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THE RISKS OF CONTEXT-FREE EVALUATION OF LEGISLATIVE LANGUAGE SOLUTIONS (POLEMICAL ARTICLE)

Abstract

The purpose of this paper is a creative polemic with the theses expressed by Katarzyna Sornat in her article concerning the analysis of selected Polish legislation from a normativist point of view. However, the Author adopts only the methodology of normative linguistics and ignores the achievements of legal theory, which leads to omitting the whole contextual layer of the examined texts, and thus impoverishes K. Sornat's analysis. Critical comments to her conclusions serve to observe how sensitive the social space is to the introduction of technical changes to the law and why the analysis of the state law must also take into account the directives of its interpretation.

KEYWORDS

legislation technique, linguistic error, legal language

SŁOWA KLUCZOWE

technika legislacji, błąd językowy, język prawny

1. INTRODUCTION

The 83rd issue of *Studia Iuridica* published an article by Ms. Katarzyna Sornat entitled “The language of legislative texts and its normative evaluation – on the example of selected legal acts”.¹ In this work, the Author, using her normativist² skills, analysed several normative acts published in the Journal of Laws of the Republic of Poland in November and December 2016. The study resulted in the listing of accusations against the legislator in connection with his imperfect handling of the Polish language.

This article is an attempt to polemicize with the criticism expressed by the Author. The legislator can – and should – be rebuked for any stumbling blocks and sloppiness, since, as the Author herself aptly notes, legislation is a matter of great public importance, but it is inappropriate in this criticism to dismiss lightly the wealth of research resources offered by legal theory. In my opinion, most of the remarks made by the Author, although arguably in line with the doctrine of normative linguistics, ignore the research context, which includes the principles of law interpretation and related principles of law-making. This, unfortunately, leads to a significant impoverishment of the presented argument that consequently does not constitute a sufficiently reliable set of demands directed at the legislator.

2. THE PROBLEM OF METHODOLOGICAL ASSUMPTIONS

The Author begins her argument with the remark that the purpose of her article is not to “stigmatize anything or anyone”,³ although the very attempt to comment critically on the legislature’s language is a thing worth praising, not the scepticism she is trying to defend against with this sentence. The technique of legislation, after all, can only develop adequately under conditions of free discussion, which for obvious reasons presupposes positions of approval and doubt.

Drawing the contextual landscape of her work, the Author adds that – as a philologist – she does not agree with the view that “a Polonist should not evaluate legislative texts using the criteria provided for general Polish, since they [these

¹ K. Sornat, *Język tekstów legislacyjnych i jego ocena normatywna – na przykładzie wybranych aktów prawnych*, “*Studia Iuridica*” No. 83 (2021), DOI: 10.31338/2544-3135.si.2020-83.15.

² I understand “normativism” here as a derivative of normative linguistics, also called prescriptive linguistics, which assumes the existence of a normative pattern in language against which a given speech act can be syllogistically compared and its “correctness” checked. The Author herself uses this term to describe this type of approach to language, see *ibidem*, pp. 223, 229.

³ Nonetheless, she uses precisely the expression “stigmatization” and its category several times to describe her desired stance on linguistic errors in her assessment, cf. *ibidem*, pp. 221, 230.

texts] are written in a specific language, characteristic of lawyers”⁴ However, it should be doubted whether such a view actually functions, let alone is “circulated”, but the Author does not provide her sources to help adequately address this issue. There does not seem to be a belief in the public discourse that linguists are incompetent to evaluate legal language; on the contrary, this is repeatedly done and is not met with scientific outrage. As an example of the involvement of linguists in legal discourse, one can cite the work of the Constitutional Committee of the National Assembly, whose expert was Professor Jerzy Bralczyk. Perhaps the Author is referring to the view that the evaluator of legal texts – regardless of his education – should not only use the philological method (or any other), but necessarily also take into account the legal perspective. Such a belief actually prevails quite widely,⁵ being at the same time my own, because it stems from the assumption that the achievements of legal theory in the field of legal interpretation have their justification and should not be frivolously ignored. Their rejection is at the same time the source of the fundamental shortcoming of the work under discussion – the deprivation of its fundamental context.

As justification for the discussed decision to choose a purely normative method, the Author points out that the legal language, “despite its peculiar terminology and phraseology (...) cannot be considered a separate code (...) because it has not developed (...) its own grammar”.⁶ Such a procedure calls for the expression of several doubts. First – the legal language has not only developed its own terminology and phraseology, but at the same time, on syntactic grounds, it is so separate from the common Polish language that its noun formation can be interpreted as another feature that distinguishes it from the rest of the general language.⁷ At the same time, it is a part of the language with a unique feature, which is the formal separation – statements in this register are formulated only by the legislator in a strictly defined constitutional procedure.⁸ Secondly – without going into the recognition of the development of one’s own grammar as a prerequisite for recognizing something as a separate code – it should be noted that the

⁴ *Ibidem*, p. 230.

⁵ As an example, we can cite the words of M. Sobieszewska summarizing this problem well: “The interpretation of legal texts, as opposed to other texts [emph. M.R.], requires knowledge of the rules of legal interpretation in order to determine the real will of the legislator”. - cf. M. Sobieszewska, *Juryslingwistyka: między językiem a prawem*, “Studia Iuridica Lublinensia” Vol. 24, No. 4 (2016), DOI: 10.17951/sil.2015.24.4.123., p. 123.

⁶ K. Sornat, *ibidem*, p. 220.

⁷ Legal language is above average noun-formative, as pointed out, for example, by A. Malinowski. Cf. A. Malinowski, *Pomiar czytelności polskiego tekstu prawnego*, “Państwo i Prawo” No. 5 (2017), p. 11.

⁸ Here, I use the distinction between legal and juridical languages (or legal language and legalese – depending on the translation), common in jurisprudence, which was initiated by Bronisław Wróblewski. There is no risk of a terminological discrepancy with the article under comment, since the Author also uses it. - cf. p. 221.

Author has not justified why it is precisely the recognition of something as a separate code that is necessary to be scientifically obliged to apply some additional criteria of analysis beyond merely evaluating it from the perspective of normative linguistics (for this is the spirit of the statement). The Author concludes these considerations with the remark that, speaking of legal language, she has in mind “rather a *legal style*, understood as a special (functional) variety of general Polish, subject to normative evaluation from the perspective of the principles of general language”.⁹ Such a position also calls for scepticism. The Author chooses to analyse “legal style”, but sticks to the subjective conception of legal language (if she decided to analyse style, she could also reach for non-normative or at least non-statutory texts).

The desired state, according to the Author, is a “correct” language, i.e. without “errors and faults, i.e. functionally unjustified innovations”.¹⁰ However, this raises the question – left without an explanation by the Author – as to which innovation can be considered functionally justified and which not. Further analysis will be aimed at indicating that the innovations that the Author cited as examples of errors, implicitly assuming their non-functionality, may turn out to be more functional than they might appear at first glance. Also, the “requirement to adhere to the principles of the model standard in all types of official contacts”, which the Author unjustifiably deems “perfectly valid”, raises some problems. It is obvious that the legislator should take care of the linguistic quality of the law-making, but it is not necessarily saying that this quality must automatically be measured by compliance with the opinions of selected linguists on linguistic correctness, if only for the reason that compliance, even if considered a component of quality, is not the only nor most important component.¹¹

Thus, it seems that the methodological problems begin when the Author recognizes that there is a “circulating” opinion about the incompetence of Polonists as to the evaluation of legal texts. Such an opinion, as mentioned, does not prevail, but it serves the Author – as part of the presentation of an approach that differs from her [opinion] – to choose an alternative methodology, grounded only in the theses of normative linguistics. In order to justify such a decision, K. Sornat denies the separate status of the legal language, which, while maybe correct in foundation, is at the same time a justification for rejecting the entire theory of legal interpretation, which, after all, is immanently linked to language. Having instead rejected this context, the Author chooses a normativist catalogue of errors

⁹ *Ibidem*, p. 221, italics as written by the Author.

¹⁰ *Ibidem*.

¹¹ After all, among the so-called directives of legal language clarity, unambiguity, comprehensibility, conciseness, or cataphaticity are also mentioned. – cf. T. Gizbert-Studnicki, *Język prawny z perspektywy socjolingwistycznej*, Cracow 1986, p. 103 *et seq.*; A. Nowak-Far, *Katafatyczny kod prawa*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” Vol. 76, No. 3 (2014), DOI: 10.14746/rpeis.2014.76.3.1.

to evaluate the chosen legislation. The main shortcoming of such an approach, however, is related to the fact that the legislator, when constructing legal texts, takes this very context into account, and it strongly affects the linguistic shape of the created legislation. Hence, failure to take it into account in the analysis may lead to shortcomings in its results.

3. ABANDONED METHODOLOGICAL INSTRUMENTATION

In order to be able to more precisely address the allegations made by the Author, it is worth at least briefly describing the two pillars of the omitted context – the directives for the creation and interpretation of the law. Those two are very much intertwined and their individual principles ideologically correspond with each other.

The Author recognizes one of them – the directives for law-making contained in the Rules of Legislative Technique¹² (hereinafter: ZTP, which is the Polish abbreviation). She points to the directives to draft legal regulations concisely and synthetically so that they are understandable to their addressees (§§ 5 and 6), to avoid complicated syntax (§ 7), and to use words in their basic meaning (§ 8(1)). In principle, the catalogue of the cited provisions does not raise any objections, although the Author's analysis touches primarily on § 7, which mentions not only simple syntax but also the accepted rules of the Polish language and the avoidance of multiple compound sentences. The study refers to the remaining paragraphs in a cursory manner at most. At the same time, it is worth noting that the ZTP does not directly mention the rules of the Polish language in a context other than syntax. An appropriate normative point of reference here could be the Polish Language Act,¹³ which in Article 3(1) indicates that the protection of the Polish language consists, among other things, in taking care of its correct use (but does not specify against what standard this correctness should be measured).

However, the Author omits equally relevant subsequent paragraphs of the ZTP. Paragraph 10, in particular, will prove particularly interesting in the context of the Author's allegations, and it concerns the labelling of equal notions with equal terms, and different notions with different terms. This corresponds with the second pillar of the omitted context, which is the theory of legal interpretation.

Within the framework of the theory of legal interpretation and the directives formulated in the course of scientific discussion, among other things, the

¹² Annex to the Regulation of the Prime Minister of 20 June 2002 on the "Principles of Legislative Technique", Journal of Laws of 2016, item 283.

¹³ Act of 7 October 1999 on the Polish language, Journal of Laws of 1999, No. 90, item 999 as amended.

prohibition of synonymous and homonymous interpretation is pointed out. The prohibition of synonymous interpretation is based on the assumption that different phrases should not be assigned the same meaning, and the prohibition of homonymic interpretation – hence the same phrase should not carry different meanings. Combined with the assumption of the rationality of the legislator (often challengeable, but nevertheless useful), these principles lead to the suggestion of an interpretation that assumes that the legislator shapes the law in a deliberate manner, and if he decides on a particular linguistic procedure, he does so consciously and thus attempts to refer to a fragment of reality different from what would be the case with a different expression. This nuanced approach often eludes interpreters, who advocate changes to the law without delving into the consequences this will have for its application.

4. SELECTED PROBLEMS WITH THE AUTHOR'S ALLEGATIONS

The statistical analysis conducted by K. Sornat is not objectionable. It seems that within the framework of the methodology adopted, the Author consistently and coherently uses specific terms and reliably classifies linguistic phenomena into the category of “errors” with its internal typology. However, reservations are raised by the Author’s specific objections to the analysed corpus.

4.1. “INAPPROPRIATE” USE OF THE -ĄC¹⁴ PARTICIPLE

K. Sornat cites the following statement from the law under review: “Uwzględniając skargę, sąd na żądanie skarżącego przyznaje od Skarbu Państwa sumę pieniężną w wysokości od 2000 do 20 000 złotych”. [“Taking into account the complaint, the court shall, at the request of the complainant, award a sum of money from the State Treasury in the amount of 2,000 to 20,000 zlotys”.] suggesting that it would be correct in this situation to replace the word “uwzględniając” [“taking into account”] with the prepositional phrase “po uwzględnieniu” [“after taking into account”].¹⁵ Similarly, she cites a blanket provision that directs the Prime Minister to issue a regulation with the words “Prezes Rady Ministrów

¹⁴ Some subtleties of the Polish language may escape the reader unfamiliar with the nuances of Polish grammar here. In this example, it is important to know that there are essentially two types of adverbial participles in Polish: contemporary and antecedent. Contemporary adverbial participles can be recognized by the ending “-ąc” and semantically signal the simultaneity of the described action with respect to the main verb in the sentence.

¹⁵ Again: to a reader unfamiliar with Polish, this change may seem absurd or trivial – it’s just adding “after”. In Polish, however, this changes the grammatical concept of this sentence, since it

określi (...), uwzględniając (...), biorąc pod uwagę (...), mając na uwadze (...)" ["The Prime Minister shall determine (...), taking into account (...), considering (...), having regard to (...)]. Here, too, the Author's object of criticism is the use of participles, particularly such a large accumulation of them, she believes this raises "even more doubt".¹⁶

The flaw in this approach stems from ignoring the semantic difference resulting from the proposed alternative. With regard to the first example, the Author herself correctly notes that her proposal emphasizes the unevenness of the actions expressed in the two constituent sentences. Indeed, the construction "[p]o uwzględnieniu skargi, sąd (...) przyznaje" ["after taking the complaint into account, the court (...) shall award"] outlines a picture of the court's work, in which first, the complaint is considered valid and only later, some monetary sum is awarded. However, the Author fails to see (since she does not refer to it) the possibility that the legislator deliberately [emph. M.R.] uses the construction of temporal simultaneity. Such a procedure may have at least two motivations: (1) psychological and (2) pragmatic. The (1) psychological motivation suggests such a strong coupling between the validity of the complaint and the amount awarded that the court should make these two decisions in a single train of thought. The (2) pragmatic motivation, on the other hand, rests on the fact that such a grammatical approach cuts off doubts about whether the court should (formally) make one decision or two, promoting the economy of the proceedings. Psychological motivation can be successfully applied to the Prime Minister's case as well. These activities (taking into account and considering factors) are supposed to occur necessarily during [emph. M.R.] the process of issuing a decree. In blanket regulations, by the way, such use of participles is quite common.

The Author comments on these examples, pointing out that "correctness" in this regard is extremely important due to the fact that we are dealing with important state documents, in which precision and comprehensibility are more important than economy.¹⁷ If the economy of a statement is understood as its conciseness, then the Author's thesis is not justified by the ZTP she cites, as it treats all principles equally (cf. §§ 5, 6), without indicating any hierarchy between them. The literature also recognizes the problem of optimization of these rules, emphasizing their asymptotic or even contradictory nature.¹⁸ This results from the fact that it is often not possible to connect precision and comprehensibility at the same time.¹⁹ It should also be noted that if, in fact, the above argument is

transforms contemporary adverbial participle into a prepositional phrase with a gerund. The latter is more commonly used in the Polish language, as it is simpler.

¹⁶ K. Sornat, *ibidem*, pp. 224-225.

¹⁷ K. Sornat, *ibidem*, p. 225.

¹⁸ M. Andruskiewicz, *Problem jasności w języku prawnym – aspekty lingwistyczne i teoretycznoprawne*, "Comparative Legilinguistics" Vol. 31 (2018), DOI: 10.14746/cl.2017.31.1, p. 19.

¹⁹ T. Gizbert-Studnicki, *ibidem*, pp. 103-104.

sensible, i.e. the legislator's use of a participle instead of a verb-noun spells out a slightly different picture of reality, then the effect of this is just the opposite of K. Sornat's conclusions, since "breaking" the model norm here will lead to greater precision of expression. Indeed, the rigid use of constructions promoted by normative linguists would impoverish the possibility of putting reality into the words of the law.

The conclusion put forward by the Author in connection with this phenomenon also raises some concerns, for she suggests that the "best" solution is to completely abandon participle constructions in legal language.²⁰ This is a very strong thesis, considering that it is quite an important part of the Polish language resource. Abandoning it will result in the need for complex linguistic procedures attempting to render the same fragment of reality as close as possible to how the previous category did. At the same time, replacing participles with prepositional phrases in the form of preposition + noun would greatly intensify the predominance of nouns in the legal corpus, which would contribute to intensifying the effect of heavy style. This seems to make it a suboptimal solution.

4.2. ERRORS IN AGREEMENT

Describing a different error, the Author notes that it is very common in legal language to use a singular judgment next to a several-element entity, e.g., "podmiot reprezentujący Skarb Państwa, organ administracji rządowej lub osoba zastępowana przekazuje Prokuraturii Generalnej informacje (...)".²¹ ["the entity representing the State Treasury, a government administrative body or a deputized person provides information to the Attorney General's Office (...)"].²¹ According to the Author's opinion, the correct form here would be the pronouncement "przekazują" ["(they) provide"].²² Although one may have objections of lesser force against this remark, it should be noted that – again – perhaps the legislator deliberately uses such syntax in order to be able to signal the fact that these actions are performed by only one of these entities. In a situation where the singular is used in combination with a conjunction or alternative, the result could be an interpretation of the provision leading to the recognition that the competence in question is vested only in all of the indicated entities at the same time. The use of the singular "anticipatory" closes the way to such an interpretation.

²⁰ K. Sornat, *ibidem.*, p. 225.

²¹ K. Sornat, *ibidem.*

²² K. Sornat, *ibidem.*

4.3. BAD SENTENCE FORMATION AND SECONDARY SYNTACTIC RELATIONSHIPS

K. Sornat then goes on to criticize the erroneous sentence formation, pointing out that in most cases the correction of such a phenomenon would involve introducing new elements into the statement. This remark alone may raise some concerns because if a statement meant the same thing after adding certain elements, its meaning would also remain the same after taking them away again. This, in turn, contradicts the directive of interpretation, which prohibits an interpretation that would lead to deeming some part of the text superfluous. Thus, once again, we enter the territory of semantic nuances. At the same time, however, this does not imply nihilism in approaching the possible technical repair of the quality of normative acts in an attempt to strive for a stable meaning – such amendments are possible, but require deeper thought and care. As an example of carelessness, the Author points out, for example, the construction “[o]bniżenie wynagrodzenia zasadniczego sędziego o 5%-20% na okres od sześciu miesięcy do dwóch lat” [“[t]he reduction of a judge’s basic salary by 5%-20% for a period of six months to two years”] pointing out that a syntactical ambiguity results in the string “wynagrodzenia zasadniczego sędziego” [“judge’s basic salary”], presumably following the intuition that it could mean “wynagrodzenie zasadnicze” [“basic salary”] and, in inversion, “sędziego zasadniczego” [“basic judge”].²³ However, this problem is not due to the sloppiness of the legislator’s language, but on the contrary, due to his diligence. “Wynagrodzenie zasadnicze” [“Basic salary”] is, in fact, a systemically well-established construction with its own definition, which appears at least in the Labour Code (Article 77³ § 3(1)).²⁴ However, since § 9 of the ZTP states that “In a law, the terms that are used in the basic law for a given field of affairs, in particular, in the law referred to as ‘code’ or ‘law’, should be used.” The ‘rigid’ adherence to the code construction requires the highest praise in this case, as it positively affects the consistency of the entire system. It is worth adding that this passage comes from the amendment to the Law on the System of Common Courts, so a law that is fundamentally distant from the Labour Code – all the greater reason to appreciate the concern for terminological uniformity.

In case of another doubt, the Author suggests replacing the phrase “identyfikacja ruchomości sędziego” [“identification of the judge’s movables”] with the construction “identyfikacja ruchomości należących do sędziego” [“identification of movables belonging to the judge”] or “identyfikacja ruchomości będących

²³ This, too, is an example that is not easy to render directly in English. The confusion in this case stems from the fact that the grammatical constructions of “basic salary” and “judge’s salary” both use a genitive case, with the result that the combined construction of “judge’s basic salary” could refer the word “basic” to both salary and judge.

²⁴ Act of 26 June 1974 - Labour Code (Journal of Laws of 1974, No. 24, item 141 as amended).

własnością sędziego” [“identification of movables owned by the judge”]. The first objection to these proposals is that civil law demands great care in handling terms like ‘belonging’ or ‘ownership’, since they mean quite different things and are not easily interchangeable. The second – that the Author does not mention whether perhaps “ruchomości sędziego” [“judge’s movable property”] is also not an established legal construction, which the legislator should not swat away on the altar of editing the sentence formation.

4.4. SYNTACTIC HOMONYMY

Another of the Author’s objections is the occurrence of syntactic homonymy in legal texts, i.e. the identification of the subject of a sentence with the complement form, which leads to ambiguity as to who is the performer of a given action, and what its result is. As an example here, she cites the sentence “Wniesienie odwołania w terminie wstrzymuje wykonanie orzeczenia”. [“The timely filing of an appeal suspends the execution of the judgment”.] in which, according to her, it is unclear whether the filing of an appeal leads to the suspension of the execution of the judgment, or whether the execution of the judgment results in the filing of an appeal. It seems that the so-called reasonable person can reject the second interpretation out of hand, as it is difficult for the execution of a ruling to result in someone filing an appeal – this would be an interpretation leading to absurdity, and as such should also be avoided. The solution proposed by the Author (“wniesienie odwołania w terminie skutkuje wstrzymaniem wykonania orzeczenia” [“the filing of an appeal within the deadline results in the suspension of the execution of the judgment”]) may dilute the unambiguous meaning of the previous wording suggesting that the judgment is suspended by operation of law itself and immediately. Instead, the use of an expanded construction could lead to support the understanding that some decision still needs to be issued to confirm it.

4.5. MISUSE OF PHRASES GOVERNING THE GENITIVE

In the case of this remark, one has to agree with K. Sornat, at least as far as the sensibility of the consequences of implementing her proposal is concerned. After all, if one tries to transform legal texts from noun-oriented to slightly more verb-oriented, they will certainly gain a certain “vividness” that will raise the level of their communicability. The Author rightly notes that the use of complementary phrases and the accumulation of noun forms are manifestations of a heavy style. The literature recognizes the existence of this problem, signalling

the need to refrain from using nouns. At the same time, it is proven that more verb-heavy texts are more efficiently read and remembered by the audience.²⁵

5. FINAL REMARKS

The Author conducted an exploratory analysis of several selected laws in an effort to assess their linguistic correctness from the perspective of normative linguistics. She accomplished this task well, as her work provides conclusions that are full of meaning once this paradigm is adopted. However, the problem of the analysed work is not the Author's normative incompetence (which cannot be observed), but her selectivity in methodological choices resulting in significantly impoverished interpretations of the described phenomena. As mentioned, in the process of law-making, the legislator is aware of the entire contextual layer of the directives of legislation and interpretation, so depriving oneself of them at the stage of analysing such a text leads to erroneous – or at least very truncated – conclusions.

The purpose of this article is not to undermine any reflection on the technical repair of the quality of normative acts. This one seems necessary, however not for normative reasons, but rather for intelligibility reasons. After all, the literature does not indicate that the source of problems in evaluating legal language is “linguistic errors”, but rather its “heaviness” or “nouniness”. At the same time, correcting any of these dimensions will result in the need to face the challenge of vagaries of interpretation so often cited in the argument above. This does not mean that such attempts should not be made, but rather that they should be made with what is called due caution.

K. Sornat concludes her article with the observation that more frequent recourse to correctness studies on the part of legislators and their mastery of the “rules of grammar” will result in greater precision of statutory information and improve the public image of the institutions represented by the law. Again – but for the last time – I am left to disagree with her here. As indicated earlier, a greater variety of linguistic solutions – despite the possibility of their critical evaluation by normativists – can lead to greater, not lesser, precision of texts, so harmonizing them in the face of the – already quite fluid – “linguistic norm” can mean petrification of statutory language and impoverishment of its tools. As for the image of public institutions, on the other hand, insofar as it is affected by legal texts, the thesis that it is lower than it could be precisely because of normativist lapses has not been empirically confirmed so far. Exaggerated attention to com-

²⁵ L. Sokołowski, *Wpływ struktury gramatycznej tekstu na jego rozumienie*, “Zeszyty Prasoznawcze” Vol. 8, No. 4(34) (1967).

pliance with the normativist pattern could lead to the perpetuation of the image of these institutions as distant from their addressees, and after all, the law should use such words (sentences) that “listeners and readers will be able to understand”.²⁶

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²⁶ Lord Denning, quoted by M. Sobieszewska, *ibidem*, p. 126.