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Between the text and the discourse. A few remarks on the subject of communicative competence within the texts of legal acts

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Abstract: The subject of legal interpretation is the text of a legal act as the source of law. Adequately ascertaining the substantive contents of the law therefore requires knowledge of the intrinsic characteristics of the act of law as a form of normatively defined mode of utterance. Due to the high level of conventionalization of the texts of acts of law, their interpretation requires specialized knowledge of legal interpretation of the texts of law, which may be classified as legal communicative competence. Because this competence characterises individuals who are professionally prepared to interpret acts of law, and at the same time who function in a given community of discourse, it is in essence a type of discursive competence within the law.

Keywords: legal text act, legal interpretation, discourse competence, legal competence

1. Introduction

> The two separate terms *text* and *discourse* have, in fact, been related to two different but complementary perspectives on language (A. Trosborg 1997: 4).

Texts of legal acts are specific types of text. It is the status of those texts that determines their specificity. It also determines certain features of the legal acts, which other texts do not possess, or which are not defined normatively (legally). These texts are moreover embedded in their contexts, which in itself is nothing peculiar. What is peculiar, is those very contexts. Presented in this article is a viewpoint on the interpretation of the text of legal acts both as a static text, which is subject to interpretation, and as a dynamic text, which is part of the interpretative process. Hence, two different but complementary methodological and cognitive perspectives will be considered.

2. The text of a legal act as a subject of interpretation

The text of a legal act as the end result of legislative action is, on the one hand, an independent individualised text, while on the other hand being a realisation of a textual model. Referring to a specific legal act's text (legal acts' texts) cannot in this instance happen without taking into account the features of its normatively defined model. In extreme cases, the degree to which the normative model is achieved can determine the legitimacy of the text of a legal act (or a part of that text) as a legal text indeed. Such an approach to this kind of text is at the same time qualita-

tively different from the following relation: a specific text vs. a prototype or textual model of this type of text. This difference relates mostly to the degree of conventionalisation of the textual model of the text of a legal act in comparison to the models of other texts. For it represents the highest degree of conventionalisation, and in the case of Polish legal text acts, it is also institutionalised and of legal nature.

3. The features of the textual model of a legal act's text

The text of a legal act is notable for being tiered. It is written in the form of grammatical sentences but read as normative statements. One of its basic features is therefore the fact that it is a normative text. This normative premise applies to any text of a legal act, including the statements made in this text. However, not all statements are equally normative.

It is worth differentiating here between the normative character and the normative significance in legal acts' texts. The normative character is typical only in the statements of legal acts, whereas the normative significance characterises every element of a legal act's text, including the title of a legal act, the titles of systematising units or prefaces (preambles). Normative statements thus have significant relevance in the interpretation of legal acts' texts when it comes to their contextual reading (the linguistic context); they do not, however, independently constitute the basis for determining the normative situation of legal subjects.

One consequence of the tiered nature of this type of text is its quasi-idiomatic character. These texts can be read in two ways. Firstly, they can be read explicitly, as it happens with regard to basic legal regulations, or with regard to any other text written in the language known to the reader. This way does not apply to the reading of the text of a legal act, however, as it is not sufficiently exact for this type of text, even though it is conceivable. Secondly, the texts can be read as normative texts, which enables an accurate reading of them. The sentence *Honey I am home* can certainly be read by someone who speaks the language in which it was formed, as information. Somebody informs someone that he is a home, and the one being informed is a honey. However, it is clear that this is not the accurate way of reading this sentence.

In the case of legal acts' texts, it is not only about the hidden meaning (the meaning that lies under the surface of the *prima facie* linguistic sense) within the statements contained in those texts, but also about the differences in the syntactic structure of the statements found on the surface level and in normative statements, which influences the deep structure of the discussed texts. These differences are considered in the normative model of the legal acts' texts. Thus an editor of the text of a legal act knows it and applies this knowledge in practice. A legal article as a sentence in the grammatical sense can consist of the subject, the verb, and the object. A legal norm in turn is a sentence that consists of the addressee, the circumstances, the order or the ban, and the actions. The difference in the semiotic status of these types of statements is already apparent at this point. The rules of conduct require that a sentence is complete with regard to syntax, logic and content. Accordingly, it is about comprehensiveness in terms of the syntactic structure, the fullness

of content and the logical completeness. Legal norms in rules and regulations do not occur in such a form. Their syntactic and content structure is disarticulated by placing complementary elements of their organisation and content in other regulations. The same applies to logical incompleteness, manifested in legal acts through relative terms that require complementing with statements found in other regulations. Hence the statement below, art. 237 act 1:

Art 37.1. Legal counsel trainee is removed from the list of legal counsel trainees in the case of:

1) referred to in art. 29, point 1 or 3-5 or art. 293, applied accordingly;
1a) referred to in art. 29, point 6, applied accordingly;
2) failure to complete his legal counsel's application without a justified reason within the time limit referred to in art. 32 act 2;
3) entry on the list of legal advisers;
4) the lapse of a year from the date of ending the application indicated in the certificate of completion of the legal advisor application[1].

The regulation cited above is a statement that is apparently descriptive and in addition incomplete. In the process of interpretation the declarative mode is transformed into a warrant "it is ordered". At the normative level it is also complemented with syntactic additions (because it lacks an addressee of the warrant). Furthermore, due to the various circumstances in which the obligation to remove a trainee from the list of legal counsel trainees occurs, the above example consists of elements of as many norms as there are circumstances. This example shows that the editor of the texts has used a few techniques of coding the norms concurrently, which is a rather standard situation. These coding techniques include syntactic disarticulation (because of the lack of an addressee), condensing the norms in the legal process (a few descriptions of circumstances in which the norm finds its application) and logical incompleteness (flagged by the text editor in the phrase "referred to in…").

The above cited excerpt of the text of a legal act realises a textual model in both the editorial and the normative way. Also, by non-articulation of certain elements missing from the syntactic completeness.

It is important to note here that both the discussed characteristics of the textual model and the features of language of the text of a legal act, further discussed below, are related to the type of text and not the type of interlocutors, although an accurate reception of the discussed texts undeniably depends on the level of knowledge about the features of legal acts' texts, legal knowledge, and the ability to interpret such texts. However, no one apart from the legislator, who currently (at least in the European legal culture) is not seen in a personal way, does not practice (communicate) in the language used to edit texts of legal acts[2]. Various meta-languages are used to aid communication about law, such as non-legislative languages, including the specific legal language that is the sociolect of lawyers.

[1] Act of 6 July 1982 on legal counsel (text.: Dz. U. z 2017 r. poz. 1870 ze zm.).
[2] The concern here is not the Polish language, for obvious reasons, but the specific functional form of the language of legal acts' texts.

All features of the language of legal acts' texts are subordinated to articulating their normative nature in the most accurate, precise and communicative way (which does not necessarily entail its accessibility to the average beneficiary). It relates particularly to the way of using modal phrases ("must", "can", "should") in the thetic meaning, using the declarative mode as a means of articulating an obligation (sometimes as a prohibition, as in the case of sanctioned norms in criminal law, and sometimes as a requirement as in the case of sanctioning norms in criminal law), using the singular form to articulate generalised names and also using the masculine form or, less frequently, gender-neutral.

Normative statements are not articulated directly (a regulation rarely contains all syntactic elements) and as a rule the content of a statement in the form of a legal provision is additionally modified by other provisions of the same act or other legal acts. As far as the semantic issues are concerned, the statements in the form of legal provisions are not sufficiently unambiguous, which creates the necessity to take (potentially always) measures leading to extrapolating from the text of the legal act(s) a statement sufficiently explicitly indicating who and when is ordered to do or prohibited from doing something (the standards of conduct). This situation entails the procedure of clarification, meaning converting the statement from a legal act to a legal norm, which is performed by everyone who is aware of the normative nature of the texts of legal acts. If these actions are performed by a professional interpreter (lawyer), then he translates the statement of a legal act into a standard of conduct by using a specific approach to the interpretation of legal acts, based on a specific set of interpretative directives, which he uses in a specific order. The particular set of directives and the order in which they are used both determine the end result of the interpretation. If the interpreter neglects to reconstruct the elements of the legal norm from the legal act and proceeds straight away to determining the meaning of the words used in the interpreted provision, then the end result of his interpretation may significantly vary from the result of a person who does not omit the reconstruction stage.

The issue can be illustrated in the example of art. 3 act 1:

> Art 3.1. A declaration of will to establish a foundation should be made in the form of a notarial deed. Adhering to this form is not required if the foundation is established in a last will.

In the cited excerpt of the legal text there are two sentences, and therefore two provisions. It is not hard to notice that these provisions are interrelated. In addition, it is clear that only the first provision is meaningful enough to exist independently. Such is not the case in the second provision, which is indicated by the use of the words "Adhering to this form is not required", in which the use of the anaphoric reference indicates referring back to the preceding sentence and thus signalling content relationship between the two provisions. And the nature of this relationship is that the content of the first provision is modified by the second one.

In this case the provisions should be interpreted together. Recreated from it norm-like statement (incomplete) will have the following form: "If it is not a foundation established in a last will the submission of a declaration of will to establish it

must be made in the form of a notarial deed". So if somebody wants to establish a foundation and is not doing it in his last will, he is obligated to submit a declaration of will to establish it in the form of a notarial deed.

The product of the actions of the interpreter of a legal text has certain time limitations. It concerns the so called interpretative moment, and so the time for which the interpretation is made, which does not have to be the same as the time of the interpretation itself (the interpretative moment). Hence the adequacy (and also the validity) of the legal interpretation is also dependent on the time factor. This situation leads to the interpretation becoming a communicative event. Although the results of the interpretation are lasting and legally significant, they do not constitute an invariable constant. In a communicative event where all of the interpreter's actions are demarcated by the interpretative moment, only this element (the moment in time for which the interpretation is made) is objective.

An adequate reading of the text of a legal act, such as one that takes into account the intrinsic qualities of the text of a legal act as a textual model[3] in a specific text of a legal act, requires specific knowledge and skills. This knowledge does not necessarily concern philological aspects (at least not solely). The text itself, edited in a specific way (in accordance with the directives regulating editing texts of legal acts, in many instances differing from the linguistic norm) assumes a certain model interpreter[4], whom certainly neither an average user of an ethnic language nor an outstanding one can be. Although reading of the text of a legal act as a text in a given language is certainly possible, such a reading is insufficient for its adequate understanding, i.e. the reading of the text as a text of a legal act. The model interpreter on the other hand, assumed by the textual model of the text of a legal act, is endowed with the competence to interpret the texts of legal acts. Reading of a legal act without the above considerations will be a form of its understanding, because the reader will apply some meaning to the text. This is not, however, the type of understanding of the text of a legal act that concerns the interpretation of legal texts as such texts and not just as texts in a given language. An adequate understanding of legal acts' texts happens when their intrinsic qualities are taken into account, and above all, their normative qualities are respected even when they appear as descriptive.

4. Competence in matters of understanding the texts of legal acts

The above understanding of legal interpretation is naturally related to the concept of a specific type of communicative competence; more specifically, an aspect of discourse competence. Legal interpretation, which is made for a given interpretative moment as discussed before, is a specific communicative event, especially when it is an interpretation *in concerto* (made in relation to a legal fact). Knowledge relating to

[3] Indicated normatively by the directives for the editing of legal acts' texts as contained in the provisions of the Regulation of the Prime Minister of 20 June 2002, regarding the "Principles of legislative technique" (Dz. U. z 2016 r. poz. 283).

[4] Based on the Model Reader proposed by Umberto Eco (Eco 1994).

the text of a legal act and the instruments (interpretative directives) enabling an adequate understanding of this text, as well as the skills of interpretation of the texts of legal acts, altogether form discursive competence in the area of legal text interpretation. Achieving a sufficient level of this competence is what will ascertain adequate understanding the texts of legal acts, not limited to understanding the text as merely a text in the language known to the reader.

We say that someone has understood a phrase when he attributed to it not just any meaning, but a meaning adequate to the given message. Only this kind of comprehension will satisfy both the message communicator and the recipient, because only then can they come to an understanding (verbal).

Understanding of the text of a legal act means reproducing the legal norms contained in the text, and specifically answering the questions: 1) whose?; 2) what actions?; 3) in what circumstances?; 4) are ordered/banned by these norms?, what actions is the legal subject entitled to at the given interpretative moment? The issues surrounding understanding of the text of a legal act are therefore not only related to the semantic agreement, but also require prior syntactic analysis that considers various semiotic categories of statements involved in regulations and legal norms.

Communicative (or discursive) competence in law is therefore a specific expression of communicative (discursive) competence (A. Duszak 1998: 253) in matters of understanding the texts of legal acts as this type of texts. Participants of the legal discourse (the legislator and the interpreters) should possess a similar level of the discussed competence, which is acquired in the process of specialist education – in the area of interpretation of the texts of legal acts in particular. This focus on realising the communicative goals is characteristic of a "discourse community". As John Swales writes: "A discourse community consists of a group of people who link up in order to pursue objectives which are prior to those of socialization and solidarity, even if these latter should occur. In a discourse community, the communicative needs of the goals tend to predominate in the development and maintenance of its discourse characteristics" (J.M. Swales 1990: 24).

It is obvious then that the level of competence regarding interpretation of legal acts' texts in such a discourse community should be comparable. Any difference in the level of competence between the legislator (communicator) and the interpreter (recipient) always carries the risk of misunderstanding the meaning of the text of a legal act. An adequate understanding of these texts requires both the knowledge and the skill of using interpretative directives, which is not a general knowledge. Members of the discourse community, as mentioned before, are people whose competence in the interpretation of the texts of legal acts (knowledge of the texts of legal acts and their understanding) is comparable to the knowledge attributed to the legislator. Let us also remember that the legislator is understood here in theoretical, and not sociological or institutional, terms.

5. The pitfalls in the *prima facie* understanding of the texts of legal acts

When the understanding of the message received differs from the understanding of the message communicated, the state of misunderstanding (verbal) arises, which is

even worse than the state of incomprehension. In the latter case, the receiver, knowing that he does not understand, can take steps to understand the communicated message; in contrast, he may not be aware of a misunderstanding, and may even realise it in very unfavourable circumstances. Hence, when someone comprehends a given message, he should approach it with caution and try to verify whether he genuinely understood this message (i.e. whether he received the same message that was given).

Attributing meaning to familiar words is a natural human reaction. We do it without much reflection, based on prior knowledge. The human mind naturally ignores what it does not know. Many people feel overly confident about unsupported opinions. However, "subjective certainty, with which people view their own intuition, is not a reliable indicator of its accuracy" (D. Kahneman 2012: 320).

Legal interpretation is an expert interpretation *par excellence*. For it requires specialist knowledge, and not only about the law, but mostly the knowledge of the interpretation of the texts of legal acts *par excellence*. As S. Šarčević (2000: 9) has noted: "language of the law is used strictly in special-purpose communication between specialists, thus excluding communication between lawyers and non-lawyers". Such a statement may seem too radical for some. But, if we realise the dangers that an inadequate understanding of legal texts carries, and that it brings legal consequences, radicalism starts to sound like the voice of reason. When somebody is guided by the premise "Only what can be seen exists", he does not even know that outside of this favoured view are other equally possible perspectives (D. Kahneman 2011). This ignorance enables a false belief in the accuracy of his own judgements. The danger of inadequate understanding of the texts of legal acts derives from the fact that they are written in the ethnic language known to the reader. Yet the intrinsic qualities of the legal acts' texts as well as certain specificities of the language in which they are written are not always known to him. Succumbing to the illusion of understanding of these texts has therefore at least two different reasons. The first one involves unfamiliarity with the type of textual model that is the text of a legal act. The second one stems from the fact that the same words used in the texts of legal acts are also used in other types of texts, although with other than legal meanings.

Legal interpretation is not based on the *prima facie* impression. It is a cognitive process that happens according to content-specific and chronologically ordered interpretative directives. As a consequence, any initial impression as to the meaning of a legal text, does not constitute the ultimate interpretation, but is verified through applying the interpretative directives.

A person cannot turn off the intuitive stage of his linguistic understanding, because it accompanies him without reflection and is beyond his controlled awareness. It is in a sense automatic and at the same time precedes the conscious processing of information. A person experiences a subjective impression of clarity of the text, to which a point of reference is his linguistic and non-linguistic knowledge, his attitude and experience, influencing in the certain context whether and in what way he understands a given text. On the one hand, is it within the realm of subjective linguistic

and communicative competence; on the other, however, it is to a certain extent subject to unification within the community, which in turn determines communicative success. For practical efficiency of "common" linguistic communication it is sufficient that the degree of similarity between the semantic intuitions of interlocutors be merely satisfactory (it does not have to be either complete or perfect). The same cannot be said, however, about such a complex matter as law, which includes understanding of the texts of legal acts.

The above observations also relate to the understanding of legal acts' texts by lawyers themselves, whose legal competence is by no means uniform. There may be various facts and associations related to particular excerpts from the texts of legal acts, certain types of interpretative actions, axiology, or even objectives that guide the "reading" of the interpreted text. For this reason the feeling of intuitive "obviousness" of the linguistic meaning in many cases cannot provide any assurance of its intersubjective accuracy. It is in fact dependent on and relative to individual factors that contribute to different results of the intuitive processes of recognising the meaning of the text of a legal act. Therefore only acting according to a specific and consistent set of interpretative directives based on consistent methodological premises offers a chance to accurately understand, and therefore adequately read, the text of a legal act.

6. Conclusion

The existence of a discourse community is premised on the realisation of common goals. In the case of the community of interpreters of the texts of legal acts this goal is an understanding of the text of a legal act, which requires appropriate preparation – a discursive competence within legal interpretation. At the same time, because of the specific subject knowledge that is the text of a specific legal act, knowledge of the intrinsic qualities of the textual model for the text of a legal act is required, as well as the knowledge of interpretative directives.

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