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## Narrativity of legal language in the law-making process<sup>2</sup>

### 1. Introduction

The use of narratives in legal language is quite obvious today, which is primarily due to the trend of literary research on law. In particular, this applies to research projects involving the search for similarities between legal and literary texts<sup>3</sup>. Admittedly, it seems that this is not fully reflected in the attention devoted to this issue in jurisprudence. This probably results from some reorientation of the latter towards social sciences, which has taken place in recent decades, as a consequence weakening its traditional links with the humanities. So, similarities are being observed between law interpretation and the historical method or literary interpretation<sup>4</sup>, but the search for common features in the structures of a text in legal language or in the language of the law with other types of texts does not seem attractive. Meanwhile, studying narrativity of legal language exactly requires noticing such structural similarities. So, although the way for such research has long been open, it is not very often taken. The purpose of this study is to demonstrate that following it can significantly expand our knowledge on legal language, whereupon the following steps are required.

First, it will be determined what the narrativity of a text is about and what are its elements. It can be assumed that legal language does not contain narrative texts in the full sense, but contains some elements of this phenomenon. Consequently, narrativity may be its gradable feature. In the second step, the relationship between this feature and other properties of legal language, primarily its argumentativeness, will be discussed. This is necessary because these two characteristics of legal statements are sometimes contrasted, and rationality of legal argumentation is sometimes treated as the basis for excluding narration from the acts of creating and applying law. In the third step, I will

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<sup>3</sup> In fact, there are two currents in this respect: law in literature, examining literary, or – more broadly – cultural images of law, and law as literature, exploring the possibilities of applying tools from the field of literary theory to law. See *i.a.* I. Ward, *Law and Literature. Possibilities and perspectives*, Cambridge 1995, pp. 4–25.

<sup>4</sup> For example in legal hermeneutics, see: J. Stelmach, B. Brożek, *Metody prawnicze. Logika, analiza, argumentacja, hermeneutyka* [Eng. *Legal Methods. Logic, Analysis, Argumentation, Hermeneutics*], Kraków 2004, p. 225ff.

analyse an example of several texts – legal opinions of professional self-governments in legislative proceedings – that contain elements of narrativity. Thanks to this, it will be possible to show not only that such elements actually exist, but above all that they can become the basis of theoretically interesting findings.

## 2. Elements of a narrative text

The concept of narration has a very long tradition and comes from the Latin term *narratio*, meaning storytelling<sup>5</sup>. From ancient times, it has also been disputable. For example, to Aristotle, narration is a way of presenting the plot not through direct actions of people involved in it, but through another person who we could today describe as a narrator. This is one of the criteria for distinguishing between drama and epic as literary forms. In the first case, the characters perform the story themselves, and in the second, it is reported by someone<sup>6</sup>. For Cicero, narration is a part of rhetorical speech that aims to describe its subject in detail, and thus to authenticate the whole. It involves a clear, concise and plausible exposition of the order of events, but it can also concern persons. As regards the kind of narrative based on exposing facts, Cicero distinguishes three types: myth, history and story. Narration may also concern issues, i.e. their sources or the history of their emergence. Thus understood, it should be placed after the introduction, but before argumentation and polemics as elements of composition<sup>7</sup>. Despite the differences, a common point may be indicated in both thinkers, i.e. narration is a way of presenting facts and not of justifying positions.

Nowadays, one can distinguish a current of reflection called narratology, which studies all narrative texts. According to a popular approach, these are texts in which the subject communicates the story to the recipient via a specific medium. Story is therefore the content of a narrative text, and is a concrete way of manifesting the plot. The plot is a system of logically and chronologically related events provoked or experienced by actors. The plot is therefore a kind of internal logic of the story. The same plot can be told in many ways<sup>8</sup>. Such a three-fold approach – distinguishing the narrative text, story and plot – has various consequences, three of which seem to be the most important in terms of the possibility of treating legal statements as narrative texts.

### 2.1. The story and plot of a narrative text

First of all, different narrative texts, each of which contains a slightly different story, may refer to the same plot, namely the “logic of events”. However, in such cases the condition that they are based on the same internal logic must be met. For example, one fable can be told in many ways, but due to the identity of the plot, it will be the same fable each time. From a legal point of view, examples of such situations are quite obvious, such as describing the same events in various statements: actions protocol, witness interview report or justification of a decision. Each of them may contain a different story, but if the identity of the actors, events and connections between them are maintained, the plot

<sup>5</sup> M. Korolko, *Sztuka retoryki. Przewodnik encyklopedyczny* [Eng. *Art of Rethoric. The Encyclopedic Guide*], Warsaw 1998, p. 87.

<sup>6</sup> Aristotle, *Poetyka* [Eng. *Poetics*], in: Aristotle, *Retoryka-Poetyka* [Eng. *Rethoric-Poetics*], Warsaw 1998, no. 1448a, 18ff.

<sup>7</sup> M.T. Cicero, *O inwencji retorycznej* [Eng. *On Rethorical Invention*], Warsaw 2013, pp. 57–63

<sup>8</sup> M. Bal, *Narratology. Introduction to the Theory of Narrative*, Toronto 2017, pp. 5–6.

is the same. Evidentiary proceedings may be used to eliminate possible discrepancies between the narrative texts belonging to the case, occurring at the plot level. However, discrepancies between narratives are not the only problem in determining factual merit of the decision. It follows from the essence of law application that, if narrative texts appear on its basis at all, they must meet certain conditions.

First, as part of evidentiary proceedings, there is always a division into three types of facts, i.e. a.) *material*: relevant to the case, b.) *evidentiary*: serving to prove material facts, c) *immaterial*: with no relevance to the case. The task of the organ applying the law is to establish only material facts – determined by substantive law – which requires their prior separation from other facts<sup>9</sup>. In consequence, the plot of, for example, documents such as pleadings or substantiation to material facts, should be limited. If a given text describes “logic of events” exceeding material facts, then what is not a material fact is usually going to be left out when determining the factual merit. It can be assumed that this is often the case in witnesses’ testimonies.

In addition, there is the problem of translatability of terms of the language of facts and the legal language. Legal terms are never fully definable by means of non-legal expressions. However, they cannot be eliminated either. It is only possible to define them partially by means of terms of the language of facts, which always leaves a certain scope of their meaning to be determined in an interpretation decision<sup>10</sup>. Consequently, the description of the same facts or the whole plot, for example by a party using factual statements and by a professional representative or court using legal language terms, may differ semantically. Of course, the description in legal terms is crucial for deciding the case, which means that some kind of translation is required. This usually has a series of stages<sup>11</sup>. For the above reasons, interpretative decisions are made in its course.

These two limitations – the admissibility only of facts relevant to the case, and terms of legal language – mean that some narrative texts, such as judicial opinions, are not only institutionally privileged, but also differ in their content. This certainly occurs at the level of the story, and perhaps also at the level of “logic of events,” i.e. the plot. Even if the translation referred to above, from a “subjective” narrative of, for example, a party or witness, into a more objective, by definition, legal narrative remains faithful to the plot, both texts will surely differ at the story level<sup>12</sup>. It is not just a trivial remark that, for a party or witness on one side and for a lawyer or a court on the other, the same events differ, and because of that they would be described with the help of stories with different semantics. In legal contexts, the difference between stories, and maybe also plots, is sometimes referred to, in a way taken from philosophy, as the “lost narrative” problem<sup>13</sup>.

This consists of the fact that the author of a narrative legal text unknowingly or knowingly omits what in other narratives about the same events is very important or even crucial. Unknowingly, this is usually due to cognitive errors, lack of skills or

<sup>9</sup> R. Kmieciak (ed.), *Prawo dowodowe. Zarys wykładu* [Eng. *Law of Evidence. Outline of the Lecture*], Warsaw 2008, pp. 19–20.

<sup>10</sup> L. Morawski, *Domniemania a dowody prawnicze* [Eng. *Presumptions and Legal Evidence*], Toruń 1981, pp. 19–21.

<sup>11</sup> J. Wróblewski, *Sądowe stosowanie prawa* [Eng. *Judicial Application of Law*], Warsaw 1988, pp. 43–51.

<sup>12</sup> This problem is known in Polish theory of law primarily in relation to interpretation of law and is associated with the distinction between the elucidating role of legal interpretation (making something understandable to oneself) and its explanatory role (making something understandable to someone else), see M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* [Eng. *Legal Interpretation. Principles, Rules, Guidelines*], Warsaw 2010, pp. 229–230.

<sup>13</sup> H. Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, “Journal Of The Association Of Legal Writing Directors” 2010/7, p. 229ff.

excessive routine, while it happens consciously when authors adopt paternalistic stances and do not implement the communication standards in their profession. In both cases, it is an ethical problem, though, of course, of a different kind. The consequences of this phenomenon may differ. In this respect situations of misunderstanding the essence of the problem, which is most important for the party in relation to a given case, as well as situations in which the party or client feels treated as an object are indicated<sup>14</sup>, their occurrence may constitute at least a violation of due process and affect the legitimacy of the judiciary and legal practice<sup>15</sup>.

## 2.2. The narrator in a narrative text

It is also very important that the narrative text does not depict the events directly but through a story that requires narration by the subject. Of course, the narrator may be more or less present in the text, and there are various types of narration. The narrator may present himself as the author of the text or as a character of the plot or its witness, though he can never be identified with one of them, for it is a separate role in the text<sup>16</sup>. In this case, it would also be difficult to maintain that this view is unfamiliar to lawyers, as it is known that the real author of the text cannot be equated with the subject who speaks for the them. For example, members of parliament or legislative drafters though they prepared a bill, are not the legislator. The reporting judge or judge's assistant are not the court that speaks in the judgment and its justification. It is impossible to determine here whether the source of entities such as the court or the legislator are idealisations made by the interpreter at the cognitive level (interpretative approach), or whether they are derived from certain institutional facts according to social norms (normative approach). Undoubtedly, the problem of social ontology and legal entities as artifacts is one of the most interesting in contemporary philosophy of law<sup>17</sup>.

From the point of view of this reflection, the basic question in this respect is whether the institutional author can be considered a narrator. For, if they cannot be identified with the factual author, then perhaps the specificity of the narrativity in law consists in their designation by legal norms. Then, norms may be interpreted as limiting the freedom of the actual author by clearly determining their role in the text. This role would determine the construction of the narrator, and at the same time the style of narration in the manner adopted for a given institutional context. Therefore, they would be shaped differently in the reasoning of a judgment, and differently in a pleading or legal opinion. It should also be noted that the discussed view would mean that the narrator was given the sense of bringing the institutional author into existence. The latter would be brought to life through the text, naturally in compliance with legal norms. Therefore, the view would assume such a theory of institutionalisation in which it is not legal norms that constitute legal entities, but linguistic performance that occurs on the basis of these norms. This approach could be described as performative.

<sup>14</sup> See, for example, C.D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards An Ethnography Of Legal Discourse*, "Cornell Law Review" 1991–1992/77, p. 1299ff.

<sup>15</sup> S. Burdziej, *Sprawiedliwość i prawomocność. O społecznej legitymizacji władzy sądowniczej* [Eng. *Justice and Validity. On the Social Legitimacy of the Judiciary*], Toruń 2017, p. 82ff.

<sup>16</sup> M. Bał, *Narratology...*, p. 12ff.

<sup>17</sup> See, for example, T. Gizbert-Studnicki, A. Dyrda, A. Grabowski, *Metodologiczne dychotomie. Krytyka pozytywistycznych teorii prawa* [Eng. *Methodological Dichotomies. Critique of Positivist Legal Theories*], Warsaw 2016, pp. 169, 177.

Of course, this question could be answered conversely, namely that the institutional author and the narrator of legal texts cannot be identified. The former exists because they are independent of their statements, i.e. by virtue of legal norms alone or the assumption adopted by legal discourse participants. As a result, the factual author, by assuming a specific professional role, speaks as an institutional author. It is only the latter that creates the narrator in the text they create. The relationship between them is therefore the same as that between the author and the narrator, and the institutional context is perhaps a source of problems as regards social ontology or epistemology of law, but not narratology. Therefore, if we analysed a judicial justification and treated it as a narrative text, then, according to the discussed view, the way the judge became its author, i.e. the court, would not belong to the subject of analysis. However, it would be analysed that, on the one hand the court is the author of this text, and on the other, they may be present in it as the narrator. Yet, the subject as the author of a statement is different from the subject as its internal figure.

Determining which of these answers is correct is beyond the scope of this study. However, it should be presumed that legal practice hardly ever undertakes reflection on the narrator's status. Rather, it is either unconscious acceptance that the narrator and the institutional author are identical, or, possibly, conscious use of such efforts to make the addressee of the text reach this identification. In other words, lawyers either believe that, when they create a narrative text, they speak directly in their institutional roles and can eliminate the narrator completely from it, or, considering such a figure in the text is indispensable, they adopt a narrative style in which the narrator is identified with the institutional author, and they do this as they believe that this way of speaking follows from their role. However, in both cases, at least in a minimum degree, the narrator can be identified in the text and analysed. This is a very important conclusion for the study of legal texts as narrative texts for the following reasons.

First, analysis of such a text, and the narrator appearing in it in particular, can tell us a lot about a more or less conscious understanding of the institutional author adopted in it. It may be completely abstract from the intentions or mental states of the factual author, and be based on the narrator's way of speaking. Their choice of phrases or style, as well as their attitude to the "logic of events" they present, reveals a lot as regards the concept of institutional author – consciously or not – that the factual author adopted. Assuming that the latter is not arbitrary in this respect, it can also tell us a lot about the "self-understanding of institutions". Therefore, from the point of view of these considerations, the narrator as an element of the narrative text is of primary importance, perhaps even more important than the plot.

### 2.3. Argumentative fragments of a narrative text

Now, since a narrative text cannot be equated with the plot, the "logic of events," it also contains other elements. These are primarily all kinds of universal concepts, which are broadly understood in narratology – as everything that belongs to the external world in relation to this logic, and thus, for example, statements regarding the nature of things, opinions, and also assessments. Fragments of narrative text referring to such concepts are referred to as argumentative<sup>18</sup>. They fulfill explanatory and persuasive functions.

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<sup>18</sup> M. Bal, *Narratology...*, p. 24.

The former is related to the fact that the description of facts that do not belong to the plot explains the conditions in which it can take place, and which co-create its course. The latter is that the narrator's opinions and assessments are aimed at forcing a specific interpretation of the events that make up the plot. In both cases, we deal with arguments built on the "logic of events", which is an essential element of the narrative. Separated from it, they would be either incomprehensible or trivial.

Also in relation to this element of a narrative text, it is hardly a novelty for the legal language, and we do not mean here an obvious statement that arguments are formulated in the latter. It should be emphasised that the last decades have been a time of dynamic development of argumentation theory in European philosophy of law. Thanks to them, we know that, at least, judicial application of law is a space for the formulation of reasons, and perhaps argumentation has greater significance for the epistemology of law, i.e. we learn law through normative arguments. As a result, no matter how popular such concepts are and how deeply the theses they proclaim are enrooted, it is worth noting that it is narrativity as an aspect of legal disputes that is a certain novelty and has started to be noticed – mainly due to Anglo-Saxon authors. For lawyers, it may come as a kind of discovery that, applying the law, they use not only normative arguments, but also sentence structures forming kinds of stories.

The unequal development of both theories means that the relationship between the argumentative and narrative quality of legal language is unclear. It seems that, formally, none of the definitions of the latter<sup>19</sup> oppose the narrative texts also being included in it. For, if we assume that different vocabulary and semantic rules are the criterion for its separation, none of these features precludes either structuring the text around the plot or the narrator's presence. It is similar with the criterion of legal language having the properties of meta-language in relation to the legislator's statements. Even if the latter were by no means narrative, this feature in the legal language may occur in connection with other elements of the statement in this language, such as description of the facts of the case, reconstruction of case law or presentation the interpretation process. Neither does the criterion of productivity in the understanding of the speech-act theory, i.e. the fact that legal language performs legally effective qualification of states of affairs, seem to be an obstacle. The aforementioned restrictions imposed by legal norms on legal narrative texts so that they are limited to the facts of the case and formulated in the appropriate language result precisely from the fact that they relate to one of the premises of legal qualification. However, formal characterisation of legal language does not apply to its argumentative quality. The lack of obstacles to narrativity in one case does not necessarily mean that there are no obstacles in another. This issue should be further analysed.

### 3. Argumentativeness and narrativity of legal language

In literature, there occur positions that, due to the argumentative nature of the law, either exclude narrative texts from its scope or allow them only a limited role. These positions may be supplemented with views that see an important place for narrativity in law. Four models of its reception in jurisprudence are most often indicated: 1) examination of its actual occurrence in legal disputes, such as pleadings, speeches at court,

<sup>19</sup> T. Gizbert-Studnicki, *Język prawny a język prawniczy* [Eng. *Language of the Law and Language of Legal Practice*], in: T. Gizbert-Studnicki, *Pisma wybrane. Prawo – język – normy – rozumowania* [Eng. *Selected Writings. Law – Language – Norms – Reasoning*], Warsaw 2019, p. 23.

justifications, etc., 2) examination of similarities between law and literature, in particular as regards interpretation, 3) studying the narrative structure of the law itself, which would be an alternative to its systemic nature, and 4) studying how the narratives in legal texts shape the identity of the entities they concern<sup>20</sup>. The criteria on which this division are based are not clear. In this study, to distinguish different approaches to narrativity of legal language, the criterion of narrativity's relation to the argumentativeness of legal statements will first be adopted. In this way, five positions can be distinguished, which to some extent correspond to the cited division.

### 3.1. Narration as a negation of the rationality of the law

The most sceptical stance on narratives in law is based on the assumption that they are the opposite of argumentation. Such a claim presumes that the latter is a means not only of persuasion, but also of justification. So, it serves not to form a specific belief in statement addressees, but to provide them with binding reasons for action. Argumentation is therefore a special kind of reasoning that guarantees the rationality of conclusions formulated with its help. Naturally, justification by means of arguments is not the same as proving on the grounds of formal logic, and it does not have to meet the same rigorous conditions. Nonetheless, there are many theories that formulate requirements for argumentation that are supposed to guarantee the rationality of judgments and norms proven with its help. They include the condition that the justification should be public, hence it can refer only to such premises that are part of the commonly shared beliefs – extensive doctrines. Therefore, they cannot rely solely on a subjective, unrecognised and unaccepted by others way of understanding problems that the argument concerns. The requirement of public justification cannot be met in the case of narratives, because they are subjective by nature. They can, of course, play an important role in making individual decisions, because through them we can formulate reasons only for our actions. However, they will only be private, whereas all public decisions, including legal decisions, must be based on reasons exceeding the individual perspective. Therefore, narratives – unlike arguments – remain outside the public reason, and hence there is no place for them in the law. Outside the private sphere, they can play at most a heuristic role, and therefore be helpful in searching for arguments on one or the other solution. So, we can treat them as a starting point for formulating our position in a dispute, but we must always indicate arguments in support of it. Narratives alone can never become part of its justification. If this happened, then in weaker interpretation narratives would be only an addition or decoration of argumentative disquisition. In the stronger view, they would pose a threat to it by introducing a subjective (and therefore irrational) element in the sense of the theory of public rationality<sup>21</sup>.

### 3.2. Narration as a structure of discourse on facts

A less sceptical stance on narration in law gives it limited significance in the legal justification discourse. It assumes that justification is heterogeneous, and therefore contains

<sup>20</sup> D. Herman, M. Jahn, M.-L. Ryan (eds.), *Routledge Encyclopedia of Narrative Theory*, London-New York 2010, pp. 271–274.

<sup>21</sup> See, for example, J. Cohen, *Procedure and Substance in Deliberative Democracy*, in: S. Benhabib (ed.), *Democracy and Difference. Contesting the Boundaries of the Political*, Princeton 1996, pp. 104–105. Cf. I.M. Young, *Communication and the Other: Beyond Deliberative Democracy*, in: S. Benhabib (ed.), *Democracy...*, pp. 129–131.

those elements in which narrative plays a significant role and those from which it is excluded. The former refer only to the facts of the case, the determination of which is, however, synonymous with the formulation of an indispensable condition in the process of applying the law. This is because these facts always contain a certain “logic of events” that can be presented in various ways. Consequently, although the role of narration, according to the discussed position, is limited, it is also very important.

It would be even greater if we assume that the narratives can not only appear in descriptions of the facts of the case, but that these facts are cognised through them. The argument for such an approach is the orientation of judicial cognition towards clarifying the circumstances of the case, and not, for example, determining the laws of nature. It is therefore idiographic, not nomological. If there is a similarity between these types of cognition, it occurs only at the level of individual sentences. In both cases, they contain judgments about reality. However, if you take into account the supra-sentence structures, the differences between them become visible. The former focus on the “logic of events”, and thus narration, and the latter on general theorems about the world, grasped as theories. If so, the facts of the case can only be included in narrative structures, not theoretical ones, which means that narratin about a “logic of events” cannot be replaced by another type of expression.

On the grounds of this position, an interpretation can be put that argumentativeness and narrativity are two complementary ways of judicial cognition that relate to different spheres, i.e. determining the legal basis of the decision and the factual circumstances. Therefore, there is no point in opposing them. At the same time, however, presumably it makes little sense to talk about narratives in law, as it would be a merely not very contributory reception of a term by jurisprudence – perhaps even of a term well rooted in literary studies or history – but would point only to the known similarity of judicial and humanistic methodologies, which also differ greatly<sup>22</sup>. However, this issue is not so obvious and there are many reasons why argumentativeness and narrativity can be treated as alternatives.

### 3.3. Narration as a means of rhetorical persuasion

The thesis on alternativity, and thus also in some way interchangeability or the translatability of arguments and narratives in law, is related to the next position. This treats narrative texts as a means of persuasion, the consequence of which is, i.a., that their persuasive power can be compared with argumentative discourse. In this view, all legal texts, for example pleadings, statements of reasons, etc., may have a narrative structure. At the same time, narration is not limited to the facts of the case, but also covers the normative sphere. It is “a story about the facts that led to the court’s decision, and a story about what decision the court made and why”<sup>23</sup>. Therefore, typical legal arguments can be included in it or replaced by it, for it may cover the entire decision-making process leading to the resolution of a case, and arguments that have been considered significant become points (facts) in the “logic of events” leading to this resolution.

<sup>22</sup> See M. Zieliński, *Poznanie sądowe a poznanie naukowe* [Eng. *Forensic Cognition and Scientific Cognition*], Poznań 1979, p. 21ff.

<sup>23</sup> A. Młynarska-Sobaczewska, *Narracyjność w aktach stosowania prawa* [Eng. *Narrativity in the Acts of Applying the Law*], “Państwo i Prawo” 2015/11, p. 55.



This way of viewing narrativity in law is typically associated with emphasising its advantages over argumentativeness. It is pointed out that the persuasive power of narration is greater as it allows the use of skillfully selected archetypes and other language means that affect the imagination and emotions of recipients<sup>24</sup>. It is therefore more convincing, above all, for laymen, but can also work for professionals. This is mainly due to the fact that, in a narrative, it is easier to find a common starting point with other discourse participants than in the case of arguments. For it is easier to make reference to a common cultural background and universally known schemes of a story. However, the conclusion by no means that narratives, in contrast to argumentation, are irrational. In the discussed approach, there is the same problem of rationality of narration and argumentation, their susceptibility to manipulative use, and the issue of the responsibility of the person using them. It can therefore be said that it has the same assumptions as topical-rhetorical theories of legal discourse<sup>25</sup>.

### 3.4. Narration as a meta-argumentative structure

The next position not only notes the advantages of narrativity over argumentation, but even gives it a kind of supremacy. It has several versions, all sharing the thesis that narrative structures in discourse are primary in relation to argumentation structures, and that the latter are built on the former. In simplification, this is because lawyers present arguments in order to solve concrete legal problems, and thus they always rely on facts. They do not build a purely analytical argumentation as this would be useless, whereas facts, and in particular the “logic of events”, as the basis of argumentation, impose upon it a narrative structure<sup>26</sup>. The discourse of jurisprudence does not have to be based on facts – but this is rather an exception and does not undermine the main thesis of the discussed view.

Another version of this view takes as its starting point the claim that the law is a literary undertaking and judicial practice resembles the creation of a narrative work in episodes (chain of novells)<sup>27</sup>. If this is not taken merely as a metaphor, then it is easy to see that all narratives on the grounds of law application, for example those presented by the parties or by the court in justification, always refer to the broader shared knowledge already contained in the law, and thus also in previous rulings. Such references and their matching determine the relevance of a given legal view or decision, hence their authors try to make them part of broader legal narratives. They try not only to adapt them to a specific “logic of events”, but also seek to formulate them as if they were written by one legal narrator. One might say that, according to this view, we learn the law through narration rather than argumentation. At the same time, many such narratives which fundamentally disagree clash in legal discourse<sup>28</sup>.

However, theories of law to which such narratives can be assigned do not conflict directly. Yet, the relation in this regard is that legal narratives imply such theories. The latter admittedly fulfill higher requirements of methodological rigorism, but they are

<sup>24</sup> A. Młynarska-Sobaczewska, *Narracyjność...*, pp. 56–57.

<sup>25</sup> Ch. Perelman, L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, Notre Dame 1971, p. 142ff.

<sup>26</sup> P.N. Meyer, *Storytelling for Lawyers*, Oxford 2014, pp. 2–3.

<sup>27</sup> R. Dworkin, *Law's Empire*, Cambridge (Mass.) 1986, pp. 228–234.

<sup>28</sup> M. Dubowska, A. Dyrda, *Legal Narrative and Legal Disagreement*, “Archiwum Filozofii Prawa i Filozofii Społecznej” 2018/2, pp. 48–49.

less practical<sup>29</sup>. Consequently, lawyers rather engage large legal narratives in their thinking, which determine both the structure of the narration and argumentation that are used in practice. However, this relation not only causes the discussed view to emphasise the practical importance of narrativity in law, but also opens the field for theoretical exploration of individual stories that appear in it. When formulating theoretical claims about law, one should refer primarily to broad legal narratives, to which particular legal arguments belong, and thus take into account the diversity of lawyers' thinking.

### 3.5. Narration as a subject of critical analysis

The theoretical importance of narrativity in law is even more emphasised by the last view, which also has many versions sharing the assumption that legal activity has literary character not only because of the rhetorical use of narratives, or even their cognitive value, but primarily because the use of them results from the very ontic structure of legal discourse and of the subject participating in it<sup>30</sup>. For, according to the claims of proponents of the theory of narrative identity (here, greatly simplified), it is through the story about oneself that the individual constitutes their unity and uniqueness. The identity function of texts is also known in narratology and it is accompanied by the relational one – consisting in negotiating and creating social relations through stories, and ideational one – consisting in expressing a certain vision of the world through stories. Therefore, if it is an individual with concrete identity, and not only some theoretically existing, abstract entity that participates in legal discourse, they must either use narratives or be excluded from this discourse.

Thus, one may say that, according to this position, the subject through narratives constitutes their identity as a participant in legal discourse. By choosing one of the legal narratives in the sense that was discussed in the previous position and declaring that their position in the case belongs to it, they decide on their identity. If their participation in legal discourse were limited only to argumentation, then participation would be purely formal, not full or truly engaging. Elimination of narration from law application would mean a cult of institutionalised impersonality. Of course, many rhetorical means are used in practice to create such an impression, which is done to guarantee objectivity and impartiality. However, such measures are only a certain narrative style, and hence they are structured by a certain “logic of events”, contain the specific figure of the narrator, etc. This is important from the theoretical point of view, because critical analysis of a given style allows one to find out what identity it expresses – what elements it excludes from the identity and what it exposes.

This does not mean that the subject voluntarily shapes their identity through narratives in legal discourse. On one hand, by opting for a style that is supposed to create an impression of a purely argumentative one, devoid of any narrativity elements, they conform to specific requirements of the formal style. On the other, it is also possible that, among many narratives present in the law, they do not find any that would correspond to their understanding of themselves. In such situations, it is likely that subordination occurs often. In both cases, the price of a possible mismatch may be exclusion. The phenomenon of more or less deliberate concealment of narrativity, including its sources, and the degree of ideology or oppressiveness, may be the subject of critically oriented theories.

<sup>29</sup> M. Dubowska, A. Dyrda, *Legal Narrative...*, p. 53.

<sup>30</sup> M. Wojtuś, *Prawda, prawo i literatura* [Eng. *Truth, Law and Literature*], "Acta Universitatis Lodzianis. Folia Iuridica" 2014/73, pp. 44–46.

#### 4. Example: narrativity in law-making

The above issues, and in particular the last position, can be illustrated by the example of self-governments of public trust professions' participation in law-making in Poland. This is not a typical area of the occurrence of narratives in law, because – as already mentioned – they are usually associated with legal proceedings. Legislative proceedings do not require reference to the specific facts, at least not in the same sense as when applying the law. Thus, it would be easy to consider a narrative contained in the justification of a draft normative act or opinion provided in such proceedings as an irrational or purely rhetorical element. Nevertheless, it seems that the presence of narrative elements exactly in this area may be interesting and confirm the position regarding their theoretical importance, mainly in relation to the issue of constituting the subject's identity. By analysing argumentation contained in the mentioned texts, it is certainly possible to find out what position in relation to the subject of the proceedings a particular subject has taken. In turn, analysis of narrative elements provides insight into how the subject understands themselves and what position they take in relation to their tasks and role. The latter problem concerns self-governments of public trust professions to a great extent. As with any public law corporation, there is a duality in them that, on one hand, means they unite a separate group of people, and on the other allows them to exercise power over them. Art. 17 Par. 1 of the Polish Constitution entrusts self-governments of public trust professions with two tasks – representing persons exercising these professions and overseeing their proper practice within the limits of public interest and for its protection. In this way, self-governments were allowed to speak in the interests of a professional group, and are at the same time obliged to pursue the public interest. It is often emphasised that this duality has a negative impact on the duty to oversee the proper practice of a profession. According to research, it also gives rise to a structural conflict as regards realisation of the task of representing a professional group, including within the framework of law-making processes.

This largely consists of the fact that, on one hand, professional self-governments are part of public authority, although they do not belong to the state administration (government). As such, they can see their role (and at the same time be seen in law-making processes) as entities of an expert nature operating within the authority structures. On the other hand, in some way they remain outside this structure, and as a consequence they can take actions specific to interest groups and be regarded as acting as such. It is not possible to determine here how this conflict is usually resolved, or to discuss normative ways of resolving it in greater detail. However, the examples below illustrate that narrative means, most probably unconsciously used in legal opinions provided by self-governments in legislative proceedings, mainly at the governmental stage, are not accidental, for they reveal the conflict in question and show how self-governments constitute their identity despite the constant tension resulting from it.

##### 4.1. Agentivity and nominalisations in the legal language of law-making

The first example is about a change in the way narratives are developed depending on whether the arguments formulated relate directly to the public interest or rather give the impression of realising professional interest. In the first case, the narrator is more likely to use expressions pointing to their active role (agentivity), while in the second,

they become more withdrawn and speak the language of objects (nominalisations)<sup>31</sup>. This is evident, for example, in the letter<sup>32</sup> of 26 July 2013 sent by the Polish Chamber of Patent Attorneys to the Minister of Justice regarding the bill called the Second Deregulation Act of 18 June 2013. The Chamber commented i.a., on the proposal to repeal Art. 236 Par. 3 of the Industrial Property Law, in the wording “Persons who do not have a place of residence or a registered office in the Republic of Poland may, in matters referred to in Par. 1, act only through the patent attorney”. It argued as follows:

**We notice** the inconsistency between the legislative measure consisting in the removal in Art. 236 Par. 3 of the Industrial Property Law, and the justification for the proposed change, which indicates contradiction of the current regulation with the prohibition of discrimination, expressed in Art. 18 in conjunction with Art. 21 of the Treaty on the Functioning of the European Union (...) **We draw attention** that the repeal of the existing art. 236 Par. 3 will have legal effects not only for those belonging to the European Union, but also for entities outside the European Union (...) **We suggest** upholding Par. 3 and leaving Poland in the group of countries such as Finland, Ireland, Germany and Sweden<sup>33</sup>.

Significant agentivity of the language of this passage lies in the fact that the Chamber actively formulates its position and arguments in support of it. Through expressions such as “we notice”, “we draw attention” or “we suggest” the Chamber emphasises that it strongly identifies with the view it endorses and takes responsibility for it.

The situation is slightly different in the case of the proposal to amend Art. 21 Par. 1 of the Act on Patent Attorneys, which was to consist of broadening the solution consisting in the fact that “from the requirement to undergo an attorney’s apprenticeship, one may exempt, in whole or in a relevant part, a person who demonstrates that they have specific knowledge or practice in matters of industrial property, useful for practicing the profession of patent attorney” in such a way that the exemption could also cover passing the qualifying exam and not only the completion of the application. With regard to this proposal, the self-government stated, i.a., that:

Exemption from the requirement to pass the qualification exam – **is unacceptable** due to the complex nature of patent attorney profession, in accordance with Art. 8 and 10 of the Act on Patent Attorneys, regarding both knowledge and techniques of law (...) **It is doubtful** whether the lack of knowledge and skills in the field of technique could be considered a “important reason” in the meaning of Art. 10 Par. 1 of the Act on Patent Attorneys, which allows a patent attorney to refuse to provide assistance (...) As to full or partly exemption from the requirement to complete an apprenticeship, **it is absolutely obligatory to specify conditions** for the exemption, specify the time during which the performance of the applicant’s activities would justify the exemption, taking into account the nature of patent attorney’s profession, involving both its technical and legal scope<sup>34</sup>.

In this passage, the Chamber points out that the position and arguments of self-government are no longer the sphere of action, but rather possession. They are treated as objects, or traits of objects, and objective duties. The Chamber not so much rejects

<sup>31</sup> See N. Fairclough, *Analysing Discourse. Textual Analysis for Social Research*, London-New York 2003, pp. 143–144. According to the author, nominalisations are essentially representations or metaphors that are not ideologically neutral, because they hide the subject and its action, which evokes certain state of affairs under the guise that they are the result of objectively occurring processes.

<sup>32</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 2331.

<sup>33</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 2331, pp. 7–8.

<sup>34</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 2331, p. 10.

the proposed solutions, but considers their being “unacceptable” to be their objective feature. Similarly, doubt is no longer an act of the subject, but it is attributed to the project as its “being doubtful”. Finally, the self-government does not propose to specify the conditions for the exemption referred to in the provision, and considers it an absolute duty.

So, arguments in both instances are structured differently, and the most important role in this respect is played by the narrator, who in the first case is a participant in events, and in the second, becomes their objective observer. Interestingly, it might seem that the opposite solution would be more appropriate, i.e. argumentation of the principles of European law or of the prohibition of discrimination could be presented with the use of nominalisations, and the opposition to solutions based on their functional defects rather than contradiction with other norms could be expressed in agentive terms. It seems, however, that precisely such a structure as the one adopted in the discussed letter gives a greater impression of the objectivity of the whole argumentation: on one hand, when self-government speaks on the basis of principles, and thus clearly in the public interest, it speaks on its own behalf. On the other hand, when there is a question about whether a position is dictated by professional interest, the self-government presents only objective doubts.

#### 4.2. Multiplicity of voices in the legal language of law-making

The second example also refers primarily to the narrator who, presenting the same “logic of events”, changes the narrative depending on what arguments they use in connection with it. This creates a kind of multi-voice composition reminiscent of a situation in which the same events are presented by different participants with different perceptions<sup>35</sup>. This is evident, for example, in the letter<sup>36</sup> of 31 October 2013, sent by the National Council of Judicial Officers to the Sejm of the Republic of Poland regarding the bill amending the Act of 29 August 1997 on Court Bailiffs and Enforcement Act. Giving a negative opinion about the proposed changes, the Council primarily presented a “logic of events”:

The currently binding Court Bailiffs and Enforcement Act was enacted in 1997 and has been amended twenty-three times during its sixteen years of validity. In addition, the provisions of the Act have been subject to analysis and evaluation by the Constitutional Tribunal eight times, which often led to the provisions of the Act being found inconsistent with the Constitution of the Republic of Poland. This means that during its validity, the Act on Court Bailiffs was amended nearly twice during each year of its being in force<sup>37</sup>.

Then, the events were assessed from different points of view, which arrange into a multi-voice composition, where each voice tells a slightly different story. First, the self-government spoke as follows:

Such a situation means that at present individual provisions of the Act and particular institutions regulated by the Act **have lost** their internal coherence and **compliance** with the **legal system** in force in Poland<sup>38</sup>.

<sup>35</sup> J. Bartmiński, *Polifoniczność tekstu czy podmiotu? Podmiot w dialogu z samym sobą* [Eng. *Text or Subject polyphonic? The Subject is in Dialogue with Himself*], in: J. Bartmiński, A. Pajdzińska (eds.) *Podmiot w języku i kulturze* [Eng. *Subject in Language and Culture*], Lublin 2008, p. 161ff. It is arguable whether thus understood multiplicity of voices is a textual reflection of the subject’s complexity or of the structure of the world they cognise.

<sup>36</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 1728, no. 1842.

<sup>37</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 1728, no. 1842, pp. 1–2.

<sup>38</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 1728, no. 1842, p. 2.

Therefore, the Council deems that the next amendment would deepen the state of non-compliance or inconsistency with other provisions. This argument is presented as an element of a narrative in which the history of a normative act is marked by instability or even confusion, and subsequent changes will provide its ending. It is presented as a pessimistic story on the whole. However, it should be noted at the same time that the basis of these negative conclusions is to adopt the point of view of the entire legal system and articulate the requirements that should be taken into account when constructing it. Then, the local government changed the perspective and made the following remark:

In the opinion of the National Council of Judicial Officers, **the assumed goal is not achievable** by further amendments in the form presented by the authors of the bill – in a selective manner changing only some provisions and institutions. Therefore, according to the bailiff’s self-government, it is advisable to undertake the effort of developing a new law<sup>39</sup>.

The instrumental argument contained in this passage, indicating the ineffectiveness of the planned action, is an element of a different narrative, as the reality in which the events take place is no longer about building a coherent legal system, but rather an effective legal policy. Again, the story is pessimistic, yet there is the possibility of overcoming this attitude, although this would require the appropriate party to “undertake the effort”. This, in turn, leads the narrator to another change of point of view and to formulating the following argument:

It should also be emphasised that **the lack of grounds for further amendment** to the act on court bailiffs and enforcement is also dictated by the provisions (...) on “Principles of legislative technique” (...) if the changes introduced in the act were to be numerous or would violate the construction or coherence of the act or when the act had been amended many times before, a bill is being prepared<sup>40</sup>.

Therefore, this is a comedown to the practical or even technical level of considerations. The state of the legal system or the ability to achieve the set goals are not important here, unlike the compliance of the action with the rules of good practice.

Again there is a situation when the narrative structures the presented argumentation. At the same time, however, it says something about the identity of the arguing entity, i.e. it indicates with which greater legal narratives they identify. For it does not refer to concept analysis, or at least not only to this, but to various arguments that may convince the legislator. Therefore, though the “logic of events” suggests that, within the scope of the discussed act there had not been rational actions, the narrator assumes the position of a rational legislator, yet does so in a way characteristic of the theory of law-making, and not the theory of interpretation. Then, assuming that rational legislation can mean different things, the narrator divides the composition into three voices – the legislator as a constructor or guardian of the legal system, the legislator as a politician, and the legislator as guided by the principles of good practice.

#### 4.3. An ideal interpreter in the legal language of law-making

The third example also mainly concerns the figure of the narrator, who this time consistently presents the argument from the position of an “ideal reader”. Therefore, the

<sup>39</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 1728, no. 1842, p. 2.

<sup>40</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 1728, no. 1842, p. 2.

narrator defines their role in relation to the text which the narration concerns, and not the one in which it is contained. The narrator adopts the perspective of impartial interpreter directly focused on the public interest, which in this case is the interest of citizens<sup>41</sup>. At the same time, they feel historically and structurally entitled to do so, which is largely related to their extensive knowledge of the issue being assessed. This is evident, for example, in the letter<sup>42</sup> of 2 April 2014, which the National Council of Notaries addressed to the Minister of Justice regarding the “deregulation bill”. At the beginning, the council formulated its position clearly and categorically:

At the outset, the the National Council of Notaries would like to point out that a notary public in Poland is an organ of legal protection, not a service provider. Therefore, the notary public institution should by no means be the subject of the assessed bill, which is addressed to service providers providing more or less specialised services<sup>43</sup>.

It is worth noting that the way this argument is presented also self-defines the narrator. Since the council represents notaries, i.e. persons who definitely are not service providers, but legal protection authorities, it is impossible for them to pursue interest that could possibly be involved in commercial activities. As an organ of legal protection, a notary public works in the interest of citizens, and therefore this is the point of view also from which the Council argues with regard to the project. Then it presents the “logic of events,” which clearly shows that such self-definition is true:

Pursuant to the well-established case law of the Constitutional Tribunal, “Notary public is not a free legal profession providing certain legal services, but rather a special type of public official associated organizationally with the system of justice” (...) The above views of the Constitutional Tribunal are deeply rooted in Polish legal thought. It is enough to quote one sentence of the greatest authority in the field of notarial law: Władysław Leopold Jaworski *Reforma notarialna* [Eng. *Notary Reform*] Kraków 1929 (...)<sup>44</sup>.

Next, the self-government refers not only to the legal narrative of notaries, but also to the history of the social and economic system:

The Polish National Council of Notaries points out that the system in the Republic of Poland is not based on collective ownership, and therefore the institution of notary is not only not superfluous, but it is even necessary to ensure the security of property of citizens and the state, safeguard secure legal transactions and the sense of property stability throughout the country. Therefore, undermining the role and tasks of the notary public by including notaries as service providers in the strict sense is consequently directed against the security of the state and citizens<sup>45</sup>.

In this narrative, the move away from the state-run economy to the market economy does not mean the need to deregulate every activity. Quite the opposite – the narrator

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<sup>41</sup> J.B. White, *Justice as Translation. An Essay in Cultural and Legal Criticism*, Chicago-London 1990, pp. 100–101. Discussing the concept of the ideal reader, the author claims that each text is based on the assumption that it will be read by the subject with excellent competences of various nature – linguistic, expertise and ethical. It is worth noting that the text discussed in this section differently assumes that its narrator is the ideal interpreter. This is possible because the text is essentially a narrative of interpretation and a response to the assumption in the original text – the bill being reviewed.

<sup>42</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 806.

<sup>43</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 806, p. 1.

<sup>44</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 806, p. 2.

<sup>45</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 806, p. 2.

notices that the public interest needs a departure from competition mechanisms for the good of citizens:

(...) ultimately, service providers are to be verified by their clients who are the recipients of the services. (...) A better service provider is to win and stay on the market – the worse one is to be eliminated (...) Simply speaking, citizens will be wronged and affected, they will suffer losses, various damages, including to their property. (...) At the same time it is an assumption that the specific loss ratio that will inevitably occur after such an operation will not exceed the level of social acceptance<sup>46</sup>.

It can be said that a certain turn has taken place here in the “logic of events”. To clarify, the narrator compares notary activity to enterprise and public sectors. On one hand:

if a tour guide in Kraków (who saw the city for the first time the day before) guides a tourist around mistakes the Kosciuszko Mound (Kraków, Poland) with Mount Kosciuszko (Australia), then the tourist treated in this way will probably not be delighted, but apart from a wasted, relatively small amount of money, great damage will not be done. Instead, the invisible hand of the market will prevent this tourist from using this unqualified guide’s service again. Admittedly, this does not protect further unaware tourists, but can a similar assumption be made in the case of real estate transactions, where a life’s work is often at stake. Assumption that, for example, invalid notary deeds are possible, fundamentally contradicts the very purpose of notary existence<sup>47</sup>.

On the other hand:

Nobody, however, thinks to do it by lowering qualification requirements for judges, referendaries, and government or local officials. It is completely unthinkable to call for economic competition in this respect. Is it even conceivable that, for example, courts seek clients by proposing quick, efficient and cheap sentences? Of course not<sup>48</sup>.

Then, comparative arguments are also given, indicating that the proposed changes would be against the tendencies of notary development in other European countries.

In general, it can be seen that, unlike the previous examples, the discussed opinion contains a rather extensive narrative style. Elements of the story are not deeply hidden, as is usually the case in legal statements, and the narrator is active – asks a question, provides answers, is categorical, speaks directly, etc. This kind of lack of restraint is possible due to the narrator’s self-definition, mentioned at the beginning, as the “ideal reader”. Since the narrator’s interpretation is constituted by public interest and they have extensive knowledge, there is no need to use additional rhetorical measures aimed at increasing their credibility, emphasising objectivity, etc. It should be noted that, as in the previous cases, the choice of such a narrative need not be conscious, but it is undoubtedly a clear answer to the problem of identity of professional self-governments suspended between two interpretations of their role.

## 5. Conclusions

The above examples – selected from a specific field, but being normal uses of the legal language – illustrate the thesis that legal texts can be treated as narrative texts. This is

<sup>46</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 806, p. 3.

<sup>47</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 806, p. 4.

<sup>48</sup> Sejm of 7<sup>th</sup> term of office, Sejm papers no. 806, p. 4–5.



not prevented by the fact that they are primarily argumentative. Although narratives may possibly introduce an irrational element to legal statements, they usually perform a number of functions important for the whole text: they are used to present facts, structure arguments and constitute the identity of the subject using arguments. Therefore, they are indispensable for legal arguments for pragmatic reasons. One can probably imagine a legal culture based only on authority, in which the justification of decisions is unimportant as their binding force is crucial. However, in legal culture based on providing justifications, argumentation is indispensable<sup>49</sup>. As it turns out, in such a culture, legal language must necessarily also involve narrativity.

### Narrativity of Legal Language in Law-Making Processes

**Abstract:** The paper concerns the relation between argumentative and narrative features of legal texts and the question whether legal texts can be perceived as narrative texts. A narrative text is understood as transferring a story to the recipient through a given medium. The story, being the content of a narrative text, constitutes a specific way of manifesting the plot. The latter is a sort of internal logic of the story. The very same plot might be told in many different ways. Hence, the narrative text does not depict events directly, but through a story that requires a storytelling agent – the narrator. Certainly, there are different kinds of narrators, who can be more or less exposed within the text. In consequence, there are at least five positions concerning the relation between argumentation and narration in law: 1) sceptic – narration is a negation of the reasonableness of law; 2) narration is a structure of presentation of facts; 3) narration is a means of rhetoric persuasion; 4) narration is a meta-argumentative structure; 5) narration is a subject of critical analysis as it reveals the identity of an author. The theory of narration is applied to a particular problem of participation of professional self-governments in law-making.

**Keywords:** legal narrative, legal argumentation, legal language, law-making, professional self-governments

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<sup>49</sup> Om the distinction between culture of authority and culture of justification see: D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford 1999; D. Dyzenhaus, *Proportionality and Deference in a Culture of Justification*, in: G. Huscroft, W. Bradley, B.W. Miller, G. Webber (eds.), *Proportionality and the Rule of Law. Rights, Justification, Reasoning*, Cambridge 2015.