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Interpretation Theories in Ukrainian Courts – Past and Present

by Ievgen Zvieriev*

Abstract. The article is devoted to the analysis of the issue of legal interpretation, and in particular to its aspect of being an art, and the way the three main interpretation theories fit into the artistic concept of interpretation. This concept is also used to analyze the state of legal interpretation conducted by Ukrainian courts, as well as tendencies of its development. The author first provides a brief overview of the concept of interpretation generally, and legal interpretation particularly. Then he elaborates briefly on the issue of the artistic nature of interpretation as a skill of a human being. This is followed by an analysis of the Ukrainian legal system supported by the example of a recent case, and the author concludes with his ideas on the working practical combination of the theories of interpretation to be beneficial for both the Ukrainian and other legal systems.

Keywords: legal interpretation, Ukrainian courts, art, textualism

1. LEGAL INTERPRETATION AS AN ART AND SCHOLARLY CONCEPT

Legal interpretation, being one of the most important parts of judges' activity, keeps providing us with the largest number of questions with open answers among all other legal concepts. Interpretation is both a work of art and a scholarly concept, and can sometimes be called *the talking law,* since in most cases we all depend not on the written form of the law or any other rule, but rather on the understanding thereof, and the interpretation of those who are authorized to make decisions we are concerned in. There are numerous scholarly works dedicated to the issue of legal interpretation which try to analyze its essence and application in different forums. On the one hand, interpretation (if we consider that it is a true work of art) cannot be subjected to certain rules. On the other hand, due to its legal nature and dependence on the law (which in itself is a set of rules), legal interpretation should be applied within certain limits, which reveals its scholarly nature. The combination of the scholarly and artistic nature of legal interpretation has created lots of problems for the authorized people (mostly judges). They have created their own set of rules of interpretation they apply whenever faced with difficult situations while solving cases. Legal scholars in their turn have developed their own theories of interpretation. Some of these theories and judges' rules of interpretation were so influential that they later appeared in written laws: statutes, international treaties and other legal documents.

Interpretation is an art. This controversial statement is as true as anything about interpretation. This statement is also a matter of interpretation for any one of us, and may be true or false depending on the circumstances and/or context. However, the idea of viewing interpretation generally (and later also legal interpretation in particular) appeared in Ancient Greece, where special competitions of orators were held.[1] The skill of

[1] Bederman, (2001) 11–13.

* SJD candidate, Central European University (CEU), Budapest, Hungary and PhD candidate, National University of "Kyiv-Mohyla Academy" (NaUKMA), Kyiv, Ukraine. E-mail: zvieriev_ievgen@phd.ceu.edu

interpretation, which is attributable to every human being, has been a matter of concern for many philosophers, religious leaders, as well as legal professionals. Legal interpretation most probably formally appeared in Ancient Rome, when the term *interpretatio* (the basis of the same term in many of the contemporary languages) was created.[2] Later on, it became a matter of philosophic and scholarly disputes on different aspects of its essence. These disputes continue nowadays, and have a good chance of never ending.

However, the idea that interpretation has an artistic nature is usually attributed to F. Schleiermacher, who stated that "the context in which interpretation is being conducted may never be ideal, and thus absence of ideal situation eliminates the possibility of rational approach which brings the interpretation process to the state of art having no clear canons".[3]

This approach confronts the idea of one of the three main interpretation theories – textualism, which requires clear rules and a clear source of interpretation – of the written text. However, this approach fits into two other main theories – contextualism and teleological theory, where clear rules of interpretation and a clear source are not a prerequisite.

The ongoing debate on whether or not interpretation is an art has been clearly illustrated by a stone composition in the famous park of "Sofiyivka" located in the author's hometown Uman in Central Ukraine (Picture 1).

Picture 1

[2] Schiller (1941) 734–735.
[3] Schleiermacher (2006) 76.

This composition is called "The Nature and the Art" and reveals two stones of about the same size, one crafted by a human being and the other crafted by nature. Both of them consist of the same material – stone, both are of about the same size and weight, however, the difference lies in their form as the result of the forces applied to them. The handcrafted stone represents the approach that interpretation is not an art, with strict canons and rules. The second one represents interpretation as an art with no clear-cut canons and rules and is governed just by the interpreter's common sense. The two stones viewed separately are not very different – products of one or another type of force, however, what matters here is their combination. If we imagine and insert one stone into the other (Picture 2), we will see that some parts will be attributable to both stones and overlap, while some parts would be attributable solely to either the natural or handcrafted stone. These non-overlapping parts are to be viewed as special cases of interpretation, which fall outside of the rules of interpretation established by the law (in case we are dealing with parts of natural stone sticking out) or which fall outside of the rules of common sense (if we are dealing with the parts of handcrafted stone sticking out).

Picture 2

In most countries, the goal of a judge is to produce a decision, interpreting legal norms in such a way that they can fit into the area occupied by both stones (grey area). The decision does not have to only comply with common sense, it also has to comply with legal requirements; otherwise, the interpretation complying with solely legal requirements and located outside of the borders of common sense cannot be viewed as a justified one.

2. UKRAINIAN LEGAL SYSTEM IN THEORY AND PRACTICE

The Ukrainian legal system is a typical example of a post-Soviet system of legal institutions having still one word in common – *System*. The old Soviet idea that all state institutions should be consolidated into a monolithic system that has only one goal – to protect Socialist legality – is a *de facto* governing idea of Ukrainian courts. The majority of judges are still governed by old Soviet textualist approaches, naming it the *letter of the law*. The article will not go deep into the issue of the *letter of the law* since this is a topic for another research. However, this approach ends up in the areas of the stone within legal regulations, but outside of common sense borders.

A good example of the abovementioned approach is the series of decisions of the Obolonskiy district court of the city of Kyiv of January 25 and January 27, 2014 in the case

of Mykola Pasichnyk.[4] The accused (born 1942) was detained by the Ukrainian special security police on January 22, 2014 for "harsh resistance". The investigator claimed that Mr. Pasichnyk had beaten up the special security police officer, and had thrown flammables with his right hand, however, in fact the man cannot use his right hand at all due to his disability. Moreover, the investigator claimed that the man was preparing military actions, whereas in fact, he came to Kyiv from one of the small towns in Central Ukraine aiming to take part in one of the marches, and brought only two fish, a piece of bacon, half a loaf of bread, two bottles of water and toilet paper. The list presented in the court has somehow managed to include 7 Molotov cocktails. The man was sentenced to two months in jail by the order of the court on January 25, 2014, which was changed to house arrest by the decision of the same court two days later.

This is an example of strict application of the *letter of the law* by the court which simply justified investigators' and prosecutors' findings without any regard to legal principles contained in the Constitution of Ukraine, numerous international treaties, as well as most of the statutes in force at that time. The same court has heard 17 other cases against activists, and the decision was more or less similar in every case.[5] The court followed the *letter of the law* by adopting the formulations attributed to the accused (including Mykola Pasichnyk), however, it did not conform its decision to the requirements of common sense, specifically as to how a 72-year-old disabled man with a non-functioning right hand beat up an equipped special security police officer. Nonetheless, this was the approach of the court to interpretation of the law in this case.

3. UKRAINIAN COURTS' APPROACHES TO LEGAL INTERPRETATION

The outcome of this case can be attributed to the special situation in Ukraine due to numerous protests at the beginning of 2014, however, this severe breach of the common sense borders of legal interpretation was not only the outcome of the special situation. It reveals the general approach of Ukrainian courts to justice and legal interpretation as an integral part of justice. This approach can be summarized as follows:

1. Ukrainian courts tend to apply the textualist approach in the majority of cases, and turn to contextualist and teleological approaches only in cases of high social or political value or in rare cases when a judge is not afraid that his/her decision will be overruled by the appellate court.

2. Ukrainian courts tend to base their decisions mostly on the norms of Ukrainian national legislation, and very rarerly do they turn to legal norms from outside the Ukrainian legal system (international treaties, foreign law, decisions of international courts).

3. Ukrainian courts tend to produce numerous "copy-pasted" decisions (decisions that are completely the same in all aspects except for dates, names of parties involved and

[4] Світлана Корженко, '72-річний «екстреміст» Микола Пасічник отримав струс мозку після затримання «Беркутом»', *Gazeta.ua* (30 січня 2014) [Svitlana Korzhenko, '72-richniy "ekstremist" Mykola Pasichnyk otrymav strus mozku pislya zatrymannya "Berkutom"', *Gazeta.ua* (30 January 2014)] <http://gazeta.ua/articles/life/_72richnij-ekstremist-mikola-pasichnik-otrimav-strus-mozku-pislya-zatrimannya-berkutom/539334 > accessed 1 March 2015.

[5] 'Оболонський райсуд арештував 17 активістів', *Українська правда* (25 січня 2014) ['Obolonskiy raysud areshtuvav 17 aktyvistiv', *Ukrayinska pravda* (25 January 2014)] <http://www.pravda.com.ua/news/2014/01/24/7011247/> accessed 1 March 2015.

some other minor factors). There are cases that, given the same reasoning, the decision is completely different.

3.1. Textualism as the cornerstone of Ukrainian court interpretation

There are reasons why the textual approach is admired – its application does not require serious considerations and analysis of whether there is a legal norm outside of the provided written text and what the norm's essence is. Hence most judges (not only Ukrainian) prefer this approach due to its simplicity. This approach may be compared to the handcrafted stone from Picture 1: the rules of textualism have exact handmade borders, just like the handcrafted stone has nicely polished sides. Nevertheless, by polishing the sides, craftsmen may cut some material off, just like the textualist approach cuts some material off by limiting the interpretation only to the written text, even though this material may be important as it is impossible to predict everything.

Another reason for the admiration of textualism is the old Soviet tradition. As noted above, Soviet legal system was created for the protection of socialist legality. The term *Socialist Legality* was widely used in Soviet times with respect to interpretation, claiming, for example, that one should possess a socialist mentality in order to properly understand the Soviet Criminal Law.[6]

3.2. Fear as the most influential factor in Ukrainian post-Soviet legal system

The issues of socialist mentality, socialist legality and their borders are outside of the scope of this article. The article will focus only on one aspect which has been one of the main reasons for the continuation of Soviet traditions. This aspect is *fear*. The Soviet system incorporated total control, including the control over judges and their activity, as its integral and effective part. Everyone, except for a handful of high-level individuals within the Soviet system, had a strict boss and a multitude of different controlled activities which targeted them, which included the system of police, prosecutors and judges. In terms of its application to judges, not only were their judgments reviewed by appellate courts and the Supreme Court, but they also were evaluated on the number of cases heard, the number of positive and negative decisions in criminal cases, and similar factors. However, this evaluation did not usually address the reasoning part of court decisions rendered, and thus in many cases it was very short, containing only reference to specific articles used, and sometimes reciting them. Moreover, the binding nature of the Supreme Court Plenum Decrees made courts more dependent on the interpretation given by the Supreme Court, and not on their own understanding of the legal nature of the issues.

This system, in many cases completely unchanged (except for the fact that Supreme Court Plenum Decrees are no longer *de iure* binding on the lower courts – however *de facto* courts follow their requirements), has remained in Ukraine since 1991, and is very well preserved as the majority of judges were either working within the Soviet system or were trained and raised in a Soviet and post-Soviet environment.

[6] См. М Д Шаргородский, *Избранные работы по уголовному праву* (Юрид. центр Пресс, СПб 2003). See MD Shargorodskiy, *Izbrannye raboty po ugolovnoti pravu* (Yurid. centr Press 2003) 173, 176. Cited by ЕМ Шилина, *Толкование права: теоретич. и практ. аспекты* [*prava: teoretich. i prakt. aspekty*] (Тесей 2008) 7.

4. PRESENT SITUATION OF THE UKRAINIAN LEGAL SYSTEM

Nevertheless, this situation is starting to change. Ukrainian independence and its accession to the Council of Europe, OSCE and other international organizations resulted in numerous international treaties becoming binding for Ukraine. A few of them regulate the issues of the utmost importance such as human rights – Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter – "the Convention") was ratified by Ukrainian parliament in 1997, and the decisions of the European Court of Human Rights (hereinafter – "ECHR" or "Strassbourg Court") became binding for Ukraine.

However, simple ratification of the Convention was not enough for Ukrainian judges, who are not accustomed to applying either international norms or common law features, which are attributable to the activity of the European Court of Human Rights. Moreover, there is another issue that made judges refuse to apply the Convention and specifically the decisions of the Strassbourg Court. The Ukrainian Constitution views international treaties as an integral part of Ukrainian national legislation (Article 9)[7], however, it is silent on which level of hierarchy they belong to, unlike the legislation of many other states, where the Constitution clearly provides the status of international treaties. Some Ukrainian scholars apply Article 8[8] of the Ukrainian Constitution, where the principle of the rule of law is provided, to prove that international treaties have priority over the national legislation of Ukraine.[9] On the other hand, some scholars argue that since international treaties are ratified in the form of the regular Law of Ukraine, they belong to the same level, and thus in order to determine the ruling norm in the case of a conflict between the norms of international treaty and national legislation the regular rules of conflict of norms should apply.[10]

These considerations led Ukrainian legislators to adopt a special Law "On execution of the decisions and application of the practice of the European Court of Human Rights"[11] on February 23, 2006, which obliged the courts to apply the decisions of the Strassbourg Court in rendering their own decisions. This solution was more effective, the passing of this law resulting in a significantly higher number of Ukrainian court decisions citing and/or reasoning their decisions with the help of the decisions of the European Court of Human Rights.

[7] Конституція України 1996 [Konstytuciya Ukrayiny 1996] <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/print1423771761302088> accessed 1 May 2015.

[8] Конституція України 1996 [Konstytuciya Ukrayiny 1996] <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/print1423771761302088> accessed 1 May 2015.

[9] МІ Козюбра, 'Тенденції розвитку джерел права України в контексті європейських правоінтеграційних процесів' (2004) 26 Наукові записки Національного університету «Києво-Могилянська академія» [MI Koziubra, 'Tendenciyi rozvytku dzherel prava Ukrayiny v konteksti yevropeyskyh pravointegraciynyh procesiv' (2004) 26 Naukovi zapysky Nacionalnogo universytety "Kyevo-Mohylyanska akademiya"] 4.

[10] В Шаповал, 'Конституція і співвідношення національного та міжнародного права (порівняльний аналіз)' (2006) 10 Юридична газета [V Shapoval, 'Konstytuciya i spivvidnoshennya nacionalnogo ta mizhnarodnogo prava (porivnyalniy analiz)' (2006) 10 Yurydychna gazeta] 4.

[11] Закон України 'Про виконання рішень та застосування практики Європейського суду з прав людини' 23 лютого 2006 [Zakon Ukrayiny 'Pro vykonannya rishen ta zastosuvannya praktyky Yevropeyskogo sudu z prav lyudyny' 23 February 2006] <http://zakon4.rada.gov.ua/laws/show/3477-15/print1419870043740792> accessed 1 March 2015.

However, many judges are still reluctant to support their decisions with citations from decisions of the Strassbourg Court for two main reasons. A larger group of judges who adopted this approach claim that they cannot apply those legal sources because they are either unaware of such sources or cannot understand them as they are rendered in foreign languages, whereas Ukrainian or Russian translations of all ECHR decisions are not easily available. The other group states that they do not understand which decisions of the European Court of Human Rights they should apply – either only the ones in cases against Ukraine or also the ones in cases against other countries; and in the latter case, how should the judges make direct application if the legislation of other countries is different from Ukrainian legislation; even more, in order to make a comparison, the Ukrainian judge has to be competent in a foreign language, which is usually not the case.

5. CONCLUSION

These are not the only reasons why Ukrainian court decisions are very textualist, bureaucratic, copy-pasted, and in many cases far from reality. The two other factors are corruption and heavily overburdened courts. A recent survey showed that there are courts in Ukraine where judges have less than 6 minutes for a case, and having around 30 minutes for one case is considered a luxury.[12] These factors in combination with an overwhelming post-Soviet mentality, inability to speak foreign languages and unwillingness to learn them, and fear of various formal inspections (as to the number of the cases a judge has reviewed, and the number of decisions overruled) lead to a special Ukrainian judicial mentality, which is the reason for the copy-pasted decisions, absence or near absence of a reasoning component of a decision, long consideration times for cases, and in many cases, judgments which have nothing to do with justice. Most judges are accustomed to working within textualist handcrafted borders, and are either unwilling or unable to look outside of the text of the law, and apply legal principles, the norms of international treaties, the decisions of international courts, or even the norms of foreign law. Those cases have to be well reasoned, and Ukrainian judges seem to have no time, will and/or ability to conduct such a research.

Nevertheless, to the admiration of the author, the situation is slowly getting better. Even though complete improvement within the next couple of decades is far from reality, there are several factors which may be considered as positive in this case:

1. There is a new generation of young judges who were not raised in the Soviet system. They have different views, and they are mostly not as afraid of overwhelming control as the judges of the older generation.
2. Younger judges have usually had some kind of training in western and/or international judicial institutions, which also plays a role in the forming of the judges' views. Quite a few of the new young judges have western legal degrees, which makes it easier for them to understand common law issues. They usually have a good command of English, as well as other foreign languages (German or French for the most part) in addition to their native Ukrainian and Russian, which seriously broadens their possibilities in legal interpretation and general decision making.

[12] Олександр Мінін, Олександр Шемяткін, 'Український суд: коли все пофіг', *Економічна правда* (24 жовтня 2012) [Oleksandr Minin, Oleksandr Shemiatkin, 'Ukrayinskiy sud: koly vse pofig', *Ekonomichna Pravda* [24 October 2012)] <http://www.epravda.com.ua/publications/2012/10/24/341024/ > accessed 1 March 2015.

3. The overall legal climate has seriously changed since Soviet times. People do not view courts only as an element of the repression machine attributable mostly to criminal law (as it used to be in Soviet times). Nowadays, courts play a more important role, and both ordinary people and legal persons tend to turn to courts in appropriate cases. However, the level of trust in justice in Ukraine still remains quite low.

Most courts in Ukraine still apply the textualist approach in most cases. This applies to both the older generation of judges, and many young judges who had all the chances to bring something different to the system but eventually became part of it (gave up willingly or unwillingly). Unfortunately, in many cases judges do not try to turn to the help of other theories of interpretation (contextualist and teleological), and prefer to decide cases only within the borders of the handcrafted stone leaving behind important features that do not fit within the artificially created borders.

The other extreme is when the judge turns only to context, or looks for the purpose of a certain act, legal norm or anything else he/she is interpreting. This brings us to the natural stone, which is crafted by nature, and thus not adjusted for humans, for it does not give any direct or indirect orders as to where to look for the norm to interpret. This situation may lead to the situation when the interpreter in the process of trying to find out the essence of the norm based only on the context and/or its purpose, will eventually fall out of the scope of legal norms (handcrafted borders) provided by the textualist approach (the handcrafted stone). The decision of the court based on such interpretive approach has nothing to do with justice either.

While trying to analyze the state of Ukrainian approaches to legal interpretation, an analogy with these two stones would also be appropriate. The handcrafted stone represents the older generation of Ukrainian judges having the already established views, and being accustomed to working within a system, and applying textualist approach. On the other hand, the natural stone represents the younger generation of Ukrainian judges who are not as experienced as their older colleagues, but who try to think out of established rules and regulations, and try to find the answer from outside of the established system. The biggest value that these two groups can provide is their working together. The combination of the older generation's experience with the younger generation's lack of fear to go outside borders would be most benefitial for every judiciary, including Ukrainian.

Same applies to interpretation theories – there is no universal interpretation theory, never was, and never will be. All three of the main theories: textualism, contextualism, and teleological theory have their pros and cons. The only solution, however, is their wise combination, like the combination of the given two stones in the park; it would preserve the interpreter of getting into either of the extremes, and reveal the correct interpretation being the basis of a justified decision.

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