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Objectivity and Legal Interpretation[*]

1. Introduction

Practical lawyers as well as ordinary people pay special attention to neutrality, impartiality and objectivity of the judicial application of law. It is a common sense requirement that judicial decisions should be neutral, objective and impartial. The very concepts of neutrality, impartiality and objectivity are, however, by no means clear. Therefore, it is a task of the legal theory to answer the question what do neutrality, impartiality and objectivity mean and what role those concepts play in the legal discourse.

In this paper we would like to focus on the problem of neutrality, impartiality and objectivity in the context of judicial application of law and interpretation of law. Obviously, such task involves examination not only of the concepts themselves, but also the relationship between them and the adopted concept of law, the use of those concepts in a particular legal culture, as well as their significance in the judicial application of law.

The problem of neutrality seems to be the most trivial one. As Leslie Green writes : „Law is a normative system, promoting certain values and repressing others. Law is not neutral between victim and murderer or between owner and thief. When people complain of the law's lack of neutrality, they are in fact voicing very different aspirations, such as the demand that it be fair, just, impartial, and so forth. A condition

[*] We would like to thank professor T. Gizbert-Studnicki and all people who participated on the discussion panel at the Philosphical Rally 2010 for comments and suggestions to this paper.

of law's achieving any of these ideals is that it is not neutral in either its aims or its effects."[1] We consider that the acceptance of postulate idea of neutrality of law would simply reduce the sphere of laws to procedural rules, not based on any evaluations. The law is, at least in its major part, a matter of fundamental axiological choices made initially by the lawgiver, which ensures fulfilment of the most important function of law: the regulation of social life. The problem of axiological neutrality of law does not arise at all, as the fundamental aim of law is to „promote certain values"[2].

But let us turn to the problem of judicial application of law. Even if the postulate of neutrality cannot be applied to the law itself, it still may be applied to the interpretation of law and application of law. The basic axiological choices are made by the lawgiver, who takes responsibility for such choices. It may be said that the judge preserves neutrality, if she is guided by such choices, and not by her own axiological preferences. Therefore, the requirement of neutrality of application of law and its interpretation does not disappear. It may be said that a judge is neutral, if she does not challenge axiological choices made by the law giver, but just follows them.

The difficulty is that „neutrality" is quite frequently used interchangeably with „objectivity" and „impartiality". Yet, it must be stressed that if we do not treat „neutrality", „objectivity" and „impartiality" as synonyms, we need to find the differences. When we say that application and interpretation of law should be neutral, impartial and objective do we mean the same, or we have in mind distinct requirements?

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[1] Lesile Green, *Legal Positivism* [in:] Stanford Encyclopedia of Philosophy; source: http://plato.stanford.edu/entries/legal-positivism/; entry 02.05.2010.

[2] Even the very concept of „liberal law" is not neutral in that sense. See: W. Sadurski, Neutralność moralna prawa [Przyczynek do teorii prawa liberalnego] (Moral neutrality of law[Contribution to the legal theory of liberalism]), Państwo i Prawo, nr. 7/1990.

2. Objectivity and its relation to other notions.

Objectivity is an ambiguous word, having various meanings both in ordinary language, as well as in the language of law. Even in the language of philosophy no single and precise meaning has been ascribed to the word *objectivity*.

As far as the language of philosophy is concerned, in the context of requirement of objectivity of epistemic justification a distinction can be drawn between *strong* meaning of objectivity and its *weak* meaning (also known as the objectivity in the „moderate“ or „minimum“ meaning). The strong claims to objectivity of verification or falsification of a statement require the recourse to the empirical or analytical methods based on the adopted criteria of truth. On the other hand the moderate and minimum claims to objectivity only require such justification of a statement which procures its acceptance by a certain audience. In the procedure of justification, which involves numerous rhetorical and persuasive steps, certain statements become valid in the sense that they cannot be rejected by the audience, therefore such statement are deemed to be „objective“[3].

Analysis of the language of law leads to the observation that the term "objectivity" has no fixed meaning, given once and for all. The concept functions in many contextual meanings and is used in various types of legal discourse. It should be stressed that the requirement of objectivity is a fundamental and essential component of the ideology of interpretation accepted and applied by lawyers in contemporary legal cultures. Administration of justice must be objective, as otherwise uncertainty and unfairness arises. Unfortunately the meaning of this requirement is still not precise. At least three different senses of objectivity must be distinguished:

(a) "objective" as "coming from the object", or „adequate“ which means that a statement is objective if it adequately corresponds to the object,

(b) "objective" as "universally valid" or "valid for everyone", where the statement is

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[3] L. Rodak, Pojęcie i koncepcje obiektywności (Notions and concepts of objectivity) [in:] (ed.) T. Pietrzykowski, W kręgu teorii prawa i zagadnień prawa europejskiego (In the range of european law theory), Sosonowiec 2007, p. 88.

objective if it should (could) be accepted by everyone,

(c) "objective" as " free from emotion and / or unbiased", where a statement is objective if it is accepted without prejudice, after careful consideration of all relevant circumstances[4].

In the first sense objectivity is a synonym of a complete object-statement adequacy, and is very similar to the strong philosophical understanding of objectivity described above. In the second sense it is very similar to the moderate philosophical claim to objectivity.

If we leave aside the first and second sense of objectivity[5] we see that objectivity in the third sense is closely related to the impartiality and neutrality. A statement which is „free from emotion and/or unbiased“ can also be characterized in this way as neutral or impartial.

The lawyers tend to use those three terms (objectivity, impartiality and neutrality) in identical contexts, or even treat them as synonyms, but they do it in the third, peculiarly juristic, meaning of objectivity.

As we consider, those three concepts should be differentiated, especially when we consider the relationship between them in the context of law and legal procedures. Just to give an example which shows the necessity of such differentiation. The postulate to preserve neutrality in a dispute potentially refers both to the subjects that are formally and institutionally "outside" such dispute, as well as to those who have specific roles in the dispute. When we consider the persons who do not participate in the dispute in any role the postulate of impartiality of such persons seems to be irrelevant. Neutrality of such persons means only that they do not interfere in the dispute. Such persons, provided that they do not interfere (and, thus, are neutral), do not need to preserve impartiality. This shows that at least in this

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[4] T. Gizbert-Studnicki, Podstawy argumentacji prawniczej (Foundations of legal argumentation), Acta Universitatis Wratislaviensis 1772, Wrocław 1995, p. 36.

[5] ...which seems to be irrelevant for the purpose of this paper, and we can exclude it in the same way we did it with ontological meaning of „neutrality“ in the beginning.

context impartiality cannot be identified with neutrality[6].

The claim to impartiality in the context of legal dispute is addressed to such persons only who, due to their role in the procedure of dispute resolution, take responsibility for the decisions resolving the dispute as the decision makers. Parties to a dispute (for example the plaintiff and the defendant) do not need to be impartial, as their pursue their own interests. With respect to the decision makers, the requirement of impartiality and neutrality overlap, because a judge (arbitrator) is bound to make her decision on the basis of pre-existing general rules, and not on the basis of her own *resentiments*, private beliefs or subjective convictions. The basis of her decision is the pure application of the law, since she supports neither the plaintiff nor the defendant. In this context, requirement of impartiality of decisions constitutes only a component of the basic constitutional principle of the Rule of Law in its positivistic sense.

In many cases, however, the legal standards that bind the judge do not determine fully the content of the decisions, which she has to take. In such a case judicial decision is at least partially discretionary. The judge is on her own, since she has to operate in situation of an epistemic or axiological doubt, which may refer either to fact of the case or to the content of the law[7]. The postulate of impartiality requires, that in deciding such problematic cases a judge is not "biased", in the sense that the decision is not driven by any „private“ interests. Thus, in cases where the judge must decide in favour of either party, and the criteria for he decision are left to her

[6] Thus it it easily seen that the postulate of neutrality simply denies active participation. In this way we can say that Switzerland is used to be neutral country, because if any conflict between other countries arises, it remains neutral and do not participate in conflict, like – in Swiss perspective - it has never occured. On the other hand the postulate of impartiality refers to the agent, who is, like an arbitrator or witness, in decisive or descriptive position. Such an agent is obliged to remain impartial, while deciding (due process of law) or testify without any additional and unnecesary evaluation or surplus interpretation.

[7] The problem of discretionality is crucial to the contemporary discussion between legal positivists (both exclusive and inclusive) and non-positivists (with a chief-example of Ronald Dworkin).

discretion, the postulate of neutrality is identical with the imperative of impartiality[8]. It is useful to add that the legal positivism maintains that in such a situation any decision made by the judge in the scope of her discretion is legally right. On the other hand the non-positivism denies the existence of the judicial discretion, claiming that the judge is always bound to follow certain principles and policies which determine her decision. Irrespective of the fact which claim is true, both of them require the impartial attitude either in making a discretionary decision or choosing the right principle which best fits the case.

Objectivity as impartiality belong to the catalogue of basic legal values, especially concerning formal aspects of the doctrine of Rule of Law and procedural determinants of authoritative settlement of legal disputes, which are characteristic for the judicial resolution of disputes. In most systems of procedural rules of dispute resolution, both the right to a hearing and resolving the case by an impartial tribunal, as well as various types of guarantees of impartiality exist[9]. Certain examples of legislative acts of this kind in Poland are: article 45 of the Constitution[10], article 48 and 49 Civil Procedure Code, article 40 and 41 Penal Procedure Code, article 24 of Administrative Code, article 130 in Tax Ordinance or article 18 of Penal Execution Code.[11]

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[8] Z. Tobor, T. Pietrzykowski, Postulat neutralności w porządku prawnym (Postulate of neutrality in legal order), [in:] (ed.) O. Bogucki, S. Czepita, System prawny a porządek prawny (Legal system and legal order), Szczecin 2008, p.183-183.

[9] Z. Tobor, T. Pietrzykowski, Roszczenie do bezstronności (Claim to impartiality), [in:] (ed.) Jerzy Stelmach, Filozofia prawa wobec globalizmu (Legal philosophy towards globalism), Kraków 2003, p. 57.

[10] Article 45 says: "1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court. 2. Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly. "

[11] Norms of a similar nature can be easily found in the legislation of other countries. Examples include article 30 of the Constitution of Switzerland, §22-24 German Strafprozessordnung (StPO), §40-42 Zivilprozessordnung (ZPO) or Article 630 (Chapter 62, Title 44) of Alaska Statutes, which requires that "The functions of hearing officers and officers participating in decisions shall be conducted in an

Impartiality as a legal notion is frequently explicitly referred to in the texts of statutes, sometimes the very term "impartiality" is used, and sometimes other concepts are applied, which, however, cannot be interpreted without reference to impartiality, such as for example fairness. These rules can be divided into six major groups:

a) rules that provide for "a situation of impartiality" to the judge (arbitrator) under the procedure in question;

b) rules which impose general, institutional conditions for making unbiased decisions;

c) rules which lay down criteria for determining the position of all participants of the disputes (requiring or prohibiting differentiation among them in some respects);

d) rules that impose an obligation to conduct the proceedings impartially, addressed to certain class of subjects;

e) rules that prohibit taking any actions, which may raise doubts as to impartiality;

f) rules which express the right to an impartial decision or order to ensure the impartiality of a particular type of decisions[12].

Yet, objectivity as impartiality may be understood as a feature of the law, attributed to the procedures (procedural objectivity, or as a feature of the decisions, e.g. made by judges resolving disputes[13] (decisional objectivity). We leave aside the question whether impartiality may be ascribed also to the rules of substantive law.

The role of the postulate of impartiality in the legal procedure is to fund a set of requirements relating to procedures, compliance with which conditions its impartiality[14]. Certain of such procedural rules are obvious and embedded in

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impartial manner and with due regard to rights of all parties and the facts and the law (...)" (See: Z. Tobor, T. Pietrzykowski, Roszczenie do bezstronności (Claim to impartiality), op. cit., p. 57).

[12] Z. Tobor, T. Pietrzykowski, Bezstronność jako pojęcie prawne (Impartiality as a legal concept) [in:] Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowaka (Law and values. In honour of professor Józef Nowak), Kraków 2003, p. 277

[13] Ibidem.

[14] Ibidem p. 60.

practically each procedure: no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against her (*audiatur et altera pars*), the prohibition of being a judge in her own case (*nemo iudex in causa sua*), or the principle guarantying each party equal rights to pursue her own interests. Various concepts of legal arguments assume that the impartiality of the procedure is its essential feature. However, the postulate of an impartial procedure applies only to conditions for fair conduct of the judge or arbitrator, so it is not the point, that a trial is impartial itself, but only that it can create "a situation of impartiality", which, however, is not yet a sufficient guarantee of impartiality.

Let us come back to the problem of the process of application of law[15]. A distinction should be drawn between impartial decision-making procedures and the impartiality of judicial reasoning (justification). As it appears we have to do with two different concepts of impartiality. Impartial application of legal rules means that in the course of the decision making process no rule has been overlooked and all relevant facts have been considered. Impartiality so understood may be defined as the requirement of taking into account all elements of the case (the facts), with regard to all relevant legal rules. Thus, impartiality of the decision making procedures aims at achieving objectivity in the third of the meanings distinguished above (objectivity as freedom from emotions and bias). But requirement of impartiality applies also to justification of judicial decisions. . The judge is bound to justify her factual statements and her interpretation of law in an impartial way. A justification is impartial when it may be accepted by all participants in the free legal discourse. Thus, impartiality of justification can be identified with its objectivity in the sense (b) (objectivity as „universal validity).

Let us turn to the issue of interpretation of law. A distinction needs to be made between interpretation conceived of as a process (to which the requirement of objectivity in the third sense applies) and interpretation conceived of a result of such process (to which objectivity in the second sense applies). Obviously, there exists a

[15] Ibidem p. 62.

sort of a link between the features of the process itself and the features of its result. If the process of interpretation fulfils the requirement (c), the chance that it result will fulfil the requirement (b) are higher. But, on the other hand, the failure of fulfilling (c) does not preclude the fulfilment of (b). Even if the decision making process is biased, its result still can be „objective' in the sense (b).

So far, we have discussed two out of the three meanings of „objectivity" distinguished above (objectivity as „universal validity" and „objectivity" as „freedom of emotions and bias"). As it appears, however, the issue of „objectivity" is relevant for the legal theory also in the first of its meanings („objectivity" as „adequacy to the object"). In particular, one of the classical problems of the theory of legal interpretation is the problem whether so called „objective meaning" of the law text exists.

J. Wróblewski distinguishes three extensionally different concepts of interpretation: interpretation *largissimo sensu*, interpretation *sensu largo*, and interpretation *sensu stricto* (in the strict sense). In the first sense of interpretation (*largissimo sensu)* it is treated as the very vast concept of understanding of any cultural phenomenon or item. Interpretation in the broad sense (*sensu largo*) is the understanding of written or spoken texts. Finally, the interpretation in the strict sense occurs in a borderline situations, in which doubts as to the meaning of a text arises[16].

The interpretation doubts, to be solved on the basis of accepted rules and ideologies of interpretation, arise when the interpretation sensu largo does not lead to unequivocal conclusion. This relation between the interpretation sensu largo and the interpretation sensu stricto reveals the question of distinction of an objective meaning (which is a sort of pre-existing meaning to be discovered in the process of interpretation and the subjective meaning, which is a sort of ascribed to the text in

[16] J. Wróblewski, Chapter 3, [in:] W. Lang, J. Wróblewski, S. Zawadzki, Teoria państwa i prawa (Theory of state and law), Warszawa 1979, p. 394. In that context we shall note that Wroblewski, as a supporter of the principle of *clara non sunt interpretanda,* claimed that the interpretation of the law is unnecessary in a situation of well-known, direct understanding of the legal articles.

the process of its interpretation guided by the adopted rules ad ideologies of interpretation. The same problem has been discussed in the contemporary theory of literature.

Two main standpoints with respect to the matter of an „objective“ reading of texts may be distinguished[17]. The first of them claims that we cannot even talk about the existence of any objective interpretation or objective meaning of a literary text. This orientation is predominant among the theorists of literature. S. Fish believes that the so-called "accurate reading" or "real words" are only fictitious constructions, which are harmful to the literature because they limit creativity of the interpreter, and thus deplete our culture[18]. Supporters of the second standpoint see the benefits of establishing an objective interpretation of literary text. There is, however, no agreement among them whether this interpretive objectivity is possible to define. It is argued that the existence of one, proper and correct interpretation of a literary text is an ideal affecting literary critics, who should aim at it, but it is neither possible nor necessary to achieve. There are also theorists, who believe in the existence of an objective interpretation of a literary text, and they are mostly those who believe that the text includes one certain meaning. However, all attempts to define what is an objective interpretation of a text raise a lot of doubts, mainly because of the vague terminology and ambiguous terms such as "real meaning", "sense” or "author's intention"[19].

On those grounds, the lawyers tend to be reluctant to talk of "objective interpretation" of legal texts (understood as such interpretation which discovers a pre-existing „objective meaning“), although it seems that the assumption of achieving neutral and objective quality of interpretation should be the starting point for any process of interpretation. Just because talking about "objective interpretation" of the legal text entails a theoretical risk, lawyers prefer to discuss any interpretative

[17] R. Sarkowicz, O interpretacji (On interpretation) [in:] Universitas, 1993 z.5, p. 22.

[18] S. Fish, Is there a Text in this Class, Cambridge 1980, p. 180.

[19] R. Sarkowicz, O interpretacji (On interpretation) [in:] Universitas, 1993 nr. 5, p. 22 - 23.

decisions rather as providing "admittable", "authoritative", or "real" meaning of legal text.

The risk mentioned above is due to the fact that the legal interpretation theorists quite commonly share opinion that the discussed desire to establish the single and "accurate" legal meaning of the text is not based on the belief that there is an objective meaning of the text, but on the fact that it is practically reasonable to treat it „as if“ it is objective. The judges, while interpreting the legal text, simply cannot conclude that the text is ambiguous, since this would freeze the case, leaving it without resolution, and therefore the judge has a duty to select meanings and try to justify the most appropriate of them.

In the daily practice of interpretation, the officials apply the law and more or less consciously aim to produce the conviction that the arrangements made by their interpretation are objective. However, interpretation theorists reveal the evaluative nature of the process of determining the meaning of the text through interpretative process, providing rich material that shows how lawyers try to "objectify" certainly important legal texts[20].

3. Conclusion.

The problem of objective, impartial and neutral application and interpretation of law is still vivid in contemporary legal theory. The contemporary philosophy clearly affects the understanding of those concepts in legal theory. In this way the discussion on objectivity in metaphysics, epistemology or axiology determines to some extent legal understanding and use of those terms. Nevertheless, lawyers and legal theorists have developed those senses in specific context.

The non-neutral (in axiological sense) nature of law is determined by its

[20] R. Sarkowicz, Autorytet a obiektywna interpretacja tekstu (Authority and objective interpretation), [in:] G. Skąpska (ed.), Prawo w zmieniającym się społeczeństwie (Law in developing society), Kraków 1992, p. 198-199.

pursuance to promote certain values. To some extent this fundamental feature of law affects the process of legal interpretation.

The objectivity in strong epistemic sense relates to the adopted view on nature of law (laws' metaphysics) and the nature of human cognizance of such phenomena. This sense requires the real subject-object adequacy (as e.g. „coming from the object"). Talking about objectivity of interpretation of law in this sense requires a strong assumption that an objective, pre-existing meaning of the law text exists.

The objectivity in „moderate" epistemic sense, which is most of all a synonym of objectivity as „universal validity", as well as impartiality („free from emotion and / or unbiased") appears in three distinctive uses - procedural, substantive and decisive – which sometimes overlap (we discussed only two of them: procedural and decisive).

Each of these uses refers to the phenomenon of legal interpretation. The latter provoke many problems, concerning especially different approaches to understanding the „objective meaning of legal text. In order to elude the illusion one can get while interpreting legal texts that there is one certain meaning, it is useful to point out the process of „objectification", which is tied with practical dimension of interpretation and the estimated weight of its effect. The objective, as unequivocal and shared by everyone, meaning may not be able to be achieved in legal reasoning. Thus, in such situations there appears unavoidable need to refer to particular ideologies and directives of interpretation, for there is one „objectified" and useful meaning of dubious word. The problem of such „objectified" terms' utility in legal discourse is a central question in domain of legal argumentation.

The importance of these notions shows, that above all doubts we can treat them like as Kantian regulative ideas[21], as they appear to be very useful, stimulating,

[21] ...which „regulate, set guidelines for the researches to follow in order to achieve the desired unity of science". See: R. Sarkowicz, A note on "objective interpretation" [w:] Challenges to Law at the End of the 20th Century (17th IVR World Congress Bologna, 17-21 June, 1995), Vol. V: Working Groups 50-69 – Sources of Law, Legal Theory and Computer Science, Bologna 1995, p. 78

and inspiring concepts, wilfully used by theorists of interpretation[22]. At least for this reason may they deserve further investigation.

[22] Ibidem.