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Clara non sunt interpretanda vs. omnia sunt interpretanda

A Never-Ending Controversy in Polish Legal Theory?

The paper addresses a contemporary Polish debate on the limits and functions of juristic interpretation of law. After presenting the main theses and features of Jerzy Wróblewski's clarificative theory of juristic interpretation and Maciej Zieliński's derivational theory of juristic interpretation, the author critically discusses various arguments (epistemological, ethical, empirical, historical, and practical) used in the debate. Finally, a tentative solution of the controversy, based on the criticism of Zieliński's conception of legal norm, is proposed. It is argued that his conception is utopian and not recommendable, due to unacceptable conceptual and practical consequences.

Key words: legal interpretation, clara non sunt interpretanda, isomorphy, omnia sunt interpretanda, legal norm

1 INTRODUCTION

In the 1950s, a new theory of legal interpretation was created by Jerzy Wróblewski – the so-called clarificative (*klaryfikacyjna*) theory of juristic interpretation.[1] This descriptive theory was based on the analysis of Polish legal practice, in particular on the methods and techniques of legal interpretation applied by judges of the Polish Supreme Court. From the 1950s until his early death in 1990, Wróblewski elaborated on his theory and proposed some minor changes.[2] The clarificative theory of juristic interpretation has predominated Polish legal culture for a long time and is still frequently used by Polish lawyers.

The second most important Polish theory of legal interpretation was introduced by Maciej Zieliński in the 1970s.[3] It is called the derivational (*derywa-*

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1 Wróblewski 1956, 1957, 1959.

2 See e.g. Wróblewski 1960, 1961, 1967: 378–379, 1972: 109ff., 1972a, 1985, 1987, 1988: 112ff., 1990: 52ff., 1992: 87ff.; Dascal & Wróblewski 1988; Opałek & Wróblewski 1969: 230ff., 1991: 249ff.

3 Zieliński 1972.

cyjna) theory of juristic interpretation.[4] Zieliński's normative theory is mainly based on the linguistic and logical analysis of the characteristic features of Polish legislative texts, and (additionally) on the examination of the judicial decisions of Polish courts and the accomplishments of Polish legal doctrine.[5] After Wróblewski's death, the derivational theory of juristic interpretation gained momentum and today it is increasingly used by the Polish judiciary.

Despite the fact that both theories of interpretation are based on the very same paradigm of legal positivism and refer to the juristic interpretation of legal texts, they are contradictory in many regards. Undoubtedly, the choice between two fundamental meta-principles of legal interpretation is at the centre of the controversy. In Wróblewski's clarificative theory, one of the main directives of juristic interpretation is the *clara non sunt interpretanda* principle.[6] In short, the basic function of this principle is to express the idea of the direct understanding of legal texts, which takes place when the so-called operative interpretation of positive law is not necessary because the law-applying authority has no doubts regarding the meaning and the scope of application of a given legal norm that is to be applied in a legal case. Moreover, in Wróblewski's clarificative theory, the related principle of *interpretatio cessat in claris* indicates the precise moment that marks the end of juristic interpretation. By contrast, in Zieliński's derivational theory of juristic interpretation, the *omnia sunt interpretanda* principle comes to the fore.[7] In short, the basic idea is to exclude the possibility of the direct understanding of legal texts by claiming that the interpretation of legal provisions (legal text) is always necessary (against the principle of *clara non sunt interpretanda*) and it has to be brought to an end by applying all the acceptable methods and techniques of juristic interpretation (against the principle of *interpretatio cessat in claris*).

The controversy over the adequacy of the two opposite meta-principles of legal interpretation began in the last decade of the 20th century and is very intense in Poland today.[8] In the debate, many specific arguments (epistemological, ethical, pragmatic, historical, empirical etc.) were formulated and it is argu-

4 This name was proposed by Franciszek Studnicki in Studnicki 1978: 41.

5 Zieliński 1972: 3, 2002: 80, 2012: 85.

6 It has to be noted that, as far as I know, Wróblewski for the first time directly pointed out this principle in Dascal & Wróblewski 1988: 204ff. and (as regards his works in the Polish language), in Wróblewski 1990: 59. In his earlier works, he mainly referred to the principle of *interpretatio cessat in claris* or to the doctrine of *claritas* (*lex clara*) and, but very rarely, to the rule *in claris non fit interpretatio*.

7 This principle was formulated for the first time in Zieliński 2005: 120.

8 See e.g. Zieliński 1990: 179ff., 2005: 118ff., 2010: 138–143, 2012: 53ff.; Sarkowicz 1995: 23–26; Morawski 2002: 63ff., 2006: 15–18, 49ff.; Lang 2005: 169ff.; Zieliński & Radwański 2006: 17–20; Zirk-Sadowski 2006, 2012: 140ff.; Radwański 2009: 9ff.; Płeszka 2010: 187–235, 2010a: 96ff.; Rozwadowski 2010; Grzybowski 2012, Tobor 2013: 20–36.

ably an open question as to which principle will be victorious and will influence Polish legal practice in the future.[9]

Even though the aforementioned controversy is parochial, I assume that the underlying problem is universal and worthy of discussion. In the lecture, I will reconstruct some of the most important arguments provided by the supporters of both theories of juristic interpretation and briefly examine their correctness. Finally, I will also propose a tentative solution to the controversy, based, on the one hand, on some methodological considerations, and, on the other hand, on the juristic concept of the legal norm. However, first we have to take a closer look at both interpretive principles and their roles in the theories of Wróblewski and Zieliński.

2 THE *CLARA NON SUNT INTERPRETANDA* PRINCIPLE IN WRÓBLEWSKI'S CLARIFICATIVE THEORY OF JURISTIC INTERPRETATION

Due to the well-known ambiguity of the concept of legal (juristic) interpretation, in his theory, Wróblewski made a distinction between three principal meanings of the term "interpretation" (*interpretacja* in Polish). He distinguished interpretation *sensu largissimo* (SL-interpretation), interpretation *sensu largo* (L-interpretation) and interpretation *sensu stricto* (S-interpretation).[10] The principal criterion of distinction has an extensional character: when we speak about interpretation *sensu largissimo,* we refer to the interpretation of any cultural object;[11] in the case of interpretation *sensu largo,* we are dealing with the interpretation of texts (i.e. linguistic objects);[12] and interpretation *sensu stricto* is also connected with the interpretation of texts, but only those whose meaning raises some doubts in the context of law application.[13] Moreover, Wróblewski

9 See e.g. Kondratko 2007; Kotowski 2014.

10 See e.g. Wróblewski 1972a: 53ff., 1979: 75–76, 1988: 112–114, 1990: 55–59; Dascal & Wróblewski 1988: 203–205; Opałek & Wróblewski 1991: 250–251. It is worth noting that Wróblewski's tripartite distinction was supplemented by Zieliński with the category of interpretation *strictissimo sensu*, i.e. legal interpretation based on extra-linguistic (e.g. systemic or functional) directives of legal interpretation – see Zieliński 1990: 185, 2002: 58. However, this amendment is only indirectly grounded on an extensional criterion.

11 In his words, the SL-interpretation "means any understanding of any object as an object of culture, through the ascription to its material substratum of a meaning, a sense, or a value" – Dascal & Wróblewski 1988: 203.

12 The L-interpretation "means an ascription of meaning to a sign treated as belonging to a certain language …". Dascal & Wróblewski 1988: 204.

13 The S-interpretation "means an ascription of meaning to a linguistic sign in cases where its meaning is doubtful in a communicative situation, i.e., in cases where its 'direct understanding' is not sufficient for the communicative purpose at hand". Dascal & Wróblewski 1988: 204.

claims that the juristic (legal) operative interpretation of law is an instance of interpretation *sensu stricto*. If an interpreter has no doubts concerning the meaning of legal norms (rules, norm formulations, legal provisions), then she understands them directly and the operative interpretation of the legal text is not necessary.

At this point, a linguistic remark is perhaps appropriate. In Polish juristic language, as in the German language, two terms exist that are used in the discourse of legal interpretation: "interpretacja" and "wykładnia". The former need not be translated and the latter is the equivalent of "Auslegung" in German. Due to such a linguistic distinction, it has to be noted that in Polish juristic language, the equivalent of the term the "operative interpretation of law" is "wykładnia operatywna". Therefore, the abovementioned thesis of Wróblewski states that "wykładnia operatywna" (i.e. the operative interpretation of the law/legal texts, as opposed to "wykładnia doktrynalna", i.e. a doctrinal/dogmatic interpretation of the law)[14] belongs to the category of "interpretacja *sensu stricto*" (S-interpretation). As he claims:

> [t]he operative interpretation takes place if there is a doubt concerning the meaning of a legal norm which has to be applied in a concrete case of decision-making by a law-applying agency. This interpretation is thus a case-bound interpretation. Operative interpretation has to fix a doubtful meaning in a way sufficiently precise to lead to a decision in a concrete case.[15]

In order to explain this claim, in his later works, Wróblewski introduced a distinction between the "situation of interpretation" (*sytuacja wykładni*) and the "situation of isomorphy".[16] The concept of isomorphy was borrowed from Kaarle Makkonen.[17] According to the Finnish author, in the course of the judicial application of law, we are dealing with an isomorphic situation (*Isomorphiesituation*) if no act of legal interpretation is required from the judge due to the "clear and self-evident" character of the norm to be applied to the facts of a given legal case.[18] As Makkonen claims, a judicial decision, in which:

> zwischen den gegebenen Tatsachen und den in einer bestimmten Vorschrift geschilderten Tatsachen Isomorphie herrscht, konzentriert sich die eigentliche Entscheidungsproblematik auf die Festsetzung der Rechtsfolge. Es ist wichtig zu beachten, dass es sich dann nicht um Auslegung der Bestimmung handelt, hinsichtlich deren Isomorphie herrscht. Da Isomorphie gerade das bedeutet, dass die Bedeutung

14 Of course, the category of operative interpretation (*wykładnia operatywna*) is also well known outside Poland – for example, in his works, Wróblewski often refers to Ferrajoli 1966.

15 Wróblewski 1985: 244.

16 See e.g. Wróblewski 1967: 378, 1972:53, 1988: 121ff., 1990: 58, 1992: 33, 92ff.; Dascal & Wróblewski 1988: 215.

17 See Makkonen 1965: 78ff. On the contemporary criticism of Makkonen's theory see Siltala 2011: 29ff.

18 Siltala 2011: 7.

> des Rechtsnormsatzes, der diese Bestimmung enthält, völlig klar ist, kann natürlich über diese Bedeutung keine Unklarheit entstehen.[19]

Therefore, for Makkonen, isomorphy is the relation of correspondence between the facts depicted in a given legal norm, which is to be applied in a case, and the facts in the real world. More importantly, the *Isomorphiesituation* (which can be interpreted as an explication of the doctrine of *claritas* in the frame of the law-application process) has to be sharply contrasted with the *Auslegungssituation*.

Generally speaking, for Wróblewski, the understanding of a legal norm is based on the concept of the fulfilment of the norm. The meaning of a legal norm is grasped as a pattern of the ought behaviour.[20] The understanding of a norm is equivalent to the subject's knowledge on whether a norm is fulfilled or not. If a person knows when a given norm is fulfilled, then she understands it. Thus, it is hardly surprising that Wróblewski also asserts that the situation of isomorphy, in which:

> the text fits the case under consideration directly and unproblematically, as a glove to a hand,[21]

is possible; moreover, according to him, two *bona fide* relevant facts justify the use of the concepts of interpretation *sensu stricto* and pragmatic clarity in the description and explanation of legal interpretive practice:

> (a) not all applied legal texts are S-interpreted; and (b) sometimes the alleged clarity of the text is used as an argument for its direct understanding and against the need of S-interpretation.[22]

Finally, the pragmatic character of the concept of clarity has to be emphasised. In his analysis, Wróblewski distinguished between three types of "pragmatic clarity of law": the clarity of (legal) qualification (which is the only type that is relevant to the *clara non sunt interpretanda* principle), the clarity of the subject's orientation in the law and the clarity of the systematisation of the law.[23] When explaining the "pragmatically oriented" character of his theory of legal interpretation,[24] Wróblewski stressed that the same legal norm (or norm formulation) in some contexts of law application calls for S-interpretation, but for others, it does not require interpretation because the "direct understanding" (a.k.a. "immediately given meaning")[25] is sufficient *in concreto*, i.e. in a given

19 Makkonen 1965: 108.

20 See Wróblewski 1959: 74ff.; Woleński 1972: 26ff.; Płeszka & Gizbert-Studnicki 1984: 26.

21 Dascal & Wróblewski 1988: 215.

22 Dascal & Wróblewski 1988: 215.

23 See e.g. Wróblewski 1988a; Opałek & Wróblewski 1991: 253–254.

24 See e.g. Wróblewski 1985: 243; Dascal & Wróblewski 1988: 215ff.

25 Wróblewski 1979: 76.

case of law application,[26] notwithstanding the fact that legal language (in which legal texts are formulated) is fuzzy.[27]

To conclude, the *clara non sunt interpretanda* principle is, for Wróblewski, a concise formulation of the basic idea of the juristic (legal) interpretation of legal texts, stemming from his comprehension of the operative S-interpretation (*wykładnia operatywna*) of the law, which takes place if and only if a law-applying agent has reasonable doubts[28] concerning the meaning of a given legal norm to be applied in a case.

3 THE *OMNIA SUNT INTERPRETANDA* PRINCIPLE IN ZIELIŃSKI'S DERIVATIONAL THEORY OF JURISTIC INTERPRETATION

Maciej Zieliński is the author of the derivational theory of legal interpretation (*derywacyjna teoria wykładni*). In his Ph.D. thesis from 1969, published in an abbreviated form in 1972,[29] he proposed a reconstructionist-type normative theory of juristic interpretation. The final version of derivational theory was presented in the works published by Zieliński in the last decade.[30] Since Zieliński and his co-workers from the Poznań-Szczecin school of legal theory[31] mainly publish their works in Polish,[32] a short description of the derivational theory of interpretation is perhaps in order.

The basis of the derivational theory of juristic interpretation is a conceptual distinction between a legal provision (legal disposition) and a legal norm, proposed by Zieliński's mentor Zygmunt Ziembiński in 1960.[33] Whilst a legal provision is defined as the (simplest) unit of legal texts, being a sentence from a grammatical point of view, a legal norm belongs to a broader category of the norms of conduct (comportment). In Zieliński's words:

> The term "norm of conduct" is to be understood as an expression which on the ground of the meaning rules of a given national language (independently of the occasional el-

26 Wróblewski 1985: 243.

27 See e.g. Wróblewski 1983, 1985: 241–243; Dascal & Wróblewski 1988: 217ff.

28 Dascal & Wróblewski 1988: 221–222.

29 Zieliński 1972.

30 Zieliński 2002, 2005, 2012; Zieliński & Radwański 2006.

31 For more on this important school in Polish legal theory see Czepita, Wronkowska & Zieliński 2013.

32 Probably the only, yet very short and fragmentary presentation of Zieliński's derivational theory of legal interpretation in English is given in Zieliński 1987.

33 Ziembiński 1960.

ements of situation) formulates in a *direct* way an order or a prohibition for the *directly* appointed subjects [of – *A. G.*] *directly* appointed conduct in a given situation.[34]

Moreover, the norms of conduct (comportment) and, consequently, all the legal norms, are "strictly univocal expressions",[35] because they are formulated in the "extra-contextually univocal (unambiguous) language".[36] Such an idealising assumption[37] of the derivational theory of legal interpretation has many far-reaching consequences; e.g. it means that the results of the "translation" of the legal provisions into legal norms are extremely complicated.

Let us examine an "easy" interpretive case. In the last chapter of his book from 1972,[38] Zieliński provides an example of the derivative interpretation of Article 148 § 1 of the Polish Penal Code from 1969[39] (which was valid from January 1970 until September 1998). This provision established the legal consequences of a basic type for the crime of intentional killing (murder), by (simply) stating that:

> Who kills a man is penalised by no less than 8 years of imprisonment or by capital punishment.

However, a partial result of the derivational interpretation of this legal provision provided by Zieliński in the form of a "norm-shaped expression" is almost unreadable – in my opinion, even for some lawyers:

> A man, who is not a mother, acting under influence of the labour and during it, in relation to the child, and who is not a person, which in necessary defence is repelling any direct and illegal attack against any social good or any personal good, and who is not an authorised person executing a legally valid death penalty, and who is not a soldier acting against the enemy during the war hostilities not in a way inconsistent with the laws of war, is ordered that, in any circumstances from the 1st of January 1970, she does not kill, and even does not attempt to kill neither under the influence of the strong emotion, nor on demand of the other man and under the influence of a compassion for her, a man.[40]

34 Zieliński 1987: 165. Italics in original.

35 Zieliński 1987: 166.

36 This idealizing assumption, often criticised for being too rigid in relation to legal interpretation (see e.g. Wróblewski 1973: 124–125, 1990: 57; Płeszka & Studnicki 1984: 22ff.; Brożek 2006: 84), was later softened by Zieliński. For example, in Zieliński 1996: 5–6, he defines a legal norm as "an utterance which sufficiently univocally orders (or prohibits) someone (the addressee) certain behaviour in certain circumstances". However, a "sufficient univocity" looks very suspicious in comparison with the initial assumption of the "strict univocity" of legal norms. And, unfortunately, Zieliński's position is very inconsistent, because in his later basic monograph on legal interpretation, he defines the norm of conduct (and, consequently, also the legal norm) again as a "univocal expression". See Zieliński 2002: 16, 2012: 14.

37 Zieliński 1972: 17, 1987: 166.

38 See Zieliński 1972: 71–81.

39 *Kodeks karny. Ustawa z dnia 19 czerwca 1969 r.* [Penal Code. Statute of 19 June 1969]. Published in *Dziennik Ustaw* [Journal of Statutes] of 1969, No. 13, Item 94.

40 Zieliński 1972: 80. The emphasis (by enhanced letter spacing) is in the original.

This result is partial[41] because the derivational theory proposes a sequential model of juristic interpretation,[42] which consists of three phases (stages) of interpretation.[43]

First, the arranging phase (also called the validating phase),[44] in which an interpreter has to identify the set of valid legal provisions, i.e. the content of the current legal texts at a moment of interpretation (or at a moment in the past). In this phase, the main problems can stem from changes in legislative acts (statutes, governmental regulations etc.): their derogations or amendments. Naturally, the preparatory activities of an interpreter do not necessarily take place prior to the activities belonging to the next phase of interpretation.[45]

Second, the phase of reconstruction, in which legal norms encoded by the legislator in legal texts are decoded in the form of "norm-shaped expressions". As can be seen, in this stage, the interpreter of the legal texts has to take into account not only the so-called central legal provision (in the abovementioned case – Article 148 § 1 of the Polish Penal Code), but also the other relevant legal provisions (in the abovementioned case – Articles 11 § 1, 22 §1, 148 § 2, 149 and 150 of the Polish Penal Code, Article I of the Introductory Provisions to the Penal Code,[46] and the rules of the public international law of war and humanitarian law), which modify the meaning and the scope of application of the interpreted norm. This is the case because legal norms are encoded by the lawmaker, who frequently uses legislative techniques of condensation (one legal provision – more than one legal norm) and dismemberment (many legal provisions – one legal norm)[47] in legal texts. According to Zieliński, a "norm-shaped expression" must include four elements that are crucial for the subsequent formulation of a legal norm: the addressee, the circumstances (situation), the normative operator (of ordering or forbidding) and the determination of conduct (compartment).[48]

41 It is also partial in yet another sense: from Article 148 § 1 we can decode not only a sanctioned norm (addressed to the "ordinary" people), but also a sanctioning norm and a norm of competence, both addressed to the judges of penal courts. See Zieliński 1972: 81.

42 See Zieliński & Radwański 2006: 31; Gizbert-Studnicki 2010: 50, 64ff.

43 Zieliński 2002: 273, 298ff., 2012: 289, 319ff.; Zieliński & Radwański 2006: 18.

44 See Kanarek & Zieliński 2001; Zieliński 2002: 298–303, 2012: 319–324; Zieliński & Radwański 2006: 16–17.

45 Zieliński 2002: 298, 2012: 319.

46 *Przepisy wprowadzające kodeks karny. Ustawa z dnia 6 czerwca 1997 r.* [Introductory Provisions to the Penal Code. Statute of 19 April 1969]. Published in *Dziennik Ustaw* [Journal of Statutes] 1969, No. 13, Item 95.

47 For more on these common legislative techniques see Zieliński 1972: 15–16, 54ff., 2002: 103ff., 2012: 108ff.; Zieliński & Radwański 2006: 15–16.

48 See Zieliński 2002: 103ff., 2012: 108ff.

Thus, we arrive at the third and final phase of perception, in which the (univocal) meaning of the "norm-shaped expressions" is being established and, therefore, we finally obtain a legal norm as the result of the derivational interpretation of legal provisions. Zieliński admits that the formulation of a legal norm can be much extended.[49] What is more important, however, is that especially within the phase of perception, the principle of *omnia sunt interpretanda* governs the process of interpretation, at least in accordance with the derivational theory.

As already noted, the *omnia sunt interpretanda* principle was introduced by Zieliński in 2005. It states that:

> every legal provision (legal text) has to undergo the process of interpretation in order to establish its content (to understand it), irrespective of the degree of its understanding *prima facie*.[50]

Moreover, in 2011, this principle was supplemented by a new and more detailed principle of *interpretatio cessat post applicationem trium typorum directionae*,[51] which means that juristic interpretation can be concluded if and only if the directives of linguistic, systemic and functional interpretation have been thoroughly applied by an interpreter.[52] It has to be added that in Polish legal culture, such a tripartite division of the first-level directives of legal interpretation, introduced by Jerzy Wróblewski in 1959,[53] is universally taken for granted, even by Zieliński and the supporters of the derivational theory of legal interpretation.[54]

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49 As he observes, the reconstruction of the complete legal norm from Article 148 § 1 of the Penal Code will comprise "no less than 8 typewritten pages". Ziembiński & Zieliński 1992: 119.

50 Zieliński 2005: 118. It is worth adding that in his basic monograph on legal interpretation, this principle is listed as the first of eleven universal principles of juristic interpretation – see Zieliński 2002: 294, 2012: 315. It implies that the *omnia sunt interpretanda* principle can also be applied in the arranging and in the reconstructive phase of derivational interpretation. However, it has to be noted that only in the phase of perception do we deal with the problems of meaning; therefore, only in this very phase of interpretation does the *omnia sunt interpretanda* principle contradict the *clara non sunt interpretanda* principle – compare a similar argument in Płeszka 2010: 191–192.

51 Peno & Zieliński 2011: 126.

52 According to the derivational theory, however, five exceptions exist where the univocal linguistic meaning may not be overruled by means of the systemic and, especially, the functional interpretation of legal texts. For instance, we have to accept a linguistically univocal meaning of legal definitions, the norms of legislative competence (as far as they directly and unambiguously indicate the law-making authorities) and legal provisions that confer legal rights to the citizens etc. See Zieliński & Radwański 2006: 30–31; Zieliński 2012: 344.

53 Wróblewski 1959: 211ff.

54 In fact, Zieliński incorporates the main elements of the clarificative theory of interpretation into the phase of perception. See e.g. Zieliński 2002: 243, 310ff., 2012: 253–254, 330ff.; Zieliński & Radwański 2006: 20–26.

It is worth adding that in recent works, Zieliński and his co-workers have attempted to elaborate (on the basis of the derivational theory) on the "integrated Polish theory of legal interpretation" by including all the valuable achievements of the other conceptions of legal interpretation created in Poland in the 20th century, which constitute the "common good" of Polish jurisprudence.[55] Such an integrative effort can indeed be welcomed; however – as Zieliński overtly acknowledges[56] – the *omnia sunt interpretanda* principle has nothing to do with the integration, as it was introduced by him in order to replace two of Wróblewski's meta-principles of legal interpretation: *clara non sunt interpretanda* and *interpretatio cessat in claris*. In effect, both principles, as well as Wróblewski's concept of the direct understanding of legal texts, are treated by Zieliński as myths of juristic thinking concerning legal interpretation.[57]

4 THE POLISH DEBATE

The above presentation of the opposing standpoints of Wróblewski and Zieliński can be synthetically summarised by the following scheme:

The theory of interpretation:	**clarificative (J. Wróblewski)**	**derivational (M. Zieliński)**
starting point of interpretation	*clara non sunt interpretanda* i.e. the interpretation takes place iff *lex non clara est*	*omnia sunt interpretanda* i.e. every legal provision must be interpreted
ending point of interpretation	*interpretatio cessat in claris* i.e. the lack of reasonable and relevant doubts	*interpretatio cessat post applicationem trium typorum directionae*[58]

At this point, before beginning the discussion on the Polish debate, a brief comment on the main assumption of the paper seems to be in order. I have assumed that the basic problem that underlies the Polish controversy is not parochial, but universal. As there is no time to justify this assumption in a more detailed way, let me put forward only a couple of examples that seem to support this hypothesis.

55 See Zieliński 2006, 2012: 310–313; Zieliński, Bogucki, Choduń, Czepita, Kanarek & Municzewski 2009; Zieliński & Zirk-Sadowski 2011.

56 See Zieliński 2005: 120, 2012: 60–61; Radwański & Zieliński 2006: 20.

57 Zieliński 2010: 138–143, 147.

58 With five exceptions – see above (footnote no. 52).

The first example, which is quite evident, is taken from recent jurisprudential literature. When we consider the following quotation:

> The commonsense view that the content of the law is often clear enough – and at other times, it is not – is the correct one. Mostly, just like in an ordinary conversation, we hear (or read, actually) what the legal directive says and thereby understand what it requires. In some cases, it is unclear what the law says, and interpretation is called for. /…/ The law requires interpretation when its content is indeterminate in a particular case of its application,

we realise that it looks quite familiar and could be, arguably, attributed *in toto* to Wróblewski. Yet, this quotation is taken from Andrei Marmor,[59] who in his well-known theory of legal interpretation sharply differs between understanding and interpretation[60] in a way that is similar in many regards (however, it is not identical) to Wróblewski's distinction between the direct understanding and the S-interpretation of legal texts. As Marmor's conception is the subject matter of an ongoing jurisprudential discussion – one that is also taking place in Italy[61] – it implies that the underlying problem can hardly be classified as parochially Polish.

The second evident example is related to the contemporary critique of the jurisprudential doctrine of *claritas*. Of course, it is impossible to even list all of the relevant authors who claim that every legal text must be interpreted; therefore, let us just point out that when analysing the criticism of the traditional doctrine of clarity, Wróblewski directly refers to the works on legal interpretation by Michel van de Kerchove, Giovanni Tarello and Riccardo Guastini.[62] In addition, as regards the contemporary Polish discussion, it can be added that many scholars examine (usually with positive conclusions) the correctness of the *clara non sunt interpretanda* principle (and Wróblewski's clarificative theory of interpretation in general) in the context of the doctrine of *acte clair*, adopted in the jurisdiction of the (European) Court of Justice.[63]

After this digression, we will now address the main issue by reconstructing the most important objections against the principles of *clara non sunt interpretanda* and *interpretatio cessat in claris* put forth by Zieliński in his numerous works[64] and the basic, mainly defensive arguments formulated by the supporters of the clarificative theory of interpretation. In order to make the presen-

59 Marmor 2011: 144–145.

60 See Marmor 2005: 15ff., 2011: 137ff.

61 See e.g. Chiassoni 2007: 149ff.; Poggi 2007.

62 See Dascal & Wróblewski 1988: 209ff.; Wróblewski 1990: 57.

63 See e.g. Skrzydło 1998; Płeszka 2010a.

64 As the majority of the arguments was repeatedly used by Zieliński, I only generally indicate the relevant text sources: Zieliński 1990: 179ff., 2002: 52ff., 2005: 118ff., 2006: 100, 2010: 139ff., 2012: 53ff.; Zieliński & Radwański 2006: 18–20; Zieliński & Zirk-Sadowski 2011: 102ff.

tation more readable, in what follows, the arguments presented in the Polish debate will be generally labelled.[65]

4.1 Epistemological arguments

Zieliński maintains that Wróblewski did not specify whose doubts are relevant when we are dealing with the direct understanding of a legal text – the doubts of a person (judge) who has to decide, of the litigants or of the "ordinary" citizens? By arguing *ad absurdum*, he refers to the case of an uneducated person who has no linguistic knowledge and is so unreflective that she does not understand the legal text at all. As such, a person surely has no doubts – he argues – so, according to the *clara non sunt interpretanda* principle, she is not in the "situation of interpretation" and has no chance of establishing, by the means of interpretation, the meaning of the legal provisions. Thus, according to Zieliński, Wróblewski did not specify the criteria for distinguishing the situation of direct understanding from the situation of interpretation well enough, because the author of the clarificative theory of interpretation did not provide any applicable relativisation of the concepts of doubt and clarity, which play such an important role in his theory. And, if he did provide such a relativisation, for instance, by claiming that the clarity of a legal text is relativised to a given language, then it would be tantamount to the self-destruction of Wróblewski's theory, since in such a case, we must always determine whether a given legal provision is clear or not; that is, we must always embark on interpretation.

Furthermore, in his argumentation in favour of the *omnia sunt interpretanda* principle, Zieliński, somewhat paradoxically,[66] claims that we always have to carry out the systemic and the functional interpretation of a legal text, because only by doing so can we reveal the doubts concerning the meaning of the legal provisions, and in consequence prove that such doubts are present. In effect, Zieliński explicitly admits that exceptionally, in one type of situation, legal interpretation is usually unnecessary; namely, if we have already completely (i.e. in accordance with the principles of *omnia sunt interpretanda* and *interpretatio cessat post applicationem trium typorum directionae*) interpreted a given legal provision and we are dealing with a similar case at law, then the reinterpretation of this provision can be omitted, providing that its meaning has not changed in the meantime.

65 The names of the arguments analysed in Sections 4.1, 4.2 and 4.5 are borrowed from Płeszka 2010: 197ff.

66 See Płeszka 2010: 195–196. It looks paradoxical because the principal objective of legal interpretation is to get rid of interpretive doubts and not to discover or invent them; however, it is *prima facie* true that before carrying out the systemic and the functional interpretation we can only have linguistic doubts, if there are any – see a similar opinion in Morawski 2006: 51–52.

To conclude: Zieliński's standpoint is that the understanding of legal texts is always preceded by legal interpretation; therefore, a "direct and unreflective understanding of a legal text" is an obvious juristic myth. Hence, legal interpretation is always necessary – *omnia sunt interpretanda*!

The response to Zieliński's arguments is very restricted, probably because for some of the supporters of Wróblewski's clarificative theory of interpretation (and the *clara non sunt interpretanda* principle), these arguments are self-evidently pointless, and for others, they are convincing. In fact, only one of them – Lech Morawski – directly responds to Zieliński's criticism by indicating that the concept of doubts is indeed relativised: only the objective doubts, related to the problem of legal qualification, which have not yet been unambiguously explained in jurisdiction or by the legal doctrine (dogmatics), are to be taken into account as far the applicability of the *clara non sunt interpretanda* principle is concerned.[67] On the other hand, Marek Zirk-Sadowski (a successor of Jerzy Wróblewski at the Department of Legal Philosophy and Legal Theory in the University of Łódź), concedes that from the linguistic (analytical) point of view, the *clara non sunt interpretanda* principle is contemporarily difficult to sustain.[68] However, he also maintains that we can try to reinterpret the concept of direct understanding extra-linguistically by claiming that the clarity of a legal text is to be understood institutionally, i.e. in terms of the institutional clarification (explanation) of the meaning of legal provisions in the jurisdiction (e.g. when the constant and stable line of jurisdiction can be observed and/or the interpretive decision in the form of a valid Resolution of the Supreme Court is adopted).[69]

In my opinion, although the epistemological arguments of Zieliński are not convincing, they bring about the necessity of some modifications to the contemporary reading of the *clara non sunt interpretanda* principle and to the clarificative theory of legal interpretation in general.

First, the clarificative theory of Wróblewski is a theory of the operative legal interpretation, i.e. the interpretation that constitutes a part of the judicial application of law[70]. Therefore, it is hardly surprising that Wróblewski states that:

> The standard subject of the understanding and of the operative interpretation of the law is the court. /…/ The court uses legal provisions in the direct understanding when

67 See Morawski 2006: 50ff. He also claims, in reference to Stanley Fish's well-known analysis of Hart's theory of interpretation, that the clarity of a legal rule can depend on its "interpretive history". Morawski 2002: 64, 2006: 52. It is worth noting that for Zieliński, the relativisation proposed by Morawski is – quite surprisingly – a "free modification" of Wróblewski's basic idea. Zieliński & Radwański 2006: 19.

68 See Zirk-Sadowski 2012: 156–159; Zieliński & Zirk-Sadowski 2011: 103–104, 107.

69 See Zirk-Sadowski 2012: 156–159; Zieliński & Zirk-Sadowski 2011: 103.

70 See e.g. Wróblewski 1959: 125ff., 1972: 50ff., 109ff., 1988: 42ff., 117ff., 1990: 76ff., 1992: 30ff., 87ff.

> it recognises that in a concrete situation they are sufficiently clear for the purposes of deciding. /…/ The clarity of a text is a pragmatic feature and depends on the application of the provision to a concrete situation.[71]

Thus, we see – without any doubt – that for Wróblewski, it is the judge who *in concreto* directly understands the law or has reasonable doubts regarding the meaning of the applicable legal provisions (legal norms). Thus, the first epistemological argument of Zieliński is missing the point.

Secondly, the objection stating that in Wróblewski's theory of interpretation we do not find any sound criterion for the distinction between the situation of the direct understanding of a legal text and the situation of interpretation is also rather easy to rebut. It is, obviously, the concept of isomorphy that fulfils this function: if the judge recognises isomorphy, then *clara non sunt interpretanda* (i.e. a judge is not embarking on legal interpretation) or *interpretatio cessat in claris* (i.e. a judge is terminating the interpretive activity). Of course, taking into account that for Wróblewski, the legal language is fuzzy (and legal rules are defeasible and open textured), it is an open question as to whether such a criterion is not too subjective, imprecise or vague. Yet, in the contemporary legal systems, we have many institutions that guarantee the intra-systemic relative objectivity and uniformity of judicial interpretive decisions. And, I think that we should also remember a particular realistic appeal from Wróblewski for tolerance within legal discourse:

> Neither as a starting point nor as an ending point of the understanding of a text is clarity an absolute given. Consequently, legal language has to tolerate the existence of interpretive doubt, even concerning the question of whether a text must or must not be interpreted.[72]

Finally, surely the most important epistemological objection: Is the direct understanding of a legal text possible at all? Without entering into a deep philosophical debate, first let us remember that Zieliński, in effect, admits that it is possible to understand a legal text without interpreting it, providing that we are dealing with – as he calls them – the "post-interpretive understanding"[73] or the "decisional cases",[74] which are different from "interpretational cases". I suppose that at this point we do not have any controversy: Wróblewski, Morawski, Płeszka, Tobor or Zirk-Sadowski could accept this thesis without hesitation. Thus the real controversy seems to be limited to the case of the judge who has to apply a new (in a subjective, or also in an objective sense) legal provision, which she has never interpreted before.

71 Wróblewski 1990: 71.

72 Dascal & Wróblewski 1988: 222.

73 Zieliński 2002: 219, 2012: 229.

74 Zieliński 2002: 246, 2012: 257.

For Wróblewski, the concept of direct understanding is intuitive and it has a "pre-theoretical" and a "pre-analytical" character.[75] However, it does not mean that this concept may not be explained on an extra-legal basis. Recently, a proposal regarding such an explanation from the perspective of contemporary empirical psycholinguistics was elaborated by Marcin Romanowicz.[76] His analysis confirms that the direct understanding of a text is possible (as such), but its factors are significantly different from those that have been included in Wróblewski's theory of interpretation.

For Wróblewski, the direct understanding is founded on a subject's general linguistic knowledge and is governed by the linguistic directives of direct understanding[77]. As he stated in his monograph from 1959:

> The "direct understanding" is difficult to be precisely specified for the reason that it is an elementary fact, which we also encounter outside the normative sphere. /…/ If someone, who knows Polish language well, reads some phrase in this language connected with the domain that she knows well, and if this phrase need not to consider any context apart from that, which is directly and presently available to her, then unquestionably at once, without any consideration and launching an investigation, she "directly understands" what a given phrase means. /…/ Similarly, we can accept that in some cases the law-applying body "directly understands" a norm, providing that the established state of facts obviously fits the hypothesis of a given norm, which in a concrete case of its application is completely univocal (that does not exclude the ambiguity or meaning indeterminacy in the other applications).[78]

We see that initially, for Wróblewski, the direct understanding was based not only on linguistic competence, but also on the good knowledge of a domain to which a given expression refers. However, in his later work, he restricted the cognitive background of the direct understanding by connecting it exclusively with the linguistic rules of sense:

> The knowledge of the rules of sense /…/ is the foundation of a linguistic competence of a language user. These rules constitute the basis for the direct understanding of a text in any natural language.[79]

And precisely such a change in his original insights was mistaken, because the analysis of Romanowicz shows that in any act of direct understanding, the cognising subject is activating not only its linguistic knowledge, i.e. the "knowledge about language", but – simultaneously – also general knowledge, i.e. the

75 Wróblewski 1990: 58.

76 See Romanowicz 2011: 65ff. It is worth adding that his analyses are also relevant to the purely philosophical hermeneutic category of *Vorverständnis*, which is quite mysterious as well – see Gizbert-Studnicki 1987.

77 Wróblewski 1972: 114, 1988: 117, 1992: 90.

78 Wróblewski 1959: 115.

79 Wróblewski 1990: 58.

"knowledge about the world".[80] Therefore, during the act of understanding, the cognising subject is using not only its operative short-term memory, but also its long-term memory.[81]

What is more important, however, is the conclusion by Romanowicz, stating that from the psycholinguistic perspective, the conception of the direct understanding is fully acceptable:

> For the cognising subject the mere process of processing linguistic information, which is a legal provision, remains unconscientious. Only the outcome of such a process, that is, a certain understanding of the legal provision, is given to the consciousness, and hence the impression of the "directness" of cognition (understanding).[82]

This conclusion is crucial in the context of our discussion. We can take for granted that the direct understanding of legal provisions is empirically possible. Can Zieliński be satisfied with such a conclusion? Surely not, since he can still maintain that even if the direct understanding of legal texts is possible, it is never sufficient to arrive at the *Isomorphiesituation*, because – as he indeed argues[83] – it is hardly possible to identify any example of the *lex clara* in the texts of positive law. Yet, in my opinion, this line of argumentation is also misleading, for Wróblewski's concept of clarity is of a pragmatic nature. Therefore, to argue that the understanding of every legal provision can be doubtful would be an exact instance of the *ignoratio elenchi* fallacy: even the demonstration that every legal provision is semantically indeterminate, unclear or vague is not sufficient to falsify the statement that in some ("easy") cases, the direct meaning of a legal norm (provision) is pragmatically clear enough for the judge to decide the case at law.

4.2 Ethical argumentation

Moral arguments are less sophisticated and easier to discuss. Firstly, Zieliński claims that the use of the *clara non sunt interpretanda* principle by the public authorities can deteriorate the situation of a citizen because it can justify the limitation of human rights caused by the absence of legal interpretation. Secondly, providing that it is a public agent (authority) whose doubts are decisive for the assessment as to whether *lex clara est*, it also implies the possibility of meaning manipulation by granting enormous discretionary power to the public agents. Moreover, it can be the source of a specific "interpretive opportunism" – the law-applying organ can take advantage of the *clara non sunt interpretanda* principle in order to refuse to carry out legal interpretation, whereas

80 Romanowicz 2011: 68.

81 Romanowicz 2011: 69.

82 Romanowicz 2011: 70.

83 See Zieliński 2010: 141, 2012: 58; Zieliński & Radwański 2006: 19. This argument is borrowed by Zieliński from Łętowska 2002: 54ff.

the actual reasons may be totally different; for example, convenience, laziness or a reluctance to provide adequate interpretive arguments. Therefore, the appeal to the *clara non sunt interpretanda* principle can allow the law-applying authority to prevent the interpretive dispute in the courtroom and to justify its legal interpretive decision by *ratione imperii*, instead of by *imperio rationis*.[84] Finally, the *clara non sunt interpretanda* principle only apparently strengthens legal certainty, since a citizen can be surprised both by the absence of a judge's doubts (in the case in which the clear meaning of an ambiguous legal text has already been established in the jurisdiction or by legal doctrine) and by the presence of such doubts (whilst – yet only for the citizen – the legal text is linguistically clear and univocal). In both cases, the conviction that the rule of law has been broken can easily arise on the side of the citizen.

The counter-arguments from the supporters of the *clara non sunt interpretanda* principle are less numerous. Marek Zirk-Sadowski[85] and Krzysztof Płeszka[86] claim that this principle, in effect, defends the citizens against the "linguistic violence" of the judges (law-applying organs). The *omnia sunt interpretanda* principle expands the power of the judges by increasing the possibility of the application of various interpretive techniques (especially extra-linguistic ones), which the citizens simply do not know. On the other hand, the principle of *clara non sunt interpretanda* obligates the judge to provide a direct justification for any deviation from the ethnical linguistic meaning of legal terms. In addition, Zirk-Sadowski proposes a history-laden indirect explanation of Wróblewski's intentions connected with the introduction of the *clara non sunt interpretanda* principle. As he states (in the paper recently written together with Zieliński):

> Independently from the controversies over the linguistic sense of the *clara non sunt interpretanda* principle, it has to be noted that formerly (in particular in the 1950s) it was able to play a positive role in limiting the temptations of the totalitarian system, by emphasising the role of the certainty of legal text. The minimising of the role of interpretation in the process of law application – as it seems – can be an element of the protection of citizens against the excessive role of political and ideological factors in the understanding and application of the law.[87]

84 This argument is also borrowed by Zieliński from Łętowska 2002: 54–55.

85 See Zirk-Sadowski 2006: 70ff.

86 See Płeszka 2010: 233ff.

87 Zieliński & Zirk-Sadowski 2011: 105. Of course, it is only a very defeasible hypothesis of mine that this passage was introduced by Zirk-Sadowski. This hypothesis is based on the fact that Zieliński has overtly argued that the principle of *clara non sunt interpretanda* in effect "would exclude the possibility of the defence from the part of the Weaker". Zieliński & Radwański 2006: 19. In Wróblewski's texts, for obvious political reasons (Poland remained a totalitarian state until 1989 and Wróblewski died in 1990), any moral intention of such a nature might not have been explicitly expressed by him.

Finally, according to Wiesław Lang, the principle of *clara non sunt interpretanda* can be regarded as the necessary precondition for the legitimisation of the *ignorantia iuris nocet* principle.[88] As he claims:

> [t]he absolute rejection of the principle of *clara non sunt interpretanda* and the stringent realization of the principle of *ignorantia iuris nocet* could be exclusively possible in the society of lawyers,[89]

because only the lawyers (and, in particular, the judges on account of the principle of *iura novit curia*) can be (morally) obligated to know whether *lex clara est*, or – on the contrary – whether the legal interpretation is necessary.

In my opinion, in order to evaluate the moral value of both principles, we have to distinguish between two historical contexts. In the *Unrechtsstaat*, no matter whether it is a totalitarian or an authoritarian state, these principles can be equally used for the iniquitous manipulation of the results of legal interpretation for political or ideological reasons. And, arguably, it would be highly naive to presume that the selection of one of them would bring about some progress in the administration of justice. However, the situation changes if we consider the role of these principles in the law-governed state (*Rechtsstaat*). In such a context, it can be presumed that the *clara non sunt interpretanda* principle is more favourable for the doctrine of judicial passivism, whereas the *omnia sunt interpretanda* principle mutually reinforces the doctrine of judicial activism. Thus, it seems that the moral evaluation of these principles depends on whether we prefer the active or the passive role of judges in the application of law. Generally speaking, I suppose therefore that our moral evaluation of both principles can be based on the most general assessment of the degree of people's confidence in public authorities. If we have more trust in the lawmaker (legislator), then we should prefer the *clara non sunt interpretanda* principle because it will limit judicial activism.[90] And if we trust more in the judiciary, the principle of *omnia sunt interpretanda* appears to be morally better since it promotes judicial activism.

4.3 Empirical arguments

Zieliński claims that the principles of *clara non sunt interpretanda* and *interpretatio cessat in claris* are very seldom referred to in the jurisdiction of the Supreme Court and the other higher Polish courts. He highlights some

88 See Lang 2005: 169ff.

89 Lang 2005: 177.

90 Unfortunately, however, this reasoning reveals a certain antinomy. For it is also true that the acceptance of the *clara non sunt interpretanda* principle implies that we do trust in judges – we trust them because they will decide whether "reasonable doubts" exist or *lex clara est*. Thus, it seems that if a judge wants to be active, the principle of *clara non sunt interpretanda* may not be sufficient to prevent her from embarking on a creative interpretation of the law.

empirical data, stating that from 1971–2000, these principles were explicitly mentioned only 29 times in the judicial decisions of the Supreme Court, the Constitutional Tribunal and the Supreme Administrative Court (with the referential basis of about 35,000 rulings). On the other hand, in an unspecified – yet, in his opinion, a significant and constantly increasing – number of cases, these courts have interpreted the law despite the fact that the linguistic meaning of the given legal provisions was clear and unambiguous. These empirical observations are supported by the empirical research and analyses of Zieliński's co-workers.[91]

Moreover, Zieliński insists that, except for the clarificative theory of Wróblewski, all of the Polish theories of legal interpretation elaborated in the 20th century[92] have unanimously rejected the doctrine of clarity. Therefore, the principles of *clara non sunt interpretanda* and *interpretatio cessat in claris* must be abandoned altogether. He even maintains that we have already witnessed the change of the interpretational paradigm in Poland and cites some new rulings in which the principle of *omnia sunt interpretanda* is explicitly applied by the courts.[93]

For the chief opponents of Zieliński's *omnia sunt interpretanda* principle, these theses are only an instance of wishful thinking. They also cite many rulings (Morawski – 12[94]; Płeszka – 34[95]) from the last two decades in which the Polish higher rank courts directly refer (mainly positively) to the principles of *clara non sunt interpretanda* and/or *interpretatio cessat in claris*. The adherents of these two principles maintain that they not only defined the paradigm of legal interpretation in Poland, but are still the important elements of the Polish legal culture[96] and are commonly accepted by Polish judges.[97]

It is impossible to argue against the facts. In my opinion, however, the above evaluations and empirical argumentation are based on interpreted facts, and – more importantly – the samples of judicial decisions, to which the opponents refer, are not representative at all. Firstly, the discussed interpretive meta-principles are applied in the vast majority of cases without being explicitly mentioned by the judges. Secondly, the analysis of the justifications for

91 See e.g. Municzewski 2004; Radwański 2009; Bogucki 2012.

92 In particular, he refers to the theories of Eugeniusz Waśkowski, Sawa Frydman (Czesław Nowiński), Jan Woleński, Leszek Nowak, Franciszek Studnicki, Ryszard Sarkowicz and Leszek Leszczyński. See Zieliński 2002: 68ff., 2012: 72ff.

93 The first judicial decision, in which the principle of *omnia sunt interpretanda* was explicitly mentioned, was the *Ruling of the Constitutional Tribunal from 13 January 2005*, Sign. P 15/02, published in *Dziennik Ustaw* [Journal of Statutes] 2005, No. 13, Item 111.

94 Morawski 2002: 65–69.

95 Płeszka 2010: 217–230.

96 Płeszka 2010: 231.

97 Morawski 2002: 66, 2006: 54; Płeszka 2010: 216–217.

the judicial decisions of the higher courts is not representative, since we can assume that the rate of "hard" interpretive cases (in which we do not deal with *lex clara*) is considerably higher than in the lower rank (first instance) courts. Thirdly, the inferred conclusions of the empirical research are well beyond the obvious methodological standards. For example, from the official data on the judicial decisions of the Polish Constitutional Tribunal,[98] we can easily obtain the information that after the first decision from 2005, the principle of *omnia sunt interpretanda* was explicitly mentioned twice (in 2008 and 2012), whereas (in the same period) the principle of *clara non sunt interpretanda* was positively referred to four times (in 2006, 2007, 2008 and 2014). Due to the fact that in the period 2005–2014, the Constitutional Tribunal had passed about 6100 rulings and decisions, it is hardly possible to reasonably infer anything from these data. Presumably, we will obtain analogous non-conclusive data by examining the judgments of the Polish Supreme Court or the Supreme Administrative Court.

Moreover, the empirical argumentation is arguably pointless as far as the substantiation of the conflicting interpretive principles is concerned. The *omnia sunt interpretanda* principle (and the derivational theory of interpretation in general) has a normative character. The *clara non sunt interpretanda* and *interpretatio cessat in claris* principles were introduced by Wróblewski as descriptive statements; however, at present, the change in the methodological status of these principles in the Polish legal discourse and judicial practice, and the fact that they are usually interpreted normatively, are not questioned.[99] Therefore, the well-known argument from Hume's guillotine seems to be fully applicable: any direct empirical justification of these principles, belonging to the category of directives, is excluded.[100]

Thus, I suppose that the empirical data, and the arguments founded on them, are useless for the purposes of our discussion. They could be relevant only if we grasp the discussed interpretive principles as the customary rules of the judges' interpretive reasoning. I think that such a legal-sociological approach to the principles of *clara non sunt interpretanda* and *interpretatio cessat in claris* is indeed possible, but it is impossible in reference to the principles proposed by

98 Http://otk.trybunal.gov.pl/orzeczenia/ (accessed November 5th, 2014).

99 See e.g. Gizbert-Studnicki 2010: 51ff.; Romanowicz 2011: 62ff.; Zieliński & Zirk-Sadowski 2011: 105–106; Kotowski 2014: 62. Even Wróblewski has explicitly accepted the possibility of the change in the methodological status of these directives. See Wróblewski 1990: 76; Opałek & Wróblewski 1991: 259–261.

100 This argument is directly accepted by Zieliński, who criticises the use of empirical arguments by Płeszka as the *ignoratio elenchi* error, for there is no "transition" from facts to directives. See Zieliński 2010: 141. However, this argument shows that Zieliński's argumentation is inconsistent, since he also adduces empirical arguments against the *clara non sunt interpretanda* principle and in favour of the *omnia sunt interpretanda* principle. See e.g. Zieliński 2002: 56, 2006: 100, 2012: 57.

Zieliński, for it is conceptually self-contradictory to "invent" and "introduce" the "new" customary rules of judicial reasoning. And it makes empirical argumentation irrelevant.

4.4 The argument from Roman law and the "argument from architecture"

Zieliński presents two historical arguments. Firstly, the argument from the Roman law, according to which the principle of *clara non sunt interpretanda*, notwithstanding its Latin formulation, is not grounded in Roman tradition. On the contrary, as Zieliński's co-worker and expert in Roman law, Władysław Rozwadowski, argues on the basis of the analysis of Roman legal tradition, we may rather formulate the ancient version of the *omnia sunt interpretanda* principle: *Etiam clarum ius exigit interpretationem*.[101] Secondly, a specific argument against the Roman pedigree of the *clara non sunt interpretanda* principle, according to which the fact that this paroemia was not included in the set of 86 paroemias, which have been placed on the pillars situated at the entrance to the building of the Polish Supreme Court (constructed in Warsaw from 1996–1999), also supports the negative evaluation of the Roman roots of the *clara non sunt interpretanda* principle. For Zieliński, if this paroemia were really of Roman origin, it could not be ignored by the experts in Roman law and Polish medieval law who made up the list.[102]

In the current Polish debate, nobody has answered these arguments. It is worth noting, however, that Wróblewski himself has provided some information concerning the historical antecedents of his main ideas. In the basic monograph from 1959, he indicated a German scholar, Valentin Wilhelm Foster, who, in the book *Interpres sive de interpretatione juris libri duo*, published in Wittenberg in 1613, mentioned the maxim *interpretatio cessat in claris*.[103] Later, in collaboration with Marcelo Dascal, Wróblewski explained the philosophical foundations of the modern interpretive doctrine of *claritas* by relating it to the Cartesian epistemological principle of clear and distinct ideas, and to the Port Royal Logic of Antoine Arnauld and Pierre Nicole.[104]

Of course, it does not mean that the questions related to the historical origins of the *clara non sunt interpretanda* and *interpretatio cessat in claris* principles are definitively resolved. For instance, Clausdieter Schott maintains that the maxim

101 Rozwadowski 2010.

102 Let us note, however, that at least one paroemia from that list is expressing a mode of reasoning that is directly related to the principle of *clara non sunt interpretanda*: *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio* (D.32.25.1). According to Masuelli, this maxim of Paulus "ha rappresentato sicuramente il punto di partenza del brocardo '*in claris non fit interpretatio*'". Masuelli 2002: 415.

103 Wróblewski 1959: 129.

104 Dascal & Wróblewski 1988: 206ff.

interpretatio cessat in claris was invented by the lawyers of the Renaissance: Guido de la Pape, Aloisius de Albertis, Philippus Decius and Petrus Paulus Parisius – who, in the first half of the 16th century, formulated this maxim for the first time.[105] And Saverio Masuelli convincingly demonstrates that the origin of the equivalent brocard *in claris non fit interpretatio* can be traced back to Cicero and Quintilian.[106] Hence, the ancient pedigree of the interpretive principles belonging to Wróblewski's clarificative theory of interpretation is, in my opinion, indisputable. In particular, the long history of the formulation of the *interpretatio cessat in claris* principle provides a good counter-argument against Zieliński's first historical argument from the Roman law.

And, as regards the second peculiar "pillar argument" by Zieliński, I think that it does not deserve any elaborated comment, but simply this: *Argumenta non numeranda, sed ponderanda sunt*!

4.5 Pragmatic (praxeological) arguments

Jerzy Wróblewski had already raised his most fundamental and powerful objection against the derivational theory of legal interpretation in the review[107] of Zieliński's basic monograph *Interpretation as a Process of Decoding Legal Text*. He stated that the operations of decoding a legal text, which – according to Zieliński – are "factually indispensable" for legal interpretation, extend well beyond the frames of the "traditional models of juristic interpretation". Wróblewski also expressed serious doubt as to whether anybody would in fact undertake the task of decoding a complete "norm" that had been so rigorously defined by Zieliński ("univocity"). In his later works, Wróblewski slightly weakened his criticism, conceding that the derivational theory of interpretation, which conceptualises legal interpretation as belonging to the category of the interpretation *sensu largo* (L-interpretation), can be "convenient" for some jurisprudential considerations or linguistic studies.[108] Nevertheless, he still insisted that due to the peculiarities of legal language (in which legal provisions are formulated), it is "practically impossible" to construct the norms in a way that would satisfy the strict requirements established by the derivational theory of interpretation.[109]

In a similar pragmatic line of argumentation, Lech Morawski formulated his principal pragmatic (praxeological) objections against the *omnia sunt inter-*

105 Schott 2001: 158, 166–167.
106 Masuelli 2002: 402ff.
107 See Wróblewski 1973: 125.
108 See Opałek & Wróblewski 1991: 252.
109 Wróblewski 1990: 57.

pretanda principle and the derivational theory of interpretation in general.[110] As he claims:

> The principle that clear legal provisions do not require any interpretation is first and foremost pragmatically justified. The assumption that in every situation the court is obligated to carry out the interpretation of a provision, even the one which sense does not provoke any reasonable doubts neither in jurisdiction, nor in legal doctrine, would in practice lead to the paralysis of the law-applying institutional bodies, which will be forced to waste time and to provide the ordinary interpretive clichés in the justifications of their decisions.[111]

Moreover, Morawski insists that the application of the derivational theory of interpretation is hardly possible in legal practice, since the result of such an application would be:

> the construction, completed with much pain and toil, of the rules which nobody knows and which are utterly needless.[112]

In his direct answer to Morawski's argumentation, Zieliński emphasises that his criticism is superficial and unconvincing.[113] The application of the *omnia sunt interpretanda* principle only apparently slows down the judicial proceedings. In fact, if the court of appeal does not approve the decision of the first instance court, which was based on the *clara non sunt interpretanda* principle, the process of the application of law will be much longer. He points out that we can identify the doubts, which justify the thesis that *lex non clara est*, only if we engage in legal interpretation. Thus, according to Zieliński, the application of the *omnia sunt interpretanda* principle in every legal case by the first instance courts will minimise the duration of judicial proceedings. Moreover, the process of judicial law application can be speeded up by other means that are morally less risky.

In my opinion, it is symptomatic that Zieliński did not respond to the charge that it is practically impossible to decode legal norms in conformity with the conditions stipulated by the derivational theory of legal interpretation.[114] And even though the thesis that we sometimes need to carry out legal interpretation in order to identify the (reasonable) interpretive doubts seems justified, it does not imply that the principle of *omnia sunt interpretanda* is practicable. Indeed, this principle determines not only the manner of interpreting legal provisions, but also the ultimate end of legal interpretation, which cannot be successfully

110 See Morawski 2002: 63ff., 2006: 16ff., 50ff.

111 Morawski 2002: 64, repeated in Morawski 2006: 51.

112 Morawski 2006: 17–18.

113 See Zieliński & Radwański 2006: 18–19; Zieliński 2010: 142–143, 2012: 59–60.

114 A partial reply from the point of view of the derivational theory of legal interpretation was proposed by Radwański, who claims that the legal norm – as a result of the derivational interpretation of legal texts – must not be the "all-embracing" one – Radwański 2009: 10.

achieved in legal practice, since – as Zygmunt Tobor plausibly argues – the result of the derivational legal interpretation (i.e. the "univocal" legal norm) will always be open for further interpretation.[115] Arguably, any interpretation based on the *omnia sunt interpretanda* principle is a never-ending intellectual activity. Therefore, the interpretive meta-principle proposed by Zieliński as the remedy for the alleged severe shortcomings of the *clara non sunt interpretanda* principle calls to mind the famous Virgil dictum from Aeneid (12.46): *Aegrescit medendo*. In effect, in the practical context, it seems to me that Zielinski's remedy is worse than the disease, despite the fact that the correctness of Wróblewski's clarificative theory of legal interpretation, based on the doctrine of (pragmatic) clarity, is controversial as well.

5 A TENTATIVE SOLUTION

Before I present a tentative solution to the discussed controversy, several methodological remarks would appear to be in order, as it is not easy to establish a common methodological ground for the discussion and evaluation of the correctness of the conflicting interpretive meta-principles proposed by Wróblewski and Zieliński. The methodological aspects of the clarificative and the derivational theory of juristic interpretation are different in many regards and the careful identification of these differences is crucial for the elaboration of any reasonable proposal for the solution to the controversy between the *clara non sunt interpretanda* (and *interpretatio cessat in claris*) and the *omnia sunt interpretanda* (and *interpretatio cessat post applicationem trium typorum directionae*) interpretive principles.

Due to the typologies of the modern theories of legal interpretation proposed by Riccardo Guastini, first of all, it should be noted that the clarificative theory of Wróblewski belongs to the category of the mixed ("vigil") theories, whilst the derivational theory of Zieliński is presumably a specific example of the cognitive (formalist, "noble dream") theory of legal interpretation.[116] Secondly, as already noted, the theory of Wróblewski was elaborated and introduced as a descriptive theory, whilst Zieliński's derivational theory is a purely normative one.[117] Thirdly, the clarificative theory is primarily focussed on the operative

115 See Tobor 2013: 24. His argument from the interpretive *regressus ad infinitum* is based on Wittgenstein's observation from the *Philosophical Investigations* (§ 201). However, I suppose that we may reach the very same conclusion if we take into account the jurisprudential doctrines of the open texture and the defeasibility of legal rules.

116 See Guastini 1997: 279–283, 2011: 149–151. One reservation must be made: Zieliński is not a cognitivist.

117 See e.g. Zieliński 2002: 80, 2012: 85, 285ff.; Brożek 2006: 83ff.; Gizbert-Studnicki 2010: 51; Zieliński & Zirk-Sadowski 2011: 106.

interpretation that takes place in the frames of judicial law application, whilst the derivational theory is universal, i.e. it is supposed to be applicable to all kinds of juristic interpretations of law (operative, doctrinal etc.).[118] Therefore, fourthly, the theory of Wróblewski primarily refers to the case-oriented (facts-oriented) legal interpretation (i.e. interpretation *in concreto*), whilst the referent of Zieliński's theory is the text-oriented (i.e. *in abstracto*) interpretation of law. Fifthly, according to the current view,[119] the clarificative theory is related to the context of justification of interpretive decisions, whilst the derivational theory is surely primarily focussed on the context of discovery.[120]

Thus, we can observe that it is not an easy task to establish a common methodological perspective (basis) for these two Polish theories of legal interpretation. However, in order to propose a solution to the controversy, it is indeed indispensable to anyone interested in finding such a solution. Therefore, in what follows, I assume (somehow arbitrarily) that the appropriate methodological basis consists of:

(1) the adoption of the normative understanding[121] of both theories in general, and the interpretive meta-principles in particular;

(2) the acceptance of the common reference of them; namely, the operative, case-oriented (*in concreto*) judicial interpretation of law; and

(3) the assumption that we are dealing with the heuristically interpreted context of discovery of the courts' interpretive decisions.

Moreover, in order to make the proposed tentative solution more readable, the following scheme will be very useful:

118 Płeszka and Gizbert-Studnicki have proposed that the derivational theory of legal interpretation should be used in reference to the dogmatic (doctrinal) interpretation, whereas the clarificative theory of interpretation is more adequate for the operative interpretation of law. Płeszka & Gizbert-Studnicki 1984: 24ff. However, the former thesis was explicitly rejected by Zieliński, who stresses the universal character of his theory. See Zieliński 2002: 80, 243ff., 2012: 85, 254ff.; Płeszka 2010: 163ff.

119 See e.g. Romanowicz 2011: 63ff., 72ff.; Grzybowski 2012: 52ff.

120 Zieliński emphasises this feature of his theory many times. See e.g. Zieliński 2002: 249ff., 2012: 260ff.; Zieliński & Radwański 2006: 35; Zieliński & Zirk-Sadowski 2011: 104–105.

121 Let us remember that nowadays, the clarificative theory of Wróblewski is usually interpreted as a normative theory of interpretation, especially within the Polish judiciary and even Wróblewski himself has explicitly accepted the possibility of the normative interpretation of his theory of legal interpretation. See Wróblewski 1990: 76; Opałek & Wróblewski 1991: 259–261.

The theory of interpretation:	clarificative (J. Wróblewski)	derivational (M. Zieliński)
the object of interpretation	legal norm (norm formulation, legal provision/text or rule)[122]	legal provisions, i.e. legal text
the purpose of interpretation	pragmatic clarity (isomorphy)	semantic univocity
the result of interpretation	the meaning of a norm (a pattern of the ought behaviour) sufficiently determined for deciding a given legal case	the legal norm, i.e. the (sufficiently) univocal and "all-embracing"[123] expression (a norm of conduct)

Certainly, the solution to the Polish controversy could be based on various considerations: axiological, sociological, methodological, argumentative etc. Yet, I am going to propose an analytical solution of a conceptual kind, mainly based on the analysis related to the juristic concept of a legal norm that is used in the legal discourse.

First, let us consider the second row of the scheme: the purposes of legal interpretation. It is obvious that the pragmatic clarity of the law (which takes place in the situation of isomorphy) is not equivalent to the semantic univocity of legal norms. In the clarificative theory of Wróblewski, the former concept is connected with a referential theory of meaning, whilst in the theory of Zieliński, the latter concept is a category of non-referential semantics.[124] What is more important, however, is that the pragmatic clarity of legal norms can be (and, in fact, is) successfully achieved by the judges in a huge number of legal cases. But the semantic univocity can probably be treated only as a regulative idea of juristic interpretive reasoning, mainly because of practical and epistemological reasons (open texture, defeasibility, interpretive *regressus ad infinitum*). What is

122 Jerzy Wróblewski was very inconsistent on this point; however, in his most important monographs, he referred legal interpretation to the legal norms or legal rules. See Wróblewski 1959, 1972, 1992. This inconsistency is excusable, because for him, the most important aspect of legal interpretation was always to establish the meaning of a given normative utterance (or legal text) in the form of "a pattern of the ought behaviour".

123 It means that a legal norm has to be the result of the derivational interpretation of all of the relevant legal provisions of a given domestic legal system, the European and the international law etc. By the way, many commentators point out that such an "all-embracing", normatively complete legal norm can never actually be formulated. See e.g. Płeszka & Studnicki 1984: 24; Brożek 2006: 84.

124 See Płeszka & Gizbert-Studnicki 1984: 21. This characteristic has never been questioned in Polish jurisprudence and was recently explicitly accepted in Zieliński, Bogucki, Choduń, Czepita, Kanarek & Municzewski 2009: 26.

still more important is that the semantic univocity of a given legal norm does not imply its pragmatic clarity: in my opinion, a judge can have no semantic doubts over the intension of legal terms used in a given legal norm, but she can still have some doubts as far as the extension of those terms is concerned. This is the case because when we apply non-referential semantics to the issues of legal interpretation, we always have to make a next final step that enables us to relate language (legal norms) to reality (facts of a case).

Now, let us turn our attention to the two remaining rows of the scheme (the first and the third ones) in order to make the final point. As we can easily observe, there is a crucial difference between Wróblewski and Zieliński: for the first scholar, the legal norm is the object of legal interpretation, and for the second, the result of it. And we can also see, this time maybe not so easily, that for Wróblewski, the meaning of a legal norm can be (however, it need not be, because sometimes the direct understanding of a norm is sufficient) the result of legal interpretation. What is essential here is that the legal norms and their meanings are ontologically distinct: in Wróblewski's conceptual network, we deal separately with the legal norm and with its meaning, i.e. a pattern of the ought behaviour. But within the derivational theory of Zieliński, the legal norm and its meaning are even linguistically indistinguishable – the same linguistic expression, called a "legal norm", is the legal norm and the self-referential expression of its complete meaning (i.e. a legal norm "XYZ" means "XYZ" and nothing else or more). Therefore, in the case of "legal norms" in Zieliński's sense, it will be redundant or even absurd[125] to speak about the meaning of any legal norm (or we can speak about the meaning indeed, but exclusively about the literal one).[126] I think that such consequences of the conceptual apparatus of the derivational theory of legal interpretation are not acceptable for lawyers, because in the legal discourse, no matter whether it is practical or theoretical, we are used to speaking (and need to be able to speak) separately about legal norms and about their various, potential or actual meanings (literal, systemic, functional etc.).

The above reasoning also explains why, in my opinion, Zieliński needs the interpretive meta-principles of *omnia sunt interpretanda* and *interpretatio cessat post applicationem trium typorum directionae* for his theory of legal interpretation. And why for him the pragmatic clarity of law is without any relevant value. As a legal positivist, he wants the legal system to consist of legal norms, that is, the univocal and "all-embracing" semantically complete expressions of the legal ought, which indeed can be formulated if and only if *omnia sunt interpretanda*. Maybe his aspiration is axiologically justifiable, yet I think that it is

125 Because the only available answer to the question, "What is the meaning of legal norm XYZ?" will simply be "XYZ".

126 Since legal norms are formulated in the "extra-contextually univocal language".

utopian.[127] Therefore, my vote is for Wróblewski's *clara non sunt interpretanda* and *interpretatio cessat in claris* meta-principles of legal interpretation, the use of which in the (judicial) interpretive discourse does not have such strange conceptual consequences.[128]

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127 Stefan Kisielewski (1911–1991), a famous Polish publicist, writer and composer, once said (in reference to the nonsensical reality of the regime of a real-socialist People's Republic of Poland, which happily died in 1989) that "Socialism is the regime in which the difficulties unknown in any other system are being heroically overcome!". It is a pity, but I think that this dictum, *mutatis mutandis*, can be referred to the derivational theory of legal interpretation. A similar argument was formulated in Morawski 2006: 18. He claims that the derivational theory of legal interpretation "is rather creating imaginary problems, instead of resolving the actual problems".

128 I am fully aware that this solution of the parochial Polish controversy is parochial as well. And, for me, it is possible that the solution to the underlying universal controversy as to whether we should distinguish, on the basis of the doctrine of *claritas*, the phenomena of the direct (pre-interpretive) and the indirect (interpretive) understanding of legal norms, perhaps can be just the opposite, i.e. the negative one. Yet, that is quite another story.

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