References:

1. Кримінальний кодекс України : Кодекс України від 05.04.2001. № 2341-III: станом на 27 січ. 2023 р.
2. Альошина О.І. Провокація злочину (кримінально-правове дослідження): автореф. Дис.канд. юрид. наук: спец. 12.00.08 / О.І. Альошина; Дніпропетр. держ. ун-т внутр. справ. – Д., 2007. – 19 с.
3. Борисов В. І., Тацій В. Я., Тютюгін В. І. та ін.; за ред. В. Я. Тація, В. І. Борисова, В. І. Тютюгіна. – 5-те вид., переробл. і допов. – Х.: Кримінальне право України: Загальна частина: підручник / Право, 2015. – 528 с.
4. Орловський Р. С. Підстава кримінальної відповідальності за співучасть у злочині / Р. С. Орловський // Правова держава: історія, сучасність та перспективи формування в Україні : матеріали міжнар. наук.-практ. конф., м. Ужгород, 28 лют. - 1 берез. 2014 р. – Херсон, 2014. – С. 186
5. Саакян М.Б, провокація: кримінально-правовий аспект. Роль та місце правоохоронних органів у розбудові демократичної правової держави: матеріали VIII Міжнар. наук.-практ. конф., м. Одеса, 25 березня 2016 р. Одесса : ОДУВС, 2016. С. 326–327.

AUTHENTIC INTERPRETATION OF LAWS. RISK TO THE PRINCIPLES OF SEPARATION OF POWERS AND NON- RETROACTIVITY?

TYMUR YAKYMENKO, postgraduate student
DMYTRO LUKIANOV, Doctor of Science in Law, Scientific Adviser
OLGA ZELINSKA, PhD in Philology, Language Adviser
Yaroslav Mudryi National Law University

It is reasonable to agree that only judges should resolve cases and disputes between citizens, state and citizens. Practically and given the separation principle, legislators cannot do that job and ought not to. Facts-finding is a judicial task; measuring the proportionality of punishment, damage evaluation, and others are also purely court issues. But what is it in the separation of powers principle that does not allow authentic interpretation (AI) of law by the lawmaker, especially if given as an abstract interpretation? If the judges are not generally authorized to make a law, why then should they have the only right to interpret it? Maybe it is the legislator who has to interpret its laws *ex officio?*

When these questions are addressed to opponents of AI, the answer is that legislators interfere with the judge's function to interpret the law. Why is it only the judge's power? They might answer that the principle of the separation of power ostensibly says so. However, the principle's root was quite different as the Montesquieu - author of the separation thesis – thought that *"judges are nothing but 'mouthpieces of the law,' 'inanimate beings' incapable of modifying either its force or its rigour. ...".*

Although judges unavoidably deemed to interpret laws in their adjudication it does not mean that legislator quit this job. It would be irresponsible towards society.

Firstly, it is important to address the main concern that as AI is retrospective, it violates another "tabu" on applying new laws to past events. However, the European Convention on Human Rights, for instance, does not prohibit retroactive legislation *per se*. European Court recognized several times that it was appropriate to use retrospective provisions "*where…applicant…attempt to benefit from the vulnerability of the authorities resulting from technical defects in the law, and as an effort to frustrate the intention of Parliament*" or " *where the applicants … attempted to derive benefits as a result of a lacuna in the law, which the legislative interference was aimed at remedying*."

In Ukrainian case law, different or contrary interpretations of the same norm(s) appear sporadically. According to procedural law, a possible resolution is to unify case law by a decision of Grand Chamber of SC. Judges, therefore, will consider their previous decisions and find out the "best" or "true" interpretation of the "problematic" legal provision. Their honors hardly ever, at least officially and publicly, ask lawmakers what those meant or would have meant, if they had been asked about the legal provision in the relevant context. What would be the "best" interpretation at the current stage of life? Thus, here is another reason for AI – opposite interpretations of the same provision by different panels of SC and/or chambers of SC. I can suppose that such a situation definitely allows lawmakers to give AI. The following approach of the Constitutional Court of Italy might illustrate my point better:

The provision resulting from a law specifying an authentic interpretation may not therefore be regarded as unconstitutional where it is limited to allocating a meaning to the provision interpreted that is already contained within it, and which is recognizable as one of the possible readings of the original text… In such cases in fact, the interpretative law has the purpose of clarifying ―situations of objective uncertainty within the legislation resulting from ―an unresolved debate in the case law … or of re-establishing an interpretation that is more in keeping with the original legislative intention …

Judicial deference to the interpretation made by an administrative body that passed a specific regulation or has been authorized by Congress to administer a law is well recognized by the US Supreme Court in the number of its precedents. The US courts of appeal also recognized a distinction between legislative or "substantive" rules and "interpretative" rules issued by agencies. According to the *A. Vermule*:* "*Where texts are intrinsically ambiguous, the legal system does best if judges assign the authority to interpret texts to other institutions - administrative agencies in the case of statutes, legislatures in the case of the Constitution*."

Contradictory judicial interpretations show that it may be difficult for the judiciary to apply a specific legal provision. So, courts should not be entirely bound by AI made by Parliament or other authorized body. However they should,

at least, give the lawmakers say a word about possible interpretation of a legal provision at hand. Furthermore, in case of a disagreement to AI, there should be solid judicial motivation, not just an omission or a simple reference to the recommendatory character of AI. There should not be "*judicial indifference".*

References:

1. Endicott, T. (2020), Authentic Interpretation. Ratio Juris, 33: 6-23. https://doi.org/10.1111/raju.12271
2. van den Berge, Lukas (2017), Montesquieu and Judicial Review of Proportionality in Administrative Law: Rethinking the Separation of Powers in the Neoliberal Era European Journal of Legal Studies, Vol. 10, No. 1, 2017, pp. 203-233, Available at SSRN: https://ssrn.com/abstract=3041325
3. European Court of Human Rights (2014), Case of Stefanetti and Others v. Italy - https://hudoc.echr.coe.int/eng?i=001-142400
4. Constitutional Court of Italy (2012), Judgment No.78 - https://www.cortecostituzionale.it/actionJudgment.do
5. REITZ, J. C. (2018). Deference to the Administration in Judicial Review. *The American Journal of Comparative Law*, *66*, 269-298. https://doi.org/10.2307/26497462
6. Court of Appeals, 6th Circuit (1990), Friedrich v. Secretary of Health and Human Services, 894 F. 2d 829 - https://scholar.google.com.ua/scholar?scidkt=15423903300971419 77&as_sdt=2&hl=en
7. Court of Appeals, 9th Circuit (1985), Southern California Edison Co. v. FERC, 770 F. 2d 779 - https://scholar.google.com.ua/scholar_case?case=12908666335045707605&hl=en&as_sdt=2006
8. Farrelly, C. (2008). The Institutional Theory of Legal Interpretation [Review of Judging under Uncertainty, by A. Vermeule]. The University of Toronto Law Journal, 58(2), 217–232. http://www.jstor.org/stable/20109844

THEORIES OF LEGAL ENTITY

IRYNA YAREMKO, student
MYKOLA OPRYSKO, Assistant Professor, PhD in Law, Scientific Adviser
LILIA KUZNETSOVA, Associate Professor, PhD in Philology, Language Adviser
Ivan Franko National University of Lviv

Introduction. The category of legal entity is one of the most problematic in civil science, and the problem of the essence of a legal entity is one of the fundamental and "eternal" problems of civil law. Since the emergence of this important group of subjects of civil law in the property turnover and until now, theoretical disputes regarding this issue have not been subsided, and a generally accepted approach to its disclosure has not been developed. Almost every scientist with a famous name created his own theory of legal entity. Nevertheless, at the same time, a comprehensive answer to the question of what a legal entity is has not been found yet.