UNIVERSITY OF LJUBLJANA | PF Faculty of Law

Zbornik znanstvenih razprav – LXXXIII. letnik, 2023
Ljubljana Law Review – Vol. LXXXIII, 2023 • pp. 7–34
ISSN 1854-3839 • eISSN: 2464-0077

© The Author(s) 2023

Scientific article
DOI: 10.51940/2023.1.7-34
UDC: 347.9:340.1(438)

Maciej Wojciechowski[*]

Interpretational Oppositions between the Majority Opinion of the Court and the Dissenting Opinion

Abstract

This article aims to identify the reasons for disagreement in interpretive judgments by examining selected cases from the Polish Supreme Administrative Court. The analysis focuses on the traditional triad of linguistic, systemic, and teleological interpretive canons. The study distinguishes interpretive disputes in a weak and strong sense (axiological disputes) and explores the utilisation of interpretive canons in the examined cases. The values used to characterise specific interpretive positions do not necessarily align with the intended purposes of the interpreted provisions. The analysis of opposing opinions, initially expected to reveal easily describable interpretive oppositions, proved challenging due to the complex nature of argumentation used to justify positions. While classic opposition between linguistic and teleological rationales was occasionally observed, it was difficult to discern such oppositions solely based on the justifications provided. In conclusion, the article tentatively posits that interpretive canons serve a more justificatory than heuristic function, providing limited explanation for occurrence of interpretive disagreements.

Key words

canons of interpretation, judicial dissent, interpretive disagreement, legal argumentation, reasons for disagreement.

[*] *University of Gdansk, maciej.wojciechowski@ug.edu.pl.*

1. Introduction

Judicial dissent captivates the legal community, prompting a fundamental inquiry: why does it occur? However, it is essential to distinguish between why a judge decides to submit a dissenting opinion (reasons for dissenting) and why a judge disagrees with the other judges on the panel (reasons for disagreement). A disagreement among judges is probably a necessary but often insufficient condition for judicial dissent. This is because not every judge who finds themselves in the minority elects to articulate a dissenting view.[1]

The subject of interest in this article pertains to the "reasons for disagreement" between the majority of the court and the dissenting judge or judges. The primary sources to understand these reasons are the court's opinion and dissenting opinions. This research thus focuses on the judges' practice of justifying interpretative claims when they form part of a dissenting faction. The fundamental method of legal reasoning involves interpretative canons, and it is assumed that the manner in which they are employed in the justification process may serve as a means to comprehend the reasons for interpretative disagreement. The inquiry focuses on whether such disagreements arose from applying divergent canons of interpretation within a given method.

2. Terminology and Status of Canons of Interpretation

The concept of canons of interpretation is a central category within the theory of legal interpretation. The term "canons of interpretation" is not the sole designation used for them. In the common law legal culture, they are also referred to as "maxims of interpretation"[2] or "canons of construction".[3] In Polish legal culture, the term "directives of interpretation" gained popularity during the second half of the 20th century.[4] MacCormick

[1] Some authors explain this fact by a factor they call 'dissent aversion', the source of which is the effort a judge must expend in the form of, for example, time to write reasons (Epstein, Landes and Posner, 2013, p. 255). Other authors draw attention to the interactional aspect, which they label as the "interpersonal environment" (Donald, 2019, p. 328) "internal dynamics of the court" (Kelemen, 2013, p. 1346). However, this aspect will not be the subject of this article.

[2] Brudney, 2005, p. 8.

[3] "Lawyers have been known to make the embarrassing linguistic gaffe of talking about *constructing* a statute when they refer to deriving meaning from it". Scalia and Garner, 2012, pp. 39–40.

[4] This term was introduced into the Polish legal language by Jerzy Wróblewski in his work from 1959, titled *Zagadnienia teorii wykładni prawa ludowego* (Issues of the Theory of Interpretation of People's Law). Wróblewski based his theory of interpretation on Kazimierz Ajdukiewicz's concept of meaning from the 1930s, which characterised language by its dictionary, syntactic rules, and directives of meaning. As Wróblewski (1959, p. 145) stated, "it seems that every normative theory of interpretation must assume that the interpreter uses directives of meaningfulness of the language in which the norm was formulated.".

and Summers expressed their doubts regarding such terminology because "a 'directive' may be thought to presuppose some 'director' who issues it," which raises the question about the status of canons of interpretation. In other words, what function do they serve? They have been variously described in the literature as "presumptions about what intelligently produced text conveys"[5], "forms of legal argument [...] by which lawyers show the truth and falsity of legal propositions"[6], "linguistic habits of mind"[7], and "concepts and tools of statutory interpretation"[8]. The diversity in terminology stems from the question of whether canons constitute a tool that judges use to determine the meaning of legal texts (heuristic function) or merely serve as a reservoir of arguments to reason their decisions (rationalisation function).

Within the heuristic function, a distinction should be made between the sequentiality of the interpretative process[9] and the concept of canons of interpretation as heuristics[10]. According to the latter, canons of interpretation are not rules but heuristics in the sense that they represent "ways of coping with the complex enterprise of statutory interpretation"[11] Sequentiality—whether actual or postulated—of the interpretative process signifies a specific sequence of interpretative activities.[12]

The difference between the sequentiality of the interpretative process and treating "concepts and tools of statutory interpretation" as heuristics lies in the usage of canons. In the sequential concept of interpretation, the interpreter should consider the application of each interpretative canon. In the concept of canons as heuristics, only some of them are utilised. This is precisely where the distinction between algorithmic and heuristic action lies. To draw an analogy to a game of chess, algorithmic action involves considering every possible move, while heuristics are simplifying strategies aimed at problem-solving. Staying true to the chess analogy, heuristics mean limiting consideration to only a portion of the moves.[13]

---

5 Scalia and Garner, 2012, p. 73.

6 Paterson, 2005, p. 693.

7 Baude and Sachs, 2017, p. 1088.

8 Mullins, 2003, p. 5.

9 Zieliński, 2008.

10 Mullins, 2003.

11 *Ibid.*, p. 68.

12 In legal education in Poland, the proper interpretative process is often presented in this manner. It starts with distinguishing three methods of interpretation: linguistic, systemic, and teleological. A similar organisation of interpretative stages is presented by MacCormick and Summers in their model of the interaction of interpretive arguments. MacCormick and Summers, 2016, p. 530.

13 Saks and Kidd, 1980, p. 131.

3. Legitimacy of Canons of Interpretation

The legitimacy of interpretative canons in European legal culture is generally considered unquestionable.[14] However, in the ongoing discussion within the common law culture, the validity of canons is being challenged. K. Llewellyn's famous compilation demonstrated that "there are two opposing canons at almost every point"[15], resulting in the indeterminate nature of their application. Other authors express scepticism about the effectiveness of canons as a method, claiming that "no magical formula can guide the interpreter in applying them".[16] Similarly, Cross argues that the canons cannot resolve most interpretive disputes but remain useful on occasion.[17] Richard Posner contends that the style of judicial opinions pretends that the interpretation of statutes is a mechanical application of canons.[18] Moreover, according to Posner, canons allow a judge to create the appearance that his decisions are constrained.[19] Baude and Sachs point out that canons of interpretation are often disconnected not only from the everyday way of speaking of non-lawyers but also from lawyers. Frequently, legal practitioners are not familiar with canons.[20] Additionally, canons are sometimes used in an instrumental manner.[21]

Defenders of canons emphasise their relative clarity, neutral character, common-sense virtues, and their ability to render statutory meaning more predictable.[22] Sets of canons shape what Eskridge and Frickey refer to as "interpretive regimes".[23] These regimes serve the purposes of the rule of law by making interpretation more predictable, regular, and coherent.[24] According to this perspective, a higher level of predictability can be achieved through coordinating canons of interpretation with legislators' knowledge about them. In other words, if legislators are aware of the rules operating within a particular interpretive regime, they will be able to anticipate the results of different statutory interpretations.[25] For instance, if the approving attitude of a specific court towards the canon *expresio unius*

14 Dyrda and Gizbert-Studnicki, 2020, p. 22.
15 Llewellyn, 1950, p. 401.
16 Manning, 2012, p. 180.
17 Cross, 2009, p. 89.
18 Posner, 1983, pp. 805–806.
19 Ibid., p. 816.
20 Baude and Sachs, 2017, p. 1089.
21 Brudney and Ditslear, 2005, p. 7.
22 *Ibid.*, p. 5.
23 Eskridge and Frickey, 1994, p. 66.
24 *Ibid.*
25 *Ibid.*

est exclusio alterius (known in Europe as *argumentum e contrario*) is known[26], the legislator will be aware that any enumerations in the text of the statute should be exhaustive.[27]

Criticism seems to be primarily directed at canons perceived as tools that guide the interpretive process, rather than as arguments used to support one's position. Regardless of the debate over the legitimacy of canons, their presence in the judicial discourse is a fact. Various compilations of canons exist both in common law culture[28] and in civil law countries.[29] Poland, being part of the state law culture, was the subject of a large-scale research project in the early 1990s that examined canons of legal interpretation in selected countries, which revealed the existence of a similar set of interpretive rules consisting of 11 arguments.[30]

The situation that calls into question the canons' capacity to enhance consistency is the submission of a dissenting opinion. When the judicial panel is unanimous, interpretative canons can increase the predictability of the court's decisions. However, in cases where the judges on the panel are not unanimous, and a dissenting opinion is submitted, the effectiveness of canons in ensuring predictability becomes questionable (Brudney and Ditslear, 2005, p. 102).

4. Judicial Dissent

Judicial dissent is

> "any of the acts undertaken by an individual in a judicial or quasi-judicial capacity [...] that expresses that individual's disagreement with the decision of the decision-making body of which he or she is a member of, as determined by the majority."[31]

A useful distinction can be made between a judicial dissent and a dissenting opinion. A judicial dissent is a disclosed objection to the decision of the majority of the panel. In Poland, such an objection is typically conveyed by judges through an appropriate annotation on the judgment, often using the abbreviation "v.s." derived from the Latin term *votum separatum*. On the other hand, a dissenting opinion refers to a set of reasons that a dissenting judge is obligated to provide in writing.

---

26 See: Jansen, 2005.

27 Eskridge and Frickey, 1994, p. 66. However, it is worth noting that one judge remarked, when he was in Congress, "the only 'canons' we talked about were the ones the Pentagon bought". Cross, 2009, p. 97.

28 Scalia identified as many as fifty-seven canons. Scalia and Garner, 2012.

29 Macagno, Sartor and Walton, 2021, p. 44.

30 Summers and Taruffo, 2016, p. 462.

31 Mistry, 2023, p. 3. In international courts, a dissenting opinion is a type of minority opinion along with concurrence, individual opinion, or separate opinion. Dunoff and Pollack, 2022, p. 340.

The judicial dissent allows multiple research perspectives to be addressed. Scholars from fields such as political science and economics employing quantitative research methodologies aim to explain the fact of submitting a dissenting opinion[32]. They accomplish this by considering various factors, such as political or ideological preferences in the case of an attitudinal approach[33] or structural elements, such as the level of workload and the number of judges on the panel as relevant in an institutional approach[34]. However, these studies often overlook the reasons explicitly stated in the court's opinion. This omission appears rooted in doubts concerning the cognitive relevance of the officially stated reasons, which can be traced back to the tradition of American legal realism and its assertion that the reasons presented by judges merely serve as a facade, concealing the true motives behind a given decision.[35]

Such quantitative studies allegedly disregard the internal legal perspective, which recognises the content of legal norms as a genuine factor influencing judges' decisions. Furthermore, participating judges in the discourse express concern that the significance of collegiality in decision-making has been overlooked.[36] However, when examining dissenting opinions, the central focus of the discussion shifts toward the issue of the legitimacy of judicial dissent.[37] Matters under consideration include the impact of dissenting opinions on legal doctrine or future legislative decisions[38] and the jurisprudence of the court.[39]

---

32 Brace and Hall, 1993.

33 Segal and Spaeth, 2002.

34 Lamb, 1986, p. 182.

35 Schauer, 1991, p. 192.

36 Edwards, 1998, p. 1359.

37 The ongoing debate has witnessed the reiteration of similar arguments over the course of several years, at times employing the same values to support opposing viewpoints. An example of such a value is judicial independence, which can be invoked both to endorse and contest the permissibility of judicial dissent. Advocates of the right to dissent argue that it represents an expression of a judge's internal independence from their colleagues and superiors (Keleman, 2021, p. 1359). Conversely, opponents contend that dissents, by revealing a judge's position, may exert influence on the state's decision-making process regarding reappointments in the case of international judges (Dunoff and Pollack, 2022, p. 348). Notably, certain esteemed dissenting judges have expressed reservations about this right. For instance, in the dissenting opinion of *Northern Securities vs. United States* (1904), Oliver Wendell Holmes declared his general position on judicial dissent as 'useless and undesirable' (Holmes, 1904).

38 In common law culture, the impact of dissenting opinions on doctrine and future rulings is emphasised. A famous example is the words of Benjamin Cardozo: "The dissenter speaks to the future" (Cardozo 1938, p. 36) or Judge Charles Hughes: "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." (Hughes, 1928, p. 68)

39 Dunoff, Pollack 2022, p. 345. Judges claim that dissent may lead the majority opinion's author to "refine and clarify her initial circulation" (Ginsburg, 2010, p. 3). Justice Antonin Scalia outlines

The aforementioned approach perceives judicial dissent as an inherently individual act that distinguishes a judge from other panel members.[40] However, the submission of a judicial dissent actually signifies a disagreement among judges. It is the legal disagreement itself that Ronald Dworkin focuses on in his well-known argument against legal positivism. Dworkin discerns disagreements in three categories: matters of fact, matters of law, and matters of political morality and fidelity.[41] His primary emphasis lies on disagreements regarding the law, particularly theoretical disagreements.[42] In theoretical disagreements, lawyers and judges "disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law."[43] In essence, these disputes revolve around the criteria for legal validity,[44] that is, what should be regarded as law.[45] Lawyers from a continental legal culture may find it perplexing to view these disputes as criteria for legal validity, as they tend to apply such criteria to legal acts rather than legal propositions. A more comprehensible explanation, as provided by Leiter, is that when judges engage in theoretical disagreements, they are actually disagreeing about the interpretation of legal sources.[46] Lawyers and judges who debate whether courts discover or create law may not be fully aware that they are engaged in such a dispute.[47] Dworkin attributes their adherence to what he terms the "plain fact" perspective on the foundation of law

ways in which a dissenting opinion can improve the quality of the majority opinion: mobilising the author of the majority opinion when he or she knows that the dissenting opinion will be filed, changing or even altering the outcome of the vote so that the dissenting opinion becomes the majority opinion (Scalia, 1998, p. 22). Justice Brennan claims that judicial dissent forces "the prevailing side to deal with the hardest questions urged by the losing side." (Brennan, 1986, p. 430) Similar remarks are made by Polish judges. One stated: "If someone submits a dissenting opinion, it works both ways. He has to prepare better. But it also forces the judge who will write the reasoning to make sure that it is prepared very carefully." Wojciechowski, 2019, p. 121.

40 Donald, 2019, p. 323.

41 Dworkin, 1986, p. 3.

42 The second type of disagreement Dworkin mentions are empirical disagreement. For instance, such disagreement may be about what words are in the statute books (Dworkin, 1986, p. 5) or "Did a majority really approve the legislation?" or "Didn't the executive veto the legislation in a timely manner?" (Leiter, 2009, p. 1219). In case of empirical disagreements, the parties agree about the conditions of validity but disagree on whether those conditions apply in a given case (Marmor, 2015, p. 3). Dworkin describes them as "hardly mysterious" (Dworkin 1986, p. 5).

43 Dworkin, 1986, p. 5.

44 Leiter, 2019, p. 250.

45 Plunkett and Sundell, 2013, p. 243.

46 Leiter 2009, p. 1222.

47 Dworkin, 1986, p. 6

> "they appear to be disagreeing in the theoretical way about what the law is, they are really disagreeing about what it should be. Their disagreement is really over issues of morality and fidelity, not law".[48]

Dworkin argues that legal positivism cannot explain such disagreements. Under the positivist approach, the parties to the dispute are disingenuous, meaning that they are really trying to tell what the law should look like, or they remain in error.[49] In the latter scenario, they hold the belief that there exists a correct legal answer, despite the absence of any supporting social rule.[50]

5. Assumptions

Addressing purpose of this article necessitates making several methodological assumptions. Firstly, it assumes that canons of interpretation serve as tools for providing reasons supporting an interpretative standpoint and play a role in the decision-making process. These functions of canons align with Hans Reichenbach's distinction between the context of discovery and the context of justification.[51] Building upon this foundation, Polish legal theorist Jerzy Wroblewski introduced a distinction between explanation and justification of court's decision in the 1970s.[52] Wroblewski argued that the court's opinion does not explain the decision but aims to provide a persuasive rationale.[53] Contemporary research suggests that the separation between the context of discovery and the context of justification is not a rigid boundary.[54] Consequently, it is reasonable to assume that canons of interpretation also serve a heuristic function to some extent.

The second assumption was that the linguistic canons include: the plain meaning rule, the rule of legal language, the rule of special meaning, the prohibition of ascribing the same meaning to different terms (synonymous interpretation), the prohibition of giving different meanings to the same phrases (homonymous interpretation), prohibition of interpretation *per non est*, a prohibition of differentiation unless carried out

---

48 *Ibid.*, p. 7.

49 Leiter, 2009, p. 1224

50 *Ibid.*

51 Reichenbach aimed at narrowing the focus to the context of justification and recognising questions in the context of discovery as unphilosophical (Howard, 2006, p. 8). Context distinctions have temporal and logical dimensions. In the case of the temporal version, the process of discovery is followed by the process of justification. In the logical version, the justification is separated as its objectives are logical reconstruction, explication, and assessment. Schickore and Steinle, 2008, p. viii.

52 Wróblewski, 1976, p. 7.

53 *Ibid.*

54 Novak, 2018, p. 81.

by the legislator.[55] Systematic interpretation encompasses the obligation to interpret in accordance with the constitution and international norms, the prohibition of interpretation leading to gaps, the prohibition of interpretation leading to contradictions, and the argument from the structure of the act.[56] Teleological interpretation includes the rule to consider the legislator's intentions, to consider the consequences of a particular interpretation, and the prohibition of interpretation leading to absurdity.[57]

The third assumption pertains to the identification of sentences that can be regarded as manifestations of the interpretation of the law. The choice lies between asserting that every sentence in the majority or dissenting opinion reflects some form of interpretation and asserting that only specific sentences manifest the judge's interpretation. It is posited during analysis that not all sentences within the opinions of the court serve as manifestations of the interpretation of law. Even if we assume that interpretation occurs in every case (rejecting the doctrine of *claritas*), it is not always readily discernible within the written justification. A distinction can be made between an explicit declaration of the mode of interpretation and an ascribed method of interpretation. In the former case, the author of a given opinion explicitly declares the adoption of a particular mode of interpretation. In the latter case, the interpreter does not explicitly declare the use of a specific method of interpretation, but it is possible to attribute the application of a particular method based on the articulated rationale within the written justification.

The fourth assumption is that both the written opinion of the court and the dissenting opinions are susceptible to interpretation. M. Tushnet similarly argues that understanding a judge's dissenting opinion relies not only on the author's intention but also on the reader's interpretation.[58] In this context, notion of "interpretation" is used broadly, referring to the act of understanding.[59] The interpretation objective may resemble that of interpreting a legal text, such as discerning the lawmaker's intention, in this case, the judge's intention. However, when interpreting a judge's statement, the focus shifts from what the judge precisely meant to the cultural significance of the judgment and the values it embodies. The key point is that a judgment can be perceived to align with specific values that may not necessarily align with the explicit purpose attributed to the text of the law. An example of this broad concept of interpretation can be seen in a judgment where the court advocates for a formalistic interpretation of the law. From the perspective discussed here, this formalism may be regarded as a manifestation of a lack of trust or a unique desire for security.

---

55 Morawski, 2002, pp. 115 ff.

56 *Ibid.*, pp. 161 ff.

57 *Ibid.*, pp. 217–222.

58 Tushnet, 2008, p. XXIII.

59 Marmor, 2005, p. 9.

6. The Object of Study and Methodology

Dissenting opinions in Polish courts, including the Constitutional Court, are rare occurrences[60]. However, the significance of these sentences is not determined by their frequency. As observed in the United States during discussions on methodological standards in legal science and the issue of representativeness, there are cases that hold importance beyond statistical significance.[61] It can be reasonably presumed that situations where the court decides in an enlarged panel are key for the issue to be decided. Hence, the analysis focuses on a sample of 24 resolutions from the Supreme Administrative Court (SAC, *Naczelny Sąd Administracyjny*) to which 48 dissenting opinions were submitted.[62] Those resolutions were chosen because of their accessibility in the Central Database of Administrative Court Rulings at the time of the analysis (convenience sampling). The resolutions of the SAC are judicial decisions made by panels in an enlarged composition. The standard practice at the SAC involves delivering judgments by three-member panels. However, resolutions are made by seven-member panels or judges from the respective chamber(s), or in the case of *en banc* sessions, all judges from the court participate[63]. These resolutions are issued to clarify the application of legal provisions that have led to inconsistencies in case law (abstract resolutions), or to address significant legal issues in specific administrative court cases (specific resolutions). Judicial disagreements in the SAC are mainly interpretive, whereas in the Provincial Administrative Courts (PAC, *Wojewódzki Sąd Administacyjny*), one can speak of disputes concerning the determina-

[60] Since 1997, when the current Constitution was enacted, the annual percentage of cases in which at least one dissenting opinion to the judgment of the Tribunal was submitted is 14%. According to the Central Database of Administrative Court Rulings, the percentage of dissenting opinions in Polish administrative courts from 2004 to 2023 did not exceed even 1% of the total number of judgments issued in any year. In absolute numbers, it ranged from 3 in 2004, the first year of judging in Provincial Administrative Courts, to 61 in 2014. Between 2017 and 2023, there were 190 dissenting opinions in Provincial Administrative Courts (sixteen PACs) and 90 in Supreme Administrative Courts]. If one were to consider that judicial disputes resulting in the submitting of dissenting opinions constitute a manifestation of theoretical disagreement, then B. Leiter is right writing that "massive agreement about the law – not disagreement – is the norm in modern legal systems" (Leiter, 2009, p. 1228). The submission of dissenting opinions, however, is not necessarily the only determinant of a finding of theoretical disagreement. Another may be, much more frequent and more difficult to empirically identify, inconsistency of case law.

[61] Goldsmith and Vermeule, 2002, p. 160.

[62] Number of 24 resolutions represents 34% of all SAC resolutions for which a separate opinion was submitted according to the Central Database of Administrative Court Judgments available online (accessed on 29 May 2023).

[63] In the Supreme Administrative Court (SAC), there are three chambers: the Financial Chamber, the Economic Chamber, and the General Administrative Chamber.

tion of the facts of the case, their qualification, or the scope of the normative basis, i.e. which provisions of the statute should be applied in the case.[64]

The qualitative analysis of the majority and dissenting opinions involved assigning specific methods of interpretation to particular passages in both texts. Additionally, the created database included a rubric for the "subject of the dispute", which provided a descriptive characterisation of the factors that, according to the researcher, divided the judges in their decision-making. The excerpts from both opinions were encoded as manifestations of linguistic, systemic, and functional (teleological) interpretation. The encoding was in the form of binary code (0s and 1s). Schematically, an exemplary situation where the all three methods of interpretation were present in opinion of the court were described as "majority_(1,1,1)". A corresponding situation regarding a dissenting opinion was presented as "dissent_(1,1,1)". However, it was already established at the preliminary stage that merely registering the utilisation or declaration of a specific method of interpretation in this form did not adequately reflect its significance for the entire reasoning or the nature of the opposition formed. It was necessary for the researcher to "immerse" himself in the disputed matter discussed by the parties. Naturally, this did not reach the level of understanding of the intricacies of the case by the adjudicating judges.

The method employed, in which the cited excerpts serve as support for the researcher's theses, can be described as an intermediate approach combining elements of content analysis and argumentation from paradigm cases. This approach, referred to as interpretive, is subjective in nature and shares similarities with the work of literary critics or social activists critiquing the public speeches of politicians.[65] Within this framework, researchers focus on key judgments, seeking out similarities and differences between them.

In the initial segment, I introduce one of the primary concepts that arose during the preliminary phase of acquainting myself with the material, namely the concept of interpretive opposition. Subsequently, I proceed to delineate two variations of this form of opposition, weak and strong. The latter is referred to as axiological opposition and can manifest itself in either a bipolar or unipolar fashion. Subsequently, I proceed to illustrate the oppositions present within each mode of interpretation.

7. The Concept of Interpretive Opposition

The fundamental conceptual category that I intend to employ in analysing the dynamics of a panel dispute is the notion of opposition. This concept can manifest itself in either an "axiological" or an "interpretive" manner. Axiological opposition refers to a scenario wherein the opposing positions of the dispute can be attributed a specific interpretation based on a given value. This alignment does not imply a causal relationship. In

[64] Wojciechowski, 2019, p. 316.

[65] Hall and Wright, 2008, p. 78.

other words, the fact that judges make decisions that can be interpreted as favourable to the taxpayer does not mean that they make such decisions solely because they are advantageous to the taxpayer. This kind of opposition does not necessarily revolve around the methods of functional or teleological interpretation. Alignment with a particular value, such as legal certainty, can be expressed by emphasising linguistic arguments. In other words, safeguarding a specific value does not necessarily entail a particular method of interpretation. For instance, legal certainty can be protected in one case by emphasising linguistic arguments, while in another case, provisions can be interpreted purposively. A similar idea is expressed by Scalia when he states that "a textualist reading will sometimes produce 'conservative' outcomes, sometimes 'liberal' ones."[66] The interpretive opposition signifies a situation where conflicting positions arise from the adoption of different canons of interpretation or the same canons applied in distinct ways.

It should be noted that interpretive opposition and axiological opposition are not mutually exclusive concepts, provided one accepts the premise that values are invariably present in the process of interpretation. "The presence of values in the process of interpretation" denotes a certain degree of inclination toward a particular method of interpretation. This presence can be substantiated through either empirical or analytical means. Empirical demonstration entails the researcher's ability to cite or attribute arguments from either the majority or dissenting opinion that justify the use of a specific method of interpretation. Analytically, the presence of values emerges as a consequence of adopting a particular conception of specific methods of interpretation. For example, systemic interpretation, by virtue of referencing legal principles, possesses an axiological nature since principles are intrinsically linked to values.[67] This connection with values becomes even more apparent in purposive interpretation since the objectives denoted by legal texts typically correspond to values.

Regarding the presence of values in the process of interpretation (referred to as "axiological saturation"), there are two discernible positions derived from the aforementioned approaches. The first claim asserts that values are always present in the process of interpretation, while the second claim posits that values are only present in some cases. The second claim suggests that in technical-legal interpretive problems, the reconstruction of the values at stake is either impossible or so dubious that the claim of their presence is relinquished. In such instances, proponents of this claim argue that maintaining the presence of values would amount to an outright metaphysical assertion—an assertion that may be true but cannot be proven as such. Consequently, advocates of this claim would recognise only the empirical method to demonstrate the thesis of value presence.

The first claim can be formulated in stronger and weaker versions. In the stronger version, the justification for the presence of values is empirical, as the content of the majority

66 Scalia and Garner, 2013, p. 43.

67 Avila, 2007, p. 29.

or dissenting opinion allows for the identification of the values that determine a mode of interpretation. Values are present in the interpretation process in the weaker sense when their presence is analytical, meaning they are not explicitly invoked by the interpreter in the justification but rather result from the mere preference for linguistic arguments. In such cases, the concept of the "axiological capacity of linguistic interpretation" emerges, referring to the question of whether favouring this method can be viewed as a manifestation of alignment with a specific value. Recognising that it may be motivated by the pursuit of objectivity or legal certainty supports the adoption of the first claim for further analysis. Embracing the assumption of value presence in the process of interpretation enables the presentation of the proposed categorisation of interpretive disputes in this article.

Interpretive disputes can be typologically classified into disputes over "second-level rules of interpretation,"[68] which are axiological disputes based on the assumption (1) in its weaker version (referred to as "weak interpretive oppositions"), and disputes with a pronounced "presence" of the axiological element (known as "strong interpretive oppositions"). Strong interpretive oppositions can take the form of bipolar disputes involving the opposition of two conflicting values or unipolar disputes in which both sides acknowledge the same value but differ in the legal mode of its realisation.

7.1. "Weak" Interpretive Oppositions

Interpretive opposition in the weaker sense corresponds to a situation that can be considered a classic example, where one side of the dispute adopts a position based on linguistic arguments while the opposing side favours a purposive interpretation. An illustrative case of an interpretive dispute in legal theory and philosophy is the opposition surrounding Herbert Hart's rule of "no vehicles in the park".[69] A key characteristic of this type of opposition is that the attribution of values to the disputed position relies solely on the choice of a specific mode of interpretation, such as textualist or consequentialist.

The practice of providing reasons for a particular interpretation is intricate and typically follows a cumulative argument form, wherein multiple arguments support the same conclusion.[70] Due to this complexity, recognising the nature of interpretive opposition necessitates meticulous analysis and cannot be reduced to a simplistic binary classification. For instance, consider the case of a resolution that can be schematically coded as majori-

[68] Wróblewski, 2016, p. 282.

[69] Hart, 1958, p. 607 The example is widely regarded as fictional, but F. Schauer argues that Hart most likely drew it from the 1931 case *McBoyle v. United States*, in which the issue arose as to whether an aircraft was a vehicle within the meaning of a federal law prohibiting the transportation of stolen vehicles across state borders. It is interesting to note Schauer's suggestion that Hart became aware of this case at Harvard University in 1956–1957, where he may even have learned about it from L. Fuller. Schauer, 2008, p. 1115.

[70] MacCormick and Summers, 2016, p. 526.

ty_(1,0,1) – dissent_(0,1,1),[71] indicating that the majority justification invoked linguistic and purposive rationales, while the dissenting opinion invoked systemic and purposive rationales but not linguistic. However, such schematic coding fails to adequately capture the intricacies of the oppositions observed in this case. Utterances coded as manifestations of teleological interpretation in both the majority and dissenting opinions did not pertain to the same provision of the statute. Furthermore, the declared purposive interpretation in the majority opinion was actually confined to a single sentence which may illustrate that not all invoked interpretive arguments carry equal weight or significance. The majority opinion predominantly revolved around arguments of a linguistic nature, particularly applying argument from a legal definition. In contrast, this case's dissenting opinions clearly emphasised teleological arguments. Dissenting judges criticised the resolution for relying on linguistic interpretation and excluding purposive interpretation "more appropriate [...] in view of the EU subject matter of the regulation."[72]

7.2. "Strong" Interpretive Oppositions – Bipolar and Unipolar

Strong interpretive oppositions can manifest in either a bipolar or unipolar form. In the bipolar form, a dispute arises between a majority and a dissenting opinion, presenting an opposition between two conflicting values. Unipolar disputes, on the other hand, involve parties deriving different consequences from shared values. These situations resemble what Cass Sunstein calls "incompletely theorized agreement on general principle", where individuals who accept a principle may not agree on its specific implications in a particular case.[73]

Within the analysed group of the Supreme Administrative Court resolutions, those categorised as manifestations of bipolar disputes can be framed as a clash between the values of individual interest and public interest. However, this opposition of two values is a simplification that reduces various factors to a common denominator, and in practice, the fit between these factors and the description may vary. In the interpretation of tax law, undoubtedly, this tension is particularly apparent due to the nature of obligations towards the state. This applies not only to substantive tax law but also to procedural rules. An illustrative example of how the interpretation of tax procedural rules can align with the interests of the taxpayer or the Treasury is the case of interpreting the phrase "failure to issue an individual interpretation" by a tax authority. The subject of the dispute was whether the deadline for issuing a decision is considered met at (1) the moment the authority issues the decision or (2) when the decision is delivered to the taxpayer. The interpretation favouring (1) was in support of the taxpayer, while (2) favoured the tax

[71] Resolution II GPS 1/09.

[72] Dissenting opinion of Judge K. Stec to resolution II GPS 1/09.

[73] Sunstein, 2018, p. 35.

authorities and the interest of the Treasury. Notably, the Supreme Administrative Court delivered two conflicting judgments in this case.[74] In the first one, majority took holistic approach using three types of interpretation methods (majority_(1,1,1) while dissenting judge limited his argumentation to reference to one legal principle (dissent_0,1,0).[75] In the 2009 resolution, both sides of the dispute employed a holistic approach in terms of the modes of interpretation used (majority_(1,1,1) – dissent_(1,1,1)), yet the conclusions derived from these arguments remained divergent.

This case is particularly interesting because the values underlying a specific method of interpretation appear to determine the choice of interpretation method. The names of these values were also mentioned in the justifications provided. The judge who presented the dissenting opinion in the 2009 resolution emphasised the value of legal security for individuals. Notably, this judge also served as the judge rapporteur in the 2008 resolution. Conversely, in the position favouring the tax authorities, the value at stake was the certainty of the authority regarding compliance with the deadline as a result of its own action, namely, the issuance of the interpretation.[76] Indeed, a possible consequence of the position favourable to the taxpayer would have been the uncertainty for the authority regarding whether it had issued the decision within the legal deadline, considering the taxpayer's evasive behaviour.[77] Taking into consideration the issue of certainty/uncertainty allows for an alternative depiction of this dispute, namely in terms of trust. This means that the dispute can be described not only as an opposition between the interests of the individual and the State Treasury but also as a conflict related to the level of trust. One of the justifications for adopting a particular interpretive stance is rooted in a lack of trust toward potential actions of the tax authority or towards the taxpayer, who is suspected of potentially attempting to evade receiving the directed interpretation.

An illustrative instance of opposition that resists easy categorisation within the framework of the axiological tension between individual and general interests is the dispute surrounding the legitimacy of foundation to act as a social organisation in administra-

[74] First, a seven-judge panel issued a resolution on 11 April 2008, I FPS 2/08 with an interpretation favourable to the taxpayer. One judge dissented. However, a year later, the full panel consisting of 29 judges interpreted the same phrase unfavourably for the taxpayer. Resolution of 14 December 2009, II FPS 7/09, with six judges submitting dissenting opinions.

[75] Dissenting opinion of Judge B. Gruszczynski to resolution I FPS 2/08.

[76] This is stressed in the majority opinion of the resolution II FPS 7/09: "If the taxpayer is to gain, through the delivery of an interpretation, certainty about the law, then the same certainty, as to the end of the deadline for issuing a decision, should have the tax authority. The protective function of the law is not one-sided. The deadline in question sets the limits of security for both the interested party and the tax authority."

[77] This aspect was raised in a dissenting opinion to the resolution I FPS 2/08, in which it was written: "Regardless of the fact that people also work in the body, no entity can be imposed an obligation whose deadline for performance ends on a day that is unforeseeable to it."

tive proceedings pertaining to the legal interest of another individual.[78] The Supreme Administrative Court classified the foundation as a social organisation based on the principle of citizen participation in the functioning of the state. A dissenting opinion argued that foundations should not be classified as social organisations. The dissenting judges claimed that the resolution favoured social interests over individual interests, violating the right to a fair judicial procedure. While it may seem like a clear opposition between pro-social and pro-individual positions, the situation was more nuanced. The pro-social interpretation of the resolution is derived from the dissents rationale rather than explicit statements in the resolution itself. The dissenting opinion's view of social interest appears influenced by past ideologies, which valued social interests over individual ones. Examining the specific case that led to this resolution, involving the Helsinki Foundation for Human Rights participating in refugee status proceedings, further complicates the understanding of the dispute. The depiction of a pro-social resolution versus a pro-individual dissent loses clarity in this context. It raises questions about whether the dissenting opinion represents doctrinal conservatism rather than a strict opposition between individual and social interests. It becomes a clash between flexibility and a willingness to re-evaluate existing legal categories versus defending the status quo in reasoning.

The second category of disputes that can be recognised within the realm of strong oppositions pertains to unipolar disputes. Such disputes revolve around disagreements regarding the implementation of teleological interpretation. The designation "unipolar disputes" is subordinate to the broader classification of "disputes regarding the method of purposive interpretation." As demonstrated in the paragraph 6.3, the disputes examined in the context of the analysed administrative court resolutions do not primarily concern the objective of the interpreted provisions, but rather focus on the manner in which the legal text should be interpreted to achieve this objective.

8. Interpretive Oppositions in SAC Resolutions Applying the Same Method of Interpretation

During the analysis, it was observed that conflicting interpretive conclusions could be supported by the same method of interpretation. Considering that a method of interpretation encompasses multiple interpretive directives, this finding should not be surprising. Nonetheless, it seemed pertinent to examine instances where the same method of interpretation was employed to determine whether judges, who held differing opinions in each case, relied on distinct arguments within that method of interpretation, as initial intuition would suggest. Additionally, it is important to establish a distinction between interpretive oppositions in the pragmatic and non-pragmatic sense.[79] Pragmatic interpre-

[78] Resolution II OPS 4/05.

[79] MacCormick, 1978, p. 207 pointed out the antinomic nature of rules and canons of interpretation.

tive oppositions occur between arguments of interpretation, while non-pragmatic interpretive oppositions arise between statements resulting from applying interpretive rules. In the case of non-pragmatic interpretive oppositions, the specific type of interpretive arguments employed may remain undisclosed, as they are not explicitly stated in the opinion text.

8.1. Oppositions Within the Framework of Linguistic Interpretation

The following types of interpretive opposition could be found in terms of linguistic interpretation:

(1) The positions of the majority of the panel and the dissenting opinion refer to different canons of linguistic interpretation;
(2) The positions of the majority of the panel and the dissenting opinion refer to the same linguistic canons of interpretation;
(3) The dispute is over the meaning of the legal term in question, but no interpretation canons are invoked or attributable.

Situations in which parties to a judicial dispute use different arguments belonging to the canon of linguistic interpretation were expected. One of the sources of divergent judicial rulings in Poland, for example, is the issue of the scope of application of legal definitions. This involves determining whether the statutory definition of the word "A" should solely apply to the word "A" as used in the specific statute containing the definition or whether this legal definition can be applied to the word "A" used in another statute. Such sources of judicial disagreements can be identified in interpretive oppositions occurring within the Polish provincial administrative courts.[80] When the interpreter believes that the legal definition from another act cannot be applied in a particular case, they generally resort to the rule of the plain meaning. This creates an opposition between the canon of plain meaning and legal language. This kind of situation occurred in the cited resolution II FPS 7/09, where the majority opinion analysed the meanings of the word "to issue" as found in other legal acts. The judge writing a dissenting opinion referred to the plain meaning of the interpreted word.[81]

A less typical and thus perplexing situation arises when both parties to a dispute refer to the same interpretive canon. For instance, the resolution and the author of the dissenting opinion agreed on the result of the linguistic interpretation conducted using the legal language canon but differed in their assessment of the outcome of this interpretation. The majority opinion considered this result sufficient, labelling the alternative approach using functional interpretation as "law-making". On the other hand, the dissenting opinion

[80] Wojciechowski, 2019, p. 329.

[81] Dissenting opinion of Judge M. Dożynkiewicz to resolution II FPS 7/09.

acknowledged the necessity of functional interpretation.[82] In another case, both parties relied on the same canon of legal language but arrived at different results. The application of the legal language canon in resolution II FPS 7/09 was illustrated above. The approach of the second judge who wrote a dissenting opinion to this resolution can also be characterised as employing the canon of legal language, albeit in a different manner. The judge referred to the provision to which the interpreted provision made reference, considering it to be a kind of legal definition constructed to "emphasise the essential feature of the action taken", and concluded that this very provision "contains indications reflecting the sense (meaning) of the autonomous concept of 'issuance of an interpretation'."[83]

8.2. Oppositions within the Framework of Systemic Interpretation

In cases involving disputes where systemic interpretations were identified, it was confirmed that, in most instances, the parties involved do not employ the same canons of interpretation under this method. Examples of discrepancies within the framework of systemic interpretation can be observed in the following pairs:

- Divergent assessment of the regulation in question to its compliance with EU law (resolution)[84] versus allegations of inconsistency with other laws and moral principles (dissenting opinion);[85]
- Emphasis on the primary principle of taxpayer liability (resolution)[86] versus a declaration to refrain from interpreting the provision without considering provisions on the tasks of the administrative judiciary (dissenting opinion);[87]
- Interpretation of a legal provision with reference to constitutional regulations (resolution)[88] and the application of the *in dubio pro tributario* principle, along with the rejection of the relationship between the statutory institution and the constitutional principle of property protection (dissenting opinion);[89]
- Rejection of the interpretation outcome due to a violation of the equality principle (resolution)[90] and the speediness of proceedings principle as the criterion for assessing the correctness of the interpretation made (dissenting opinion).[91]

82 Majority opinion to resolution I FPS 4/09

83 Dissenting opinion of Judge Kmieciak to the resolution II FPS 7/09. The provision that the judge considered to be a kind of legal definition read: "Notice of a revised individual interpretation shall be served on the entity to which the interpretation was issued in a given case."

84 Resolution I FPS 4/09.

85 A dissenting opinion of Judge M. Kołaczek to the resolution I FPS 4/09.

86 Resolution I FPS 7/07.

87 A dissenting opinion of Judge M. Niezgódka-Medek to the resolution I FPS 7/07.

88 Resolution I GPS 1/11.

89 Dissenting opinion of Judge R. Batorowicz to the resolution I GPS 1/11.

90 Resolution I OPS 4/09.

91 Dissenting opinion of the Judge J. Runge-Lissowska to resolution I OPS 4/09.

The above juxtapositions, resulting from the pairing of these manifestations of systemic interpretation, may imply that they are mutually incompatible. However, in most cases, this is not the case, as the displays are considered "out of context", meaning their incompatibility may stem solely from the contrasting conclusions they aim to justify. It also appears that the incompatibilities between manifestations of systemic interpretation conducted by different interpreters are less pronounced compared to those seen in linguistic and purposive interpretation.

8.3. Interpretive Oppositions within the Framework of Teleological Interpretation

The number of canons governing teleological interpretation, as examined in most legal theory studies, deviates significantly from the number of rules pertaining to linguistic and systemic interpretation. There is a notable scarcity of rules in the former category at least in Polish discourse on legal interpretation. Consequently, it was anticipated that within the context of teleological interpretation, interpretive oppositions would arise not due to the adoption of distinct canons within this type of interpretation, but rather in terms of teleological reasoning. This mode of reasoning comprises of two premises: first, the reasoner possesses a goal (referred to as "g") and believes that a particular tool (denoted as "α") is a suitable means of achieving goal g. Based on this foundation, the reasoner chooses α.[92] With regard to a legal text, the reasoning unfolds as follows: premise 1 (P(1)) asserts that legal provision R is directed towards goal P, while premise 2 (P(2)) posits that the meaning M of the legal provision represents the means to attain goal P (teleological premise). Consequently, the conclusion (C) is that meaning M should be adopted. Disagreements that arise within this framework usually concern not the varying purposes ascribed to the legislator, but rather the question of which meaning of a legal provision most effectively realises that purpose.

The resolution of such a question often takes the form of a pair of assertions. One assertion contends that a particular interpretation of a provision of a statute violates its intended purpose, while the other maintains that the purpose remains intact. For example, such a situation occurred in a resolution (reference) where the divergence between the majority opinion and the dissenting opinion centred around whether a specific procedural action contravened the provision's purpose of objective and impartial adjudication.[93] In cases where the judicial dispute does not revolve around ascertaining the *ratio legis* of a given provision but rather the teleological premise, it may be possible to classify the opposing positions as "liberal" or "restrictive". In this context, "liberalism" denotes a tendency to gradually relax the requirements stemming from a particular value, while a

[92] Sartor, 2010, p. 183.

[93] Resolution I OPS 3/05.

"restrictive" approach entails upholding and reinforcing the existing requirements emanating from a given value.[94]

In some instances, determining that judges do not actually differ on the first premise of teleological reasoning necessitates additional reconstructive procedures. Take, for instance, a dispute over the interpretation of procedural rules. Here, the majority opinion posited that the purpose of the interpreted statutory provisions was to safeguard the right to a fair trial. In contrast, the dissenting opinion argued that the purpose of those provisions were "the efficiency of the proceedings" and "the discipline of the body". Yet, if one accepts that "streamlining the pending proceedings" and "disciplining the state authority" are manifestations of the right to a fair trial, then the incompatibility between the reasoning of the resolution and the dissenting opinion becomes evident at the level of the second premise of practical reasoning, namely the teleological premise.

9. Unitary and Bipolar Disputes and Teleological Interpretation

By considering the concepts of bipolar and unipolar disputes discussed earlier in relation to disputes involving the teleological premise, it might initially appear that the latter are always unipolar in nature. However, it becomes evident that the presence of a dispute concerning the interpretation of a teleological premise does not automatically classify it as unipolar. In certain cases, despite the agreement between the majority opinion and the dissenting judge regarding the *ratio legis*, the dispute can still be categorised as bipolar. For instance, in one resolution (II OPS 1/10), the majority opinion and the dissenting judge concurred on the purpose of the interpreted provisions, which was the protection of agricultural and forest land.[95] Nevertheless, the dispute can be understood as a clash between the value of safeguarding the independence of local self-government (represented in the resolution) and the value of upholding an individual's property rights (expressed in the dissenting opinion). Thus, a bipolar dispute does not necessarily arise solely from a divergence in the *ratio legis*. The values that enable the classification of a particular interpretive position as compatible or incompatible with a given dispute may differ from the interpreters' stated objectives for a given legal text. Additionally, it should be emphasised that no discernible increase in the significance of purposive argumentation was observed in cases considered as interpretational in the strong sense.

[94] The study had a purely qualitative nature and was conducted on a small sample, but it is worth noting that in those cases where such descriptions could be applied, dissenting judges acted as "advocates" of a particular value, while the majority opinions tended to be more "liberal".

[95] Resolution II OPS 1/10.

10. Conclusion

The article attempted to identify reasons for disagreement in selected Polish Supreme Administrative Court resolutions. The analysis focused on the rules of interpretation encompassing the traditional triad of linguistic, systemic, and teleological arguments. The initial outcome of the study was the distinction between interpretive oppositions in a weak and strong sense (axiological opposition). However, this differentiation did not translate into a discernible pattern of utilising canons of interpretation within the examined sample.

An explanation for this could be the limitation of the study to the administrative court, where cases with a clear ideological significance are considerably fewer compared to, for instance, the constitutional court. By distinguishing between types of interpretative opposition, hypotheses can be formulated for potential future research, such as investigating whether the frequency of references to linguistic canons increases in cases of a technical nature. Another research question that could be formulated in future research is whether the number of teleological arguments rises in other courts where strong interpretative opposition takes place.

In cases labelled as manifestations of axiological opposition, no increase was observed in the significance of teleological interpretation. However, it is crucial to note that the study was qualitative one, and a significant outcome of the analysis is the observation that the values used to characterise a particular interpretive position may not necessarily align with the objectives of the interpreted provisions. The explanation for this differentiation can be attempted by distinguishing between an external and internal perspective. The external perspective entails an outlook from an entity that may not necessarily be concerned with the manner of resolving a particular case. Their attitude is descriptive and cognitive. Law, from this standpoint, is perceived as a cultural phenomenon. In contrast, the internal perspective is typically legal and practical, focused on the objective of ascertaining the legislator's intentions and resolving the case.

Before analysing the opinions justifying divergent conclusions, it was expected that clear interpretive oppositions would emerge. However, this expectation was not confirmed. While instances of classical opposition between linguistic and teleological rationales were identified, articulating such oppositions proved challenging due to the manner in which the positions were substantiated. The study did not identify cases in which both the court's position and the dissenting judge's position were solely supported by a single type of rationale. Nonetheless, there were instances in which one interpreter justified its stance through cumulative-form arguments, while the opposing view could be reduced to a single-form argument. MacCormick and Summers argue that the reasons for presenting all the arguments in full may be stylistic, institutional, or political/constitutional when courts aim to demonstrate that their decision is grounded in robust legal rationales

rather than ideological preferences of the judges.[96] In the case of administrative courts in Poland, it is difficult to speak of political/constitutional reasons since the vast majority of cases they handle are of a technical nature.[97] Nevertheless, the manner of constructing justifications depending on the type of interpreted provisions (e.g., tax, construction, procedural) could be an interesting subject for further research.

Another significant challenge in describing interpretive oppositions arises from the assumption that not every argument equally supports the conclusion. In other words, the mere observation of teleological or linguistic interpretation does not imply that each carries the same weight.[98]

The proposition concerning the relative force of individual argumentation in justifying an interpretive position necessitates stronger empirical evidence. If confirmed, this would constitute a significant argument in the ongoing discussion within the Polish legal theory concerning the so-called sequentiality of interpretation. There are two stances in Polish legal theory in this regard. The first postulates a specific order of interpretive steps as an antidote to the inconsistency of canons.[99] Such an approach to interpretation can be likened to a path where successive stages are delineated by distinct canons of linguistic, systemic, and teleological interpretation.[100] The second position, ascribed to J. Wróblewski's theory of legal interpretation, distinguishes canons of the first and second degree. The canons of the first degree encompass linguistic, systemic, and teleological canons of interpretation. The role of the canons of the second degree is to resolve situations where the application of the canons of the first degree leads to divergent outcomes. Adopting the distinction between the two levels of canons leads to interpretation as a discursive process.[101] The observation of the relative weight of individual arguments presented by judges would constitute further confirmation that the sequential vision of interpretation remains merely a maximalist postulate, and a more appropriate depiction involves considering competing reasoning and argumentative rationales.

The thesis regarding the variable weight of interpretative arguments is also consistent with the concept of interpretative canons as heuristics.[102] Let me recall that, according

96 MacCormick and Summers, 2016, p. 527.

97 In the context of the ongoing crisis in the Polish judiciary since 2016, characterised by issues at the level of the Constitutional Tribunal (see: Bricker 2020) and the activities of the National Council of the Judiciary, deemed to be established in an unconstitutional manner, cases have emerged within administrative courts where echoes of this crisis resonate.

98 Mullins, p. 73.

99 Zieliński, 2008, p. 296.

100 Traces of sequentiality can also be observed in Mullins, 2003, p. 6-9, who discusses a "two-step framework", where the initial step entails the analysis of the statutory text, and if the text is not deemed clear, "then a court must go further". *Ibid*. p. 9.

101 Płeszka, 2010, p. 167.

102 Mullins, 2003, p. 50.

to the heuristic strategy, an entity considers only certain possibilities that it believes will help in problem-solving. Legal interpretation, however, is an exceedingly intricate activity involving numerous variables. Consequently, judges often operate under conditions of uncertainty.[103] Mullins explicitly discusses the diverse potency of individual concepts and tools of statutory interpretation, which changes depending on the case.[104] The heuristic strategy of selectively employing canons stems from the understanding of interpretation as a mental processing endeavour. According to this concept, this cognitive activity does not adhere to rigid artificial rules akin to legal statutes and is likely beyond the control of such rules.[105] For this reason one cannot expect high level of predictability in the process of interpretation.

The varying weight of interpretative arguments is not an element of justification easily accessible in the reading. It demands a thorough analysis and methodology. This fact alone may support the criticism of canons as failing with limiting of judicial discretion.[106] The most frequently repeated criticism aimed at interpretative canons pertains to their indeterminacy and the possibility of applying different canons to the same provision.[107] The compilation made by Llewellyn encompassed maxims cited by courts in various cases. Their inconsistency was thus potential in the sense that the aim was to demonstrate that a judge could choose one of two mutually incompatible canons. It can be argued, therefore, that every interpretative regime contains the potential for disagreement. The situation of submitting a separate opinion is an exemplary instance of disagreement, and one could expect that in the analysed sample, similar "thrusts and parrys" could be identified, as Llewellyn indicated in reference to his legal system. However, the practice of judicial disagreement analysed in this article turned out to be more complex. Indeed, cases were identified where an application of a different rule of linguistic interpretation (e.g., the classic opposition between plain meaning rule and legal meaning rule) was probably the reason for disagreement. Inconsistencies were also recognised in the realm of teleological interpretation and the underlying teleological premise.

Nevertheless, a cautious conclusion suggests that there is another reason for interpretive disagreements. It lies not in different canons within the same interpretive method but in distinct sets of legal provisions and principles that form the basis for interpretive positions. Even if these sets are similar for both sides of the dispute, the reason of disagreement seems to lie in the emphasis one side puts on the different provisions of a statute, that he/she eventually interprets. To describe this situation, it will be useful to employ Wróblewski's category of "decision of validity", which refers to a fractional deci-

[103] *Ibid.,* p. 54.

[104] *Ibid.,* p. 72.

[105] *Ibid.*, p. 42.

[106] Brudney and Ditslear, 2005, p. 7.

[107] Llewellyn, 1950, p. 401.

sion at his model of the judicial application of law. This type of decision (not in formal sense) determines which rules the court treats as valid and can be utilised as arguments justifying a decision.[108] It means that disagreeing judges adopt different premises, i.e. the content of their validation decisions differ, and these premises are justified through interpretive canons. Such a practice of justifying their positions may lead to the conclusion that judges are more focused on the outcome of their decision rather than the interpretative methodology through which they arrived at it.[109] Viewing this situation from a different, broader perspective, it can be regarded as an example of the circumstance described by Descartes in "Discourse on the Method", where "diversity of our opinions" arises "solely from this that we have different ways of directing our thoughts, and do not take into account the same things".[110] To the extent that differences in opinions stem from varying premises, such as utilising slightly different provisions of the statute, the plausibility of the thesis of indeterminacy of interpretative canons diminishes somewhat.

In conclusion, it is worth noting that the manner of utilising interpretative canons may vary depending on the problem being addressed. This applies not only to cases where the role of linguistic canons increases due to the technical dimension of the matter.[111] The role of linguistic canons may also diminish in situations where the legal issue cannot be formulated as questions such as "what does word X mean?" or "does word X signify situation Y?" In such cases, there is a significant probability that maxims of linguistic interpretation will not play a pivotal role. An exemplary question that appears to trigger alternative lines of argumentation, including methods of interpretation other than linguistic, could be one concerning the procedural consequences of a particular action or its legal character. Identifying such situations and creating their typology is one of the many topics that can be explored in future research.

This work was supported by the Polish National Centre of Science. Grant number 2014/13/D/HS5/03399.

[108] Wróblewski, 1992, p. 85.

[109] Cross, 2009, p. 141.

[110] Descartes, 2006, p. 5.

[111] Brudney and Ditslear, 2005, p. 71.

References

Avila, H. (2007) *Theory of Legal Principles*. Dordrecht: Springer.

Brace, P., and Hall, M. (1993) 'Integrated Models of Judicial Dissents.' 55 *Journal of Politics* 914 (55).

Bricker, B. (2020) 'The (Very) Political Dissent: Dissenting Opinions and the Polish Constitutional Crisis'. *German Law Journal*, *21*(8), pp. 1586–1605.

Baude, W., and Sachs, S.E. (2017) 'The Law of Interpretation'. *Harvard Law Review*, 130(4), pp. 1079–1147.

Brudney, J.J., and Ditslear, C (2005) 'Canons of construction and the elusive quest for neutral reasoning'. *Vanderblit Law Review*, 58(1), pp. 1–116.

Cardozo, B. (1938) *Law and Literature and Other Essays and Addresses*. Narcourt: Brace and Company.

Cross, F.B. (2009) The Statutory and Practice of Statutory Interpretation. Stanford: Stanford University Press.

Descartes, R. (2006) [1637] *Discourse on the Method*. New York: Oxford University Press.

Donald, B.B. (2019) Judicial Independence, Collegiality, and the Problem of Dissent in Multi-member Courts', *New York University Law Review*, (94), pp. 317–339.

Dunoff, J.L., and Pollack, M.A. (2022) The Road Not Taken: Comparative International Judicial Dissent. *American Journal of International Law*, *116*(2), 340–396.

Dyrda, A., and Gizbert – Studnicki, T. (2020) Granice sporów interpretacyjnych w prawoznawstwie [The Limits of Interpretative Disagreements in Jurisprudence]. *Archiwum Filozofii Prawa i Filozofii Społecznej*, 2, pp. 19–34.

Epstein, L., Landes, W.M., and Posner, R.A. (2013) *The Behavior of Federal judges: a Theoretical and Empirical Study of Rational Choice*. Cambridge: Harvard University Press.

Eskridge, W.N., and Frickey, P.P. (1994) 'Foreword: Law as Equilibrium', *Harvard Law Review* 108, pp. 26–108.

Frickey, P. 'Faithful interpretation'. *Washington University Law Quarterly* 73, pp. 1085–1094.

Goldsmith, J., and Vermeule, A. (2002). Empirical methodology and legal scholarship. *The University of Chicago Law Review*, 69(1), pp. 153–167.

Hall, M.A., and Wright, R.F. (2008). Systematic Content Analysis of Judicial Opinions. *California Law Review.* 96(63), pp. 63–122.

Hart, H. (1958) 'Positivism and Separation of Law and Morals'. *Harvard Law Review*, vol. 71(4), pp. 593–607.

Holmes, O. (1904) Dissenting opinion in Northern Securities vs. United States, 193 U.S. 197

Howard, D. (2006) 'Lost Wanderes in the Forst of Knowledge: Some Thoughts on the Discovery-Justification Distinction' in Schickore, J., and Steinle, F. (2006). *Revisiting Discovery and Justification. Historical and Philosophical Perspectives on the Context*, Dordrecht: Springer, pp. 3–22.

Hughes, Ch. (1928) *The Supreme Court of The United States: Its Foundation, Methods, and Achievements: an Interpretation*. New York: Columbia University Press.

Jansen, H. (2005) 'E Contrario Reasoning. The Dillemma of the Silent Legislator'. *Argumentation* 19, pp. 485–496.

Kelemen, K. (2013) 'Dissenting Opinions in Constitutional Courts'. *German Law Journal*, *14*(8), pp. 1345–1371.

Leiter, B. (2009) 'Explaining Theoretical Disagreement'. *The University of Chicago Law Review*, 76(3), pp. 1215–1250.

Leiter, B. (2019) 'Theoretical Disagreements in Law: Another Look' in: Plunkett, D., Shapiro, S., and Toh, K. (eds.) (2019) *Dimensions of Normativity. New Essays on Methaethics and Jurisprudence*, New York: Oxford University Press, pp. 249–262.

Llewellyn, K.N. (1950) 'Remarks on the Theory of Appellate Decision and The Rules or Canons about How Statutes Are to Be Constructed.' *Vanderbilt Law Review*, 3(3), pp. 395–406.

Macagno, F., Sartor, G., and Walton, D. (2021) *Statutory Interpretation. Pragmatics and Argumentation*. Cambridge: Cambridge University Press.

MacCormick, D.N. (1978) *Legal Reasoning and Legal Theory*. Oxford: Clarendon Press.

MacCormick, D.N., and Summers R.S. (2016) 'Interpretation and Justification' in MacCormick, D.N., and Summers, R.S. (eds.) (2016), *Interpreting Statutes. A Comparative Study*. London and New York: Routledge, pp. 511–544.

Manning, J.F. (2012) 'The New Purposivism'. *The Supreme Court Review*, 2011(1), pp. 113–182.

Marmor, A. (2005) *Interpretation and Legal Theory*. Oxford and Portland: Hart Publishing.

Mistry, H. (2023) 'A Performative Theory of Judicial Dissent.' *Modern Law Review* 86 (3), pp. 729–755.

Morawski, L. (2002). *Wykładnia w orzecznictwie sądów. Komentarz [Interpretation in the Case Law. Commentary]* Toruń: Dom Organizatora.

Mullins, M. (2003), 'Tools, Not Rules. The Heuristic Nature of Statutory Interpretation.' *Journal of Legislation*, 30(1), pp 1–76.

Novak, M. (2018) 'Rhetorical Legal Argumentation through a Multimodal Dimension' in Novak, M., and Strahovnik, V., (eds.) (2018) *Modern Legal Interpretation: Legalism or Beyond*, Newcastle: Cambridge Schola Publishing, pp. 70–91.

Paterson, D. (2005) 'Interpretation in Law' *San Diego Law Review* 42(2), pp. 685–710.

Posner, R.A. (1983) 'Statutory Interpretation: In the Classroom and in the Courtroom,' *The University of Chicago Law Review* 50(2), pp. 800–822.

Plunkett, D., and Sundell, T. (2013) 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes.' *Legal Theory*, 19(3), pp. 242–281.

Płeszka, K. (2010) *Wykładnia rozszerzająca [Extensive Interpretation]*, Warsaw: Wolters Kluwer Polska.

Saks, M., and Kidd, R. (1980) 'Human Information Processing and Adjudication: Trial by Heuristics' *Law and Society Review* 15(1), pp. 123–160.

Sartor, G., (2010) 'Doing Justice to Rights and Values: Teleological Reasoning and Proportionality.' *Artificial Intelligence and Law*, 18, pp. 175–215.

Segal, J., and Spaeth, H. (2002) *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.

Shapiro, D. (1992) 'Continuity and Change in Statutory Interpretation' *New York University Law Review* 67(5), pp. 921–960.

Schauer, F. (2008) 'A Critical Guide to Vehicles in the Park'. *New York University Law Review*, 83(4), pp. 1109–1134.

Scalia, A. (1998) 'Dissents.' *OAH Magazine of History*, 13(1), pp. 18–23.

Scalia, A., and Garner, B. A. (2012) *Reading Law: The Interpretation of Legal Texts*, St. Paul: Thomson/West.

Schickore, J., and Steinle, F. (2006) 'Introduction: Revisiting the Context Distinction' in Schickore, J., and Steinle, F. (eds.) (2006). *Revisiting Discovery and Justification. Historical and Philosophical Perspectives on the Context*, Dordrecht: Springer, pp. vii–xv.

Lamb, C. (1986) 'A Microlevel Analysis of Appeals Court Conflict: Warren Burger and His Colleagues on the D.C. Circuit' in: Goldman, S., and Lamb, C. (ed.) *Judicial Conflict and Consensus. Behavioral Studies of American Appellate Courts*. Lexington: The University Press of Kentucky.

Summers, R.S., and Taruffo, M. (2016) 'Interpretation and Comparative Analysis' in: MacCormick, D.N., and Summers, R.S. (eds.) (2016), *Interpreting Statutes. A Comparative Study*. London and New York: Routledge, pp. 461–510.

Sunstein, C. (2018) *Legal Reasoning and Political Conflict*, New York: Oxford University Press.

Tushnet, M. (2008) *I Dissent. Great Opposing Opinions in Landmark Supreme Court Cases*. Boston: Beacon Press.

Wojciechowski, M. (2019) *Spory sędziowskie. Zdania odrębne w polskich sądach [Judicial Disputes. Dissenting Opinions in Polish Courts]*, Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.

Wróblewski, J. (1976) 'Uzasadnianie i wyjaśnienie decyzji sądowej' [Justification and Explanation of Judicial Decision]. *Studia Prawno-Ekonomiczne*, vol. XVI, pp. 7–23.

Wróblewski, J. (2016) 'Statutory interpretation in Poland' in: MacCormick, D.N., and Summers, R.S. (eds.) (2016), *Interpreting Statutes. A Comparative Study*. London and New York: Routledge, pp. 257–309.

Wróblewski, J. (1992) *The Judicial Application of Law*, Dordrecht: Springer-Science+Business Media, B.V.

Zieliński, M. (2008) *Wykładnia prawa. Zasady, reguły, wskazówki [Interpretation of Law. Principles, rules and leads*, Warsaw: LexisNexis.