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## **Derivative concept of legal interpretation**

### **Introduction**

The aim of this paper is to introduce the foreign reader to the concept of interpreting the law dominating in Polish jurisprudence.

In Polish legal doctrine, several important concepts of legal interpretation have been developed. For the purposes of this paper, one will be mentioned, and the second one will be thoroughly developed. The first is the clarification concept of interpretation, developed by Prof. J. Wróblewski, while the second one is the derivative concept of the interpretation of the law, developed by Prof. Maciej Zieliński.

As a starting point, in order to indicate the sources of the derivative concept, one should take a closer look at the concept proposed by Prof. J. Wróblewski. The clarification concept of the interpretation of law was based on the assumption that a part of the legal provisions does not require interpretation and is understood directly. The adopted assumption was justified by the maxim *clara non sunt interpretanda*, and the process of interpretation itself according to this concept only became necessary when the legal provision was not sufficiently clear. In other words, interpretation can take place only where there is no direct understanding (isomorphia), i.e., in the situation of ambiguity of the lined provision<sup>1</sup>. The task of interpretation was to determine the meaning of particular words or phrases of legal language and thus determine the contents of the “pattern of the proper conduct”. It is worth remembering that “the clarification concept of interpretation can be considered as an important part of the more general derivative concept of the interpretation”<sup>2</sup>.

The derivative concept itself was presented by Prof. Z. Ziemiński in 1966, and developed by Prof. M. Zieliński in 1972<sup>3</sup>. The latest version of the derivative concept of legal interpretation is the “integrated concept of the interpretation”, which is the subject of the paper.

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<sup>1</sup> T. Spyra, *Granice wykładni prawa*, Kraków 2006, p. 74–75.

<sup>2</sup> P. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 2001, p. 158; J. Mikołajewicz, *O możliwych rozwinięciach Macieja Zielińskiego koncepcji wykładni prawa*, w: *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, pod red. A. Choduń, S. Czepity, Szczecin 2010.

<sup>3</sup> M. Zieliński, *Derywacyjna koncepcja wykładni jako koncepcja zintegrowana*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2006, LXVIII, z. 3, p. 94.

Before discussing the main assumptions of the concept, it is necessary to return to the definitions used by Prof. M. Zieliński in his concept of interpretation. An important element of this concept is to distinguish the concept of legal provision and the standard of conduct, and then the legal norm (or legal standard). The distinction between a legal provision and a legal standard was introduced by Prof. Z. Ziemiński<sup>4</sup>. A legal provision is therefore a statement of the fundamental text of a legal act (it does not include, among other things, the legal basis of the event, or the preamble) taken from start to finish, regardless of the number of judgments appearing in it and regardless of whether or not it contains clearly separated elements. A legal standard, on the other hand, is a standard of conduct<sup>5</sup> (i.e. a directive statement) which was established or recognised by the authorised body of the state, in the traditional jurisprudence of the tripartite structure (hypothesis-instruction-sanction), which clearly requires (prohibits) the particular entity, in specific circumstances, the specified behaviour<sup>6</sup>. In Polish legal culture, legal standards are general and abstract standards.

Before it is possible to discuss the essence, phases and concepts connected to the derivative concept of legal interpretation, it is essential to define the concept of interpretation. Interpretation of the law can be understood in the pragmatic sense, as a set of actions aimed at understanding legal provisions, while in the apragmatic sense this term means the result of these actions<sup>7</sup>. In the context of this paper, one should develop the term 'interpretation of the law' in its pragmatic sense, which can be understood in two ways. Firstly, in the narrower sense, it includes actions which are, generally speaking, connected with understanding legal texts. Secondly, in the broader sense, alongside actions connected with the understanding of legal texts, it also covers actions consisting of the conclusions from the norms reconstructed from the legal text of other norms<sup>8</sup>, which is the consequence of the standards in the legal system expressed directly in the text and standards interpreted from it (inference rules)<sup>9</sup>.

The last issue that needs clarification is the purpose for which the interpretation of the legal provisions is made. In accordance with the concept being discussed, the aim of interpretation is to “restore the standards expressed in the legal provisions with the perception

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<sup>4</sup> Z. Ziemiński, *Przepis prawny a norma prawna*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 1960, z. 1, p. 105.

<sup>5</sup> P. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, wyd. 3, Poznań 2005, p. 13.

<sup>6</sup> Ibidem, p. 18.

<sup>7</sup> Ibidem, p. 76–77.

<sup>8</sup> M. Zieliński, *Wykładania prawa. Zasady, reguły, wskazówki*, wyd. 4, Warszawa 2008, p. 48.

<sup>9</sup> P. Wronkowska, *Podstawowe pojęcia...*, p. 92.

of their contents”<sup>10</sup>. This is so-called “derivative detailing”, as Prof. M. Zieliński calls the originally understood goal of the interpretation he later modified, which for the purpose of this paper can be characterised as the path using the right rules of interpretation from the rule by the standard expression to the legal standard and terminally its perception by the interpreter.

## **1. Features of the language of Polish legal texts**

The derivative concept of the interpretation of the law is based on the knowledge of the language of legal texts and it is the recognition and the in-depth analysis of the language features in which the legal provisions are formulated which then become the subject of the interpretation, which in turn constitutes the core of the concept under discussion<sup>11</sup>. Indeed, as indicated by Prof. M. Zieliński, the mere properties of the legal text “condition the derivative nature of the concept of legal interpretation”<sup>12</sup>.

The first feature highlighted by Prof. M. Zieliński in characterising the legal text is its specific variability. The most important issue is the fact that the volatility of a legal text occurs somehow beyond it (hence this “specificity” of variability), it is “virtual”, because it occurs in legal acts changing other legal acts, or in those fragments of legal acts on the occasion changing other legal acts. The variability of the legal text was reflected in the ordering phase of the interpretation.

Another feature is the observation that the legal text is written at the “descriptive level”, and it is read at the “normative level”. In the original version of the derivative concept of the interpretation this feature was described as the quasi-idiomaticity of the text.

The third feature of the legal text is the fragmentation of standards (primarily syntactic and semantic) in the legal texts, which will be discussed in greater depth in the part describing the reconstruction phase of the interpretation. It is the feature of the legal text which the author of the concept determines as the “most derivative”<sup>13</sup>.

Another feature of legal texts are that the language of these texts belong to the Polish language in general, not colloquial, and the formulation of legal texts based on a dictionary of ambiguous words. Of course, the role of the legislator is to use formulations in a clear and

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<sup>10</sup> Ibidem, p. 257.

<sup>11</sup> M. Zieliński, *Derywacyjna koncepcja wykładni...*, p. 96–99; M. Zieliński, *Wykładnia prawa...*, p. 101.

<sup>12</sup> M. Zieliński, *Derywacyjna koncepcja wykładni...*, p. 95.

<sup>13</sup> Ibidem, p. 98.

precise way, although this will not always be possible. In order to obtain the potentially full explicitness, the editor of the text can use two basic tools, i.e., legal definitions and a disambiguating language context.

Another noteworthy feature of the legal text is the presence of vague and imprecise phrases, such as “substantial circumstance”, “substantial damage”, “high degree”, or “special danger”. Their presence in the legal text requires the interpreter to mark out the borders of the 'blur belt of vague phrases', which in practice allows the interpreter to state whether the event occurred within the range of the given name, or the event beyond this scope.

## **2. Phases of interpreting the derivative concept**

An interpretation of the derivative concept is made in three separate phases, which include a set of directives used in order to achieve interim results, which in total lead to the determination of the clear legal norm.

These directives can be combined into one strand comprising three phases of interpretation: ordering, reconstructive and perceptual<sup>14</sup>. Apart from these three phases of interpretation, the fundamental nature of the derivative concept requires certain general directives of legal interpretation to be used regardless of the phase the interpreter is dealing with. The aim of these general directives is to emphasise that the process of interpretation should apply to every legal provision, regardless of the degree of its *prima facie* understanding. Their aim is also to stress that every interpretation decision should be justified, or that one should use the legal text published officially..

### **2.1. Ordering phase**

The first phase of the interpretation in the concept outlined by Prof. M. Zieliński is to eliminate the consequences of the variability of legal texts. Therefore, its main principles are to determine the validity of the legal provision and the word shape in the adopted interpretative moment and also to determine whether the provision being interpreted is in force at the time to which the interpretation (validation) applies<sup>15</sup>.

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<sup>14</sup> M. Zieliński, *Wykładowania prawa...*, p. 319.

<sup>15</sup> K. Pleszka, *Wykładnia rozszerzająca*, Warszawa 2010, p. 147.

This phase consists of a series of rules and interpretation guidelines. However, for the purposes of this paper, it should be emphasised that the goal of this phase is to determine the valid legal state and contents of the provision in question. Prior to the reconstruction phase of the interpretation, it is necessary to determine whether the particular provision (framework, central, supplementary, or modifying)<sup>16</sup> at the moment of interpretation was not changed or repealed, and to establish the verbal shape in which it is valid.

## 2.2. Reconstructive phase

The reconstructive phase of the interpretation begins the substantive work on understanding the given provision in order to reconstruct the standard expressed in the provision<sup>17</sup>. The purpose of the interpretation directives attributed by Prof. M. Zieliński to this phase is to obtain a standard expression, including determination of the recipient (the subject to which the order or prohibition of action is directed) and determination of the circumstances in which the specified behaviour is ordered or prohibited. A standard expression does not yet constitute a legal standard due to its potential ambiguity<sup>18</sup>.

According to the interpretation concept proposed by Prof. M. Zieliński, this phase should begin with recognizing the syntactic features of the provision in question, which will affect the further course of the interpretation process. Thus, the interpreter should first determine whether the provision is single- or multi-sentence. A multi-sentence provision should be treated as the “aggregate of provisions” and a separate interpretation procedure should be used for each sentence. The next step is to determine whether the provision is a framework provision and for how many standards. A framework provision should be interpreted independently, while a non-framework provision in the context of the framework provision. Continuing the attempt to reproduce the standard expression from the legal provision, in reference to the framework provision, it should be determined whether the provision is normatively complete<sup>19</sup>, and in case of normative incompleteness, the provision's supplementary elements should be identified (i.e. to determine the recipient or circumstances).

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<sup>16</sup> B. Kanarek, M. Zieliński, *Porządkująca faza wykładni prawa*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2001, z. 3, s. 1–5, [https://repozytorium.amu.edu.pl/jspui/bitstream/10593/5170/1/01\\_B\\_Kanarek\\_M\\_Zielinski\\_Porz%C4%85dkuj%C4%85ca%20faza%20wyk%C5%82adni%20prawa\\_1-12.pdf](https://repozytorium.amu.edu.pl/jspui/bitstream/10593/5170/1/01_B_Kanarek_M_Zielinski_Porz%C4%85dkuj%C4%85ca%20faza%20wyk%C5%82adni%20prawa_1-12.pdf) (accessed: 19 I 2015).

<sup>17</sup> M. Zieliński, *Wykładania prawa...*, p. 330–334.

<sup>18</sup> P. Wronkowska, *Podstawowe pojęcia...*, p. 81.

Supplementing the incomplete framework provision (or when it was not needed and the framework provision was complete), the provision should be treated as the central provision. One should establish whether it is complete in content and whether it does not require modification. If the central provision does not contain modifiers in the legal text or they are applied, this phase ends with the formulation of the standard expression.

As it follows from the reconstructive phase of the interpretation, it is important whether the standard implementation can be reconstructed from one provision, or whether it is necessary to use several. In this context it should be stated that the fragmentation of legal standards in the provisions is characteristic for the structure of legal text. Prof. M. Zieliński distinguishes two basic ways of fragmenting standards, i.e., syntactic and semantic, sometimes also indicating an explanatory fragmentation.

Syntactic fragmentation<sup>20</sup> of the legal standard in the process of forming the legal text consists of separating the components of legal norms, such as the definition of the recipient, circumstances, order or prohibition of behaviour, and placing them in different provisions. Non-separation elements, or the order or prohibition with the specification of the behaviour are placed in the provision engaging the most important normative matter and are hence called the framework provision. In the reconstruction phase, the framework provision subjects to the supplementation with other elements shaping the standard expression.

Content fragmentation<sup>21</sup> consists of introducing other provisions into the legal text, alongside the framework provision, thus modifying its content. This type of fragmentation is often encountered in civil law<sup>22</sup>. Due to the content nature of modification, Prof. M. Zieliński introduced the concept of the central provision. This definition is used to determine a framework provision which is syntactically complete, i.e., containing all the syntactic elements of the legal standard indicated above<sup>23</sup>. It should be shown that in the legislative texts in which the semantic fragmentation of the standard has been applied, even despite the syntactically complete expression of the standard, it will not be fully expressed semantically, because its elements are contained in the modifying provisions<sup>24</sup>. Such a constructed central provision is an incomplete central provision, requiring modification. From the practical point of view the problem of the semantic fragmentation of legal standards and the need to modify

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<sup>20</sup> M. Zieliński, *Wykładowania prawa...*, p. 115.

<sup>21</sup> Ibidem, p. 124.

<sup>22</sup> K. Pleszka, op. cit., p. 154.

<sup>23</sup> M. Zieliński, *Wykładowania prawa...*, p. 124

<sup>24</sup> M. Zieliński, Z. Radwański, *Stosowanie i wykładnia prawa cywilnego*, w: *System Prawa Prywatnego*, pod red. M. Safjana, t. 1, Warszawa 2007, s. 502.

them is particularly important and often difficult in practice. After all, it should be noted that it is possible to find provisions modifying the central provision at a considerable distance from it, which may lead to difficulties in the process of interpreting the law. What is more, the provisions modifying the central provision can be found in another legal act.

### 2.3. Perceptual phase of the interpretation

At the beginning it should be noted that the concept of perception in the derivative concept of legal interpretation is used in a dual meaning<sup>25</sup>, as the original perception and the final perception<sup>26</sup>.

The original perception corresponds to the “direct understanding” in the semantic concept of interpretation<sup>27</sup>. However, it should be noted that the author of the derivative concept of interpretation has directly indicated that direct understanding, or the original perception, does not replace interpretation, and it does not make it unnecessary. Caution is necessary here in the context of the rest of this paper, which will indicate the position of Prof. M. Zieliński towards the principle of *clara non sunt interpretanda* (the principle *clara*). At this point, for the purpose of discussing the perceptive phase of the interpretation, it is sufficient to show that the derivative concept rejects the principle *clara*, and it should certainly be stated that it rejects such an understanding of this principle, according to which clear provisions *prima facie* do not require interpretation.

The final perception constitutes the final interpretation, as it consists of the “final reading of the given expression, having the specified sense ending the process of the interpretation”, i.e. “the appropriate understanding of the specific message given in the legal text by the legislature”<sup>28</sup>.

The perceptive phase of the interpretation refers to the final perception of the standard expression. This means that activities implemented during this phase of the interpretation only commence after reconstructive activities have been completed and the standard expression of the structure obtained : addressee, circumstances, order or the prohibition of the behaviour, characterised by the normative fullness and logical.

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<sup>25</sup> M. Zieliński, *Wykładowania prawa...*, p. 335–350.

<sup>26</sup> Ibidem, p. 235.

<sup>27</sup> K. Pleszka, op. cit., p. 158.

<sup>28</sup> M. Zieliński, *Wykładowania prawa...*, p. 235–236.

Such a reconstructed expression is indeed complete in the sense that it contains all elements of the standard expression. However, it is not yet a clear expression. Therefore, it is necessary to pass through the final phase of the interpretation to obtain a fully precise legal standard.

The perceptual phase of the interpretation refers to the process of determining the meaning of a given standard expression through the definitive determination of all its component expressions, i.e., words or verbal clusters occurring in the expression. To determine the meaning of particular words or expressions one should refer them to the legal definitions occurring in the legal text or sometimes in another legal text subjected to interpretation. If one finds the legal definition of the given expression, one should subject it to interpretation according to procedures referring to other provisions, although without the possibility of break its clear linguistic meaning. When, however, it is not possible to obtain the explicitness of the interpreted expression using the legal definition, one should recognise that it is ambiguous on the grounds of language directives and that the interpretation procedures should be initiated. These are based on non-linguistic directives, i.e., systemic and functional. In the event of further occurrence of discrepancies between the results obtained, one should determine the hierarchy of these, justify them in detail and select the meaning of a given expression which is according to the highest preferred values, in particular those protected by the Constitution. However, one must remember that the directive concept of the interpretation assumes the interpretation of words or verbal clusters also in cases where these are unambiguous in the language. The process of interpretation in the perception phase, and thus the interpretation process, ends when after carrying out the aforementioned procedure in relation to all words, one obtains the explicitness of the standard expression, and thus from it one recreates the standard of conduct that is subject only to perception.

### **3. The derivative concept of legal interpretation, and the principle of *clara non sunt interpretanda***

The maxim *clara non sunt interpretanda* has a semiotically dual character. It can be understood in a descriptive and directive way. Prof. M. Zieliński indicates that the *clara* principle can be understood in several ways, which also depend on the way the concept of the interpretation is understood<sup>29</sup>.

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<sup>29</sup> Ibidem, p. 59; K. Pleszka, op. cit., p. 187.

Hence, the *clara* principle should be understood as the statement that due to actual reasons, there is no need to interpret (the potential further interpretation – *interpretatio cessat in claris*) the specified cultural creations, whose meaning is objectively clear, or their understanding does not require any special effort. Moreover, understanding this principle may refer to a situation in which there was no “situation of the interpretation”, which leads to the differentiation of the situation of interpretation and isomorphia known to the semantic concept of interpretation.

The principle analysed in its directive meaning can be understood as a total directive, which requires the specific procedure of the interpreter while carrying out the interpretation and, secondly, as the functioning and valid standard of conduct of a given culture, in particular the legal standard governing specific interpretation behaviour. It should also be emphasised that in both directive versions, this rule may concern the admissibility of the interpretation or the admissibility of the further use of the interpretation, in the form of specified interpretation rules.

The criticism of the *clara* principle is based on six theses.

Firstly, it is not embedded in the culture of Roman law and its roots are very modest, and therefore the elimination of this rule does not constitute a breach of broadly understood tradition and legal culture<sup>30</sup>.

Secondly, the acceptance of this principle would require acceptance of the distinction of the situation of interpretation and isomorphia introduced by Prof. J. Wróblewski. However, this distinction should be rejected, because understanding the legal text is possible only through its interpretation.

Thirdly, accepting the *clara* principle will lead to a significant methodological error, namely the lack of the criterion of distinguishing the situation of understanding the law and the situation of its interpretation. Furthermore, it may lead to conceptual confusion and the *clara* principle being identified with the principle of *interpretatio cessat in claris*.

Fourthly, the author refers to pragmatic arguments connected with the practical use of the law (on the official and judicial application of the law). They refer, among other things, to the fact that it is difficult to indicate an indisputable example of the possibilities of using the *clara* principle. Its use does not facilitate the work of entities applying the law, and on the contrary, the principle of the interpretation economy leads to mistakes in interpreting the law.

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<sup>30</sup> W. Rozwadowski, *Etiam clarum ius exigit interpretationem*, w: *W poszukiwaniu dobra wspólnego. Księga jubileuszowa Profesora Macieja Zielińskiego*, pod red. A. Choduń, S. Czepity, Szczecin 2010, p. 37.

Therefore, the *clara* principle should be recognised as harmful in the course of applying the law.

Fifthly, referring to subjective issues, Prof. M. Zieliński poses a question, namely whose clarity of understanding is the referred to by the *clara* principle, or in other words, whose doubts and to what degree the responsibility for the lack of doubt falls on the person who does not have them? In particular, the ethical dimension of this argument is manifested in power relations, when the *clara* principle can be used to limit the rights of the citizen in relation to the state.

Sixthly, the *clara* principle can be used as a veil in the justification of *ratione imperii*.

Thus, the derivative concept of legal interpretation adopted the inverse principle to the *clara* principle, i.e. the principle of *omnia sunt interpretanda*. According to the rules of derivational interpretation, each legal text and its all expressions are subject to interpretation in the process of understanding and using the law. Moreover, the approach to the *clara* principle and explanation during the interpretation of all, even the slightest, ambiguities is reflected in the next property of this concept, i.e., clarification<sup>31</sup>, which is revealed both in the reconstructive and perceptual phase. Therefore, it should be indicated that understanding and rejecting the *clara* principle constitutes one of the most important assumptions of the derivative concept of interpretation.

## Conclusions

In conclusion, the dominant concept of legal interpretation in Polish jurisprudence is M. Zieliński's derivational concept. This concept forms the basis and is also a point of reference for any discussion on the problem of legal interpretation in Polish jurisprudence. Although the narrow scope of the present work makes it difficult to present a full picture of the problem, it does offer readers unfamiliar with the Polish legal system an insight into this concept.

Comprising several successive phases (ordering, reconstructive and perceptual), the concept itself constitutes a coherent whole. The notional framework set out by the author allowed the precise distinction of legal norms from legal regulations of norm-forming expression. A legal norm, inferred from a legal provision and with a tripartite structure (hypothesis - disposition – sanction), may be read from a legal provision (legislation) using the directives of interpretative procedure developed by Prof. M. Zieliński in each phase of

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<sup>31</sup> M. Zieliński, *Wykładania prawa ...*, p. 259–260.

interpretation. One of the bases of the concept is the rejection of the *clara non sunt interpretanda* principle and the order that every legal regulation should be subjected to interpretation (*omnia sunt interpretanda*), regardless of how it is understood *prima facie*. It is this assumption that distinguishes Prof. M. Zieliński's concept from Prof. J. Wróblewski's concept of clarification.

However, this analysis of the characteristics of the language in Polish legal texts might be acknowledged as the basis of the derivational concept of legal interpretation. It is such characteristics as well as the characteristic variability of legal texts, which is produced through other legal texts, and the facts that they are written at the descriptive level and read at the normative level that form the axis of Zieliński's concept. Yet it is important to note that the author himself identified statements regarding the deconstruction of legal norms in regulations as the most derivational characteristic (he points primarily to syntactic and content-based deconstruction, as well as explanatory deconstruction). Understanding the principles of this deconstruction of legal norms in legal regulations enables flawless interpretation of such legal norms in even the most complex of legal texts, by means of a conscious search for all elements of norm-shaped formulation and all regulations modifying the framework regulation.