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# Legislative Materials in the Light of Polish and Spanish Law, Judicial Practice and Theoretical Literature

## 1. Evidence of legislator's intent

As rightly indicated in the doctrine, the role of a legal text interpreter consists of looking for evidence to determine the legislator's intent<sup>2</sup>. There is no question that the strongest evidence is the legal text itself<sup>3</sup>. However, the situation gets more complicated when the text contains unclear, imprecise, ambiguous phrases, or when its literal interpretation leads to unacceptable results. Drawing from the terminology of criminal procedure, we can say that, in a complicated situation, the evidence in the form of the text is only circumstantial, and therefore too weak to be relied solely upon; it is insufficient evidence, which cannot be correctly interpreted in isolation from other evidence. How can such other evidence be found? A robust textualist will surely maintain that the search for it should be considered a crime against interpretation. They will stigmatise the attitude of an intentionalist, who, instead of fully understanding the text itself, goes beyond it, most often by analysing the history of its creation<sup>4</sup>. In turn, the intentionalist will reach for all the evidence at their disposal. Legislative materials can be compared to video surveillance recordings from the scene: although they will not always allow accurate analysis, it would be negligent not to use them in a situation where other "evidence in the case" seems doubtful, namely when the text is not direct evidence and legible enough. Legislative materials will not always provide a good answer. Nor will a reading of the text in isolation.

## 2. Legislative materials

So, what are legislative materials and how is the use of them perceived by legislation, case law and doctrine? These issues will be analysed on the basis of Polish and Spanish literature, judicial decisions, and the law.

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<sup>2</sup> Z. Tobor, *Krótką opowieść o szczęśliwym, zakłopotanym i nieszczęśliwym interpretatorze* [Eng. *A Short Story about a Happy Interpreter, and Embarrassed Interpreter, and an Unhappy Interpreter*], in: A. Mróz, A. Niewiadomski, M. Pawelec (eds.), *Prawo, język, media* [Eng. *Law, Language, Media*], Warszawa 2011, p. 111.

<sup>3</sup> Z. Tobor, *Krótką opowieść...*, p. 111.

<sup>4</sup> I. Gallacher, *Conducting The Constitution: Justice Scalia, Textualism, And The Eroica Symphony*, Syracuse 2007, p. 307.

First, it should be emphasised that “legislative materials” is a non-uniform, umbrella term. Terms regarding specific materials such as “government bill,” “deputies’ bill,” “draft resolution,” “explanatory statement to a bill” (also termed “justification”) usually derive from the law itself and do not raise doubts. In doctrine, however, there also are more general concepts, which may occasionally be problematic. Apart from “legislative materials”, we find “legislative history”, “preparatory materials” (Spanish: *trabajos preparatorios*, French: *travaux préparatoires*) and “historical criterion”, all of which should be identified with legislative materials or considered synonymous.

According to Spanish doctrine, the criterion for identifying legislative materials is normative since it is not developed by legal theorists, but derives from systemic regulations. It is the Basic Law that stipulates the rules of legislative process and its participants, and thus makes it possible to determine the types of legislative materials<sup>5</sup>. However, it should be noted that the Spanish Constitution<sup>6</sup> in no way refers to preparatory materials as means of interpretation. Naturally, it provides for the existence of explanatory statements, bills and amendments (e.g. Article 88 of the Spanish Constitution), but treats them only as fragments of the legislative path, not recognised as sources of law or aids to its understanding. Neither are legislative materials mentioned as sources of law in Article 87, Article 234 nor other provisions of the Constitution of the Republic of Poland<sup>7</sup>. Therefore, the starting point for answering the question of what can be considered legislative materials is the Constitution, as it contains general norms concerning the legislative procedure, while specific regulations should be sought in the practice of individual organs, in relevant parliamentary statutes and resolutions, and in legal literature.

According to Spanish legal literature, in contemporary continental Europe, political and technical documentation from the sphere of executive power directly related to a government bill is sometimes considered as legislative material<sup>8</sup>. This group also includes documents created by the legislative authority and related to some specific legal act such as legislative proposals, bills, amendments, transcripts of or reports on committee debates, justifications, and explanatory statements related to voting. In this sense, all preparatory materials (works) are legislative materials, unlike the components taken into account in historical interpretation<sup>9</sup>. But, according to another concept, legislative (preparatory) materials are not separate from historical interpretation; on the contrary, the supporters claim that using such materials for interpretation is in itself historical interpretation, and speak of a “historical criterion in the interpretation process”<sup>10</sup>.

Historical resources (*recursos históricos*) useful in legal interpretation can vary in nature. The doctrine emphasises this diversity by creating various classifications. There is a variously understood division of *precedentes* (historical factors, sources) into *los remotos* (literally: distant) and *los inmediatos* (literally: direct). According to Felipe Clemente de Diego, the latter are preparatory materials (works) (*trabajos preparatorios*)

<sup>5</sup> P. Salvador Coderch, *Los materiales prelegislativos: entre el culto y la polémica*, “Anuario de derecho civil” 1983/4, p. 1658.

<sup>6</sup> The Spanish Constitution of 27 December 1978 (Spanish title: Constitución Española, BOE núm. 311 de 29.12.1978, pp. 29313–29424).

<sup>7</sup> The Constitution of the Republic of Poland of 2 April 1997 (Polish title: Konstytucja Rzeczypospolitej Polskiej z 2.04.1997 r., Dz. U. Nr 78, poz. 483 ze zm.).

<sup>8</sup> P. Salvador Coderch, *Los materiales...*, p. 1658.

<sup>9</sup> P. Salvador Coderch, *Los materiales...*, p. 1658.

<sup>10</sup> E.g. J. Rodríguez-Toubes Muñiz, *El criterio histórico en la interpretación jurídica*, “Dereito” 2013, pp. 599–632.

and *exposiciones de motivos*, namely justifications for introducing specific legal regulations. In turn, José Castán Tobeñas considers Roman, Germanic and canon law to be *precedentes remotos*, the legislation preceding the binding one to be *precedentes inmediatos*, while *trabajos preparatorios* or *materiales prelegislativos* fall into a separate, third category<sup>11</sup>. Preparatory materials (*materiales prelegislativos*, *trabajos preparatorios*) can generally be defined as documents created in the course of and with the aim of drafting an act, as well as those that record actions and discussions that took place in this process<sup>12</sup>.

Agnieszka Bielska-Brodziak indicates five variants of legislative history<sup>13</sup>, based on the distinction made in the common law countries<sup>14</sup>. The first is the conventional legislative history of an interpreted act. This is the most general and intuitive understanding of legislative history. The second is the history of changes to a bill. The third relates to history leading up to the start of legislative work, and also has several versions<sup>15</sup>. The fourth variant is history created after enacting the interpreted legal act, and the fifth is the broad historical context of creation of the interpreted act<sup>16</sup>.

Passing on to analysis of specific types of legislative materials, we should mention bills in the first place. In Poland, pursuant to Art. 118 of the Constitution, legislative initiative is vested in deputies of the lower house (*Sejm*), the upper house (*Senat*), the President, the Council of Ministers, and a group of at least 100,000 citizens entitled to vote in the *Sejm* elections. The Spanish Constitution, under Art. 87, vests the legislative initiative in the government, the Congress of Deputies, the Senate, and a group of at least 500,000 citizens. The right to initiate legislative assemblies by Autonomous Communities is regulated separately (Article 87.2 of the Spanish Constitution). According to the traditional nomenclature, the term *proyectos* is reserved for government bills, while other bills are referred to as *proposiciones de ley*. Without delving into analysis of individual types of bills, it is worth noting that they vary both in terms of their number and their legislative effectiveness and quality of documents depending on which of the mentioned bodies developed them. Undoubtedly, both in Poland and Spain, government bills will be in the lead, as they are usually professionally prepared, not subject to many transformations, and rarely rejected<sup>17</sup>. The activity of deputies is also significant<sup>18</sup>. In Spain, the *Cortes Generales* stand out as regards the number of submitted proposals<sup>19</sup>. When a bill is used in the interpretation process, it is crucial whether it was adopted unchanged, and if not, what are the changes to which it was subject during the legislative procedure<sup>20</sup>.

<sup>11</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 611. The author refers to: F. Clemente de Diego, *Instituciones de Derecho Civil*, A. de Cossío y Corral, A. Gullón Ballesteros (eds.), vol. I, Madrid 1959, p. 146, and J. Castán Tobeñas, *Teoría de la aplicación e investigación del derecho (metodología y técnica operatoria en Derecho privado positivo)*, Madrid 1947, pp. 245–246.

<sup>12</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 613.

<sup>13</sup> A. Bielska-Brodziak, *Śladami prawodawcy faktycznego. Materiały legislacyjne jako narzędzie wykładni prawa* [Eng. *In the Footsteps of the Actual Legislator. Legislative Materials as a Tool for Law Interpretation*], Warszawa 2017, p. 134ff.

<sup>14</sup> Drawing from the achievements of the countries with common law culture, where there has been a longstanding discussion on the use of legislative history in the interpretation process, one must obviously take into account the differences between common law culture and civil law culture.

<sup>15</sup> A. Bielska-Brodziak, *Śladami...*, p. 139.

<sup>16</sup> A. Bielska-Brodziak, *Śladami...*, p. 139.

<sup>17</sup> A. Bielska-Brodziak, *Śladami...*, p. 150; C. Gutiérrez Vicén, *Sinopsis artículo 89*, <http://www.congreso.es/consti/constitucion/indice/sinopsis/sinopsis.jsp?art=89&tipo=2>, accessed on: 4.12.2017.

<sup>18</sup> A. Bielska-Brodziak, *Śladami...*, p. 154.

<sup>19</sup> C. Gutiérrez Vicén, *Sinopsis...*

<sup>20</sup> A. Bielska-Brodziak, *Śladami...*, p. 167.

The second, very important type of legislative materials are explanatory statements to bills. They have several functions. In Polish doctrine, interpretative function is indicated as one of them. Explanatory statements play an important role “in the process of law-application by serving as a non self-executing source of law, making it easier to understand the legislator’s intentions”<sup>21</sup>. The usefulness of a justification depends on its wording, i.e. primarily on a clear expression of the aim of a given normative act, since this element is most often sought in a statement by the interpreter<sup>22</sup>.

As regards Spanish law, mention should be made of explanatory statements contained in the very text of statute, namely *exposiciones de motivos*. According to the Spanish directives of normative technique<sup>23</sup>, preliminary bills and drafts of royal legislative decrees, as well as laws (decrees) already adopted, are divided into three parts. The first, *exposición de motivos*, describes the content of a law, indicates its objectives and motives, as well as the facts preceding its adoption. The idea is to attain a high level of comprehensibility of a legal text. As indicated in case law of the Spanish Constitutional Court, although preambles or *exposiciones de motivos*<sup>24</sup> do not have normative value<sup>25</sup>, they serve as an interpretative criterion allowing discovery of the legislator’s will (*voluntad del legislador*)<sup>26</sup> and teleological interpretation<sup>27</sup>. Also, the Spanish Supreme Court (hereinafter SSC) clearly stated that the legal value of *exposición de motivos* is not about providing legal disposition, but to serve as interpretative guidelines<sup>28</sup>. This is a specifically Spanish understanding of explanatory statements. Apart from Spain (and South America, which draws on the former’s achievements and models), preambles can be found in European normative acts and national Constitutions, while such regulations are only exceptionally present in laws or municipal regulations<sup>29</sup>. It should be added that Spanish case law regularly refers to *exposición de motivos*<sup>30</sup>.

<sup>21</sup> G. Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych. Komentarz* [Eng. *Writing and Publishing Normative Acts. A Commentary*], Warszawa 2016, p. 116.

<sup>22</sup> Judgment of the Voivodship Administrative Court (hereinafter: WSA) in Gliwice of 18 May 2017 (IV SA/Gl 1108/16), LEX No. 2303799; Judgment of the WSA in Krakow of 20 April 2017 (III SA/Kr 185/17), LEX No. 2281706. The cited judgments concerned child-support benefit. The courts, citing the justification of the government bill, stated that “it does not follow from the legislative materials *per se* that the legislator’s aim was not to distinguish foster families depending on the legal basis of financing the costs of maintaining children raised in such families”. Sometimes the courts refer not to the justification but to its lack: e.g. the judgment of the WSA in Krakow of 20 April 2017 (III SA/Kr 205/17), LEX No. 2281686 (“In the Court’s assessment, the lack of precision and uniformity in using similar terms in the system of provisions concerning social assistance should not be interpreted as the clear will of the legislator, the more so that legislative materials lack such justifications”).

<sup>23</sup> Directives of normative technique of 22 July 2005 (Spanish title: *Directrices de técnica normativa*, BOE núm. 180 de 29.07.2005, pp. 26878–26890).

<sup>24</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 616. As the author indicates, citing J. Tajadura Tejada, *Sobre los preámbulos de las leyes*, “*Revista Jurídica de Navarra*” 2000/29, p. 173ff., some distinguish *exposiciones de motivos* as addressed to the legislator and *preámbulos* as addressed to the recipients of the law. He adds, however, that this is an artificial distinction and most often these terms will be considered synonymous (e.g. M.C. Rovira Flórez De Quiñones, *Valor y función de las “exposiciones de motivos” en las normas jurídicas*, Santiago de Compostela 1972, p. 105 and 113).

<sup>25</sup> Judgments of the *Tribunal Constitucional*: of 23 July 1998 (173/1998), BOE núm. 197 de 18.08.1998; of 4 October 1990 (150/1990), BOE núm. 266 de 6.11.1990; of 12 November 1981 (36/1981), BOE núm. 277 de 19.11.1981.

<sup>26</sup> Judgments of the *Tribunal Constitucional*: of 6 July 2006 (222/2006), BOE núm. 185 de 4.08.2006; of 12 November 1981 (36/1981), BOE núm. 277 de 19.11.1981.

<sup>27</sup> Judgments of the *Tribunal Constitucional*: of 20 April 2009 (90/2009), BOE núm. 111 de 7.05.2009; of 7 April 2005 (83/2005), BOE núm. 111 de 10.05.2005.

<sup>28</sup> Judgments of the *Tribunal Supremo* of 23 February 2012 (STS 1478/2012), ECLI:ES:TS:2012:1478. This and other judgments with ECLI identifier (European Case Law Identifier) available on the website: <http://www.poderjudicial.es>

<sup>29</sup> G. Cerdeira Bravo De Mansilla, *Principios, realidad y norma: el valor de las exposiciones de motivos (y de los preámbulos)*, Madrid 2015, p. 17.

<sup>30</sup> Typing *exposición de motivos* in CENDOJ, the search engine for judgments ([www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp), accessed on: 4.12.2017), returns 165.181 decisions. Just recall some of them. In the *Tribunal Supremo* judgment

*Exposiciones de motivos* are not usually used as a historical criterion. However, they can serve as such when the legislator directly justifies the amendment by contrasting it with the previously binding law<sup>31</sup>. Sometimes it is pointed out that it is necessary to distinguish between 1) *exposiciones de motivos* in applicable laws and 2) *exposiciones de motivos* in provisions not yet adopted and explanatory statements to bills (*explicaciones*). The latter have the nature of a “pure” historical criterion; the former, discussed above, are treated as a historical criterion only by analogy<sup>32</sup>.

Legislative materials also include amendments (*enmiendas*), introduced at different stages of the legislative process, including self-amendments<sup>33</sup>, various statements made during debates<sup>34</sup>, or more generally “parliamentary debate”<sup>35</sup>, and expert opinions.

It is worth mentioning that references to parliamentary debate (more broadly, to discussions on introducing a given provision) sometimes rely on criticism of a specific solution<sup>36</sup>, or are associated with evoking controversies provoked by the introduced changes. When courts turn to preparatory materials, this enables not only interpretation, but also interaction between the legislative and judicial authorities by making ongoing reference to the effects of solutions criticised, or approved, by the courts. Whether a court may or should negatively assess law is, of course, another issue; yet courts are often involved in such “discussions” with the legislator<sup>37</sup>.

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of 26 October 2017 (3734/2017), ECLI:ES:TS:2017:3734, the court explained that it is clear from the *exposición de motivos* that the Spanish legislator voluntarily overfulfilled the requirements of the transport directive (referred to in the judgment) and extended the rules of the good regulation into other sectors. In the *Audiencia Nacional* judgment of 18 October 2017 (3979/2017), ECLI:ES:AN:2017:3979, it is indicated that it followed from *exposición de motivos* which entities were eligible for funding in this case. In the *Tribunal Supremo* judgment of 16 October 2017 (3530/2017), ECLI:ES:TS:2017:3530, the SSC examined the right to public information, *i.e.* in the context of the costs incurred by RTVE (the Spanish audiovisual corporation) in connection with the country’s participation in the Eurovision Song Contest in 2015. The court found that *exposición de motivos* implies a broad understanding of the right to access public information – this right is available to all persons who can exercise it, without providing grounds for their demand, and may be restricted only in cases where it follows from its own nature. Thus, the legislator obliges interpretation of all restrictions of this right in a restrictive way. Finally, the *Tribunal Supremo* judgment of 28 June 2017 (2497/2017), ECLI:ES:TS:2017:2497 states that any doubts that could arise in relation to the legal basis of the judgment are dispelled by a reading of the preamble to the Criminal Code, in which the legislator clearly explains his will to introduce the aggravated type of theft, referring to the social context and drawing attention to the intended goals.

<sup>31</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 617ff. As an example, the author gives the judgment of *Tribunal Constitucional* of 26 July 1982 (54/1982), BOE núm. 197 de 18 August 1982.

<sup>32</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 615.

<sup>33</sup> A. Bielska-Brodziak, *Śladami...*, p. 204ff.

<sup>34</sup> A. Bielska-Brodziak, *Śladami...*, p. 234.

<sup>35</sup> 2.054 results are returned by the CENDOJ search engine in connection with the term *debate parlamentario*, accessed on: 5.12.2017).

<sup>36</sup> Judgment of the Court of Appeal in Gdańsk of 6 July 2016 (III AUa 396/16), “Kwartalnik Sądowy Apelacji Gdańskiej” 2017/1, pp. 243–266: “As a side note, in the light of the above reflection, let us remark that analysis of legislative materials related to the amendment commented upon, including legal opinions and transcripts from the meetings of the *Sejm* committees, leads to the conclusion that its originators were unable to convincingly justify the purpose and legitimacy of the proposed, and eventually introduced, amendment to the provisions on soldiers who are not on a mission outside the country”.

<sup>37</sup> The *Tribunal Supremo* judgment of 28 June 2017 (2497/2017), ECLI:ES:TS:2017:2497 concerning multiple recidivism. The court criticises the fact that, in the primary three sentences of a person accused of *delito leve de hurto* (theft of the mitigated form, treated less severely), the *hyperagravado* type (aggravated) can be applied, which allows a change to the maximum “fine of three months” (roughly equivalent to the Polish three months’ day-fine units) into imprisonment, which may last as long as three years. The court points out that this is evidently disproportionate and remarks that “it is not surprising that in the lower court an attempt was made to escape the application of the *hyperagravado* type”. The court notes that the legislator changes the “mitigated” type (Spanish: *tipo atenuado*) from art. 234.2 of the Spanish Penal Code into the *hyperagravado* type of art. 235 of this code, passing over the intermediate level, *i.e.* the standard type of theft under art. 234.1. As the court states “various examples of consequences it produces in judicial practice could be cited, but one is particularly illustrative. In such a system of punishment, the same effects will be ascribed to the theft of a very valuable painting by a Renaissance painter and the theft of four wallets containing no more than 50 euro. However, the most controversial in the new system of penalties for this type of crime is that

The assumption that the legislator intends to create meaningful provisions consistent with the rest of the legal system helps overcome possible ambiguities, gaps and contradictions<sup>38</sup>. It occurs that legislative materials are used when there is a need to go beyond literal meaning leading to absurd results<sup>39</sup>, or if the legislator's mistake must be rectified<sup>40</sup>. In difficult situations, legislative materials are the best tools available because, like the text itself, they come from the legislator<sup>41</sup>.

The judiciary makes use of legislative history. Polish and Spanish courts resort to legislative materials, which gives the green light to "intention-seekers". It is worth recalling that the Polish Supreme Court (hereinafter "PSC") explicitly allowed the use of interpretation by means other than grammatical<sup>42</sup> by *expressis verbis* referring to historical interpretation, which comprises the use of legislative materials<sup>43</sup>. However, it has been noticed in literature that Polish court practice has not yet developed a hierarchy of preparatory materials or standards of their application<sup>44</sup>. Furthermore, there are no detailed guidelines for their interpretation in the provisions of Polish law, and acts usually comprise neither equivalents of *exposiciones de motivos* nor normative guidelines regarding interpretation of a specific text.

As regards Spanish law, Art. 3 of the Spanish Civil Code<sup>45</sup> directly indicates that provisions should be interpreted in accordance with the very meaning of the words, in relation to the context and to "historical and legislative antecedents" (*antecedentes históricos y legislativos*), as well as to social reality at the time of the application of the norms, given in particular their spirit and purpose. *Antecedentes históricos* reveal what the legislator wanted to change or preserve from previously applicable law, while *antecedentes legislativos* reveal what they proposed, discussed, and what conclusions they eventually drew<sup>46</sup>. Interpretation "in relation to *antecedentes históricos y legislativos*" is considered a historical element of interpretation. *Antecedentes históricos* are historical

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recidivism is used as the sole basis for constructing a *hyperagravado type*." In the *Tribunal Supremo* judgment of 17 May 2017 (354/2017), ECLI:ES:TS:2017:1883, the SSC criticised the fact that the crime of self-indoctrination (Spanish: *auto doctrinamiento*) introduced in the Criminal Code in 2015 is a pre-preparatory action (Spanish: *protopreparatorio*), and emphasised that expressing harmful or violent beliefs is within freedom of speech. The ruling was commented upon in the media. One can refer, among others, to the article *El Supremo revoca la primera condena por auto doctrinamiento yihadista y crítica la reforma legal* [Eng. *The Supreme Court revokes the first judgment for jihadist self-indoctrination and criticises the legal reform*] <http://www.elmundo.es/espana/2017/05/18/591db15322601d42548b45d6.html>, accessed on: 5.12.2017).

<sup>38</sup> M. Calvo García, *La voluntad del legislador: Genealogía de una ficción hermenéutica*, "Doxa" 1986/3, p. 114.

<sup>39</sup> A. Bielska-Brodziak, *Śladami...*, p. 404; A. Ročławska, *Stosuj ustawy i rób co chcesz? Pojęcie niezawisłości a deontologiczny model cnót sędziowskich* [Eng. *Apply the Law, and Do What You Want? The Concept of Judicial Independence and the Prospective of a Deontological Model of Judicial Virtues*], "Folia Iuridica" 2017/78, p. 88ff.

<sup>40</sup> A. Bielska-Brodziak, *Śladami...*, p. 407; A. Ročławska, *Stosuj ustawy...*, p. 88ff.

<sup>41</sup> L.B. Pilarz, *Jakie wartości cenić powinni sędziowie w systemie prawa* [Eng. *What Values Should Judges Treasure in the Legal System?*], in: K. Bałękowski, P. Wiatr (eds.), *Wokół wartości dobra – filozofia o moralności i sprawach państwa* [Eng. *On the Value of Good – Philosophy on Morality and Affairs of State*], Lublin 2016, p. 39.

<sup>42</sup> The PSC explicitly stated that linguistic interpretation "must be complemented with conclusions resulting from the application of other types of interpretation: historical, systemic, functional, logical, and finally, and maybe primarily, teleological, which, in reference to individual cases resolved by means of administrative decisions, is considered the most appropriate and leading best to deciphering the legislator's intentions and goals". The PSC judgment of 8 January 1993 (III ARN 84/92), OSNC 1993/10, item 183.

<sup>43</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 611.

<sup>44</sup> A. Bielska-Brodziak, *Materiały legislacyjne w dyskursie interpretacyjnym z perspektywy brytyjskiej, amerykańskiej, francuskiej, szwedzkiej i polskiej. Konwergencja czy dywergencja kultur i systemów prawnych* [Eng. *Legislative Materials in Interpretative Discourse from the British, American, French, Swedish and Polish Perspectives. Convergence or Divergence of Legal Cultures and Systems?*], in: O. Nawrot, S. Sykuna, J. Zajadło (eds.), *Konwergencja czy dywergencja kultur i systemów prawnych?* [Eng. *Convergence or Divergence of Legal Cultures and Systems?*], Warszawa 2012, p. 151.

<sup>45</sup> Royal decree of 24 July 1889 – Spanish Civil Code (Spanish title: Código Civil, BOE núm. 206 de 25.07.1889, BOE-A-1889-4763, incluye reformas).

<sup>46</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 610

provisions, former laws such as Roman law, and *antecedentes legislativos* are identified with preliminary drafts (*borradores, anteproyectos*), bills (*proyectos*) and parliamentary discussions<sup>47</sup>. As far as the historical element is concerned, the argument arising from the change of regulations also comes into play. Doctrine sometimes states the need to find the golden mean between subjective interpretation – focused on discovering the meaning the creator of the norm gave it at the time of its establishment, and objective interpretation – understanding the norm per se as part of the entire legal system at the time of norm-application<sup>48</sup>. Art. 3 of *Código civil*, cited above, seems to be the answer of the Spanish legislator to these demands. However, putting a few signposts at once without specifying which of them points the right way does not seem to be a real attempt to find balance between *voluntas legis* and *voluntas legislatoris*.

Incidentally, it is worth noting that Art. 111–2 of Catalan *Código civil* regulates interpretation guidelines slightly differently<sup>49</sup>. As provided in the second paragraph of this provision, when interpreting and applying the civil law of Catalonia, account should be taken in particular of the civil case law of the *Tribunal de Casación de Cataluña* and the *Tribunal Superior de Justicia de Cataluña*. Therefore, the main interpretative tool is to refer to the case law tradition of Catalan courts. The legislator does not preclude the use of legislative materials, but also does not explicitly provide for it in this provision.

No interpretative tools have been specified in the Spanish Penal Code, which is undoubtedly related to the matter being regulated. According to the principle *nullum crimen sine lege scripta, stricta, certa*, priority should be given to literal wording of the Penal Code provisions<sup>50</sup>. The use of legislative materials in interpreting criminal law is of marginal importance even in the countries where there is no doubt as to the relevance of using preparatory materials<sup>51</sup>.

### 3. Criticism of legislative materials

The use of legislative materials to find out the legislator's intent is sometimes met with criticism. Though it is impossible here to address all the objections, it is worth noting at least some of them.

#### 3.1. First objection: reference to the intent

The first objection is made not only against those who reach for legislative materials, but against intentionalists in general. It is argued that it does not matter what the legislator wanted to say because, under the rule of law, what matters is what they actually said<sup>52</sup>. However, what the legislator actually said is not always known. Linguistic interpretation

<sup>47</sup> E. Valladares Rascón, in: R. Bercovitz Rodríguez-Cano, *Comentarios al Código Civil*, Elcano 2001, p. 31.

<sup>48</sup> M. Lete del Río, *Teorías sobre la Interpretación de las Normas*, <http://leyderecho.org/teorias-sobre-la-interpretacion-de-las-normas>, accessed on: 5.12.2017).

<sup>49</sup> Law of 30 December 2002 – Catalan Civil Code (Spanish title: Código Civil de Cataluña, BOE núm. 32 de 6.02.2003, BOE-A-2003-2410, p. 4912; Catalan title: Codi Civil de Catalunya, DOGC núm. 3798, 13–01–2003, p. 486).

<sup>50</sup> Organic Law of 23 November 1995 – Criminal Code (Spanish title: Código Penal, BOE núm. 281 de 24.11.1995, BOE-A-1995-25444).

<sup>51</sup> Cf. A. Bielska-Brodziak, *Materiały...*, p. 149.

<sup>52</sup> O.W. Holmes, *The Theory of Legal Interpretation*, "Harvard Law Review" 1898–1899/12, p. 419. Particular attention is given to the importance of linguistic interpretation in such branches of law as criminal or tax law. See R. Mastalski, *Stosowanie prawa podatkowego* [Eng. *Application of Tax Law*], Warszawa 2008, p. 156; L. Morawski, *Zasady wykładni prawa* [Eng. *The Principles of Legal Interpretation*], Toruń 2010, p. 78ff.

alone is not enough when facing semantic or syntactic ambiguity, vagueness or open texture<sup>53</sup>. It is worth stressing here that these are not rare situations, as the legislator must respond to “the enormous need to provide legal texts with flexibility that would allow legal decisions to be adequately adapted to all individual characteristics of concrete situations (also in the distant future)”<sup>54</sup>, and this task may be implemented by applying vague phrases (however, the occurrence of an ambiguous phrase whenever it is impossible to eliminate its ambiguity by means of a definition or context is negatively assessed, while the use of vague phrases is generally considered as intended by the legislator)<sup>55</sup>.

Additionally, it should be noted that a legal provision is, or at least should be, the result of a compromise<sup>56</sup>. This compromise is not aimed at creating some provision, but its final text is a result of provisions that were *intended* to be created; therefore, it is meant to realise the *goals* of participators in the legislative process as much as possible. Hence, the legislator’s activity undoubtedly has the embedded aim to “express their decisions, sometimes particularly subtle and socially, politically or economically complicated”<sup>57</sup>. “Obviously, the legislator wants to attain certain pragmatic goals, namely expecting certain results after implementation of the norm they established”<sup>58</sup>. An act cannot be analysed in isolation from its purpose. Even the most ardent advocates of textualism do not question the view that law is the result of the legislator’s deliberate activity<sup>59</sup>.

It is worth mentioning that, in order to truly understand the compromise, an understanding of the dispute must first be gained. This pertains not only to such complex and politically entangled processes of working out a compromise as lawmaking. Imagine a commonplace situation: it’s 8 p.m. on a summer evening, and a married couple are going to the cinema to see the latest Woody Allen production. If this is the only information given, presumably what is crucial here is this particular movie, as well as the fact that it was directed by Woody Allen. However, we will assess the situation differently if we learn that at 6 p.m. a conflict arose between the spouses, as the husband wanted to watch a new series at home, while the wife preferred to have a walk in the park and then see some movie in an outdoor cinema. At 7 p.m. the couple agreed that going to the cinema would be the perfect compromise: each of them felt like spending the evening in front of the screen, they will go to the cinema on foot (so the wife will have her walk), and the latest release will be, for her husband, as good a topic to discuss with friends as the new series he intended to watch. Hence, what matters is not a specific film but *something to watch*. It is not without significance that this is a *new production* (this was what the husband wanted), as well as the fact that the spouses go to the cinema *on foot*

<sup>53</sup> Z. Tobor, *Iluzja wykładni językowej* [Eng. *Illusion of Linguistic Interpretation*], in: P.J. Lewkowicz, J. Stankiewicz (eds.), *Konstytucyjne warunki tworzenia i stosowania prawa finansowego i podatkowego* [Eng. *Constitutional Conditions for the Creation and Application of Financial and Tax Law*], Białystok 2010; Ł.B. Pilarz, *Jakie wartości...*, p. 42. In the PSC’s decisions it has also been pointed out that, in view of current regulations when there is a “very significant vagueness of terms, as well as ambiguous, undefined and indeterminate phrases are used”, it is not possible to rely solely on a linguistic interpretation, and it is necessary to refer to other methods of interpretation, especially functional interpretation and systemic”. See Resolution of the PSC of 22 March 2007 (III PZP 1/2007), OSNP 2007/21–22, item 306.

<sup>54</sup> M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* [Eng. *Interpretation of Law. Principles, Rules, Guidelines*], Warszawa 2006, p. 175.

<sup>55</sup> M. Zieliński, *Wykładnia...*, p. 176.

<sup>56</sup> See L.M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, CRS Report for Congress, Congressional Research Service 7–5700 www.crs.gov 97–589, 19.12.2011, <https://fas.org/sgp/crs/misc/97–589.pdf>; A. Kozinski, *Should reading legislative history be an impeachable offense?*, “Suffolk University Law Review” 1998/4, p. 813.

<sup>57</sup> M. Zieliński, *Wykładnia...*, p. 51.

<sup>58</sup> M. Zieliński, *Wykładnia...*, p. 185.

<sup>59</sup> Z. Tobor, *W poszukiwaniu intencji prawodawcy* [Eng. *In Search of the Legislator’s Intent*], Warszawa 2013, p. 132.

(this was what the wife wanted). The example may be a simplification, but illustrates the mechanisms of perceiving a situation depending on how much information is revealed.

According to Stanley Fish, “Words alone, without an animating intention, do not have power, do not have semantic shape.” Therefore, even what the one who claims “that he or she is able to construe words apart from intention”, what they “will really have done is assumed an intention without being aware of having done so”<sup>60</sup>. Instead of assigning the legislator one’s own intention arbitrarily and often unconsciously, it is better to deliberately avail of tools allowing discovery of the true intention, especially when work on the text was turbulent or the provision raises interpretation doubts.

### 3.2. Second objection: subjective intention

The second objection concerns the use of legislative materials in the interpretation process with a subjective attitude<sup>61</sup>. Spanish opponents of subjective theories<sup>62</sup> indicate that proponents of subjectivity are looking back, whereas the law is applied “here and now,” hence the understanding of the provision should be adapted to the legal and socio-political context of its interpretation<sup>63</sup>, which seeking the historical legislator’s intent would supposedly not allow. In Spanish doctrine, in order to refute this argument, it is argued that subjectivism cannot be equated with originalism<sup>64</sup>, and that the legislator may have intended to have the interpretation of the regulations they created adapted to the changing world<sup>65</sup>. This seems plausible. Why assume that the legislator’s intent at the time of the creation a law was put in a specific, now dated, context, as in a prison without windows or clocks? Of course, seeing the context of a provision’s origin is in itself valuable for the purposes of understanding that provision. The literature assumes that knowing the social, economic and cultural circumstances in which a provision was adopted will often prove crucial for dispelling unclearness and ambiguity<sup>66</sup>. Nevertheless, context cannot be a hindrance. It should not be forgotten that a legislative body is a collection of *people*, and a *human being*, by their nature, is endowed with *imagination*. Why not see the context of a provision’s origin as a mountain meadow with a view of the whole area? Creating regulations is prospective by nature. If the law was made *ad hoc* and concerned only specific situations, provisions would be but arbitrary decisions with addressees only seemingly defined in a general way, and the instructions would be abstract. Proponents

<sup>60</sup> S. Fish, *There is No Textualist Position*, “San Diego Law Review” 2005/42, pp. 632–633.

<sup>61</sup> L. Morawski, *Zasady...*, p. 163; Some Spanish authors explicitly indicate that legislative materials are not often used in interpretation since, in Spanish judicial practice, the objective approach is dominant (see J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 614). Such a conclusion would, however, require in-depth research.

<sup>62</sup> In Polish literature, see J. Wróblewski’s distinction between static and dynamic theories (J. Wróblewski, *Zagadnienia teorii wykładni prawa ludowego* [Eng. *Problems of the Theory of Interpretation of the Law of the Polish People’s Republic*], Warszawa 1959, pp. 151–176; K. Opalek, J. Wróblewski, *Zagadnienia teorii prawa* [Eng. *Problems of the Theory of Law*], Warszawa 1969, pp. 239–244), namely, in dynamic view the law is to be adequate to life, while in static view it is to be certain. According to this division, in dynamic theories, legislative materials would not be useful, but there is no doubt that in static theories their role would be crucial. The arguments of Spanish opponents of subjective theories would be somewhat similar to those raised by the supporters of those theories which Wróblewski would classify as dynamic. As a side note, one may also observe the division of the goals of interpretation sometimes adopted in Polish doctrine into those realised irrespective of psychological intention (in this sense objective goals) and normative ones. (J. Wróblewski, *Zagadnienia...*, pp. 133–139). It is uncontroversial that normative formulation of goals seems supportive for illustrating the possible position of legislative materials as those helping ensure the certainty of law.

<sup>63</sup> M. Lete del Rio, *Teorías...*; J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 614.

<sup>64</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 608.

<sup>65</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 608.

<sup>66</sup> J. Rodríguez-Toubes Muñiz, *El criterio...*, p. 611.

of using legislative materials in the process of interpretation indicate that we speak of the legislator's intent exactly when we can call it a purpose, and not a motive<sup>67</sup>. These materials do not tie the interpreter's hands: recognition that the purpose cannot be found in legislative materials, or that this purpose is more like a motive and has dated, will lead to overcoming the original intention in favour of finding the new meaning of the provision in a changed reality.

It should be emphasised that this does not mean that the real intentions of the factual legislator are devoid of interpretative qualities. In Polish literature, it is sometimes indicated that discovering intentions by referring to legislative materials is not objective, and the position negating the need to refer to legislative materials is considered predominant<sup>68</sup>. Similar criticism has also appeared in the decisions of the PSC<sup>69</sup>. In common law countries, it has been pointed out in response to similar objections that even identifying objectivity with the understanding by a rational reader, or constructing a fictitious objective intention, is based on the key presupposition that there is some subjective intention. At the same time, subjective intention is not identified with hidden intentions, which could be learned only through privately obtained information, but with the intention discovered on the basis of publicly available data<sup>70</sup>. Indubitably, legislative materials are such data. Literature emphasises that a legislative body has a functional equivalent of intention, based on the procedures for adopting acts, preparing drafts, etc.<sup>71</sup> In accordance with these rules, the legislative body shapes and reveals its group intention. This means that the context is not in someone's mind, but is public and constitutionally approved, and what we call legislative history is simply legislative context, constituting objective and accepted "rules of the game" by which the legislator operates<sup>72</sup>. Since knowledge of the context determines understanding of a legal text, therefore legislative context is very important.

<sup>67</sup> S. Breyer, *On the uses of legislative history in interpreting statutes*, "Southern California Law Review" 1992/65, p. 864.

<sup>68</sup> An example of such an approach to legislative materials is the following statement on functional interpretation: "In most cases, there is no search for such a way of objectification which would rely on demonstrating that certain convictions and values were actually recognised by persons who were the actual creators of the normative act, and thus, typically, the use of legislative materials is treated skeptically. (...) Therefore, when seeking a way to objectify knowledge and values, one is looking for some criteria that are "external" in relation to the real legislator. Regarding knowledge, it is in a way natural to refer in this respect to specific sciences (...) It is permissible for the interpretation purposes to appoint an expert in a given field". See M. Zieliński, O. Bogucki, A. Choduń, S. Czepita, B. Kanarek, A. Munczewski, *Zintegrowanie polskich koncepcji wykładni prawa* [Eng. *Integration of Polish Conceptions of Interpretation of Law*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2009/4, p. 33.

<sup>69</sup> In the justification of the PSC resolution of 17 January 2000 (III CZP 49/00), OSNC 2001/4, item 53, the PSC precisely pointed out that "a subjective interpretation based solely on the mental intentions of the legislator, especially as regards a multi-person legislator, is questioned by the modern theory of law and pushed into the background as an unreliable and hardly useful method. In the opinion of the composition of the PSC adopting the resolution, this way of looking at the psycho-physical aspects of creating and interpreting the law should be approved, and it should be stated that reference to the legislator's will can be justified and useful only in extreme situations, when other methods of interpretation fail or lead to absurd results. It should be emphasised, though, that in such cases the legislator whose *will* is taken into account in the interpretation process is not the real, factual legislator – who cannot restrict the allowed freedom of interpretation of the court since the relation of such legislator with the provision of law is broken at the moment of its adoption (entry into force) – but the so-called rational legislator, an artificially constructed one. Therefore, the *legislator's will* should be interpreted solely on the basis of the text of the law, trying to rationalise and objectify it, *i.a.* by reference to the objectives (functions) of legal institutions in the entirety of the normative material".

<sup>70</sup> R. Ekins, J. Goldsworthy, *The Reality and Indispensability of Legislative Intentionion*, "Sydney Law Review" 2014/1, pp. 46–51.

<sup>71</sup> V.F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intention and History*, "Boston College Law Review" 2014/55, p. 1614ff.

<sup>72</sup> V.F. Nourse, *Elementary...*, p. 1614ff.

### 3.3. Third objection: the quality of legislative materials

This objection concerns low quality and internal differentiation of legislative materials. The usefulness of legislative materials in the process of law interpretation and application should be evaluated at three levels: creating legislative materials, providing legislative materials, and using legislative materials in the interpretation process.

First, one may wonder if bills, justifications, amendments, and other preparatory materials are suitable for use outside the legislative procedure due to the purpose and form of their preparation. Hence, it should be postulated that they were created in such a way as to be suitable for such use. The assumption that legislative materials are also prepared for the interpreter – a court or citizen – would improve their quality and make their language more comprehensible. Some legal cultures place great importance on “arguments which in the course of law interpretation refer to intentions and beliefs of the factual legislator, whereby official documents accompanying the legislative process at its subsequent stages are accepted as the primary source of decisions in this matter”<sup>73</sup>. This, for example, is the case in Sweden, where the text of a provision is very often only a sort of a “headline”<sup>74</sup>. Also, creating a hierarchy of legislative materials in Polish and Spanish legal orders would be a great facilitation. In Spain, the Real Academia Española’s official dictionary is a source that not only may, but should be, used in linguistic interpretation of provisions. This solution is quite well accepted by Spanish jurists<sup>75</sup>. Perhaps a suitable body could also be established for the development and selection of materials with a view to unifying and improving historical interpretation? Without pre-judging whether such solutions are proper, it must be said that this is one of the possible ways.

Undoubtedly, the high technical and textual quality of preparatory materials should be the goal of everyone’s aspirations, no matter how they view their subsequent use. It is claimed in Spanish literature that the quality of preparatory work is of great importance even at the stage of the project creation<sup>76</sup>. The fact that parliament, within the limits set by the constitution, enjoys freedom in adopting laws may lead to the thesis that the bills are not important but the adopted law is, and that any defects and imperfections of bills may be corrected on the legislative path<sup>77</sup>. This is misleading because all bills that are to become law should be of the highest quality from the beginning<sup>78</sup>. Literature gives government bills as an example: the government has access to information and technical means relevant to bill’s development and which cannot be replaced with action in the parliamentary phase<sup>79</sup>.

<sup>73</sup> A. Borowicz, *Argument interpretacyjny odwołujący się do woli rzeczywistego prawodawcy* [Eng. *Interpretative Argument Based on the Intentions of the Lawgiver*], “Studia Prawno-Ekonomiczne” 2009/79, p. 10.

<sup>74</sup> A. Bielska-Brodziak, *Materiały...*, p. 149.

<sup>75</sup> It is hard to find voices critical of using the Royal Spanish Academy (Spanish: Real Academia Española, generally abbreviated as RAE) dictionary in case law. The RAE dictionary is also used in Latin America, including Chile, and elsewhere outside the European continent. The RAE dictionary is sometimes criticised, although the use of it is not questioned by most lawyers. S. Arenas Benavides, *Es la Real Academia Española quien da el significado natural y obvio de las palabras?*, <http://thinkinlaw.cl/2017/07/10/es-la-real-academia-espanola-quien-da-el-significado-natural-y-obvio-de-las-palabras/>, accessed on: 5.04.2019.

<sup>76</sup> V. Garrido Mayol, *Los vicios del procedimiento prelegislativo y su posible incidencia en la validez de la ley*, “Corts: Anuario de derecho parlamentario” 2004/15, p. 322.

<sup>77</sup> V. Garrido Mayol, *Los vicios...*, p. 322.

<sup>78</sup> V. Garrido Mayol, *Los vicios...*, p. 322.

<sup>79</sup> V. Garrido Mayol, *Los vicios...*, p. 322.

The second element influencing the use of legislative materials is their availability. There can be no effective application of even the best-developed documents if it is difficult to reach them. Bielska-Brodziak points to such problems as documentation not transferred after legislative processes during former parliamentary terms, no record of work of parliamentary subcommittees, and general issues such as time consumption and costliness of using legislative materials, and the need to make an intellectual effort to get through texts full of specialised terminology<sup>80</sup>. Neither is there full and universal access to legislative materials in Spain. As in Poland, the legislative history recorded on the Internet may be incomplete, not all bills are published on websites<sup>81</sup>, and tracing materials requires knowledge and a lot of time from a citizen<sup>82</sup>.

The third line of criticism concerns issues related to the appropriate use of legislative materials. Improper use of *materiales prelegislativos* neither solves interpretation problems nor helps find the correct reading of a provision; it can, at most, add diversity to the content of a judgment, or serve its rationalisation as a convenient “authentication” from which little results factually. Literature mentions some fundamental mistakes by courts. Criticism concerns, among other things, random selection of preparatory documents, and a “pick and choose” strategy<sup>83</sup>. Also, over-general references to information from the materials are negatively perceived<sup>84</sup>. Some Spanish authors note that, in certain judgments, references to legislative history do not add anything to the argument, and are only a purely historical illustration<sup>85</sup>.

It is noteworthy that criticism of *trabajos preparatorios* often relies on the fact that the preparatory materials are misused or of poor quality. Yet, criticising legislative materials on this basis is like saying that a washing machine is a useless tool because lots of bad ones are produced, and also because not everyone can use it. Analysis of practice reveals some deficiencies in the use of legislative materials by courts, as well as in the preparation of these documents at the legislative stage. When analysing legislative materials *in abstracto*, we should regard them first and foremost as an opportunity. Moreover, allowing the use of such materials does not mean that we should refer to them in every situation; the interpreter reaches for legislative materials when, for some reason, they are unable to discover the legislator’s intent with the use of other tools. It seems, anyway, that the question of whether to use legislative materials or not is no longer valid, and the only question worth asking again and again is about *how* to use them to use them well.

### **Legislative Materials in the Light of Polish and Spanish Law, Judicial Practice and Theoretical Literature**

**Abstract:** The purpose of the paper is to present comparative analysis of the use of legislative materials in the process of statutory interpretation in Poland and Spain, by referring to statutes, theoretical literature and case law. The paper is divided into three parts. The first part shows

<sup>80</sup> A. Bielska-Brodziak, *Śladami...*, p. 459ff.

<sup>81</sup> <http://blog.quehacenlosdiputados.net/el-anteproyecto-de-ley-el-paso-previo-del-gobierno-para-legislar/>, accessed on: 4.12.2017. This page, which is the expression of the Spanish initiative *Qué hacen los diputados* [Eng. *What MPs Do*], helps follow parliamentary work easily.

<sup>82</sup> Materials can be sought on sites such as [lamoncloa.gob.es](http://lamoncloa.gob.es), [boe.es](http://boe.es) and [congreso.es](http://congreso.es), but at the moment it is difficult to say that the process is easy or that the entire legislative path can be traced along with all debates.

<sup>83</sup> See A. Kozinski, *Should...*, p. 813.

<sup>84</sup> A. Bielska-Brodziak, *Śladami...*, p. 542ff.

<sup>85</sup> J. Rodríguez-Toubes Muñoz, *El criterio...*, p. 612.

that, in difficult cases, when the text is not clear enough as evidence of the legislator's intent, other evidence should be sought, including legislative materials. The second part delivers analysis of the term "legislative materials", followed by a study of concrete examples of legislative materials, including bills and their justifications. It focuses especially on the issue of the Spanish *exposiciones de motivos*. Moreover, there is reference to interpretative guidance contained in the legal regulations, and to the ways in which legislative materials are used in case law. The third part of the paper responds, on the basis of Polish and Spanish theoretical literature, to some of the objections to the use of legislative materials, underlining its importance for interpreting of the law.

**Keywords:** legislative materials, legislative history, interpretation, intention, Spanish law, Polish law, *ratio legis*

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