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Dialogical Concept of Legal Interpretation

> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean--neither more, nor less."
> "The question is," said Alice, "whether you can make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master--that's all"[3].

1. Introduction

Any interpretation, not only interpretation of legal texts, involves a paraphrase or replacement of some expressions with others. It involves substituting one word for another[4]. However, this understanding of interpretation is incomplete, because it does not enable setting the boundaries and criteria of its correctness: "every interpretation hangs in the air together with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning"[5]. This is why it is necessary to choose an additional criterion, to enable us to break out of the "prison of our interpretations, to get through to reality"[6]. Humpty Dumpty unequivocally favours the view that it is his intention behind using a given word that determines its meaning. Alice points out that even this perspective does not permit him absolute "semantic anarchy". His perspective can lead to loss of the capacity to communicate with anyone if he just juggles the terms and their meanings in an unrestrained way. Humpty Dumpty believes this is just a question of power. He is undoubtedly right, as with the right amount of totalitarian determination and force, he could force everybody around to respect his meanings and impose his own dictionary as the repository of generally valid terms.

This short excerpt from Lewis Carroll's novel makes very instructive reading for every lawyer. It illustrates the truth that the key question on legal interpretation is the question about the power to assign meanings. On the one hand, the task of the

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[3] L. Carroll, *Through the Looking Glass*, Orinda (CA) 2018, p. 64.
[4] L. Wittgenstein, *Philosophical Investigations*, Chichister 2009, § 201.
[5] L. Wittgenstein, *Philosophical...,* § 198. See: Z. Tobor, *W poszukiwaniu intencji prawodawcy* [Eng. *In Search of the Legislator's Intention*], Warszawa 2012, p. 22.
[6] H. Lenk, *Filozofia pragmatycznego interpretacjonizmu* [Eng. *The Philosophy of Pragmatic Interpretationism*], Warszawa 1995, p 207.

legislative power is to enact laws. During the legislative process, it controls the words it uses when statutes are written. On the other hand, the judges' profession is interpreting laws. In particular, in this process, they are to be independent and free from any external pressure, in particular from pressure of the legislative and executive. So the question is: who finally should hold the power to assign meanings that Humpty Dumpty spoke about and how it should be distributed between the legislature and courts, so that both can reliably discharge their constitutional tasks?

2. Why dialogue?

The aim of this paper is to present an outline of a dialogical concept of legal interpretation. We believe that every interpretation has to start with determining the relation between courts and the legislature. A dialogical concept of legal interpretation comprises an analysis of assumptions as to the mutual roles of the legislature and courts in determining the contents of the law, which makes up its normative dimension. In the descriptive dimension, the concept also tries to present the tools by means of which the legislature and courts can establish communication intended to improve the interpretation process.

As Andrei Marmor observes, the starting point in the debate about legal interpretation is the normative findings concerning the question about the proper system of allocation and distribution of power in a democratic system[7]. In this context, Victoria Nourse speaks of the "scrivener view", where courts try to erase any signs of their activity[8]. If the focus is exclusively on the work of courts and on examination of their opinions and justifications, this creates a mistaken belief that it is only in this activity that some essence of law can be found[9]. It seems that lawyers have for a long time devoted insufficient interest to the legislature. Including the legislature in the reflections about legal interpretation can have a transforming effect. From the point of view of both the legislature and ordinary people, law is a tool for resolving certain matters and attaining political goals. In an electoral manifesto, nobody boasts about their ability to avoid ambiguity and to enact precise laws. Any concepts that are detached from the communicative context of legal interpretation perpetuate judges' isolation. Textualism makes interpretation a solitary exercise. As Marek Zirk-Sadowski observed:

> A very narrow view of the lawyer's role in culture, reduced to getting to know the law in a certain linguistic community, results in a situation where, in the so-called difficult cases, a judge has to find a solution outside the law. Since a lawyer (judge) cannot actively influence the content of rules, an antinomy emerges which is characteristic for the positivist vision of legal culture[10].

Such isolation, even under the banners of a humble attitude of the judiciary and implementation of the vision of courts as faithful agents of the legislature, eventually leads to strengthening the position of judges. They no longer have to confront their interpretations with the aims and intentions of the legislature, they are free to shape the

[7] A. Marmor, *Textualism in Context*, "University of Southern California Legal Studies Working Paper Series" 2012/90, p. 1.

[8] V. Nourse, *Misreading Law, Misreading Democracy*, Cambridge 2016, p. 184.

[9] See: S.S. Abrahamson, R.L. Hughes, *Shall we dance? Steps for Legislators and Judges in Statutory Interpretation*, "Minnesota Law Review" 1991/75, p. 1054.

[10] M. Zirk-Sadowski, *Prawo a uczestniczenie w kulturze* [Eng. *Law and Participation in Culture*], Łódź 1998, p. 39.

contents of decisions as they wish, protected by canons of construction or sophisticated theories of meaning. So what is the basis on which judges usurp the right to decide what good legislative practice is? Why do some believe that attachment to canons of construction matters more than implementation of a policy agreed at legislative level?

The idea of dialogue can be seen as one that adds to the confusion if it is not expressed in a clear manner and based on transparent terminology. "Individual concepts of interpretation differ in their normative dimension in how they approach the relationships between the legislature and courts"[11]. These relationships can assume the dominant position of the legislature or the interpreter. The concept we support in this paper is that a dialogue between the legislature and courts best describes what legal interpretation should be. Our task is to outline a chart which can be used to undertake research on how dialogue functions in the legal interpretive community.

Legal interpretation can be understood in a descriptive sense and in a normative sense[12]. A good concept of interpretation should fit the practice of legal interpretation so as to be a concept of operative interpretation, applicable in real interpretive situations. It should also contain correct reasons for its own application, as compatible with the existing axiology of the legal system. This is why in the first part of this paper we will deal with a normative issue and present arguments to support the dialogical approach to legal interpretation, as well as as analyse critical arguments. In the second part, we will present various ways of understanding the dialogical concept in the descriptive sense.

3. Normative dimension of theory

Probably most contemporary papers relating to legal interpretation focus on analysing the interpretations of texts made by judges. Researchers invest an enormous amount of energy in studying judgment justifications, dissenting opinions or external factors influencing the decision-making, relating to politics or sociological determinants. Theorists of law for whom this material is the basis, formulate statements and postulates pertaining mainly to judges. Since the Hart–Dworkin debate, philosophers have focused on the position of the judge–interpreter of the text. The dominant questions concern what concept the judge should be guided by when making interpretations, what sources they can use, and what arguments are expedient and permitted in justifying interpretive decisions. Regardless of the adopted solutions, the judge and his/her interpretation occupies the central place in theories. Thus "building interpretive strategies is a task set for courts"[13]. What almost all theories have in common is the fear of the vision of a judge's unlimited power. Judges making use of discretionary power are seen as a threat. As Aharon Barak observes, the question of discretion will most likely remain a permanent point of reference for discussions on philosophy of law:

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[11] Z. Tobor, *To do a great right, do a little wrong – rzecz o sędziowskich kłamstewkach* [Eng. *To do a great right, do a little wrong: On Judges' Little Lies]*, "Przegląd Podatkowy" 2015/6, p. 22.

[12] See: M. Zieliński, *Wyznaczniki reguł wykładni prawa* [Eng. *Determinants of Legal Interpretation Rules*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1998/3–4, p. 2: "With regard to both the apragmatic construction (interpretation) and the pragmatic one, in law studies we find fundamentally different approaches: descriptive and normative ones. Regardless of the extent to which these two terms are adequate: 1) in the former approach the intention is to describe what happens in the field of construction (interpretation) in a given legal culture (possibly with a rationalization of these events); 2) the latter approach attempts to indicate all that should be taking place in said culture".

[13] See: Z. Tobor, *Strategia interpretacyjna jako środek komunikacji prawodawcy i sądów* [Eng. *Intepretive Strategy as a Means of Communication Between the Legislature and Courts*], "Państwo i Prawo" 2019/11, p. 52.

> The normative activity of a court is a product of the discretionary power vested in it, rather than a sign of judicial imperialism. This is an indication of uncertainty connected with law itself. Law is not mathematics. Law defines a normative framework, which determines what is permitted or prohibited. Unless and until we learn to predict the future, we will have to accept flexibility, which enables solving unpredictable problems. Unless and until language permits generalizations covering all possible details, it remains necessary to recognize the existence of situations which were not necessarily considered by the rule, but which are included by virtue of a court judgment[14].

Lawyers focus on isolating the judge from factors that might disturb proper decision-making. Formalists fear a judge who will not respect the limits imposed by the "objective meaning of text", meanwhile positivists fear that in order to determine the contents of law, the judge will also use his/her own beliefs and judgements, which allegedly poses a threat to the legitimacy of the judiciary and infringes the rule of law[15].

Without depriving reflections of the kind of their importance and meaning, we can raise the objection that they present a partial picture of what interpretation is and what role it plays in the system of the rule of law. Interpretation is a stage in a broader process of communication between the legislature and the addressees of the provisions of law[16]. Communication between the legislator and courts should focus on their cooperation in the process of determining meanings of legal texts and resolving concrete interpretation problems. When there is no dialogue, the process of communication between the legislature and the addressees of norms is distorted. We can indicate at least two arguments to support the statement that each doctrine of legal interpretation which fails to take sufficient account of the features of dialogicity and cooperativeness of lawyers' interpretation will be an incomplete concept, presenting a false image of interpretation.

The first argument concerns descriptive elements of theories and indicates that the idea of a judge as an unrestrained and free interpreter is an untrue image of the judge's activity and role in the legal system. Stanley Fish expressed this objection in the most categorical manner. In his view, no interpreter can be as free and unrestrained in the strong sense as many philosophers of law present[17]. S. Fish assumes that self is shaped in the process of accepting common and community meanings, which he refers to as "institutional nesting". "If what follows is communication or understanding, it will not be because he and I share a language, in the sense of knowing the meanings of individual words and the rules for combining them, but because a way of thinking, a form of life, shares us"[18]. In this way, S. Fish tries to indicate that the fears of many lawyers are groundless. It is impossible for a judge not to think like a judge. Legal standards, history of legislation and case law, as well as the whole baggage of a judge's knowledge and experience of the legal practice constitute his/her self[19]. Interpreters act as representatives of a community of language and their beliefs are both individual in character as well as communal and institutional[20]. When interpreting laws, a judge is not alone with their attitudes, but forms them when practising their profession. S. Fish shows

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[14] A. Barak, *The Role of the Supreme Court in a Democracy*, "Israeli Law Review" 1999/1, p. 2.
[15] See: M. Robertson, *Does the Unconstrained Legal Actor Exist?*, "Ratio Juris" 2007/2, p. 258.
[16] A. D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes*, "Virginia Law Review" 1989/75, p. 564.
[17] M. Robertson, *Does the Unconstrained*…, p. 263.
[18] S. Fish, *Is There a Text in this Class?: The Authority of Interpretive Communities*, Harvard 1980, pp. 303–304
[19] S. Fish, *Doing What Comes Naturally. Change*, *Rhetoric, and the Practice of Theory in Literary and Legal Studies*, Durnham–Londyn 1989, p. 367.
[20] S. Fish, *Is There a Text...*, p. 321.

convincingly that meanings to which we assign the value of obviousness and legibility are arrived at through cooperative work of the community of interpreters. It should be stressed clearly that interpretation is not a matter of judges' individual and private constructions. This is why concepts where the focus of research is on the individual decisions of selected judges cannot correctly describe the practice of legal interpretation.

The second argument concerns the normative question about the meaning of interpretation and the role of a judge in the system of a democratic rule-of-law state. Anya Bernstein indicates that when interpreting laws, judges try to justify their own interpretive decisions with arguments referring to the plain meaning or argue that a given meaning is supported by the application of a given canon of interpretation[21]. This way they demonstrate that the what they determine is arrived at using accepted methods of interpretation and not their independent decisions. In case law "we can find both untrue statements and noble lies"[22] – these are the devices courts employ to try and justify their decisions[23]. Concepts of interpretation where the object of study is only the interpretive activity of a judge, the aim being mainly to limit the judge's freedom, try to take care mainly of legitimizing practice as expert knowledge. This is a vision of a judge as a faithful agent of the legislature. But the aforementioned techniques of justification are not compatible with judges' statements about them. Judges cannot apply canons of interpretation in a consistent manner. Contrary to claims put forward by formalists, canons do not generate uniform and predictable determinations. An interpretive strategy should thus be based "on the idea of transparent justification of the interpreter's actions"[24]. Judges try to shift responsibility for the decisions they take on the accepted concepts of meaning, methods and directives of interpretation, or other texts (e.g. dictionaries). Judges are given the duty of determining the meaning of text, without enabling them to determine for whom and for what reason they make that interpretation. An interpreter's isolation is counterproductive, considering the desired results. Instead of limiting the scope of judges' power it is actually in principle strengthened. If a judge wants to do something, then no interpretation theory or strategy can prevent it[25]. We agree with M. Zirk-Sadowski, who believes that one of the basic symptoms of crisis of the administration of justice is the crisis of accountability of a lawyer for the content of the law he/she applies[26]. Under the cover of being faithful interpreters of law, implementing the imperative of being "the mouthpiece of the statute" judges can read laws against people's will, against the will of those who enacted a given law. According to V. Nourse, judges not only owe duties to the statutory text, but also to democracy. Not because they are to be obedient servants of people's whims, but because "the rule of law cannot be a rule against the people"[27].

Responding to these problems, the dialogical concept treats interpretation as team practice based on cooperation. A "partnership" view of the relation between the legislature and the courts does, however, cause resistance among lawyers. What causes the biggest

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[21] A. Bernstein, *Democratizing Interpretation*, "William & Mary Law Review" 2018/60, p. 435.

[22] Z. Tobor, *To do a great right*…, p. 15.

[23] Methods of quoting selected strategies of justifying decisions can be described by means of a comparison with the ways in which principles of courtesy and good manners operate, see: K. Kobyliński, *Po co prawnikom grzeczność* [Eng. *Why Do Lawyers Need Good Manners?*], "Kwartalnik Okręgowej Izby Radców Prawnych w Katowicach" 2019/2, pp. 39–40.

[24] Z Tobor, *Strategia interpretacyjna*…, p. 61.

[25] S. Prakash, *Text over Intent and the Demise of Legislative History*, "University of Dayton Law Review" 2017/43, p. 119.

[26] M. Zirk-Sadowski, *Uczestniczenie prawników w kulturze* [Eng. *Lawyer's Participation in Culture*], "Państwo i Prawo" 2002/9, p. 6.

[27] V. Nourse, *Misreading*…, p. 186.

fears among people is the possibility of considerable expansion of the power of judges, who might "correct" the lawmakers in their judgments[28]. Supporters of textualism and the concept of a faithful agent of the lawmaker rest their argument on a few premises[29]. Firstly, separation of powers requires the law-making activity of courts to be curtailed as much as possible, in favour of the legislature. Secondly, the legislature is "them" and not "it", therefore it is mistaken to perceive and interpret the provisions of law and as if they were the result of some sort of united or shared consciousness of the majority. Statutes should rather be seen as a result of a set of contracts between various factions represented in the benches of the parliament. Thirdly, the language of the statute reflects specific findings made during the legislative process. On every occasion, courts should interpret text as closely to the language of the statute as possible, even if in individual cases this leads to deplorable results. The consequence of these premises is the argument that such application of the law will stimulate the legislature to formulate law more carefully and accurately.

These arguments focus mainly on the role of judges as faithful agents of the legislature. At the level of declarations, they focus on the dominant role of the legislator and the subservient role of courts, which are merely executors of orders expressed in the text of the statute. The core of any problems with a dialogical concept of interpretation is how these institutions can have a conversation at all. Is the concept of inter-institutional dialogue not just a certain metaphor, which anthropomorphizes the actions of the legislative and the judiciary? If so, can it lead to assuming a wrong perspective on the role and manner of operation of these institutions within discourse?

A few arguments can be raised against the dialogical approach to interpretation: the argument from the non-existence of collective intents, the argument from the nature of communication, the argument from different audiences, and the argument from unstable institutions.

3.1. Argument from the non-existence of collective intents

Both the first and the second arguments are based on the conviction that it is impossible to make an analogy between ordinary interpersonal communication and enacting laws as a form of institutional activity. In order for any sensible conversation to exist, it is necessary that there exist a sender and a receiver, both of whom must intend to conduct a conversation. The sender has to intend to create and formulate a message in an intelligible way, while the receiver has to intend to receive it. Moreover, both parties need to have a common intent to take part in and continue the conversation. This creates the outline of the maxim of cooperation. Here the main objection focuses on demonstrating that collective bodies cannot have a single, shared intent, like individual people, so they cannot intentionally express their messages having some contents. "And without intent, it is very hard to imagine a productive dialogue"[30].

Properly understood, intentionalism renounces any psychologizing approaches to intent. Intent is not a fact of a psychological nature, but an institutional one. Approaching these issues from an even more general perspective, we should say that

[28] See: J. Manning, *Foreword: The Means of Constitutional Power*, "Harvard Law Review" 2014/128, pp. 1–84.

[29] R.H. Fallon Jr., *On Viewing the Courts as Junior Partners of Congress Statutory Interpretation Cases: An Essay Celebrating the Scholarship of Daniel J. Meltzer*, "Notre Dame Law Review" 2016/91, pp. 1747–1748.

[30] J.J. Brudney, E.J. Leib, *Statutory Interpretation as Interbranch Dialogue*, "University of California Law Review" 2019/66, p. 358.

one can only speak of aims and intents of collective bodies with respect to the constitutive rules governing such bodies' decision-making processes. These rules determine, among other things, to what extent such intents and aims of persons participating in the legislative process "count" as intents and aims of the collective body[31]. Even though the legislature does not have a "mind", it certainly has functionally viewed intents: it plans, applies internal procedures, and anticipates its future actions. This, as V. Nourse observes, the legislative intent should be understood as the legislative context[32]. This context includes the method and procedures of action of the group, legislators in this case. Justice Robert A. Katzmann notes in the US context that "there has been scant consideration given to what I think is critical for courts discharging their interpretive task–an appreciation of how Congress actually functions, how Congress signals its meaning"[33].

3.2. Argument from the nature of communication

This argument says that institutions can send signals at most, but they cannot hold a conversation in the proper meaning of this word[34]. Institutions cannot indeed treat each other as equal actors participating in a joint enterprise. Each institution has its aims and tasks, and its own capital that it wants to protect. This is why institutions are guided by their own preferences relating to specific policies, and they modify their positions only when they anticipate a possible conflict with other institutions. Consequently, institutions, at most, signal to others their actions and receive information about the actions of other entities. Delineated this way, the minimum of institutional communication is not a full form of dialogue yet. This argument is reasonable to some extent. Undoubtedly, speaking of a dialogue between institutions is a metaphor of sorts. Presenting proposals of descriptions of the mechanics of inter-institutional communication is definitely beyond the scope of this paper[35]. Later in the paper, we do, however, present some proposals of establishing formal communication paths, which are a response to the challenge this argument posed for us.

3.3. Argument from different audiences

This argument focuses on demonstrating that in certain situations, even if it might seem that courts undertake a conversation with the legislative, they indeed do not face each other or establish a sensible dialogue, but they only speak to their audiences[36]. For instance, when the Polish Supreme Court (the "SC") states that "as an aside, the point should be raised that the legislature should have been more careful in introducing

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[31] T. Gizbert-Studnicki, *Wykładnia celowościowa z perspektywy normatywnej* [Eng. *Teleological Interpretation from the Normative Perspective*], in: K. Budziło (ed.), *Wykłady w Trybunale Konstytucyjnym z lat 2011–2012* [Eng. *Lectures at the Constitutional Tribunal in 2011–2012*], Warszawa 2014, p. 120.

[32] V. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, "Boston College Law Review" 2014/55, p. 1613.

[33] R. A. Katzmann, *Judging Statutes*, New York 2014, p. 8.

[34] See: J.J. Brudney, E.J. Leib, *Statutory Interpretation*…, p. 354.

[35] It is not true, however, that the whole issue of communication between institutions is a metaphor that does not fit the reality. This issue is examined in particular in studies on organizations and management. It seems that legal professionals might benefit, to a degree, from these findings, but this remains a potential topic for another paper. See: J.P. Cornelissen, R. Durand, P.C. Fiss, J.C. Lammers, E. Vaara, *Putting Communication Front and Center in Institutional Theory and Analysis*, "Academy of Management Review" 2015/40, pp. 10–27.

[36] See: J.J. Brudney, E.J. Leib, *Statutory Interpretation*…, p. 355.

amendments to the Act on Political Parties"[37] or "the legislature should amend this provision appropriately"[38], it seems that these statements are addressed to the legislature. According to Lawrence Baum, the following potential audiences for judges should be named: other judges, the general public, other branches of government, interest groups, and other legal professionals[39]. The assessments and comments contained in justifications of judgments may be a form of judges expressing their view on some scholarly questions, referring to disputes in the field of legal dogmatics, or expressing his/her own preferences. The kind of audience determines the choice of a rhetoric strategy, which is oriented towards attaining a specific objective. The legislature and courts often have fundamentally diverging objectives[40]. Courts and legislative bodies usually want different things: member of the legislative body are mainly interested in being re-elected, pushing through their own political vision, and gaining personal influence, meanwhile judges want to uphold the primacy of law and the power resulting from it[41].

It seems that law-makers have a certain incentive to accept the judicial power. In particular they are interested in pushing their own policies forward, getting re-elected, and gaining personal power. Abstract issues of the structure of institutional power do not lie within their area of interest. Moreover, institutions are not organizational monoliths. In US literature it has been pointed out that the system of committees, the Offices of Legislative Counsel, the Congressional Research Service, as well as the offices of the House of Representatives and the Senate, through the lawyers who work there, contribute to acceptance of the federal judiciary's supremacy[42].

3.4. Argument from unstable institutions

This argument is based on the observation that the personal membership of institutions tends to change frequently[43]. It is a fundamental principle of democratic governance. The US Congress membership changes every two years, the Polish parliament – every four years. So in what sense can one speak of a stable expression of will by the legislature? In the hypothetical "dialogue" between courts and the legislature concerning a provision enacted during one of the previous terms, if the legislature made a statement about the intent that guided the adoption of that provision, the court might reply that the current MPs are not the same ones who passed the law, hence the current membership of the house would not in any way be privileged in terms of access to the intent of their predecessors. In the language of Humpty Dumpty, the new members of parliament are not masters of the meanings created in the preceding terms.

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[37] SC ruling of 4 August 2006 (III SW 14/06), OSNP 2007/17–18, item 267.

[38] SC judgment of 16 March 2012 (IV CSK 310/11), LEX No. 1136004.

[39] See: L. Baum, *Judges and Their Audiences. A Perspective on Judicial Behaviour*, Princeton–Oxford 2006, *passim*.

[40] Interesting findings result from J.M. Pickerill's research on the US Congress. It shows that the Congress is not at all interested in the interpretation methods applied by the US Supreme Court, and even if it wants to reshape the policy following the Court's decision, it rarely refers directly to such a decision, but tries to enact a similar law using different means. The interviews conducted with participants of the law-making process confirm these conclusions: "Policy issues first, how do you get a consensus to pass the bill, six other things, then constitutionality"; "When I go home and talk to my constituents, they ask me to help solve problems in Congress. They don't ask if it's constitutional. They want common sense." "We know that the Senator is not going to go home and not get re-elected because he voted for legislation that was then struck as unconstitutional". See: J.M. Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System*, Durnham–London 2004, pp. 46–47.

[41] See: K. Whittington, *James Madison Has Left the Building*, "University of Chicago Law Review" 2005/72, p. 1146.

[42] N. Devins, *Why Congress Does Not Challenge Judicial Supremacy*, "William & Mary Law Review" 2017/58, p. 1495.

[43] J.J. Brudney, E.J. Leib, *Statutory Interpretation*…, p. 356.

Moreover, as personal changes take place, so change the political preferences of the legislative. The new members may hold different views on matters of state policy and axiology. Doubts may arise in a situation when the "new" legislature communicates to courts a different set of preferences than the one which was behind a given law. The conversation between the legislature and courts concerning ways of understanding the provisions of law might potentially constitute a form of bypassing the legislative process. This situation seems unacceptable from the point of view of the separation of powers.

4. Conditions concerning dialogue between courts and the legislature

The dialogue between courts and the legislature should meet at least three conditions: formalism, responsiveness, and sincerity. These requirements are closely interrelated. Only a consciously and purposefully structured formal procedure can ensure responsive and sincere communication.

4.1. Formalism

For the idea of dialogical interpretation of law to be capable to defending itself against the counterarguments, it has to be presented in a clear manner. We should distinguish between formal dialogue, conducted by means of official tools, provided especially for this purpose, and unstructured dialogue, which assumes an unregulated and unexpected form[44]. In order for formal dialogue to exist, mechanisms must be created to enable conducting it. So far, the legislative and courts have been standing in "proud and silent isolation"[45]. It manifests itself not only in lack of consultations, or any exchange of messages, but also in mutual lack of understanding of the different aims and preferences of both institutions.

There are several ways of establishing formalized communication between courts and the legislature: communication by means of justifications of judgments, setting up special consultative units operating under the auspices of the legislature, appointing joint commissions of judges and parliamentarians, hearing judges based on the right to present to the parliament issues relating to the judiciary, and creation of an interpretive strategy.

4.2. Responsiveness

While an ordinary act of communication can be unilateral[46], conversation requires two sides engaged in maintaining it. The cooperative character of dialogue entails recognizing the participants as equals. No side can have a privileged position. Such a situation would violate cooperation, thus the very idea of dialogue. Therefore, in his theory of cooperative action, Jürgen Habermas observes that what must lie at the heart of a sensible process of deliberation is fair mutual treatment of the interlocutors, oriented towards reaching agreement. Moreover, if the conversation between courts and the

[44] J.J. Brudney, E.J. Leib, *Statutory Interpretation*…, p. 361.

[45] B. Cardozo, *A Ministry of Justice*, "Harvard Law Review" 1921/35, p. 114.

[46] It should be brought to attention that such unilateral character will rather be only apparent. Even a clearly formulated order (as an example of a unilateral act of communication) requires feedback in the form of perlocutionary effect (obeying or ignoring the order).

legislature is not to infringe the principle of separation of powers, a situation when one of the sides has a stronger voice cannot be accepted. Formalization of the process of communication enables protecting ourselves against the potential temptation of one side using the created communication space in order to obtain an additional, unjustified influence on the other one.

4.3. Sincerity

A fruitful process of communication cannot have a strategic or manipulative character. Generally, the strategic view of behaviour is based on the following assumptions: 1) social actors make decisions in order to attain specific goals; 2) actors behave strategically in the sense that their choices depend on the expectations of other actors; 3) the above choices are structured by the institutional context in which they are made[47]. An institution acting strategically can consider it justified to modify its standpoint or express it in an incomplete manner, as well as to hide part of the goals it wants to attain, which excludes cooperation. According to some authors, law-making does not have the nature of a conversation based on the principle of cooperation. The reason for such a state of affairs is that law-making is a form of strategic behaviour[48], which assumes the form of two conversations. The first one takes place in the parliament between the members of the legislative body, the other between the legislature and the addressees of the enacted laws. The situation is further complicated by the need for parliamentary parties to reach compromises. Oftentimes, certain matters are purposefully left without clear legal solutions in the hope that through legal interpretation, case law will support the interpretation favoured by one party, against the standpoint of the other. In such a case, both sides, even if they vote for the same specific content of the provision, actually hide, at least partially, what goals they are trying to achieve[49].

5. Descriptive dimension of theory. Methods of communication between the legislature and courts

An analysis of communication methods should begin with a few remarks about the current state of the provisions of Polish law in this regard. To this end, we should look for legislative instruments which potentially contain norms that would create the conditions for communication to be established between the legislature and courts. The first and rather obvious place for searches of this kind is the Principles of Legislative Technique[50] (the "PLT"). In principle, it is only section 1 that concerns the methodology of legislative work[51]. But apart from the requirements that opinions from entities covered by the scope of intervention of public authorities be sought and that effects of existing legal norms

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[47] J. Elster, *The Possibility of Rational Politics*, "Critica: Revista Hispanoamericana de Filosofia" 1986/18, p. 28. See also: J. Elster, *Rational Choice*, New York 1986.

[48] A. Marmor, *The Pragmatics of Legal Language*, "Ratio Iuris" 2008/21, p. 435.

[49] Zob. K. Kobyliński, *Podmiotowość w dyskursie z perspektywy pragmatycznej* [Eng. *Agency in Discourse from the Pragmatic Perspective*], in: A. Bielska-Brodziak (red.), *O czym mówią prawnicy, mówiąc o podmiotowości?* [Eng. *What Do Lawyers Speak of When They Speak of Agency?*], Katowice 2015, p. 122.

[50] Regulation of the Prime Minister of 20 June 2002 on "Principles of Legislative Technique" (consolidated text: Dz. U. 2016, item 283).

[51] S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r.* [Eng. *Commentary on the Principles of Legislative Technique of 20 June 2002*], Warszawa 2012, p. 25.

applicable in a given field be determined, this regulation does not create an express duty to obtain opinions from judges. Sławomira Wronkowska and Maciej Zieliński point out that an analysis of case law and administrative practice can enable estimating the effects produced by the norms applicable so far and forecasting the potential influence of the drafted amendments[52]. It should be stressed that the regulation does not contain any directive referring to the legal language, in principle all the provisions concern the ways provisions are formulated using legal language. The language of case law and broadly understood legal studies (with special focus on individual legal dogmatics) is, from the point of view of the PLT, completely outside the legislature's scope of interest. What is neglected, at least in the sphere of normative directives in the regulation, is judges' opinions, contained in judgment justifications, and lawyers' comments. Benjamin Cardozo's remark about "proud isolation" of the Congress applies also to the Polish legislature. In our opinion, it would be necessary to postulate amendments consisting in adding to the PLT provisions requiring the legislature to use the legal (non-statutory) language at the level of drafting the future legal norms.

5.1. Communication through judgment justifications

When considering the form of communication taking place through court judgment justifications, one should answer the question whether such justifications can be enough of a stimulus for the legislature to make a legislative amendment. The courts have their own interest in taking care of the value of legal interpretation and the quality of statutes that are the subject of operative interpretation. Therefore, they should acknowledge that they prepare their justifications not only for parties to the proceedings, but that the legislature can also be the receiver of the contents of judgments. For instance, in a statement of reasons for the Bill to Amend the Act on Support for the Family and the Foster Case System and Certain Other Acts, the bill promoter observes that: "the current wording of the Act does not contain such a provision, which causes interpretive discrepancies in practice"[53]. Interpretive "discrepancies" or "doubts" are a frequent motive for amendments designed by the legislature[54]. In justifications, attention is also drawn to the need to "clarify" provisions of law[55]. In the statement of reasons for the Bill to Amend the Act on Municipal Self-Government, the promoter states that: "the submitted bill is a solution to an interpretive dispute, existing both in legal scholarship, supervisory decisions of province governors, and in case law of administrative courts"[56]. Finally, in the statement of reasons for the Bill to Amend the Act on Public Roads, the promoter expressly observes that: "there were also discrepancies in administrative

[52] S. Wronkowska, M. Zieliński, *Komentarz*…, p. 26.

[53] The government's Bill to Amend the Act on Support for the Family and the Foster Case System and Certain Other Acts, parliamentary paper No. 3023, VIII term, statement of reasons, p. 9.

[54] "The bill contains also a number of provisions of systematizing nature or explaining the interpretation doubts arising in practice" (government's Bill to Amend the Act – Industrial Property Law, parliamentary paper No. 3664, VIII term, statement of reasons, p. 1); "Article 48 of the Act on Political Parties in its current wording used to cause interpretation doubts relating to whether it should be understood narrowly (just the costs of liquidation proceedings) or, perhaps, broadly" (private members' Bill to Amend the Act on Political Parties, parliamentary paper No. 3143, VIII term, statement of reasons, p. 1).

[55] "The basic aim of the Bill to Amend the Act on the Safety of Food and Feeding and Certain Other Acts is clarifying the issues…" (private members' Bill to Amend the Act on the Safety of Food and Feeding and Certain Other Acts, parliamentary paper No. 170, VIII term, statement of reasons, p. 1).

[56] Private members' Bill to Amend the Act on Municipal Self-Government, parliamentary paper No. 2181, VIII term, statement of reasons, p. 1.

courts' judgments issued in cases initiated by complaints about resolutions of municipal councils determining controlled parking zones"[57].

Yet these examples do not provide clear evidence that a stable form of communication between the legislature and courts has been established. The degree to which judgment justifications affect decisions of the legislature cannot be established precisely. First and foremost, it cannot be estimated how significant a percentage of interpretation problems fly completely below the radar of the law-makers. The legislature should be aware of the fact that courts often have excessive loads of cases that do not have any political tinge to them, while the problems they involve could often be solved with minimum legislative effort[58]. Therefore we see the need for establishing more formalized forms of communication. They may emerge within the framework of advisory units or joint committees of judges and parliamentarians.

5.2. Appointment of advisory units

The main task of advisory units working for the legislature would be to review case law in order to identify areas where statutory reforms would be needed. In some states of the US, it is the task of the State Attorney General to examine the contents of judgment justifications and suggest specific measures to the legislature[59]. A few state legislatures created formal posts: auditors of statutes and case law or permanent committees that should provide information about the discrepancies in case law[60]. The activities of entities of the kind focus on examining, comparing, and analysing statutes, in particular taking into account the errors, repetitions or potential conflicts between provisions of law, and on preparing recommendations aimed at improving the situation.

5.3. Appointment of joint committees of judges and parliamentarians

In 1921, justice B. Cardozo made an appeal for a Ministry of Justice to be established in the United States, with the task of intermediating between two branches of power[61]. In order to establish an efficient mechanism for establishing communication between the legislature and courts, the existence of committees of the kind seems necessary. They might consist of representatives of the legislature, the government, the judiciary, associations of legal professionals, academics representing schools of law, or representatives of the social groups concerned. Among the powers of such a body, we should mention examining statutes and court judgments in order to detect any defects and anachronisms, and presenting agreed-upon recommendations, issuing opinions about the legislative amendments proposed by the legislature, examining suggestions of judges, other legal professionals, and civil servants relating to identified legal problems, and analysing the necessary legislative amendments intended to harmonize the law in the face of the dynamic changes in social relations[62].

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[57] The Senate's Bill to Amend the Act on Public Roads, parliamentary paper No. 1632, VIII term, statement of reasons, p. 2.

[58] V. Nourse, *Misreading*…, p. 187.

[59] S.S. Abrahamson, R.L. Hughes, *Shall we dance? Steps*…, p. 1060.

[60] Such institutions exist e.g. in: Montana, Kansas, Minnesota, Alaska, Illinois or Wisconsin.

[61] B. Cardozo, *A Ministry*…, p. 125.

[62] S.S. Abrahamson and R.L. Hughes indicate that committees of this kind exist in selected states of the US. See: S.S. Abrahamson, R.L. Hughes, *Shall we dance? Steps*…, p. 1071.

5.4. Hearing of judges

Another case that is worth considering can be found in the Polish Act on the Supreme Court[63]. Pursuant to Article 6(1) of the Act, the First President of the Supreme Court presents to the relevant authorities comments about any irregularities or lacunae found in the law, the removal of which is necessary in order to guarantee the rule of law, social justice, and coherence of the legal system of the Republic of Poland. In the United States, more than 40 states do have such an institution, which is an excellent mechanism for stimulating dialogue between the legislature and courts.

5.5. Building interpretive strategies

The building of interpretive strategies is linked to the concept of the so-called interpretive law[64]. The aim is to create a certain model to be followed in terms of interpreting legal texts and resolving the arising problems: how to determine meaning, without going beyond the bounds of the documents; how to resolve issues that were not expressly regulated; what is the role of intent, external materials, conflicts between individual provisions, or earlier versions[65]. The interpretive strategy actually used by courts, not only the declared one, may send a clear signal to the legislature about the methods and reasoning judges follow in their individual decisions. This information can be valuable for the legislature at the stage of drafting the statutory text. A question arises: can the legislature lay down interpretation directives binding upon courts? Here we agree with Linda D. Jellum, when she says that statutory directives, if they were to be imposed by the legislature on courts, would destroy the balance and separation of powers[66]. When the legislature tries to control the process of interpretation, unlike in case of attempts at controlling the results in order to promote specific goals of policies, it broadens its powers, crosses constitutional limits, interferes in an unacceptable manner in the judiciary, and becomes the master of the interpretation process: a new Humpty Dumpty. This is why interpretive strategies should be created in agreement between courts, law-makers and legal scholars.

6. In defence of the dialogical concept of legal interpretation

This paper only signals an important issue, namely the communication between courts and the legislature. The presented proposals of creating formalized communication channels between the legislature and courts show how one can overcome the objections raised against viewing communication as dialogue. We have presented ways in which institutions can communicate sensibly and co-shape the audience for their actions with

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[63] Act of 8 December 2017 on the Supreme Court (consolidated text: Dz. U. 2019, item 825 as amended).

[64] See e.g.: W. Baude, S.E. Sachs, *The Law of Interpretation*, "Harvard Law Review" 2017/130, p. 1082ff. B. Brzeziński, *O potrzebie sformułowania sądowej strategii interpretacji ustaw podatkowych* [Eng. *On the Need to Formulate a Judicial Strategy of Interpreting Tax Statutes]*, in: J. Góral, R. Hauser, J. Trzciński (eds.), *Sądownictwo administracyjne gwarantem wolności i praw obywatelskich 1980–2005* [Eng. *Administrative Courts as a Guarantor of Civil Freedoms and Rights]*, Warszawa 2005, pp. 44–58.

[65] G.E. O'Connor, *Restatement (First) of Statutory Interpretation*, "New York University Journal of Legislation & Public Policy" 2003–2004/7, pp. 335–338.

[66] L.D. Jellum, *"Which is to be Master" – The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, "University of California Law Review" 2009/56, p. 838.

the help of special advisory bodies or joint committees. The legislature and courts have common goals. As professional participants of the legal discourse, they have to take care of the law as the mechanism of attaining the goals. "The text of a formally applicable legal instrument is also irrelevant when it is not accompanied by any measures aimed at its execution, in a broad sense"[67].

The proposal presented in the paper needs to be developed. We are aware of the plethora of theoretical issues to be faced. They are mainly connected with the fact that the processes of enacting laws and interpreting them follow different rules[68]. Yet this concept is worth working on, because such dialogue can make courts more attuned to the goals the legislature is trying to achieve through legislation, while the legislature could be more aware that it needs courts to implement its policies[69].

Dialogical Concept of Legal Interpretation

Abstract The purpose of this text is to present an outline of the dialogical concept of legal interpretation. It involves the need to establish the relationship between the legislature and courts. In the normative dimension, this concept includes an analysis of assumptions about the mutual roles of the legislature and courts in determining the substance of the law. In the descriptive dimension, the authors present tools that enable communication between the legislature and courts in order to improve the interpretation process. The authors describe the requirements for communication between courts and the legislature, and refer to existing solutions in Poland and the United States. In the text the importance of this issue is only signalled, but the authors believe that it is worth further research.

Keywords: legal interpretation, strategies of interpretation, communication theory of legal interpretation

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[67] M. Dudek, *Komunikowanie prawa w dobie pluralizmu kulturowego* [Eng. *Communicating Laws in the Era of Cultural Pluralism*], Kraków 2014, p. 55.

[68] M. Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, "William & Mary Law Review" 2014/56, p. 467ff.

[69] See: J.J. Brudney, E.J. Leib, *Statutory Interpretation*…, p. 391.

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