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Ascription of content to provisions of the law by judicial practice. Theoretical analysis of the Polish Constitutional Tribunal's judgments[2]

1. Introduction

The Polish Constitutional Tribunal[3] has withdrawn from conducting its own interpretation of the subject of constitutional review several times in its adjudications. Even though this practice is rather incidental, in the cases considered, the Tribunal's own interpretation was replaced by the adoption of the result of another court's interpretation. The Polish Constitutional Tribunal accepted another court's interpretation as that, which determines the content of the provisions of the law under review. My objective is to provide a theoretical account of the conduct of the Polish Constitutional Tribunal.[4]

First, the distinction between pragmatic interpretation and non-pragmatic interpretation, widely known in Polish legal theory, is important for enabling a better understanding. The usefulness of the distinction is demonstrated in sections 2 and 3 of the article.

Second, the paper recapitulates on various judgments in which the Polish Constitutional Tribunal notes that the practice of applying the law determines the content of that law. It simultaneously enables the establishment of the development of the practice of applying provisions of the law within the Tribunal's judgments (section 4).[5]

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3 Hereinafter: 'Polish Constitutional Tribunal', 'Tribunal', 'Constitutional Tribunal'.

4 I would like to thank one of the reviewers for his remark on the scope of this phenomenon. It is true that the Tribunal's actions are inspired by specific reasons provided by the relevant participants of the proceedings. In the vast majority of cases, these reasons are related to disagreement of the participants about the interpretation of the subject of constitutional review, as established in practice. I try to avoid considerations inherent in the study of constitutional law as far as possible. This is because the subject matter of the article is to be an example for theoretical analysis.

5 The terms 'application of the law' or 'application of the provisions of the law' are used synonymously, in line with J. Wróblewski in: Z. Bankowski, N. MacCormick (eds.), *The Judicial Application of Law*, Dordrecht 1992, p. 359, referring to the activity of a competent entity, such as a court.

Therefore, the analysis explains the reasons for the Tribunal's direct assumption of another court's non-pragmatic interpretation. These include the claim that not every practice of applying provisions of the law can aspire to be qualified as determining the content of the provisions. This is because some features of content-determining practices are proposed by the Tribunal.

Finally, the Polish Constitutional Tribunal's actions are investigated using Robert Boyce Brandom's analytic pragmatism. Analytic pragmatism plays a role of adequate metatheory, which enables the conclusion to be drawn that, through its activity, the Tribunal indicates 1) what the agent must do (as part of the legal practice) for the vocabulary of normative acts to mean something (*PV-sufficiency*) and 2) what vocabulary is sufficient to specify those practices (*VP-sufficiency*).

2. Legal provision and legal norm

Zygmunt Ziembiński's article *Przepis prawny a norma prawna*[6] published in 1960 became the founding paper of the Poznan School of Legal Theory.[7] Years later, Ziembiński's students wrote that

> […] the vision of law adopted by the representatives [of the School – W.R.] is based on it [the conceptual distinction between a legal provision and a legal norm – W.R.], and it can be said, without exaggeration, therefore actually all of the School's theoretical achievements'.[8] This should not come as a surprise, especially since Czesław Znamierowski had already suggested that 'the issue of norms of conduct, in particular legal norms, is for the theory of law almost the central issue, or maybe even *strictly sensu* the central issue [...]'.[9]

In that paper, Ziembiński presents the view that

> provisions express legal norms, i.e., indications of what a certain person should do, according to the will of the legislator; indications that someone has the obligation to do such-and-such in certain circumstances (or, on the contrary, that there is no such obligation). Norms are the content of provisions.[10]

Therefore, he specifies how legal norms are expressed in provisions. Accordingly, the direction of analysis can be reversed to reconstruct legal norms from provisions – to say how a norm can be derived from such-and-such a provision, corresponding to the scheme: 'in conditions C, every person with properties *T* is obliged (not obliged) to perform act *A*'.[11] The distinction between a provision of the law and a legal norm is not indisputable (at least in the Polish theory of law), although it seems to be adopted by the Tribunal in the judgments of interest to me.

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[6] Z. Ziembiński, *Przepis prawny a norma prawna* [Eng. *Legal Prescription and Rule of Law*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1960/1, pp. 105–122.

[7] For concepts of the Poznan School of Legal Theory see: M. Smolak, P. Kwiatkowski (eds.), *Poznan School of Legal Theory*, Leiden 2020, p. 424.

[8] S. Czepita, S. Wronkowska, M. Zieliński, *Założenia szkoły poznańsko-szczecińskiej w teorii prawa* [Eng. *Foundations of the Poznan–Szczecin school in legal theory*], "Państwo i Prawo" 2013/6, p. 9.

[9] C. Znamierowski, *Podstawowe pojęcia teorji prawa. Część 1: Układ prawny i norma prawna* [Eng. *Basic concepts of the theory of law. Part 1: Legal system and legal norm*], 2nd edition, Poznań 1934, p. 20.

[10] Z. Ziembiński, *Przepis*…, p. 105.

[11] Z. Ziembiński, *Przepis*…, p. 105.

Let me introduce just two quotations from the Tribunal's judgments:

1) In a situation where the Supreme Court is solely authorized to adjudicate on cassation, this means that the provision of Article 393 of the Civil Procedures Code has a unified understanding in the judicial decisions of the courts. In this form, the content of the said provision is subject to assessment, in accordance with the established case law of the Constitutional Tribunal, from the point of view of its compliance with the Constitution.[12]
2) The Constitutional Tribunal has repeatedly emphasized that the actual content of the provisions is in fact only formulated in the process of their application.[13]

It is difficult to understand the above statements of the Constitutional Tribunal otherwise than as a recognition of a relevant difference between one linguistic object, which is a provision, and what is the result of an interpretation mediated in the rules of interpretation, referred to in judgments as 'the content of the provision'. Therefore, for the purposes of this analysis, the distinction proposed by Ziembiński is accepted as binding.

3. Pragmatic interpretation and non-pragmatic interpretation

The interpretation of the law may be understood in two ways. First, 'interpretation of law' means a set of activities intended to provide an understanding of a legal text (in a narrower sense) or a set of activities intended to provide an understanding of a legal text, including activities involving inferring other norms from norms reconstructed from provisions of the law (interpretation of the law in a broad sense).[14] The legal interpretation understood in this way is described as 'pragmatic' because the interpreter's activities are of central interest here.[15] Second, 'interpretation of the law' constitutes a result of the interpreter's actions. Zieliński notes that 'unfortunately, often ascription of content to (…) expressions (non-pragmatic interpretation) takes place without any coherent actions (pragmatic interpretation) preceding the ascription of a given content'.[16]

As mentioned earlier, norms, according to Ziembiński, are the content of provisions. The consequence is that there is a specific relationship between the meaning of norms (as linguistic units) and the meaning of provisions of the law.[17] When Zieliński defined the term 'interpretation of a legal text' in one of his very first works, he wrote '[t]he interpretation of a legal text involves replacing the legal text with the help of rules R, with a set of the norms of conduct that are synonymous with the legal text, according to rules R'.[18]

Norms, as linguistic expressions derived from the provisions of the law, will be built from the vocabulary that is at least partially in common with the vocabulary of the provisions of the law. Furthermore, 'a provision that directly expresses a norm of conduct

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[12] Judgment of the Constitutional Tribunal of 28 January 2003 (SK 37/01), LEX No. 74916.
[13] Judgment of the Constitutional Tribunal of 12 April 2011 (SK 62/08), LEX No. 824141.
[14] See: M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki* [Eng. *Legal interpretation. Principles, rules, tips*], Warszawa 2017, pp. 43–44.
[15] M. Zieliński, *Wykładnia*…, p. 236.
[16] M. Zieliński, *Wykładnia*…, p. 43.
[17] See: W. Rzepiński, *Znaczenie językowe normy prawnej w poznańsko-szczecińskiej szkole teorii prawa w świetle pragmatyzmu analitycznego* [Eng. *The linguistic meaning of a legal norm in the Poznan-Szczecin school of legal theory in the light of analytic pragmatism*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2019/1, pp. 27–41.
[18] M. Zieliński, *Interpretacja jako proces dekodowania tekstu prawnego* [Eng. *Interpretation as a process of decoding a legal text*], Poznań 1972, p. 27.

can, incidentally, contain elements that provide an explanation as to how to understand other provisions'.[19] In this sense, the provisions create a context which has to be taken into account when analyzing the meaning of norms. Ziembiński and Zieliński clearly postulated the distinction between 'the language of provisions of the law' and 'the language of legal norms'.[20] Ziembiński adds that 'the properties of the language of legal texts and the language of legal norms are not identical, while the form of the expression of the language of legal norms largely depends on the adopted interpretative rules'.[21]

I shall try to demonstrate that the Tribunal's practice under review here is not intended to reconstruct or determine the content of legal norms. In these cases, the Polish Constitutional Tribunal dealt exclusively with the results of the actions of the interpreter (other courts) with respect to the subject of constitutional review (i.e. the non-pragmatic interpretation of these courts) and simultaneously abandoned its own pragmatic interpretation of the respective subject. This is because (for the Tribunal) interpretative practices with unique features conducted by certain courts give rise to the determination of the content of certain provisions (regardless of their methodological correctness based on a specific concept of legal interpretation). Notably, the Tribunal did not assess the methodological correctness of the pragmatic interpretation of other courts by accepted its non-pragmatic interpretation as given.

4. Non-pragmatic interpretation as a determinant of the content of the subject of the Tribunal's review

Let us have a look at specific cases, in which the Polish Constitutional Tribunal limited its interpretation to a reconstruction of the results of the interpretation of another court. As mentioned earlier, the Tribunal adopted these results as the content of the provisions that are subject to constitutional review. In this part, I shall attempt to explain the reasons that constitute the foundation of the Tribunal's actions.

4.1. Rationality and comprehensiveness as the premises for the analysis of the interpretation of other courts

Firstly, the Tribunal pointed out that the examination of the results of interpretations expressed in judgments and in the science of the law is justified 'on the grounds of rationality and comprehensiveness'.[22] In the judgment of 8 May 2000, the Constitutional Tribunal also stated that 'a homogeneous and stabilized understanding of a provision in judgments and in the legal doctrine justifies the adoption of such a position as the starting point in assessing its constitutionality.'[23]

When the Tribunal refers to 'the grounds of rationality', it seems to refer to its own activity intended to specify the subject of the constitutional review and the relevant constitutional norms. Rationality and comprehensiveness are, therefore, necessary features of this activity. The Constitutional Tribunal therefore needs to obtain an appropriate justification

[19] Z. Ziembiński, *Przepis*…, p. 110.
[20] Z. Ziembiński, *Metodologiczne zagadnienia prawoznawstwa* [Eng. *Methodological issues of jurisprudence*], Warszawa 1974, p. 212; M. Zieliński, *Interpretacja*…, p. 8.
[21] Z. Ziembiński, *Metodologiczne*…, p. 212.
[22] Judgment of the Constitutional Tribunal of 8 May 2000 (SK 22/99), LEX No. 40328.
[23] Judgment of the Constitutional Tribunal of 8 May 2000 (SK 22/99), LEX No. 40328.

for its decision. Two types of rationality appear here: first, rationality determines the way the Tribunal operates while adjudicating on the given case; secondly, rational action makes it possible to find the appropriate reasons on which the judgment will be based. These reasons will be related to the established meaning of the provisions of the law.

This understanding of rationality seems to correspond with Leszek Nowak's approach to this concept.[24] Nowak formulated the principle of rationality. This principle then served as the foundation of its theory of interpretation. Its role is to organize the process of interpretation. It can therefore be assumed that, while attempting to establish a uniform and stabilized understanding as a specific determinant of the meaning of a provision, the Tribunal is guided by the principle of rationality that it had constructed itself. In turn, this principle would require the Tribunal to extend the assumption of rationality to the practices of interpretation of other courts.

As Wojciech Patryas pointed out, the principle of rationality formulated by Nowak takes the shape of an idealizing statement in the form of logical implication.[25] Remember that the antecedent of this statement is a combination of ten assumptions, while its consequence is the statement that the subject will perform the action that is of maximum use to it.[26] In this sense, the Tribunal tries to 'grasp' in practice what other courts found to be of maximum use for their resolution of a specific case. However, whether, from the Tribunal's point of view, freely understood utility allows a non-pragmatic interpretation of another court to be adopted as a determinant of the content of the subject of review in a case examined by the Tribunal is an open question.[27]

In addition to the 'grounds of rationality', the Polish Constitutional Tribunal also distinguished comprehensiveness, which is probably understood as an appropriate level of detail or even the breadth of the analysis conducted. In this sense, the Tribunal needs to determine whether an interpretative decision made by another court – in empirical terms – is individual in nature (it has a local impact) or, on the contrary, it has a result in the form of the settlement of a certain line of judgments (it has a global impact).

Therefore, the Constitutional Tribunal's practice can be explained by referring to the principle of rationality. Furthermore, the Tribunal's actions are intentional.[28] The ascription of intentionality is possible because the reasons justifying a given decision can be reconstructed from the context of the action taken by the Tribunal, as well as from the result of this action, namely the verbal form of the judgment. It should, therefore, be possible to reconstruct the Constitutional Tribunal's practical reasoning.[29]

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[24] See: L. Nowak, *Interpretacja prawnicza. Studium z metodologii prawoznawstwa* [Eng. *Legal interpretation. A study in the methodology of jurisprudence*], Warszawa 1973, p. 219.

[25] W. Patryas, *Idealizacyjny charakter interpretacji humanistycznej* [Eng. *Idealizational nature of the humanistic interpretation*], Poznań 1979, pp. 13–14.

[26] W. Patryas, *Idealizacyjny*…, pp. 13–14. See: W. Czajkowski, *Interpretacja humanistyczna a metafilozofia* [Eng. *Humanistic interpretation and metaphilosophy*], "Przegląd Filozoficzny" 2018/1, pp. 183–195.

[27] In my opinion, there is no need to formulate an answer to the question here. For some judges, a measure of maximal utility will be, for example, a quick settlement of the case to avoid the potential lengthiness of the procedure, whereas for others, it will be an in-depth investigation of a specific case because only this method of conduct – in the light of the knowledge and preferences of those judges – will satisfy the need to ensure fairness in some cases. See: Z. Ziembiński, *O pojmowaniu sprawiedliwości* [Eng. *On understanding justice*], Lublin 1992, p. 175ff.

[28] Here, I am using the term 'intentionality' in its philosophical meaning. Therefore, I am not referring to specific language of the law, such as the language of criminal law where the term is used in a different sense (expressed by such Polish terms as *intencja*, *zamiar*, *motywacja*). For an introduction of the notion of intentionality to the philosophical discourse, see: F. Brentano, *Intentionality*, in: *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/intentionality/, accessed on: 15 May 2023.

[29] For intentionality and different understandings of action understood in this way see: M. Dybowski, *Articulating Ratio Legis and Practical Reasoning*, in: M. Dybowski, V. Klappstein (eds.), *Ratio Legis. Philosophical and Theoretical Perspectives*, Heidelberg 2018, p. 43; R.B. Brandom, *Articulating Reasons. An Introduction to Inferentialism*, Cambridge (Mass.) 2000, p. 96.

4.2. Determinants of the content of provisions in the practice of their application

In one of its judgments, the Tribunal referred to its line of judgments to date and pointed out that 'if a specific way of understanding a provision of an Act has already become clearly established, and especially if it has found homogeneous and authoritative expression in the line of judgments of the Supreme Court or the Supreme Administrative Court, it should be considered that this provision – in its practical application – has acquired exactly the content as was found by the highest court instances of our country'.[30]

Let me consider the characteristics of the practice proposed by the Tribunal, in which the meaning is ascribed to the provisions.

First, the understanding should be homogeneous. The establishment of such homogeneity can be perceived as a statement that the courts obtain the same, uniform results of interpreting a given provision or provisions. Homogeneity is most probably understood as the achievement by these courts of syntactic uniformity, namely the results of an interpretation with the same or highly similar verbal structure. Therefore, identity is confirmed, presumably by comparing the verbal forms of the interpretations expressed by the authorities applying the law in the justifications of their decisions. It would be difficult to verify otherwise, namely whether court X has the same understanding (or knowledge) of the content of the provision as court Y. According to Ajdukiewicz, 'to understand an expression in a meaning is the same as to understand it by means of a thought which (…) has certain characteristics'.[31] Therefore, we might have a significant problem with the verification of whether courts X and Y have identical characteristics of thoughts. In fact, we do not have epistemic access to such thoughts, which Ajdukiewicz also observed, concluding a little further that '[i]n order to find out what human convictions and earnest emotions are, we cannot confine ourselves to listening to what people say; we should rather watch their behaviour, since human behaviour provides better information about human convictions and emotions'.[32]

Second, the understanding of the provisions should be authoritatively expressed in the judgments of the Supreme Court or the Supreme Administrative Court. To perceive the Constitutional Tribunal's intended meaning of 'authoritative expression', I would like to recall the concept of 'identification' established by Joseph Raz.[33] Raz argues that 'identification is a common and often proper ground for accepting authority', however, as a secondary justification, it is '(…) dependent on the availability (…) of another justification'.[34] I will skip the further discussion on Raz's approach to legitimacy of an authority, as I consider it not necessary for understanding what the Tribunal means when it refers to 'authoritative expression'. Let me rather emphasize that, for Raz

> [a]cceptance of an authority can be an act of identification with a group because it can be naturally regarded as expressing trust in the person or institution in authority and a willingness to share the fortunes of the group which are to a large extent determined by the authority.

[30] Judgment of the Constitutional Tribunal of 27 October 2010 (K 10/08), LEX No. 607479.
[31] K. Ajdukiewicz, *Pragmatic Logic*, Dordrecht 1974, p. 13.
[32] K. Ajdukiewicz, *Pragmatic*…, p. 15.
[33] J. Raz, *Authority and Justification*, "Philosophy & Public Affairs" 1985/1, pp. 18–22.
[34] J. Raz, *Authority*…, p. 20.

> But trust in an authority is trust that the authority is likely to discharge its duties properly. It therefore presupposes a principle which should govern its activities.[35]

Bearing this in mind, it is possible to return to the Tribunal's argumentation. Indisputably, the Polish Constitutional Tribunal refers to the Supreme Court and the Supreme Administrative Court as institutions endowed with authority. Therefore, the Tribunal identifies these institutions – in Raz's words – as trustful. The argument from 'authoritative expression' is sufficient for the acknowledgment that the results of the pragmatic interpretations of these courts as reliable. It presupposes that the Tribunal accepted – once again referring to Raz – the principle which governed the activities of these institutions (or to paraphrase Raz: that the authority discharged its judicial duties properly). However, it is unclear how the notion of a group used by Raz in his approach is to be transposed. I think that, by appealing to the authority of the most important courts in the Polish legal system, the Tribunal seeks to demonstrate that the mere hierarchical position of these institutions implies the non-legal commitment of other entities which take part in legal practice, namely the commitment to follow (or slightly weaker – to respect) the argumentation of these institutions. Undoubtedly, the Supreme Court and the Supreme Administrative Court are perceived – from a sociological point of view – as courts which are distinguished in a certain way (e.g., hierarchically) within the Polish practice of applying the law. The activities of the Supreme Court and the Supreme Administrative Court are of particular importance to other participants of these practices and constitute an important reference for them. Although the nature of the above commitment is not the subject of this paper, it seems that the problem is related to the primary activity of humans: the way they use language.

Interestingly, the problem of the authority of the judiciary and its relationship to the perception of the results of legal interpretation has been noticed by the Polish Supreme Court itself. The Supreme Court pointed out:

> (…) the authority of the judiciary, the authority of law, implies only fair interpretation and application. Both the law and the authorities applying it will have no authority when a false (unauthorized) interpretation replaces a fair (honest and honouring all rules adopted in the theory of law) interpretation of the law. Everyone – in such a situation – could interpret them not according to the binding – universally approved – rules of interpretation, but according to criteria created to protect their own advantages and interests.[36]

4.3. Adoption of a resolution by 'the highest judicial instances' as an expression of a uniform understanding of the provision

The Constitutional Tribunal also referred to the practice of granting the force of a legal principle to resolutions of the Supreme Court, which, in its opinion – apart from binding the members of the Supreme Court with the expressed interpretation – means giving a homogeneous understanding of the provision in question in judgments and '[i]n this form the content of the cited provision is subject to (...) assessment from the point of view of its compliance with the Constitution'.[37]

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[35] J. Raz, *Authority*…, p. 20.
[36] The Supreme Court's decision of 28 July 2010 (II KK 27/10), LEX No. 619606.
[37] Judgment of the Constitutional Tribunal of 28 January 2003 (SK 37/01), LEX No.74916.

In the justification of the judgment in case (SK 3/11), the Tribunal also commented on the so-called 'concrete resolution' (*uchwała konkretna*) or 'subsumption resolution' (*uchwała subsumpcyjna*).[38] According to the Polish Constitutional Tribunal, the appearance of a result in the form of permanent, common and homogeneous reading of a normative act should be assessed each time, even though such a resolution had already been adopted. This is because

> the adoption of a concrete resolution by the highest instance court does not automatically mean that the interpretation of a normative act (…) may become the subject of constitutional review.[39]

In another case regarding a niche problem in civil law dogmatics, the Tribunal noted that the problem of the constitutionality of the provision under review arose from a change in the judgments of the Supreme Court. The change was caused by a resolution of seven judges of the Supreme Court. I would like to emphasize the Tribunal's two conclusions arising from the judgment. First, the Polish Constitutional Tribunal acknowledged that the understanding of the situation created through the legal norm in question changed after the resolution of the seven judges had been issued, and – second – the Tribunal named the result of the Supreme Court's interpretation (its non-pragmatic interpretation) in this case 'an operationally common interpretation, adopted by other benches of the Supreme Court, and in fact by other courts as well as participants of civil law transactions'. [40]

4.4. A justified manner of interpretation is protected by the provisions of the Constitution

The Polish Constitutional Tribunal formulated the conviction that 'constitutional protection must apply not only to the trust of the citizens in the letter of the law, but also to the justified manner of its interpretation adopted by the state authorities when applying the law'.[41] We can see here the emphasis placed on the social dimension of the judicial activity. A point of reference for the citizen is not only the text of the normative act itself, but also the method of interpretation by the authorities in practice. For the Tribunal, while determining his legal situation, the citizen must be able to examine how the specific authorities apply the law. Therefore, the citizen's trust in fixed ways of interpretation by specific judicial authorities is considered worthy of protection in the Polish constitutional order.

Referring this issue to the distinction between official and unofficial sources of cognition of the law (*fontes iuris cognoscendi*), it can be concluded that the Tribunal does not grant official sources the exclusivity of being a sufficient *fontes iuris cognoscendi*. Riccardo Guastini states that 'ascertaining the prevailing jurisprudential trends (…) is a *necessary* preliminary to identifying the law in force'.[42] It can be emphasized, in accordance with Wojciechowski, that 'the authenticity of the text of a normative

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[38] The Tribunal found that, in the case in question, 'the Resolution of the Supreme Administrative Court (…) was adopted under Article 187 of the Law on Proceedings Before the Administrative Courts of 30 August 2002 (…) to resolve a legal issue that arose while examining a cassation appeal. Therefore, a resolution of this type is binding in a specific case'.

[39] Judgment of the Constitutional Tribunal of 6 December 2011 (SK 3/11), LEX No. 1085775.

[40] Judgment of the Constitutional Tribunal of 28 October 2003 (P 3/03), LEX No. 81787. The notion of 'an operationally common interpretation' was used also in judgment of the Constitutional Tribunal of 9 June 2003 (SK 12/03), LEX No. 80194.

[41] Judgment of the Constitutional Tribunal of 3 June 2008 (K 42/07), LEX No. 382607.

[42] R. Guastini, *A Realistic View on Law and Legal Cognition*, "Revus" 2015/27, http://journals.openedition.org/revus/3304; DOI: https://doi.org/10.4000/revus.3304, No. 49–50, accessed on: 19 March 2022.

act (…) concerns its content, truthfulness in the sense of correspondence with reality, which in this case is the actual will of the legislator (…)',[43] however, these authentic texts – in the opinion of the Tribunal – may not allow for a sufficient determination of the legal situation of a citizen by conducting a methodologically correct (pragmatic) legal interpretation (see 4.5 below). From this perspective, the Polish official sources of the cognition of law (associated with concepts of interpretation established in the legal theory) are necessary, but insufficient to recognize and understand the legal norms.

4.5. Determination of the content of the law in the course of its application and the indicative role of jurisprudence

At a certain stage of the development of its judicial practice, the Tribunal took the view that 'the actual content of the provisions is really formulated only in the process of their application'.[44] In the same ruling, the Tribunal refers to the functioning of provisions in the 'social reality'. It follows that the meaning of the provisions which constitute the subject of the constitutional review in the particular case can be treated as having been established in the 'reality'.

Furthermore, the Tribunal noted that

> the established judicial practice regarding the interpretation of provisions of the law, especially when it is quite homogeneous, indicates the content of the applied law [...], even if, theoretically, there was a possibility of a different interpretation' and '[i]n the absence of legal discrepancies in the interpretation of provisions of the law, the content of the law established in practice should be treated as corresponding to the will of the legislator. To this extent, it is also subject to review from the point of view of compliance with the Constitution'.[45]

It might be concluded that the practice of applying law has (at least) two functions. First, it determines the content of the provisions of the law. At the time of their establishment, the regulations do not yet have 'developed' content, so interpretative practices are required to determine the content. In turn, specific interpretative practices can determine 'the actual meaning of the provision'. Second, the practice of applying the law as a linguistic practice enables familiarization with the content of the provisions ascribed by specific interpreters. In this sense, the practice specifies the content of the provisions, because it expresses – in the form of sentences – the results of the interpretation of the law. The practice of applying the law – according to the Tribunal – would therefore have an indicative role, or, in other words, it would allow the actual meaning of provisions of the law to be established.

Finally, I would only like to mention the thread from the Tribunal's practice regarding the consequences of the point of view described in this article for constitutional review in general. As concluded by the Polish Constitutional Tribunal

> (…) especially because of the obligation to protect constitutional human and civil rights and freedoms, it [the Tribunal – W.R.] cannot ignore the uniform and well-established practice of interpreting the law, even if its correctness is contestable. Such a practice can lead to the emergence of an unconstitutional legal norm that breaches the freedoms or rights of the individual.[46]

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[43] M. Wojciechowski, *Niektóre aspekty tzw. autentyczności tekstów aktów normatywnych* [Eng. *Selected aspects of authenticity of the texts of normative acts*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2003/4, p. 67.

[44] Judgment of the Constitutional Tribunal of 12 April 2011 (SK 62/08), LEX No. 824141.

[45] Judgment of the Constitutional Tribunal of 6 September 2001 (P 3/01), LEX No. 49149.

[46] Judgment of the Constitutional Tribunal of 25 November 2014 (K 54/13), LEX No. 1548179.

Since the content of provisions can be determined in practice, the norm (the content of the provisions) can create situations for legal entities that breach the standard of protection provided for in the Constitution of the Republic of Poland. In other words, practice sometimes 'goes against' the proper results of the interpretation, namely those that can be obtained on the basis of a specific concept of legal interpretation. In such situations, the Tribunal assumed the position of the authority that has the competence to 'organize' the practice.

5. Making use of the PV- and VP-sufficiency. Analytic pragmatism as a metatheory for describing the practice of applying the law

Now, let me use the tools provided by Robert B. Brandom in his *Between Saying and Doing*.[47] The proposed relations, PV- and VP-sufficiency, are those achievements of Brandom's analytic pragmatism which I believe can be usefully employed by legal theory. It can address what Dybowski referred to as '(…) extracting the pragmatic aspect from the project of analytic philosophy in legal theory'.[48]

As Brandom mentioned, the relationship of PV-sufficiency is the relationship between use and meaning, which enables the specification of 'what one must *do* in order to count as *saying* what the vocabulary lets practitioners express'.[49] I would also like to add that – in line with Dybowski – the interpretation of the law can be referred to as the translation of the vocabulary of provisions of the law into the vocabulary of legal norms.[50] Therefore, the extension of the project of analyzing legal texts to include practices in which the vocabulary acquires meaning – according to the 'guidelines' contained in the Tribunal's judgments – could involve determining what the Tribunal believes must be done for the normative acts to mean something. The Tribunal's statements (see para. 4 above) can be transformed into the language of the PV-sufficiency relationship as follows:

(A) A comprehensive analysis of the court's extant interpretive statements shall be conducted to infer the legal norm encoded in the legal texts. For the Tribunal, this is sufficient, in particular, for expressing the vocabulary of the provisions of the law that it allows practitioners to express.
(B) (A) is sufficient if the (pragmatic) interpretation can be distinguished from what is being interpreted.
(C) (A) is sufficient if the relevant interpretive statements can be distinguished from the irrelevant interpretive statements.
(D) In order for (C) to be possible, it must be possible to distinguish statements of the highest judicial instances of the Polish legal system from the statements of other judicial instances.
(E) In order for (D) to be possible, it must be possible to distinguish statements that are sufficiently homogeneous from statements that shape judicial trends.
(F) In order for (E) to be possible, it must be possible to compare one statement to another (their verbal structures).

[47] R.B. Brandom, *Between Saying and Doing. Towards an Analytic Pragmatism*, New York 2008, p. 250.
[48] M. Dybowski, *Teoria prawa wobec wyzwań pragmatyzmu analitycznego* [Eng. *Theory of law and the challenges of analytical pragmatism*], "Archiwum Filozofii Prawa i Filozofii Społecznej" 2017/1, p. 28.
[49] R.B. Brandom, *Between Saying*…, p. 9.
[50] M. Dybowski, *Teoria*…, p. 20.

(G) It follows from (A) to (F) that it is insufficient to have the ability to interpret the relevant subject of constitutional review (where interpretation is understood as pragmatic interpretation made in accordance with a specific concept of interpretation).

The second relationship, namely, VP-sufficiency, takes place between the *practices-or-abilities* and the *vocabulary* in which we refer to those practices-or-abilities. Therefore, 'VP-sufficient vocabularies that *specify* PV-sufficient practices let one *say* what it is that one must *do* to count as engaging in those practices or exercising those abilities, and so to deploy a vocabulary to *say* something'.[51] What should this vocabulary consist of? It will not constitute a complete set of vocabulary that is sufficient, although it can be said that (for the Constitutional Tribunal) the set should include the vocabulary of norms and provisions (including the vocabulary in which those are formulated), as well as the notion of homogeneity, rationality, and comprehensiveness. Furthermore, the set of sufficient vocabulary should contain the notion of hierarchy and authority. It is because, by using this vocabulary, the Tribunal specified the practice of ascription of content to provisions of the law by judicial practice. It can now be noticed that the vocabulary of norms and provisions enables the specification of the practice of distinguishing the (pragmatic) interpretation from what is interpreted (see point B above). The Constitutional Tribunal seems to suggest that the vocabulary of homogeneity, rationality and comprehensiveness give practitioners the resources to point out the relevant interpretive statements.

6. Conclusions

This article serves rather as an overview than a complete description of judicial activity. I attempted to focus on a specific part of the practice of the Polish Constitutional Tribunal and to draw conclusions from such a consideration. Therefore, the analytical part of the article focuses on 'fact-finding', where the Tribunal's statements function as facts. This activity of perceiving what was perceived by the Tribunal satisfies the TOTE characterization.

The term TOTE is an acronym for the Test-Operation-Test-Exit cycle, 'in which each incremental movement is observed, checked against its approach to the objective, and then followed by another movement calibrated by the results of the previous one, until the goal is reached',[52] and it is a pragmatist model of analyzing practices. The feedback-governed TOTE cycles, which are open-ended, ensure that objective practice could be achieved.[53] Because T-O-T-E is feedback governed, the sequence of middle stage O (Operate) and T (Test) can be repeated during the same cycle, so that testing an operation leads to another operation that becomes the subject of a test, and so on (until the 'Exit' is reached).

I think it can be observed that the practice of the Tribunal also complies with the TOTE. By adding new conditions to its argumentation, the Polish Constitutional Tribunal is still refining its approach to the problem of ascription of content to the

[51] R.B. Brandom, *Between Saying*..., pp. 10–11.
[52] R.B. Brandom, *Between Saying*..., p. 64.
[53] R.B. Brandom, *Between Saying*..., p. 178.

provisions of the law by legal practice. This article was, at best, an attempt to provide a theoretical explanation of this approach.

Finally, the viewpoint supported here is far from so-called semantic externalism. This means that I do not intend to replace the intentionality of action with such determinants of meanings which are ultimately beyond any practical activity of the entity, making the entity 'inert' to acts of application. In other words, I think subjectivity cannot become unnecessary as a source of meaning. This is one of the causes why, for instance, the ability to compare the verbal structures of sentences is insufficient to count as *interpreting* provisions of the law. Meanwhile, the (judicial) interpretive practices appear to be *knowing* in the sense which Wilfrid Sellars understood it: 'The essential point is that in characterizing an episode or a state as that of *knowing*, we are not giving an empirical description of that episode or state, we are placing it in the logical space of reasons, of justifying and being able to justify what one says'.[54] Given that the Tribunal's activity is 'open-ended', it is possible that one day the Constitutional Tribunal would find a sufficiently significant reason enabling the addition or change of another *practice-or-ability*, namely what must be done for the normative acts to mean something.

Ascription of content to provisions of the law by judicial practice. Theoretical analysis of the Polish Constitutional Tribunal's judgments

Abstract: The article examines the way in which the Polish Constitutional Tribunal operates, which involves replacing its own process of interpreting the provisions under review by accepting the interpretation of another court. The objective of the article is to provide a theoretical account of the Polish Constitutional Tribunal's conduct to the readers. Therefore, the concepts developed at the Poznan School of Theory of Law are used, namely the distinction between a provision of the law and a legal norm, as well as a distinction between pragmatic and non-pragmatic interpretation. The role of the metatheory used to analyse the Tribunal's conduct is also played by Robert B. Brandom's analytic pragmatism. Analytic pragmatism allows the conclusion to be drawn that, through its activity, the Tribunal indicates 1) what an agent must do (within the legal practice) for the vocabulary of normative acts to mean something (PV-sufficiency), and 2) what vocabulary is sufficient to define those practices (VP-sufficiency). The practice of applying the law can be described with the use of the TOTE concept (Test--Operation-Test-Exit). In this case TOTE cycles are open-ended. Therefore, in its further practice, the Tribunal might indicate further practices-or-abilities which are sufficient for the vocabulary of normative acts to mean something.

Keywords: judicial practice, Constitutional Tribunal, analytic pragmatism, provision of the law, legal norm, application of the law

[54] W. Sellars, *Empiricism and the Philosophy of Mind*, in: R.B. Brandom (ed.), Cambridge (Mass.) 1997, para. 36.

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