

# AXIOLOGICAL PROBLEMS OF STATUTORY INTERPRETATION

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## INTRODUCTION

**T**he article concerns the relationship between two fundamental subjects of jurisprudence: interpretation of law and axiology. Both are analysed from a theoretical perspective, but the conclusion offers some pieces of advice to legal practitioners.

It must be highlighted that interpretation of the law as presented in this paper pertains to certain aspects of its theory according to its perception in civil law. Civil law should be understood as the Continental Legal Culture or the Legal Culture of Statutory Law; in any case, the opposite culture is the Common Law System (which is sometimes defined as “unwritten law”<sup>1</sup>). Another important condition is that interpretation of the law is not analysed as if it was based on case law and its precedential model of law application - its main feature is its uncodified character (in general, still valid today)<sup>2</sup>. In legal systems of the Continental Legal Culture, due to its monolithic legal sources, which are normative acts only, interpretation of the law is connected only with statutory law. Its theoretical claims, which include rules of legal reasoning, are sometimes used for interpretation of texts with normative statements which are not on the list of sources of the law, conventions in particular, but primarily deal only with the question of sources of the law, which, in countries of the statutory legal culture, involve only an enumerative list defining the types of normative acts (i.e. the Constitution, statutes, and local regulations). This is why, when speaking about legal interpretation, lawyers in the Continental Legal

1 CF Stychin and L Mulcahy, *Legal Methods and Systems* (4th edn, Sweet & Maxwell 2010) 88.

2 L Vencatasamy, *The Common Law and Civil Law Traditions*, <[www.academia.edu/18096090](http://www.academia.edu/18096090)> accessed 16 October 2020.

Culture (that is the Civil Law Systems) are only concerned about matters of statutory interpretation. This is due to the fact that legal interpretation in that system concerns statutory law and the key element in the process of interpretation is the application of a legal procedure.<sup>3</sup> It is a type of statutory interpretation which is done by courts or administrative institutions. When they provide interpretation of the law, they only focus on statutory law, since it can only be put in the context of a legal decision (i.e. a court judgment, an administrative decision, etc.).

This will be discussed further in greater detail, but it is worth mentioning that there are also two perspectives of legal interpretation. The first is the analysis which is provided by jurisprudence, and the second is the approach in legal practice. The first perspective leads to theory of legal interpretation. This involves not only a description of the practice of legal interpretation performed by certain types of legal practitioners (i.e. judges). It also includes tradition of the statutory interpretation, general knowledge about it which comes from the past, modern knowledge about language, rules of legal reasoning, etc.<sup>4</sup>

Axiology, defined as the theory of values in jurisprudence, is classified as a part of general science of the law in the domain of legal theory, which, apart from ontology and epistemology of the law, is one of its constituents. According to Herbert L.A. Hart, despite there being many philosophies of the law,<sup>5</sup> in case of jurisprudence, we all admit that it is an extremely important issue both for legal doctrine and legal practice. There is no doubt that the law, as a normative system, is both a carrier and a creator of values. Creation of values occurs through legal rules which a lawmaker provides to the society. The relationship between legal interpretation and axiology often manifests itself in the fact that the contents of a legal rule pertain to an axiological matter; otherwise, the axiological perspective of an interpreter could result in a different meaning of the legal rule which is interpreted, especially if it has certain axiological connotations.

This paper discusses. The problem of axiological determinants of statutory interpretation can be analysed from the perspective of legal theory (axiology as a problem of jurisprudence) or as a matter of legal practice when an interpreters are asking themselves about the value conveyed in a legal rule. Finally, it is a fundamental matter for the law in the Continental Legal Culture, regardless of the perspective of analysis, to be generally understood as, in accordance with the Roman maxim, *boni et aequi*.

## ASSOCIATIONS WITH LEGAL INTERPRETATION

Statutory interpretation is a branch of legal theory with a large number of conceptions which postulate something about it (so-called normative theories of legal interpretation) or only describe the

<sup>3</sup> Similar to the legal syllogism. See F Bennion, *Statutory Interpretation* (2nd edn, Butterworths 1992) 820.

<sup>4</sup> R Cross, J Bell, and G Engle, *Statutory Interpretation* (Butterworths 1995) 21.

<sup>5</sup> HLA Hart, *Pojęcie prawa* [The Concept of Law] (J. Woleński tr, Wydawnictwo Naukowe PWN 1998) 30.

6 Generally speaking, legal interpretation comes from hermeneutics. See H Rabault, *Granice wykładni sędziowskiej* [Borders of Judicial Interpretation] (B Janicka tr, Scholar 1997) 21, 41.

7 The ancient Roman law in the cultural combination of the Continental Legal Culture is juxtaposed with the Christian axiology and the Greek theory of truth as the main foundations of the statutory systems and their theory of interpretation. See T Giaro, 'Roman Law Always Dies with a Codification' in A Dębiński and M Jońca (eds), *Roman Law and European Legal Culture* (Lublin 2008) 15.

8 C Varga, *The Paradigms of Legal Thinking* (Szent Istvan Tarsulat 2012) 44.

9 See E Waśkowski, *Teoria wykładni prawa cywilnego. Metodologia dogmatyki cywilistycznej w zarysie* [Theory of Interpretation of the Civil Law. Civil Law Methodology – an Outline], (Izba Adwokacka w Warszawie 1936) 15.

practice of interpretation by certain types of legal practitioners.<sup>6</sup> The knowledge that has been gained through the practice of statutory interpretation has been greatly influenced by several historical factors which have shaped its current status; these are the following:

- the ancient Roman law with some of its maxims which can be adopted to the theory of interpretation, for example: *omnis definitio in iure civili periculosa est: parum est enim, ut non subverti potest* (every definition in civil law is dangerous, for rare are those that cannot be subverted) plus the fact that the ancient Roman law was also being created through its interpretation by famous lawyers. That which we understand as a source of legal knowledge nowadays was not its source in contemporary understanding at all;<sup>7</sup>
- the Justinian's Code with its important claim that this was the first great adoption of the traditional Roman law to fit the actual needs of the society. Justinian was aware that meaning of the law can easily be changed by interpretation, so he forbade to interpret it<sup>8</sup>. However, as it is commonly known amongst legal practitioners, it is impossible to perceive any text without the process of interpretation;
- the process of Roman law adoption in the Middle Ages which was done, generally speaking, via its reinterpretation according to contemporary needs. That process influenced legal interpretation, because it highlighted the possibility and necessity of changing the meaning of the law without modifying a legal text;
- sometimes the French Revolution is mentioned as a historical factor influencing the evolution of statutory interpretation, because of establishing the paradigm of prohibiting the interpretation of the law. The new regime which established the new, revolution-based law was afraid that some judges who survived the revolution could try to restore the feudalistic relations through creative interpretation of the new law. This paradigm influenced not only the legal doctrine in France (which, as some say, still exists in some way), but also the whole jurisprudence in the Continental Legal Culture. It is also mentioned that that was one of the factors of "the historical school's" popularity in the first half of the 19th century. By comparing the evolution of a legal text, legal practitioners were trying to adapt its meaning, hiding the interpretation methods which were valid at the time of performing the process.<sup>9</sup> Nevertheless, the historical school of jurisprudence and its influence on statutory interpretation was observed to a great extent in the first half of 19th century. That is, until the emergence of the continental variant of legal positivism which, in the second half of that century, created a number of concrete theories of legal interpretation. It is said that theory of legal interpretation is much

younger than legal interpretation itself and came to life with legal positivism and its attempts to transform jurisprudence into a “fully-fledged” science within the naturalist paradigm of the methodology of science. Despite its failure to reach that goal, it was the time of not only well-grounded knowledge of statutory interpretation and its tradition, but also establishing methods of interpretation and the theory of the whole interpretation process. This is important, because in the times of legal positivism, legal practitioners were aware that statutory interpretation is different from the “humanistic” approach to interpretation. This was true due to two general reasons: difference of the object (any legal text is written in a different form than other human texts) and the role of legal ways of reasoning;

- the naturalistic upturn after the Second World War, thanks to which legal practitioners realised that statutory interpretation is not only an important formal way of obtaining the meaning, but also produces effects. Formal correspondence to methods of interpretation could lead to an absolutely amoral meaning of legal rules, so statutory interpretation has always certain connections with axiology.

Despite there being a variety of theoretical statements on legal interpretation, for the purposes of this analysis, it is only necessary to indicate that in the field of the Civil Law Tradition (the Continental Legal Culture), one can distinguish several associations with the term “legal” or “statutory” interpretation. These associations exhaust the common way of thinking about legal interpretation. It is possible to recognize, among others, the following associations:

1. The first one defines interpretation as a number of decisions. It is a decision-based way of thinking about statutory interpretation. It is a common perspective for legal practitioners, such as judges, prosecutors, lawyers, or legal advisers who understand legal interpretation as a step-by-stop decision making process. They are interested in what is right and what is wrong in order to understand the meaning of a legal text which is examined in a particular case. It is sometimes connected with the term “operative interpretation”, because its effect is always connected with an individual, concrete legal rule. However, the correct usage of operative interpretation narrows the act of interpretation only to that which is established by law enforcement authorities. Nevertheless, legal interpretation is conventionally understood as a process of obtaining the meaning of a legal text through a very formal method.<sup>10</sup> For lawyers, this perspective is attractive because they always look for the justification of methods they use to obtain the meaning of a legal

<sup>10</sup> Which is done via textual or non-textual methods of interpretation. See FR Easterbrook, ‘The Absence of Method in Statutory Interpretation’, (2017) 84 *The University of Chicago Law Review* 81 <<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5986&context=ucilrev>> accessed 16 October 2020.

11 Although interpretation is limited to vague phrases, or it is assumed that any decision to interpret must be justified. See A Grabowski, 'Clara non sunt interpretanda vs. omnia sunt interpretanda: A Never-ending Controversy in Polish Legal Theory?' (2015) 27 *Revus* [Online] <<http://revus.revues.org/3326>>, DOI: <https://doi.org/10.4000/revus.3326> accessed 18 October 2020.

12 The legal method is sometimes "considered as a weapon in the fight against the theory of randomness and intuitive nature of reflection in the science of the law" (quotation from A Bator, Z Pulka, and A Sulikowski, 'Czy koniec teorii prawa?' [Is This the End of the Theory of Law?] (2011) 312(3337) *Acta Universitatis Wratislaviensis. Prawo* 13). It is also well known that "Kirchmann, a prosecutor from Berlin, who in 1848 possibly delivered his most famous speech for the prosecution, in his lecture entitled *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* not only critically evaluated the state of jurisprudence's development, but also stated that the knowledge of legal practitioners is utterly useless or even 'parasitic,' saying, among other things, that 'legal practitioners have become worms preying on rotten wood, turning their backs on what's healthy. They nest and spin their thread in a sick world, and the science of the law is becoming a servant of coincidence, error, passion, and misconception, with its eyes stared into the future only'" (quotation from J. Stelmach, 'Pozytywistyczne mity metody prawniczej' [Positivist Myths of the Legal Method] 2012 3(11) *Forum Prawnicze* 7).

- rule.<sup>11</sup> Describing the process and using theoretical statements about legal interpretation, lawyers can easily justify their decisions about the method of obtaining the meaning of a legal rule.
2. The second concerns putting the sign of equality between the notions of legal interpretation and legal argumentation. It is also particularly common in legal practice, especially for judges who think about statutory interpretation in that way. This is why when they perform statutory interpretation, they are always under big pressure to accurately justify their final decision about the meaning of a legal concept which is decisive for a case. This point of view passes over the obvious division from the cognitive perspective that obtaining the meaning is something significantly different than providing its justification; however, judges often perform statutory interpretation, bearing in mind that they would have to provide a justification, so they do not make a division between legal interpretation and legal argumentation. It is the most common perspective about legal interpretation that comes from the analysis of legal practice.
  3. Legal method: this form of defining legal interpretation is an important matter for the scientific status of jurisprudence. By claiming that legal interpretation, the exegesis, is an autonomous method of jurisprudence, legal practitioners are able to justify that jurisprudence is a science-based concept. This is primarily supported by the general notion that every science requires its own methodology.<sup>12</sup>
  4. The last association is the theory of legal interpretation. Theory of legal interpretation is known from two possible perspectives, which are not in direct opposition to each other. The first one considers legal interpretation as a matter of general legal knowledge in the field of legal theory. This perspective focuses on categorizing concrete theories of legal interpretation and providing methodological studies about research in that field. The second perspective focuses on these concrete theories of legal interpretation which are present in great numbers in jurisprudence. All of these features are related to jurisprudence and hence to the legal doctrine concerning statutory interpretation. Their influence on legal practice is not significant. The relations can be easily observed in the field of legal discourse where legal practitioners seek to justify their interpretation-based actions.

Finally, both legal interpretation and legal axiology can be approached in a descriptive or a normative way. The first one involves descriptive statements about what legal methods of interpretation or what values are functioning in society, while the second one, the normative perspective, assumes to postulate something concerning legal

interpretation or values, and especially, what is important to legal practitioners, concerning what is right and what is not. The same applies to legal interpretation. The normative perspective formulates the thesis on widely accepted methods of interpretation. It constitutes the main grounds for formulating statements on the theory of legal interpretation.

## LEGAL AXIOLOGY AND ITS THEORY OF VALUES

In case of axiology, it is easy to answer the question about its methodological status and place in the structure of jurisprudence. On the other hand, it is extremely difficult to define the term 'value,'<sup>13</sup> especially from a legal point of view and due to its susceptibility to differences in assessments.

When trying to answer the question on what the term "value" constitutes, we need to admit that it is important to analyse it from a general perspective, which involves the definition of 'value' from a non-extensive approach (so-called extensive semantics which shows the full range of objects a term means). From the point of view of the law and its interpretation, it is necessary to further clarify that the term "value" is defined from the perspective of the mutual relationship between the two. This allows for an accurate method of finding the meaning of values, since a lawmaker establishes the contents of values with a concrete axiological standard. Thus, multiple values create the axiological foundation of a system which contains legal rules. Such a method of defining what values are and what they have in common is more practical, since it refers to the cultural meaning of a value. This can be done with rules of intentional semantics which are connotation rules. They are effective when finding the characteristics of objects which each value denotes.

<sup>13</sup> W Dziedziak, 'Axiological Basis for the Application of Law – a Perspective of the Equitable Law' (2015) 24(2) *Studia Iuridica Lubliniensia* 49, 50-51.

It could be said that a value is something which<sup>14</sup>:

- is precious,
- provides an absolute good (an objective, common good),
- requires a person to behave according to its contents (needs to be done for the good of society, for a higher good, etc.),
- could be perceived as having a connection with nature (it comes from the past and is formed by tradition),
- is related to an idea of some kind,
- is a representation of justice and ensures welfare.

<sup>14</sup> *ibid* 51.

The general characteristics of a value make it possible to distinguish between the relative and non-relative perspective, depending on the legal question. Naturally, it is based on the main division of the philosophies of law. The perspective of legal positivism comes to the conclusion that the contents of a legal value are connected with the will of the political sovereign, since the law and axiology contained in the legal

15 B Bix, 'Radbruch's Formula and Conceptual Analysis' (2011) 56 *American Journal of Jurisprudence* 45, Minnesota Legal Studies Research Paper No. 12-13 <<https://ssrn.com/abstract=2017942>> accessed 18 October 2020.

rules are the only elements that can change in time. This is the result of a primary ontological statement of legal positivism that the law is merely a set of relationships between institutional powers (state bodies which have the right to create legal rules) and people or entities which are the addressees of legal rules. Even after the Second World War and the famous Radbruch Formula, many legal practitioners have accepted this point of view because of the empirical claims of its justness.<sup>15</sup> Even if many legal values, which are set along with legal rules, today realise the postulates of morality, Christian axiology, etc. (i.e. the law on dignity of a person facing a criminal trial or animal rights), legal practitioners notice that all of these values, before they become part of a legal system of rules, need the act of positivisation ('establishing a legal rule which originates from another normative order' or 'creating a legal rule which is completely new and does not exist in any other normative order'). This of course involves the legislative procedure. Basing on their empirical point of view, legal practitioners say that legal values are only those which have been established by a lawmaker. Only values which are contained within legal rules can be interpreted by state organs which apply the law and only in the way that makes it possible to tell they have real effect on people or institutions. For example, if someone says argues that they concluded a contract, because they were under the influence of the so-called "moral law", positivist lawyers will argue that it is not a matter related to the legal perspective. In other words, it is a matter of social rules not legal ones, and thus lies in the scope of legal sociology (the question of why the contract was concluded) not jurisprudence.

16 Sometimes test which principles are shared in common and which not gives us the answer to the question about the morality itself. See S Veitch, *Moral Conflict and Legal Reasoning* (Hart Publishing 1999) 15.

But there is of course the other point of view – the perspective of non-positivistic philosophies of law, such as *Ius natural*. This perspective states that some values are principles which cannot be changed by human will<sup>16</sup>. They are not only directives to a lawmaker indicating how to determine whether a rule should be established or not, but also they are the law for themselves. Naturally, it is a true challenge for law enforcement authorities, since when issuing decisions, they can refer only to these rules which are in normative acts. On the other hand, there is a lot of room for interpretation and the contents of a value ultimately determine whether it is immutable or unchangeable in some way. This can be done with acts of interpretation and that is the way for law enforcement authorities to affect the meaning of legal rules with the ingredient of a value.

## LEGAL VALUES

With regard to the law, which is considered as a system of rules originating from statutes, a value can be defined from an internal point of view in a strictly legal way. This requires decoding the contents of values from a legal text as it was established by a lawmaker.

An external point of view, not strictly understood as Herbert Hart's conception of values, allows for moral analysis of legal values.<sup>17</sup> This is the core requirement of the so-called soft positivism. Naturally, it cannot lead to repealing a rule which contains a value with amoral contents but it involves its negative evaluation. It is the only possibility but gives law enforcement authorities real methods to deal with a problem if, according to their point of view, values which were established as law by a lawmaker are contrary to the common values; it is required by the idea of a just law or a judge's conscience.

Nowadays, legal values are often connected with the so-called non-axiological conception of jurisprudence. The primary problem faced by legal practitioners or, especially, law enforcement authorities, is the exploitation of the interpretation process when formulating arguments about the necessity of conformity between legal values and moral law, which originating from the Christian axiology. To avoid such an accusation (despite its falsity), after World War II, statutory interpretation was founded on the aforementioned non-axiological perspective of jurisprudence with the assumption not to refer to any values which are external to the legal system. The key problem is that the Christian axiology or moral law is no longer an objective criterion to evaluate legal values<sup>18</sup>. This can be mainly observed in the problem of abortion, where the non-axiological perspective, which postulates formal determinants of evaluating values, only leads a lawmaker to a decision to establish such a law. The argument of compliance with the contents of a legal value, which originates from a certain legal rule, is considered as one which should not be addressed by the law. It does not originate from a common sense of justice but a certain ethical system to which the moral law or the Christian axiology is reduced.

Today, legal values are deprived of a number of moral ideas. The idea is that it makes the system of legal rules free of moral evaluation, with the exception of the most important values, such as life, human dignity, etc. Strictly legal values are for example: certainty, clear meaning of rules, formal justice. The last is an important matter, since it involves the assumption that it is more important to have an effect on a legal decision which was obtained according to the procedure than to evaluate it; notwithstanding the obvious argument that an attempt to remove the axiological perspective from the law is in itself an axiological problem.

## HOW TO INTERPRET VALUES?

There should be no difference in interpreting the rules which have axiological content in their meaning. Otherwise, it would be necessary to define how to distinguish a rule with or without values, and why to carry out statutory interpretation in a different way. The most important

17 M Tebbit, *Philosophy of Law. An Introduction* (3rd edn, Routledge 2017) 40-41.

18 D Bunikowski, *Values and Axiology in the European Union Legal System In Context of The European Culture and the Constitution for Europe. Why does the EU need the axiology?* 4 <[https://www.researchgate.net/publication/303971870-Values\\_and\\_Axiology\\_in\\_the\\_European\\_Union\\_Legal\\_System\\_In\\_Context\\_of\\_The\\_European\\_Culture\\_and\\_the\\_Constitution\\_for\\_Europe\\_Why\\_does\\_the\\_EU\\_need\\_the\\_axiology](https://www.researchgate.net/publication/303971870-Values_and_Axiology_in_the_European_Union_Legal_System_In_Context_of_The_European_Culture_and_the_Constitution_for_Europe_Why_does_the_EU_need_the_axiology)> accessed 16 October 2020.



thing is to obtain the correct meaning of a legal rule with axiological contents along with its correspondence to the moral law or the Christian axiology without the accusation of exploiting legal interpretation.

Generally speaking, there are two possibilities of obtaining the meaning of words or expressions when proceeding with interpretation. According to Rudolf Carnap's division, semantics (the meaning) can be obtained through descriptive or the so-called "pure" approach:<sup>19</sup>

19 R Carnap, *Pisma semantyczne* [Semantic Papers] (T. Ciecierski and others trs, Aletheia 2007) 19-20.

20 The descriptive perspective as an approach to interpretation (getting a meaning) must be distinguished from the descriptive-type theories of legal interpretation which are focused on depiction of legal practice of some kind of interpreters. For example: NS Zeppos, 'The Use of Authority in Statutory Interpretation: An Empirical Analysis' (1992) 70(5) *Texas Law Review* 1088.

21 Waśkowski (n 9) 19-20.

22 Cross, Bell, and Engle (n 4) 35.

- The descriptive approach, called the pragmatic type of interpretation in Polish legal theory, tackles the problem of how to do it.<sup>20</sup> According to statutory interpretation, it consists of interpretation rules. This is a common way of thinking about legal interpretation and for some scholars this is one of the reasons why legal interpretation is different from the humanistic one. For legal practitioners, the formality of legal reasoning is of great importance and that is why the descriptive approach to legal interpretation is so popular. Another reason is that the tradition of *Ius interpretandi* was evolving for hundreds of years and its theory has thus become a list of (a) directions for how to carry out statutory interpretation, (b) habits which provide a set of tools for a legal practitioner to obtain the meaning of words or expressions used by a lawmaker in the text of a normative act, and, most importantly, (c) sets of methods of interpretation known as linguistic, purposeful, and systemic ones which were distinguished by F.C. von Savigny in the mid-19th century.<sup>21</sup> Some scholars additionally list von Savigny's favourite method, i.e. historical comparison of literal meaning of the law; however, nowadays the most common way to obtain meaning is through the use of the linguistic method which involves semantic and syntactic operations on a text along with applying some general legal interpretation principles (i.e. prohibition of synonymous interpretation). Legal practitioners often focus on this approach when thinking about legal interpretation, especially in case of the theory of legal interpretation.
- The pure (definitive) approach to interpretation distinguishes, as a part of legal interpretation, the method of finding clear meanings (in its conservative variant, it prefers literal meaning of a text as opposed to the extensive paradigm of interpretation which makes it possible to produce semantics which are not equal to words used in a legal text by a lawmaker.<sup>22</sup> This is possible because both can be understood as finding definitions which are correct meanings of terms or just fit into the word's semantic shadow). Hence the name "pure semantics", since its goal is to find pure relations between a word and a denoted object. It is focused on the effect of interpretation. The pure approach to interpretation is about the process of establishing semantics (meaning of words

or expressions). It is a very common way of thinking about statutory interpretation in legal practice but very rare in jurisprudence. This is because main theories of interpretation in jurisprudence are sets of statements telling how meaning is obtained, and they do not touch upon literal semantics. Legal practitioners, such as judges, prosecutors, etc., understand statutory interpretation as looking for an answer to the question: 'what means what.'

### AXIOLOGICAL VS. NON-AXIOLOGICAL JURISPRUDENCE AS PARADIGMS OF STATUTORY INTERPRETATION

The aforementioned division into axiological and non-axiological jurisprudence has a great influence on legal interpretation nowadays and offers the two paradigms of statutory interpretation. First, it must be admitted that the non-axiological jurisprudence is the most common practice of legal interpretation, because it states that freeing statutory interpretation of moral evaluation or reducing it to the minimum is a value in itself for modern jurisprudence. It is related to the descriptive approach to legal interpretation, and, as result, involves claims that legal theory of interpretation must be free of these methods, directives, etc. which can influence the effect of this process, which could in turn have an effect on its result due to exploitation of the law. This view is incorrect, because a decision about meaning is always determined using some kind of approach with some kind of axiology; nevertheless, the idea for the non-axiological jurisprudence is in general as stated above.<sup>23</sup> The most important thing is to know that non-axiological jurisprudence as a paradigm of legal interpretation focuses on the descriptive type of meaning along with looking for connotation rules of meaning, naturally in the course of general evaluation. The second most important thing is the goal to interpret legal rules in such way as to keep the compatibility of semantics with legal axiology. This presupposes that legal interpretation makes the assumption that values change depending on the time and type the society and that internal morality of the law might be changeable to some extent due to activity of a lawmaker. The other presupposition is that the law should be free of evaluative, moral axiology, falsely considered as something outdated. As a result, there is a conviction that an answer to the question 'how to interpret' is: without using any values of interpretation which could directly influence the effect of the interpretation process, i.e. the meaning itself. Thus axiology of legal interpretation must first of all be related to formal legal ways of reasoning, such as: clarity of legal rules meaning, equality, and, most importantly, the outcome of interpretation which is of course semantics and which must result from applying a legal method of interpretation and not "pure" definitions which can be incorporated

23 T Grzybowski and M Zirk-Sadowski, 'Argumentum a Contrario' 2017 72(11) *Państwo i Prawo* 15.

into the law semantics from other normative orders. This is how for the non-axiological perspective exploitation of the law works. The effect of statutory interpretation is obtained without performing legal interpretation itself.

Axiological perspective refers to the pure legal meaning decoding according to the scheme: 'what means what.' The descriptive approach to obtain a meaning is not discarded entirely but, as it seems, this extends to the Radbruch Formula's scope of application so that it can be used for effects of interpretation which are contrary to the general principles of morality: not only for values from the positive law, but also values of any kind. The axiological perspective considers greater flexibility in the selection of interpretation methods as a paradigm of statutory interpretation. The general criterion is something which can be called an "axiological test:" during the step of validating a decision (which takes into account which legal source and which fragments of a legal text are relevant for a particular case), there is a question if an interpretation problem contains axiological ingredients and of what kind (which values are related to the case). As a result, there is no exclusion of the descriptive approach to statutory interpretation. In case of the axiological requirement of unity with meaning of content of a legal value, which is the basis for interpreting a legal rule with a value ingredient from a different normative order (like morality or the Christian axiology), there is a postulate to try to find a connection between them. As a result, it modifies the St. Thomas's requirement of unity in meaning between *lex positiva* and *lex naturalis* in some way. The term 'modification' should be understood as 'adopting to the modern legal ways of reasoning.' The important thing which counteracts the accusations about exploitation of the law, for example by the Christian axiology, is the fact that the presented axiological paradigm of statutory interpretation claims there is no need of unity between rules of two separate normative orders of morality and the law (which is a general principle of the Continental Legal Culture), but there is a great necessity of cohesion between contents of values which are the basis for legal rules and which originate from morality, the Christian axiology, the natural law, axiological tradition, etc. We can once again refer to G. Radbruch who states that the unity of legal values with the natural law comes with "antiquity, Christian middle-ages, up to the Age of Enlightenment, and is continued up to today in the Catholic-Thomistic philosophy of law."<sup>24</sup>

The reasoning above does not offer a full solution to the argument of exploitation of the law by its interpretation in such a way. On the other hand, we must ask what exploitation of statutory interpretation means and if it is acceptable for the contents of a given value to be considered as united with the contents of the same values which

24 „...od antyku, przez chrześcijańskie średniowiecze, aż po wiek oświecenia i kontynuuje do dzisiaj w katolicko-tomistycznej filozofii prawa” (quotation from G Radbruch, 'Ustawa i Prawo' (J Zajadło tr) [2002] *Ius et Lex* 157, 163 <[https://www.law.uj.edu.pl/users/kprz/docs/radbruch%20ustawa\\_i\\_prawo.pdf](https://www.law.uj.edu.pl/users/kprz/docs/radbruch%20ustawa_i_prawo.pdf)> accessed 18 October 2020.

are the basis for rules in other normative orders. Answering that question with 'no' leads to a false conclusion that legal interpretation should be carried out in an absolutely formal way and the effect of this process cannot lead to incorporating (transposing) values from other normative orders to the order of the normative law through applying legal rules of interpretation with an axiological connotation. This way, for example, removing the Cross from a classroom could be justified on the grounds of removing any connotations from other normative systems, in this case Christian morality, from the legal order; nevertheless, the Cross is not only a religious symbol, but also an important element of a nation's cultural tradition. This way comes the reasoning that a legal order must be free of values that are associated with other normative systems unless they are common in the society. Such a statement cannot, however, explain cases where the values of a minority are incorporated into the law (the best example are LGBT organisations), while the same is impossible for others (like Catholics) because of the accusation of exploiting the law.

The observation that an important result of the mentioned paradigm of axiological interpretation is the assumption that sometimes 'how to interpret' is less important than 'what will be interpreted.' Its presupposition is that legal values are not only generated by a lawmaker. There is also another problem that all of them are incorporated into a legal order through activities of law enforcement authorities (especially judges). As a result, what common people consider the law and if it contains some moral values, regardless of the activity of a lawmaker, is less important than what a judge or an administrative organ can do with the values and what is prohibited.

The non-axiological perspective is often presented as the axiological one. The effects of interpretation of texts with axiological context obtained with legal ways of reasoning, methods, or directives of statutory interpretation are presented as if they offered protection of fundamental values but in truth they are related to the non-axiological perspective with their assumption of the changeable nature of values. The best example is a legal rule which sounds like an oxymoron: the "right" to abortion, presented as a value which protects human dignity, or the rule that would order to remove the Cross from classrooms because of its status as a religious symbol.

It must be stated that the non-axiological interpretation (as part of the non-axiological jurisprudence) does not provide an effective protection against totally amoral legal rules.

In order not to stir up unnecessary emotions with contemporary examples, it is worth looking at known examples from history. Two well-known rules from the law of the Third Reich, one from The Law for the Prevention of Hereditarily Diseased Offspring and the other from the Citizenship Law<sup>25</sup>:

25 More about the subject: RD Heideman, 'Legalizing Hate: The Significance of the Nuremberg Laws and the Post-War Nuremberg Trials' (2017) 39(5) *Loyola of Los Angeles International and Comparative Law Review* <<http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1729&context=ilr>> accessed 18 October 2020.

The Law for the Prevention of Hereditarily Diseased Offspring (1933):

- sterilization due to hereditary disease, including epilepsy, congenital deafness, alcoholism,

Reich Citizenship Law (1935):

- A citizen of the Reich is that subject only who is of German or kindred blood and who, through his conduct, shows that he is both desirous and fit to serve the German people and the Reich faithfully.

## THE NON-AXIOLOGICAL INTERPRETATION

The non-axiological interpretation leads to obvious paradoxes. Attempting to remove the axiological evaluation from legal interpretation can simply produce absolutely amoral effects of statutory interpretation or even justify legal rules whose literal meanings are in contradiction with the natural law, morality, the Christian axiology, etc. Despite Radbruch's writing only about the second issue, i.e. contradiction between the positive and the natural law in the context of human dignity, nowadays we do not consider the existence of legal rules leading to clearly amoral rules a problem but 'make a fuss about' lack of methods of statutory interpretation which are connected with axiological contents.

It can be observed when interpreting the literal meaning of legal rules from the German law of the Third Reich. Formal legal ways of reasoning, not taking the impact of values like human dignity, life, etc. into account, could lead to catastrophic results of statutory interpretation which are absolutely unacceptable from the point of view of moral evaluation. If we rely only on the descriptive approach to interpretation and exclude axiological content of the aforementioned rules from consideration, we can come to the conclusion that the meaning of the rules <sup>26</sup>:

- is only formal (since the rules have a clear meaning): they establish equal methods of evaluating facts. 'Equal' in this context means that different interpreters should be able to easily establish meaning of the rule stating who must do what (the legal semantics);
- respects (and so the lawmaker) the important rule of statutory law which is clarity of meaning. This is related to the previous question, i.e. the rules are mostly clear (according to literal meaning) and they fulfil the condition of correct editing from the legislative point of view<sup>27</sup>;
- could offer certainty if applied for a longer period of time: the rules seem to pose no problems with the procedure of legal application, provided competent authorities take care of it.

<sup>26</sup> The non-axiological interpretation could be defined also as an example of "neutralization of values in the law" which is trying to exclude any ethical system external, as a normative order, to the law from the process of statutory interpretation. See M Dudek, 'Instrumentalization [Exploitation] of the Law and Neutralization of Values in Law. Some Reflections after Reading the Draft Amendments of the Special Part of Polish Penal Code of the Sixth Term of Office of the Polish Sejm (2007-2011)' in K Pałecki (ed), *Neutralization of Values in Law* (LEX a Wolters Kluwer business 2013) 190.

<sup>27</sup> Clarity of legal text comes as the assumption of the rule of law. See M Cerar, 'The Ideology of the Rule of Law' (2011) 97 ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy 393.

As a result, if we exclude from the interpretation process all the informal values which are interpreted according to the “pure” way of carrying out the process (i.e. by finding the relationship between a word or an expression and their designation) and use only formal legal ways of reasoning, the effect of the statutory interpretation will lead to a conclusion that nothing is wrong with the meaning of these rules on a strictly legal ground. It can be well observed in case of the dramatic example of acts from the Third Reich; however, it is not as obvious in case of current regulations. What I specifically mean here is the aforementioned ‘right’ to abortion or a rule banning cultural religious symbols in the name of ‘equality’ (the result of such an interpretation leads to the conclusion that there should be no religious symbols at all in the public space, even if it is based on an incorrect assumption that they are only religious, and not cultural or traditional symbols of the society).

The last and maybe most important matter is that this scheme of interpretation is based on the presupposition that there are variations in an ethical system, so the stability of law is maintained by the current state of morality, ‘here and now.’ This scheme is based on an assumption that every value is defined in the law by a lawmaker as it is related to the current understanding of values by the society. This is why it may lead to obvious paradoxes such as the legal situation where, on the one hand, human life is defined as a natural, unchangeable law but, on the other hand, an embryo is defined (the meaning established by a lawmaker) as if they were not a human; as a result, in case of a conflict of values, a conclusion can be drawn that they do not require legal protection, thus giving a chance to establish a legal principle such as ‘the right to abortion.’

### AXIOLOGICAL INTERPRETATION

The question of ‘how to carry out interpretation for cases with axiological contexts as a paradigm for this process’ is primarily concerned with the problem that if axiological arguments, which are not related to those based on formal ways of reasoning, are to be incorporated into a case, it is possible to face the accusation of exploiting the process of statutory interpretation. But it should be remembered that applying the non-axiological paradigm of interpretation is also an axiological question. And this question is often not assessed with the axiological paradigm of statutory interpretation in terms of its axiological evaluation. The main problem is that after reducing a portion of the natural law into positive law, the Christian axiology, which had defined universal interpretation of values for nearly 17 centuries, after World War II, was degraded to one of the ethical systems which is only a point of evaluation for legal axiology.

It is clear that axiology of moral law which could be based on the Christian axiology was changing over the centuries (for example the value of the head of a family which was previously based on the *pater familias pattern* and today is perceived as an anachronism). As a result, that moral law or the Christian axiology which is related thereto is founded on never changing principles that do not fit the modern society is a false argument. There absolutely is a division between Christian axiology and common morality, since the first one is an ethical system which is based on rules originating from several dogmas which, as it is believed, should be reflected in statutory law (through establishing appropriate meanings of rules and their interpreted semantics). This results in the statement that certain legal rules which contain certain values (for example about life of a human being) are just laws or are not. The accusation of exploitive interpretation is wrong, since some postulates as to the contents of the law and the effects of its interpretation result from the system of assumptions concerning the relationship between the natural law and enacted law. And nothing can change that, it is what it is.

In conclusion, it can be said that carrying out statutory interpretation for cases with axiological context should be very simple and with a clear indication which meanings are in accordance with morals and which are not. The process should be conducted using generally “pure” semantics with limited use of legal ways of reasoning, such as interpretation methods, directions, etc., so that everything is related to the descriptive approach to legal interpretation. Such a scheme of interpretation is better at justifying that no methods of exploiting semantics are used. The meanings of legal rules are based on legal tradition and, what is probably more important, on the common sense of societal morality. The latter one is of course more relevant in case of societies with a strong sense of natural morality. An example of such a society is Poland, where natural values and Christian axiology are widely understood as general principles of intuitive law and the basis of natural relations between people<sup>28</sup>.

An interpreter who would like to carry out statutory interpretation when faced with cases with axiological context are the following:

1. Legal interpretation should be carried out according to “pure” semantics; the process must rely on the search for meaning itself, not methods of doing it. This pertains only to rules with the value ingredient, because when a rule is not related to any axiological context, looking for pure meaning is impossible, since there is no knowledge about possible semantics at all. This also prevents the accusation of using legal ways of reasoning or formal methods to construct meanings, and not finding them in the legal tradition.

<sup>28</sup> If we wanted to consider legal interpretation as a textual translation (from a legal text to a legal rule), such an approach would be the most similar to the sociocultural model of translation which claims that the main role of an translator is to find a meaning which is the most common in a society and founded on tradition using a language.

See A Neubert and GM Shreve, *Translation as Text* (The Kent State University Press 1992) 25.

2. Justification of legal interpretation should be short, based on linguistic meaning, and not provided through artificial legal reasoning; it is possible for 'axiological cases.' It is about justifying the effect of statutory interpretation, semantics of a rule, but it is also related to the process of interpretation.
3. An interpreter should not be afraid to write what is right and what is wrong.

The last tip is very simple, yet very effective for legal interpretation of meanings compatible with the natural law; but it is often forgotten or not used for reasons one can only guess.

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## ABSTRACT

The paper discusses the question of axiological determinants of statutory interpretation in the context of statutory law. The author

formulates the argument that the paradigm of the so-called non-axiological statutory interpretation, originating from the non-axiological jurisprudence approach, does not offer an effective protection against obtaining meanings which are contrary to elementary moral rules. The paper focuses on axiological instructions for an interpreter, i.e. how to look for morally objective meanings and what the moral objectivity criteria of meaning in the law are.

## **ABSTRAKT**

### **Aksjologiczne problemy wykładni prawa**

Artykuł omawia kwestię aksjologicznych determinant wykładni prawa na gruncie systemu prawa stanowionego. Autor przedstawia argument, zgodnie z którym paradygmat tzw. wykładni prawa wolnej od aksjologii nie oferuje skutecznej ochrony przed takim sensem prawa, który byłby sprzeczny z podstawowymi zasadami moralnymi. Artykuł koncentruje się na aksjologicznych wskazówkach dla osób dokonujących wykładni prawa, tj. na tym, jak szukać obiektywnego moralnego sensu prawa, oraz na tym, jakie kryteria obiektywnej moralności występują w prawie.

## **KEYWORDS:**

statutory interpretation, axiology, theory and philosophy of the law, morality, theory of legal interpretation

## **SŁOWA KLUCZOWE:**

wykładnia prawa, aksjologia, teoria i filozofia prawa, moralność, teoria wykładni prawa