect to the subject making an interpretation may be divided into the following types of interpretation: authentic, legal, operative, and doctrinal.

The authentic interpretation is conducted by the same institution which established a given norm. In this way the interpretation made by the same institution has a legal force equal to the legal force of a normative act which was subjected to interpretation. This is the interpretation of the commonly binding force. The official authentic interpretation is contained in the act which is formally binding. The law-making body clarifies the meaning of norms passed by them. Authentic interpretation is interpretation where the intentions of the law-making body are recognized based on preparatory materials or declarations which are not formally binding.[12] In the current legal system there are no decisions referring directly to authentic interpretation. It is permitted as justified by the rule *argumentum a maiori ad minus: cuius est codnere eius est interpretari*. The authentic interpretation is very rare in practice since law-makers do not use the possibility of interpreting the law.[13]

Legal interpretation is made by the institution entitled by virtue of statute to interpret certain provisions of law. This kind of interpretation may have a binding force. The binding force may be limited only in relation to specific entities, or it may not have a binding force.[14] According to the position taken by the Constitutional Tribunal based on Art. 190, judgments of the Constitutional Tribunal on compliance or non-compliance with the Constitution are the commonly binding legal interpretation. The condition

[11] A. Stelmachowski, Wstęp do teorii prawa cywilnego, PWN, Warszawa 1984, p. 434.

[12] L. Morawski, Wstęp do prawoznawstwa, TNOiK, Toruń 2009, p. 206.

[13] J. Nowacki, Z. Tobor, Wstęp do prawoznawstwa, Wolter Kluwer, Warszawa 2012, p. 203.

[14] L. Morawski, ..., op. cit., p. 39.

is that the Constitutional Tribunal should define in the conclusion of the judgment in what meaning and scope the provision is declared as compliant or non-compliant with the Constitution.[15] Moreover, according to Art. 60 of the Law on the Supreme Court of 23 November 2002 (J. of Laws from 2002 No. 240 item 2052), if the judicial practice of common courts of law, military courts or the Supreme Court reveals discrepancies in the interpretation of law, the President of the Supreme Court may present their decision to the Supreme Court composed of seven judges or another applicable panel. It is also the Public Ombudsman, the Public Prosecutor General, and within their jurisdiction the Ombudsman for Children, the President of the Polish Financial Supervision Authority, and the Spokesman for the Insured who may also file a request for resolving discrepancies. There is no, however, clear statutory provision giving commonly binding force to the judgments of Supreme Courts resolving discrepancies. They only have the *imperio rationis* binding force.

The operative interpretation involves all situations where courts or other bodies apply the law by interpreting it. The operative interpretation is specific in character. It is issued in individual matters.[16] This is not, however, a commonly binding interpretation. An exception to the rule is a situation where the court gives a ruling in the appeals court and this ruling has a binding force also in relation to the lower court and the resolution of the Supreme Court resolving legal issues raising doubts in specific matters.[17] Applying the operative interpretation may have influence on the factual state and creates the legal situation of the entity; that is, the laws and responsibilities depending on the adopted assumptions resulting from the interpretation.[18] In practice it is common to refer in pleadings to the rulings given in similar cases. It serves to support one's position. A paradox arises here – applying a precedent in the legal system where the precedent does not normally exist. It may, however, contribute to the unification of judgments in specific cases. When copying a decision given in a different case, but of the same factual state, the Court establishes the practice of applying provisions of law and their reference to specific factual circumstances. The operative interpretation, apart from the court judgments, administrative bodies, and the Supreme Court, also includes the judgments of the Supreme Administrative

[15] L. Morawski, ..., op. cit., p. 39.
[16] J. Nowacki, Z. Tobor, ... op. cit., p. 210.
[17] L. Morawski, ..., op. cit., p. 46.
[18] J. Nowacki, Z. Tobor, ..., op. cit., p. 210.

Court and individual interpretation of the provisions of tax law made by the Minister of Finance according to Art. 14b of the Tax Ordinance.[19]

The doctrinal interpretation is made by the representatives of the science of law. It is not related to the process of law application or creation. This is analysing provisions of law by writing glossaries for judgments as well as commentaries for legal texts and scientific studies. This is not a binding interpretation, but it has an enormous influence on the operative or legal interpretation.[20] The Constitutional Tribunal in its judgment of 8 May, 2000, file ref. SK 22/99, OTK 2000/4/107 recommended that the judgments and doctrine be used as broadly as possible.

Another group is that distinguishing types of interpretation with respect to method, i.e. the linguistic, systematic, functional, or historical one.[21]

Linguistic interpretation is the interpretation of law based on the analysis of language. It is one of the most fundamental and essential interpretations of the provisions of law. There are four types of language in the analysis of law: the natural (colloquial) language used every day; legal language (most frequently the precise definitions of colloquial concepts written down by the very law-maker), legalese (used by lawyers, often without corresponding synonyms in the colloquial language) and specialist language (used in a given area of science). According to the directive of language interpretation priority, the literal meaning of a provision is considered first when interpreting it.[22] The Supreme Court in its decision of 26 July, 2007, file ref. no. I KZP 16/07 ruled that "in the course of dogmatic exegesis of legal provisions, the idea that these provisions may be the result of irrational act is rejected in advance". It is assumed that "no word in a legal provision is redundant and at the same time the interpretation as a result of which an excerpt of legal text is regarded as redundant is not admissible; and also that the statutory provisions are interrelated and that is why when interpreting them the whole context of the statute should not be ignored. (...) The language interpretation of (...) the provision does not give any reasonable grounds for finding "hidden" meanings in the text or attributing functions going beyond the one which clearly results from its grammatical understanding". The above judgment shows that if it is clearly visible from the literal sense of the provision what the law-making body wanted

[19] L. Morawski, ..., op. cit., p. 47.

[20] L. Morawski, ..., op. cit., p. 49.

[21] J. Wróblewski, Sądowe stosowanie prawa, PWN, Warszawa 1988, p. 128.

[22] L. Morawski, ..., op. cit., p. 117.

to achieve, there is no need to subject the provision to further analysis and search for other meanings.

Systematic interpretation consists in the argumentation of reference to the location of provision in the system of law. What is more, the provisions of law should be supported with arguments in consideration of their place in the internal or external system of law. If a normative act can be found in the fundamental part, its scope of application is narrow. The internal part consists of an introduction, main part, and final provisions. The external part is the place of the act in the system of law; that is, whether it is a regulation, statute, etc. In the interpretation, logical analysis of the whole system of law related to the issue should be made, to rationalize the assumptions of the law-maker.[23] This is known in the literature on the subject as *argumentum a rubrica*.[24]

Functional interpretation encompasses a set of directives which are multifaceted from the point of view of legal provisions, and refer to the function, role and purpose to be fulfilled by a normative act undertaken by the law-making body. The directives of this interpretation talk about referring to what the lawmaker wanted to achieve when issuing a given act. It should be established what norms are accepted in a given society. Within the framework of functional interpretation there is an intentional interpretation. The purpose of legal regulation is understood here as the purpose of the legal provision, the aim of the institution whose provision is an element of and the aim of the whole system of law. When making a legal interpretation, the interpreter must strive to adjust these aims.[25] As a consequence the interpretation may seem to be a complicated procedure.

Historical interpretation is based on the circumstances accompanying the creation of a given provision of law; i.e., it is a complex analysis of facts contributing to the shaping of legal status. Within the framework of its application the historical circumstances which led to the appearance of a given regulation are examined by referring to, for instance, economic, political, state, or social determinants. Currently, this method is applied in a different way than provided for by the theory of law. The present application of historical interpretation has as its aim to make law less rigid based on the current situation, for example the economic one, which had not

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[23] A. Bator, W. Gromski, A. Kozak, S. Kaźmierczyk, Z. Pulka, Wprowadzenie do nauk prawnych (ed. by Andrzej Bator), LexisNexis, Warszawa 2010, p. 264.

[24] M. Zieliński, ..., op. cit., p. 75.

[25] http://prawo-administracyjne.wyklady.org/wyklad/882_wykladnia-systemowa-i-funkcjonalna.html, date of reading: 11/10/2012.

been previously known to the lawmaker.[26] It may apply, for instance, to the bill of exchange Law. Only two amendments have been introduced to the Bill of Exchange Law from April 28, 1936 (J. of Laws no. 37, item 282) from the moment of its creation; only two changes have been introduced (2006.05.13 J. of Laws from 2006r no. 73, item 501; 2013.01.01 J. of Laws from 2012, item 1529), and at the same time its updated version is the interpretation of the provisions of law based on the current legal and economic situation.

The last discussed group are types of legal interpretation with respect to result: the broad and the narrow one.

The broad interpretation of law (*interpretatio extensiva*) is supported by the principle of friendly interpretation of all citizens' rights and freedoms. According to it, all citizens' rights and freedoms may be interpreted in a broad way. The understanding resulting from extralinguistic directives is selected and it is broader than the linguistic understanding. The broad interpretation is in operation when interpreting different rights and freedoms of citizens, especially personal and political rights – since their protection was provided for in the Constitution.[27] Broad interpretation cannot lead to the diminishing of rights of some entities by giving rights to other entities, or by applying the provision of law. The Supreme Court in its judgment of 23 January, 2007, file ref. no. III CSK 278/06, OSNC 2007/12/186 declared that the broad interpretation of the provisions of law posing a limitation on a subjective right is inadmissible. Likewise, the Supreme Court in its resolution of 18 April, 2007, file ref. no. III CZP 139/06, OSNC 2007/11/159 showed that "by construing the provisions of property law and other legal provisions with legal and property effects, the construction (...) which leads to depriving the entitled of property rights in a similar broad construction of law should be avoided".[28]

The broad interpretation of law is also burdened with other restrictions. *Exceptiones non sunt extendendae*, i.e. exceptions shall not be interpreted in a broad way.[29] Often this principle is confirmed by court judgments. In its judgment of 4 January 2007, file ref. no. V CSK 388/06 the Supreme

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[26] E. Łętowska, Podstawy prawa cywilnego, Ecostar, Warszawa 1993, p. 58.

[27] Compare judgment of the Constitutional Tribunal of 10 November, 1998, K 39/97, OTK 1998/6/99, i.e. in reference to Art. 20 of the Law, the National Court Register says that although the phrase "provisions concerning the accused person are applicable to the person subject to vetting procedure (...)" is not very skillful, this provision should be understood in such a way that it is only the rights of the accused resulting from the Code of Penal Procedure).

[28] Compare L. Morawski, ..., op. cit., p. 200.

[29] Ch. Perelman, Logika prawnicza. Nowa retoryka, PWN, Warszawa 1984, p. 133.

Court declared that "Art. 554 of the Civil Code as a special provision on the time limits for claims barred by prescription must be interpreted in a narrow way (...) as the one pertaining to only such claims whose source is a sales agreement. (...) Secondly, (...) the plaintiff may assert another claim whose source is a statute and which is indirectly linked to the prior sale of medicines to individual persons based on prescriptions. This kind of claim, even when adopting the most liberal construction of Art. 554 of the Civil Code, should not be classified as "a sales agreement claim" in the understanding of this provision. The prohibition may result from the fact that the broad interpretation of exceptions may cause adjustment of legal regulations to the factual circumstances, and in consequence each legal situation could become an exception".

Another obstacle is the lack of possibility to interpret intertemporal provisions and nationalization provisions. This results from the fact of transience or momentariness of legal regulations in the first case, and in the second case from limiting personal rights.[30] The situation is similar as regards reliefs, exemptions, and other tax privileges.[31] According to the judgments of the Supreme Administrative Court the provisions concerning reliefs, exemptions and other tax privileges are an exception to the common character and equality in the tax law. Broad interpretation in this scope could lead to an unfair decision.

Another group of provisions covered by the ban on broad construction are special provisions.[32] Special provisions originated in relation to the need to regulate the legal situation of a specific circle of people and circumstances. In view of the above, the broad interpretation cannot be applied in relation to the people or circumstances not mentioned in the statutes defining the scope of subjects or situations where specific subjects acquire special powers. That would be transgressing the borders of interpretation.[33] Other limitations result from the *expressio unius est exclusio alterius* principle, i.e. the law-making body defines in the legal norm the scope of certain situations, persons, and concepts, and it should be assumed that this is a closed catalogue. Therefore, recalling elements from the closed catalogue in cases not connected with the functioning of this catalogue is not possible.

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[30] L. Morawski, ..., op. cit., s. 202.

[31] Compare the judgment of the Supreme Administrative Court of 19 March, 1992, file ref. no. SA/Po 1902/91, ONSA 1993/1/18.

[32] L. Morawski, ..., op. cit., p. 204.

[33] Compare the resolution of the Supreme Court of 7 May, 1992, file ref. no. II UZP 1/92, OSNC 1992/10/173.

On the other hand, if the catalogue contains detailed norms applied in specific situations, these regulations should be applied in the current factual circumstances, compliant with the purpose of provision. Thus, other provisions should not be referred to on account of more favourable directives contained in them. According to the *expressio unius esteiusdem generis* principle, if the catalogue is not closed and the situations or subjects mentioned in it are just examples, it should be assumed that in similar situations or in reference to persons in similar circumstances a given provision will be possible to apply.[34]

The concept of narrow interpretation (*interpretatio restrictiva*) does not appear in court judgments.[35] The narrow interpretation consists in the fact that the scope of applying or forming a given norm, achieved based on functional principles, is inferior to the scopes of norms achieved through application of linguistic rules.[36] The narrow interpretation is acceptable in the case of citizens' obligations and provisions restricting the rights and freedoms they are entitled to. This position is supported by the Supreme Court which, for instance in the judgment of 24 June 2003, file ref. no. III RN/95/02, acknowledges that all circumstances restricting the right of the press to demand information should be interpreted strictly or even narrowly.[37]

3. Creative interpretation of law

In accordance with the judgment of the Polish Constitutional Tribunal of 28 June, 2000, file ref. no. K. 25/99 in the legal state the interpreter must first of all take into consideration the linguistic meaning of a legal text. If the linguistic meaning of a text is clear, then according to the principle *clara non sunt interpretanda* there is no need to reach for other extralinguistic methods of interpretation. In view of the above, the law interpretation may be made only if there are unclear points in the legal text which should be removed. A different position was taken by the Supreme Administrative

[34] L. Morawski, ..., op. cit., p. 206, also compare the First Instance Court of European Communities, in its judgment of 30 November 2005, file ref. no. T-191/04 the Court ruled that the provisions of Art. 8 and 42 of Regulation no. 40/94 on the EC trademark and principles 15, 16 and 20 of the executive order concerning trademarks relative grounds for refusal of registration as well as the proceeding regarding objection.

[35] L. Morawski, ..., op. cit., s. 207.

[36] M. Zieliński, Z. Radwański, Wykładnia prawa cywilnego, in :Studia Prawa Prywatnego, 2006, no. 1, p. 30.

[37] Por. L. Morawski, ..., op. cit., s. 208.

Court. The judgment of 30 November, 2005, file ref. no. FSK 2396/04 declared that "the basis for constitutional control is always a specific content established by way of interpretation since there is no clear, abstract meaning of the provision which may be adopted without any interpretive attempts". This thesis is, according to the Court, broadly presented in the theory of law interpretation. Taking into consideration the position of the Supreme Administrative Court, it should be assumed that the *omnia sunt interpretanda* principle is binding here. The advocates of this concept claim that each reading of the provisions of law inevitably entails its interpretation. Apparently simple provisions of law require making assumptions and adopting definitions as well as a specific understanding of words and contexts which are culturally, linguistically, class, and civilization conditioned.[38]

This is not, however, a creative interpretation of law. In the Polish legal reality, this process is a rare occurrence. The Constitutional Tribunal defends its position on that, saying that the interpretation of law made by it is in compliance with declarative theory. Therefore, it does not have a creative character. In its resolution of 7 March, 1995 file ref. no. W 9/94, OTK 1995/1/20 the Tribunal declares that "interpretation is not and may not be creating new legal norms, but establishing the proper understanding of legal norms expressed in statutory provisions, in compliance with the constitutional principles and with the application of interpretation rules adopted in the legal culture of a democratic state".

A question arises when a legal provision may or should be interpreted in a creative way, although in concordance with the commonly held view that courts should not create new legal norms. The answer to this question is complex. It is difficult to draw a line between creative interpretation of a law compliant and non-compliant with the statutory purpose. On the other hand, what should be taken into consideration is that interpreting the law should take place based on direct understanding; that is, by using all linguistic rules of sense in the first place. If they prove to be insufficient, then the broader interpretation should be applied, however, in such a way that a new law is not created. The issue of relations between the *clara non sunt interpretanda* and *omnia sunt interpretanda* arises here. There is an ongoing dispute among legal theorists concerning this matter.[39] The literature on the subject says that provisions may be interpreted if doubts have the form of

[38] Interpretation and Coherence in Legal Reasoning, First published Tue May 29, 2001 w: http://plato.stanford.edu/entries/legal-reas-interpret/#2.5, date of reading: 11/10/2012.

[39] K. Płeszka, Wykładnia rozszerzająca, Wolters Kluwer, Warszawa 2010, p. 188–197.

a legal issue requiring fundamental interpretation; that is, if they are truly related to the flawed, ambiguous provision of law, unclear about its scope or regarding the terms used in it, whether this situation gave rise to obstacles and discrepancies in the interpretation and application of these provisions in judicial practice, or they must inevitably lead, as a logical consequence, to such discrepancies and obstacles (which was the case in the judgment of the Supreme Court of 26 July, 2007, file ref. no. I KZP 14/00, OSNKW 2000/7-8/59 SN).[40] This view supported by the literature on the subject and rulings of the Constitutional Tribunal diverges from practice to a large extent. The manifestation of this is the frequent role of the judge in the process of law interpretation when passing judgments in cases. Here, the Supreme Court acknowledges that the issue whether the Supreme Court acts within its powers when making a creative interpretation of Art. 632 point1 of the Code of Penal Procedure requires an attitude. With regard to this problem, it should be strongly emphasized that it is not only the law but also the obligation of each court to interpret statutory provisions in a way which is compliant with the Constitution (...) There is no doubt that the direct use of provisions contained in the Polish Constitution as provided for in its Art. 8 section 2 also involves taking account of the constitutional context when interpreting statutes.[41]

The result of correct use of interpretive methods is establishing the semantic sense of an analysed provision with the degree of precision sufficient to resolve a case so as not to infringe the logical purpose of the provision, and be adequate to the factual state at the same time. Creative interpretation is often used in common courts of law, mainly on account of imprecise legal provisions and lack of clarity in the way they are applied.[42]

L. Morawski observes that when applying the rule *clara non sunt interpretanda* the fact that clarity or doubts related to the provision are not only the object of semantic analysis, but also an issue of doctrine and judicial practice. Creative interpretation may help work out a permanent mode of deciding cases based on the same factual state. It allows for unifying law

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[40] Compare L. Morawski, ..., op. cit., p. 52.

[41] Decision of the Supreme Court of July, 26 lipca 2007, file ref. no. I KZP 14/00, OSNKW 2000/7-8/59 SN.

[42] K. Opałek, J. Wróblewski, Zagadnienia teorii prawa, PWN, Warszawa 1969, p. 230, and also the resolution of the Supreme Court file ref. no. III CZP 11/2011 deciding whether a belated complaint about the actions of court enforcement officer based on which the Court ruled that there were grounds for commencing legal proceedings based on Art. 759§2 of the Code of Civil Procedure or resolution of the Supreme Court, file ref. no. III CZP 79/11 where the court decided if the deed of real property donation constituting a legal act covered by an apparent sales agreement was invalid.

in relation to the doubtful issue analysed. This debatable issue is no longer necessary for analysis then.[43] Departure from the *clara non sunt interpretanda* rule is aimed at the in-depth analysis of the controversial provision. Based on the interpretive methods, the legal purpose should be found which is a basis for later application of this rule, when the judiciary will refer to the decisions reached as a result of the analysis made.

A different position is taken by E. Łętowska. In her opinion the law-making role of the judicature can be observed when a provision is presented in a vague or general way, or when the interpretation should be made based on the principles of social harmony. In this respect the court has more freedom of interpretation,[44] since doubts arise in reference to, for instance, the hypothesis or disposition. Sanction, as a rule, is clearly specified in the Polish legal system. It is the ambiguous character of hypothesis or disposition that causes problems in law interpretation. Therefore, when a particular part of the provision is not precise, interpretation is needed in order to find the missing sense. The view held by E. Łętowska that this is how the law-making role manifests itself seems arguable. In her opinion the court creates the law since it completes the sense of a provision by providing it with meaning as the result of semantic analysis. According to the theory presented by E. Łętowska, higher courts have a greater possibility of creative law interpretation as the range of their influence and authority is higher. It should be thus understood that the Supreme Court or the Supreme Administrative Court have a greater freedom of creative interpretation in respect to the final character of their decisions.[45] The decisions of the above-mentioned courts may contest the decisions of lower courts, or should change them. They have a decisive influence upon the shape of challenged decisions. In this respect both the Supreme Court and the Supreme Administrative Court may interpret the provisions in a way that enables them to justify their position and at the same time influence the judicial practice in a given factual state. This is not, however, creating the law but is still its interpretation. In this way E. Łętowska emphasizes that knowledge of judicial decisions is as important as knowledge of the law since it allows for specifying the chances in a court dispute by comparing judicial decisions in a given matter.[46] Therefore, the possibility of making a claim is also based on judicial decisions and not only on the substantive law.

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[43] L. Morawski, ..., op. cit., p. 57.
[44] E. Łętowska, ..., op. cit., p. 54.
[45] E. Łętowska, ..., op. cit., p 54.
[46] E. Łętowska, ..., op. cit., s. 54.

The above views should be subject to critical review as they "overstate" the role of judicial decisions in the way that, according to Łętowska, the law is created through them. The current diversity of judicial decisions in similar or identical cases shows that perceiving the courts as creators of the law carries a high risk. Judicial decisions are not mutually binding and in view of the above, they are regarded to be the interpretation and application of the law, and not its creation.

4. Summary

Interpretation of the law is a complex and multifaceted problem. The idea of interpretation and construction of law are not interpreted in the same way. The literature on the subject allows for using the terms interchangeably.[47] However, this idea has been worked out by judicial practice and doctrine for years. It may be observed that law interpretation is subject to constant semantic improvement. This is an issue on the border of the theory and philosophy of law, often referring to the ethics of law.

Interpretation as a tool whose purpose is to read the meaning and purpose of a legal provision, encompasses the attempts at recreating norms from provisions. This is the sense stricte interpretation. However, if interpretation aims at plugging legal loopholes by way of analogy legis or acceptable creative activity, this is the sense largo interpretation which is closely related to the imperfection of law.[48] By creating legal regulations the law-maker could not anticipate all possibilities of using legal norms. If all possible factual circumstances could be foreseen in the statute, the law would have the shape of a closed catalogue. However, the interpretation of law would not be necessary then. The law should be adjusted to economic relations so as to ensure the legality of, for instance, business entities as well as institutions of authority. The law, however, to a large extent does not meet the expectation. Current changes in the legal situation of Poland are so fast that the constant changing of the law would be troublesome. This could lead to legal disinformation. Law interpretation complements the role of law in the shaping of the legal situation of citizens, which is the sphere of rights and responsibilities.

The interpretation of law is an indispensable process both in making the law and its application. Automatic application of norms could in many

[47] M. Zieliński, Z. Radwański, ..., op. cit., p. 5.

[48] M. Zieliński, Z. Radwański, ..., op. cit., p. 14.

cases lead to decisions unjust in character. The interpretation of law allows for rational, optimal and legal decisions based on the provisions of law. Creating precise law which could anticipate each undertaken act or omission is impossible. The interpretation of law complements the legal system. When the law is applied, it is also interpreted, for instance in the grounds to court rulings.

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