OPTIMUM PARADIGM FOR INTERPRETATION AND APPLICATION OF LAW

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Introduction

Court and administrative disputes, including disputes between entrepreneurs, include various legal and economic issues. It seems obvious that economic rationale, frequently presented by experts in economics, usually comes second after the opinion of lawyers which is frequently based on grounds not clear to parties involved. It turns out that court decisions are to a large extent unpredictable because of the ways judges (officers) define the content of law[1]. Therefore, one may consider whether it is possible to interpret and apply law in a way enabling the verification of the conduct of a judge and his/her legal decision from the point of view of ethical correctness. In other words, the idea is to develop an optimised paradigm for interpretation and application of law. For this reason, it is necessary to answer the following questions: Is it possible to develop an optimised law interpretation paradigm? Is it needed? What should be the composition of the optimised law interpretation paradigm? The discussion included in the article is based on analyses of the Polish law. However, they are universal and can be applied in fact to any legal order — the issues defined at the beginning of the article is also present in all legal orders.

The notion of 'paradigm'

Paradigm is one of many commonly used scientific terms. It is so common that practically we do not need to quote sources of its definition. The notion first appeared with the publication of a dissertation on The Structure of Scientific Revolutions by Thomas Kuhn[2]. In this paper, paradigm is a set of notions and theories that comprise the basis of specific scientific field. Theory and notions that together make a paradigm are rarely questioned, at least until the paradigm contributes to creation and knowledge, i.e. it can be used to develop detailed theories according to experience (historical data) in a given field. In the formal sense, T. Kuhn's explication of the notion of "paradigm" (gr. parádeigma — pattern,

[1] Isensee J., Vom Ethos des Interpreten. Das subjektive Element der Normauslegung und seine Einbindung in den Verfassungsstaat; Staat und Recht, Festschrift für Günther Winkler, Wien-New York 1997.
[2] Kuhn T., Struktura rewolucji naukowych (The Structure of Scientific Revolutions), Warsaw 2001.

example) proposed by G.Ch. Lichtenberg, and understood as a primary model of sensual objects, a model in its schematic form, having a didactic value providing clear and direct insight into particularly complex research[1]. In the theme-specific sense, T. Kuhn questioned previous belief regarding the cumulative and evolutionary nature of science, since he claimed that it is not a set of facts, theories and methods presented in books, and advancement in science is not based on collecting additional elements, one by one or several at a time to continuously growing pool of techniques and knowledge[2]. He also noticed that for the majority of history of science, the latter was governed by a 'paradigm'[3] that could be defined as a certain flexible research pattern: a scheme of terms, findings and procedures, which organizes later research. A paradigm is established by scientific works, and a set of theoretical presentation of phenomena is considered by the majority of scientists as a basis for further research for some time. Then, the normal science, exercised within the paradigm, is increasingly less useful and results of its application are less satisfactory. Kuhn calls these difficulties 'anomalies'[4]. Sooner or later, anomalies lead to a crisis in science and an old paradigm is replaced by a new one[5].

In the field of legal sciences, three basic paradigms include:

1) legal-natural paradigm,

2) positivist paradigm,

3) sociological-psychological paradigm (realistic),

and possibly:

4) theological paradigm[6].

Undoubtedly, these legal science paradigms influence interpretation and application of law. Their more elaborate presentation is included in several works[7]. In this paper, however, the main focus is on the paradigm of interpretation and application of law. Therefore, these issues will not be further elaborated on.

Law interpretation theories and concepts

The science of law is familiar with very precise, and sometimes formalised sets of claims concerning interpretation phenomena (or wider, interpretation of law). These sets are usually known as law interpretation theories, and sometimes

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[1] Kaliński M., Paradigmy nauk prawnych, s. 2 (Paradigms of legal sciences, p.2) — www.knhd.law.uj.edu.pl (website of 07.10.2012)

[2] Kuhn T., op,cit. p.20.

[3] Kaliński M., op.cit., p. 2, Sady W., Spór o racjonalność naukową, Od Poincarego do Laudana (Dispute around scientific rationality. From Poincar to Laudan), Wrocław 1995, p. 159.

[4] Sady W., op.cit., p. 159.

[5] Kuhn T, op.cit,p.156.

[6] Bator A., Wprowadzenie do Nauk Prawnych, Leksykon tematyczny (Introduction to Legal Sciences, Theme Lexicon), Warsaw 2008, p. 18-19, Stelmach J., Sarkowicz R., Filozofia prawa XIX i XX wieku (Philosophy of 19th and 20th c. Law), Kraków 1999, p. 13-14.

[7] For example: Stelmach J., Sarkowicz R., Filozofia prawa XIX i XX wieku (Philosophy of 19th and 20th c. Law), Kraków 1999) Kraków 1999, S. Blackburn, Oxford Philosophical Glossary, Warsaw 1997, Bator A., Wprowadzenie do Nauk Prawnych, Leksykon tematyczny (Introduction to Science of Law, Theme Lexicon), Warsaw 2008, Tatarkiewicz W., Historia filozofii, v. III (History of Philosophy, v. III), Warsaw 1998.

descriptive theories of law interpretation[1]. In a specific way, those claims apply to interpretation rules. It should be emphasised, however, that these rules may be applied by entities providing interpretation (in particular courts), and these rules, based on distinguished features of legal texts, are taken into consideration to devise from those texts legal information about what is required and what is prohibited.

The concepts are more or less descriptive (reflecting) or postulated concepts when the description is rather a model or pattern (idealising facts described)[2]. An important feature of statements formulated within a 'theory' is the nature of interpretation directives (rules): recommended and postulated but rarely comprising a specific system[3].

The legislation distinguishes various typologies of law interpretation concepts. Usually, however, three different types of interpretation concepts are mentioned:

analytical concepts (deductive understanding models),

hermeneutic type (non-deductive understanding models),

Argumentative type[4] (non-deductive understanding models).

Considering the nature of law interpretation concepts presented we may assume that so called law interpretation concepts adopt a specific law interpretation paradigm. In the Polish science, however not only Polish science, they partially depend on science of law paradigms.

All kinds of concepts resented include a common paradigm which includes linguistic attempts to define the actual content of a legal text and non linguistic attempts taking into consideration values for defining the sense of a legal text. It is not particularly important whether it is a text of a normative act or justification of a court's decision. Concepts vary as regards processes permitted to define linguistic and non-linguistic meaning of a legal text. In this sense, they are open to development in language and law axiology which should be taken into consideration in every concept. A common feature of law interpretation concepts is that they apply to interpretation but not law application, in which they preserve their didactic 'division'. None of the concepts considers the interpreter and the operation of linguistic and non-linguistic interpretation to be the object of interpretation.

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[1] Peczenik A., Kierunki badań interpretacji prawa, PiP 2/1966, s. 259. Wróblewski J., Opisowa i normatywna theoria interpretacji prawa (Descriptive and normative theory of law interpretation), PiP 7/1958, p. 47.

[2] Zieliński M., Interpretacja prawa. Zasady. Reguły. Wskazówki (Law interpretation. Principles. Rules. Guidelines), Warsaw, LexisNexis 2008, p.64.

[3] It is recognised by the author Wróblewski J. [in] Opałek K., Wróblewski J., Theory of law issues, Warsaw 1969, s. 239.

[4] Ziembiński Z. [w:] Wronkowska S., Ziembiński Z., Zarys teorii prawa (The outline of theory of law), Ars Boni et Aequi, Poznań 1997, p. 194; about third type – Cf. Morawski L., Argumentacje, racjonalność prawa i postępowanie dowodowe (Argumentation, rationality of law and hearing of evidence), Toruń 1988, p. 33 and n., p. 67., p. 104.; about all three types — Stelmach J., Współczesna filozofia interpretacji prawniczej (Contemporary philosophy of legal interpretation), Kraków 1995, v. II, III and IV, in particular Zirk-Sadowski M., Wprowadzenie do filozofii prawa (Introduction to philosophy of law), Kraków 2000, v. V, VI and VII. Shortly about all types Zieliński M., Interpretacja prawa (Interpretation of law)..., op. cit. p. 65–68.

Then, how we can consider the participation of the interpreter in the law interpretation or application paradigm or from the point of view of his/her ethical correctness, especially that the latter defines reliable, unbiased, and honest behaviour of the interpreter.

Linguistic error in law interpretation and application

Issues of ethical law interpretation and literary research are discussed by legal and general interpretation theory. Examples include the output of such English speaking authors as J.Raz, S.Veitch, M.Rosenfeld, R.Dworkin, and Polish authors M.Dąbrowski, E.Rewers, E.Szczęsna, R.P.Wierzchowski, and other authors in the publication edited by A.F.Kola and A.Szahaj, Philosophy and Ethics of Interpretation, Kraków 2007. The works seem to create a favourable scientific and philosophical climate supporting the presentation of unavoidable freedom of a lawyer's decision, as well as ethical conditions for his decisions by subjecting those decisions and the lawyer himself to ethic rules, which can be tentatively called professional. However, it has little to do with the contemporary understanding of professional ethics. Therefore, we need to look for a basis for ethical reflection regarding law interpretation and application within the existing apparatus of terms such as law interpretation and methods, legal conclusions and their options, legal gaps and general clauses. The author of the article attempts to create positivist approach to axiological values which are unavoidably exemplified in every law and professional practice. The main focus is on values present in the legal language relevant regarding the law interpretation and application process.

Linguistically oriented law interpretation and application concepts are based on the following assumption: 'wisdom rests in the procedure"[1], which in itself has certain values, unless it is reduced to linguistic analysis only. It is hard to agree with such an overvalued role of a language as in those concepts. Supporters of linguistic concepts do not recognize that under apparent modern, precise use of a language as the main determinant of correctness of law interpretation and application exemplified is the power. Those concepts which allow for overcoming the result of linguistic interpretation provided there is no axiological justification practically allow for injustice.

The attractiveness of the court practice rests in the possibility of hiding the attitude of the interpreter in the consideration of legal text features or practically unlimited empowerment to overcome the linguistic sense of a legal text. It is interesting and important that linguistic concepts develop through analysis of language knowledge concepts, other concepts (e.g. argumentative) rather refer to interpretation concepts in literature and science of literature. Therefore, there is a different point of view for linguistic concepts – which is formal and linguistic, and other for interpretation concepts – which is axiological and literature science. Supporters of linguistic concepts go deeper into formalised considerations reaching the peak of abstraction, but increasingly losing contact with the reality of legal activity.

[1] Similarly, but concerning other subject — Kaniowski A.M., Filozofia po lingwistycznym zwrocie, «Teksty drugie» (Philosophy after linguistic turn, 'Second Texts'), 1990, no. 5/6, p. 93-105.

A linguistic trend, which so much corresponds with the conviction of lawyers regarding the role of a language in the law that it is linked with absolutism of language[1]. With this assumption, the world is perceived through the language and in the language. A reality is such as it can be described with a word, melodic line, tone of sound, colour, and shape of colourful spot, mimics and gesture. Perception of the world occurs in the process of naming things, expressing oneself — semiotic process, in other words cognition. What we notice can be thought about or expressed in words or in any other form, but we will always have a linguistic expression of an observance[2].

Ethical trend in law interpretation and application

There is always someone uttering words, and there is always a person with whom the other person wants to communicate and convince. Such a person uses words that have special sense for that person. Therefore, neglecting the fact that words are spoken or placed in a text by someone makes the pronouncement written or oral defective and incomplete. In the case of literary interpretation, in consequence we only have uninteresting and incomplete interpretation of a literary work. The situation differ when such interpretation applies to a legal text or law in general. A legal text has its author, or many authors. It is not possible to associate it with a specific person or determine his/her attitude. Therefore, the author of a legal text is its interpreter. It has a paramount importance since they give sense to the text. What happens when the interpreter hides his/her real intentions behind law interpretation in result of using linguistic interpretation and application of legal concepts. When we analyse court proceedings, we may be struck by the lack of any discussion in the court. In other words, the judge does not reveal his position until decision is made and justification developed, and even then we deal with the position of the state rather than a specific person. In this way, a person or people presenting the institutional position are free of any responsibility. Hiding oneself behind increasingly formalised linguistic analyses enables to hide the real attitude of the interpreter. The more such an interpreter disregards recipients of the interpretation and decision, the more he can 'hide behind the language'. Language in this sense is the emanation of interpreter's violence (ruler) against subjects of that power. Therefore, there is a need for ethical consideration and reflection, and more importantly there is a need of taking into consideration the ethical verification of the interpreter's position.

A mere statement that the law interpretation and application requires by definition taking into consideration the involvement of a specific person in law interpretation and a decision to apply law is insufficient if it is not followed by solutions enabling to consider the involvement of a person in law interpretation and application. Ensuring real and ethically correct participation of the interpreter and decision making body applying law requires specific 'tools' – legal institutions that

[1] Burzyńska A., Od metafizyki do etyki, «Teksty drugie" 2002 (From metaphysiscs to ethics, 'Second Texts'), no. ½, p. 64-80; Nussbaum M. in: «Czytać, aby żyć», «Teksty drugie» 2002 (Read to live, 'Second Texts'), no. ½, p. 7-24.

[2] Cf. Dąbrowski M., Projekt krytyki etycznej (Project of ethical criticism), Universitas, 2005, p. 19-20.

verify correctness of ethical involvement in law interpretation and application. Such verification is possible through institutional permission for formulating accusations taking into consideration standards of ethical conduct of the interpreter and a party applying the law.

We also need to consider what is required while formulating accusations and what ethical standards are involved, and the form, including the language used while formulating them.

In order to develop concepts for notification and verification of ethical accusations, it is necessary to formulate a new paradigm for law interpretation and application, and then developing and selecting ethical terms so participants to the discourse use the same language from a semiotic point of view. Another step is to create a plane for the exchange of opinions — an intellectual construction that enables verifying ethical conditions for law interpretation and application in a given case (optimum paradigm of law interpretation and application). Then, it is possible to discuss ethical concepts enabling verification of the interpreter's conduct.

Optimum paradigm for law interpretation and application

At the outset, we need to ask a question mentioned at the beginning of the article: Is it possible to have a paradigm of law interpretation or application that takes into consideration ethics or ethos[1] of the interpreter? or Can it only be considered while discussing proceedings guarantees for decisions made by the judge who cannot be accused iudex suspectus? In other words, the issue is whether the conduct of the interpreter can be included in the process of establishing the content of law and, while making legal decisions, as an element of interpreting the conduct of the interpreter in the context of defining the content of law (e.g. sentence, legal opinion).

This requires establishing what type of a phenomenon law interpretation and application is. It is commonly accepted that interpretation of law is a kind of interpretation. Regardless whether it is a linguistic interpretation or non-linguistic one we always deal with interpretation. Its parts, such as issues established by the school of economic analysis of law in Poland[2], will not always be accepted; however it is going to be an interpretation of legal phenomena, e.g. analysis of a legal text or behaviour commonly accepted by a given community (tradition, habit).

Since the interpretation of law is an act of interpretation, it can be juxtaposed with other interpretations, such as interpretation of the behaviour of the interpreter who provides linguistic or non-linguistic interpretation. While interpreting the behaviour of the interpreter we do not interpret rules or guidelines for linguistic or non-linguistic interpretation, but interpret activity of the interpreter. It is therefore a possible operation and we can supplement the law interpretation paradigm to include linguistic and non-linguistic interpretation of the activity of the interpreter.

We need to consider, however, the need of such a change since the correctness of interpretation by the judge may lead to excluding a biased judge and a statement that the latter institution makes is sufficient with this respect.

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[1] Isensee J., Vom Ethos des Interpreten. Das subjektive Element der Normauslegung und seine Einbindung in den Verfassungsstaat; Staat und Recht, Festschrift fűr Gűnther Winkler, Wien-New York 1997.

[2] Stelmach J., Brożek B., Metody prawnicze (Legal methods), Kraków 2006, p. 21, 22.

The institution of excluding the judge in the Polish civil law[1], which can be considered a standard, assumes obligatory exclusion according to Art. 48 of the Code of Civil Proceedings[2]:

1) in cases in which he/she is a party or has a legal relationship with one of the parties and the result of the case has influence on his rights or obligations;

2) in cases of his/her spouse, relative or directly related, and relatives to the fourth degree and related persons to the second degree;

3) in cases of people related to him due to parenting, care or curatorship;

4) in cases in which he/she was or still is a plenipotentiary or legal advisor for one of parties;

5) in cases in which at a lower instance he/she was involved in issuing appealed decision, as well as in cases on validity of a legal act he/she developed or examined and in cases in which he performed the role of a prosecutor;

6) in cases on compensation due to damage made by issuing a valid decision is not in line with the law, provided he/she was involved in issuing of the decision.

Regardless the reasons listed in Article 48, the court excludes a judge on his/her request or a motion of a party if there are circumstances giving rise to justified doubts regarding unbiased approach of the judge in a given case. According to the decision of the Supreme Court of 21 April 2011 and UZ 9/11[3],

1. The right to just and overt processing of the case without undue delay by relevant, unbiased and independent court is guaranteed by Article 45.1 of the Constitution. The right to exclude a judge is a constitutional guarantee of the right to impartial court proceedings.

2. The decision on excluding a judge is necessary when a party has a subjective but justified doubt regarding his impartiality.

3. Circumstances making that the judge represents a legal opinion unfavourable for the party, does not justifies his exclusion according to Article 49 of the Code of Civil Proceedings.

4. Accusations regarding the assessment of evidence by the court of the first instance can be a subject of appeal. They cannot be, however, considered to be a sufficient basis for requesting the exclusion of a judge from a given case.

As we can see, the Supreme Court rejected the possibility of excluding a judge when the judge represents a legal opinion unfavourable for a party. The problem is that the opinion completely neglects circumstances of such a legal opinion, its deviation from standard legal opinions of the legal doctrine in the court and scientific versions.

Setting ethical conditions for the interpreter requires distinguishing criticised steps taken by the interpreter similarly to prohibited contractual clauses in a civil law contract. As regards argumentative law interpretation concepts in Poland, this role is performed by the work by J.Stelmach Argumentative Code for Lawyers, Zakamycze 2003. It is the ethical code of the interpreter or a party making

[1] Developed in the same way as in other branches of law and other legal orders.
[2] Polish Code of Civil Proceedings – Law of 17 November 1964 (JoL No. 43 item 296 as amended).
[3] Polish legal program Lex no. 966824.

legal decisions. It is not about the current professional ethics of the judge, since it is used for a different purpose. This, however, it a topic for another paper, or a number of papers, but gives hopes for the implementation of a research task which should provide for larger clarity of court proceedings and eliminating or at least reducing covert interpretation partiality, something that some layers call the malicious nature of decision making.

Yet another issue that should be considered in relation to the law interpretation and application paradigm is the possibility of further acceptance of didactic distinction of interpretation of law and application of law. We need to notice that in the Polish theory of law it is an unquestioned statement included in course books on the introduction to the science of law[1]. Apart from opinions considered to be expressed by theoreticians of law, it is not a commonly accepted position. We may distinguish a position according to which the interpretation of law is an element of the application of law[2]. It seems that the two positions are compromised by the assumption that interpretation and application of law are two different aspects of thinking leading to establishing who, in what circumstances, what the person needs doing and if it is required or prohibited. There is no doubt that the approach of a lawyer does not cover two physically separate ways of reasoning, but only one – interpretation and application of law at the same time.

Summarising, the optimum paradigm of law interpretation or application should be the paradigm of law interpretation and application. Moreover, it should include linguistic and non-linguistic interpretation of the conduct by the interpreter as regards defining the content of law, as well as making legal decisions. According to intentions of the Polish constitutionalists it is worth noting the explication of the term 'application of law' as regards including all elements listed[3].

On the one hand, an ethical measure verifying interpretation by the interpreter who applies law can be any moral doctrine, but on the other, it is decisive of everything since it defines the axiological status of a given legal order.

Conclusion

In the court and administrative practice, applicable to entrepreneurs, there are methods for hiding the real basis of court decisions, which are unnoticeable for non-lawyers (and some lawyers). This may take place while establishing the content of law and therefore it is unnoticeable for other participants of the process than lawyers. This practice involves such interpretation and application of law that benefits the favoured, for some reasons, participant to court proceedings. In other words, it is possible to select methods of analysing legal provisions to receive the desired content of law and in consequence a desired decision. Such interpretation of law remains within freedom of a decision making body. This cannot be considered as a basis for excluding a judge or a civil servant/officer due to personal relationship

[1] Nowacki J., Tobor Z., Wstęp do prawoznawstwa (Introduction to legal science), Zakamycze 2000, s.200.
[2] Tuleja P., Stosowanie Konstytucji RP w świetle zasady jej nadrzędności (Wybrane problemy) (Application of the Polish Constitution in the light of the superiority principle (Selected issues)), Zakamycze 2003, p. 71.
[3] As above.

with one of the parties to the process. It is possible to hide behind increasingly formalised linguistic analyses, which enable hiding the true basis assumed by the interpreter. Language in this sense is the emanation of interpreter's violence against the addressees of law. It should be noticed that according to T.Kuhn, neglecting the ethical attitude of the interpreter is an anomaly of the law interpretation and application paradigm.

A remedy to that can be ethical reflection on the conduct of a judge (officer) interpreter. To take into consideration the ethical control over the interpreter we need to change thinking about law and considering such circumstances in the new paradigm of law interpretation and application.

Such an optimum paradigm of law interpretation or application should be the paradigm of interpretation and application of law. Moreover, it should take into consideration the linguistic and non-linguistic interpretation as well as ethical interpretation of the interpreter's conduct while establishing the content of law, as well as making a legal decision.

Ethical interpretation requires adopting a moral doctrine as a standard for verifying the conduct of the interpreter. It is possible to select a doctrine relevant for a given culture, and in this particular sense a new paradigm is universal and optimum, since it can be easily adjusted to specific circumstances.

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Пішко Роберт. Оптимальна парадигма для тлумачення і застосування права

Стаття присвячена дослідженню питання, яким чином фактичні підстави правового рішення можуть бути приховані внаслідок різних способів визначення змісту норм права (тлумачення права) особами, які вирішують судові та адміністративні спори. Встановлено, що завдяки застосуванню різних методів визначення змісту закону, іншими словами, маніпулюючи змістом правових норм, можна дійти бажаного висновку. У статті зроблено спробу представити парадигму тлумачення і застосування права, що дозволяє перевірити правильність підходу юриста через аналіз етичності його/її поведінки при визначенні змісту правових норм таким чином, щоб вони були обов'язковими для всіх, зокрема, для тих, хто приймає рішення у судових розглядах.

Ключові слова: *судові спори; парадигма тлумачення закону; етика і моральні цінності суддів та посадових осіб, які займаються тлумаченням правового тексту.*

Пишко Роберт. Оптимальная парадигма для толкования и применения права

Статья посвящена исследованию вопроса, каким образом фактические основания правового решения могут быть скрыты вследствие различных способов определения содержания норм права (толкования права) лицами, которые решают судебные и административные споры. Установлено, что благодаря применению различных методов определения содержания закона, иными словами, манипулируя содержанием правовых норм, можно сделать желаемый вывод. В статье сделана попытка представить парадигму толкования и применения права, что позволяет проверить правильность подхода юриста через анализ этичности его / ее поведения при определе-

нии содержания правовых норм таким образом, чтобы они были обязательными для всех, в частности, для тех, кто принимает решения в судебных разбирательствах.

Ключевые слова: *судебные споры; парадигма толкования закона; этика и нравственные ценности судей и должностных лиц, которые занимаются толкованием правового текста.*

Piszko Robert. Optimum paradigm for interpretation and application of law

The article discusses how the actual basis of legal decisions can be hidden due to different ways of defining the content of law (interpretation of law) by people resolving court and administrative disputes. By different ways of establishing the content of law, in other words by manipulating the content of legal regulations, one may arrive at desired conclusions. The article attempts to present the paradigm of interpretation and application of law which enables verifying the approach of a lawyer by analysing the ethical correctness of his/her behaviour while determining the content of law in a way which is binding for others and those who decide in various proceedings.

Keywords: *court disputes, law interpretation paradigm, ethics and ethos of a judge and officer as parties interpreting a legal text.*

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