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Author: Agnieszka Bielska-Brodziak

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Agnieszka Bielska-Brodziak
University of Silesia (Poland)

USING A PROVISION'S LEGISLATIVE HISTORY AS AN INSTRUMENT FOR INTERPRETATION – SEVERAL OBSERVATIONS BASED ON JUDGMENTS OF POLISH ADMINISTRATIVE COURTS[1]

1. HOW TO CONSTRUE THE TERM LEGISLATIVE HISTORY

The era of advanced information technologies, allowing free access to the electronic versions of legislative materials, has opened up new opportunities for searching for traces of legislative intent, thus starting a new chapter of reflecting on the admissible or preferable tools for interpretation in various disciplines of law. This kind of discussion appears particularly significant for such areas of the law as fiscal law and administrative law, both of which interfere with the rights and freedoms of citizens, who may be acutely affected should they base their decisions on an incorrect interpretation of a regulation, and subsequently decide on a solution that will later be rejected by public administration authorities. On the other hand, fiscal law and administrative law are disciplines of the law that give rise to interpretative conflicts whose outcome is the most difficult to predict – the intuitive sense of justice, good and evil does not serve as a compass for understanding the text of a piece of legislation (understanding the intent of the legislator) as much as it does in criminal or civil law. This is why legislative materials, ever since they have become commonly available online, appear to be a tempting source of support in the process of interpreting provisions. This thesis is corroborated by judgments of Polish administrative courts, which demonstrate that a broad spectrum of decisions are taken using parliamentary materials in the process of interpreting acts that raise doubts.

Let us start by explaining what the term *legislative history*[2] means. In international literature (in Poland, this issue has not been thoroughly explored yet[3]), legislative history is conventionally described as a collection of documents generated in the course of drafting legislation and reflecting this process; it is a set of documents that is the outcome of completing specific legal procedures, from using the right of legislative initiative to enacted legislation. "The legislative history of a statute is the history of its

[1] Project financed by the Polish National Science Centre under grant no. DEC-2011/03/D/HS5/02493.

[2] Legislative history is a popular term in English literature – see e.g. W.D. Popkin, *A Dictionary of Statutory Interpretation*, Durham 2007, pp. 160–183. Another commonly used term for this type of interpretative materials is *travaux preparatoire.*

[3] The first comprehensive analysis of this issue, authored by A. Bielska-Brodziak and entitled *Materiały legislacyjne jako narzędzie interpretacji prawa*, is pending publication by Wolters Kluwer in 2017.

consideration and enactment"[4]; it is "the written record of deliberation surrounding and preceding a bill's enactment. Legislative history includes all the documentation that was generated during the enactment process"[5]. It is materials, in the form of documents, generated by the legislator (or commissioned by the legislator) in the process of creating and enacting a statute. Conventional LH[6] consists of written statements – usually subcommittee and committee debates and debates of the Sejm and the Senate as a whole – which accompany the passage of a statute[7]. This group also encompasses draft bills and statements of reasons[8], as well as opinions and expert reports. Since the particular stages of the legislative process are meticulously documented, the comprehensive set of documents offers a faithful representation of the process leading to the creation of the final version of a regulation. The objective of using LH is – as signalled at the beginning of this paper – to obtain information allowing to determine the intent behind introducing a provision or a bill, and to establish what goals the legislator was planning to achieve through the bill[9].

As far as the Polish interpretative practice is concerned, the situation of legislative materials is very interesting. As mentioned before, the issue of using *travaux preparatoires* in statutory interpretation is given marginal treatment in Polish literature. However, despite the apparent lack of interest by literature, the popularity of using LH in judicial decisions is beyond significant. An analysis of decisions issued by administrative courts reveals the growing importance of this argument and shows an increase in the number of references made to legislative history in judicial decisions. Despite the lack of legal education in this respect, legislative materials constitute an important and increasingly used interpretative tool. An ever-growing number of judicial decisions containing references to *travaux preparatoires*, and – perhaps more importantly – the fact that, in the case of some decisions, the argument from preparatory documents becomes the clinching argument suggests an increase in the interest in this type of instrument.

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[4] Y. Kim: *Statutory Interpretation: General Principles and Recent Trends*, New York 2009, p. 31.

[5] L.D. Jellum: *Mastering Statutory Interpretation*, Durham 2008, p. 161. – "Legislative history is the written record of deliberation surrounding and preceding a bill's enactment. Legislative history includes all the documentation that was generated during the enactment process, including committee reports and hearing transcripts, floor debates, recorded votes, conference committee reports, presidential signing and veto massages, etc. Most legislative history is generated at the chokeholds, or vetogates, within the legislative process". Similarly W.N. Eskridge Jr., P.P. Frickey, E. Garrett, *Legislation and Statutory Interpretation*, New York 2006, p. 303: "The legislative history of a statute is the record of deliberations surrounding, and generally prior to, the law's enactment".

[6] In this text "LH" will be the equivalent of meaning of the term "legislative history".

[7] W.D. Popkin, *A Dictionary of…*, p. 140: "Conventional legislative history consists of written statements (usually committee reports and legislative debates) which accompany the passage of a statute". Suggestions on how to construe the term LH may also be found in S. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, "Southern California Law Review" 1992, Vol. 65, p. 845. In Poland, L. Morawski, *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń 2002, p. 277.

[8] Ibidem.

[9] R.B. Brown, S.J. Brown, *Statutory Interpretation: The Search for Legislative Intent*, Notre Dame, Indiana 2002, pp. 117–118.

2. WAYS OF USING LEGISLATIVE HISTORY IN JUDICIAL DECISIONS

Analyses of administrative court decisions demonstrate how useful legislative materials are for statutory interpretation. Arguments developed using legislative process information can corroborate the meaning that follows from the letter of the law. The corroborative function of legislative history is its most popular and obvious function. Another popular way of deploying arguments from LH is to use them as directives of choice from among various interpretation hypotheses. However, it is two other uses that appear to be the most interesting – using LH to "supplement" the norm or "break" the linguistic meaning. I am going to illustrate these uses, with examples so as to better demonstrate the fundamental value and importance that the information from legislative materials has for the final decision.

The first case encompasses a series of decisions[10] issued in relation to regulations governing the award of veteran status. The status in question can be awarded to an individual taking part in activities carried out outside the country who has experienced damage to his health as a result of an accident related to these activities. What follows from the literal wording of the definition laid down in Article 4 (15)C[11] is that it is a sudden event, caused by external factors, resulting in damage to a person's health, which took place in the course of or in connection with other activities directly related to performing activities outside the country. This wording resulted in veteran status applications submitted by individuals who sustained accidents in the following circumstances:

> after finishing his duty, was on his way back to the building where he was quartered. When he was climbing the stairs, he tripped and fell, and the firearm he was carrying hit him in the mouth. As a result, the applicant sustained injury in the form of a tooth crown fracture[12].
> [W]as lifting a printer from the floor to the table in a service room. In doing so, the applicant failed to exercise due care, as a result of which he sustained a spinal overload injury[13].

In view of the facts of such cases, a question arose as to how to construe the phrase "accident related to activities carried out outside the country". In order to answer the question, the court referred to information from legislative materials and concluded that:

> It is unequivocally clear from the explanatory statement to the bill that the legislator's intent was to honour and reward individuals who put their life and health at risk, who are in direct contact with events and situations that do not take place in peaceful conditions, and who, as a result of these events and situations, sustain damage to their health. For this reason,

[10] Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1473/12, LEX No. 1249102; Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1412/12, LEX No. 1249091; Judgment of the Voivodeship Administrative Court in Warsaw of 6 December 2012, II SA/Wa 1808/12, LEX No. 1334348; Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1605/12, LEX No. 1249127; Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1434/12, LEX No. 1249094.

[11] Act on Veteran Activities Outside the Country of 19 August 2011, Journal of Laws of 2011, No. 205, item 1203.

[12] Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1473/12, LEX No. 1249102.

[13] Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1434/12, LEX no, 1249094.

> a broadening, as proposed by the applicant, of the catalogue of individuals eligible to be awarded the status in question would inevitably lead to changing the nature of this status – individuals undertaking military activity or those affected by this activity, […] and individuals who are indeed involved in activities carried out outside the country, but at the time of the accident are not subject to threats relating to the nature of the mission[14].

As demonstrated, the intent expressed by the legislator in the legislative materials provided context that enabled the court to properly interpret the literal meaning of the provision in question. This made explicit and obvious what legal intuition had suggested before – the legislator did not mean every single accident that happens outside the country, but a very specific type of accidents. And, while the literal wording of the provision did not allow for a different treatment of an individual who strained his back while lifting a printer, or one who damaged his tooth when stumbling to that of an individual who sustained damage to his health in connection with warfare, the context provided by legislative history made it possible to identify the legislator's intent in a very precise way. It turned out that interpreting the provision using the legislator's intent, as expressed in the LH, makes the wording of the provision unequivocal, both linguistically and axiologically. In this case, the legislative materials played a supplemental role – they enriched the literal interpretation of the provision with the legislator's intended meaning, which was not expressly stated in the wording of the act, but was nonetheless essential for the passing of fair judgments.

Another very interesting example concerns a situation where information from legislative materials was used to "break" the literal meaning of a regulation[15]. The case involved a female who applied to establish her eligibility to receive maternity allowance and a single-payment birth grant[16]. Pursuant to the legislation[17], in order to be eligible to receive these benefits, a woman must be placed under medical care from the 10th week of the pregnancy at the latest, and must remain under such care until birth. The timeline has been defined extremely precisely – by a number – without having provided any exceptions. In the case analysed, the woman did not know she was pregnant, as she had been treated for hypothyreosis for over a year. Prior to the diagnosis, she maintained a regular menstrual cycle, but when she started taking medication, her menstrual cycle became irregular. This is why, during a check-up gynaecologist appointment, she found out she was 12 weeks pregnant. The court referred to the explanatory statement to the

[14] Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1473/12, LEX no, 1249102; judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, SA/Wa 1412/12, LEX no 1249091; judgment of the Voivodeship Administrative Court in Warsaw of 6 December 2012, II SA/Wa 1808/12, LEX No. 1334348.

[15] In another interesting judgment, (see judgment of the Voivodeship Administrative Court in Wrocław of 10 July 2013, I SA/Wr 482/13, LEX No. 1351221), the tax authority proposed a judgment based on information from the LH, breaking the literal meaning. Nevertheless, the court did not decide to adopt this line of interpretation and concluded: "The explanatory statement to a bill can help dissolve doubts in a situation when a provision of the law is equivocal. However, it cannot be used to form conclusions that contradict the wording of the provision. The objectives expressed in the explanatory statement cannot change the literal meaning of the provision". The judgment represents a line of interpretation that precludes the *a priori* rejection of the literal meaning of a provision.

[16] Judgment of the Voivodeship Administrative Court in Gdańsk of 11 July 2013, III SA/Gd 223/13, LEX No. 1368857.

[17] Article 9 (6) and Article 15b (5) of the Act on Family Benefits of 28 November 2003.

bill in order to determine what the legislative intent was[18]. Based on the explanatory statement, the court concluded that, while the regulation does introduce an exact time limit, expressed by a number (10 weeks), at which time a woman must be placed under medical care, the interpretation of the act's provisions must not overlook the "legislator's real intent". Based on the LH, the court deemed that, in order to establish the woman's eligibility to receive benefits, it was necessary to determine both whether she had cared for her health during pregnancy (whether she had been under medical care during this period), and whether she had exercised due care in meeting the deadline for submitting to medical care[19]. In the court's opinion, it was necessary to adopt such a line of interpretation that would guarantee access to assistance also to those women who, without any fault on their part, failed to be placed under medical care by the 10th week of pregnancy. It is worth noting that, in the case discussed here, the arguments that affected the court's judgment were entirely absent in the literal wording of the regulation. As a result, the literal wording of the regulation was rejected, and the legislator's intent, as expressed in the legislative materials, prevailed.

3. SEVERAL REMARKS ON THE FACTORS THAT DETERMINE THE VALUE OF LH IN STATUTORY INTERPRETATION

The significance and popularity of interpretative arguments based on LH varies between countries, and depends on a number of factors: both the quality and availability of the legislative materials, the competence of the interpreters, and cultural factors – beliefs held by the interpretive community as to the role that legislative materials ought to play in statutory interpretation[20]. In general, it can be observed that the worldwide ideological dispute on the place and role of legislative history in statutory interpretation is held by proponents and opponents of the deployment of LH. Operating at the level of idea, the proponents of using LH, who subscribe to the statement that *"The letter of the law is the body of the law, and the sense and reason of the law is the soul of the law"*[21], see it as highly useful, in that it allows strong, hard-to-refute arguments to be developed. In substantiating their position, they claim that each regulation has its underlying objective, which – unlike nitrogen – does not come from the air, but derives from the

[18] The court concluded that: "The intent of the regulation is to ensure that pregnant women actually receive medical care during pregnancy, which may decrease the high infant mortality level and reduce the number of infants with low birth weight" (Sejm of the Republic of Poland of the 6th term, Sejm paper No. 630)".

[19] The Court observed: "we cannot eliminate the possibility that, for reasons beyond a woman's control and knowledge, she might not be able to meet the deadline for submitting to medical care (e.g. in case when the waiting time between booking an appointment and the actual date of the appointment is long or when a woman cannot find out that she is pregnant within the first 10 weeks due to her individual physiological or health circumstances)".

[20] Cf. H. Fleischer, *Comparative approaches to the use of legislative history in statutory interpretation,* "American Journal of Comparative Law" 2012, Spring. In Polish literature, see: A. Bielska-Brodziak, *Materiały legislacyjne w dyskursie interpretacyjnym z perspektywy brytyjskiej, amerykańskiej, francuskiej, szwedzkiej i polskiej*, [in:] *Konwergencja czy dywergencja kultur i systemów prawnych?*, Eds. O. Nawrot, S. Sykuna, J. Zajadło, Warsaw 2012, pp. 144–153.

[21] W.N. Eskridge Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, "Columbia Law Review" 2001, Vol. 101, p. 1000.

language of the act and is interpreted in light of other external manifestations of the intent[22]. On the other hand, the opponents are of the opinion that "the legislator said what he wanted to say, and omitted what he did not want to say (quod voluit dixit, quod non dixit noluit, idem dixit quam voluit)"[23]. In other words, "interpretation cannot be determined by how the legislator was going to regulate a given issue, because what matters is how he actually did it"[24].

As the statements above show, these two extreme positions accentuate certain contradictory visions of the law. According to the first one, law is what the legislator wants of us. Therefore, searching for the intent of the legislator can and should centre on the wording of an act and on any other proofs of legislative intent, and the final outcome of the search can differ from what *prima facie* followed from the letter of the law. According to the other position, law is what the legislator has managed to exhaustively contain in the wording of an act. In addition to the aforementioned ideological preferences, there are two other factors that influence the position of legislative history in interpretation. Although these are practical factors, it is my belief that they play a key role. These factors are: quality of access to LH and the interpreters' competence in using LH.

Let us elaborate on the issue of the availability of legislative history. The attitude towards legislative history has changed considerably due to the development of modern data transfer technologies. As a result of technological advancements of the past decades, the citizens of Poland – and of most other democratic states for that matter – have obtained access to public information via the Internet. Consequently, parliamentary materials, which are a form of public information, have to a large extent become available to the general public online, free of charge. This has unquestionably influenced the popularity of legislative history in interpretation. It must be noted, however, that making legislative materials publicly available was a manifestation of the principle laid down in Article 61 of the Constitution of the Republic of Poland (providing citizens with access to public information so as to allow social control; protection of transparency of public life). It was not, therefore, not directly at least, intended to facilitate the work of interpreters of the law. This impacts the way in which legislative materials are shared – in many cases they are made available without treating the needs of interpreters as a priority (examples of such needs being a simple access path, short processing time, easy copying). Whereas the current Polish *status quo still* requires many improvements, it is considerably different from the reality less than twenty years ago, at the turn of the 20th and 21st century. Building a coherent and comprehensive system allowing access to legislative materials is not a short-term process, but a large-scale and time-consuming project.

The other important issue from the perspective of the usefulness of LH and, as a result, from the perspective of its attributed value, is the competence of the interpreters themselves. Lack of competence is likely to deter interpreters from using this instrument

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[22] F. Frankfurter, *Some Reflections on the Reading of Statutes*, "Columbia Law Review" 1947, Vol. 47, pp. 538–539, quoted after: L.D. Jellum, *Mastering Statutory…*, p. 183.

[23] Resolution of the Polish Supreme Court of 26 October 2016, file ref. No. III CZP 56/16.

[24] Cf. a resolution passed by 7 Supreme Court Judges of 16 December 2008, III CZP 102/08, OSNC 2009, No. 5, item 65. Also see an example of an interesting tax judgment, formulated in a similar spirit – Judgment of the Voivodeship Administrative Court in Gdańsk of 23 January 2013, I SA/Gd 1218/12, LEX No. 1291455.

due to fears of formulating incorrect conclusions and potentially losing prestige. It is currently stressed that the subject of debate is not whether or not to use legislative materials, but *when and how* to use them[25]. However, to know *when and how* to use them, one needs to be provided with the right knowledge in the course of education, and must continue to acquire it on their own after completing their education. Literature offers more and more rules on how to properly use legislative materials[26]. Examples of some of the universally applicable rules are as follows:

1) never use legislative history without knowing the legislative procedure – the legislator's intent is not a psychological experience, but rather a decision taken in compliance with clear procedural rules;
2) remember that legislative sequence is not random – *lex posteriori derogat legi priori* – decisions taken during later stages of the legislative process supersede earlier ones. If you refer to a fragment of legislative history, you must bear in mind that the position you are referring to might have changed during later stages of the process. Therefore, the legislative intent must be searched for in reverse order.
3) do not create abstract hierarchies of legislative history. Assuming that the most valuable form of LH is, for example, the explanatory statement to a bill, and the least informative part are the various deputy speeches is hasty and may lead to missed conclusions. The value of LH depends on the interpretative context, and cannot be determined in abstract terms.
4) do not quote legislative history if you do not know who won in the parliamentary debate. The wording was achieved through a compromise. Reliable materials are those that have been recognised as such during the legislative process. If the legislators did not take them into consideration, neither should interpreters[27].

Administrative judicature in Poland, although quite young, is characterised by its very modern and creative approach to the application of the law. It is worth noting that some of the new and significant interpretation directives, such as the *in dubio pro tributario* principle concerning interpretative doubts, or the distinction between two types of changes of the law (interpretive and normative) derive from judgments of administrative courts. Clearly, to a large extent, it is this part of the Polish judicature that should be credited with the current increase in the popularity of using legislative materials in statutory interpretation. It is said that if you have just a hammer, nails are your only solution to any problem. The interpretation of the law, just like interpretation of literature, paintings, or holy books, is such a complex undertaking that in order to do it in a responsible and fruitful manner, one needs to resort to using all the tools available. Only the comprehensive use of all these instruments will make it possible to develop argumentatively strong reasons for a judgment – one that will persuade the parties involved that the court conducted the proceedings in a fair way, and that it was right in its judgment.

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[25] S. Costelloe, *The Need for Conditions Limiting the Use of Legislative History in Statutory Interpretation: Lessons from the British Courts*, "Notre Dame Journal of Law, Ethics & Public Policy" 2015, Vol. 29, p. 327.

[26] V.F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, "Yale Law Journal" 2012, Vol. 122, pp. 90–133.

[27] Ch. Boudreau, A. Lupia, M.D. McCubbins, D.B. Rodriguez, *What Statutes Mean. Interpretative Lessons from Positive Theories of Communication and Legislation*, "San Diego Law Review" 2007, Vol. 44, p. 973 et seq.

BIBLIOGRAPHY

LITERATURE

Bielska-Brodziak A., *Materiały legislacyjne w dyskursie interpretacyjnym z perspektywy brytyjskiej, amerykańskiej, francuskiej, szwedzkiej i polskiej*, [in:] *Konwergencja czy dywergencja kultur i systemów prawnych?*, Eds. O. Nawrot, S. Sykuna, J. Zajadło, Warsaw 2012.

Boudreau Ch., Lupia A., McCubbins M.D., Rodriguez D.B., *What Statutes Mean. Interpretative Lessons from Positive Theories of Communication and Legislation*, "San Diego Law Review" 2007, Vol. 44.

Breyer S., *On the Uses of Legislative History in Interpreting Statutes*, "Southern California Law Review" 1992, Vol. 65.

Brown R.B., Brown S.J., *Statutory Interpretation: The Search for Legislative Intent*, Notre Dame, Indiana 2002.

Costelloe S., *The Need for Conditions Limiting the Use of Legislative History in Statutory Interpretation: Lessons from the British Courts, Notre Dame Journal of Law*, "Ethics & Public Policy" 2015, Vol. 29.

Eskridge W.N. Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, "Columbia Law Review" 2001, Vol. 101.

Eskridge W.N. Jr., Frickey P.P., Garrett E., *Legislation and Statutory Interpretation*, New York 2006.

Fleischer Cf.H., *Comparative approaches to the use of legislative history in statutory interpretation*, "American Journal of Comparative Law" 2012, Spring.

Frankfurter F., *Some Reflections on the Reading of Statutes*, "Columbia Law Review" 1947, Vol. 47.

Jellum L.D., *Mastering Statutory Interpretation*, Durham 2008.

Kim Y., *Statutory Interpretation: General Principles and Recent Trends*, New York 2009.

Morawski L., *Wykładnia w orzecznictwie sądów. Komentarz*, Toruń 2002.

Nourse V.F., *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, "Yale Law Journal" 2012, Vol. 122.

Popkin W.D., *A Dictionary of Statutory Interpretation*, Durham 2007.

JUDGMENTS

Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1473/12, LEX No. 1249102.

Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1412/12, LEX No. 1249091.

Judgment of the Voivodeship Administrative Court in Warsaw of 6 December 2012, II SA/Wa 1808/12, LEX No. 1334348.

Judment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1605/12, LEX No. 1249127.

Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1434/12, LEX No. 1249094.

Judgment of the Voivodeship Administrative Court in Warsaw of 21 November 2012, II SA/Wa 1473/12, LEX No. 1249102.

Judgment of the Voivodeship Administrative Court in Wrocław of 10 July 2013, I SA/Wr 482/13, LEX No. 1351221.

Judgment of the Voivodeship Administrative Court in Gdańsk of 11 July 2013, III SA/Gd 223/13, LEX No. 1368857.
Judgment of the Voivodeship Administrative Court in Gdańsk of 23 January 2013, I SA/Gd 1218/12, LEX No. 1291455.

RESOLUTIONS

Resolution of the Polish Supreme Court of 26 October 2016, file ref. No. III CZP 56/16.
Resolution passed by 7 Supreme Court Judges of 16 December 2008, III CZP 102/08, OSNC 2009, No. 5, item 65.