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Legal Interpretation. Intensional and Extensional Dimensions of Statutory terms

This paper deals with semantic aspects of legal interpretation. We apply a bottom-up perspective for analysis of semantics of statutory text. Intensional and extensional aspects of statutory expressions are analyzed and presented on a diagram. It is argued that such diagram may play a role as a tool for explanation of disagreement concerning meaning of statutory terms and that it represents a typology of legal interpretive problems. It also supports the view that legal reasoning is rather constructive than reconstructive enterprise.

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1 Introduction

[Rz 1] Legal interpretation is one of the most (if not the most) elaborated and at the same time controversial topics in legal philosophy. Interpretation is ubiquitous in lawyers' everyday life, yet it is very difficult to approach this topic theoretically because at any particular point of departure we seem to be determined by very strong philosophical traditions and competing theoretical proposals.

[Rz 2] One important claim is shared both by legal practitioners and theoreticians: interpretation is concerned with meaning of law (where different objects may be substituted for the word «law» used here: statutory terms, legal rules, legal propositions and so on – the choice may depend on theoretical considerations or on practical aims). Especially, in the context of application of law, the lawyers generally agree that interpretation enables them to determine the meaning of law and eventually to apply the (interpreted) law to a concrete case. We will follow Wróblewski to refer to this kind of interpretation as «operative interpretation».[1]

[Rz 3] In legal philosophy, the concept of meaning is notoriously invoked in the context of (operative) interpretation. Let us quote selected authoritative sources:

«In contemporary systems of statutory law the court, as a law-applying agency, is required to decide any properly presented case within its competence according to valid legal rules. This is why the directives of interpretation are formulated in such a way that the determination of the meaning of any rule with the necessary degree of preciseness is possible».[2]

«By ‹interpretation in the strict sense›, I thus mean entertaining some doubt about the meaning or proper application of some information, and forming a judgment to resolve the doubt by deciding upon some meaning which seems most reasonable in the context. (...) Issues of interpretation in the defined sense are endemic to law (...)».[3]

«Every statement regarding the meaning contents of a linguistic expression can be defined as meaning statement. (...) It may be considered that a meaning statement is used to make the range of meaning more exact by cutting out possible alternatives or alternatives which enter the question. (...) the meaning statement referred to (...) will be called an interpretive statement. »[4]

«(...) the place to start when interpreting a statute is with the words themselves. We begin with the most basic question: How do you know what a word means? »[5]

1 Wróblewski1992, 87.

2 Ibid., 90.

3 MacCormick2005, 121–122.

4 Aarnio1987, 56.

5 Jellum and Hricik2009, 73.

[Rz 4] In consequence, the standard view is that statutory interpretation takes place when certain doubts concerning meaning of statutory provisions should be removed – both on the other hand, in order for these doubts to occur we have to begin with some initial understanding of legal text. On the basis of this assumption broad theories of methods of interpretation are elaborated. The very concept of meaning which underlie further investigations is investigated less often. This paper aims at elucidation of important semantic features of certain statutory expressions. Our analysis is based on well-known distinction between intension and extension of linguistic terms, which is, in our opinion, underrated in the context of theory of legal interpretation. More precisely, we aim at (1) a bottom-up analysis of (2) intensional and extensional aspects of carefully chosen statutory expressions (3) in the context of operative interpretation (4) to indicate sources of disagreement concerning understanding of statutory expressions.

[Rz 5] Two important qualifications are in place. First, we do not claim that all what is typically referred to as «legal interpretation» is a semantic problem. In our opinion, the contrary is the case. Second, we abstract from legal-philosophical work on legal interpretation here for purpose: we intend to stick our investigation as close to actualities of legal practice as possible, adopting a bottom-up approach to analyzed problems.

[Rz 6] The order of investigations is as follows. In the next Section, we outline the problematic of legal interpretation in general and we attempt to place our contribution on this map. In the following Section chosen statutory expressions are carefully analyzed to indicate important problems concerning understanding of the word «meaning» crucial to the topic of legal interpretation. In Section 4, we introduce two dimensions important for semantic analysis of statutory expressions. In the last Section, we conclude and present perspectives for further research.

2 The Grand ISSUE of Legal Interpretation

[Rz 7] The literature of the subject is way too vast to be described here. Let us enumerate a few broad traditions in legal philosophy which try to attack the problem of legal interpretation from different philosophical stances.

[Rz 8] As regards historical considerations, the tradition of hermeneutics has to be mentioned first. The very concept of hermeneutics is ambiguous, but its connections with the term «interpretation» are not contested. From the ancient times on, hermeneutics was developed as the art of interpretation of literary, religious and last but not least of legal texts – but these investigations were conducted in separation. It was in the 19th century when hermeneutics was created as a unified method for interpretation by Schleiermacher and the elaborated theoretically as philosophy of understanding, thereby giving foundations for the methodology of humanities, by Wilhelm Dilthey. In the 20th century an ontological version of hermeneutics was developed, most notably by Hans Georg Gadamer. As regards influence of hermeneutics on legal theory, the work of Arthur Kaufmann has become very important in the last decades of the 20th century.[6]

[Rz 9] Another very important – and perhaps more influential nowadays – account of interpretation of legal texts has been developed under the influence of Anglo-American analytic philosophy, to mention for instance the work of J.L. Austin which was very formative for development of

[6] Stelmach, Brożek2006, 167 seq.

H.L.A. Hart's method for analysis of problems of jurisprudence. Legal interpretation, when seen from the standpoint of this kind of «weak» analytic philosophy, focuses on characteristic features of legal and juristic language and on different methods of resolving ambiguities in legal text and dealing with such problems as vagueness[7] and open-textured[8] character of legal terms. Let us also emphasize at this point that also «hard» analytic philosophy made its contribution to the problem of legal interpretation, to mention for instance the work of Jan Woleński.[9]

[Rz 10] Interpretation has become a crucial topic in jurisprudence of Ronald Dworkin. The author of Law's Empire claimed that law is an interpretive concept, and thereby he insisted on inseparability of the issues of existence of law and its interpretation. Dworkin indicated important connections between interpretation of law and interpretation of works of art. He advocated taking the so-called constructive interpretation view in the context of understanding and applying of statutes, the thesis being well-illustrated by the conception of Hercules judge.[10]

[Rz 11] The three abovementioned traditions are not the only ones as regards philosophical reflection on legal interpretation. However, nowadays it is rather a difficult task to master entirely any of these traditions to be able to speak competently from the internal point of view of any of them, and to competently compare them. The philosophical discussion of the issue of interpretation has become unbelievably sophisticated. There are many interesting theoretical problems as regards the topic of legal interpretation. Let us follow Julie Dickson[11] to indicate some of them, which are considered very important: 1) the object of legal interpretation, 2) (the degree of) creativity in legal interpretation, 3) constraints on the process of legal interpretation, 4) possibility of general theory of legal interpretation, 5) the relation between meaning and interpretation, 6) the axiological problem: which values should be realized in the process of legal interpretation, 7) the problem of there being one right interpretation or more (equally) right interpretations.

[Rz 12] The following problems can be added to this list: 8) the problem of methodological stance from which we analyze the problem of interpretation: descriptive, analytical or normative (and the connected problem of possibility of clear-cut distinction of these stances as regards legal interpretation) 9) the place of legal interpretation in broader model of legal reasoning; in particular, this problem encompasses the question whether legal reasoning necessarily involves interpretation or whether there can be such tokens of legal reasoning which are non-interpretive.

[Rz 13] It is not my aim to criticize this degree of sophistication of these discussions (it has a degree of value of its own), but at the same time it is striking how far the legal-philosophical investigation on interpretation drifted away from the actualities of legal practice.

[Rz 14] In legal practice, the issue of legal interpretation is pervasive. Lawyers use the term «interpretation» all the time. Sometimes they use the word «interpretation» to designate literally any intellectual activity they perform. Although such account is undoubtedly too broad, this does not alter the obvious contention that legal interpretation is indispensable in legal practice. Counsels of the opposing parties criticize interpretive proposals formulated by their opponents. In many jurisdictions it is possible to complain on the judicial decision on the basis of «wrong interpre-

7 Gizbert-Studnicki2000.

8 Bix1993, 7 seq.

9 Woleński1972.

10 Dworkin1986, 313 seq.

11 Dickson2010.

tation of the law» therein. Lawyers typically do not have problems as regards accounting for interpretation as a kind of process («right now I am interpreting the statute») and as a result of this process («an interpretation proposed by me would be as follows»). At the same time, they would have problems in presenting a definition of this process or result. Furthermore, probably it would be problematic for them to present a more precise description of interpretive activities they are performing: it is highly likely that they would use phrases such us «explanation of meaning of statutory terms», or «application of canons of interpretation» or «arguing for the best interpretation».

[Rz 15] The fact that on the one hand so many lawyers are very confident as regards their interpretive skills and many some of them are actually excellent in the art of interpretation, and, on the other hand, it would be impossible for them to account for a definition of the process of interpretation, is not surprising at all. Such definition is not necessary to perform sound processes of legal interpretation. What is more, the experience of legal theory and philosophy as regards formulation of definition of legal interpretation would corroborate practicing lawyers' unwillingness to engage in this kind of investigation rather than encourage them to focus on such definition. This is a common phenomenon that acquisition of knowledge concerning «how» does not necessarily entail knowledge on «what» and «why». And indeed it is doubtful whether it is possible to account for a single adequate definition of legal interpretation. At the same time, theoretical inquiry into the mechanisms of this phenomenon are of utmost importance for both theoretical and practical reasons.

[Rz 16] Although the philosophical discussion on legal interpretation is very sophisticated, it seems that the basic semantic mechanism of this process still seems somewhat fuzzy, even in the so-called easy cases. Our task in this paper is to shed some light on this basic semantic mechanism. We will deal with the problem 3 from Dickson's list: semantic constraints on legal interpretation. We do not claim that the theoretical account of legal interpretation solves all the problems as regards the matter at stake, but in our opinion it yields important insights.

3 Analysis of Examples

[Rz 17] What is the most typical context of interpretation of statutory expressions? Most of the lawyers would respond that such context is constituted by concrete cases and application of legal rules to them – that is – operative interpretation. The lawyers want to know whether they are authorized to apply a given legal rule to a situation which is presented to them and this is why they want to determine what they refer to as «meaning» of statutory expressions.

[Rz 18] We claim that in fact more than one type of reasoning is hidden under the expression «determination of meaning» but also that these types of reasoning may be effectively systematized.

[Rz 19] Let us consider five examples of rules taken from actual statutory law and focus on how a lawyer could reason on the problem of application of each of these rules to a state of affairs presented to him.

[Rz 20] *Example 1.* This example is taken from the Polish Forest *Act*. According to Article 30.1.13 of this act: «*In forests it is forbidden to let dogs run loose*».

[Rz 21] How would we determine whether this rule applies to a concrete situation, therefore pro-

hibiting an action[12] under consideration? In order to do this, we should answer three questions: (1) whether this action takes place in a forest, (2) whether the animal in question is a dog and (3) whether a person actually lets this dog run loose. In consequence, we have to establish whether certain features of our situation qualify within the scope of expressions «forest», «dog» and «to let run loose». How do we answer such questions? The meaning of all statutory text mentioned here is apparently understandable for everyone. Every person would be able to explain (not very precisely, perhaps) what is meant by these expressions and to indicate examples of things and actions which according to his or her opinion surely qualify under these expressions. Of course, as we might have expected, the «common understanding» of the term «forest» would be too imprecise for legal purposes and this is why the legislator gives us a legal definition of this expression in Article 3 of the *Forest Act*:

[Rz 22] «Art. 3. *Forest within the meaning of this Act is a land: 1) a compact area of at least 0.10 acres, covered with forest vegetation (forest crops) - trees and bushes and forest rune - or temporarily deprived of it: a) intended for forest production or b) forming a nature reserve or a part of a national park or c) listed as a monument; 2) related to the forestry, occupied by used for the purposes of forestry: buildings and structures, water management devices, spatial division lines of the forest, forest roads, land under power lines, nurseries, timber storage areas, and parking areas used for forestry and tourist device.*»

[Rz 23] It can be easily seen that this definition not only encompasses what is commonly regarded as «a forest», but that it is much broader. Presumably, only the initial part of this provision (ending with expression «forest rune») is in accordance with «natural» account of this term. Also, the vagueness of the term is eliminated (by introduction of minimal size of the land). However, the knowledge of common meaning of the word «forest» may be helpful in determining whether a given piece of land is a «forest», because the abovementioned legal definition is circular and it makes us of such expressions as «forest vegetation» or «forestry» in its *definiens*.

[Rz 24] Neither of the terms: «dog» and «to let run loose» is legally defined in the *Forest Act*. Most people would be able to present a set of features which surely should be possessed by an animal to qualify as «dog» and even if this list would be inadequate as a definition, it would cover most of animals scientifically referred to as dogs (presumably, certain very unusual races of dogs would be left outside such spontaneous definition). And it would be presumably unproblematic for anyone to qualify each animal as dog or non-dog – unless we dealt with some rare race of *Canis familiaris* not known to general public. Presumably, the situation is the same with the expression «to let run loose», which is (in typical situations) synonymous with «not to keep on a leash».

[Rz 25] To sum up, Example 1 offers an insight into two mechanisms of establishing what tentatively referred to as «meaning» of statutory expressions. First, some statutory expressions are seemingly obvious to a native speaker of a language: he or she would be ready to (1) explain what conditions should be fulfilled in order for a certain thing or situation to qualify «under» this statutory expression and (2) to indicate examples of objects and situation which are within its scope. The existence of borderline cases, is, of course, not excluded. Second, legal definitions interfere with this picture by changing the scope of statutory expressions.[13] As we could see, according

[12] The expression «action» should be understood broadly here and encompass not only active actions, but also omissions. I am grateful to Hage for this remark, because it is very informative as regards peculiarities of legal perspective on (apparently) easy cases.

[13] Legal definitions may perform many other functions, but a wider discussion of this problem is not necessary for our purposes here.

to the Forest Act, the expression «forest» covers much more than we would expect, basing on «natural» meaning of this word. However, in order to apply this definition, we have to resort to «natural» meaning of the terms used in its *definiens*.

[Rz 26] *Example 2.* This example is based on art. 159 of the Polish *Penal Code*: «*Whoever, engaging in a brawl or battery, makes use of a firearm, a knife, or other similarly dangerous object, shall be imprisoned for the period of time from 6 months to 8 years*».

[Rz 27] Although this provision is seemingly understandable to non-lawyers, like the provision analyzed in the previous example, this impression is very misleading. There are some similarities as regards interpretation of these two provisions, but there are also vital differences. There are two main conditions of application of this provision to a concrete case: (1) engagement in a brawl or battery and (2) making use of a firearm, a knife or other similarly dangerous object.

[Rz 28] Although both terms «brawl» and «battery» are used in plain language, in the context of provisions of penal law it is necessary to interpret these terms in accordance with their legal understanding – which is determined by the doctrine of penal law and by the judiciary. The doctrine of penal law attempts at formulation of necessary and sufficient conditions of the expressions designing types of crimes. For instance, for the crime of brawl, this list of conditions is as follows (1) it is an incident, involving fight, (2) with at least three participants, (3) and each of these persons is both attacking and attacked in the incident.[14]

[Rz 29] The degree of precision of understanding of «brawl» encompassed by these criteria is, of course, much higher than the precision of common understanding of brawl, which is very intuitive. However, in the context of penal law we need much more determinate account of what counts as «brawl» and what counts not, because otherwise the basic principle of determinacy of types of criminalized behavior would be violated. On the other hand, let us note that, again, to actually use the criteria, we have to resort to the terms which do not have such elaborated legal meaning – therefore it is necessary to resort to their «natural» meaning.

[Rz 30] As regards the second condition of application of the provision, at the first sight it is less problematic: we are well aware what constitutes a «firearm» or «a knife» and although there may be some borderline cases. However, the expression «other similarly dangerous object» is far more problematic. The words «similarly» and «dangerous» used in this expression are open. The formulation of the whole provision suggests that a firearm and a knife could constitute prototypes of dangerous objects. However, the understanding of the term «similarity» is crucial here and at the same time problematic – because the word «similar» is ambiguous and vague. Therefore, what «counts» here as «relevant» similarity is established in the course of argumentative discourse, concerning, in particular, aims of the Penal Code. This kind of discourse is not semantic and it involves value judgments. It is difficult to state in abstraction which types of objects are «similarly dangerous» to firearms and knives. The lawyers will be inclined to focus on the purpose of the provision at hand, which is the protection of certain good, namely, human life, which may be threatened by use of some dangerous objects. Indeed, in a commentary to the Polish Penal Code one may read that 'by «other similarly dangerous object» one should regard such tool which, when used is a brawl or beating, endangers human life to the same extent as the use of a firearm or a knife».[15] As we can see, the relation of «similarity» is replaced here by «sameness of

[14] Zoll, 2006.

[15] *Ibid.*

endangerment of human life» – which does not change the overall conclusion according to which a resort to considerations concerning the meaning of words is not very helpful here. In particular, to decide whether an object used in a given incident is «similarly dangerous» we will have to engage in the process of argumentation.

[Rz 31] This example proves to be more complicated as regards its «interpretation» than the previous one. Analysis of «plain meaning» of the used words is not very helpful and legal definitions are not at our disposal. Moreover, we are forced to argue on application of the term «similarly dangerous» in concrete cases.

[Rz 32] *Example 3.* Let us quote art. 172 § 1 of the Polish Civil Code: «*The possessor of immovable property not being the owner thereof shall acquire ownership, if he has been in possession for twenty years without interruption as an independent possessor, unless he has acquired possession in bad faith (acquisitive prescription).*»

[Rz 33] The part of statutory text quoted above is, again, more technical than discussed in Example 2. The crucial concepts used in it are: (1) ownership, (2) immovable property, (3) (independent) possession / possessor and (4) bad faith.

[Rz 34] Any attempt to understand these concepts according to their «plain meaning» would result in confusion and, in consequence, in erroneous application of this statutory provision. Let us look at the possible causes of this result.

[Rz 35] The concept of ownership is a typical (even prototypical) concept concerning certain legal status. In legal theory there is a still lively debate, notably initiated by Alf Ross, whether such concepts have meaning at all or whether they are just inferential nodes, introduced to facilitate operation of legal rules.[16] We are not able to engage in this discussion in this place, however it must be emphasized that the formulation of legal provisions will determine to large extent «what it means» to be an owner under particular legal regime and what is the reference of this term (due to the content of «input rules» determining who counts as an owner in a given jurisdiction).

[Rz 36] The term «immovable property» is typically ascribed to parts of land (and sometimes to buildings and pieces of these buildings). As the market of immovable property is of extreme importance, the degree of precision of provisions stating what counts as immovable property is typically high – this is the case, for instance, in the Polish Civil Code. In consequence, lawyers rarely have problems concerning determining scope of this term.

[Rz 37] The contrary is, however, the case as regards the terms: «possession» and «bad faith». Although the word «to possess» is used in plain natural language and is understood by speakers of language, lawyers would be tempted to state that it acquires an autonomous meaning in the domain of civil law. Although there are many important differences as regards understanding of possession in different jurisdictions, in most of them lawyers would resort to Roman law tradition and state that possession encompasses two elements: (1) corporal element, that is, physical contact with the thing (so-called *corpus*) and (2) the element of will, that is, an intention to control the thing (as an owner, in the case of «independent possession» under Polish law; so-called *animus*). In consequence, the term of possession becomes understood as a conjunction of two expressions, each of which is technical and indeterminate at the same time. A nice illustration of this point has been recently given by a discussion of the Popov and Hayashi case (in which the concepts of

[16] For the beginning of this discussion see Ross, 1957; for recent contributions to the discussion for instance: Hage2009 and Sartor2009.

possession played the crucial role) in AI and Law community.[17]

[Rz 38] The term «bad faith» should also be understood in a legal-technical manner. An analysis of Polish judgments concerning this concept shows that the scope of application of this concept is much broader than plausible intuitive reading of it as «knowledge about lack of ownership of a given immovable property by the possessor»).

[Rz 39] As a consequence, lawyers, when interpreting the provision at hand, will not be inclined to study «plain meanings» of the terms used in it. They will rather focus on theoretical work of civil law doctrine and in particular on previous judgments, in which certain situations were qualified (or disqualified) as «possession» or «acting in bad faith». «Plain meaning» considerations will be of limited use here, even in the case of, *prima facie* quite clear, «physical contact» condition relevant for the concept of possession.

[Rz 40] *Example 4.* The illustration is provided by Art. 11 of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva 1930): «*Every bill of exchange, even if not expressly drawn to order, may be transferred by means of endorsement. When the drawer has inserted in a bill of exchange the words ‹not to order› or an equivalent expression, the instrument can only be transferred according to the form, and with the effects of an ordinary assignment. The bill may be endorsed even in favour of the drawee, whether he has accepted or not, or of the drawer, or of any other party to the bill. These persons may re-endorse the bill.*»

[Rz 41] The provision quoted here is completely unintelligible for non-lawyers. Each significant term used here («bill of exchange», «to draw», «drawee», «endorsement», «assignment» and «acceptance») has a specific legal meaning; most of these words mentioned here are not used at all outside the context of bills of exchange law.

[Rz 42] However, a trained lawyer would not have serious problems with the «interpretation» of these expressions. To the contrary, he would be willing to explain what does this mean to be a drawer or a drawee and how the term «acceptance» should be understood in this context. This is because the doctrine of civil law provides for very precise technical definitions of these terms. The most problematic part of the provision would be, presumably, the term «equivalent expression», where the expression should be equivalent to the words «not to order». In fact, types of such «equivalent expressions» will be determined by the judiciary.

[Rz 43] *Example 5.* The final example is taken from the Convention for the Protection of Human Rights and Basic Freedoms (Rome, 4 Nov 1950), Article 6 par. 1 sentence 1: «*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*»

[Rz 44] Even at the first sight, this example poses completely different problems from the previous one. Although the terms used here are (roughly) understandable by non-lawyers, it is obvious that it takes legal expertise to «interpret» them correctly. The degree of disagreement concerning «meaning» of the expressions used here as «civil right», «fairness» and «impartiality», goes beyond dogmatic legal discourse and touches the deepest philosophical problems as regards the conceptions and functions of the system of judiciary and the law itself. The jurisprudence of the European Court of Human Rights devoted to «interpretation» of this provision of the Convention is immense. The question whether establishing of understanding of these terms has anything in

[17] Cf. Artificial Intelligence and Law Vol. 20, Issue 1, 2012.

common with semantic issues is very much on point.

[Rz 45] An initial conclusion stemming from the analysis of the five examples above is as follows. «Interpretation of statutory terms» involves very different types of intellectual operations. This diversity is revealed on very basic level, before we are engaged in choice of a given «theory of interpretation» (e.g. textualismn or purposivism) and of application of certain «canons of interpretation». To state that each act of interpretation leads to determination of meaning of a statutory term would be a tremendous simplification – also because different objects may be referred to as «meanings» of statutory terms. The next Section is devoted to systematization of the discussion of the problems revealed by the discussion of examples.

4 Understanding Statutory Interpretation. Intensional and Extensional Dimensions of Legal Terms

[Rz 46] Lawyers tend to refer to all types of their legal reasoning as «interpretation». Such use of this term, is, of course, misleading. However, if we limit our considerations to these intellectual activities which actually concern semantics of statutory expressions, we will still end up with a variety of different types of reasoning. This variety seems to be determined by the type of statutory expressions we are dealing with. We can distinguish the following types of expressions on the basis of the discussed examples:[18]

[Rz 47] 1) common expressions of plain natural language (like «dog» or «to let run loose»). Typically, lawyers are able to explain clearly which conditions must be fulfilled for this kind of expression to be predicated of an object or a situation. Moreover, it is unproblematic to indicate objects or situations which fall under these expressions, at least as regards prototypical objects or situations. To achieve these aims, lawyers may resort mainly to their «plain» knowledge about the language and the world.

[Rz 48] 2) «legalized» common expressions of natural language (like «brawl» or «possession»). While explaining conditions for predications of such terms of objects or situations, the lawyers will resort to their legal expertise and not to their «plain language» intuitions. The degree of difficulty of indicating examples may vary. For instance, while it is quite clear which facts have to be proven to determine whether a given incident should count as a brawl, it can be far more problematic to indicate such facts concerning «possession» in a given situation. Although it is trivial to state that both *corpus* and *animus* elements have to be ascribable of a state of affairs to refer to it as possession, it may be extremely difficult to establish whether a give state of affairs should count as «physical contact» with a thing or «manifested intent to control it».

[Rz 49] 3) legally defined expressions. As the «forest» example discussed above suggested, legal definitions make the scope of given expressions more precise; at the same time, they may modify it (narrow it or broaden it). It depends on the terms used in *definiens* of legal definitions which type of reasoning will be used to ultimately determine whether a give object or situations falls within the scope of legally defined expression.

[Rz 50] 4) precise technical legal expressions. In order to explain which conditions should be fulfilled to predicate such expressions as «drawee» or «endorsement» of a given object or situa-

[18] We do not claim that this list is exhaustive. In particular, for the sake of brevity, we exclude from this typology specific technical extra-legal expressions, taken from the language of medicine, engineering or economy.

tion, the lawyer will resort solely to his or her legal expertise. At the same time, he or she will be quite comfortable of indicating objects referred to by these expressions in the world, because typically the conditions for a given object to acquire certain status will be precisely prescribed by the law and typically they would involve some type of explicit conventional action (for instance, signature on a document; entry into a register and so on).

[Rz 51] 5) open technical legal expressions. When dealing with such expressions as «bad faith», instead of giving a list of conditions which have to be fulfilled to qualify a certain object or situation as an instance of the term, lawyers will be inclined to present a catalogue of circumstances which tend to strengthen or weaken our claim that this object or situation counts as such. In AI and Law research, this phenomenon is discussed under the label of dimensions[19] and factors[20]. In consequence it is difficult to state simply what it *means* to be «in bad / good faith» – rather, lawyers would tend to discuss different theories of bad / good faith and it is worth noting that (1) such theories may evolve in time, also due to evolution of relevant judgment lines and (2) there may be many competing theories of such concepts.[21]

[Rz 52] 6) philosophically engaged expressions. For this type of expressions it is very difficult (if not impossible) to provide the set of conditions of their application or even a set of relevant factors. Although certain objects and situations may be presented as prototypical examples of, for instance, «fair trial» or «civil right», an agreement may often arise as regards the actual prototypical character of the discussed example. This is because understanding of these concepts is deeply connected with the most basic considerations concerning the concepts of law and legally relevant values. Yet, lawyers tend to state that they look for a meaning of concepts of this type, although they admit that in this context legal interpretation is an extremely difficult endeavor.

[Rz 53] The typology of statutory expressions outlined above is by no means exhaustive; moreover, the particular types overlap to certain extent and it is difficult to draw sharp boundaries between them (the latter feature being quite natural for typologies) – however, it shows plainly how different reasoning patterns can be, and actually are, referred to as «interpretation» of these terms. So far, we have not gained much more than another illustration for the phenomenon of ambiguity of the term «legal interpretation». The question is, what type of strategy should be applied to systematize our thinking about this subject.

[Rz 54] First, at the point of departure let us restate that we are interested in very basic features of statutory interpretation – the stage which appears before lawyers start to argue about «different interpretations» of terms of legal text and begin to apply different theories and canons of interpretation. We are interested in sources of this disagreement and its conditions of possibility. Of course, many of these sources, like different types of ambiguity, vagueness and open texture in legal text are very well elaborated. The problem of legal indeterminacy has so rich literature that it would be impossible to even outline it here. Our aim is to account for the potential sources of disagreement also in situations when statutory expressions are (at least apparently) clear and determinate.

[Rz 55] Second, although it is tempting to resort to semantic theories elaborated in general phi-

19 Ashley1990.

20 Ashley and Aleven1995.

21 Another perspective on this issue is possible, too. A trained lawyer may be ready to explain the meaning of bad faith (on general level), but still, this semantic consideration will be hopelessly unhelpful as regards determination of what counts as bad faith, because of dynamic and moral aspects of this concept.

losophy to solve the theoretical problems of legal interpretation, we are of the opinion that such strategy can lead to misleading and counterintuitive results. There are many reasons for this. In our opinion, the most important reason is that the differences between the context of use and understanding of statutory terms and the terms used in extra-legal speech are so numerous and important. Let us point out the following ones, borrowing the Wittgensteinian concept of language game for convenience:

[Rz 56] 1) unsettled disagreements. In extra-legal language games[22], certain disagreements about the meaning or scope of a given term may remain unsettled between interested parties. In the context of judicial application of law, such disagreements about legal terms must be resolved.

[Rz 57] 2) pragmatic functions. In extra-legal language games, one and the same expression may perform very different pragmatic functions. In particular, we often use linguistic expressions to induce certain emotional reactions. The main function of legal expression is to formulate norms and to constitute institutional facts.

[Rz 58] 3) generality. In extra-legal language games, we often refer to concrete objects, persons and situations. Obviously, we also use general names, but their reference is often concretized by context of utterance of such terms. Statutory terms, in typical situations, aim at referring to certain types of behavior, objects or states of affairs and not to any concrete entities. Quite often, statutory provisions have universal character. In everyday speech we do not intend to refer to universal classes very often.

[Rz 59] 4) the scope of constitutive character. Although in extra-legal language games we use words referring to institutional facts on many occasions (let the game of chess serve as a notorious example), it is the lawmaker who is able to create whole systems of new institutional facts by means of enactment of new statutes. It is well-known phenomenon that in a new statute the lawmaker may introduce dozens of statutory expressions which were not present in legal system before. The task of the players of the law language game will be to determine their meaning and reference.

[Rz 60] Although the list presented above is not exhaustive, it seems sufficient to support the thesis that it would not be plausible to apply legal text expressions any of the semantic theories developed in extra-legal context. In particular, this refers to any attempt to apply natural kinds of semantics (for instance, Kripke-Putnam semantics) or individual names semantics to legal terms.[23] However, undoubtedly, legal-theoretical considerations may benefit from application of certain concepts discussed in the general theory of semantics of (certain parts or aspects of) natural language. This may be the case even if the semantic theory in question possesses historical rather than contemporary significance.

[Rz 61] The famous distinction between intension and extension of expression of the language is very well-known and grounded in the classic work of John Stuart Mill (who distinguished connotation and denotation of names) and Gottlob Frege (famous for his theory of meaning and reference of terms).[24] Now, if we reconsider our discussion of examples in previous Section, we

[22] We use plural form here for purpose, because there are numerous language games in everyday, extra-legal life. Many of them may be opposed, however, against legal language game in the aspects discussed here.

[23] Poscher2009 advances a thesis that all legal terms possess specific legal meaning. However, acceptance of such strong thesis is not necessary to undermine the soundness of application of any natural kind terms semantics to interpretation of statutory terms.

[24] For a brief exposition of this distinction, and a famous critique of this classic account of meaning, cf. Putnam1975.

can easily notice that we distinguished two basic operations that may be employed by lawyers in the process of interpretation: (1) formulation of the set of conditions (either necessary and sufficient conditions; or just typical conditions; or sets of factors) that should be satisfied by and object or a state of affairs if a statutory expression should be predicated of it, or (2) delimiting the scope of given statutory expression or indicating examples of objects or states of affairs which are within its scope.

[Rz 62] Let us refer to the first aspect of legal interpretation as the *intensional* one and to the second one as the *extensional* one. We do not intend to refer to any particular philosophical theory of meaning here; we only take these two useful terms to indicate an important distinction, which is pervasive in actual legal reasoning, although not always explicitly revealed in discussion on statutory interpretation. In some cases, both aspects of legal interpretation are easily realizable: it is unproblematic to explain what a given term means and whether a given object is within its scope. In some cases it can be problematic to qualify a given object to the scope of the term even if the meaning of the term seems quite clear. All other combinations are also theoretically possible (and they actually appear in legal practice).

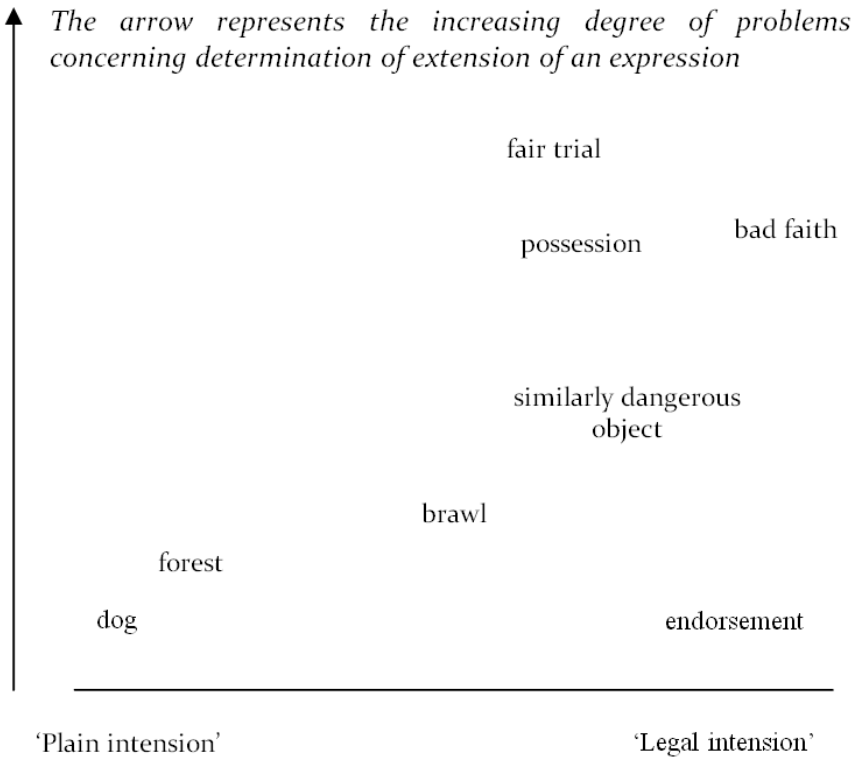
[Rz 63] Our knowledge about intension of a given legal term may stem from different sources. In some cases it is grounded in our knowledge concerning «plain meaning» of legal terms; the meaning of purely technical legal terms would be on the opposing side of the spectrum. In between, there will be many cases of terms which intension is constituted (to different extents) by «plain meaning» and «legal meaning» components. In consequence, we obtain a scale of legal terms ranging from these whose intension is determined mainly by «plain natural language» considerations to those whose intension is artificially created by the lawmaker, or the legal doctrine, or the judiciary. This determination may be affected by evaluative standards.

[Rz 64] As regards extensional aspect of legal terms, determining their scope may be a more or less complex task and the degree of this complexity may be affected by different reasons. In certain easy cases it may seem (at least *prima facie*) that a trained lawyer is able to state about each object in the world whether is belongs or does not belong to the scope of this term.[25] However, such determination may be interfered not only by the well-known phenomena as vagueness or open texture, but also by many circumstances characteristic for legal reasoning (as, for instance, efficient use of argument from absurdity) which may lead to narrowing or broadening of the initially perceived scope of a given statutory term. In certain cases the scope of statutory expressions will be solely constructed by means of legal argumentation. In consequence, we will obtain a scale of legal terms: from the almost «automatically applicable» to objects in the world to those whose extension must be created in the process of exchange of arguments.

[Rz 65] These considerations are illustrated in the following figure. The horizontal line represents the dimension of «source of intension» of a given statutory term, from the «plain intension terms» on the left to «legal intension terms» on the right. The distance from the horizontal line represents the degree of problems concerning determination of extension of statutory terms. Placing a given term on «ground zero» would mean that objects in the world are actually undoubtedly and indefeasibly qualified inside or outside the scope of a given term. Selected statutory expression discussed in the previous Section are located in the figure to illustrate their characteristics.

[25] For instance the term «a person under 18 years of age».

Fig. 1. Semantic dimensions of statutory expressions.



[Rz 66] The figure enable us to analyze (1) «plain language» and «legal language» components of intensions of statutory terms and (2) the degree of complexity regarding determining the scope of the expression. The exact relative position of the terms in this figure is for illustration only, although it captures an insight that typically it would be argumentatively more problematic to qualify certain states of affairs or objects as instances of a philosophically engaged expression, than as instances of a common expression of plain natural language. The two dimensions included here are very important, because the position of the term along these two scales will suggest us what interpretive procedures should be applied to ultimately establish the scope of a given expression. For instance, any resort to «plain meaning» would be futile if the term in question is rightly positioned on the right side of the scale. Linguistic considerations will be typically insufficient if the term is placed relatively high over the horizontal line – in such situations a process of argumentation will be necessary for determination whether a given object is within the scope of a given statutory expression or not. This last remark leads us to the conclusion that in many cases, if not in majority of the cases in legal reasoning, statutory interpretation does not have much in common with meaning of the expressions if we identify meaning with intension. Rather, it will be a quest for partial determination of its extension (leading to determination of the scope of application of a rule at hand), and this quest will be realized to large extent by extra-semantic considerations.

5 Conclusions and further Research

[Rz 67] The results of this paper are relatively preliminary, but in our opinion they are interesting and worth discussion. First, although in many papers on legal interpretation this process is discussed in the context of *meaning* of statutory expression, making use of the distinction between intension and extension may reveal many initially hidden aspects of the process. Second, the paper suggests that even if in some cases intension of statutory expression may determine its extension to large extent, it never does it completely. This aligns with the theory according to which legal reasoning should be looked at rather as process of construction, and not reconstruction.[26] Third, the dimension of «distance» of the legal term from the horizontal line on Fig. 1 explains when lawyers engage in the process of legal argumentation concerning determining of scope of the term in question: they do it when this distance is significant (cannot be ignored) or when there is disagreement concerning significance of this distance.[27] Fourth, the dimensional aspect encoded in the horizontal line on. Fig 1 suggests that it is not possible to classify the the statutory terms into «natural meaning terms» and «legal meaning terms»; instead, we have a continuous scale of statutory terms as regards plain meaning and legal meaning constituents of their intension. Fifth, what follows from that, it is not a plausible strategy to apply any of semantic theories, for instance any theory of meaning of natural kind terms, to statutory expressions. Rather, an autonomous semantic theory should be constructed. This paper may be seen as a very preliminary step towards construction of such autonomous semantic theory of statutory expressions.

[Rz 68] As regards perspectives for further research, in our opinion the project outlined here could be seen as a starting point for a research project concerning interrelations between intensional and extensional aspects of legal interpretation. In this paper we focused mainly on operative legal interpretation, concerning application of statutory provisions to concrete cases as an aim. It would be purposeful to extend this perspective by abstract, i.e. purely classificatory, instances of interpretation of statutory terms.

[Rz 69] As regards methodology, an empirical work concerning collecting opinion of lawyers concerning position of chosen statutory expression on dimensional diagrams, with providing justification of such choices, could lead to interesting results as regards sources of interpretive disagreement in actual legal disputes.

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[26] Hage2013.

[27] Hagerightly pointed out to me that the distance itself may be a result of a process of argumentation.

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