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Legislative Materials as a Tool for Solving Grammatical Problems in Statutory Interpretation[1]

1. Legislative materials in interpretation of the law

Legislative materials, treated as a potential tool in the interpretation of the law, have arguably been one of the most discussed issues in global legal theory over the past few years. The discussion on ways of using legislative materials and the role they play – or should play – in the interpretation of the law is taking place in numerous countries[2] across Europe (Germany, Sweden, the UK, France, Spain), but also outside the European culture: in the United States (which not only started this discussion, but in fact continue to keep it at a very high level[3]), as well as in Australia, Canada, New Zealand, or in Asian countries. The ongoing debate, which involves not just interpreters, but also legislators[4], is a trigger for discussions on the value of legislative materials for interpreting the law.

Legislative materials (also referred to as preparatory materials or *travaux preparatoires*) usually appear in the context of interpretation of the law under the name of **legislative history**. The term was coined in the English-language literature, where its

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[2] Extensive literature on this subject is listed in monograph A. Bielska-Brodziak, *Śladami prawodawcy faktycznego. Materiały legislacyjne jako narzędzie wykładni* [Eng. *Following the footsteps of the factual legislator. Legislative materials as a tool for statutory interpretation*], Warszawa 2017. The discourse taking place in the German-speaking countries is described in A. Bielska-Brodziak, *Cel interpretacji jako kryterium oceny przydatności materiałów legislacyjnych dla wykładni prawa na gruncie niemieckiej kultury prawnej* [Eng. *The purpose of interpretation as a criterion for assessing the usability of legislative materials for the interpretation of law in the German legal culture*], in: M. Kłodawski (ed.) *Szkice z teorii tworzenia prawa i techniki legislacyjnej* [Eng. *Sketches from the theory of lawmaking and legislative technique*], Warszawa 2018, pp. 46–59.

[3] Due to the multitude of materials available, we shall quote here just some of the more important works devoted to using legislative history in the interpretation of law: the first one comes from the 1970s – G.B. Folsom, *Legislative History. Research for the Interpretation of Law*, Charlottesville 1972; the second one is Ch.E. Mammen, *Using Legislative History in American Statutory Interpretation*, Hague–London–New York 2002. See also: J.J. Brudney, *Below the surface: Comparing legislative history usage by the House of Lords and the Supreme Court*, "Washington University Law Review" 2007/85, pp. 1–62. It is also useful to check the analyses of legislative materials usage in the US Supreme Court – see: B.M. Henschen, *Judicial use of legislative history and intent in statutory interpretation*, "Legislative Studies Quarterly" 1985/3, pp. 353–371.

[4] See e.g. a comprehensive and detailed empirical study conducted in the legislative circles, described in a two-part work by A.R. Gluck, L.S. Bressman, *Statutory interpretation from the inside – an empirical study of congressional drafting, delegation, and the canons*, Part I, "Stanford Law Review" 2013/65, pp. 901–1025, and A.R. Gluck, L.S. Bressman, *Statutory interpretation*..., Part II, "Stanford Law Review" 2014/66, pp. 725–801.

use is widespread[5]. Conventionally understood, legislative history is a set of materials – in the form of documents – produced or commissioned by the legislator in the course of drafting and passing of a piece of legislation. In this category – as citations in court decisions suggest – documents deriving from the parliamentary stage of the law-making process are the most important for statutory interpretation.

Legislative history is used in the process of interpretation in such a way that the interpreter accesses bills, explanatory statements, or parliamentary debate records and other legislative documents in order to develop, accept, or reject interpretive hypotheses. The objective is to obtain information on the historical intentions of the legislator that led to the introduction of a particular provision or instrument[6].

Poland has not introduced, either by statute or through established interpretation directives, any rules for using legislative materials. Therefore, there are generally no directives that require or prohibit their use. As a rule of thumb, the Polish legal tradition has allowed the use of any materials which may prove useful for interpreting the law, although it is obvious that some interpretation tools will be more culturally valued and recommended than others. The use of *travaux preparatoires* in the process of interpretation of the law has, until recently, only received marginal interest in the Polish literature[7], and yet their popularity in judicial decision-making is surprising: legislative process materials constitute an important interpretive tool, used with increasing frequency[8]. It should be emphasised that this is partly due to the fact that over the past few years the conditions of using legislative materials have significantly improved owing to free, relatively easy, and convenient access via the Internet.

Legislative materials are used in the process of statutory interpretation in several interpretation situations[9]. In Polish case law they are deployed in the following four most frequent situations: to confirm a specific interpretation, to select one from among several interpretation hypotheses, to supplement the meaning of the interpreted phrase, and to depart from the literal meaning.

Using legislative history in order to choose from among several interpretation hypotheses appears to be the least controversial use of this tool[10]. The choice has to be made when the interpreter is dealing with ambiguous wording of a provision of the law[11]

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[5] "Legislative history" is a highly popular term in English-language literature – cf. e.g. W.D. Popkin, *A Dictionary of Statutory Interpretation*, Durham 2007, pp. 160–183; W.N. Eskridge Jr, Ph.P. Frickey, E. Garrett, *Legislation and Statutory Interpretation*, New York 2006, p. 303 (especially literature listed in footnote 17).

[6] At this point it is worth mentioning a similar term "historical interpretation" – see more broadly Z. Tobor, *Wykładnia historyczna* [Eng. *Historical interpretation*], in: M. Mikołajczyk et al. (eds.), *O prawie i jego dziejach księgi dwie: studia ofiarowane Profesorowi Adamowi Lityńskiemu w czterdziestolecie pracy naukowej i siedemdziesięciolecie urodzin* [Eng. *The law and its history in two volumes: studies dedicated to Professor Adam Lityński in the fortieth anniversary of his academic work and his seventieth birthday*], Białystok 2010, pp. 1177–1186; A. Bielska-Brodziak, Z. Tobor, *Zmiana w przepisach jako argument w dyskursie interpretacyjnym* [Eng. *A change in regulations as an argument in the interpretive discourse*], "Państwo i Prawo" 2009/9, pp. 18–32.

[7] The first, recently published, comprehensive study: A. Bielska-Brodziak, *Śladami…*

[8] A. Bielska-Brodziak, *Śladami…*

[9] The issue has been discussed in more detail in A. Bielska-Brodziak, *Śladami…*, chapter 5.

[10] That said, the scholars are not unanimous even about the admissibility of this usage – see a comparison of views held by Antonin Scalia and Stephen Breyer on the acceptable ways of using legislative history in the interpretation of law: C.E. Mammen, *Using…*, p. 155 ff., 169 ff.

[11] A frequent problem when a choice has to be made is a conflict between the so-called "plain" meanings, inferred from the general (colloquial) language. "In a case where various provisions of the text suggest two completely different «plain» meanings, a tie-breaking device is necessary. Legislative history can be such a device (…)" – see: N.S. Zeppos, *Legislative history and the interpretation of statutes: Toward a fact-finding model of statutory interpretation*, "Virginia Law Review" 1990/76, p. 1328. In Polish literature on ambiguity in law see: T. Gizbert-Studnicki, *Wieloznaczność leksykalna w interpretacji prawniczej* [Eng. *Lexical ambiguity in legal interpretation*], Kraków 1978. More recently, important observations, from an intentionalist position, were presented by Z. Tobor, *W poszukiwaniu intencji prawodawcy* [Eng. *The search for legislative intent*], Warszawa 2013, pp. 153–189.

or with the so-called legal classification[12]. Whenever this is the case, referring to legislative materials makes it possible to select one of several meanings of a legal text and reject the other ones.

Legislative history is frequently employed to confirm a line of interpretation[13]. In many judgments, this argument merely serves to reinforce and provide a better justification for an interpretation hypothesis, or to ensure that it is correct (or unequivocal)[14]. Nevertheless, the confirming function of legislative history is not limited to merely strengthening the argumentation in favour of a specific, previously selected, interpretation hypothesis. In fact, it frequently becomes a litmus test for clarity as in many cases a *prima facie* unambiguous text, once analysed in the context of its legislative history, loses its clarity[15].

The third way of using legislative history is the so-called supplementation. The justification for this function of legislative materials is the conviction that the legislator has included in them a number of hints for courts – for instance hints on how to construe details which have not been expressly set out in the text – and that they can be treated as a vehicle for conveying these additional details[16]. In order to correctly interpret a text, one sometimes needs to simply supplement it with these details. The most frequently recognised category of problems where interpreters resort to legislative history in order to "supplement" the meaning is vagueness[17]. The job of the interpreter is then to decide whether a case he or she is considering can be identified as a vague expression[18].

The last situation where lawyers resort to legislative history is when they depart from the literal meaning, or interpret against the wording. This encompasses cases when the linguistic meaning of a legal text is clear, however the interpreter rejects it, and decides in defiance of it. Interpretation against the wording means in fact correcting, amending, and refining the text of an instrument through interpretation. Therefore, the interpreter accepts a fiction and decides as if the wording of the instrument were different. This is arguably the most interesting category of uses of legislative history. Departures from the

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[12] This is an interpretation situation in which the interpreter must decide whether a case is an element of a specific legal category. Naturally, this decision entails that certain effects, as provided for by the law, will or will not be applied. On classification as a separate type of interpretation situations, see: Z. Tobor, *W poszukiwaniu*…, pp. 213–223: A. Grabowski, *Pragmatyczna charakterystyka odróżnienia problemu interpretacji i problemu klasyfikacji w koncepcji N. MacCormicka* [Eng. *Pragmatic characteristics of the distinction between the problem of interpretation and the problem of classification in N. MacCormick's concept*], in: M. Zirk-Sadowski (ed.), *Filozoficzno-teoretyczne problemy sądowego stosowania prawa XII Ogólnopolski Zjazd Katedr Teorii i Filozofii Prawa (Łódź, 8–10 November 1996)* [Eng. *Philosophical-theoretical problems of the judicial application of law. XII Polish Convention of Departments of Theory and Philosophy of Law (Łódź, 8–10 November 1996*], Łódź 1997, pp. 85–89. In foreign literature, see: N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, pp. 95–97, 147–148.

[13] The confirmatory function of legislative materials was analysed in J.J. Brudney, *Confirmatory legislative history,* "Brooklyn Law Review" 2011/3, p. 901 ff.

[14] Judgment of the Voivodeship Administrative Court in Kraków of 28 November 2013 (I SA/Kr 1222/13), LEX No. 1485017. Other examples of judgments: judgment of the Voivodeship Administrative Court in Krakow of 6 June 2013 (I SA/Kr 1903/12), LEX No. 1333935; judgment of the Supreme Administrative Court in Warsaw of 26 February 2013 (I FSK 491/12), LEX No. 1354026.

[15] On how a text's clarity and ambiguity depends on the context see: C.E. Mammen, *Using*…, pp. 33–37; V.F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, "Boston College Law Review" 2014/55, p. 1650 ff.

[16] A.R. Gluck, L.S. Bressman, *Statutory*…, Part I, p. 973.

[17] Given that there is extensive literature on vagueness, we will only refer to selected publications: K. Greenawalt, *Vagueness and judicial responses to legal indeterminacy*, "Legal Theory" 2001/4, p. 433 ff.; T.A.O. Endicott, *The value of vagueness*, in: A. Marmor, S. Soames (eds.), *Philosophical Foundations of Language in Law*, New York 2011, pp. 14–30; O.P. Jonsson, *Vagueness. Interpretation and the Law*, "Legal Theory" 2009/3, pp. 193–214.

[18] For more details on this, see: E. Łętowska, *Interpretacja a subsumpcja zwrotów niedookreślonych i nieostrych* [Eng. *Interpretation and subsumption of indeterminate and vague expressions*], "Państwo i Prawo" 2011/7–8, p. 17.

linguistic meaning are the most controversial interpretation situations and, considering the uncertainty that they entail, they give rise to concerns among the addressees of the decision implementing the law[19]. In the light of the deeply ingrained belief that the limits of the law are defined by "the four corners of a sheet of paper"[20], such manifest cases of deviating from the letter of the law attract attention of both interpretation practitioners and legal scholars specialising in interpretation[21]. On the other hand, if departing from the literal meaning is inevitable, it appears that legislative history ought to provide the strongest justification for the decision to do so: the context created by legislative history, which comes directly from the legislator, seems to best justify abandoning the imperfect wording of the instrument.

2. Grammar in statutory interpretation

The use of legislative materials in the process of statutory interpretation will be illustrated by problems related to the grammar of legal texts. This category of interpretation problems is rather under-examined in the Polish literature on the theory of law, and as such requires a short introduction.

Grammar is a set of morphological and syntactic rules, i.e. rules governing the creation and combination of words (and smaller units of language – the so-called morphemes) into larger structures[22]. Hence, grammar is responsible for the relations occurring between words. Correct detection of these relations is a necessary condition for interpreting any text, including a legal one. It is not surprising, therefore, that any vagueness in this respect should cause interpretive doubts. An examination of court decisions reveals a whole spectrum of grammar-related issues: grammatical cases, numbers, and gender of nouns and adjectives; tenses, types, voice and forms of verbs; participles; pronouns; prepositions; word order; relations between the clauses of a complex sentence, as well as conjunctions and punctuation marks, which are particularly problematic[23]. It is not without reason that in case law, the term "grammatical interpretation" is used alongside "linguistic interpretation"[24].

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[19] This is especially the case when breaking from the literal meaning causes negative consequences for the citizen.

[20] Z. Tobor indicates, however, that "contemporary textualists have given up the conviction that meaning can be determined *within the four corners* of a legal text" (Z. Tobor, *W poszukiwaniu*…, p. 232). See also: C. Nelson, *What is textualism*, "Virginia Law Review" 2005/91, pp. 368–369.

[21] The opponents of departing from the literal wording of an instrument maintain that they ought to be construed in line with their plain or conventional meanings, and – in the event of a conflict of meanings – the plain, linguistic meaning ought to prevail over other possible interpretations – B. Bix, *Jurisprudence: Theory and Context*, London 1996, p. 132.

[22] K. Polański (ed.), *Encyklopedia językoznawstwa ogólnego* [Eng. *Encyclopedia of general linguistics*], Warszawa –Wrocław–Kraków 1993, p. 183. It should be noted that syntactics in the semiotic perspective is not nearly the same as syntactics in the linguistic perspective. We shall further focus only on the latter, i.e. syntactics as part of grammar (syntax).

[23] A detailed analysis of these issues has been presented in doctoral dissertation by Mateusz Zeifert entitled *Argument z gramatyki w interpretacji prawa* [Eng. *Grammar as an argument in legal interpretation*], written under the academic supervision of Zygmunt Tobor and auxiliary supervision by Agnieszka Bielska-Brodziak (forthcoming).

[24] The phrase "grammatical interpretation" comes up in the text of almost 20.000 judgments available in the legal information system LEX Omega (as of 8 August 2017). The relation between these two "kinds" of interpretation is treated differently, see resolution of the Supreme Court of 15 March 2006 (II UZP 4/06), LEX No. 172367; resolution of the Supreme Court of 29 April 2009 (I KZP 4/09), LEX No. 490951; judgment of the Supreme Administrative Court of 5 July 2012 (I OSK 354/12); resolution (by 7 Justices) of the Supreme Court of 31 May 1994 (I PZP 18/94), LEX No. 11867; judgment of the Voivodship Administrative Court in Gdańsk of 16 April 2013 (I SA/Gd 273/13), Internet base of administrative court judgments *Centralna Baza Orzeczeń Sądów Administracyjnych* (CBOSA).

Interpretation problems connected with the grammar of legal provisions have long been noticed by the theory of law[25]. However, since at least the pre-war period these problems have been believed to be rare that they are not worthy of an in-depth analysis. Some 80 years ago, Eugeniusz Waśkowski wrote:

> Lexical elements are responsible for most of the difficulties in interpreting legal norms. The syntactic structure of contemporary norms, the logical relations between their respective parts, and their style, are usually simple, and only on rare occasions do they make it difficult to understand the legislator's requirements[26].

This conclusion was later shared by Jerzy Wróblewski:

> Absence of separate syntactic provisions of the law entails absence of interpretive discrepancies that stem from the use of these rules and means that fundamental issues in interpretation concentrate primarily on determining the meaning of particular words and not their complexes[27].

Similar views have been expressed in more recent American literature: "Most battles over legal interpretation are battles about the meanings of words. Grammatical rules typically remain in the background unnoticed"[28]. This is why publications devoted to legal interpretation usually do not go beyond banal statements that when interpreting legal texts one ought to follow the general syntactic rules of the national language, and that the grammar of legal texts is not different from general grammar[29].

Lack of attention to the grammar of legal texts can indeed appear surprising, given the enormous interest that other aspects of legal language receive in the theory of law[30]. For instance, significant attention has for some time now been given to the use of dictionaries in the process of interpretation[31]. We can therefore speak of the primacy of

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[25] It is pointed out, among other things, that syntactic ambiguity – alongside lexical ambiguity and vagueness – is the main source of interpretive doubts, see K. Opałek, J. Wróblewski, *Prawo: Metodologia, filozofia, teoria prawa* [Eng. *Law: Methodology, philosophy, legal theory*], Warszawa 1991, pp. 253–255; Z. Ziembiński, *Logika praktyczna* [Eng. *Practical logic*], Warszawa 1996, pp. 237; J. Woleński, *Logiczne problemy wykładni prawa* [Eng. *Logical problems of legal theory*], Kraków 1972, p. 80.

[26] E. Waśkowski, *Teoria wykładni prawa cywilnego* [Eng. *Theory of the interpretation of private law*], Warszawa 1936, p. 27.

[27] J. Wróblewski, *Zagadnienia teorii wykładni prawa ludowego* [Eng. *Problems of the theory of interpretation of people's law*], Warszawa 1959, p. 213.

[28] See L. Solan, *Why laws work pretty well, but not great: Words and rules in legal interpretation*, "Law and Social Inquiry" 2001/26, p. 244.

[29] See: T. Chauvain, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa* [Eng. *Introduction to jurisprudance*], Warszawa 2012, p. 236; L. Morawski, *Zasady wykładni prawa* [Eng. *Principles of the interpretation of law*], Toruń 2006, p. 88; M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki* [Eng. *Legal interpretation. Principles, rules, guidelines*], Warszawa 2012, p. 101; A. Malinowski, *Polski język prawny. Wybrane zagadnienia* [Eng. *Polish legal language. Selected issues*], Warszawa 2006, p. 237; M. Zirk-Sadowski, *Wprowadzenie do filozofii prawa* [Eng. *Introduction to legal philosophy*], Warszawa 2011, p. 91.

[30] See e.g. E. Malinowska (ed.), *Prawo – Język – Społeczeństwo* [Eng. *Law – Language – Society*], Opole 2004; A. Malinowski, *Polski…*; A. Mróz, A. Niewiadomski, M. Pawelec (eds.), *Prawo i język* [Eng. *Law and language*], Warszawa 2009; A. Mróz, A. Niewiadomski, M. Pawelec (eds.), *Prawo, język, media* [Eng. *Law, language and media*], Warszawa 2011. Publications devoted to the theory of legislation are exceptions in this respect. See especially A. Malinowski, *Redagowanie tekstu prawnego. Wybrane wskazania logiczno-językowe* [Eng. *Writing legal texts. Selected logical-linguistic suggestions*], Warszawa 2008; S. Wronkowska, M. Zieliński, *Problemy i zasady redagowania tekstów prawnych* [Eng. *Problems and principles of writing legal texts*], Warszawa 1993. In literature on statutory interpretation, see: Z. Tobor, *W poszukiwaniu…*, p. 166 ff., 241–242; L. Morawski, *Zasady…*, pp. 101–103; A. Bielska-Brodziak, *Interpretacja tekstu prawnego na podstawie orzecznictwa podatkowego* [Eng. *Interpretation of legal text based on the example of tax case law*], Warszawa 2009, pp. 69–74.

[31] See: M. Zieliński, *Wykładnia…, passim*; Z. Tobor, P. Żmigrodzki, A. Bielska-Brodziak, *Co każdy prawnik o słownikach wiedzieć powinien* [Eng. *What every lawyer should know about dictionaries*], "Przegląd Sądowy" 2008/7–8, pp. 79–95; A. Bielska-Brodziak, Z. Tobor, *Słowniki a interpretacja tekstów prawnych* [Eng. *Dictionaries and the interpretation of legal texts*], "Państwo i Prawo" 2007/5, pp. 20–33.

lexis over grammar in the theory of legal interpretation. This primacy stems from the practice of law implementation wherein grammatical doubts are indeed significantly less frequent than lexical doubts[32]. This, however, does not change the fact that the former do in fact emerge. In the part of the article that follows we shall present several examples of judgments where doubts caused by the grammatical structure of a provision are solved using legislative materials. In doing so, we shall limit ourselves to problems of syntactic nature and skip morphological problems (i.e. problems related to grammatical categories of words)[33].

3. Selected judgments

3.1. Conjunction *oraz* (and, as well as)

We shall begin with a case where interpretive doubts resulted from the fact that the legislator had used the conjunction oraz. Polish conjunctions used in legal texts, such as i (and), oraz (and, as well as), lub (or, and), albo (or) have long caused problems in judicial decision-making and attracted attention of legal theorists. There is a widely known proposal that the meaning of conjunctions and, consequently, syntactic relations within a sentence, should be established based on the meaning of the corresponding truth-functional connectives in formal logic[34]. This entails a number of problems. First of all, using conjunctions as exponents of specific logical relations is a matter of convention adopted among logicians, and one not used consistently at that. This convention does not bind the legislator[35]. Secondly, it is not uncommon for the same conjunction to express more than just one logical relation, e.g. conjunction *i* (and) is attributed in logic a conjunctive, enumerative, and synthesising functions[36]. Thirdly, the logical meaning of a conjunction is often different from the meaning it has in common parlance, and from the meaning it is assigned by linguists. This stems from the fact that "semantic relations (and the hidden reasoning behind these relations) expressed through syntactic constructions are far more complicated than those described by logic"[37]. Fourthly, many sentence conjunctions do not have established meanings in logic. Examples include Polish conjunctions a (and, while, whereas), tudzież (and), chociaż (although).

The provision we shall discuss confers certain rights on persons "who worked for at least ten years at a commercialised state-owned enterprise *and* its predecessor"[38]. The applicant had worked for 10 years at the predecessor of a commercialised enterprise, however, his employment had terminated before the commercialised enterprise was

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[32] Lawrence Solan writes: "Because so many of the interpretive problems in the law are lexical, legal scholars have tended to think of meaning, and even language, as dealing almost exclusively with the meanings of words", see: L. Solan, *Why laws*…, p. 245.

[33] On the same topic see e.g. resolution of the Supreme Court of 21 November 2001 (I KZP 26/2001), LEX No. 49484; resolution of the Supreme Court of 17 March 2000 (I KZP 58/99), LEX No. 39502.

[34] See e.g. M. Zieliński, *Wykładnia*…, p. 338 (P) Guideline 21; A. Malinowski, *Redagowanie*…, p. 65.

[35] See: S. Wronkowska, M. Zieliński, *Problemy*…, p. 146; According to Andrzej Malinowski, this matter is clearly a legislative gap, see: A. Malinowski, *Redagowanie*…, p. 65.

[36] See: Z. Ziembiński, *Logika*…, p. 86

[37] R. Grzegorczykowa, *Wykłady z polskiej składni* [Eng. *Lectures on the Polish syntax*], Warszawa 2004, pp. 100–101. For this reason, the types of conjunctions identified in linguistics do not fully match the relations identified in logic and typically only partially correspond to them, see. L. Bednarczuk, *Polskie spójniki parataktyczne* [Eng. *Polish paratactic conjuncions*], Wrocław–Warszawa–Kraków 1967, p. 16.

[38] Article 2(5)(c) of the Commercialisation and Privatisation Act of 30 August 1996. Polish title: Ustawa z 30.08.1996 r. o komercjalizacji i niektórych uprawnieniach pracowników (tekst jedn.: Dz. U. z 2017 r. poz. 1055 ze zm.).

established. Hence, doubts arose as to whether he was eligible for the rights set forth in the provision. At the level of language, it all boiled down to determining the relation between the two clauses conjoined by the conjunction *oraz* (and). Courts of the first and second instances dismissed the action, holding that obtaining the right was contingent upon working at both the commercialised enterprise and its predecessor. The courts argued that this followed from the use of conjunction *oraz* (and), which is a conjunction connective, in the wording of the provision[39]. The Supreme Court[40] agreed with this reasoning, pointing out, however, that "it cannot be held that it follows from the linguistic interpretation of the analysed provision" as "the conjunction was used therein somewhat unfortunately". The Court pointed out that recognising the conjunction *oraz* as a conjunction connective would lead to unacceptable outcomes. More specifically, it would mean that in order to be eligible for the right it is not enough to have worked at either the predecessor of the commercialised enterprise or the commercialised enterprise, but at both. The Court held that this line of reasoning would be a misinterpretation, given the strong arguments "that follow from the systemic and historical interpretation and from the motives presented by the drafter of the current wording of the provision". The explanatory statement to the draft introducing the provision's wording as it is analysed herein makes it clear that "the intention was to maintain the prerequisite criterion of eligibility to acquire shares free of charge, which is associated (...) with the commercialised enterprise". As a result, the Court held that the entitlement should apply to employees who had worked for at least 10 years at the commercialised enterprise or cumulatively at the commercialised enterprise and its predecessor.

We are therefore dealing with a case of departing from the literal meaning of the conjunction *oraz*. Admittedly, the meanings of coordinating conjunctions (*i, oraz*), as identified in the science of law, are different[41], and none of them corresponds to the meaning adopted by the Court in the case discussed above. As a matter of fact, the Court denied the conjunction *oraz* the role of both conjunction connective (contrary to what courts of the lower instances argued) and non-exclusive disjunction (contrary to what the applicant had argued), deciding instead that the wording of the provision should be interpreted entirely using extra-lingual factors, derived predominantly from legislative history.

3.2. Prepositional phrase *w tym* (including)

In the next case, the point of contention was not a conjunction, but the prepositional phrase *w tym* (including)[42]. The law stipulates that "municipal police shall only become vested with the power of a public prosecutor when, within its remit, *including* in the course of investigation, it revealed petty offences and petitioned for punishment"[43]. The question that arose was whether municipal police could act as a public prosecutor in case

[39] In fact, the Court wrote that it expresses "an inclusive alternative relation" (sic!).

[40] Judgment of the Supreme Court of 13 November 2013 (I PK 56/13), LEX No. 1555020.

[41] See: A. Malinowski, *Redagowanie*…, p. 66; Z. Ziembiński, *Logika*…, p. 85; S. Wronkowska, M. Zieliński, *Problemy*…, pp. 150–151.

[42] As a matter of fact, wrongly classified by the court as a conjunction. For the record, differentiating conjunctions from prepositions causes problems at the theoretical level, too, see: Z. Topolińska (ed.), *Składnia*, [Eng. *Syntax*], Warszawa 1984, pp. 223–224.

[43] Article 17(3) of the Petty Offences Procedure Code of 24 August 2001. Polish title: Ustawa z 24.08.2001 r. – Kodeks postępowania w sprawach o wykroczenia (tekst jedn.: Dz. U. z 2018 r. poz. 475 ze zm.).

of a petty offence that, although it was revealed in the course of activities carried out by its officers, in its substance went beyond the statutory scope of activity of this service.

The Attorney General regarded the prepositional phrase *w tym* (including), used in this provision, as the main argument in favour of a negative answer[44]. The analysed provision was introduced into the statute by means of amendment[45]. In an earlier version of the draft, the expressions "within its remit" and "in the course of investigation" were conjoined using the conjunction *lub* (or). However, at later stages of the legislative work a change was made and *lub* (or) was substituted by *w tym* (including); the change was described as "an editorial change" and no broader discussions ensued[46]. The Attorney General argued that, as a matter of fact, the change was substantial. The conjunction *lub* (or) would mean that both of the quoted expressions would constitute two alternative grounds for awarding municipal police the power to bring prosecutions. Therefore, municipal police officers would be able to appear before courts both in cases involving petty offences they revealed within its remit and in cases involving petty offences they revealed in the course of the investigation. As a result of the amendment, the investigation must fall within the scope of activity of municipal police. This means that there was only one condition ("within its remit"), which was described in more detail ("including in the course of investigation"). In the opinion of the Attorney General, the "teleological and systemic interpretation should not negate an unambiguous outcome of correctly conducted linguistic interpretation and lead to unacceptable creation, by means of a court judgment, of a desired – yet not expressed in the provision – legal norm"[47].

The Supreme Court rejected the Attorney General's argumentation. The Court first observed that, while the linguistic interpretation could not be omitted, it would be useful to:

> first, as part of the historical interpretation, analyse the process of passing of the amendment (...) so as to prove that (...) the objective of the changes introduced by the amending statute was, among other things, to extend municipal police's power to bring prosecutions[48].

A thorough analysis of the legislative process led the Court to conviction that the legislator indeed believed substituting *lub* (or) with *w tym* (including) was merely an editorial change. The MPs voted:

> believing – and the belief was reinforced by explanations of the MP-rapporteur – that the introduction of the phrase "w tym" (*including*) into Article (...) in place of the originally proposed word "lub" (*or*) was not a substantive amendment leading to a different than originally planned regulation of the power to bring prosecutions vested in the entities specified in the provision[49].

As a result, the Court held that "it was a legible intention of the legislator to award the entities listed in Article 17(3) of the Petty Offences Procedure Code extensive powers to bring prosecutions", in line with the earlier, broadly discussed version of the draft.

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[44] Attorney General wrongly classified the phrase as a conjunction.

[45] Implemented by means of the Act of 29 October 2010 amending the Traffic Law Act and certain other acts. Polish title: Ustawa z 29.10.2010 r. o zmianie ustawy – Prawo o ruchu drogowym oraz niektórych innych ustaw (Dz. U. Nr 225, poz. 1466 ze zm.).

[46] MP Janusz Dzięcioł: "Two amendments – no. 1 and 2 – are editorial changes. I do not think they will lead to any controversy". Report from joint work of the Administration and Internal Affairs Committee and the Infrastructure Committee of 23 October 2010.

[47] Resolution by 7 Justices of the Supreme Court of 30 September 2014 (I KZP 16/14), LEX No. 1508864.

[48] Resolution by 7 Justices of the Supreme Court of 30 September 2014 (I KZP 16/14).

[49] Resolution by 7 Justices of the Supreme Court of 30 September 2014 (I KZP 16/14).

In the light of the above, the Court deemed the reasoning of the Attorney General "too categorical". The phrase *w tym* (including) has, in the opinion of the Court, numerous meanings. Sometimes it is used:

> not so much to indicate that "something" falls within "something" else (…), but rather to make a certain phrase more specific, which is also the case with words *również* (also), *także* (as well), *włącznie z* (including), *w szczególności* (in particular) (e.g. "the bouquet was made of flowers of various colours, including red ones")[50].

As a result, the Court argued that the results of the linguistic interpretation did not contradict the conclusions developed with the help of extra-lingual interpretation tools, including in particular legislative materials.

We are therefore once again dealing with a case of departing from the literal, statutory meaning. This time, however, it is even more marked. Unlike in the previous case, the meaning of the prepositional phrase *w tym* (including) can be considered (in the context given) as entirely unambiguous. The sentence proposed by the Court seems a sufficient confirmation of this. "A bouquet made of flowers of various colours, including red ones" is an excellent example of the inclusion relation that the Attorney General argued in favour of. The meaning assigned to the provision by the Court may, on the other hand, be expressed by a hypothetical sentence: "A bouquet made of white flowers, including red ones". This clearly shows that the meaning of the phrase *w tym* (including), obvious to each language user, was significantly modified by the Court in order to achieve the outcome devised by the legislator. This argumentation style, in which the interpreter makes every effort to convince that a given hypothesis does not contradict the linguistic meaning, and that it "falls within" this meaning, etc., is very characteristic of the Polish judicature. It allows the courts to conceal law-making solutions and "hide" behind the construct of the language limits of interpretation. The benefits are rather limited, as even the best concealed law-making activity tends to stand out, and – what is more – the average citizen may feel disoriented and insecure when faced with this type of arguments. It appears that nothing justifies keeping the appearance that departing from, or interpreting against, the literal meaning is inadmissible. In the process of application of the law, legitimacy and consistency are higher values than compliance with faultily expressed (especially in the light of legislative materials) letter of the law.

3.3. Syntactic structure of in-line enumerations

The next example is connected with the problematic syntactic structure of enumerations included in the wording of a provision. Provisions which encompass the so-called in-line enumerations are particularly conducive to syntactic ambiguity, i.e. a situation wherein the rules of syntax allow for more than one correct interpretation of a phrase or sentence[51]. The provision in question provided for the possibility of awarding a building licence in specialties listed in points 1–6, including, among others, "4) installation of

[50] Resolution by 7 Justices of the Supreme Court of 30 September 2014 (I KZP 16/14).

[51] See: M. Zeifert, *Problem wieloznaczności składniowej w przepisach zawierających wyliczenia wierszowe* [Eng. *Problem of syntactic ambiguity in the provisions containing in-line enumerations*] (forthcoming); on the difference between in-line enumerations and columnar enumerations, see: S. Wronkowska, M. Zieliński, *Problemy*…, p. 96; A. Malinowski, *Redagowanie*…, p. 157.

heating, ventilation, gas, water and sewage networks, systems and devices"[52]. Doubts arose as to whether the fragment quoted above concerned one specialty whose scope encompasses all the areas listed, or several separate specialties.

Given the interpretive difficulties, the case was referred to seven justices of the Supreme Administrative Court[53]. When referring the case, the Court sitting as an ordinary panel provided several interesting arguments in favour of the first option. First of all, the singular number of the noun "installation" suggested that it was a single specialty. Secondly, during the legislative process it had been mentioned that the number of specialties should be reduced. The explanatory statement accompanying the bill stated that construction practice did not confirm the need for as many as fourteen narrow specialties (as it was the case in the past), and so it was legitimate to reduce the number to four (architectural-building, construction-building, sanitary installations, and electric installations specialities). Although at a certain stage of the legislative work a colon was used after the word "devices", the change "was neither discussed nor explained, which would suggest that it was not meant to change the original conception included in the draft bill". Thirdly, the ministerial regulation issued on the basis of this statute explicitly provided for just one specialty, whose scope encompassed the five disciplines[54]. It is indeed difficult to agree that "the minister issuing the regulation was not familiar with the wording of the Act or misinterpreted its provisions, as he was the author of the bill and the regulation"[55].

The Court did not find these arguments sufficient. At the outset, the Court pointed to the syntactic ambiguity of the provision. Despite the use of the singular number denoting the type of specialty (installation), the Court opined that:

> it can be argued that the use of the singular number at the beginning of this point refers solely to its relation with the words that follow the colon, i.e. to the relation between the first (general) part of the designation of the specialty and the areas of specialist activity in the building industry subsequently listed separately (and thus autonomously) after the colon[56].

The Court furthermore pointed to the punctuation used in the enumeration:

> the nouns used after the colon are not in alphabetical order, and there is the conjunction "and" as well as commas used in various places between them. This makes it legitimate to assume that there is conjunction between the words "water and sewage" and separation between the other ones, since they are separated by commas, and the conjunction "and" at the end of the sentence does not have a conjunctive function[57].

After discussing the syntactic structure of the sentence, the Court proceeded to a systemic and teleological interpretation, and in doing so resorted to the legislative history:

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[52] Article 14(1)(4) of the Building Law of 7 July 1994 in its version before 11 July 2003. Polish title: Ustawa z 7.07.1994 r. – Prawo budowlane (tekst jedn.: Dz. U. z 2013 r. poz. 1409 ze zm.).

[53] Resolution by 7 Justices of the Supreme Administrative Court of 4 July 2002 (OPS 4/02), LEX No. 55810.

[54] Regulation of Minister of Spatial Planning and Building of 30 December 1994 on Independent Technical Functions in the Building Industry, § 5(5) and Annexes 1 and 3. Polish title: Rozporządzenie Ministra Gospodarki Przestrzennej i Budownictwa z dnia 30.12.1994 r. w sprawie samodzielnych funkcji technicznych w budownictwie (Dz. U. z 1995 r. Nr 8, poz. 38).

[55] Resolution by 7 Justices of the Supreme Administrative Court of 4 July 2002 (OPS 4/02).

[56] Resolution by 7 Justices of the Supreme Administrative Court of 4 July 2002 (OPS 4/02).

[57] Resolution by 7 Justices of the Supreme Administrative Court of 4 July 2002 (OPS 4/02).

> Assuming that the legislator is rational, it should be stressed that the overarching objective of the law regulating the activity in the field of independent technical functions in the building industry is, without a doubt, ensuring appropriate quality of construction works and safety (this purpose behind the award of a building licence is in fact stressed in the explanatory statements to both building law bills) [58].

Assuming that the provision in question concerns several specialties and not just one does not interfere with the realisation of this objective.

> On the other hand, the emphasis placed in the versions of the bill on ensuring greater versatility of building specialties (...) cannot be decisive in, (...). While the legislator intended to reduce the number of specialties in comparison to the earlier legislation, it does not necessarily follow that the intention was to have just one specialty (...)[59].

Finally, the Court presented its decision as a form of protection of the principle of freedom of economic and professional activity, guaranteed by the Constitution. At this point, it should be mentioned that maintaining the one-specialty view would mean that the party in the case would lose their licence.

The case discussed above should be analysed as a situation of choosing between two interpretation hypotheses, each of which – given the syntactic ambiguity – was admissible from the perspective of the rules of language. One of the hypotheses was corroborated by explicit declarations by the legislator as to the need for a reduction in the number of specialties. The other one, in the opinion of the Court, better realised the objective of the statute, as inferred from the explanatory statement to the bill. We can conclude that the Court decided to achieve the objective intended by the legislator, but refused to apply the means foreseen for achieving it.

It is furthermore worth noting that Supreme Administrative Court Justice Andrzej Gliniecki appended a dissenting opinion to the resolution discussed above. Invoking the principle of primacy of the literal interpretation, the justice argued that "the interpretation process is a mirror image of the drafting process", and that "legal texts are drafted in compliance with the rules of grammar and syntax of the Polish language". He then made references to several publications devoted to the grammar of the Polish language[60], and carried out a detailed syntactic analysis of the provision in dispute. The analysis led him to conclude that "this is a description of one «installation [specialty] regarding networks, systems and devices»", and the specialty encompasses not just four, but in fact nine disciplines[61]. This view is corroborated by the wording of the provision – all of the disciplines have been listed in one point. Last but not least, the justice presented a number of extra-lingual arguments showing, beyond any possible doubt, that the legislator's intention was to decrease the number of specialties[62].

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[58] Resolution by 7 Justices of the Supreme Administrative Court of 4 July 2002 (OPS 4/02).

[59] Resolution by 7 Justices of the Supreme Administrative Court of 4 July 2002 (OPS 4/02).

[60] Namely: P. Bąk, *Gramatyka języka polskiego* [Eng. *Polish grammar*], Warszawa 1997, p. 337 ff.; S. Jodłowski, W. Taszycki, *Zasady pisowni polskiej i interpunkcji ze słownikiem ortograficznym* [Eng. *Rules of Polish spelling and punctuation and an orthographic dictionary*], Wrocław 1983, p. 150 ff.

[61] Namely the following ones: water and sewage networks, heating networks, ventilation and gas networks, water and sewage systems, heating systems, ventilation and gas systems, water and sewage devices, heating devices, ventilation and gas devices.

[62] It is worth noting that the provision in question has already been changed several times ever since the resolution analysed herein was issued. The character of these changes clearly indicates that they were made with the interpretation problem discussed herein in mind.

3.4. Syntactic structure of columnar enumerations

The next example also concerns enumerations, this time columnar enumerations, which on very rare occasions cause interpretation problems[63]. The provision stipulates that the concept of "contribution payer" means, among others:

> other (...) referring entities – in respect of individuals who receive scholarships during the period of education, internship, or vocational training – which are: (...)
> – research facilities, (…) [eighth indent – authors' note]
> – career counselling and psychological counselling centres [twelfth indent – authors' note]
> – entities using public Community funds and public domestic funds under project co-financing agreements or decisions specified in the law[64] [thirteenth indent – authors' note][65].

The question was whether a private higher education institution could be considered a contribution payer within the meaning of the provision. The court of the second instance excluded such a possibility, and the arguments it presented were very interesting. First of all, the court pointed out that the school in question could not be considered "a research facility" (eighth indent) as it did not meet the criteria laid down in the relevant statute[66]. While it could be considered an entity "using public Community funds and public domestic funds" (thirteenth indent), a provision of the Legislative Drafting Principles, pursuant to which each indent should end with a comma, and the last indent should end with a comma, semicolon, or full stop, unless an enumeration ends with a shared part, applicable to all indents, stood in the way of treating it as such. Whenever this is the case, the comma, semicolon, or full stop should be placed after the shared part[67]. Since the twelfth indent of the provision did not end with any punctuation marks, the court held that the wording that followed it constituted such a shared part, not another (thirteenth) indent. In the court's words: "all entities listed in this provision (12 types) should be contribution payers and only to the extent that they use public Community funds and public domestic funds allocated for project co-financing or decision"[68].

The Supreme Court[69] called this argumentation into question and observed that, in the original wording of the statute, the twelfth indent was followed by a comma, which was subsequently omitted during one of the amendments (presumably by mistake). This is why the Court considered that "invoking the legislative drafting principles alone does not suffice to explain what entities are considered to be referring entities within the meaning of this provision". In order to determine it, the Court conducted an extensive analysis of legislative history. To start with, the Court established that in the governmental amending bill the contentious provision was very concise and did not

[63] See: S. Wronkowska, M. Zieliński, *Problemy…*, p. 96; A. Malinowski, *Redagowanie…*, p. 157.

[64] Namely provisions of the National Development Plan Act of 20 April 2004 and of the Act of 6 December 2006 on the Principles of Development Policy. Polish titles: Ustawa z 20.04.2004 r. o Narodowym Planie Rozwoju (Dz. U. z 2018 r. poz. 478) and Ustawa z 6.12.2006 r. o zasadach prowadzenia polityki rozwoju (tekst jedn.: Dz. U. z 2017 r. poz. 1376 ze zm.).

[65] Article 4(2)(za) of the Social Insurance System Act of 13 October 1998. Polish title: Ustawa z 13.10.1998 r. o systemie ubezpieczeń społecznych (tekst jedn.: Dz. U. z 2017 r. poz. 1778 ze zm.).

[66] Act of 8 October 2004 on the Principles of Financing Science. Polish title: Ustawa z 8.10.2004 r. o zasadach finansowania nauki (tekst jedn.: Dz. U. z 2008 r. Nr 169, poz. 1049).

[67] § 57(6) of the Regulation of the President of the Council of Ministers of 20 June 2002 on the Legislative Drafting Principles. Polish title: Rozporządzenie Prezesa Rady Ministrów z 20.07.2002 r. w sprawie „Zasad techniki prawodawczej" (tekst jedn.: Dz. U. z 2016 r. poz. 283).

[68] Judgment of the Supreme Court of 28 January 2011 (I UK 230/10), LEX No. 784910.

[69] Judgment of the Supreme Court of 28 January 2011 (I UK 230/10).

include an enumeration of eligible entities. The wording of the provision only became more precise as a result of the work of a special Sejm committee. The Court quoted a lengthy statement delivered during one of the committee meetings by the deputy director of a ministerial department, which clearly showed that the objective behind the changes was to "ensure the fullest possible support for the youth, including graduates of all types of schools, so that they do not become unemployed". In line with that objective, the phrase "other referring entities", as used in the statute, should encompass all beneficiaries who, as part of an EU project, undertook measures intended to activate unemployed youth. This included higher education institutions of various types, too. Ultimately, the Supreme Court overturned the judgment and referred the case back to the court of first instance, since misinterpretation of the contentious provision led to significant inadequacies in the findings.

We are therefore once again dealing with a choice. One of the interpretation hypotheses is confirmed by a drafting rule laid down in the Legislative Drafting Principles. The other one appears to be better justified in the light of the legislative history, i.e. given the objectives the legislator intended to achieve through the provision under dispute. Both types of arguments, namely the Legislative Drafting Principles and the legislative history, have been provided by the legislator, which makes the choice controversial. Interestingly, the courts considering the case concentrated on the structure of the provision so much that they made very little reference to the wording of the presumed thirteenth indent, which describes an attribute: "using…", but does not specify the entity to which it refers. This makes it different from the other indents within this provision, which clearly denote institutions, organisations, centres, etc. This is, without a doubt, an argument in favour of acknowledging, contrary to the Supreme Court's decision, that the presumed thirteenth indent merely constitutes a shared part referring to the previous elements of the enumeration.

3.5. Absence of a comma

The last case to be discussed here concerns punctuation. Punctuation is defined as "the rules governing the use of punctuation marks, i.e. auxiliary graphic signs dividing a written text into sentence units (expressions) and their parts"[70]. In the Polish language, punctuation is primarily subordinate to syntax[71], which justifies discussing it in this article, although, strictly speaking, it does not constitute a branch of grammar[72]. The punctuation system used in the Polish language consists of ten signs[73]. Of those, commas account for the most problems.

Arguably the most famous comma in the history of Polish legislation was the comma wrongly placed in Article 156(1)(2) of the Criminal Code of 1997. The provision was published in the Journal of Law in the following wording: "Whoever causes grievous bodily harm in the form of: (...) a serious illness that is incurable or prolonged illness

[70] K. Polański (ed.), *Encyklopedia*…, p. 260.

[71] S. Jodłowski, *Zasady*…, p. 23.

[72] For the same reasons, grammar and punctuation are jointly discussed only in English-language publications devoted to interpretation of the law, see e.g. A. Scalia, B.A. Garner, *Reading Law: the interpretation of legal texts*, St. Paul (MN) 2012, p. 160; L.D. Jellum, *Mastering Statutory Interpretation*, Durham 2008, p. 81 ff.

[73] Linguists distinguish significantly more punctuation marks, e.g. by differentiating between single marks (e.g. – "dash") and double, two-sided punctuation marks (e.g. – –"double dash"). See: S. Jodłowski, *Zasady*…, p. 87.

that is life-threatening (...)"[74]. This version was included in the bill, which was then correctly passed by the Sejm. However, the version submitted by the Marshal of the Sejm to the President to sign was modified. Due to the insertion of a comma, the sense of the text changed as follows: "a severe illness that is incurable or prolonged, illness that is life-threatening", allegedly "with the drafters' knowledge and approval". This wording was indeed consistent with the previous legislation[75]. After the Code was published in the Journal of Laws, the President of the Council of Ministers noticed the discrepancy between the version published and the one submitted to the President for signature and – considering it to be a technical error – corrected it by means of a notice[76].

The legal circumstances created as a result caused considerable doubts in the application of the law. The courts unanimously agreed that the placement of the comma influenced the meaning of the provision. In accordance with the version published, the constituent elements of the offence included, among others, causing a serious incurable illness and a prolonged life-threatening illness. On the other hand, the wording of the provision post-correction included the following constituent elements of the offence: a serious incurable illness, a serious prolonged illness, and a life-threatening illness. The first version significantly narrowed down the scope of penal responsibility of the perpetrator, as it excluded from penalisation instances of causing a life-threatening disease that was not prolonged.

The courts initially applied the corrected version of the Code, maintaining that "it is not the courts' task to review the legitimacy of correcting the wording of the provision (...) since the correction was made in compliance with the law"[77]. The Constitutional Tribunal, having conducted a thorough analysis of the legislative history, determined that the corrected version did not correspond with the version passed in compliance with the legislative procedure and ruled that a fragment of the notice was unconstitutional[78]. The judiciary thus became obliged to apply the provision in its original wording, which – as was already known – did not reflect the actual intention of the legislator. In this situation, the courts demonstrated far-reaching creativity, e.g. by arguing that it was not time that determined whether an illness was prolonged but "the invasive nature of a surgical procedure affecting an organ important for life"[79], or that "prolonged can also be interpreted as lasting for a period of several days"[80]. The courts therefore departed from the obvious meaning of the adjective "prolonged", but did not interfere with the syntactic structure of the sentence. Similar examples can be found in other judgments[81].

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[74] Polish title: Ustawa z 6.06.1997 r. – Kodeks karny (Dz. U. Nr 88, poz. 553; obecnie tekst jedn.: Dz. U. z 2017 r. poz. 2204 ze zm.).

[75] Article 155(1)(2d) of the Criminal Code of 1969 (Ustawa z 19.04.1969 r. – Kodeks karny, Dz. U. Nr 13, poz. 94: "Whoever (...) causes grievous bodily harm, a serious incurable or prolonged illness, or a usually life-threatening illness".

[76] Notice by the President of the Council of Ministers of 13 October 1997 on error corrections. Polish title: Obwieszczenie Prezesa Rady Ministrów z dnia 13 października 1997 r. o sprostowaniu błędów (Dz. U. Nr 128, poz. 840).

[77] See: judgment of the Administrative Court in Kraków of 18 May 2000 (I AKa 66/00) KZS 2000/6, poz. 13; judgment of the Administrative Court in Katowice of 14 April 2002 (II AKa 7/02), LEX No. 56782.

[78] Judgment of the Constitutional Tribunal of 7 July 2003 (SK 38/01), Dz. U. Nr 121, poz. 1142. The provision was eventually amended and given its original wording, i.e. the same as used in the notice repealed by the Tribunal. See: Act of 3 October 2003 amending the Criminal Code. Polish title: Ustawa z 3.10.2003 r. o zmianie ustawy – Kodeks karny (Dz. U. Nr 199, poz. 1935).

[79] The Supreme Court Decision of 3 November 2004 (IV KK 212/04), LEX No. 163183.

[80] Judgment of the Administrative Court in Kraków of 16 October 2003 (II AKa 151/03), LEX No. 82905.

[81] See an interesting decision of the Supreme Court of 30 June 2008 (I KZP 9/08), LEX No. 393995, wherein the insertion (and not omission) of a comma was considered a legislative mistake, which led to the narrowing of the scope of criminalisation, which was inconsistent with the *ratio legis* of the regulation. Nevertheless, the court did not choose to depart from the literal meaning of the provision. See also in American literature: A. Scalia, B.A. Garner, *Reading*…, pp. 162–163.

The case discussed above shows that using legislative history does not always yield homogeneous results. Materials from the legislative process provided arguments both in favour of the literal interpretation of the text of the Code (as the comma was absent both during the parliamentary works and in the text passed by the Sejm), and against such an interpretation (as the Marshal of the Sejm, followed by the President of the Council of Ministers, with the approval of the drafters, considered that the version passed contained an evident error). For the Constitutional Tribunal, the legislative history confirmed that the correct and binding version of the Code was the one published in the Journal of Laws. On the other hand, for the courts hearing cases involving Article 156(1)(2) of the Criminal Code, the legislative history triggered departure from the literal meaning of the provision (more specifically – of the word "prolonged"). The multilevel controversy accompanying this case illustrates the need for further, in-depth research on legislative history in the application of law. On the other hand, the case in point shows the enormous importance of the context provided by legislative materials for the decision of the Constitutional Tribunal. Without familiarity with legislative materials, it would not have been possible to determine how the legislative process developed, which was of great importance for the case.

4. Conclusions – the text and what is "beyond the text"

We discussed five cases in which courts resorted to legislative history in order to resolve interpretation doubts caused by the grammar of a provision (conjunctions, sentence construction, and punctuation). Whereas a research sample of this size is insufficient for formulating decisive conclusions, it amply illustrates the problem discussed in the paper. The presented cases encompassed the situations of departing from the literal meaning, choosing from among two interpretation hypotheses, and confirming an interpretation hypothesis. They did not illustrate the situation of supplementing the meaning, which can be explained by the character of the interpretive doubts discussed in the article. After all, supplementation of meaning primarily concerns the situation of vagueness, which is characteristic of lexical problems, and sometimes also morphological ones (i.e. problems related to grammatical categories of words, such as the number, tense, aspect, etc.), but as a rule is not required in case of syntax-related problems.

The particularity of the examples discussed in the text lies in the combination of intuition and grammar. Grammar is conventionally understood as a set of rules governing the formal correctness (grammaticality) of a sentence. Hence, these rules could be expected to always determine a single correct way of understanding a text. The examples analysed in the article prove that this is not the case. First of all, sometimes the rules of grammar allow for several, equally acceptable, interpretations of a sentence. Secondly, a line of interpretation derived from an unambiguous syntax may be challenged given other factors that influence the meaning.

In the light of contemporary linguistic theories, this is by no means unusual. For instance, cognitive grammar – a highly influential theory developed by a US linguist Ronald Langacker – emphasises grammar's subsidiary role vis-à-vis the communicative function of language, and analyses grammatical phenomena through their semantic motivation. The notion of grammatical correctness is replaced by the notion of conventionality (entrenchment)[82]. Grammar rules are perceived as a network of intertwined

[82] R. Langacker, *Gramatyka kognitywna*, Kraków 2009, p. 299 ff. In English: R. Langacker, *Cognitive Grammar: A Basic Introduction*, Oxford 2008.

construction schemas, abstracted from the actual examples of language usage[83]. Understanding a language structure entails recognising that it constitutes a concretization of one of the schemas stored in the speaker's mind. What takes place is a universal (and not merely linguistic) process of categorization. The choice (mental activation) of a specific schema does not result from a quasi-mathematical algorithm, but is made based on a number of diverse factors, in line with the neural network model. Those factors include the similarity to the target schema, the degree of entrenchment of the schema, but also the context[84], or expectations of the language user[85]. This is, therefore, not an objective process, determined solely by the properties of linguistic units. It is entirely natural that a specific context may predetermine the process of categorisation of a certain structure so much that some, theoretically acceptable, ways of construing it will not be taken into account[86].

The description above constitutes an attempt to reconstruct the cognitive processes that take place beyond the conscious mind of a speaker. In this sense, it does not directly apply to interpretation of the law in the strict sense, and does not offer justification for the decisions analysed in this article. Nevertheless, we do believe that knowledge of the "mechanics" behind these processes may be highly informative for lawyers. Langacker's conception shows that grammar itself has a somewhat argumentative nature.

Using *a fortiori* inference, we can say that if the syntactic structure at the level beyond consciousness is shaped by an array of factors, including those traditionally labelled as extra-lingual, these factors should gain more prominence in a conscious, in-depth analysis of a provision in the process of legal interpretation.

Concluding, it is also worthwhile to invoke discussions on legislative history. One of the main veins of criticism of using legislative history as an interpretive tool focuses on the assertion that as a source external to the text of the legal instrument (extra-textual, coming from beyond the legal text), legislative history is unsuitable for interpreting the law[87]. This claim is justified in several ways, however the strongest emphasis is placed on the fact that "the ordinary citizen", who is not a lawyer, should be bound only by legislative texts, as they constitute the source of his or her rights and obligations. The need to be familiar with legislative materials in order to correctly understand and interpret the wording of provisions of the law is perceived as a burden that exceeds reasonable expectations, and more importantly, the capabilities of a regular citizen. Textualists, who lead the way in this vein of criticism, compare practising the use of legislative materials to a trick used by emperor Nero, who placed his decrees high on

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[83] R. Langacker, *Gramatyka*…, p. 311 ff.

[84] "An expression is always understood with respect to some actual or imagined context", R. Langacker, *Gramatyka*…, p. 84.

[85] R. Langacker, *Gramatyka*…, pp. 301–303.

[86] Langacker writes that "categorization is partially shaped by expectations (proceedings in «top-down» fashion) rather than being solely driven by the nature of the target (in «bottom-up») fashion. Indeed, the target itself is often largely constituted by its categorization. Once invoked by the target based on preliminary processing (which may be rudimentary), the categorizing unit imposes its own content and organization, which can reinforce, supplement, or override those inherent in the target". R. Langacker, *Gramatyka*..., p. 302. This explains why, upon hearing "Will you pass me the salt?" we instinctively perceive it as a request, and upon reading "Whoever kills a human being, shall be subject to the penalty of ..." we understand it as a directive prohibiting killing and establishing a punishment for doing so.

[87] On legislative materials as an extra-textual tool in the USA more broadly R.J. Araujo, SJ, *The use of legislative history in statutory interpretation: A look at Administrative Tribunal Regents v. Bakke*, "Seton Hall Legislative Journal" 1992/16, pp. 122–130.

columns so as to make it difficult for citizens to get familiar with them[88]. Making the interpreter choose between using either the approved text or legislative materials is also – in the opinion of the critics – completely inconsistent with the ideals of democracy[89]. Consequently, the critics claim that the right context for the interpretation of the law is the context defined by the usual, plain meaning, whereas the legislative context should not be taken into consideration.

Cases involving grammar-related problems prove that even the most precise legislative constructions cannot free a piece of legislation from the lack of precision. Hence, it is necessary to disambiguate the meaning of a text with the help of evidence derived from outside of the text itself, and the legislative context should play the leading role in that. In order to interpret a text, we simply have to use external contexts. The claim that the strongest proof of the legislator's intent is the contents of the created text is arguably obvious. However, when the text causes doubts (becomes a subject of dispute), it is necessary to go beyond it.

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[88] According to Scalia, obliging citizens to know legislative materials external to the legal text means obliging them to interpret the text based on sources that are not only poorly available, but also not approved by the legislator. A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton 1997, p. 17; P.A. Rubin, *War of the words: How courts can use dictionaries in accordance with textualist principles*, "Duke Law Journal" 2010/60, pp. 173–174.

[89] A. Scalia, *A Matter*…, p. 17.

Legislative Materials as a Tool for Solving Grammatical Problems in Statutory Interpretation

Abstract: The article begins with a presentation of an interpretative tool in the form of materials from the legislative process (legislative materials, legislative history), including arguments offered in the theory of law in favour and against their use for interpretation purposes. These matters are then discussed with references to a specific type of interpretive problems, namely problems that stem from the grammatical constructions of the provisions of the law. The authors analyse five cases in which Polish courts reach for legislative materials in order to resolve doubts caused by sentence syntax, conjunctions or punctuation. The decisions issued vary – in their use of legislative materials courts deploy various other tools and values (e.g. vocabularies, formal logic, the *ratio legis* behind a provision or the rules of legislative procedure). The outcomes of such a confrontation are varied. Thus, the judgments presented here are a good illustration of the diversity of issues connected with the theoretical and practical aspects of the use of legislative materials in the process of interpreting the law.

Keywords: legislative history, legislative materials, statutory interpretation, grammatical problems

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