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## THE INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS INTERPRETATION ON POLISH LAW INTERPRETATION

Protection of human rights has been shaped during the process of international law evolution. Regulations forcing international interpretation of those rights has caused its developing modification which led to creation of specific interpretation model. What is more, countries by resigning from their autonomous right to establish law in the area of human rights and devolving the issue on international ground are responsible for creating individual law systems. Those systems are consistent with international standards but at the same time countries accept their participation in international control measure. From external point of view, it is less important how it is explained as what counts more is the effect in the form of legal norms and decision of applying the law as they make the basis of international court measuring<sup>1</sup>.

The normative basis of proper functioning of the European system of human rights in the area of personal and political laws is the European Convention on Human Rights and Fundamental Freedoms<sup>2</sup>. On its ground the European Court of Human Rights has originated. It is responsible for ensuring the obedience of conventional obligations by member states. At the same time the court establishes the interpretation of conventional regulations. It derives from the article 32 protocol 1 of the Convention according to which the Court is the only body to recognize all cases regarding interpretation and apply Co-

1 A. Kalisz, L. Leszczyński, B. Liżewski, *Wykładnia prawa model ogólny a perspektywa Europejskiej Konwencji Praw Człowieka i prawa Unii Europejskiej*, Lublin 2011, s. 87 i n.

2 Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności z dnia 4 listopada 1950 r. (Dz. U. z 1993 r., nr 61, poz. 284).

vention and its Protocols which will be justified by articles 33, 34 and 47. Above mentioned prerogative allows to formulate protection standards of individual rights. The Court's omnipotence interpretation role has huge meaning for the process of the Court's interpretation through taking into consideration its earlier judgements as well as making interpretation by member states courts. It is also worth mentioning that in the interpretation process of European Court of Human Rights not only Convention's regulations judgement standards of the Court are taken into account but also general principles of law accepted by civilized countries, interpretation rules of 1969's Vienna Convention on the Law of Treaties, non-binding acts of organs of Council of Europe and norms deriving from other bodies of Council of Europe which countries do not have their representatives. It has to be marked that above mentioned sources of norm's reconstruction which are taken into account on the validation stage have only supplemental character.

When analyzing the Convention's process of operative interpretation it is worth noticing the institutions which accomplish them. In national law in the area of human rights decisions are made on legal and administrative level. National courts adjudge in the convention's objective range. Nevertheless, some laws can be infringed by organs of administration through stating by them administrative decisions.

The Court accomplishes the decisive process in legal way of applying the law. It has to be marked, that some ECHR's explanations mechanisms are more exposed than in national law. The Court is legal organ of supranational measure which is the reason for dissimilarity of statutory interpretation. Operative interpretation embraces sequence of decisions from the moment of the process' beginning till potential final decision in front of the Court<sup>3</sup>.

The European Court of Human Rights is independent. Being on the top of the measuring system causes that it is not connected with statutory interpretation of the superior court. As it is the only court of Strasbourg system it can independently shape the interpretation policy. It makes decisions in legal way of applying the law. It assesses judicial decisions and partially the administrative ones. The Court's judgements should exert influence on the process of national statutory interpretation effectuated by courts and organs of administration. The country is responsible for paying of granted atonement and undertaking various actions which should suppress all kinds of infringements. It is regulated by the system of guarantying respect of the Convention's rules. If the

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3 A. Kalisz, L. Leszczyński, B. Liżewski, *Wykładnia prawa model ogólny...*, op. cit., s. 93.

source of infringement derives from national regulations, legislator is obliged to make an amendment or enact it so it would be compatible with the Convention. For instance, the act from 17<sup>th</sup> June, 2004 which is the effect of statement in Kudła against Poland case<sup>4</sup>. The act regards the charge about affecting the law to hear the case in action without unjustified delay. In case the Court questions the trial and conclusions of national courts' statutory interpretation it forces them to act according to Court's suggestions. Formally, courts are not bounded with Court's statutory interpretation but not taking into consideration its opinion very often causes unfavorable judgements for Poland. It happened in Bugajny's case and others against Poland in which the Court questioned way of accomplishing the statutory interpretation of act from 21<sup>st</sup>, August, 1997 article 98, paragraph 1 regarding real estate economics. The Court induced Polish subjects expounding the interpretation to change this regulation<sup>5</sup>.

New edition of ECHR's article 28 may in future result in national courts subordination to the Court's judgements. By virtue of this regulation the Committee in reference to infringement based on Convention's article 34 can unanimously find it acceptable and pronounce the judgement if the complain is justifiable. If national courts will not take into account the Court's judgements, the Committee consisting of three people will pronounce the judgement based on those standards. In this way the Court's judgements partially will have precedential character binding courts of all member states of the Convention<sup>6</sup>.

Decisions of administrative organs are also under measure in national process including control of court and administrative proceedings. We can distinguish two situation. First, when in spite of judicial measure an infringement reaches the Court which affirms imperfection of national law regulations (for instance, stating the infringement of Convention's article 13 in Bączkowski case against Poland<sup>7</sup>). The second one is when the compatibility of national regulations with the convention is beyond all doubts but the way of its interpretation may be questionable (for example, the infringement of Convention's article 13 in Bączkowski case against Poland<sup>8</sup>).

According to Polish Constitution the European Convention of Human Rights is the one of common source of applicable law. From operative interpretation point of view national courts work differently. In their decisions they have

4 Wyrok w sprawie Kudła przeciwko Polsce z 26 października 2000 r., skarga nr 30210/96.

5 Por. wyrok WSA w Lublinie z dn. 26 czerwca 2008 r., II SA/Lu 326/08, LEX nr 566034.

6 A. Kalisz, L. Leszczyński, B. Liżewski, *Wykładnia prawa model ogólny...*, op. cit., s. 149.

7 Wyrok w sprawie Bączkowski i inni przeciwko Polsce z 3 maja 2007 r., skarga nr 1543/06.

8 *Ibidem*.

to take into account the Court's repetitive cases. The Court's actions embrace cases which in national law belong to common and administrative courts. It is because personal and political laws may have few dimensions: penal and legal, administrative or civil and legal.

Objective scope of national courts' actions is much wider. National judiciary's main characteristic is its right to appeal. Due to Chamber judgements' measuring procedure the Strasbourg system has only quasi right to appeal. This issue is regulated by Convention's article 43 and the following. According to national courts the right to appeal is strictly connected with examination of an appeal by separated court which belongs to superior or lower court. Whereas the Chamber and the Grand Chamber belong to the same court. The Court acts on subsidiarity system. Its main role is to control by individual complain institution which is taken into consideration if admissibility conditions are fulfilled.

Worth underlying is the fact that in the area of subjects responsible for accomplishing the process of operative interpretation we can distinguish two stages: validation and derivation. The Court reconstructs norms in agreement with international law while the national courts accept Constitution, acts, secondary legislation and others international agreements. This is the reason for wider specification of norms reconstruction sources in national law which causes differences in derivation.

When expounding regulations of the statutory interpretation the role of doctrine cannot be omitted. In interior law it has primary role as interpretative directives are not formulated in normative acts. Most often, there is no competent organ to accomplish legal interpretation which makes doctrine and legal statement the primary sources of creating the methodology of interpretation process. The main role of national doctrine is to disseminate the role of statutory interpretation and the Courts' statement standards in view of courts and administrative organs. It is worth noticing that due to that Polish courts are not limited to passed statement toward the country of court giving decision but they can also apply to other judgements<sup>9</sup>. In Strasbourg system the doctrine has secondary function. It deals with activating new interpretation tendencies of unchangeable in years the Convention's regulations.

Operative interpretation is made when the subject of interpretation is not clear and needs statutory interpretation. In accordance to Strasbourg system of human rights above mentioned assumption is determined by the concep-

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9 Wyrok w sprawie Kubaszewski przeciwko Polsce z 2 lutego 2010 r., skarga nr 571/04.

tion of cultural interpretation. It is justified by long period of active Convention, durability and relative lack of regulations' changes while in the national law irrelevant rules might be amended or the whole normative act can be repealed and replaced by another. This is why the Court, if necessary, uses evolutionary interpretation of the Convention's text. What is more, the Convention contains not specified decisions and textually capacious like tortures, privacy, family life. They require specification in judicial decisions. ECHR's statement takes into consideration social transformation in Europe, evolution in the sphere of social values and cultural conditions. Moreover, relatively small amount of the Convention's lapidary material judgements justifies expounding a statutory interpretation.

To operative interpretation we include interpretation processes carried out in course of individual cases recognition. It is the most important in context of actual guarantees demanded by individual at the national court and the Court.

The basis of the statutory interpretation of human rights process is the validation-derivation concept as in the strict sense it takes into account: sources of norm's reconstruction, their diversity, types, regulations' character and interpretation holism of the judgement. The decisive institution making the statutory interpretation is also important. From the Court of Human Rights point of view, the main source of norm's reconstruction is the ECHR together with additional Protocols. When determining the case, the Court establishes compatibility of national law with the Convention. It enriches the validation aspect and wide range of analyzing the legal basis necessary to pass the sentence. From national courts and organs point of view, the Convention and the Court's judgement influence on newly created legislative solutions and in some cases the necessity of amending national regulations. On validation stage, judge and administration organ making a statutory interpretation have to take into account the Courts' statement standards.

Article 31 of the Vienna Convention on the Law of Treaties<sup>10</sup> formulates a general principle of interpretation of ECHR's regulations. It regulates type and range of detailed usage of directives in an interpretation. In its content it includes directives embraced with collective meaning of textual interpretation: grammatical and linguistic, semantic, logical, systemic. Moreover, in process of interpretation it also considers functionality directives presented as teleolo-

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10 Konwencja wiedeńska o prawie traktatów z dnia 23 maja 1969 r. (Dz. U. z 1990 r., nr 74, poz. 439).

gical interpretation. Article 32 of Vienna Convention implicates regulations of historic interpretation through the possibility of appealing to preparatory works and circumstances of compromising the treaty as additional mean of interpretation. It cannot be omitted that according to the ECHR's article 32 paragraph 1 describing Courts' attributes, in the process of the Convention's interpretation the main meaning has, already described above, statement interpretation. So it can be noticed that as classic regulations of the VCLT are not sufficient the Court has to use also evolutionary and autonomous interpretations as well as the conception of marginal judgment<sup>11</sup>.

The order of using an operative interpretation regulations enforces analyze of the Courts' judgements. It is because no rules treat this matter and a statement is the source of constituting some specific interpretation directives. Starting point of determining this order is the VCLT' article 31 according to which it begins from linguistic rules through systemic and ending with functional ones. However, on the stage of linguistic interpretation first modifications appear. They derive from using the evolutionary or autonomous directives. Other transformations may emerge out among others of using to define terms, which using the Convention, of using other treats considered on a validation stage to define notions wielded by the Convention etc.

Conception of validation-derivation interpretation of international human rights differs significantly from the national one. The Convention system is an international system of measure while the Court performs a subsidiary role in relation to national law system. It is not subsequent court so individual infringement must be considered on its merits by one judge or Committee consisting of three members. This part of validation argumentation has pretrial character and recognition of infringement implicates the beginning of process consisting of seven-person Chamber. It restrains the Chamber's validation reasoning, however lack of Committee's consensus implicates the whole range of validation argumentation in the Chamber. Limitation of norms' reconstruction sources is case recognition by the Court in the area of infringement.

Seeking for reconstruction sources embraces various types of norms. The most important is material and law norm which main component is qualification norm that is the base for subsumption of facts of the case and implica-

11 Por. L. Leszczyński, *Prawo międzynarodowe w sądowej wykładni operatywnej- teoretyczno prawne aspekty wpływu na przebieg i wynik wykładni*, [w:] *Zapewnienie efektywności orzeczeń sądów międzynarodowych w polskim porządku prawnym*, red. A. Wróbel, Warszawa 2011, s. 67-70.

tion norm. In order to find the source of qualification norm, the Court exploits convention's regulations, its own judgement and preterlegal criteria. The Court's statements are not legislative precedents. Authority norm has lesser meaning as the Court is the only decision body, though reconstruction embraces also procedure norms. Norms describing rules of proceeding emerges from the Convention and Court's regulations. Moreover, the Court not only states about the ECHR's infringement or its lack but also declares the source of it which directs the attention to national regulations which are under interpretation of their conformity to the Convention. This allows to use indirectly national regulations as a validation argument.

The most important validation argument is the Convention's regulations. They have initial and basic character. Reconstruction's sources are also other regulations of international treaties. Laws in the Convention are not arrange in hierarchy but their order is not accidental. The Convention's regulations might be divided taking into account different criteria. We can distinguish rules stating suspense and non-suspense laws which protect rights of the individual and collective entity. They also anticipate the possibility of law restriction including general and specific referring clauses.

It is worth mentioning the Court's statement and open criteria. The Court assigns standards of convention's material resolution protection. In its judgements it defines their content and range of application. This function is substantiated by conciseness of the Convention's wording. According to ECHR's article 32, the Court is the constructive interpreter of the Convention, however it is not bounded with its earlier judgements. On the other hand, open criteria are connected with axiology preface to the Convention. They point out systematic interpretation through which unspecified phrases gain concrete content.

During the interpretation process the most important rules are linguistic principles. In Polish law order they have primary character as the base of interpretation lays in legal regulations made form grammatical sentences. From results of linguistic interpretation depend application of other interpretation directives. In the convention system classical order of making an interpretation is modified by bigger number of variables. There is a proportion between interpretation directives of the VCLT and specific directives (evolutionary and autonomous) of ECHR's interpretation which dynamize it. In case of stating insufficiency based on the VCLT's article 31 paragraph 1, the Court appeals to semantic specific methods. Moreover, the Convention's resolutions have general and open character due to which in the first place they require linguistic interpretation. The Convention wording with those characteristics results

in statement specification<sup>12</sup>. In Polish law, regulations are more specific while normative acts are detailed and extensive. When analyzing the concise Convention's regulations the Court has big margin of discretion in interpretation which limits its own judgements relation when making statement standards.

We cannot omit the issue of relation between linguistic and non-linguistic rules in the Convention's interpretation. The VCLT's article 31 paragraph 1 is a base to interpretation of treat's resolutions according to common meaning of words used in it but still keeping the consistency with the object and the aim of the treat.

Semantic rules act an important role in the process of establishing the convention's notions. In the first place we have to withdraw to the VCLT's article 31 paragraph 1 as it contains exact relation between clarified rule and systemic and functional rules. Through this relation interpretation accent is moved to the context, object and aim of the treat. "While interpretation of the treat lesser meaning has semantic itself and more important is its object and aim"<sup>13</sup>. Normal meaning is modified by rule of article 31 paragraph 1 according to which the word has special meaning when both parties accept that. Relation between paragraphs 1 and 4 from the article 31 were explained in case of Litwa against Poland<sup>14</sup>. Calculation from the paragraph 1 determines the order of individual directives application.

The essential problem appears when meaning of words is different in various languages. The Vienna Convention formulates principle of equivalents regarding authentic texts. If articles 31 and 32 are not sufficient enough to remove those differences the chosen meaning has to bond together both texts in object and the aim of the treat.

At this moment application of specific regulations of the Convention's interpretation (evolutionary directive and autonomous interpretation) has to be mentioned. The aim of evolutionary interpretation is affirmation of adequacy of meaning of the Convention's static statements to changing social reality. The Court treats the Conventions as a living instrument which interpretation should be adjusted to changing social relations. Evolutionary interpretation directive is based on flexibility of interpretation which leads to change of the Court's statements standards through meaning modifications. The perfect example is case of Marckx against Belgium<sup>15</sup>. Stating meanings of expressions

12 Por. *Konwencja o Ochronie Praw człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1- 18*, red. L. Garlicki, Warszawa 2010, s. 8.

13 M. A. Nowicki, *Wprowadzenie do interpretacji EKPC*, EPS 2010, nr 1, s. 4.

14 Wyrok w sprawie W. Litwa przeciwko Polsce z 4 kwietnia 2000 r., skarga nr 26629/95.

15 Wyrok w sprawie Marckx przeciwko Belgii z 13 czerwca 1979 r., A. 31 par. 41.

used to form the convention's regulations taking into account their generality is impossible. Through evolutionary interpretation the ECHR updates the meanings. It is done due to notions' change of the meaning in member states of the Convention which in the first place notice changes in social life.

The Court's autonomous interpretation describes independence of some convention's notions from the meaning included in internal law. It gives the Court autonomy in interpretation of the Convention's text which guarantees more effective protection. This interpretation directly affects coherence and harmony in the process of using the Convention. Vicariously it has an effect on gradual acceptance of the convention's understanding of notions in national law.

Syntactic arguments aid to determine the sense of normative statement included in legal regulation. Process of their usage depends on the level of regulations' specificity, range of determining open criteria, institutional court's validity making the interpretation and position of judge. Decision-making process needs using of common language syntax and legal syntax in order to assemble meanings in process of norms' reconstruction. While interpretation of the Convention, a concision is of huge importance. Notions used there have often bigger textual capacity. More normative law is defined by the Convention's resolutions, lesser range of defining in the Court's interpretation is noticed. In Polish law normative regulations are more specific as the role of semantic principles boils down to formulating normative utterance depended more on text than its interpretation.

What is more, due to application of the VCLT's article 31 it is possible to demonstrate strict relations between semantic regulation of language and systemic and functional regulations. When making interpretation the Court invokes to arguments transcending article text being interpreted, preface axiology, contextual relations between word being interpreted and other concomitance notions, and last but not least to aim of the Convention or interpreted regulation and function of ECHR. Moreover, the Court's statements are also taken into consideration.

When elaborating the system interpretation we have to notice the differences between internal national and international systems. In internal national law, including Poland, legal system is a system of organized in hierarchy normative acts which regulates different aspects of social life. Vertical and horizontal taxonomy of this system is a determinant of its connection. As part of this connection, relations connected with form of normative acts determine systemic and structural rules and law regulations are shaped by systemic and axiology rules. Normative acts are compromised unilateral. International law

differs immeasurably from the national law as the country underlies to such obligation which it undertakes. One of international law subsystems is the European system of human rights. Member states of the ECHR can modify its resolutions. This system is based on equal authority of all its legal sources. In the process of application of systemic regulations reinforcement of systemic relations is marked when the source of reconstruction is legal regulations and their weakness. It is because non-systemic elements are included to sources of reconstruction and also they are marginalized when the source is based on extralegal criteria. The main influence on systemic regulations of interpretation has the VCLT article 31 which shapes specification of systemic-structural and systemic-axiology references. Moreover, catalogue of reconstruction sources embraces the ECHR's statement, other international treaties in the range of protection of human rights and non-contractual sources.

Systemic-structural regulations collocate with determining relations between legal regulations. The Convention creates "little system" of human rights that is why above mentioned regulations are mainly connected with this act. The crucial meaning for systemic-structural relation has the meaning of context specified in the VCLT which determines three ranges of relation: "strict" context, "conventional further", "non-conventional further". "Strict" context embraces the closest relations as a part of the Convention, although not only among its regulations. It embraces text together with its prefaces and appendixes. Taking into consideration article 32 of the VCLT, the preamble is the preface to the Convention and appendixes are additional protocols. The range of "conventional further" is connected with the regulation of the article 31 paragraph 2. It also embraces every agreement concerning the treat which has been accomplished between all parties due to its conclusion and every document related to the treat made by other parties. On those basis it can be judged that such character has preparatory works connected with making the Convention. "Non-conventional further" connections relate to the Court's appealing to other international acts.

Systemic-structural regulations rarely acts the main role. It happens when the base of normative decision is reconstructed from few regulations. Very often those regulations have contextual or verification role when the Court appeals to the same or similar terms included in different international acts.

Systemic-axiology arguments are connected with legal rules. They express sphere of aims, values, ideals by accomplishing conventional protection. Their main source is ECHR's preamble which has not been embraced in the article. The regulation catalogue can be created by analyzing preamble text and the Court's statement related to the preface. Systemic-axiology arguments can be

also found in the article 7 of the ECHR but this reference has specific character and the Court declares taking into consideration in wider aspect those general rules. In the reconstruction process systemic-axiology regulations play contextual-verification role due to which ECHR examines infringements in conventional aspect. All rights and freedoms are contained in legal regulations due to which the legal rule does not become element of normative base of the decision. The Court treats some axiology rules as a starting point of creating their fundamental content in the statement process.

Purpose arguments of interpretation are taken into consideration when linguistic and systemic rules are not sufficient to reconstruct the norm. They are connected with determining the aim for which realization of normative act has been created. In Polish legal system the argument concerning the aim is usually possible argument and plays supplementary function and amends and corrects ambiguous result of interpretation. Application of advisability is used in order to precise unclear semantic agreements. Appealing to advisability arguments is connected with determining validity of normative text. It enables establishing the aim of legislator in the moment of making the normative act (historic version). Lack of textual adequacy of regulations to reality necessitates finding contemporary regulation aim (adaptation version).

Advisability interpretation of human rights system can be considered in the light of the article 31 paragraph 1. We can find there conjunction “and” which allows discretion of application those regulations in the process of making the interpretation but it assumes obligatory reference to object and aim of the treat.

Advisability interpretation formalizes and strengthens sequence of referring to individual interpretative arguments. Through all years of the validity of Convention’s regulations they have not undergone significant modifications which cannot be said about evaluating social reality. For human rights protection the Convention forced application of advisability regulations in adaptation version. Referring to aims of ECHR authors in the moment of its enacting is also current in reference to its preamble. Advisability-adaptation interpretation is strictly connected with assumption of evolutionary interpretation and apprehension of the Convention as a living instrument. It was underlined in cases of Marckx<sup>16</sup> and Tyrer<sup>17</sup>. Application of advisability regulations not al-

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<sup>16</sup> *Ibidem*.

<sup>17</sup> Wyrok w sprawie Tyrer przeciwko Zjednoczonemu Królestwu z 25 kwietnia 1978 r., skarga nr 5856/03.

ways leads to departure from linguistic meaning of the text. In the Court's statement reality advisability regulations are connected with linguistic and systemic rules. The examples are verdicts in cases of Golder<sup>18</sup> and Litwa<sup>19</sup>. On their basis it can be noticed that argument taken from the aim significantly completes or corrects linguistic agreements and systemic of operative interpretation.

Functional regulations of interpretation refers to the result which should evoke legal regulation in the context of its social influence.<sup>20</sup> Referring to those regulations may prove the lack of sufficiency of other interpretative arguments. It also happens that application of functional regulations appears in acceptance of assumption about necessity of formulating social result which should appear. Therefore, following decisive trials leads to referring to functional regulations which content is already defined. Such situation occurs in case of the Court's stating on the Convention's basis. Taking result as an assumption which should be gained through the convention's regulations determines adaptation approach do advisability rule. Function argument appears only in adaptation version. Protection of human rights is possible only when it is considered in the context of social determinants.

Taking all these things into account we may draw a general conclusion that despite differences in interpreting law on the national and international levels ECHR influences Polish law and article 28 of the Convention may be extended in the future.

## WPLYW WYKŁADNI EUROPEJSKIEJ KONWENCJI O OCHRONIE PRAW CZŁOWIEKA NA INTERPRETACJĘ PRAWA POLSKIEGO

### STRESZCZENIE

Europejski system praw człowieka, który funkcjonuje w oparciu o Europejską Konwencję o Ochronie Praw Człowieka i Podstawowych Wolności, wywiera znaczący wpływ na decyzje polskich sądów. Bardzo ważna jest relacja pomiędzy polskimi sądami, a Europejskim Trybunałem Praw Człowieka w Strasburgu. Proces wykładni operatywnej Konwencji odgrywa tu dużą rolę.

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18 Wyrok w sprawie Golder przeciwko Zjednoczonemu Królestwu z 21 lutego 1975 r., skarga nr 4451/70.

19 Wyrok w sprawie W. Litwa przeciwko Polsce, *op. cit.*.

20 A. Kalisz, L. Leszczyński, B. Liżewski, *Wykładnia prawa model ogólny...*, *op. cit.*, s. 138.

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Argumentacja walidacyjna wykładni operatywnej- specyfika procesu decyzyjnego oraz różnice w zestawieniu z procesami walidacyjnymi w krajowych porządkach prawnych mają podstawowe znaczenie. Reguły językowe wykładni prawa, ich miejsce w wykładni, rola reguł semantycznych, a także argumentów syntaktycznych implikują konieczność zastosowania innych reguł interpretacyjnych. Reguły systemowe wykładni prawa pomagają w dokonaniu rekonstrukcji norm w oparciu o zhierarchizowany system aktów prawnych, powiązania między przepisami, czy zasady prawa. Reguły celowościowe natomiast wskazują na cel aktu normatywnego, a funkcjonalne odwołują się do skutku danego przepisu prawnego.