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# Critical Jurisprudence of Duncan Kennedy and the Status of the Theory of Legal Interpretation<sup>2</sup>

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## Abstract

The article attempts to analyse the status of the theory of legal interpretation that emerges from the contributions of one of the representatives of critical legal studies (CLS). Legal interpretation is analysed by using concepts drawn from hermeneutic universalism and the post-structural philosophy of politics. The concepts of Duncan Kennedy, an American philosopher of law, are subjected to analysis, and his concept of adjudication, the indeterminacy thesis and the hermeneutic of suspicion is addressed. The paper puts forward the thesis that the political nature of law – alongside factors closely related to social structure – is also determined by factors which pertain to the cognitive subject. This fact has crucial importance for determining the status of the theory of legal interpretation.

**Keywords:** theory of legal interpretation, the political, hermeneutic universalism, critical legal studies, indeterminacy thesis, adjudication.

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# Krytyczna jurysprudencja Duncana Kennedy’ego a status teorii interpretacji prawniczej

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## Streszczenie

Celem niniejszego artykułu jest dokonanie analizy statusu teorii interpretacji prawniczej, jaki wyłania się z koncepcji przedstawicieli ruchu studiów krytycznych nad prawem (critical legal studies, CLS). Interpretacja prawnicza jest badana przy wykorzystaniu koncepcji hermeneutycznego uniwersalizmu oraz poststrukturalnej filozofii polityki. Analizie poddane zostały koncepcje amerykańskiego filozofa prawa, jednego z najbardziej znanych przedstawicieli CLS – Duncana Kennedy’ego – jego koncepcja orzekania, teza o niezdeterminowaniu oraz hermeneutyka podejrzeń. Niniejszy tekst stawia tezę, że polityczność prawa – poza przyczynami związanymi ściśle ze strukturą społeczną – uwarunkowana jest również przyczynami leżącymi po stronie podmiotu poznającego. Ten fakt ma kluczowe znaczenie dla określania statusu interpretacji prawniczej.

**Słowa kluczowe:** teoria wykładni prawa, polityczność, hermeneutyczny uniwersalizm, ruch studiów krytycznych nad prawem, teza o niezdeterminowaniu.

## Introduction

In this paper, I analyse the status of the theory of legal interpretation in the works of one of the most representative proponents of critical legal studies – Duncan Kennedy.<sup>3</sup> I claim that the political nature of law is determined not only by factors closely related to the social structure, but is also determined by factors which pertain to the cognitive subject (i.e. the interpreter of law: a scholar, judge or lawyer). In my view, this fact has crucial importance for determining the status of legal interpretation *qua* socio-cultural praxis.

According to the leading Polish literary theorist, Ryszard Nycz:

Contemporary theoretical discourse cannot justify its professionalisation by claiming some meta-linguistic status or exclusive access to objective knowledge about what lies beyond all conditions (because it considers such knowledge to be impossible or empty) – but ‘only’ to knowledge obtained as a result of applied analytical procedures (inevitably subjective, social or cultural). A specific feature of these methods is that the cognitive outcomes cannot be separated from the means by which they are obtained.<sup>4</sup>

Although R. Nycz is, as mentioned, a literary theorist, in my view, the above statement is particularly relevant in the context of the theory of *legal* interpretation as espoused by critical legal studies. In the cited passage, R. Nycz directs one’s attention to two very important issues: the status of the theory of legal interpretation with regard to the issues of objectivity and professionalisation, and the problem of the subjective conditions influencing cognition in the process of interpreting texts. The subject-object relationship in the positivist paradigm of cognition has been thoroughly examined in jurisprudence. In particular, Marek Zirk-Sadowski’s

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<sup>3</sup> I would like to thank Prof. Rafał Mańko for reading earlier versions of this paper and sharing his critical comments.

<sup>4</sup> R. Nycz, *Kulturowa natura, słaby profesjonalizm. Kilka uwag o przedmiocie poznania literackiego i statusie dyskursu literaturoznawczego*, [in:] M.P. Markowski, R. Nycz (eds.), *Kulturowa teoria literatury. Główne pojęcia i problemy*, Kraków 2012, p. 35.

well-known article should be mentioned here.<sup>5</sup> However, there are not many similar works on critical legal studies in jurisprudence.<sup>6</sup>

In what follows, I draw on two crucial concepts: *the political* and *hermeneutic universalism*. I understand the former in the sense expounded by Chantal Mouffe, and the latter in terms of Richard Shusterman's conception. Following Ch. Mouffe, I treat the political not as a straightforward connection to politics or as something influenced by politics; rather, I understand the political as the inalienable dimension of conflict in social life.<sup>7</sup> As far as hermeneutic universalism is concerned, I assume that every cognition is relativised to the perspective of the cognising subject, or, in other words, every cognition is an interpretation *per se*. It goes without saying that this also applies to legal interpretation. There is no such thing as cognition which is not relativised to a certain perspective because we see everything through a 'veil' of interpretation.<sup>8</sup>

I would also like to draw attention to a very fruitful cognitive distinction made by Lawrence Solum, concerning the 'forms' or 'levels' at which the theory of interpretation may manifest itself. This will enable me to clarify the issue of the extent to which the theory of legal interpretation is permeated by the political.<sup>9</sup> Firstly, L. Solum defines any theory that seeks to answer questions such as 'What is interpretation?' and 'What makes interpretation processes possible?', as a 'metatheory'. Hermeneutic universalism is precisely such a metatheoretical concept. Secondly, Solum defines theories which aim to access the linguistic ('communicative') meaning of a text as 'communicative theories of interpretation'. The third level at which a theory of interpretation can function is, according to Solum, the 'normative' one. Normative interpretation theories are designed to answer the question of how interpretation *should* be carried out. Lastly, Solum's fourth group, namely 'methodological' theories, consists of theories which provide practical guidance and concrete directives.

<sup>5</sup> M. Zirk-Sadowski, *Pozytywizm prawniczy a filozoficzna opozycja podmiotu i przedmiotu poznania*, [in:] J. Stelmach (ed.), *Studia z filozofii prawa*, Kraków 2001.

<sup>6</sup> One of the few exceptions is Rafał Mańko's recently published monograph: R. Mańko, *W stronę krytycznej filozofii orzekania: Polityczność, etyka, legitymizacja*, Łódź 2018. These issues are primarily addressed in chapters 2 and 4.

<sup>7</sup> R. Mańko, J. Łakomy, *In search for the ontological presuppositions of critical jurisprudence*, "Krytyka Prawa", 2018, 2, pp. 475–476. See also: R. Mańko, *Orzekanie w polu polityczności*, „Filozofia Publiczna i Edukacja Demokratyczna” 2018, 7, pp. 65–95; idem, *Dimensions of the Political in Adjudication: A Case Study*, "Acta Universitas Lodziensis. Folia Iuridica" 2020, 92, pp. 5–16.

<sup>8</sup> I included a detailed definition of this concept in: J. Łakomy, *Polityczność (teorii) wykładni prawa: perspektywa neopragmatyzmu Stanleya Fisha*, „Archiwum Filozofii Prawa i Filozofii Społecznej” 2018, 3, pp. 24–37.

<sup>9</sup> [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/04/legal\\_theory\\_le\\_3.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/04/legal_theory_le_3.html) (access: 6.11.2020).

## The Political Nature of Interpretation and Critical Legal Theory

Of all the currents of jurisprudence to emerge in the last few decades, critical legal theory is the movement that most clearly emphasises the relationship between law and politics. In this paper, I will focus on the work of one of the most well-known critical legal theorists, namely Duncan Kennedy. Put simply, the meanings of legal texts, similarly to all other texts, boil down to a specific structure that is dependent on the (historically variable) cultural and social structures which have stabilised at a given time. Law, legal scholarship, and the theory of interpretation, are therefore not autonomous. Since law does not have an autonomous ontological status, legal scholarship and the theory of interpretation must also be relativised and enriched by the achievements of linguistics, sociology and economics. Derridean deconstruction, the post-structuralist approach to language, as well as discourse and political theory, greatly complicate the rather simple and stable structuralist picture. These trends have inspired critical legal theorists, as is evident in their philosophy of legal interpretation. The new emphasis on the perception of the subject (including the author of the text, the legal scholar, and the participant of political actions), and the demonstration of the contingent nature of social identities, freed readers from the shackles of structures which were purported to be independent from them. From the perspective of critical jurisprudence, deconstruction freed the reader from the tyranny of the text. Any interpretation selects a certain meaning of the text at the expense of another. The meaning of legal texts is created by the interpreter who, though still shaped by certain social and cultural relations, now has far greater autonomy. Deconstruction which, on the basis of legal theory, can take the form of, for instance, trashing,<sup>10</sup> reveals which socio-political ideologies support a given legal doctrine. However, the ontological status of ideologies is completely different from the status of structures which determine the correct meaning of texts.

The year 2015 saw the publication of a new edition of Roberto Mangabeira Unger's canonical work, *The Critical Legal Studies Movement: Another Time, a Greater Task*.<sup>11</sup> Thus, almost thirty years after the first edition of the book appeared, this leading representative of CLS took the opportunity to look back and assess the main strands

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<sup>10</sup> M.G. Kelman, *Trashing*, "Stanford Law Review" 1984, 36(1/2), Critical Legal Studies Symposium (January 1984), pp. 293–348.

<sup>11</sup> The first edition of the work was published in 1986.

and achievements of this movement.<sup>12</sup> The CLS trend that Unger identifies as being the most important from the perspective of the last three decades is characterised by the 'radicalization of the indeterminacy thesis' which stems from diverse foundations in general philosophy and the philosophy of law. It draws on anti-formalist theories of law, such as American realism, structuralist concepts of socially shared forms of consciousness, and deconstruction.<sup>13</sup> The movement saw the legal doctrine as being an expression of a specific vision of society. It emphasised the contradictory nature of doctrinal arguments and their susceptibility to manipulation. The thesis of this movement was precisely the 'radical indeterminacy of law'.<sup>14</sup> Unger considers Duncan Kennedy to be the leading representative of this CLS current, citing one of his most important articles from the 1970s: *Form and Substance in Private Law Adjudication*.<sup>15</sup>

This conception of the 'theoretical practice' of CLS representatives brings the status of legal doctrine and the status of legal theory to the fore, including the theory of legal interpretation. For ontological and epistemological reasons, theses of legal theory are secondary to and dependent on theses on social theory. Since textual facts do not exist, it is impossible to construct a theory of interpretation that will provide one with answers as to the true meaning of specific legal texts. Therefore, the indeterminacy thesis, in its extreme form, completely changes the status of the theory of legal interpretation. Since the law is indeterminate, and because, as a result, it is impossible to build objectively correct interpretative directives which are ordered and justified by a set of coherent statements about the nature of the law and the conditions for the possibility of knowing it, then the theory of legal interpretation becomes political *per se*.

The theory of interpretation that prevails in a specific legal system at a given time is a reflection of one of the visions of society which has achieved a hegemonic status at that moment. The persistence of hegemonic theses concerning the nature and structure of society, which are widespread in the legal environment, is possible mainly due to the socialisation that takes place during the process of legal education, where – to use Kennedy's wording from one of his most famous essays – there is 'training' of students that results in the 'reproduction of hierarchies'.<sup>16</sup> Evidence

<sup>12</sup> R.A. Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task*, London–New York 2015, p. 26 ff.

<sup>13</sup> Ibidem.

<sup>14</sup> Ibidem.

<sup>15</sup> D. Kennedy, *Form and Substance in Private Law Adjudication*, "Harvard Law Review" 1976, 89.

<sup>16</sup> Idem, *Legal Education and the Reproduction of Hierarchy*, "Journal of Legal Education" 1982, 32(4), pp. 591–615.

of the clash of competing visions of society within the framework of the legal doctrine, in the discourse of legal interpretation, is provided by the often contradictory doctrinal arguments which are used – *in abstracto* and *in concreto* – to defend a particular interpretative hypothesis. The indeterminate meaning of legal texts makes the argumentation in defence of a specific meaning of the text susceptible to manipulation, the source of which is political.

One of the methods employed in the 'deconstructive' work of the representatives of critical legal studies is precisely to track down these contradictory doctrinal arguments and situate their content within the framework of the political interests of specific, mutually conflicting social groups. This is also the *modus operandi* of Duncan Kennedy himself, so the analysis of doctrinal arguments in the following considerations will illustrate his theses with regard to the philosophy of law.

Already, *prima facie*, CLS thought on the interpretation of law can be regarded as a strand of hermeneutic universalism; furthermore, it is compatible with the post-structuralist approach to the political. The demystifying role of the 'critical', general reflection on law is based on an external analysis of interpretative practice, of hegemonic doctrinal constructions which legitimise the recognised interpretations of specific legal texts. The assumption that the cognitive prejudices of interpretative communities inevitably determine the way in which the meaning of legal texts is specified makes it possible to identify the reasons why the doctrinal arguments have taken a specific form.

The basic problem requiring resolution here is the extent to which interpreters who accept the radical indeterminacy thesis are constrained by their epistemological stance, and the extent to which political will, which can be changeable and flexible, can abstract from the cognitive biases which structure the interpretation of texts (in the broader sense).

The current of CLS which had the second strongest impact on the general reflection on law in the last three decades combined functionalistic methods with some radical aims which were behind the study of law.<sup>17</sup> The theses behind these investigations were adopted from Marxist and neo-Marxist paradigms: it was assumed that both law and the legal doctrine were reflections of the divisions and hierarchies characteristic for the socio-economic formation of capitalism. This approach, which formulated broader theories which are more sociological and historical than epistemological, did not have any significant impact on the problematisation of the approach to the philosophy of legal interpretation, and, therefore, it will not be addressed in the following considerations. The third position adopted within CLS, and with which Unger clearly sympathises, is more normative than the

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<sup>17</sup> R. Unger, *op. cit.*, p. 28.

other two. Legal thought becomes a 'practice of institutional imagination'. The philosophers working within it exploit 'changes in the law and legal doctrine' as instruments for imagining and promoting alternatives for society.<sup>18</sup> This activist Ungerian approach does not share the basic epistemological assumptions of hermeneutic universalism and post-structuralist political theory, and will therefore be omitted from further consideration.

I shall focus on the first of the above-mentioned currents, but before I proceed to the analysis of Kennedy's own arguments, I would like to address a more detailed explanation of the thesis positing the radical indeterminacy of legal texts, and to consider its practical and philosophical consequences. Here I have in mind a very interesting analysis of this thesis which was presented by Solum almost thirty years ago.

## The Indeterminacy Thesis and the Status of the Theory of Legal Interpretation

In his 1987 essay *On the Indeterminacy Crisis: Critiquing Critical Dogma*,<sup>19</sup> Solum reconstructs the indeterminacy thesis from a legal-positivist perspective, and then reveals its weaknesses. In his works, Kennedy does not precisely define the assumptions underpinning his theory of adjudication, in which the philosophy of interpretation obviously plays a very important role; hence Solum's analysis, performed from different theoretical perspectives, seems all the more interesting.

A proper understanding and reconstruction of the philosophy of interpretation of the CLS representatives requires support from social theory and the philosophy of politics because only by indicating the starting points and tasks of the theory of interpretation precisely through the prism of social philosophy will it be possible to sketch a full, epistemological and methodological picture of the philosophy of interpretation. This is exactly what Solum draws one's attention to in the introduction of his aforementioned essay.<sup>20</sup>

The starting point for understanding the critical philosophy of interpretation, and, at the same time, the point of reference for constructing critical arguments against classical interpretation theories, is the 'ideology of the rule of law', which functions like the keystone of less transparent and less frequently expressed theo-

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<sup>18</sup> Ibidem, p. 29.

<sup>19</sup> L. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, "University of Chicago Law Review" 1987, 54(462), pp. 462–503.

<sup>20</sup> Ibidem, p. 462.



retical and philosophical-legal architecture, consisting of the collected ontological, epistemological and philosophical-political statements of legal positivism, being the most important element of liberal legal-political philosophy. The construction of positivist interpretation theories is intended to achieve the goal of surrendering the complete 'power' over texts to the legislator who, at the last moment of the legislative process, creates an entity external to itself and its interpreters, which – thanks to the theory of interpretation properly constructed in general reflection on the law – can be discovered and used to solve legal disputes.

Kennedy's criticism of the positivist vision of the process of adjudication very frequently starts with the assertion that the concept of the rule of law is a postulative normative model, which in practice is used to mystify the actual course of interpretation processes so as to legitimise current interpretation practices. The mystification takes place on two levels – hiding the real interests of the parties to a particular judicial process, who make different claims about the true meaning of certain legal texts, and on the macro level – hiding the real functioning of legal institutions and their political and social consequences.<sup>21</sup>

In the subsequent considerations, I adopt the understanding of the indeterminacy thesis as formulated by Solum:

[T]he existing body of legal doctrines – statutes, administrative regulations, and court decisions – permits a judge to justify any result she desires in any particular case. Put another way, (...) a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules.<sup>22</sup>

This is the 'strong' indeterminacy thesis, as it applies to all potential court cases and the interpretation of all legal texts. Not all the representatives of this movement accept such a far-reaching epistemological and extensive formulation of this thesis, hence the evolution of Kennedy's approach to the indeterminacy of the meaning of legal texts will be presented below.

At this point, it will be worthwhile to introduce the specific ways, methods and techniques employed by the representatives of critical legal studies to reveal the indeterminacy of the legal doctrine. Solum draws one's attention to several of them.

Firstly, the representatives of CLS argue that the legal doctrine is indeterminate because any legal rule can be contrasted with the so-called 'counter-rules'. Since both the rule and the counter-rule, which justify contradictory decisions in a given case

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<sup>21</sup> Ibidem.

<sup>22</sup> Ibidem.

can be considered valid. If the *instrumentarium* of arguments available in the legal discourse is used, the outcome of the process of law application is unpredictable and therefore indeterminate.<sup>23</sup>

From the perspective of the considerations in this paper, it is not the conception of the reasons for the indeterminacy of law application decisions which should be situated at the level of legal interpretation because it lies at the level of the selection of relevant legal texts. The problem becomes significant if one looks at it from the perspective of systemic interpretation directives and conflict of law rules which allow one to determine the proper meaning of the text. Such a characterisation of indeterminacy seems to be strongly related to the legal culture of common law since the counter-rule argument often takes the form of a different choice of precedent which is considered relevant in a given case. Civil law assumes a different legislative rationality; a rational legislator who strives to create a complete and coherent system of norms which is intended to facilitate validation decisions.

The second group of strategies used to prove the indeterminacy thesis concerns the demonstration that many of the cognitive categories and doctrinal distinctions – such as the public-private dichotomy in the civil law – which are used in the process of determining the meanings of legal texts are based on the logical error of the vicious circle. Interpretative decisions are made on the basis of other premises, and the appeal to specific cognitive categories is only meant to rationalise a previously made choice, and not to achieve the correct interpretative result.<sup>24</sup>

These reasons for indeterminacy are only partly related to the interpretation process as such; that is, insofar as one treats these categories as interpretative prejudices which enable texts to be assigned specific meanings. Their variability, as well as the lack of general agreement on their proper form and practical usefulness, can indeed lead to differences in judgment with regard to the proper understanding of a text.

The third way of defending the indeterminacy thesis is the most important for my deliberations. This involves paying attention to the properties of the precise language in which legal rules are formulated. A seemingly clear rule that provides predictable results is that of 'open texture', to use Hart's wording. This requires the judge to use extratextual arguments to determine the proper meaning of the text, even if, at the level of the statement of reasons, the interpreter only refers to linguistic arguments to legitimise the decision.<sup>25</sup> This method of argumentation frequently appears in many of Kennedy's works.

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<sup>23</sup> Ibidem, p. 465.

<sup>24</sup> Ibidem.

<sup>25</sup> Ibidem, p. 466.

## The Hermeneutic of Suspicion and the Status of Legal Reasoning

The above concepts are developed in one of Kennedy's most recent texts,<sup>26</sup> which concerns the process of adjudication, particularly the status of the arguments used to defend the correctness of a particular adjudicative decision. The issue of interpretation forms the core of the paper, though many other concepts and tools employed in the process of law application are also discussed.

Kennedy only provides a definition of the hermeneutic of suspicion in the final part of the essay. He states that 'the hermeneutic of suspicion is a tendency or a disposition of participants in legal discourse, as lawyers, judges, professors or social scientists who write about the law. The disposition is to interrogate skeptically claims of legal necessity made to justify decision of a legal issue involving significant ideological stakes (...).'<sup>27</sup> His argument refers to the use of the hermeneutic of suspicion to analyse arguments in the discourse of law application, which are formulated in the legal doctrine and dogma, but also in specific court cases. The hermeneutic of suspicion is used by many participants of the discourse of argumentation in their critical arguments which are directed against supporters of different interpretative hypotheses, or, to put it more broadly, hypotheses concerning the correct shape of the decision to apply the law and its effects.<sup>28</sup>

The use of the hermeneutic of suspicion is intended to show the weakness of an opponents' reasoning and, consequently, to prove that the hypothesis concerning the form of law application decision is incorrect. The erroneous nature of such an interpretative hypothesis is due to the fact that, according to those who employ the hermeneutic of suspicion, the decision was dictated by ideology. The author of the criticised interpretation hypothesis allegedly failed to see the objective meaning of a norm, or of a set of texts structured within the legal system, in a specific way. An objective, correct answer to the question about the true meaning of a given text is thus supposed to exist. It is therefore suggested that, from the epistemological perspective, it is possible to reach this objectively correct law application decision, free from entanglement in any ideology. The tools which stem from the supposedly

<sup>26</sup> D. Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, "Law and Critique" 2014, 25(91).

<sup>27</sup> *Ibidem*, p. 124.

<sup>28</sup> The very concept of the hermeneutic of suspicion should be historically understood as being in opposition to Paul Ricoeur's hermeneutics of 'trust'. In his recent article, Duncan Kennedy stresses this use of the term: D. Kennedy, *A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary American Legal Thought*, [in:] J. Desautles-Stein, Ch. Tomlins (eds.), *Searching for a Contemporary Legal Thought*, Cambridge 2017, p. 366.

apolitical theory of interpretation and the theory of law application can be properly and reliably applied. This is basically the purpose of the hermeneutical argument.

Kennedy is in favour of using the hermeneutic of suspicion, but not in the way that he believes prevails in the legal discourse which has grown out of both the common law and the civil law. He does not agree that using the "blade" of suspicion to "cut through the veil" of objective discourse and reveal the entanglement of the opponent makes the users of these techniques free from such entanglements. Duncan Kennedy claims that no interpretative hypothesis should be excluded from suspicion, thus including the one which, after criticising the initial hypothesis, was formulated by the hermeneutic of suspicion. Hence our own interpretative decision is, by analogy, also determined by ideology.

Kennedy conducts his argumentation by analysing the most commonly used techniques and tools employed in the application of law. His deliberations refer to the system of the common law, but in many places he also refers to the system of the civil law, as well as to the system of the European Union law, with the Court of Justice of the European Union at its head. Many of his conclusions are therefore universal.

He proposes using three broad groups of techniques: induction and deduction, purposeful (teleological/utilitarian) argumentation, and the test of proportionality. He demonstrates, separately for each group of arguments, how the hermeneutic of suspicion can attempt to reveal the ideological entanglement of an argument. At this point, it is necessary to show the place that determining the meaning of a legal text occupies in the broader process of law application which Kennedy writes about. The three groups of techniques discussed may relate to the interpretation of legal norms, and it is clear that these norms should be used in a given case, yet they are ambiguous or unclear. It is important to decide whether in Kennedy's theory of interpretation there may be norms which are not ambiguous in specific cases. This problem will be developed later in this paper, in the context of his many other works. This is undoubtedly a part of the process of law application which is explicitly addressed by the theory of interpretation. However, Kennedy takes a broader approach to this problem, which encompasses validation issues. The techniques in question can also be applied to legal conclusions by means of which one moves from the validity of more concrete norms to a higher level of abstraction in order to fill a gap in the legal system, or to solve a conflict between norms. Undoubtedly, the use of such techniques for these purposes, with the hermeneutic of suspicion in the background, would also have an indirect connection with interpretation.

## The Methodological Status of Duncan Kennedy's Theory of Legal Interpretation

Kennedy's considerations on law application and interpretation are to a large extent a development and deepening of the position put forward in his *magnum opus* – *A Critique of Adjudication*.<sup>29</sup> In Chapter 5, on 'Policy and Coherence', Kennedy analyses how policy arguments are used in the American discourse of law application. He calls his efforts 'the anthropology of legal conceptions' and clearly places himself in Hart's 'external' perspective on the law.<sup>30</sup> Kennedy tends not to make general statements about the philosophy of interpretation. Focusing on the discourse of law application, he analyses the application of specific tools of legal reasoning; their genealogy, methodological and discursive shape, as well as the consequences of their application, broadly understood. He builds his argumentation around the distinction which, in his opinion, organises the essential part of the arguments of the discourse on the application of common law: deduction and policy mode.<sup>31</sup>

In the picture that prevails in the Anglo-American jurisprudence and discourse on law application, the process of applying the law can be non-ideological precisely thanks to the use of deductive reasoning and the formulation of arguments based on the structure of deductive reasoning in the discourse on law application. According to Kennedy, deduction also protects those law application decisions (and thus also interpretative decisions) that resolve 'ideologised group conflicts', and thus those conflicts which constitute the political, as defined by Chantal Mouffe, against ideology.

The condition for a non-political decision being possible is therefore choosing the correct method for interpreting the text, as well as the method of drawing conclusions from the relationship between the established meaning of a particular legal text and the facts of the case pending before the law applying authority, which is to be resolved. According to the prevailing discourse on law application reconstructed by Kennedy, the 'non-ideological' nature of the process of law application is supposed to depend on, in the 'weaker' version, 'depersonalising' the process, and in the stronger version, 'objectifying' it.<sup>32</sup>

Kennedy indicates the reasons why, according to representatives of the dominant trend of positivist jurisprudence in the United States, the use of deduction in the process of law application (and thus also at the stage of legal interpretation)

<sup>29</sup> D. Kennedy, *A Critique of Adjudication*, Harvard 1997.

<sup>30</sup> *Ibidem*, p. 97.

<sup>31</sup> *Ibidem*.

<sup>32</sup> *Ibidem*.

leads to the depoliticisation of legal reasoning and an objective result. Acceptance of the role of deduction and the consequences of its application is connected with the acceptance of a number of more general premises. Above all, it is assumed that lawyers resolve legal disputes correctly by determining the meaning of legal texts which, firstly, are considered valid in accordance with the normative concept of the sources of law; secondly, they express precisely one applicable norm for a given case (the *ratio decidendi*). The meaning of this single, case-specific applicable norm (which is to be applied in further cases in line with the principle of a binding precedent) is unclear and must therefore be clarified through deductive reasoning.<sup>33</sup> Kennedy writes about the 'analytical' or 'semantic' process of 'identifying the definitions of the terms in the norm or the "meaning" of the norm taken as a whole.'<sup>34</sup>

It should be noted that this is not a deductive conclusion whose relevance to the process of law application has been described by the Polish, or more broadly – continental – theory of law. Deduction, when classically understood, is situated within the framework of the theory of legal deductions, where it constitutes the basis for legal logical deductions, whereby general norms provide the basis for deriving subsequent norms which have a narrower scope of normativity or application. The so-called 'legal syllogism', which is applied after the process of inferring norms, after applying legal conclusions and determining the meaning of norms, also has a didactic basis.

Kennedy's reconstruction of deduction from the American discourse on law application is therefore not easy to recast in continental conceptual categories. In a variety of contexts, it seems to occupy a place 'between' legal conclusions and the directives of legal interpretation. A judge working in a deductive 'model' always moves from abstraction and general statements to the concrete. The objectivity of the process of interpretation is ensured by the use of deduction since a more particular norm, deductively interpreted from a more general norm, is equivalent to that norm in the sense that these deductive 'modifications', which consist in the clarification of the meaning of the words used in the initial rule, have a logical – depersonalised – basis.<sup>35</sup>

The need to apply deductions in legal interpretation as part of the discourse on the application of common law is, according to Kennedy, due to the fact that the words in a norm that is considered valid and relevant in a given case can be inter-

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<sup>33</sup> Ibidem, p. 98.

<sup>34</sup> Ibidem.

<sup>35</sup> "The deductive mode excludes the judge's ideology because the subrule the judge chooses is the same as the more abstract valid authoritative rule, except for the logically necessary permutations that come from unpacking the meaning of its terms". – Ibidem.

preted in a number of possible ways. The key to making an interpretative decision based on a deduction is the specification of the meaning of words, on the assumption that this will solve the interpretation dilemma without undermining the legitimacy and validity (authority) of the legal norm. Both in the case of the interpretation of precedents and statutes, the result of such an interpretative deduction may be a new rule which from the very beginning, however, existed *implicitly* within the framework of the rule that can be directly interpreted from a specific text.<sup>36</sup> As can be seen, such an approach to the discourse of law application blurs the distinction – well-established in the continental theory of law application – between interpretation and the legal conclusions (in this case, the ones which are logical, based on deduction) that are made before the fundamental phase of interpretation.

These two – partially different – ways of using deductive arguments correspond, somewhat, to the ways of identifying the role of deduction in the civil law system, as was indicated above. First, according to Kennedy, when the American discourse refers to ‘deductive legal reasoning’, what is meant is syllogistic reasoning, whereby the consequence of applying the law, the ‘conclusion’ in the reasoning, is arrived at through recognising the truthfulness of a statement about a certain factual state of affairs, and the truthfulness of a statement on the validity of a legal norm of a certain meaning which is pertinent to the case at hand.<sup>37</sup> Nevertheless, by clarifying the meaning of the text, the result of a deductive interpretation does not create a new subrule – a general and abstract norm – through precisely defining the meaning of the text, the scope of application, and the scope of normativity. In the language employed by legal practitioners, the norm is ‘merely applied’, the outcome of using a norm is merely an illustration of its inherent ‘logic’ and is not an occasion to ‘interpret’ it.<sup>38</sup> In the discourse of law application within the common law system, ‘interpretation’ has a much narrower meaning than that adopted here. Kennedy rightly suggests that the term is often applied to situations where, in the opinion of an observer of the law application process, the judge has influenced the shape of the legal norm applied in the specific case. In other words, ‘interpretation’ is a creative process, an activist attitude of the subject applying the law; an example of the use of discretionary power where the ‘mere application’ of the norm was not possible.

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<sup>36</sup> Ibidem.

<sup>37</sup> “[L]egal reasoning is deductive when a rule states a factual predicate for a legal consequence, and the judge applies the rule by stating that the definitions of the terms in the rule correspond to the facts of the particular case”. – Ibidem, p. 101.

<sup>38</sup> Ibidem, p. 102.



However, when this type of deductive argument is viewed from a different perspective, it should be stressed that it is a 'deduction' in the strict sense of the word: a deduction that is the basis of syllogistic reasoning. Deductive interpretation only leads to the clarification of definitions, the clarification of meanings, which together with statements concerning the facts of the case automatically lead one to the precise shape of the law application decision. The use of deduction does not create a lower-order norm of a more precise meaning; rather, at a certain level of generality, it is only an indication of how to unequivocally resolve a particular class of cases. Prior to such deductive interpretation, the initial norm would raise doubts as to the direction in which the case should be resolved.<sup>39</sup>

This kind of reasoning would therefore constitute a second kind of deduction within the discourse of law application. The first stage of diagnosing such reasoning is to show that, in a given case, lawyers present several different proposals for understanding the meaning of the legal norm considered appropriate for resolving the case. These competing understandings will consequently lead to diametrically opposed results in the law application process. Each of the proposals is still general, referring to narrower classes of situations, and not to the individual addressee of the legal text. The choice of one of the interpretative proposals by the judge is not justified by the proper clarification of the definition of the names used in the original text or by the way in which the text thus clarified refers to the specific facts of the case, as is the case with the first kind of deduction. The choice is accompanied by arguments defending the appropriacy of a more concrete version of the authoritative normative statement which will consequently refer to similar cases in the future.<sup>40</sup>

It is no coincidence, therefore, when Kennedy rightly observes that the first type of deduction is characteristic of the continental model of applying statutes and precedents; the second type of deduction is, in turn, characteristic of the Anglo-American legal culture, as it eludes both the continental normative theory of the sources of law, and the formal-positivist model of law application. Kennedy somewhat vaguely adds that the correctness of interpretation using the second type of deduction is determined by the correctness of the restatement of the norm at a lower level of generality. The error of the other deductions, in turn, was conditioned by a 'logical error' brought about by moving from the general to the particular.<sup>41</sup>

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<sup>39</sup> Ibidem.

<sup>40</sup> Ibidem, pp. 102–103.

<sup>41</sup> Ibidem, p. 103.



## Policy Arguments in Duncan Kennedy's Theory of Adjudication

After this outline of deductive arguments, it is time to address the difference between deduction and policy arguments. Duncan Kennedy directs one's attention to three fundamental differences. The first concerns situations in which the use of policy arguments is acceptable, the second concerns the 'content' of allowable policy arguments, and the third covers the model of the decision-making process in which one also distinguishes the determination of the meaning of legal texts.<sup>42</sup>

First, a policy argument is possible in two different situations: when the application of deduction and argumentation does not allow a clear solution to the legal problem to be established, and when the legal text itself which is relevant to the case requires the consideration of extra-deductive reasons. One encounters the first situation when the legal text is insufficient, despite the use of deductive reasoning, for a precise resolution of the case; or when it is possible to formulate a policy argument which annuls the result of the deduction. One encounters the second situation when, using deductive reasoning, one comes to the conclusion that the intention of the author was to take policy arguments into account.<sup>43</sup> In the first scenario, therefore, to use the language of Polish legal theory, one deals with a gap in law and the need to fill it, while the second situation may involve interpretation *contra legem* and 'breaking' the literal meaning, for various reasons. The second scenario involves a variety of 'extra-systemic references' in the form of general clauses.

Secondly, according to Kennedy, the policy arguments in the discourse on the application of common law differ in terms of 'content' from deduction. The object of the policy argument is the purposefulness of an unambiguous legal norm, from the perspective of certain extralegal values, such as morality or utility.<sup>44</sup> Thirdly, and finally, the pattern of making and justifying law application decisions involving the use of policy arguments requires the consideration of a specific 'force field' which is constructed upon a number of ontological and epistemological assumptions.

There are several conditions which allow for the correct conceptualisation of policy arguments and the recognition of their admissibility in the dominant liberal-positivist discourse on law application. It is only when all of these conditions are met that the 'force field' within which policies operate can be used to formulate arguments in defence of a particular law application decision.

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<sup>42</sup> Ibidem, pp. 98–100.

<sup>43</sup> Ibidem, p. 99.

<sup>44</sup> Ibidem.

Firstly, it is assumed that there is a multiplicity of policies which can be taken into account in the process of interpreting legal texts and formulating law application decisions. These 'policy requirements', to use Ronald Dworkin's terminology, are in constant conflict with each other.<sup>45</sup> The manner of 'balancing' the rules, i.e. the decision as to which policy should be given precedence in a particular case, or to what extent more than one policy requirement should be taken into account, is determined by external, extralegal criteria – for instance, economic or moral. It would seem that such an approach to the operation of policies by liberal-positivist lawyers in the United States can be reconciled, *prima facie*, with the agonistic approach to the political adopted in this paper.

Secondly, a legal rule that is the result of a policy argument being deployed is an expression of a 'compromise' between conflicting policy requirements. The content, the exact meaning of the rule, is an expression of a precise demarcation of the extent to which the interest of certain parties in a legal conflict is realised, by delimiting the extent to which that interest is realised.<sup>46</sup> Positivist lawyers tend to use policy arguments to highlight the compromise character of a decision that is based on the balancing of policies, rather than to highlight the hegemonic dimension thanks to which it can be seen that the stronger party has power over the discourse at a given moment and imposes the meaning of legal texts. What is more, at the very least, the intersubjective nature of the criteria which allow the resolution of this conflict between different policies is emphasised. In other words, it is possible to answer the question of what grounds, in a given type of court case, it is necessary to precisely reconcile different claims about the correct meanings of certain legal texts, which stem from different policy requirements. Also, this element of the picture of interpretation and application of the law cannot be reconciled with hermeneutic universalism and the agonistic concept of the political, where conflict is a Lyotardian 'différend', and its resolution is the outcome of a momentary power relationship between the representatives of conflicting social groups. Thirdly, as follows from the first and second aspect, the result of applying the policy arguments can potentially be an infinite number of legal rules, each of which is the result of a different balancing of conflicting policies.<sup>47</sup> Fourthly, the method of choosing the correct legal rule that can be directly applied to a specific case pending before the court is to 'balance' conflicting policies.

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<sup>45</sup> Ibidem.

<sup>46</sup> Ibidem.

<sup>47</sup> Ibidem, p. 100.

## Conclusions

In this paper, I sought to answer the question concerning the status of the theory of interpretation according to critical jurisprudence, with particular reference to the works of Duncan Kennedy, the founder and one of the most prominent representatives of the Critical Legal Studies movement in the United States, one of the most significant currents in critical legal theory. Answering this research question, I argued that within critical jurisprudence, the status of the theory of interpretation is, above all, political. This political nature of the philosophy of interpretation is conditioned by objective (structural, agonistic and social) factors, as well as subjective factors, i.e. those concerning the person of the interpreter, their cognitive biases which are due to their position within social antagonisms, intellectual formation and personal life experience. When the theory of legal interpretation emerging from Kennedy's works is viewed from the perspective of the four different 'levels' at which the theory of legal interpretation can function in Solum's conception, which I referred to at the beginning of my paper, it should be stated that it has a primarily metatheoretical status, though one can also find normative elements therein.

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