KÁROLI GÁSPÁR REFORMED UNIVERSITY
DOCTORAL SCHOOL OF LAW
Head of Doctoral School: Prof. Dr. Jakab Éva

Judicial interpretation and linguistic pragmatics

Theses of the doctoral thesis

Dr. Tahin Szabolcs

Supervisor:
Dr. Tóth J. Zoltán professor
Budapest, 2024

I. Objective of the research

According to a recent monograph, it would be opportune to review the relationship between written law and legal interpretation in our legal thinking. For this, however, we need to think in terms of a model that takes jurisprudence and the role of judges in society into account more than before (Menyhárd 2015: 245-250). The application of the linguistic pragmatic model presented in this dissertation serves this purpose: it aims to provide a possible description of how we can think differently about judicial interpretation compared to our traditional – textual – ideas.

A strong paradigm in our legal thinking is still the law positivist view that judges can draw law only from legal texts (Hell 2001: 284, James 2011: 86–94). This approach is based on a 'linguistic superstition' (Kenesei 2003: 63), according to which the message of a written text can be calculated solely from its linguistic content. We can move out of this linguistic paradigm by pointing out the linguistic presuppositions on which these ideas are based. This justifies the linguistic theoretical starting point of the dissertation.

The interweaving of linguistic theory and legal interpretation is an accepted scientific foundation in overseas legal theory. The "linguistic turn" of Anglo-Saxon American legal theory rests on the insight that our understanding of both law and interpretation of law is framed by our view of language (Marmor & Soames 2011: 1-14, Goodrich 1987: 9-83). This research has emerged with the paradigm-shifting need to replace text-centered concepts of meaning with theories of meaning based on social interaction between language users. According to these paradigms of legal theory, the meaning of legal texts is formed through these processes, so the content of law is drawn in communication strategies between legislator and enforcer (Marmor 2014: 45-50, Skoczeń 2019: 31-33).

My research hypothesis is that Hungarian theory must also take into account the "linguistic turn" of jurisprudence, therefore it is important to study the intertwining of language and law in more depth in Hungary as well. Therefore, the thesis examines how linguistic pragmatics can shed new light on the interpretation of domestic judicial law, thus ultimately seeking an answer to the question of how living law embodied in judicial legal interpretation is formed.

The research topic does not only stem from a commitment to language elements. These examinations are also justified by the normative provisions of the interpretative rule codified in Article 28 of the Fundamental Law. Article 28 replaced textual interpretation with a goal-oriented canon of interpretation, which also makes legal techniques of interpretation that are not based solely on textual sources of law.

The text of Article 28 of the Basic Law seems to confirm Richard Ekins' "underdetermination thesis" (Ekins 2021:196). According to it, the text of a legal norm can only be considered the "skeleton" of the legislative message, even if its semantic content is otherwise clear. Article 28 of the Fundamental Law assigns an essential role to factors outside the legal text in the analysis of legal interpretation. According to this, the text of the law must be approached from the point of view of (i) legislative goals, (ii) legislative commitments (common sense, good morality, economy, public good) and (iii) fundamental rights/values enshrined in the Fundamental Law. The question inevitably arises, therefore, as to how these elements, which are not always visible in the legal text, can be described and what role they play in legal interpretation. And how can the intention/purpose of the legislature be revealed if we accept that it is not the same as the explicit legal text?

Language pragmatics research explores legal language use in different situations where language discourse takes place between different participants. According to Izabela Skoczeń, at least five such speech situations can be identified (Skoczeń 2019: 2,12).

(i) Communication within the legislative body
(ii) Language communication between the legislature and the courts
(iii) Communication between participants in legal proceedings
(iv) Communication between the legislator and laymen
(v) Communication between participants in acts governing private autonomy (contracts, letters of intent, agreements, wills, etc.).

On the one hand, research conducted in Hungarian legal literature carried out a pragmatic-linguistic analysis of discourses taking place during police interrogations and in courtrooms (Vinnai 2011, Varga 2022). Other authors have conducted more in-depth investigations in the field of linguistic crimes (defamation, incitement, threats, etc.) (Gyurik 2023, Vinnai 2019: 438-449), while there is a pioneering study that examines the decision-making reasoning of courts

using the tools of linguistic pragmatics (Fábián 2020: 44-65). In addition, several texts and monographs have been published that are only theoretically oriented, in which practical-empirical research is published in smaller volumes (Szabó 2015: 179-188, Szabó: 2018, Szabó 2001: 98–101, Szabó- Varga 2000).

In the Hungarian legal literature, the linguistic pragmatic description of communication between the legislator and the courts (cf. Skoczeń (ii)) has hardly been done so far. The analyses included in the doctoral dissertation examine this speech situation. Some theoretical studies have already been published on the subject, presenting the theoretical results of the relationship between linguistic pragmatics and legal interpretation, mainly the work of Andrei Marmor (Frőhlich 2017: 125-136, Frőhlich 2012: 142-158). However, these theoretical texts did not draw conclusions from linguistic pragmatic studies in Hungarian legal interpretation practice. So far, only a few studies have been published by the author on the theoretical connection between linguistic pragmatics and judicial interpretation (Tahin 2020, Tahin 2021 (a), Tahin 2021 (b), Tahin 2022, Tahin 2023).

In American jurisprudence, the pragmatic examination of the processes of communication between the legislature and the courts is self-evident, because in common law countries the interpretation of the law by courts has a greater power-forming power than in continental law.

The strict distinction between common law and continental law is no longer tenable. The introduction of the Hungarian system of limited precedents brings our legal order closer to the Anglo-Saxon systems in several features, which raises the need for pragmatic investigations in the domestic legal order as well. The American literature I use shows that Anglo-Saxon legal linguistic pragmatics is preoccupied with the same questions that arise in Hungarian legal life in the field of judicial interpretation. Therefore, there is no obstacle, indeed justified, to operate these linguistic considerations also in relation to the domestic legal order.

II. Research methodology

The theoretical basis of the thesis is pragmatic language theory texts published in Hungarian and English. Here I started mainly from the colloquial theory of the British philosopher of language H. Paul Grice. The results of the legal language pragmatics research are presented on the basis of English-language literature. The backbone of the dissertation is the theoretical

considerations of the legal philosophers Anrdei Marmor, Peter M. Tiersma, Aharon Barak and Izabela Skoczen. Heinonline and Academia.edu databases were of great help to me in finding foreign language literature.

The starting point of my empirical research was the corpus of texts of Hungarian living law. The basis of the investigation was the case-by-case decisions of the Curia published in the Collection of Court Decisions, decisions on legal uniformity, and decisions of the Constitutional Court published in the Official Journal of the Constitutional Court. I included the case-by-case decisions in English from the Lexisnexis database or from the original - verbatim - text quoted in legal theory works.

Chapter II of the thesis ("A Brief History and Language Representations of Judicial Law") reviews the changes in the meaning of judicial law over the past 150 years. This chapter uses a representational historical method to show that a way of thinking similar to the linguistic pragmatic model has already appeared in the legal approach of our "classical" legal scholars (Saxy-Swarcz, Grosschmid, Szladits) of the last century. The application of the ideas of linguistic pragmatics, which became the leading linguistic discipline in the 1960s, is therefore not alien to our legal tradition.

The thesis III-VI. deals with the linguistic characteristics of legal texts, their linguistic exposure and the description of the basic concepts of linguistic pragmatics. During these descriptions, the point of view of the dissertation remains in the domain of "applied science" throughout, striving to support its findings with examples taken from domestic and Anglo-Saxon legal life.

In Chapter VII I present the discourse structure of communication between courts and the legislator, while in Chapter VIII - besides reading closely a Supreme Court (in Hungary: *Kúria*) and a Constitutional Court decision - special attention is paid to presenting the fundamentals of speech act theory, which is closely related to linguistic pragmatics.

Chapter IX points out "close reading" that a possible meaning of Article 28 of the Fundamental Law (*Alaptörvény*) can also be explored by using the concept of linguistic pragmatics. The final chapters of the thesis (X-XII.) show exclusively on paradigmatic examples taken from

Hungarian legal life that the formation of law is realized through the social interaction between the legislator and the courts.

The linguistic pragmatic textual analyses of the dissertation are aimed at critical-textual reading of decisions of the *Kúria* and the Constitutional Court. The main aim of the method is to mobilize the theoretical apparatus of linguistic pragmatics and to demonstrate that the seemingly foreign discipline of language theory can show fertile interdisciplinary points of contact with the field of domestic judicial interpretation.

The perspective of the thesis is always determined by a kind of "metapoint of view". It does not describe a particular area of law or a sub-problem in a branch of law, but rather asks what linguistic and interpretive presuppositions and habitual habits determine the interpretation of Hungarian legal texts.

Therefore, the focus of my analyses is not on presenting the legislation in force and the related judicial practice, but on discussing the communicative-discursive processes that determine the complex fabric of living law, and how this fabric is jointly created by the competent language users (the legislator and the courts). In other words, through what interpretative strategies does an interpretation of law become part of living law, or why not a possible alternative?

III. Theses of the thesis

1.
From 1 April 2020, the legislator included our legal order in the system of (limited) precedent. On the basis of this "name change", we must pay even more attention to the issues of judicial interpretation than hitherto, so a more thorough examination of the "living right" cannot be neglected. Answering the question of what linguistic pragmatic factors determine the content of textual law is not only a question of language theory, but also one of the topical questions of judicial interpretation that is gaining importance in Hungarian legal life. This brings us closer to understanding the limited system of precedent.

2.
The linguistic skepticism of pragmatics provides a more realistic linguistic starting point for capturing the functioning of legal texts than traditional textual paradigms of interpreting legal

texts. Pragmatics rejects a high degree of trust in the ability of language users to communicate successfully and without barriers. Thus, it not only calls into question the performance of language, but also does not overestimate the language competences of the legislator. He believes that contexts, pragmatic conclusions, presuppositions and implied contents play a decisive role in the formation of meaning. Thus, if the semantic-grammatical content of a legal text is clear, these pragmatic factors may nevertheless make the linguistic content uncertain and undefined. I therefore argue that this awareness of language theory is also essential in the domestic legal order to describe the real processes of law.

3.

The linguistic turns that recur in the decisions of the Constitutional Court are linguistic imprints of our traditional approach to law. The reasoning of these decisions often employs the reasoning clauses 'detached itself from the text of the law' or 'went beyond the linguistic framework of the legal norm'. These paradigmatic turns define our practices of interpreting legal texts as a kind of silent, unreflected knowledge. It would be more appropriate to consider the use of these old language clauses and to develop our arguments along other linguistic lines. Arguing, for example, that the court has "detached *itself from the purpose of* the law" or, ultimately, from the "communicative content of the law".

4.

The linguistic approach and conceptual set of linguistic pragmatics forces us to rethink the relationship between legislation and judicial interpretation. For pragmatist legal approaches, the boundaries of *contra legem* legal interpretation are further out than our traditional ideas. Pragmatics' view of linguistic meaning formation and its conception of the stratification of meanings in legal texts nuance precisely the question of what is lex*,* i.e. what is the content of law. According to Article 28 of the Fundamental Law, not only the linguistic content of legal texts must be examined, but in addition to semantic content, the intended contents of the legislator and the contents assumed by the courts also have a decisive meaning-forming force.

5.

Article 28 of the Fundamental Law confines us to attempting to describe the "legal techniques" of revealing the legislative purpose. This need arises in particular when neither the legal text nor its accompanying texts (ministerial explanatory memorandum, preamble, etc.) reveal the will of the legislature. In such cases, the enforcer's assumptions about the communicative

content of the law may be triggered. These assumptions may be confirmed or overridden by linguistic acts of the legislator (drafting legal texts). Law formation often takes place in such dynamic interactions, which are constantly in motion.

6.

The ordinary courts and the legislature communicate strategically with each other. This gives each of our usual inference mechanisms (grammatical interpretation, taxonomic interpretation, logical interpretation) a different evaluation. If the court acts as a strategic interpreter, it may legitimately dispense with the use of these linguistic 'automatisms' if it can justify it in relation to the attainment of its objectives. With it, you can write law just like the legislator.

IV. Selected literature used in the dissertation

Ekins, Richard: *The Nature of Legislative Intent* (Oxford: University Press 2021) 196.

Fábián Áron: A joghézag problémája a pragmatika tükrében. in: *Állam- és Jogtudomány.* 2020/1, 44-65. (real.mtak.hu/109134/AJT_2020_01_03_FABIAN_pdf.)

Frőhlich Johanna: *Az alkotmányértelmezési módszerek igazolása*. PhD doktori értekezés. (2017)

Frőhlich Johanna: A nyelvfilozófia és az alkotmányértelmezés összefüggései. A szöveg korlátai és lehetőségei. *Századvég.* Új folyam, 66. szám - Kommunikáció (2012)

Goodrich, Peter: *Legal Discourse. Studies in Linguistics, Rhetoric and Legal Analysis* (New York: St. Martins 1987)

Gyurik Zita: *A bűncselekmény elkövetésére irányuló szándék kinyilvánításának büntetőjogi értékelése.* (acta.bibl.u-szeged.hu/forum_discipulorum_2023_285-313.pdf.).

Jakab András: A bírói jogértelmezés az Alaptörvény tükrében. *Jogesetek Magyarázata*. 2011 86–94.

Kenesei István: Jogi szemantika: problémafelvetés és kutatási program, *Világosság* 2003/11, 63-70

Marmor, Andrei & Soames, Scott (ed.): *Philosophycal Foundations of Language in the Law*. (Oxford: University Press 2011).

Marmor, Andrei. *The Language of Law*. (Oxford: Oxford Press 2014)

Menyhárd Attila: A polgári jog tudománya Magyarországon. in: *A jog tudománya. Tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal.* (szerk. Jakab András-Menyhárd Attila) (Budapest: HVG Orac 2015) 245-250.

Pokol Béla: *A jog elmélete*. (Budapest: Rejtjel Kiadó 2001)

Skoczeń, Izabela: *Implicatures within Legal Language* (Switzerland: Springer 2019)

Tátrai Szilárd: *A nagy esernyőcsel, a pragmatikai szemlélet alkalmazásának lehetőségei*. real.mtak.hu, (letöltve: 2020.04.22.)

Varga Mariann: Kést nem vett magához? A nem tagadószót tartalmazó eldöntendő kérdő mondatok szerepe a magyar büntetőperes bírósági tanúkihallgatásokban. In: *Jelentés és Nyelvhasználat.* 9/1 (2022).

Vinnai Edina: *Nyelvhasználat a jogi eljárásban* (Miskolc: PhD értekezés 2011).

Vinnai Edina: Beszédaktusok a büntetőjogban. In: *Miskolci Jogi Szemle*: A Miskolci Egyetem Állam- és Jogtudományi Karának folyóirata 14:2. különszám, 2. kötet. (2019)

Szabó Miklós: A jogi nyelv erőtere. in: *A jog nyelvi dimenziója*. (Miskolc 2015)
Szabó Miklós: A szavak ura. In: (szerk. Szabó Miklós-Vinnai Edina) *A törvény szavai*. (Miskolc: Bíbor Kiadó 2018)
Szabó Miklós: *Trivium. Grammatika, logika, retorika joghallgatók számára* (Miskolc: Bíbor 2001)
Szabó Miklós - Varga Csaba (szerk.): *Jog és nyelv*. (Budapest: k.n. 2000).

V. List of publications of the author related to the dissertation

Tahin Szabolcs: Bírói jogértelmezés és nyelvi pragmatika. *Magyar Jog*. 2020/5.
Tahin Szabolcs: Az Alkotmánybíróság határozata a köztéri óriásplakát lefestését büntető kúriai határozatról. Paradox érvelési mintázatok a rendesbíróságok alapjogi szerepvállalásáról.in: *Jogesetek Magyarázata.*
Tahin Szabolcs: A Kúria Jogegységi Panasz Tanácsának jogegységi panaszt visszautasító ötödik határozatáról. A jogszabályok kontextus nélküli olvasatáról. in: *Jogesetek Magyarázata.* 2021/2-3.
Tahin Szabolcs: Az Alkotmánybíróság határozata a Budapest Környéki Törvényszék és a Váci Járásbíróság vad és személygépkocsi összeütközése tárgyában hozott ítéleteiről. A bírói jogértelmezés védelmében. in: *Jogesetek Magyarázata* 2022/1. 17–27.
Tahin Szabolcs: Nyelvi pontosság és nyelvi kifejtettség a jogszövegekben, avagy mit tanulhatunk a nyelvi pragmatikától? Néhány gondolat a hazai jogértelmezés „nyelvi fordulatának" szükségességéről. *Jogesetek Magyarázata* 2022/4. 55-62.
Tahin Szabolcs: A jogalkotó nyelvi cselekvéséről: Kimondott és ki nem mondott nyelvi tartalmak a jogszövegekben. *Magyar nyelvőr.* 147. 479-492. (2023)
Tahin, Szabolcs: A célszerű jogértelmezésről és határairól. Jogelméleti szemle. 44-60. (2023)
Tahin Szabolcs: Dilemmák az objektív teleológiai jogértelmezés körül. Jogtudományi közlöny. 78: 3 pp. 125-133. (2023)
Tahin Szabolcs: A jogértelmezés kommunikatív természetéről. Társas jelentésképződés a jogban. *Magyar jogi nyelv* 2022/2. (2022)
Tahin Szabolcs: A „célszerűség" két arca: dilemmák a célelvű jogértelmezés kapcsán In: Miskolczi-Bodnár, Péter (szerk.) *XXIII. Jogász Doktoranduszok Országos Konferenciája* (Budapest: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar 2022) 267-275.