METHODS OF LEGAL REASONING

Law and Philosophy Library

VOLUME 78

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Springer

A C.I.P. Catalogue record for this book is available from the Library of Congress.

ISBN-10 1-4020-4936-6 (HB)
ISBN-13 978-1-4020-4936-1 (HB)
ISBN-10 1-4020-4939-0 (e-book)
ISBN-13 978-1-4020-4939-2 (e-book)

Published by Springer,
P.O. Box 17, 3300 AA Dordrecht, The Netherlands.

www.springer.com

Printed on acid-free paper

PREFACE

Anyone reflecting on the methodology of legal reasoning faces a difficult task. The number of methodological theories in jurisprudence and the vast literature on the subject are not the only problems that have to be taken into account. Perhaps the most striking difficulty concerning the methodology of legal argument is the heated debate between jurists, legal theorists and philosophers of law that has been recurring since at least nineteenth century.

Therefore a justification is needed for writing yet another book concerning the methods of legal reasoning; a book that aims to cover a lot of what has already been proposed in legal theory. We believe that there is such a justification. First, the perspective that we adopt in the present book is unique, at least in some respects. We venture to look at the methodology of legal reasoning "from the outside", i.e. from a more general, philosophical perspective, while taking into account the "hard reality" of law. This perspective enables us to ask questions about the justification for the methods of legal argument presented.

Second, we do not want to defend one, paradigmatic conception of legal reasoning. On the contrary, we put forward the thesis that there is a plurality of argumentative methods. The plurality, however, does not lead to relativism in legal decision-making.

Third, we reject any hierarchy of the methods of legal reasoning, and take the view that one can speak only of the precision and flexibility of different methodologies.

Finally, we would like to show that the methodological conceptions of jurisprudence constitute a coherent element of the humanistic methodology. The important aspect here is that the methodology of legal argument is much more precise and much better developed than the "general" humanistic methodology. However, this does not mean that there are no peculiarities of legal methodology, as we try to highlight in the course of our presentation.

This is a substantial revision of our book that appeared in Polish under the title "Metody Prawnicze" (Zakamycze Publishing House, Kraków 2004). Chapters 1 and 3 have undergone the biggest revision and a new chapter 6 has been added.

Jerzy Stelmach, *Bartosz Brożek*
Kraków – Kiel, September 2005

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CHAPTER 1

CONTROVERSY OVER LEGAL METHOD IN THE NINETEENTH AND TWENTIETH CENTURIES

1.1 THREE STANCES

A fundamental question that already preoccupied jurists in Roman times concerned the existence of a "legal method". A positive answer to that question led, in turn, to controversy over how to characterize the method, or methods, used in legal reasoning. Consequently, three substantially different perspectives on the methodology of legal argumentation developed in nineteenth and twentieth century legal philosophy.

1.1.1 The Rejection of Method

The first of these stances, by far the rarest, although very important for the purposes of the discussion in question, not only puts into doubt the scientific character of jurisprudence, but questions the very existence of any legal methods.

Kirchmann. This opinion was expressed, *inter alia*, by von Kirchmann, who in 1847 delivered a lecture entitled *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*. Attacking the historical school established by Savigny and Puchta, Kirchmann not only criticized the condition of jurisprudence but even put into doubt the usefulness of legal knowledge, which he labeled valueless and parasitic.[1]

A similar, although less radical, stance was adapted later by Hutcheson and the *Critical Legal Studies* movement.

Hutcheson. Hutcheson, a representative of the intuitionist version of American realism, claimed that a judge who has to decide a concrete case must have recourse to his own intuition and imagination, since every case is only a stimulus to which the judge reacts in order to make a good (just) decision. This reaction is an irrational, intuitive, or emotional *hunch*, a *tentative faculty of mind*, a kind of imagination or intuition that is characteristic of good lawyers.[2] Therefore, there is no objectively reconstructible method of legal reasoning.

Critical Legal Studies. The representatives of *Critical Legal Studies*, in turn, believe that the traditional methods of investigating and teaching law are useless. For them, "law is politics"; consequently, there is no such thing as the method of law. The space for the possibility of critical studies is created only when an anti-positivist, anti-legalistic and anti-formal attitude towards the law is adopted. The consequent critique leads to the "deconstruction" of traditional methodology. Some elements of this way of thinking can be traced in contemporary postmodern philosophy. From a general philosophical perspective it has to be observed that postmodernism "begs the question" while showing the bankruptcy of all methods, for it does it with the use of some methods, like deconstruction. A more sympathetic account of such schools as *Critical Legal Studies* illustrates that postmodernism does not claim the bankruptcy of methodology, but only shows precisely its limitations, relativity and pluralism.

1.1.2 Methodological Heteronomy

According to the second, more moderate stance, jurisprudence has some features of a "real science" but only under the assumption that it uses methods of other scientific disciplines, like mathematics, logic, physics, biology, or – in some cases – linguistics, sociology or economics. Jurisprudence enjoys, therefore, the status of a science but only at the cost of losing its methodological identity and autonomy. This stance cannot be analyzed exclusively within the context of Droysen and Dilthey's well known distinction between naturalistic and anti-naturalistic paradigms in science. Jurisprudence can take advantage not only of the methods of social sciences and humanities, but also of methods developed in logic and natural sciences. Such distinctions as "naturalistic – anti-naturalistic" are, in fact, pointless, and as far as legal theory is concerned – false. In jurisprudence, "outside" methods are very rarely straightforwardly applied. Rather, there has always been a kind of adaptation of methods to suit the specific needs of lawyers. We will return to this point in Section 1.2 of the present chapter.

Analytic philosophy of law. The most rigorous attempts to incorporate mathematical, logical and linguistic methods into jurisprudence have been made by analytic philosophers. In analytic legal theory, as in analytic philosophy, one can distinguish between two "methodological types" or "wings": logical (*horse-shoe analysis*), and linguistic (*soft-shoe analysis*), which is usually confined to the analysis of ordinary language.

The proponents of the "hard", logico-mathematical methodology in jurisprudence developed deontic logics, i.e., logics of such concepts as

"forbidden", "obligatory" and "allowed". One should also acknowledge their formal attempts to deal with concrete legal-theoretic problems, such as the idea of a legal system, and the theory of legal rules and principles. Among the "hard" analytic philosophers who contributed to jurisprudence, one should mention G.H. von Wright, O. Becker, J. Kalinowski, A. Ross, J. Woleński, C. Alchourron and E. Bulygin.

The "soft" methods of analysis were applied by those philosophers of law who followed the Oxford School of Ordinary Language and the "second" philosophy of L. Wittgenstein. These thinkers commonly prioritized ordinary language over artificial formal systems. They did not attempt to reform given conceptual schemes. On the contrary, their aim was to describe as precisely as possible how analyzed concepts function in ordinary language. Among "soft" analytic legal philosophers the name of H.L.A. Hart deserves special attention.

Legal realism. Legal realism is, in turn, an example of naturalistic methodology in law. According to realists, jurisprudence can be labeled "a science" only when it uses methods developed in natural sciences, or at least in empirically oriented disciplines such as sociology or psychology. Legal theory should, moreover, be descriptive in character. This kind of methodology was employed by the school of free law, American realism, sociological jurisprudence, Scandinavian realism and L. Petrażycki.

School of free law. The conception of naturalistic jurisprudence was designed to oppose legal positivism, which was criticized, *inter alia*, by representatives of the school of free law. In a work, *Methode d'interpretation et sources en droit privé positif*, published in 1899, Geny says that continental positivism assumes wrongly that the only source of law is statute law. He goes on to argue that in the process of legal interpretation one should take into account also three other sources of valid law: customs, authority and free investigation of a judge. Independent court-decisions are, ultimately, the results of the judge's will, the needs of society and balanced private interests. The main representative of the school, Kantorowicz, advanced similar theories.[3]

Petrażycki. Petrażycki aimed to develop an adequate theory of law. He argues that such a theory can be constructed when based on psychology of emotions, which he developed himself. The psychological analysis enables Petrażycki to identify a class of phenomena that is characteristic both of moral and legal emotions.[4]

American realism. American legal realism, like sociological jurisprudence, applied the methods of empirical sociology, and also of psychology and economics. Questioning positivist formalism, American realists claimed to turn to practice and to investigate "real law," especially the behavior of judges. The instigator of this movement was Holmes. In his "manifesto" paper *The Path of the Law*, Holmes argued that, in order to explain what law is, it is necessary to adopt the perspective of the hypothetical "bad man", who is not interested in the problem of justifying legal decisions or the rationality of law; rather, he is concerned with predicting how the judge will act in given circumstances.[5] Amongst the most important representatives of American realism one should mention Llewellyn, Frank and Moore.[6]

Sociological jurisprudence. From the many sources of American sociological jurisprudence Comte's sociology, Bentham's utilitarian philosophy, German jurisprudence of interests, and American legal realism should be mentioned. The most important representative of this school is Pound. According to him, law should realize and protect six social interests: common security, social institutions (like family, religion and political rights), sense of morality, social goods, economic, cultural and political progress and protection of an individual's life. The last of these "social interests" Pound deems to be the most important.[7] In order to realize those goals a new sociological jurisprudence, Pound argues, must be developed.[8]

Scandinavian realism. Scandinavian legal realism, like American realism, regards law as an empirical fact. However, American realists treated law as a kind of behavior of a certain social group, consisting of people professionally preoccupied with resolving conflicts; Scandinavian realists, on the other hand, searched for the "essence" of legal phenomena in the psychological reactions of individuals. Hence such concepts as "law" or "obligation" are regarded by Scandinavian realism as psychological facts. The father of this school, Hägerström, deems valueless all ideas and concepts that are not developed within the context of what is real. Therefore, the world of norms and rules propounded by natural law, or by legal positivism is unacceptable. Concepts such as "law", "obligation" and "validity" are purely metaphysical without a reference to empirical facts. They make sense only if we associate them with concrete emotions or psychological reactions caused by the use of such notions. Lundstedt and Ross are among other representatives of the Scandinavian school.[9]

Apart from analytic philosophy and legal realism, there are also other traditions that utilized methods developed in non-legal disciplines. Attempts have been made to adapt to legal aims methods found in systems theory, economics, argumentation and hermeneutic philosophies. As a result, several legal-theoretic conceptions have developed, and among them the systems theory of law, the economic analysis of law, theories of legal argumentation and legal hermeneutics.

Systems theory. Systematic analyses were applied already in nineteenth century sociology, as exemplified in Comte's work. Describing the methods of sociology, the founder of positivism offered some examples from biology, demonstrating analogies between living organisms and society. This idea was further developed in the 1970s by two biologists, Maturana and Varela, who formulated the theory of so-called autopoietic systems. An autopoietic system controls the process of its creation (a nice example of such a system is a cell). The opposite are heteropoietic systems, which are incapable of self-regulation, i.e., they must be controlled from "the outside". In the 1980s attempts were made to formulate a theory of autopoietic systems in the social sciences, including legal theory. That this happened was mainly due to Luhmann and Teubner, who claimed that autopoiesis, i.e., the ability to self-regulate, is a characteristic of some social systems in developed societies. A legal system, regarded as a set of communicative acts, can be considered to be such a system. Its function is not, as is usually claimed, to regulate social life and to solve social conflicts, but to secure and promote the normative expectations of a society.[10]

Although the ideas of Luhmann and Teubner were inspired heavily by biological and sociological theories, it should be noted that Kelsen, who developed the concept of a "pure theory of law" and advocated the methodological autonomy of law, wrote in a somewhat similar spirit.

Economics of law. The economic school developed in the 1970s in the USA. The school, being a conservative movement, rejected the more "left" *Critical Legal Studies*. Its representatives made use of the ideas of British utilitarianism, especially the work of J. Bentham and J.S. Mill, and of the theses of American realism and sociological jurisprudence. The main representative of Law & Economics, Posner, tried to show that the processes of creating and interpreting law comply with some economic rules. The law is, or at least should be, economically effective, i.e., its aim is to minimize social costs and promote the increase of social welfare. A rational decision is a decision that is economically

justified, and, hence, leads to the maximization of the welfare of the given society.[11]

The argumentation and hermeneutic theories of law are far harder to interpret and analyze than those theories discussed above. We will analyze them in detail in Chapters 4 and 5. Here we limit ourselves to a few general remarks.

Argumentation theory. Contemporary argumentation theories are based on various philosophical traditions, from ancient logic, rhetoric, dialectics, hermeneutics and eristic to contemporary conceptions of analytical ethics (Stevenson, Toulmin or Baier), constructivist theory of practical advice (Lorenzen and Schwemmer) and the practical and theoretical discourse of Habermas. It is justifiable, then, to say that argumentation theories are based on methodological conceptions developed in other scientific disciplines (philosophy, logic, linguistics).[12]

Legal hermeneutics. Similar things can be said of legal hermeneutics. The nineteenth and twentieth century concepts of legal hermeneutics developed as a result of the absorption of various kinds of general hermeneutics: the "methodological" as created by Schleiermacher and Dilthey, and the "phenomenological" as developed by Heidegger and Gadamer. Legal philosophy also witnessed some attempts to develop analytic hermeneutics, based on Wittgenstein's later philosophy. One should bear in mind, however, that in Roman times jurists had already attempted to describe the most important principles of legal method constituting a special legal hermeneutics. In the seventeenth and eighteenth centuries several works devoted exclusively to legal hermeneutics were produced; in this context one should mention Eckhardi's *Hermeneutica iuris*, *recensuit perpetiusque notis illustravit*, Wittich's *Principia et subsidia hermeneuticae iuris*, or Sammet's *Hermeneutik des Rechts*. The transition between old legal hermeneutics and the contemporary version that adopts the ideas of general philosophical hermeneutics is marked by von Savigny's theory of interpretation, outlined in *Juristische Methodenlehre*.[13]

1.1.3 Methodological Autonomy

The third of the stances presented here assumes that jurisprudence enjoys, at least to a certain degree, a methodological autonomy and develops its own, "inner" criteria of what constitutes a science. In this case we have to look at normative anti-naturalism, which ultimately declares that legal science should work out its own methodology, different from that of logic, mathematics and natural sciences on the one

hand, and that of other social and humanistic sciences on the other. This thesis, concerning the methodological autonomy of jurisprudence, is defended, usually, with ontological and pragmatic arguments. As a consequence, jurisprudence determines itself the minimal – material or procedural – conditions for the acceptance of its theses. Naturally, the "border" between this stance and the two discussed earlier is not as sharp as it may seem at first glance. Autonomy cannot mean methodological isolation. Lawyers have always employed not only "their own" methods, but also techniques developed in other disciplines. Thus, controversy arises over the question of whether jurisprudence is methodologically autonomous, and not over whether one can use, in addition to "legal" methods, tools adapted from other sciences. The latter question is usually answered positively. According to the theory of methodological autonomy, however, one can make use of such "adapted" methods only if they support what is achieved by specifically "legal" arguments.

Roman jurisprudence. The thesis that law is methodologically autonomous was advocated by Roman jurists. Although Roman jurisprudence did not develop any general philosophy of law, as Roman lawyers concentrated on concrete legal issues, nevertheless it addressed some problems of an abstract nature concerning legal ontology, axiology and methodology.[14]

As regards methodology, several types of written works occurred. Among them one should mention problem-oriented treaties (*Quaestiones, Disputationes, Epistulae* and *Digesta*), commentaries, textbooks (mainly on *Institutiones*), works concerning important legal concepts and rules (*Regulae, Definitiones, Sententiae, Opiniones, Differentiae*), instructions for civil servants (*Libri de officio*), monographs and collections of *formulae* and court decisions. As a by-product of their main "practical" activity, the Roman jurists constructed the fundamentals of general legal disciplines: methodology and theory of interpretation. In particular, such concepts as *definitio, regula, interpretatio* or *rationes decidendi* were elucidated and defined. Furthermore, several important directives of legal interpretation were formulated.[15] Even today, hundreds of Roman legal topoi are used both in legal practice and for theoretical purposes (especially in relation to theories of argumentation, see Chapter 4).

Historical school. The idea of the "full" methodological autonomy of legal science was expressed clearly in two nineteenth century schools of thought: the German historical school and legal positivism. The first step towards postulating this autonomy was the "detachment" of legal

philosophy from general philosophy. The step was taken by Kant in "Metaphysical elements of legal theory" and by Hegel in "Principles of the philosophy of law". But the beginning of the heated debate about legal method is marked by Savigny's *Juristische Methodenlehre*.

Savigny rejects both the *a priori* deductive methodology offered by natural law theorists and formal-dogmatic methods, which, until then, had been used in legal science. Instead, he proposes empirical research of law as a historical social fact. The law is a product of the national spirit, originating from the natural inner forces of that spirit. It is not, therefore, a simple expression of the will of the legislator.

One has to remember, however, that although Savigny's conception contributed to the establishment of the methodological autonomy of legal sciences, it was based on ideas from "outside the law", especially from Hegel's philosophy and Schleiermacher's hermeneutics.

Legal positivism. From this point of view, legal positivism seems to be methodologically "purer". However, despite appearances, the term "positivism" has been used in reference to different conceptions and schools. One can maintain that, in order for a theory to count as positivistic, it has to include at least some of the following seven theses: (1) legal norms are created and not "discovered", as the proponents of natural law maintain, (2) creation of law is an expression of the will of the sovereign, (3) law consists exclusively of norms or rules, (4) lawyers should obey the law without any exception, i.e., all legal decisions should be made on the basis of legal norms (rules), (5) there exists no necessary connection between law and morality or between the law as it is and as it should be, (6) research of legal concepts has to be distinguished from historical, sociological, or psychological research, (7) the legal system should be considered a "closed logical system", in which every decision can be inferred from predetermined norms or rules using logical tools.

According to these criteria, Austin's theory of law, the continental *Begriffsjurisprudenz*, Kelsen's normativism and Hart's analytic legal theory count as positivist. By contrast, Dworkin's conception of law challenges three of the seven theses mentioned above (3, 4 and 5). Therefore, Dworkin's work cannot accurately be classified under the heading "positivism".

Within legal positivism, substantial effort has been devoted to analysis of fundamental legal concepts. This analysis serves both as a basis for carrying out the process of legal interpretation and as the conceptual framework for legal dogmatics and philosophy of law. Such analysis was carried out by all the main representatives of legal positivism, including

Austin, Hart and Kelsen. The most detailed formal-dogmatic analyses of law were offered by proponents of the continental version of legal positivism that – not without a reason – is called *Begriffsjurisprudenz* (jurisprudence of concepts). One should mention in this context the names of: Jhering, Geber, Winscheid, Binding, Bergbohm, Merkl, Liszt, Thon or Bierling.

Did legal positivism persuasively demonstrate that jurisprudence is a special kind of normative science that has its own methods of argument? It seems that the answer should be negative. The only exception is Kelsen's *Reine Rechtslehre*, for although radical, this conception is consequential enough to be successfully defended. The "methodological purity" of other kinds of legal positivism is, however, questionable. Positivist analysis very often mixed up elements from the sphere of what is (*Sein*) and the sphere of what should be (*Sollen*). The methods it employed often had a sociological or psychological pedigree (Austin, continental positivism, Jhering's jurisprudence of interests).

1.2 METHODS OF LEGAL REASONING

What has been said so far shows that it is hard to settle the discussion concerning the methodology of legal reasoning. There are several different stances in this controversy: on the one hand, it is questioned whether methods of legal argumentation have any autonomy, or even whether such methods exist, whilst on the other hand, philosophers defend the autonomous character of legal methodology. Another noteworthy aspect of the debate is its terminological chaos, which makes reaching a clear conclusion even more elusive. This terminological chaos has already been displayed here, at the most general level. We wrote about "the methods of legal reasoning", "the methods of legal argument", "the method of jurisprudence", and "the methods used by lawyers". In order to clarify some basic terminological issues, let us identify three different categories of application of "the methods of legal reasoning". First, those methods can be applied in legal practice (by judges, prosecutors, barristers) in the process of creating and interpreting law. Let us call this application of the methods in question *practical*. Second, one can speak of *legal-dogmatic* application of those methods, i.e., their application within specialist analyses carried out in various areas of law. Finally, one can point to the *theoretical* application thereof; this occurs in legal theory and legal philosophy.

The philosophical traditions described in the previous section each explored different aspects of the application of "the methods of legal

reasoning", only rarely confining their analysis exclusively to one category. For instance, legal positivism developed "tools" both for legal practice and legal dogmatics. Legal realism proposed the use of psychological and sociological methods both in legal theory and legal practice. Analytic philosophy proposed methods to be used primarily in philosophical reflections on what the law is, but those methods could just as easily be applied in legal dogmatics and legal practice. Hermeneutics, in turn, attempted to reconstruct the basic structures of any act of understanding, i.e., legal-theoretic and legal-dogmatic as well as "practical". Finally, argumentation theories can easily be applied both in legal practice and legal dogmatics.[16]

One can make similar remarks – concerning potential applicability in two, or even three, different categories – about most conceptions of method of legal reasoning presented above. The same may be said of the structure of this book: although emphasis is placed on the methods that can be used in legal practice, we present also "tools" that are applicable to legal-dogmatic and legal-theoretic questions. In any event, the "borders" between "practical", "legal-theoretic" and "legal-dogmatic" applications of a specific method are often far from sharp.

The next terminological problem we encounter is the lack of a commonly accepted definition of "a method". We could have proposed one of our own, saying, for example, that a method is a set of rules of proceeding, that determine what actions must be undertaken in order to achieve a given aim. We have not done so, for any definition could easily dismiss many legal-theoretic traditions as not offering a proper "method". Clearly, this would result in a severe restriction on what we discuss.

Analysis of legal methodological theories enables the separation of those theories into three groups. Each group offers a different perspective on whether a method of legal reasoning can be said to exist, and on the autonomy of that method. According to the first group, lawyers reason applying no identifiable method. The second group claims that lawyers do use certain methods, but those methods are adapted from other disciplines: sociology, economics, linguistics or psychology. Within this group, there are two subtypes: the first claims the "pure adaptation", i.e., the method as used in law does not differ from the method as used in its original discipline. The second subtype, in turn, suggests that law's adopted methods are modified to take into account the special character of law. Finally, the third group asserts both the existence and the autonomy of specifically 'legal' methods of reasoning.

It is difficult to settle the controversy between proponents of the three stances. It seems, however, that there are strong reasons to consider abandoning both the first conception, which questions the very existence of methods of legal reasoning, and the third, which claims their full autonomy. We have already indicated that the first stance is troublesome, in our discussion of Hutcheson's ideas and the *Critical Legal Studies* movement. Is not it true that Hutcheson's hunch can be regarded simply as a kind of intuitive method? Further, *Critical Legal Studies* scholars tend to deconstruct all legal methods, i.e., to show all the assumptions standing behind the traditional methodology. Such deconstruction does not inevitably lead to the conclusion that there are no methods of legal argument. Rather, it is possible to reach a more moderate thesis: that there is no unique method of legal reasoning. From this point of view, the *Critical Legal Studies* movement is not an example of the first stance, but rather recognizes the pluralism and relativism of the methods of legal reasoning.

Equally problematic are those theories which defend the autonomy of the methods in question. The only significant theory that asserts the claim to autonomy is Kelsen's. It is, however, based on very strong ontological assumptions and as such cannot serve as a commonly acceptable defense of the third stance.

These considerations allow us to formulate two conclusions. First, there is no unique, universally acceptable methodology of legal reasoning, as there is no "special" legal method. Both the heteronomy and the pluralism of such methods must be stressed. Heteronomy – because there exists no specifically "legal" method. Pluralism – because there exists no unique method of legal reasoning. Second, it is necessary to point out that the "heteronomic" methods used by lawyers are in a way "specific". This "specificity" arises because any method used in law is subject to certain modifications and limitations, mainly because the creation and interpretation of law are regulated by certain procedures imposed by valid law (think, for instance, of legal presumptions or the distribution of the burden of proof). This conclusion does not concern, of course, the application of the methods in question to legal-theoretic considerations.

Finally, it must be stressed that one cannot establish any hierarchy, or system of application of the different methods of legal reasoning. The order in which they are applied is determined by the individual case, the difficulties it involves, the interpretive context, and – perhaps most importantly – the methodological habits of the interpreter. Moreover, it is easy to imagine that the same "interpretive activity" could be taken as a manifestation of applying two different methods.

1.3 LOGIC – ANALYSIS – ARGUMENTATION – HERMENEUTICS

Below we will consider four methods used by legal practitioners and theoreticians: logic, analysis, argumentation and hermeneutics. Here, two questions should be answered. First, do those four methods exhaust the entire spectrum of methods used in legal thinking? And second: what are the relationships between logic, analysis, argumentation and hermeneutics? Are they independent of each other, or do they overlap?

It is difficult to answer the first question. On the one hand, one can name several "methods" that are not instances of one of the four mentioned. A good example is the psychological theory of Petrażycki. On the other hand, however, the four listed methods (or better: groups of methods) not only have a historically established position but also are applicable to all the spheres we described above, i.e., in creating and interpreting law, in legal-dogmatic analyses and in legal theory. Therefore there is some justification backing our choice.

As for the second question: the "borders" between logic, analysis, argumentation and hermeneutics are not sharp. In popular textbooks it is usually held that there are two types of analysis: descriptive and reconstructive. Descriptive analysis aims to describe how ordinary language functions. Reconstructive analysis, on the other hand, tries to reform ordinary language with the use of logical tools. In contemporary philosophy (and legal theory) a strict differentiation between logical and descriptive analysis is impossible. Elements of both types of analysis are mixed together, as in the case of the "third way" – between the Scylla of description and Harybdis of reconstruction – developed by J. Hintikka.[17] He proposes to build formal "explicatory models" that would aim, not at reforming ordinary language, but at precise explanation of some of its fragments.

Logic is therefore a tool of analysis. One could ask why we have decided to treat logic separately from analysis. There are several reasons. First, unlike "analysis in general", logic is rather a uniform method and can hence be defined relatively easily. Second, logical methods can be presented nicely from a historical perspective, which enables their consequent development to be tracked.

The relationship between logic and argumentation is more complicated, mainly because there are different theories of argumentation. Those theories reconstruct the ways in which we use arguments. Argumentation theories concentrate, then, on relationships between arguments, on comparing them, and on bigger structures consisting of

many arguments. They say much less about how concrete arguments are built. As regards this issue, two stances are possible.

According to the first, represented, e.g., by R. Alexy,[18] arguments should be built in compliance with the rules of logic. From this perspective, logic and argumentation are complementary. The second stance – exemplified in Ch. Perelman's new rhetoric – says that the arguments used in complex argumentation structures do not have to be logically correct. This does not mean, however, that Perelman regards logic as useless. Logical schemata may serve as a special kind of *topoi*. Moreover, many of the classical legal *topoi* that play a crucial role in rhetorical argumentation, as for instance *argumentum a fortiori* or *a contrario*, can be regarded as logically valid arguments. Nevertheless, logically invalid arguments can also be rhetorically effective. Therefore, in Perelman's conception, logic does not occupy any special position and is only a possible source of *topoi*. Argumentation and logic are not, on this account, complementary.

Informal analytic methods can also be reconciled with argumentation theories. For instance, economic analysis can serve both to build arguments and to provide us with criteria for evaluating complex argumentation structures. It must be admitted, however, that the relationship between analysis and argumentation is not inevitable. As already observed, the main aim of argumentation theories is to explain how different arguments are to be compared with others and measured; the problem of constructing arguments, fundamental from the point of view of logic and analysis, is not that important for argumentation theories. It should be added, however, that in contemporary legal theory some attention is paid to the structural features of argumentation resulting in the development of logics, which take into account aspects of the process of argumentation on the one hand, and create informal "logics of argumentation" on the other.

It seems, at least at first sight, that analysis has nothing to do with hermeneutics. It turns out, however, that even those two methods are linked in various ways. One example can be found in analytical hermeneutics. This is connected with the "later" philosophy of L. Wittgenstein. Many analyses of "language games", presented by Wittgenstein, resemble the methods and results of hermeneutic philosophy. Among the "analytic hermeneutic philosophers" one usually mentions: G.H. von Wright, P. Winch and W.H. Dray. Also some legal-theoretic works have an analytical-hermeneutic character, like for instance *Das Verstehen von Rechtstexten* by Hruschka, or some of Aarnio's works.[19]

Analytical hermeneutics cannot be easily classified as one of the two types of hermeneutics: methodological or phenomenological. It is much

closer, of course, to the methodological type, which puts text and the problem of its interpretation in the central place. However, phenomenological hermeneutics, which proposes an alternative-to-traditional ontology, does not have to contradict analysis either. One of the main representatives of hermeneutics, A. Kaufmann, paraphrased a well known phrase of Kant's, claiming that: "Analysis without hermeneutics is empty, while hermeneutics without analysis is blind".[20]

Some interaction, although not as clearly visible as those mentioned above, can be traced "in-between" hermeneutics and logic and hermeneutics and argumentation. The existence of such interaction should not be surprising, for all the four methods are accounts of the same phenomenon: human reasoning. On the other hand, the existence of some similarities and "common grounds" between logic, analysis, argumentation and hermeneutics does not mean that we can speak of one theory. Although we are considering four attempts to account for the same phenomenon, those attempts are drawn from diametrically different perspectives.

Finally, we must stress that the four essays presented below are independent of each other and are self-contained. Because of that, there are some repetitions in the course of the book. We have allowed them for the sake of the coherence of the presentation.

NOTES

1. See J.H. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft,* Berlin 1847, p. 14 ff.
2. See J.C. Hutcheson, *Judgment Intuitive*, Chicago 1938, p. 21.
3. See J. Stelmach and R. Sarkowicz, *Filozofia prawa XIX i XX wieku* [Philosophy of Law in 19th and 20th Centuries], 1st ed., Kraków 1998, p. 89 ff.
4. See L. Petrażycki, *Teoria państwa i prawa* [Theory of State and Law], v.I, Warszawa 1959–1960, pp. 72–73, 123.
5. See O.W. Holmes, "Path of the Law", in *idem*, *Jurisprudence*, New York/London 1994.
6. See K. Llewellyn, *Brumble Bush*, New York 1969, p. 12 ff.
7. See R. Pound, *Outlines of Lectures on Jurisprudence*, Cambridge 1943, p. 104 ff.
8. See H. Lloyd, *Introduction to Jurisprudence*, New York/Washington 1972, p. 366.
9. See A. Ross, *On Law and Justice*, London 1958, p. 45 ff.
10. See G. Teubner, *Recht als autopoietisches System*, Frankfurt am Main 1989, p. 49 ff.
11. See R. Posner, *Problems of Jurisprudence*, Cambridge/London 1990, p. 360 ff.
12. Cf. J. Stelmach, *Kodeks argumentacyjny dla prawników* [Argumentation Code for Lawyers], 1st ed., Kraków 2003, p. 31.
13. Cf. J. Stelmach, *Die hermeneutische Auffassung der Rechtsphilosophie*, Ebelsbach 1991, p. 19 ff.

14. Cf. W. Litewski, *Podstawowe wartości prawa rzymskiego* [The Basic Values of Roman Law], Kraków 2001, pp. 22, 51–52.
15. Cf. W. Litewski, *Jurysprudencja rzymska* [Roman Jurisprudence], Kraków 2000, pp. 23, 119–133.
16. Cf. R. Alexy, *A Theory of Legal Argumentation*, translated by R. Adler and N. MacCormick, Clarendon, Oxford 1989.
17. Cf. J. Hintikka, "Epistemic Logic and the Methods of Philosophical Analysis", *Australasian Journal of Philosophy* 46, 1968, pp. 37–51.
18. Cf. R. Alexy, *Theory . . .*, *op. cit*.
19. Cf. J. Stelmach, *Współczesba filozofia interpretacji prawniczej* [Contemporary Philosophy of Legal Interpretation], Kraków 1995, pp. 71–72.
20. Quoted after K. Opałek, "Główne kierunki niemieckiej teorii i filozofii prawa po II wojnie światowej" [Main Currents in the German Theory and Philosophy of Law After the Second World War], in *idem, Studia z teorii i filozofii prawa* [Studies in Theory and Philosophy of Law], Kraków 1997, p. 41.

CHAPTER 2

LOGIC

2.1 INTRODUCTION

Logical studies have a very long and rich tradition that dates back to antiquity. Despite this it is not easy to define logic. A consensus exists, however, on the fact that logic is about reasoning: it helps us to evaluate the validity of arguments. The question "which arguments are valid?" is usually, however, answered in the following way: "the ones in which the conclusion follows logically from the premises". In this way we come back to the question of the nature of logic, or – more precisely – of logical consequence.

A famous analysis of the notion of logical consequence was presented by A. Tarski.[1] Disregarding the details, one may summarize Tarski's findings in the following sentence:

> A sentence A follows logically from the set of premises Γ if and only if in every case in which the premises of Γ are true, A is also true.

The idea behind this analysis is that logic is a theory that describes the "transmission of truth". The "transmission" begins with the premises of an argument, and ends with the conclusion. The aim of logic, therefore, is to identify forms of argument that guarantee the transmission of truth: if the premises of those arguments are true, their conclusions will also be true.

In the previous sentence we used another notion that needs explanation. We said that the aim of logic is to indicate valid "forms of argument". But what are these "forms of argument"? Let us look at the following two arguments:

(1) If John is intelligent and hard working, he will succeed as a lawyer.
(2) John is intelligent and hard working.
Therefore: (3) John will succeed as a lawyer.

(1) If the weather is good, John will go swimming.
(2) The weather is good.
Therefore: (3) John will go swimming.

Let us substitute the sentence "John is intelligent and hard working" with p, and "John will succeed as a lawyer" with q. Similarly, let p denote "The weather is good" and q – "John will go swimming". The first of the arguments can now be presented as follows:
(1) If p, then q.
(2) p
(3) q
Naturally, using this substitution the second argument looks the same. We shall say that both arguments have something in common: they have the same *form*. It is relatively easy to speak of logical form in particular cases; it is however much more difficult to define it *in abstracto*. One may say that the logical form of an argument is determined by some key terms in natural language. In our example these are "If . . ., then . . ." and "Therefore". The set of key terms also includes "and", "or", "either . . ., or . . .". It is clear, therefore, that the key terms shall have special counterparts in the logical language. The counterparts are known as logical connectives.[2]

The role of logic is to designate certain forms of argument as valid. How can one know, however, that the designated forms are indeed valid? The first of the possible answers is that acceptance of a given logic is ultimately based on intuition: if the forms of argument indicated as valid by a given logic are in accordance with our intuitive understanding of what is valid, the logic in question is adequate. The problem with this solution is that, if intuition determines whether a given argument is valid or not, we do not need logic at all. One may try to overcome this difficulty by saying that the intuition in question is not just any "subjective intuition", but an intuition that is shared by many reasonable people. One may further observe that we are able to judge intuitively only relatively simple arguments; more complicated cases have to be analyzed using logical tools and we can trust logical theory in the complex matters when it does not lead to counter-intuitive solutions in the simple.

An intuitive judgment is fortunately not the only way to demonstrate the adequacy of a logical theory. Tarski's analysis of logical consequence, mentioned above, is of help here. It forms a basis for the so-called soundness and completeness theorems.[3] Almost every logical system consists of two parts: syntax and semantics. Syntax is a language-resembling structure, consisting of an alphabet, rules for constructing well formed formulas, rules of inference and axioms. Semantics, on the other hand, may be regarded as a mathematical model of the world. If every sentence that can be proved on the basis of the axioms and inference rules of a given

logic is true in all possible "world models" (and *vice versa*), the logic is said to be sound (complete). Speaking metaphorically, and somewhat loosely, the soundness and completeness theorems show that the language of a given logic "fits together" with the world, and therefore we have grounds for believing that the logic adequately indicates valid forms of argument.

This is not the end of the trouble, however. There exist various logics with different syntaxes and semantics, identifying different forms of argument as valid; moreover, the soundness and completeness theorems hold for each of them. Thus the problem arises of choosing between different logics that are sound and complete. The choice must be made according to certain criteria. One can, for example, try to evaluate which logic uses the semantics that best reflects the world. Intuition can also help in picking out the correct logic.

At the end of this short introduction, two additional problems should be addressed. Firstly, we have said that logical validity guarantees the "transmission of truth" from the premises to the conclusion of an argument. This does not mean, however, that each argument, which is logically correct, has a true conclusion. For this to be true it is necessary for the premises of the argument to be true. If the premises are not true, there can be no "transmission of truth". In this context internal and external justifications are differentiated. We shall say that an argument is internally justified if its conclusion follows logically from its premises. An argument is externally justified, on the other hand, when it is: (a) internally justified, and (b) its premises are true.

Secondly, one must mention the role that is usually ascribed to logic. In the philosophy of science one distinguishes between the context of discovery and the context of justification; the distinction is made in at least two different ways. First, a scientific discovery could be divided into two stages: the first ends with the formulation of a hypothesis of the analyzed phenomena (context of discovery), and the second serves to justify (test, falsify) the hypothesis (context of justification). Second, in every scientific discovery one may differentiate between two aspects: socio-psychological (context of discovery) and logical (context of justification). The socio-psychological aspect consists of all factors that influence the discovery – everything described by psychologists and sociologists may be of interest here. The second aspect – the logical – enables one to look at the scientific discovery as a purely rational undertaking, which meets certain criteria for accepting and refuting scientific theories. Irrespective of which version of the distinction is chosen, logic has a certain function only in the context of justification. Additionally, it is easy to relate the

distinction between both contexts to arguments other than scientific ones. In this way the theory of the logical character of the context of justification is valid universally, i.e., it concerns all kinds of argument.[4]

Below we present a kind of "history" of the search for the logic of normative discourse (including legal discourse). We shall not, however, pay much attention to chronology. We will rather try to show the basic ideas behind different logics of normative discourse; we will also concentrate on the criteria for comparing different logics, and the reasons for constructing new normative logics. We will discuss classical logic (propositional logic and first order predicate logic), deontic logic, the logic of agency and, finally, defeasible logic.

2.2 CLASSICAL LOGIC: PROPOSITIONAL LOGIC AND FIRST ORDER PREDICATE LOGIC

2.2.1 Presentation of Calculi

The history of contemporary logic began just over a hundred years ago with the publication of the works of G. Boole, C.S. Peirce, and – first and foremost – B. Russell and A.N. Whitehead. *Begriffschrift* (1902) by Frege, and *Principia Mathematica* (1910–13) by Russell and Whitehead constituted the turning point in the history of logic; both those works set the stage for the incredible development of logic in the twentieth century.

The two basic logics elaborated by Frege, Russell and Whitehead are classical propositional logic and first order predicate logic. The propositional calculus takes into account only those forms of argument, in which elementary sentences are basic elements. The elementary sentences can be, with just a few exceptions, identified with (grammatically) simple (not compound) sentences. The compound sentences have also a complex logical structure. Because of that, the sentence connectives must have logical counterparts. Those counterparts are called truth-functional functors (or sentential connectives).

The alphabet of propositional logic consists of propositional variables that are usually denoted by small letters p, q, r, etc. A propositional variable denotes an arbitrary elementary sentence. In the alphabet of propositional calculus one can also find symbols denoting the truth-functional functors (sentential connectives): negation ($\neg$), implication ($\rightarrow$), conjunction ($\wedge$) and disjunction ($\vee$).[5] In order to provide a full syntactic characterization of propositional calculus it is necessary to recall the rules of forming formulas, the rules of inference and axioms. According to the rules of forming formulas, all propositional variables are well formed

formulas of propositional calculus. Additionally, if A and B are (arbitrary) well formed formulas of propositional logic, $\neg$A, A $\wedge$ B, A $\rightarrow$ B, and A $\vee$ B are also well formed formulas of propositional calculus.

We will not present here the axioms of propositional logic, for the metalogical features of this logical system will not be analyzed. We will limit ourselves to mentioning only one rule of inference that plays an important role in the considerations below. The rule is *modus ponens*, according to which an implication (A $\rightarrow$ B) and its antecedent (A) logically imply its consequent (B). Schematically, this rule may be depicted in the following way:

$$\frac{A \rightarrow B \qquad A}{B}$$

Besides the syntactical, a semantic characterization of propositional calculus is also needed. Interpretation in this calculus amounts to ascribing the Boolean values of truth (1) or falsehood (0) to propositional variables. The sentential connectives are defined as follows:

$\neg$A is true, if and only if A is false, otherwise it is false.
A $\wedge$ B is true if and only if A is true and B is true, otherwise it is false.
A $\rightarrow$ B is false if and only if A is true and B is false, otherwise it is true.
A $\vee$ B is false if and only if A is false and B is false, otherwise it is true.

The above semantic characterization of sentential connectives is usually presented in the form of truth-tables. The following is an example of a table for implication:

$\rightarrow$	**1**	**0**
1	1	0
0	1	1

Elementary sentences are the most basic elements taken into account when analyzing the validity of arguments using propositional logic. The other type of logic developed by Frege and Russell – first order predicate logic – enables one to take into account the inner structure of elementary sentences. In the structure predicates (corresponding to the verb-part of a sentence), the predicate's arguments (corresponding to the subject) and quantifiers (statements that the predicate refers to some or all objects in the language's domain) are distinguished.

The alphabet of first order predicate logic looks as follows. The predicates are usually denoted by capital letters: P, Q, R, S. In order to increase the

readability of the formalizations, however, we will denote predicates with words, such as `read, father_of, charged_with`. Variables referring to the predicate's arguments will be denoted by small letters x, y, z. Arguments will also sometimes be referred to with names written in italics, e.g., *john, car_of_peter, house_of_hanna*, etc. The difference between names and variables is clear: a given name (e.g., *john*) denotes a particular object (e.g., a particular person), whilst a variable x is not ascribed to a particular object, and only refers to an object determined in a general, abstract way.

In the alphabet of first order predicate logic there are also logical constants: truth-functional functors (the same as in propositional logic, i.e., $\neg$, $\wedge$, $\rightarrow$ and $\vee$) and two quantifiers: general $\forall$, and existential $\exists$.

In the above presented symbolism the sentence:

John is convicted of murder

could be written as follows:

`convicted_of_murder`(*john*)

whilst the sentence:

Some people are convicted of murder

is:

$\exists$ x(`convicted_of_murder`(x))

The rules for forming compound expressions of first order predicate logic are as follows. First, atomic formulas, i.e., an *n*-ary predicate with *n* individual variables or names (e.g., `convicted_of_murder`(*john*), `convicted_of_murder`(x), `father_of`(*john, bill*), etc.) are well formed formulas of first order predicate logic. Second, if A and B are well formed formulas of first order predicate logic, $\neg$A, A $\wedge$ B, A $\rightarrow$ B, A $\vee$ B as well as $\forall$ x A and $\exists$ x A are also well formed formulas.

As in the case of propositional logic, we shall not present the axioms of first order predicate logic. Furthermore, there exists a version of *modus ponens* for first order predicate logic.

The semantic definitions (truth-tables) of functors in first order predicate logic are not different from definitions of the same functors in propositional logic. Two additional logical constants – $\forall$ and $\exists$ – are defined in the following way: the expression $\forall$ x(`predicate`(x)) is true if and only if all the objects belonging to the domain of the discourse can truly be said to be `predicate`. The expression $\exists$ x(`predicate`(x)) in turn, is true if and only if in the discursive domain there exists at least one object that can truly be said to be `predicate`.

Interpretation in first order predicate logic is as follows. First, a set constituting the discourse's domain is chosen (intuitively this set is comprised

of the objects existing in the world). To the 1-ary predicates there are ascribed subsets of the discourse domain (containing only those objects of which the given predicate can truly be predicated); the 2-ary predicates are ascribed sets of ordered pairs of objects from the domain; the 3-ary predicates – sets of ordered triples, etc. In addition, every individual constant (name) is ascribed a determined object from the domain of the discourse.

It is worth adding that both propositional logic and first order predicate logic are sound and complete.

2.2.2 Paradoxes of Material Implication

Before we attempt to show how legal reasoning is reconstructed with the use of propositional logic and first order predicate logic, it is necessary to mention the controversies surrounding material implication. As is well known, different functors (sentential connectives) are designed to "correspond" to different connectives of natural language: disjunction to "or", conjunction to "and", etc. It is usually held that the semantic characterization of $\wedge$ and $\vee$ is in accordance with the use of "and" and "or" in natural language. For example, the sentences in which "and" occurs are held to be true only when both sentences connected by use of "and" are true.

A number of controversies are connected, however, to implication. This functor is said to correspond to conditionals of the form "if . . ., then . . .". The semantic characterization of implication, however, seems not to meet – in certain circumstances at least – the criteria for using conditionals. This is an extremely important problem as it is clear that conditionals are the natural way of expressing legal norms.

Let us look once more at the truth-table for implication:

$\rightarrow$	**1**	**0**
1	1	0
0	1	1

The last row is troublesome. According to it, an implication is true in each case in which its antecedent is false. This leads to the following sentences being established as true:

(1) If New York is the capital of the USA, then water boils at 30°C.

(2) If 2 + 2 = 5, then Washington, D.C. is the capital of the USA.

The ascription of truth to the two above sentences may seem counter-intuitive.[6] However, as W.V.O. Quine observes rightly,[7] the following sentence may seem similarly counter-intuitive:

(3) If 2 + 2 = 4, then water boils at 100°C.

With (3) we still feel that "something is wrong", although both the antecedent and consequent of the implication are true. From this we may conclude that sentences (1)–(3) are counter-intuitive because of what they say (there is no connection between the meaning of the antecedent and the consequent), and not because of the rules put forward in the truth-table for implication.

Quine's solution to the problems of material implication is not, however, fully satisfactory. The semantic characterization of implication leads to acceptance of the following expressions as tautologies of the classical propositional calculus (these are the paradoxes of the material implication)[8]:

$$((p \to q) \wedge (r \to s)) \to ((p \to r) \vee (q \to s))$$
$$\neg (p \to q) \to p$$

According to the former, the following argument is logically valid:

If John is in Paris, then he is in France; and if John is in London, then he is in England. Therefore, if John is in Paris, he is in London or if he is in France, he is in England.

The second of the tautologies leads us to accept the following chain of reasoning:

It is not true, that if there exists God, the prayers of evil people will be heard. Therefore there exists God.

It is difficult to apply Quine's solution to the two presented arguments. Should we say, then, that material implication does not correspond to conditionals?

Both positive and negative answers to this question have been advocated.[9] The positive answer leads usually to the development of new functors that fit better the criteria for using conditionals in natural language; a case in point is the development of relevant logics.[10] We will not, however, discuss these formalisms in any detail. It is sufficient to note that significant doubts exist over the relevance of material implication for representing natural language conditionals. This is of great importance for us, because – as noted above – it is usually held that every legal norm can be expressed in an "If . . ., then . . ." sentence.

2.2.3 Examples

We will start our reconstruction of legal reasoning by use of classical logic with a simple example. According to Article 278§1 of the Polish penal code (kk), "whoever takes somebody else's property shall be imprisoned for term between 3 months and 5 years". Let us imagine that the

accused, John, stole Adam's bicycle. What is the argument that leads to John's conviction? It may look something like this:

(1) Whoever takes somebody else's property shall be imprisoned for a term between 3 months and 5 years.
(2) John has taken somebody else's property (for he has stolen Adam's bicycle).

Therefore: (3) John shall be imprisoned for a term between 3 months and 5 years.

This argument may be reconstructed in classical propositional logic, assuming that (1) is an implication:

(1) $p \rightarrow q$
(2) p
(3) q

A valid form of argument has been applied here – *modus ponens*. What are the variables substituted for? If (2) is substituted with p, then p must stand for "John has taken somebody else's property"; q is, of course, "John shall be imprisoned for a term between 3 months and 5 years". If so, "$p \rightarrow q$" should be read: "If John has taken somebody else's property, then John shall be imprisoned for a term between 3 months and 5 years". This sentence is not, however, equivalent to Article 278§1 kk! That is clearly visible when one analyzes some other case, let us say a situation in which Adam has stolen Ted's car. Adam bears responsibility according to the same norm as John, namely Article 278§1 kk. The judge applies then the same form of argument as in the previous case:

(1) Whoever takes somebody else's property shall be imprisoned for a term between 3 months and 5 years.
(2) Adam has taken somebody else's property (for he has stolen Ted's car).

Therefore: (3) Adam shall be imprisoned for a term between 3 months and 5 years.

This time (2) cannot be substituted with p (for p stands already for "John has taken somebody else's property"); similarly (3) cannot be written as q. Let us therefore choose other variables, r and s. Now (1) in our formalization is $r \rightarrow s$. Our reconstructions show that, in classical propositional logic, it is difficult to formalize the first premise, which is a formal counterpart of Article 278§1 kk, of either argument. In the case of John's crime we obtain the sentence: "If John has taken somebody else's property, then John shall be imprisoned for a term between 3 months and 5 years", whilst in Adam's: "If Adam has taken somebody else's property, then Adam shall be imprisoned for a term between 3 months and 5 years".

One can apply here the following trick to maintain that both arguments have the same form:

(1) If the accused takes somebody else's property, he shall be imprisoned for a term between 3 months and 5 years.
(2) The accused has taken somebody else's property.

Therefore: (3) The accused shall be imprisoned for a term between 3 months and 5 years.

Substituting *p* with "The accused has taken somebody else's thing", and *q* for "The accused shall be imprisoned for a term between 3 months and 5 years", we obtain the same logical schema for the cases of both Adam and John. This solution is, however, not acceptable. First, it is based on the fact that the term "accused" refers to different persons in different contexts. Second, whilst premise (1) of both arguments is – as required – identical, premise (2) is likewise– and counter-intuitively – identical.

The indicated problems occur because of the fact that, in propositional logic, one cannot reconstruct the inner structure of the sentences composing the analyzed arguments. Much more can be done in first order predicate logic. Applying this calculus enables the following reconstruction of our examples:

(1) $\forall$ x(takes(x) $\rightarrow$ imprisoned(x))
(2) takes(*john*)

---

(3) imprisoned(*john*)[11]

takes stands here for "takes somebody else's property", imprisoned – "shall be imprisoned for a term between 3 months and 5 years", and *john* is a name for John. If we use *adam* as a name for Adam the judge's reasoning in Adam's case may be presented as follows:

(1) $\forall$ x(takes(x) $\rightarrow$ imprisoned(x))
(2) takes(*adam*)

---

(3) imprisoned(*adam*)

The presented formalization has the required features. In both arguments premise (1) is identical, but premise (2) is different; in other words, the structure of the analyzed examples, as reconstructed with the use of first order predicate logic, seems to resonate with our intuitions.

Arguments of the type presented above are traditionally called legal syllogisms. The concept of a legal syllogism played a crucial role in legal positivism. The continental positivists held that legal reasoning has (or should have) the form of legal syllogism. Every such syllogism consists of two premises and a conclusion. The first premise is a general and abstract legal norm, as e.g., Article 278§1 kk from our example: "Whoever takes somebody else's property shall be imprisoned for a term between 3 months and 5 years". The second premise describes a state of

affairs, e.g., "John has taken somebody else's property". Finally, the conclusion is an individual and concrete legal norm; in the case of our example: "John shall be imprisoned for a term between 3 months and 5 years". Therefore, the logical reconstruction presented below:

(1) $\forall$ x(takes(x) $\rightarrow$ imprisoned(x))
(2) takes(*john*)

---

(3) imprisoned(*john*)

is an instance of a legal syllogism.

Various arguments have been put forward against legal syllogism as a correct reconstruction of legal reasoning. It has been maintained, for example, that the syllogism is impossible, for the logic of norms is impossible. It has also been held that the essence of legal reasoning is the process of valuation and not logical consequence, as positivists and other adherents of formal logic seem to suggest. These problems will be dealt with below (see Section 2.4). Here, another issue must be addressed, namely the thesis that legal syllogism is trivial because it can be applied only after all the significant problems of legal reasoning have already been solved.

The core of this objection may easily be displayed using our earlier example. In describing the state of affairs we said that John has stolen Adam's bicycle. Meanwhile, premise (2) says that John has taken somebody else's property. These are certainly two different sentences. In one of our informal reconstructions we dealt with this problem saying: "John has taken somebody else's property (for he has stolen Adam's bicycle)". This formulation indicates that we are concerned here with an additional stage in reasoning (please note our use of the word "for"), which has not been accounted for in our logical reconstruction of legal syllogism. It is relatively easy, however, to fix this problem, e.g., in the following way:

(1) $\forall$ x(steals_bicycle(x) $\rightarrow$ takes(x))
(2) steals_bicycle(*john*)
(3) takes(*john*)

This argument follows from two premises, i.e., "Whoever steals Adam's bicycle takes somebody else's property" and "John has stolen Adam's bicycle" to the conclusion that John has taken somebody else's property.

In legal theoretic literature, the conclusion of the kind of argument that we have just presented is called the interpretational decision.[12] Here, Article 278§1 kk is interpreted; we say that the expression it contains ("to take somebody else's property") refers, *inter alia*, to the act of stealing Adam's bicycle. The argument leading to the interpretational decision can of course be adduced to our main syllogism:

(1) $\forall$ x(takes(x) $\rightarrow$ imprisoned(x)) [general and abstract legal norm]

(2) ∀ x(steals_bicycle(x) → takes(x)) [premise of the interpretational decision]
(3) steals_bicycle(*john*) [a description of the state of affairs]
(4) takes(*john*) [from (2) and (3), *modus ponens*]

(5) imprisoned(*john*) [from (1) and (4), *modus ponens*]

When we look more closely at the above reconstruction, some other troublesome elements can be found. A case in point is, for example, the conclusion of our argument: "John shall be imprisoned for a period between 3 months and 5 years". Judges never formulate their sentences in such a manner, but stipulate exactly the period of imprisonment, saying, for example, that John shall be imprisoned for 2 years. The argument of the judge which leads to the determination of the duration of imprisonment may also be reconstructed logically. Let us denote all the circumstances that make a 2 year sentence a just one by circumstances; two_years means "shall be imprisoned for 2 years".The judge's argument may be reconstructed as follows:

(1) ∀ x((imprisoned(x) ∧ circumstances(x)) → two_years(x))
(2) imprisoned(*john*)
(3) circumstances(*john*)

(4) two_years(*john*)

The key premise (1) says that when somebody should be imprisoned for a period between 3 months and 5 years (imprisoned(x)), and there are circumstances justifying a two year sentence (circumstances(x)), the person shall be imprisoned for two years (two_years (x)). Premise (2) is the conclusion of our syllogism in its earlier version. Finally, premise (3) says that the circumstances justifying the two year sentence do obtain in John's case. The conclusion of the analyzed argument, which Jerzy Wróblewski calls *consequences choice decision*, says: John shall be imprisoned for two years. We may now present our syllogism in a more complete form:

(1) ∀ x(takes(x) → imprisoned(x)) [general and abstract legal norm]
(2) ∀ x(steals_bicycle(x) → takes(x)) [premise of the interpretational decision]
(3) steals_bicycle(*john*) [description of the state of affairs]
(4) takes(*john*) [from (2) and (3), *modus ponens*]
(5) imprisoned(*john*) [from (1) and (4), *modus ponens*]
(6) ∀ x((imprisoned(x) ∧ circumstances(x)) → two_years(x)) [premise of the consequences choice decision]
(7) circumstances(*john*) [further description of the state of affairs]

(8) two_years(*john*) [from (6), (5) and (7), *modus ponens*]

In this way we obtain a complex and logically valid schema. The argumentative structure presented can be further elaborated upon. For

example, one can take into account the *validity decision*, i.e., the decision leading to the establishment of the validity of Article 278§1 kk (that has been reconstructed as (1)). Similarly, the arguments leading to the establishment of (3) and (7) (the *evidential decisions*) can be reconstructed logically.

Legal syllogism, as it is usually presented, could be called trivial. It is not, however, a complete logical reconstruction of legal reasoning. Every decision made during a judge's reasoning can be analyzed with the use of logical tools, resulting in complicated argumentative structures.

2.3 DEONTIC LOGIC

2.3.1 Possible World Semantics

From our perspective, i.e., in the context of developing an adequate "legal logic", one cannot overlook modal logics. These are logics that, besides traditional logical connectives, like negation or implication, offer also modal functors – aletic ("it is possible that", "it is necessary that"), epistemic ("it is known that", "it is believed that") or deontic ("it is forbidden that", "it is obligatory that", "it is permitted that"). Aletic modal logics were first described by the American logician C.I. Lewis. Their development is, however, connected with the creation of possible world semantics in the 1950s.[13]

The notion of a possible world is intuitively clear. In 2002 Brazil won the World Cup. But one can easily imagine a situation in which they failed to reach the final. They did not, and for that reason the world in which Brazil lost is not an actual world; but it is a possible one. If you are sitting in a chair right now, then in one minute you may still be sitting, but you may also be standing. These are two possible worlds: in one of them you are sitting and in the other – standing. But if you are in Kraków now, in one minute you may be sitting or standing in Kraków, but not in New York. There exists, of course, such a possible world, in which you may be standing in New York in one minute's time; but this world is not possible relative to the actual world, in which you are in Kraków. Therefore, one can differentiate between an "absolutely" possible world – i.e., every consistent state of affairs (the fact that you are in New York in a minute is not *logically* inconsistent) – and a "relatively" possible world, i.e., a world that is possible relative to the actual world (we will say that the possible world is *accessible* from the actual world). Brazil winning the 1998 World Cup is possible in the absolute sense. Today it is not, however, possible "relatively", for the 1998 World Cup was won by another team. At the beginning of 1998, however, it was possible not only "absolutely", but also "relatively".

It is due to Saul Kripke[14] that the above presented intuitions were encapsulated in a very elegant mathematical form. Kripke showed how one can build an adequate mathematical object that takes into account the mentioned differentiations, and serves as a semantic model for certain logical calculi. The object is an ordered quadruple:

$$\langle w_a, W, R, \nu \rangle$$

w_a stands here for the actual (our) world. W is a set of the possible worlds. R is the accessibility relation. If the relation R holds between two worlds (say w_i and w_j) – we will refer to this fact by $(w_i R w_j)$ – it means that the world w_j is accessible from the world w_i. Finally, v is the interpretation function that ascribes truth or falsehood to every sentence in the given possible world ($v_w(p) = 1$ or $v_w(p) = 0$).[15] Therefore, if we substitute p for "Brazil won the World Cup in 2002", then the interpretation function ascribes to p in the actual world w_a, the value of truth ($v_{w_a}(p) = 1$), whilst in some other possible world, w_i, in which Brazil failed to win, $v_{w_i}(p) = 0$.

The semantic structure thus constructed enables necessity and possibility to be defined. We will say that p is necessary in the actual world $w_a(\Box p)$, if p is true in all the worlds accessible from w_a; p is possible in $w_a(\Diamond p)$, if p is true at least in one world accessible from w_a. It is clear that $\Box p$ is true if and only if $\sim\Diamond\sim p$ is also true, i.e., if there does not exist such a possible world accessible form w_a in which $\sim p$ is true. The last remark shows that necessity and possibility are mutually definable ($\Box p \Leftrightarrow \sim\Diamond\sim p$).

2.3.2 Deontic Logic

S. Kripke developed possible world semantics with the aim of analyzing the concepts of necessity and possibility. Rather quickly, however, it turned out that Kripke's mathematical tool could serve perfectly well the analysis of other notions, such as "to know" and "to believe" or – important for us – "obligatory", "forbidden" and "permitted".

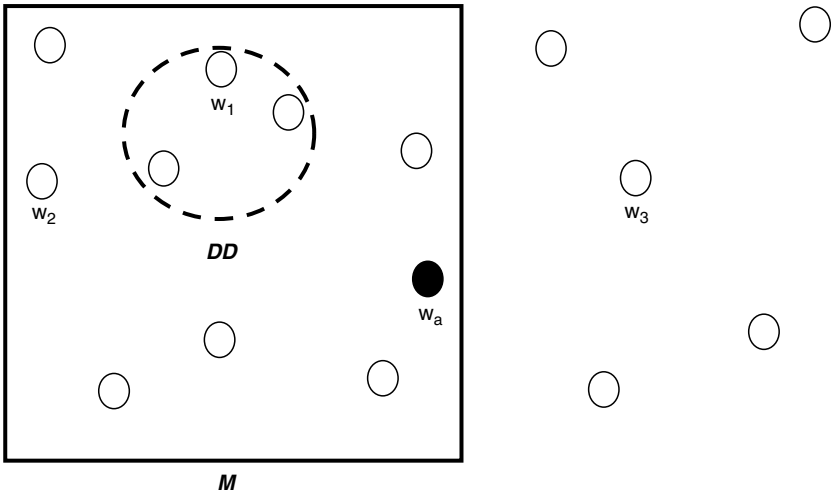
This does not mean, however, that the logic of obligations, i.e., *deontic logic*, originated with the development of possible world semantics in the mid-twentieth century. In "Nicomachean Ethics", Aristotle had already analyzed arguments like the following: "if 'everything sweet should be tasted', and 'a given thing is sweet', i.e., it is one of the sweet things, then a man who is capable should taste this given thing".[16] This is an example of applying the practical syllogism that formalizes normative reasoning. Another, much later work that includes some considerations of deontic logic is Leibniz's "Elementa iuris naturalis".

In twentieth century philosophy analyses of normative sentences can be found in the work of B. Bolzano, A. Höfler and E. Husserl. More advanced conceptions of practical discourse were developed by E. Lapie and E. Mally (logic of will), and by E. Menger (logic of habits). They were created in 1902, 1926 and 1934 respectively. Only small parts of those works were devoted to deontic logic. A different story can be told about the works of W. Dubislav, J. Jørgensen, A. Hofstadter, J.C.C. McKinsey, R.M. Hare and R. Rand, who each tried to formalize arguments that are normative *par excellence*.[17]

It is usually held, however, that the birth of deontic logic took place in 1951, the year of publication of G.H. von Wright's paper "Deontic Logic". At the same time similar problems were investigated by J. Kalinowski and O. Becker. The former published the results of his research in 1953, the latter in 1952.

The first systems of deontic logic can be characterized as syntactic. The situation changed with the above mentioned development of possible world semantics. Semantics enables one to define in a very intuitive way the notion of obligation. Let *O* stand, as usually, for "it is obligatory that . . .". What does it mean if the sentence *Op*, "it is obligatory that *p*", is true in the actual world (w_a)? One can imagine that enacting a norm of behavior simply involves a legislator picking out a subset of the worlds that are possible relative to w_a. In the chosen worlds things stand as the legislator wishes them to. Let us notice (see the figure) that the set DD of deontically perfect worlds has to be a subset of the set M that contains worlds possible relative to w_a. This condition reflects the basic principle of law, i.e., *impossibilium nulla obligatio est*. The legislator cannot make obligatory (include into DD) what is not possible (i.e., what does not belong to M).

With DD established by the legislator we can give the conditions of truth for *Op*. *Op* is true in w_a if and only if *p* is true in every world of DD. As an illustration consider the sentence "It is obligatory that John does not steal". This sentence is true in w_a, if the sentence "John does not steal" is true in every world of DD. Were the latter sentence true only in one of the worlds from DD, e.g., in w_1, "It is obligatory that John does not steal" would not be true; therefore, John would not be obliged to refrain from stealing. The world w_2 is a world that is accessible from the actual world, but the legislator does not regard it as deontically perfect. Finally, w_3 is not accessible from w_a, which amounts to saying that it cannot become an actual world. Therefore, w_3 cannot be included in DD.



In deontic logic, in addition to the functor of obligation O, there are also two other functors: the functor of prohibition F (forbidden) and the functor of permission P (permitted). Those functors can be defined in a natural way with the use of functor O. If p is forbidden, i.e., Fp, then it is obligatory that $\neg p$:

$$Fp \equiv O\neg p$$

Furthermore, if p is permitted, Pp, then it is not true that it is obligatory that $\neg p$:

$$Pp \equiv \neg\, O\neg p$$

Let us address how these definitions work in practice. Suppose that a legislator forbids John to steal. Let p stand for "John steals". According to the definition Fp is equivalent to $O\neg p$, i.e., John is under an obligation not to steal. Therefore, in order to make the sentence "it is forbidden for John to steal" true in w_a, the sentence "John does not steal" has to be true in every single world of DD. Let us now turn our attention to the sentence "It is permitted for John to steal" – Pp. According to the definition this sentence is equivalent to $\neg O \neg\, p$. And the latter sentence is true only if the sentence $O\neg p$ is false. As we know, the falsity of $O\neg p$ requires that, in at least one possible world of DD, the sentence $\neg p$ is false – which equates to p being true. In the described situation, the sentence "it is permitted for John to steal" is true, if there exists a world in DD in which the sentence "John steals" is true. Let us observe that it is possible that the sentence "John steals" is true in every world belonging to DD. Then, both Pp ("It is permitted for John to steal") and Op ("It is obligatory for John to steal") are true.[18]

The semantic ideas presented above are realized in various systems of deontic logic, as, for example, in standard deontic logic (SDL).[19] It should be noted that the soundness and completeness theorems have been proved for SDL.

2.3.3 Paradoxes of Deontic Logic

There are numerous deontic logics that differ to greater or lesser degrees. There are various reasons for the search for new logics of obligation, one of the most important being the paradoxes of deontic logic.

Amongst those paradoxes one can list the Ross paradox. This has to do with the fact that, in SDL, the argument from

$$Op$$

to

$$O(p \vee q)$$

is valid.

Let us substitute p with "send the letter" and q with "burn it". Thus, a paradoxical reasoning is constructed: "if it is obligatory to send the letter, it is obligatory to send it or burn it".

There is no consensus as to whether the Ross Paradox can be called a real problem. Some adhere to the thesis that there is a problem in the reasoning, since the acceptance of the second norm seems counter-intuitive. Others deny this, saying that the mere fact that one norm ($O(p \vee q)$) follows logically from another norm (Op) does not mean that the latter ceases to be binding. Therefore, if the norm "it is obligatory to send the letter or to burn it" is fulfilled by burning the letter, the norm "it is obligatory to send the letter" is broken. In other words, the fulfillment of a norm B that follows logically from a norm A, does not necessarily lead to the fulfillment of norm A.[20]

It is not the Ross Paradox, however, nor problems of its kind that constitute the major puzzle of deontic logic. It is usually held that the most difficult problems facing deontic logicians are contrary-to-duty (CTD) paradoxes. Those paradoxes arise in connection with CTD-norms, i.e., norms that require the breaking of another norm as a condition of their application. Let us look more closely at a famous example known as the Chisholm Paradox.[21] This paradox is connected with the following four sentences:

(1) It is obligatory for a certain man to help his neighbors.
(2) It is obligatory that if he helps them, he tells them about it.
(3) If he does not help them, he should not tell them he helps them.
(4) The man does not help his neighbors.

It is easy to observe that the norm expressed in (3) is a CTD-norm, for its antecedent ("if he does not help them") describes the fact of

breaking another norm (norm (1)). It is usually held that, intuitively, sentences (1)–(4) are mutually consistent and logically independent of each other (none of the sentences follows logically from others). Let us try to formalize Chisholm's example. If the sentence "A certain man helps his neighbors" is substituted with p, and "He tells them about it" with q, sentences (1)–(4) can be formalized in SDL in the following manner:

(1) Op
(2) $O(p \to q)$
(3) $\neg p \to O \neg q$
(4) $\neg p$

Unfortunately, this formalization is inconsistent. In SDL it follows from sentences (1) and (2) that Oq, and from (3) and (4) – $O \neg q$. The intuitively consistent set of sentences turns out in our formalization to be inconsistent.

It is easy to observe that the above presented formalization is not the only way of reconstructing sentences (1)–(4) in SDL. The issue here is how the conditional duties should be formalized. Let us notice that legal norms usually take the form of a conditional; traditionally it is maintained that every norm consists of an antecedent and a consequent. It is held, moreover (as already noticed during the discussion of first order predicate logic) that this very structure is captured by the material implication. In the language of deontic logic, however, there occurs a problem. If p is the antecedent and q the consequent, the given norm can be formalized in two ways – either as:

$$p \to Oq$$

or

$$O(p \to q)$$

In the analyzed example norm (3) was formalized in the former manner, and norm (2) in the latter. One may consider it incorrect that the two conditional norms were treated differently (even though their natural language formulation encouraged this). In light of the above observation, two solutions are possible: either represent norm (2) as $p \to Oq$, or norm (3) as $O(\neg p \to \neg q)$. It turns out, however, that neither of those solutions is acceptable. In the new formalizations some of the analyzed sentences are logically dependent on others. In the case of the former, norm (2) follows logically from sentence (4), and in the case of the latter, norm (3) follows from (1). It can therefore be concluded that attempts to formalize Chisholm's example lead to results that are intuitively unacceptable.

The CTD paradoxes, together with some other problems, serve as a reason for creating deontic logics that differ to a greater or lesser degree

from SDL. We will not attempt to describe them here. We would only like to indicate the mechanism that leads to developing new logical systems: usually, when a new logical system is built, it is provided with an intuitively sound semantics and is tested on different sets of examples. Sometimes such problems as CTD paradoxes occur. They highlight the weaknesses of the developed systems and suggest that a search for other solutions may be needed. It is vitally important, then, to consider when and why something may seem paradoxical. Clear intuitions decide this matter. Chisholm's example is paradoxical, because we intuitively held the sentences that constitute it to be consistent and logically independent. However, it seems impossible to obtain a consistent and logically independent formalization of those sentences in SDL.

2.3.4 Examples

The examples presented in Section 2.2.3 may seem atypical as regards legal reasoning. The way in which Article 278§1 kk is formulated does not make it immediately obvious that we are dealing with a legal norm. In that provision such phrases as "ought to", "it is forbidden" or "it is allowed" do not occur. This is, however, the common way of formulating legal text: legal provisions are usually expressed in an indicative mood. This does not mean, however, that at the logical level they should be reconstructed without the use of deontic operators. If the legislator says that "whoever takes somebody else's property shall be imprisoned for a period between 3 months and 5 years", it seems intuitive to reconstruct that statement in the following way: "it ought to be the case that whoever takes somebody else's property shall be imprisoned for a period between 3 months and 5 years". The following represents another way of introducing the deontic operator into Article 278§1 kk: whoever takes somebody else's property ought to be imprisoned for a period between 3 months and 5 years. In the first case Article 278§1 kk obtains the following symbolic form:

$$O\,(\forall\, \mathrm{x}(\texttt{takes}(\mathrm{x}) \rightarrow \texttt{imprisoned}(\mathrm{x})))$$

and in the second:

$$\forall\, \mathrm{x}(\texttt{takes}(\mathrm{x}) \rightarrow O(\texttt{imprisoned}(\mathrm{x})))$$

If we choose the second option, our basic legal syllogism in John's case will look as follows:

(1) $\forall\, \mathrm{x}(\texttt{takes}(\mathrm{x}) \rightarrow O(\texttt{imprisoned}(\mathrm{x})))$
(2) $\texttt{takes}(\textit{john})$

---

(3) $O(\texttt{imprisoned}(\textit{john}))$

In this formalization it is clear that both (1) and (3) are normative in character.

In the Article 278§1 kk example, one more thing may seem counter-intuitive. Whilst reading a penal code one would expect to find norms of behavior: statements of what we should and should not do. Article 278§1 kk, however, says nothing of this kind. It is often maintained that penal codes contain only sanctioning and no sanctioned norms. And it is the former that determine the obligations and rights of a citizen, whilst the addressee of a sanctioning norm is a state authority. Such a norm obliges the authority to act in a specific way where a sanctioned norm has been broken. For instance, in the case of Article 278§1 kk, the action of the authority consists in imprisoning the person who broke the sanctioned norm for a term of 3 months to 5 years.

In principle, in penal codes only sanctioning norms are expressed. It is sometimes held that sanctioned norms are "outside the code". This is, of course, a metaphor. Sanctioned norms are not directly stated in penal codes, but we can reconstruct them on the basis of directly stated sanctioning norms. If Article 278§1 kk says that "whoever takes somebody else's property shall be imprisoned for a term between 3 months and 5 years", it is a basis for formulating the following sanctioned norm: one should not in any circumstances take somebody else's property.

It may be observed that a judge does not need the norm "one should not in any circumstances take somebody else's property" in order to give her judgment. This is true, but one can easily imagine intuitively correct arguments in which sanctioned norms serve as premises or conclusions. For instance: one should not in any circumstances take somebody else's property, and because stealing a bicycle constitutes an instance of taking somebody else's property, therefore one should not in any circumstances steal a bicycle. In order to put forward such an argument one has to know that there exists a norm stating that one should not in any circumstances take somebody else's property. This norm is not expressed directly in the penal code. It has to be reconstructed and such reconstruction is not always a trivial task. We shall not analyze this problem here in any detail. It is worth observing, however, that there are no *a priori* reasons excluding the search for logical schemata of such reconstruction.

One does not find similar problems in civil codes. Let us consider, as an example, Article 415 kc of the Polish civil code: "whoever intentionally causes damage to someone has to redress it". This provision is not only addressed to "normal citizens", but also includes a deontic operator "has to". One can formalize Article 415 in the following way:

$$\forall\, x(\texttt{causes\_damage}(x) \rightarrow O(\texttt{redresses}(x)))$$

Let us consider now whether there exist reasons to formalize legal reasoning with the use of deontic logic as opposed to first order predicate

logic. It can be maintained that, from a practical point of view, there is no difference between the two. Let us look once again at Article 415 kc. In our deontic-logic formalization it has the form:

$$\forall \text{ x}(\texttt{causes\_damage(x)} \rightarrow \text{O}(\texttt{redresses}(\text{x})))$$

The following formalization that uses the predicate "has to redress the damage" and sticks to first order predicate logic seems equally good:

$$\forall \text{ x}(\texttt{causes\_damage}(\text{x}) \rightarrow \texttt{has\_to\_redress}(\text{x}))$$

If a judge finds that John has intentionally caused damage to someone (causes_damage(*john*)), she would conclude – in the first formalization- that *O*(redresses(*john*)), and in the second: has_to_redress(*john*). Both conclusions are the same: John is obliged to redress the damage. Therefore, from a practical perspective, there is no difference here.

There are, however, at least two reasons for using deontic logic. Let us try, first, to formalize both Article 415 kc and, e.g., Article 728§1 kc: "the bank is obliged to inform the account holder about every change in the account status". We can formalize this in a deontic calculus as follows:

$$\forall \text{ x}((\texttt{bank}(\text{x}) \wedge \texttt{change}(\text{x})) \rightarrow O(\texttt{inform}(\text{x})))$$

In first order predicate logic it becomes:

$$\forall \text{ x}((\texttt{bank}(\text{x}) \wedge \texttt{change}(\text{x})) \rightarrow \texttt{obliged\_to\_inform}(\text{x}))$$

Let us compare now both formalizations of Articles 415 kc and 728§1 kc. In the former case we have:

$$\forall \text{ x}(\texttt{causes\_damage}(\text{x}) \rightarrow \texttt{has\_to\_redress}(\text{x}))$$

and

$$\forall \text{ x}((\texttt{bank}(\text{x}) \wedge \texttt{change}(\text{x})) \rightarrow \texttt{obliged\_to\_inform}(\text{x}))$$

whilst in the latter we have:

$$\forall \text{ x}(\texttt{causes\_damage}(\text{x}) \rightarrow O(\texttt{redresses}(\text{x})))$$

and

$$\forall \text{ x}((\texttt{bank}(\text{x}) \wedge \texttt{change}(\text{x})) \rightarrow O(\texttt{inform}(\text{x})))$$

Only in the latter case is it clearly visible that we are dealing with the same notion of obligation (the deontic operator *O*). The formalization in classical logic forces us to include the notion of obligation in the predicate letters. This may seem counter-intuitive.

The second reason why deontic logic is better for formalizing legal reasoning than classical logic is even more profound. There are situations in which we infer one norm from another. Here is a simple example: if one

should not kill then one should not kill on Sundays. Or: if it is obligatory that a judge behaves responsibly and it is obligatory that a judge is honest, then it is obligatory that a judge behaves responsibly and is honest. Finally: if it is obligatory that Adam does not steal Sven's skies, then it is forbidden for Adam to steal Sven's skies.

Let us try to formalize those three arguments using different logical systems. For the sake of simplicity we will confine ourselves to propositional logic: classical and deontic. Let us begin with classical logic. Assume that p stands for "one should not kill" and q for "one should not kill on Sundays". The problem is that from just p, q does not follow. We need some other paraphrase. The norm "one should not kill" can be formulated – as above – as a conditional norm, in which the conditions of applications are tautological (T):

$$T \rightarrow p$$

Because of the fact that T is true in any circumstances, $T \rightarrow p$ expresses an unconditional obligation described by p. From this formula, it follows by the rule of the strengthening of antecedent that:

$$(T \wedge q) \rightarrow p$$

Naturally, q does not stand here for "one should not kill on Sundays"; it can be expressed by something like "acts on Sundays". The norm "one should not kill on Sundays" is represented by the whole expression $(T \wedge q) \rightarrow p$.

Let us look, in turn, at the second argument. Let p stand for "it is obligatory that a judge behaves responsibly", q for "it is obligatory that a judge is honest" and r for "it is obligatory that a judge behaves responsibly and is honest". From p and q it does not follow that r. This time we can also try another, perhaps slightly counter-intuitive, paraphrase. Let us assume that we are dealing with conditional norms: "if someone is a judge, then she should behave in a responsible way" and "if someone is a judge, then she should be honest". Let us formalize them in the following way:

$$p \rightarrow q$$
$$p \rightarrow r$$

From those two premises a sentence follows:

$$p \rightarrow (q \wedge r)$$

which can be read: if someone is a judge then she should behave responsibly and should be honest. It is not exactly what we have been looking

for (in the consequent of the norm there are two sentences connected by a conjunction, and not a single sentence in which there is the compound predicate "behaves in a responsible way and is honest"). This problem, however, results from using propositional logic instead of first order predicate logic. It has nothing to do with the fact that we abstained from using deontic logic here.

The last of the three arguments poses the biggest challenge for classical logic. If we substitute p for "it is obligatory that Adam does not steal Sven's skies" and q for "it is prohibited for Adam to steal Sven's skies", then q, of course, does not follow from p. In the analyzed case, however, no paraphrase can be found that would enable us to deal with the problem.

In SDL there is no problem whatsoever! Let p stand for "Adam steals Sven's skies". We can write now:

$$\frac{O \neg p}{Fp}$$

This is a valid reasoning which leads – as we desire – from the sentence $O \neg p$ (it is obligatory that Adam does not steal Sven's skies) to the sentence Fp (it is forbidden for Adam to steal Sven's skies). We apply here simply the definition of the functor F.

SDL deals similarly elegantly with the two previous examples. The second of them especially takes a simpler form than in the case of classical logic. Let us substitute p for "a judge behaves in a responsible way", and q for "a judge is honest". Let us formalize now both norms that serve as premises of our argument, i.e., "it is obligatory that a judge behaves responsibly" and "it is obligatory that a judge is honest":

$$Op$$
$$Oq$$

From those two sentences it follows in SDL that:

$$O(p \wedge q)$$

which reads: it is obligatory that a judge behaves responsibly and that a judge is honest.

One can reasonably question whether such arguments, having norms as premises and conclusions, are important. It seems that the answer should be positive. First, such arguments are actually carried out, therefore a complete theory of legal reasoning should account for them. Second, the notion of the set of logical consequences of a given set of

norms is used to define the set of valid legal norms. According to the systemic conception of the validity of law, valid norms are the norms explicitly enacted by a legislator, plus what follows logically from them.

The analyzed examples allow us to say that formalizations in deontic logic are better suited to our intuitions than classical formalizations. Similarly, possible world semantics, as used in deontic logic, seems intuitive. Moreover, SDL is an extension of classical logic. This means that, as far as the arguments that do not include the operators of obligation, permission or prohibition are concerned, deontic logic is equivalent to classical logic. It does not necessarily follow from all this that deontic logic is not problematic. The most important problems are connected with paradoxes. But the role of paradoxes is positive: they indicate what is wrong and encourage the search for new, better deontic systems.

2.4 LOGIC OF ACTION AND LOGIC OF NORMS

2.4.1 Two Types of Obligation

Amongst objections against deontic logics, in addition to the problem of paradoxes, there are several problematic questions of a more general, philosophical nature. We will try to look more closely at two such objections: first, the thesis that deontic logic formalizes the notion of *ought-to-be*, and does not take into account the notion of *ought-to-do*; second, the thesis that deontic logic is not a logic of norms because we cannot say that norms are either true or false. The former problem will serve as a pretext for discussion of the logic of action. The latter, in turn, will allow us to comment on the Jørgensen Dilemma.

Philosophers sometimes distinguish between two concepts of obligation: the first stating what ought to be the case and the second stating what ought to be done.[22] The importance of this distinction is questioned by those who claim that the latter can be reduced to the former. They insist[23] that the sentence "person α ought to do p" is equivalent to the sentence "it ought to be the case that person α does p". If one approves of this reduction then deontic logic, as described in the previous sections, which is a logic of the *ought-to-be* operator, is adequate. There are, however, strong objections against reducing *ought-to-do* to *ought-to-be*.[24] Let us present one of them. P. Geach suggested analyzing the following sentence[25]: "Fred ought to dance with Ginger". According to the reductionist conception, that sentence is equivalent to this: "it ought to be the case that Fred dances with Ginger". The sentence "Fred dances with Ginger" is, however, equivalent to "Ginger dances with Fred" (for the relations of dancing are symmetrical). Instead of saying "it ought to be the case

that Fred dances with Ginger" we could also say: "it ought to be the case that Ginger dances with Fred". But now, reversing the direction of the first transformation, we can write that "Ginger ought to dance with Fred". This seems counter-intuitive. From the sentence that Fred ought to dance with Ginger it does not necessarily follow that Ginger ought to dance with Fred.

This problem may also be illustrated from a legal perspective. Let us imagine two persons, John and Adam, concluding an agreement according to which, when a certain condition is fulfilled, John will be under an obligation to sell Adam his car, but Adam will have the right to choose whether he wants to conclude the final agreement and buy the car or not. If a similar analysis to that carried out in the case of Fred and Ginger is carried out here, from the sentence "John ought to conclude a sale agreement with Adam", and from the fact that concluding an agreement is a symmetrical relations, it would follow that Adam ought to conclude a sale agreement with John, which in the described circumstances is paradoxical.

Both presented examples show that the idea of reducing "α ought to do p" to "it ought to be the case that α does p" can lead to counter-intuitive results. One may wonder, however, whether the problems are really connected with the failure to distinguish between *ought-to-be* and *ought-to-do*. The Fred and Ginger example indicates one more feature of SDL: that the concept of obligation involved is impersonal. In our example we started with the sentence "Fred ought to dance with Ginger" and substituted it with "it ought to be the case that Fred dances with Ginger". It is suggested, sometimes, that distinguishing the "obligation from the point of view of Fred" from the "obligation from the point of view of Ginger" suffices to solve the puzzle in question. The sentence "it ought to be the case that Fred dances with Ginger" and the equivalent sentence "it ought to be the case that Ginger dances with Fred" express obligations from the point of view of Fred. In consequence, from the sentence "(From the point of view of Fred) it ought to be the case that Ginger dances with Fred" one cannot derive that Ginger ought to dance with Fred. In this way we concede that obligations differ (for they always relate to a specific person), but we are not forced to say that *ought-to-do* cannot be reduced to *ought-to-be*. This observation will be confirmed when we look in greater detail at the deontic logic of action.

2.4.2 Logic of Action

We would like to analyze now some formalizations of *ought-to-do*. It is interesting that the first attempts at constructing deontic logic aimed to

capture the *ought-to-do*. G.H. von Wright in 1951 proposed a system equipped with symbols A, B, C,. . . to which deontic operators, like *O* ("it is obligatory that. . .") were added. A, B, C,. . . stood for "general actions", e.g., theft, sale, etc. Contemporarily, various strategies of constructing deontic logics of action are employed.[26] We will look more closely at two of them.

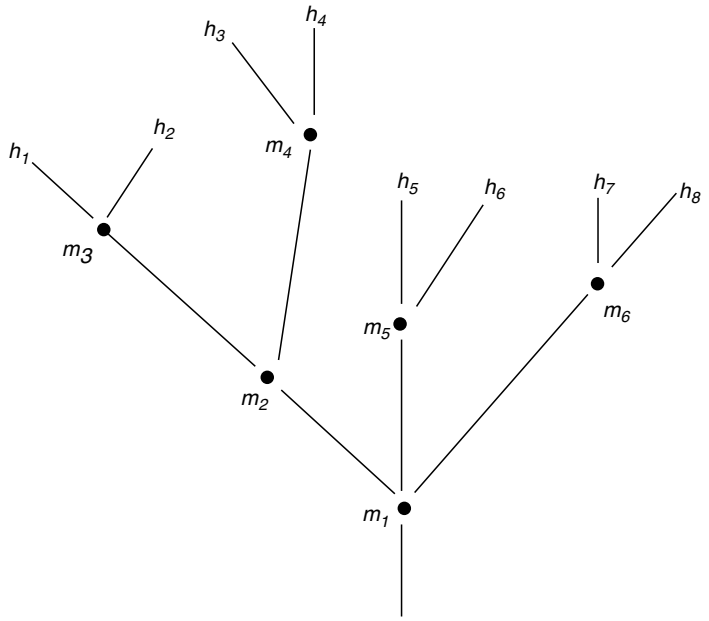
The following intuition is behind the first of the strategies. Human actions bring about changes in the world. For instance, if the action is building a bridge, the change in the world consists in the appearance of a bridge. In describing the state of the world prior to the action, the sentence "there is a bridge here" is false, whereas after the action it is true. Human actions lead us, therefore, from one state of the world to another. Or, in other words, they constitute a move from one possible world to another. This simple analysis prompts the following idea: on the semantic level actions are represented by pairs of possible worlds – the first world of the pair is the situation in which the action is undertaken, and the second is the situation in which the action ends. Observe that an expression denoting an action is not defined by a single pair – "world before action – world after action" – but by all such possible pairs. Therefore, the action "John builds a bridge" is, on the semantic level, a set of all pairs of possible worlds, of which the first is a world in which there is no bridge and the second is a world in which there is a bridge. Each pair can be labeled an *execution* of the formalized action.[27]

Now, it suffices to apply a procedure similar to that of SDL in order to define which actions are obligatory, which are forbidden and which are allowed. Recall that in the logic described in the previous section the act of creating a norm consisted in identifying a set of possible worlds which we called deontically perfect. In the deontic logic of action "moves" between the worlds (ordered pairs of worlds) are divided into legal (the Leg set) and illegal (the Illeg set). We shall say that an action A is forbidden in world *w* if the set of all executions of A in *w* is included in Illeg. Similarly, an action A is allowed in world *w* if at least one execution of A in *w* belongs to Leg.[28] In order to define obligation let us assume that *Om*A means nonexecution of A, i.e., it is an execution of any action which is not A. We shall say that the action A is obligatory in *w* if all executions of *Om*A in *w* belong to Illeg.

One can query whether a logic thus constructed is better – and in what respects – than "normal" deontic logics. The first reason to claim this is the philosophical motivation that stands behind the proposed system – the distinction between *ought-to-be* and *ought-to-do*. Another advantage of this system over "normal" logics is connected to the fact that, in the

logic of action, certain kinds of obligation can be expressed that cannot be reconstructed in SDL. The latter concerns only "ideal" situations but cannot deal with "sub-ideal" ones, i.e., obligations which must be fulfilled in situations in which other obligations have already been violated. In order to make such a reconstruction in our logic of action executions of certain actions that lead from one sub-ideal world to another sub-ideal must be included in the set Leg. Another desirable feature of the present system is that it can easily be "personalized", i.e., obligations can easily be ascribed here to specific persons.

Our second example of a formal system that tries to capture the "ought-to-do" is a deontic logic developed with the use of STIT logic, created in the 1980s by N. Belnap.[29] STIT is a logic that includes the operator "*See To It That*". This operator is defined in a very rich semantic structure, constructed with the use of a technique called *branching*. The basic semantic ideas of STIT are extremely simple and intuitive. Two fundamental concepts of STIT are that of a *moment* and a *history*. Moments are ordered (they form transitive and nonreflexive relation). Two moments can belong to the same, or two different, histories. This is depicted in the figure below as a tree, which, from the bottom-up represents the direction of the flow of time.

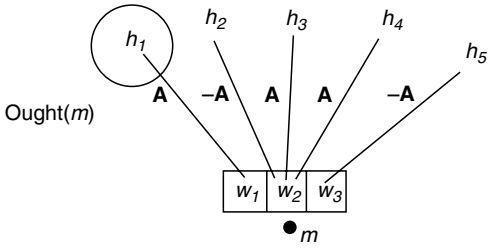


Let moment m_1 be the actual moment. As we can see, "below" m_1 the tree does not branch. Intuitively, this corresponds to the thesis that the past is fixed (fully determined). However, "above" m_1 our tree has several branches that, taken together, represent the undetermined future. Every "maximal" branch of the tree represents a certain history. For instance, the branch that goes through m_1, m_2, m_3 and onward, constitutes the history h_1 (or h_2), and the branch that goes through m_1, m_2 and m_4 constitutes the history h_3 (or h_4). It is useful to denote by H_m the set of all histories "going through" the moment m (therefore, for instance, $H_{m1} = \{h_1,h_2,h_3,h_4, h_5, h_6,h_7,h_8\}$, and $H_{m4} = \{h_3,h_4\}$). From the perspective of the logical systems we have already presented, every moment is a certain possible world (possible state of affairs); hence, in a propositional logic a moment is represented by the valuation function that ascribes to all the atomic expressions of a language the values of truth or falsehood.

In such semantics the concept of action is encoded by defining the functor "see to it that", which we write formally:

$$[\alpha \; stit \; A]$$

this is read: person $\propto$ sees to it that A. In order to give a semantic characteristic to $[\alpha \; stit \; A]$ we must introduce the concept of choice. From the intuitive point of view this is simple. In every moment m person α can choose from various actions and her choice determines the future, i.e., determines which history will be realized. It is not the case, however, that the choices of a given person determine the future univocally. The below figure illustrates this. In moment m person α has three possible choices: w_1, w_2 and w_3. Choices w_1 and w_3 determine one, concrete history (in the case of the former – h_1, and of the latter – h_5). The choice of w_2 does not determine the future univocally, reducing only the set of possible histories to h_2, h_3 and h_4.



An important feature of STIT is that, in it, we ascribe to different people the choices they can make at moment m. If person α has at m three

possible choices, it does not mean that person β also has three choices; moreover, the choices of β can "divide" the set of possible histories in a different way than the choices of α can.[30] Let us use $Choice_{\alpha}^{m}$ to denote the set of all choices of α at m. Let $Choice_{\alpha}^{m}(h_i)$ stand for the choice that includes history h_i. Therefore, e.g., $Choice_{\alpha}^{m}(h_1) = w_1$.

We can now define the functor [. . . *stit* . . .]. The expression [α *stit A*] ("Person α sees to it that *A*") is true at moment m and history h, if and only if A is true for every history *h'*, which belongs to $Choice_{\alpha}^{m}(h)$. Look at the example depicted in the figure above. [α *stit A*] is true at moment m for h_1 (since h_1 is the only history belonging to w_1 and *A* is true in h_1); in the case of the remaining histories [α *stit A*] is false. For h_5 this is obvious. The falsity of [α *stit A*] at m for h_3 and h_4 results from the fact that in one of the histories (h_2) belonging to the same choice as h_3 and h_4, *A* is false. It seems that this definition of the truth of [α *stit A*] is sound. Person α sees to it that *A*, if her choice results in A being true.

In order to take the last step – introduce to our semantic structure the functor of obligation *O* – we need, as in the case of the deontic logics discussed above, a norming function. This time "norming" means picking out for every moment m a set Ought(m) of those histories that are desirable from the point of view of a legislator. We will say that at a moment m and for a history h it ought to be that *X* (we write: *OX*), if and only if *X* is true at moment m and a history h_i for every history h_i belonging to Ought(m). For instance, in the situation depicted in the figure, the sentence *OA* is true at m and h_1, for *A* is true at m for the only history belonging to Ought(m), i.e., for h_1.

From our point of view the most interesting question is when the expression *O*[α *stit A*] ("it ought to be the case that person α sees to it that *A*") is true. According to the above definition *O*[α *stit A*] is true at moment m and history h, if [α *stit A*] is true at m for every history belonging to Ought(m). In our example, only h_1 belongs to Ought(m), and we have already determined that [α *stit A*] is true at m for h_1. Therefore, *O*[α *stit A*] is true at m for all the histories h_1–h_5. If, however, the set Ought(m) included, apart from h_1, also h_3, the expression *O*[α *stit A*] would be false at m for all the histories, since at m/h_3 [α *stit* A] is false. What is interesting, is that in the same situation *OA* would be true (for *A* is true both in h_1 and in h_3). This shows that, in the semantics under consideration, the expression "it ought to be the case that A" is not equivalent to "it ought to be the case that person α sees to it that A".

The system described above will not be developed any further.[31] We would like, however, to point out several facts. First, the expression *O*[α *stit A*] is not yet the *ought-to-do* obligation. J.F. Horty, the author of the

presented conception, indicates that even the operator O, as now defined, suffices to solve the "Fred and Ginger puzzle". Observe that the expression "it ought to be the case that person α sees to it that A" cannot be reduced to the expression "it ought to be the case that A". The difference between OA and $O[\alpha\ stit\ A]$ is based on the fact that, in the latter case the obligation is in a way personalized. This supports our diagnosis that the paradoxical character of the Fred and Ginger case stems from the fact that obligations in traditional deontic logics are not "personalized"; *a contrario*, it is not a result of reducing *ought-to-do* to *ought-to-be*. Horty shows, however,[32] that there exist situations which cannot be adequately accounted for with the use of the functor $O[\ldots stit \ldots]$. In order to describe those situations he proposes – in the framework provided by STIT – another deontic operator which encodes *ought-to-do*.[33]

Secondly, the semantics of STIT enables Horty to build a system that takes into account the obligations of many persons. Such logic has important consequences for the problem of the "group ought". One can identify at least a few such obligations. Let us look at two examples. A group of pupils has two obligations: to clean the blackboard before the lesson begins, and to keep quiet during the lesson. The first of the obligations will be fulfilled if any of the pupils cleans the blackboard. Fulfillment of the second requires that all the pupils stay quiet. The distinction between those two kinds of obligation is possible only when the language of our logic can not only express the fact that there are different obligations on different persons, but can also account for the complicated relations between those obligations.

The logics of action constitute, as we have seen, an interesting alternative for traditional deontic logics. They may be characterized, first and foremost, as using rich and intuitively sound semantic structures. The search for such structures, which are able to model more and more complex situations, is one of the most important directions of contemporary logical research.[34]

2.4.3 Jørgensen Dilemma

Up to now the focus has been on when sentences which take the form "it ought to be the case that p", can be labeled true. But can such sentences be true or false at all? It seems that one can ascribe truth or falsehood to descriptive sentences that inform us about facts. Questions, orders and norms, on the other hand, do not seem to fall into categories possessing truth values. One may maintain that this is not an important problem; but the fact is that contemporary logic – or at least the commonly

accepted part of it – concerns expressions that are true or false. If we reflect on these two observations, i.e., that:

(1) Only true or false sentences can serve as premises or conclusions in logically valid arguments.

and

(2) Norms cannot be ascribed truth values.

then we should conclude that:

(3) Norms cannot serve as premises or conclusions in logically valid arguments.

Our conclusion (3) puts into doubt the possibility of developing any logic of legal reasoning. However, we do put forward many legal arguments every day, and they seem intuitively correct. Therefore, we can note:

(4) Intuitively correct normative arguments do exist.

Theses (1) – (4) constitute a dilemma that was first described by Jørgen Jørgensen in a paper published in 1938.[35] It should be added that, in the original formulation, the Jørgensen Dilemma concerned imperatives, not norms.

It is not difficult to argue that the Jørgensen Dilemma poses a fundamental challenge for any formal reconstruction of legal, or, more generally, normative, discourse. As we have already observed, the acceptance of thesis (3) of the Dilemma leads directly to questioning the very possibility of a logic of norms. For that reason, it is necessary to devote some space to analyzing possible solutions to the Dilemma.

Thesis (3) of the Jørgensen Dilemma is a logical consequence of theses (1) and (2). Therefore, in order to resolve the Dilemma one can question thesis (1), (2) or (4). We would like to start with the latter possibility, observing that thesis (4) can be understood in two ways. First, the expression "normative arguments" can mean "arguments using norms as premises and conclusions". On the other hand, however, "normative arguments" can consist of other expressions than norms. We have therefore two versions of thesis (4): (a) when "normative arguments" means "arguments using norms"; or (b) when we maintain that intuitively correct normative arguments are built of some other expressions. The distinction between (4a) and (4b) is useless if we cannot identify those "other expressions". Philosophers and logicians have named and defined such a category of expressions called deontic sentences. A deontic sentence is an expression stating the existence of an obligation relative to a certain deontic system. The following is an example of a deontic sentence: "According to valid law, John ought not to steal". It is usually held that such sentences, which describe only what is obligatory, prohibited or permitted relative to a certain normative system can be ascribed truth

values. If, however, deontic sentences are true or false, then there can be logical relationships between them.[36]

Therefore, if we choose to understand thesis (4) of the Dilemma in the (4b) sense, then the Dilemma can be resolved, assuming that the "normative arguments" in question are arguments made up of deontic sentences. If we accept (4a), however, the problem remains. Of course, the distinction between norms and deontic sentences is problematic. We will not go into the details of the debate on this issue. However, we must address a terminological problem. Sometimes deontic logic is distinguished from the logic of norms. The former is thought to concern deontic sentences, i.e., expressions that are true or false. The latter concerns norms, i.e., expressions which are neither true nor false. This conception – that norms cannot be ascribed the value of truth – is called noncognitivism. From the perspective of noncognitivism it is essential to distinguish carefully between deontic logic and the logic of norms, whilst in the rival theory – cognitivism – this distinction is not required.

As already observed, the Jørgensen Dilemma can also be resolved by questioning thesis (1) or thesis (2). According to thesis (1) logical relations obtain only between sentences that are true or false. It must be conceded that not all logicians and philosophers agree with this stance. This is proven by some logical systems that are not based on truth values. The proponents of such logics have to deal with very serious problems, mainly related to the fact that basic and commonly accepted metalogical concepts, such as satisfaction or soundness, are based on the notion of truth. The adaptation of those concepts to a logic that makes no use of notions of truth and falsehood is not a trivial task. Therefore, the solution to the Jørgensen Dilemma that consists in abandoning thesis (1) remains highly problematic.

The last of the proposed solutions to the Dilemma is to abandon thesis (2). This thesis is questioned by cognitivists, i.e., those who ascribe truth values to norms. There is some agreement that the cognitivist theory of Aquinas is one of the most coherent. According to him, the norms that we should follow in our lives are only an inferior copy of eternal divine law. Because of their pedigree, those norms can be ascribed truth (and norms incompatible with them can be designated as false). A closer analysis of Thomistic philosophy reveals, however, that one can, with a sufficient degree of certainty, express only one – the most general – norm: *bonum est faciendum*, good should be done. To deduce more precise rules of behavior from this general norm is a question of individual decision, rather than of well established logical operations.[37] It is therefore difficult to "transfer" truth from the general norm (which is true

because of its pedigree) to the specific rules we use every day. Other versions of cognitivism are also troublesome. Usually, the notions of truth they apply are problematic. Therefore, this solution to the Jørgensen Dilemma is not commonly accepted either.

In recent years the discussion surrounding the Jørgensen Dilemma has become less and less intense, although there emerge, from time to time – new attempts to deal with it.[38] Despite the fact that there is still no commonly accepted solution to the Dilemma, the research on logical reconstruction of legal reasoning goes on, and each year new deontic logics or logics of norms are developed. This may well stem from the fact that the Jørgensen Dilemma continues to be a challenge for logicians and thus forces them to search for new formalisms and ideas. Most of the constructed logics of normative discourse are based on notions of truth and falsehood. This is also true of the logical systems presented above. This does not mean that we claim the impossibility of a logic of norms in which expressions cannot be ascribed the value of truth or falsehood. Our choice was motivated only by the importance the presented systems enjoy in contemporary legal theory. Whether we can treat them as proper logics of norms, or "only" as deontic logics depends on the accepted solution to the Jørgensen Dilemma, which, in turn, is based on some ontological choices.

2.5 DEFEASIBLE LOGIC

2.5.1 The Concept of Defeasibility

We would like to turn now to a discussion of defeasible logic. Research on this type of logical system began in the 1970s. The concept of defeasibility, however, was introduced much earlier. It appeared in H.L.A. Hart's paper "The Ascription of Responsibility and Rights", published in 1948. Hart writes:

> When the student has learnt that in English law there are positive conditions required for the existence of a valid contract, (. . .) his understanding of the legal concept of a contract is still incomplete (. . .). For these conditions, although necessary, are not always sufficient and he has still to learn what can *defeat* a claim that there is a valid contract, even though all these conditions are satisfied. The student has still to learn what can follow on the word "unless", which should accompany the statement of these conditions. This characteristic of legal concepts is one for which no word exists in ordinary English. The words "conditional" and "negative" have the wrong implications, but the law has a word which with some hesitation I borrow and extend: this is the word "*defeasible*", used of a legal interest in property which is subject to termination or defeat in a number of different contingencies but remains intact if no such contingencies mature. In this sense, then, contract is a defeasible concept.[39]

Hart's idea amounts to a declaration that certain legal concepts, like that of a binding contract, lack definite conditions of application. Unforeseen circumstances can always occur, causing us to withdraw the claim that we are dealing with a valid contract, although the usual conditions for its validity are fulfilled.[40] An important point must be stressed here. We call certain contracts "valid" because they were concluded in accordance with certain legal rules. Therefore, the ascription of a legal concept hangs together with the fulfillment of a legal norm. If we say – after Hart – that legal concepts are defeasible, then so are legal norms. A legal norm is defeasible if there are situations in which the conditions of that norm's application obtain, but the norm is not applied.

Defeasibility thus defined leads to some logical problems. If we reconstruct a legal norm, as we did above, with the use of material implication:

$$h \rightarrow d$$

(h stands for the norm's antecedent, and d for the consequent), we will not be able to say that the norm is defeasible. This is because in the case of defeasible norms, it is possible that $h \rightarrow d$ is valid, h obtains, but we cannot deduce d. In classical logic (including deontic logic based on classical calculi) this cannot be the case, since if we have $h \rightarrow d$ together with h, d follows on the basis of *modus ponens*.

It is clear from the above that acceptance of the thesis that legal rules are defeasible forces us to look for an alternative logic of legal discourse. Such logic has been developed, not in the field of legal theory, but within research on artificial intelligence. It turns out that the problem of defeasibility is important not only for legal or normative reasoning, but also in theoretical discourse. Logicians developing artificial languages for computer systems encountered the following problem.[41] It happens that a man (or a computer system) has to reason with uncertainty as to whether all relevant information has been collected. For instance, when we know that Tweety is a bird, it is reasonable to say that Tweety flies. If, however, we had additional information that Tweety is a penguin or a baby bird, then we would have to withdraw from saying that Tweety flies (for we know from elsewhere that if a bird is a penguin or a baby bird it does not fly). It follows from this example that such conditionals as "if x is a bird, then x flies" are simply false, but nevertheless, we sometimes use them in our reasoning. Naturally, such conditionals cannot be formalized as a material implication. A new, nonclassical implication needs to be sought.

Defeasible logic constitutes such a nonclassical system. It is an example of nonmonotonic logic.[42] It is instructive to expand here on the meaning of "nonmonotonic". Classical logic is monotonic. This means

that if a sentence *p* follows from a set of premises A, then *p* follows also from a set B, which is a superset of A. Every logic which lacks this feature is nonmonotonic. It is easy to show that our Tweety example requires a nonmonotonic logic. In the example we first infer from two premises – "if x is a bird, then x flies" and "Tweety is a bird" – that "Tweety flies". Later, we add the information that "Tweety is a penguin" (and we know that penguins do not fly). From this extended set of premises the conclusion that Tweety flies no longer follows.

2.5.2 Defeasible Logic

There are many defeasible logics.[43] In this section we would like to present one of them,[44] concentrating on its main ideas and omitting technical details.

Our defeasible logic (in short: DL) operates on two levels. On the first level *arguments* are built from a given set of premises; on the second level the arguments are compared in order to decide which of them prevails. The conclusion of which argument is "best" becomes the conclusion of the given set of premises.

The language of DL is the language of first order predicate logic, extended by the addition of a new functor, the defeasible implication, for which we will use the symbol⇒. For defeasible implication there exists a defeasible *modus ponens*, analogous to that of the material implication:

$$A \Rightarrow B$$

$$\frac{A}{B}$$

The difference between material and defeasible implications is visible only on the second level of DL.

The language of DL serves the building of arguments. In our Tweety example we have two situations. In the first, three sentences belong to our set of premises: "if x is a bird then x flies", "Tweety is a bird" and "if x is a penguin then x does not fly". The first of the premises can be formalized in the following way:

$$\texttt{bird}(x) \Rightarrow \texttt{flies}(x)$$

The second premise is, of course:

$$\texttt{bird}(\textit{tweety})$$

And the third:

$$\texttt{penguin}(x) \Rightarrow \neg(\texttt{flies}(x))$$ [45]

This set of premises enables us to construct only one argument. With the help of defeasible *modus ponens* we obtain:

$$\texttt{bird}(x) \Rightarrow \texttt{flies}(x)$$

$$\texttt{bird}(\textit{tweety})$$

$$\texttt{flies}(\textit{tweety})$$

The addition of a fourth premise:

$$\texttt{penguin}(\textit{tweety})$$

enables us to build the following argument:

$$\frac{\texttt{penguin}(x) \Rightarrow \neg(\texttt{flies}(x) \qquad \texttt{penguin}(\textit{tweety})}{\neg\texttt{flies}(\textit{tweety})}$$

Having those two arguments we can move to the second level of DL, in which the arguments are compared in order to decide which is better, and in consequence which of the sentences – $\texttt{flies}(\textit{tweety})$ or $\neg\texttt{flies}(\textit{tweety})$ – should be regarded as the conclusion of our set of four premises.

In the second level of DL two concepts play a crucial role: *attack* and *defeat*. We shall say that an argument A attacks an argument B if the conclusions of both arguments are logically inconsistent.[46] In our example that is the case since $\texttt{flies}(\textit{tweety})$ and $\neg\texttt{flies}(\textit{tweety})$ are contradictory. If two arguments compete with one another, one must know how to decide which argument prevails, i.e., which *defeats* the other. Various ways of comparing attacking arguments have been developed.[47] The easiest and most flexible is the following. One checks what the defeasible implications that served to build the attacking arguments are. It is assumed that those implications are ordered. In a comparison an argument wins when it is built with the use of a defeasible implication that is higher in the order. In our example the first argument is based on the implication $\texttt{bird}(x) \Rightarrow \texttt{flies}(x)$, whilst the second is based on $\texttt{penguin}(x) \Rightarrow \neg\texttt{flies}(x)$. It is reasonable to assume that the second implication is higher in the ordering, since it represents a stronger tie – there are exceptions to the rule that if something is a bird then it flies, but the second rule that penguins do not fly, is exceptionless. If $\texttt{penguin}(x) \Rightarrow \neg\texttt{flies}(x)$ is higher in the ordering than $\texttt{bird}(x) \Rightarrow \texttt{flies}(x)$, then the second argument defeats the first.

The conclusion of which argument prevails in a comparison of all competing arguments built from the given set of premises, is the logical conclusion of this set. In the first situation our set of premises contained only three sentences (bird(x) ⇒ flies(x), penguin(x) ⇒ ¬flies(x), bird(*tweety*)), which enabled us to build only one argument. The conclusion of this argument, flies(*tweety*), is the logical conclusion in the first situation. In the second situation another sentence is added to our premises: penguin(*tweety*). This made it possible to construct the second argument. Both arguments attack one another and the second argument wins. Therefore, its conclusion, ¬flies(*tweety*), and not the conclusion of the first argument, follows logically in the second situation. It is clear from this that DL is nonmonotonic. In the first situation flies(*tweety*) was the logical conclusion, but in the second, in which the set of premises is extended, flies(*tweety*) no longer follows.

2.5.3 Objections Against Nonmonotonic Logic

At the beginning of this chapter we attempted to define what logic is. The definition we proposed poses a serious challenge for defeasible (or, more generally, nonmonotonic) logics. It prompts doubts as to whether these systems are logics at all.

As already observed, the key insight regarding the nature of logic was formulated by Tarski in his definition of logical consequence. The definition may be somewhat boldly presented as follows:

> A sentence A follows logically from the set of premises Γ if and only if in every case in which the premises of Γ are true, A is also true.

A short reflection enables us to say that Tarski's analysis shows our intuitive notion of logical consequence to be monotonic (even if we extend the set of premises Γ, it still will be a case in which all the sentences of Γ are true; therefore if after the extension of Γ, A ceases to follow from it, as is the case with nonmonotonic logics, such a notion of logical consequence is incompatible with Tarski's analysis). Moreover, the concept of truth also seems to be "monotonic" (it is difficult to assume that the addition of a new premise can make false a conclusion thus far considered true). In such a situation, the idea of logic as a set of rules for the "transmission of truth" must be abandoned. Instead some theoreticians are inclined to speak of the "transmission of justification". The role of nonmonotonic logic would be to determine which forms of reasoning lead from justified premises to a justified conclusion.

Abandoning Tarski's analysis also results in abandoning the intuitively appealing soundness theorems. This is problematic as regards the

question of whether one can "trust" nonmonotonic logic. On the other hand, the concepts of the second level of DL seem sound and the analyses carried out using DL demonstrate the flexibility and usefulness of this formal system.

Let us look more closely now at some examples of formalizations in DL. This will enable us to formulate several arguments in favor of nonmonotonic logic. We will identify two important features of DL formalizations: modularity and structural resemblance between legal texts and their formal counterparts. Further, we will show how DL deals with some hard cases. A comparison of defeasible and classical techniques will highlight some additional problems of the formal reconstruction of legal reasoning.

2.5.4 Examples

Some peculiar logical problems are connected with the structure of legal texts. Let us look at the following example. Let Article 1 say that the full capacity to perform legal acts is granted once a person is 18 years old; Article 2, in turn, constitutes an exception to Article 1, stating that persons declared mentally ill by a court do not have the capacity to perform legal acts. An attempt to formalize those two provisions in classical monotonic logic leads to the following results:

A1: $\forall x((18\_years(x) \wedge \neg mentally\_ill(x)) \rightarrow capacity(x))$

A2: $\forall x(mentally\_ill(x) \rightarrow \neg capacity(x))$

A distinctive feature of this formalization is that the formula representing Article 1 includes the predicate "mentally_ill", and therefore it takes into account the exception stated in Article 2. Our formalization mixes up, then, information from two different provisions. Such circumstances do not occur when a nonmonotonic system is used. In DL Articles 1 and 2 take the following form:

A1: $18\_years(x) \Rightarrow capacity(x)$

A2: $mentally\_ill(x) \Rightarrow \neg capacity(x)$[48]

In DL the information contained in Articles 1 and 2 is not "mixed up". Therefore, the defeasible formalization *resembles structurally* legal texts.

The presented formalization, apart from being structurally similar to legal texts, displays *modularity*. Imagine introducing Article 3, stating another exception to Article 1, for instance that married men do not have

the capacity to perform legal acts. In the classical formalization this causes a revision of the formula representing Article 1:

$$\text{A1: } \forall x((\texttt{18\_years}(x) \wedge \neg\texttt{mentally\_ill}(x) \wedge \neg\texttt{married}(x)) \rightarrow \texttt{capacity}(x))$$

A formula representing the new provision is also needed:

$$\text{A3: } \forall x(\texttt{married}(x) \rightarrow \neg\texttt{capacity}(x))$$

In DL the introduction of Article 3 is much easier. It suffices to add:

$$\text{A3: } \texttt{married}(x) \Rightarrow \neg\texttt{capacity}(x)$$

The formalization in DL displays modularity because adding a new provision does not lead to the revision of the formulas formulated earlier.

Modularity and structural resemblance in nonmonotonic systems, such as DL, can be fully appreciated when we imagine that, together with Article 3, the legislator enacts also Article 4, which states an exception to Article 3 saying that those married men whose last names begin with C have the capacity to perform legal acts.

Let us recall that the formalization of Articles 1–3 in classical first order predicate logic looks like this:

$$\text{A1: } \forall x((\texttt{18\_years}(x) \wedge \neg\texttt{mentally\_ill}(x) \wedge \neg\texttt{married}(x)) \rightarrow \texttt{capacity}(x))$$

$$\text{A2: } \forall x(\texttt{mentally\_ill}(x) \rightarrow \neg\texttt{capacity}(x))$$

$$\text{A3: } \forall x(\texttt{married}(x) \rightarrow \neg\texttt{capacity}(x))$$

Assume that `name_C` stands for the predicate from Article 4. Then, this article can be formulated as follows:

$$\text{A4: } \forall x((\texttt{married}(x) \wedge \texttt{name\_C}(x)) \rightarrow \texttt{capacity}(x))$$

However, we have to change also the formalization of Article 3:

$$\text{A3: } \forall x((\texttt{married}(x) \wedge \neg\texttt{name\_C}(x)) \rightarrow \neg\texttt{capacity}(x))$$

In DL, in which we had:

$$\text{A1: } \texttt{18\_years}(x) \Rightarrow \texttt{capacity}(x)$$

$$\text{A2: } \texttt{mentally\_ill}(x) \Rightarrow \neg\texttt{capacity}(x)$$

$$\text{A3: } \texttt{married}(x) \Rightarrow \neg\texttt{capacity}(x)$$

we only need to add:

$$\text{A4: } (\texttt{married}(x) \wedge \texttt{name\_C}\ (x)) \Rightarrow \texttt{capacity}(x)^{49}$$

Modularity and structural resemblance may seem weak arguments in favor of nonmonotonic systems. There are some facts, however, which testify to the contrary. The nonmonotonic formalizations lead not only to simpler results as regards "quality", but also as regards "quantity". For instance, an attempt to formalize the provisions of the Polish penal code concerning killing in classical logic results in more than 100 formulas. A similar formalization in DL requires only 33 formulas.[50]

In order to illustrate this, and to formulate one more argument in favor of nonmonotonic logics, let us try to formalize Article 148§1 of the Polish penal code (kk). The provision says that whoever kills a man shall be imprisoned for at least 8 years. This can be formalized in classical logic the following way:

$$\text{148§1 kk: } \forall x(\texttt{kills}(x) \rightarrow \texttt{punishment}(x))$$

This is not a complete formalization, however. It does not take into account, for instance, the exception stated in Article 148§2 kk, which qualifies some types of killing. If we cover them with the predicate qualified, our formalization must be changed in the following way:

$$\text{148§1 kk: } \forall x((\texttt{kills}(x) \wedge \neg\texttt{qualified}(x)) \rightarrow \texttt{punishment}(x))$$

One must add to this a formula representing Article 148§2. Exceptions to Article 148§1 kk can be found also in the remaining part of Article 148 and in Articles 149–151 kk. It should also not be forgotten that in the general part of the penal code there are provisions concerning guilt and self-defense that also constitute exceptions to Article 148 kk. As a result, a formalization of Article 148 kk in classical logic – due to its lack of modularity and structural resemblance – requires that at least ten, if not more, exceptions be taken into account. This causes the following problem: if this formalization is accepted as the basis of a judge's decision, the judge would be required to check whether any of the exceptions to Article 148 kk have occurred in making a decision; so, the judge would have to question whether the killing in question is an act of euthanasia, killing with particular cruelty, etc. In actual cases such justifications do not exist. The judge tackles directly only those questions, which are obviously relevant. It seems that such a process of the application of law can be successfully modeled using nonmonotonic systems, for they offer formalizations that are modular and display structural resemblance.

Even more important theoretical and logical problems are connected to hard cases. The most widely popularized such case seems to be Riggs vs. Palmer, described in *Taking Rights Seriously* by R. Dworkin.[51] These are the facts: Elmer Palmer murdered his grandfather, Francis Palmer. According to the applicable law of succession, Elmer was to inherit part of Francis' property. The law in question did not contain any provision that would deprive Elmer of his right to inherit because of what he had done. The New York Court of Appeals decided, however, that Elmer had no right to the inheritance, because "no man should profit from his own wrong".

Dworkin interprets the court's decision in the following way: in a legal system there are two types of legal norms – rules and principles. Legal rules, such as the norm that gave Elmer the right to inherit are applied in an "all-or-nothing" fashion: they are either fulfilled or not, *tertium non datur*. Legal principles, on the other hand, have the "dimension of weight", i.e., they may be taken into account to greater or smaller degrees. Moreover, principles can, in particular cases, "produce" exceptions to legal rules. In Riggs vs. Palmer we are dealing with such a case. The legal principle "No man shall profit from his own wrong" 'produces' an exception to the rule that gives Elmer his right to inherit.

Let us try to look at the situation from a logical point of view. We have the following predicates: `dies`, `grandfather` and `inherits`. Observe that both `grandfather` and `inherits` are two-place predicates for we will not say "Francis is a grandfather", but "Francis is Elmer's grandfather"; similarly, we will say "Elmer inherits from Francis", and not "Elmer inherits". In classical first order predicate logic the rule of the law of succession, which determines that if someone dies and has a grandson, the grandson has a right to the inheritance, can be formalized in the following way:

R: $(\forall x)\,(\forall y)\,((\texttt{dies}(x) \wedge \texttt{grandfather}(x,y)) \rightarrow \texttt{inherits}(y,x))$

The principle, in turn, which says that "No man shall profit from his own wrong" can be written:

P: $(\forall x)\,(\texttt{wrong}(x) \rightarrow \neg\texttt{profit}(x))$

Since Francis died (`dies`(*francis*)), and he was Elmer's grandfather (`grandfather`(*francis*,*elmer*)), then on the basis of *modus ponens* we can conclude that Elmer benefits from Francis' inheritance (`inherits`(*elmer*, *francis*)):

$(\forall x)\,(\forall y)\,((\texttt{dies}(x) \wedge \texttt{grandfather}(x, y)) \rightarrow \texttt{inherits}\,(y, x))$

dies(*francis*)

grandfather(*francis*, *elmer*)

---

inherits(*elmer*, *francis*)

On the other hand, Elmer did wrong (killing Francis) and therefore, according to the principle we formulated, he shall not profit from his act (¬profit(*elmer*)):

(∀x) (wrong(x) → ¬profit(x))

wrong(*elmer*)

¬profit(*elmer*)

If we assume what seems obvious – that the fact of inheriting is an instance of profit (it can be formalized as: (∀x) (∀y) (inherits(yx) → profit(y))), then our formalization of the rule R and the principle P produces a contradiction. Using the rule we obtain inherits(*elmer*, *francis*), and hence, on the basis of the just formulated relationship, profit(*elmer*); applying the principle, on the other hand, leads us to the conclusion ¬profit(*elmer*).

Our analyses suggest a way out of this problem: in the formalization of the rule R we must include the exception "produced" by the principle P. R thus becomes:

(∀x) (∀y) ((dies(x) ∧ grandfather(x,y) ∧ ¬wrong(x)) → inherits(y,x))

Now, the argument leading to the conclusion that Elmer benefits from Francis' inheritance (inherits(*elmer*, *francis*)) is blocked:

(∀x) (∀y) ((dies(x) ∧ grandfather(x,y) ∧ ¬wrong(x)) → inherits(y,x))

dies(*francis*)

grandfather(*francis*, *elmer*)

wrong(*elmer*)

Now we cannot apply *modus ponens* to R for wrong(*elmer*) obtains, and not ¬wrong(*elmer*).

Is the presented solution satisfactory? It is easy to observe that R does not resemble structurally the rule it stands for. This formalization is not modular either. One can easily imagine that the norm saying that a

grandson benefits from the inheritance of his late grandfather, could "lose" against some other principle. This other exception would also have to be included in the formulation of R. If there is interaction between rules and principles, the lack of modularity has, however, catastrophic consequences. Principles can "produce" exceptions to rules in *particular* cases and the number of those exceptions is theoretically unforeseeable and potentially infinite. Therefore, one can never construct "the final" formalization of any legal rule, for there is always a possibility that in a certain case a principle will "produce" an additional exception.

Those problems are omitted when one shifts to nonmonotonic logic. In DL, R becomes:

$$\text{R: } (\texttt{dies}(x) \wedge \texttt{grandfather}(x, y)) \Rightarrow \texttt{inherits}(y, x)$$

and the principle:

$$\text{P: } \texttt{wrong}(x) \Rightarrow \neg\texttt{profit}(x)$$

We have to add, as in the case of the classical formalization, that:

$$(\forall\, x)\,(\forall\, y)\,(\texttt{inherits}(y, x) \rightarrow \texttt{profit}(x))$$

Modularity in the nonmonotonic formalization makes it possible to deal with the potentially endless list of exceptions to R "produced" by different principles very easily. Those exceptions do not have to be included in the formulation of R.

Up to now, we have not looked at how legal norms are applied in DL. This process is highly characteristic and may even be deemed problematic.

Let us recall, first, the classical, monotonic formalization of Articles 1, 2 and 3 introduced above (for the sake of simplicity we omit Article 4):
A1:

$$\text{A1: } \forall x((\texttt{18\_years}(x) \wedge \neg\texttt{mentally\_ill}(x) \wedge \neg\texttt{married}(x)) \rightarrow \texttt{capacity}(x))$$

$$\text{A2: } \forall x(\texttt{mentally\_ill}(x) \rightarrow \neg\texttt{capacity}(x))$$

$$\text{A3: } \forall x(\texttt{married}(x) \rightarrow \neg\texttt{capacity}(x))$$

Imagine two situations. In the first John is more than 18 years old, is not mentally ill and is not married. On the basis of Article 1 we conclude that John has the capacity to perform legal acts ($\texttt{capacity}(\textit{john})$):

$$\forall x((\texttt{18\_years}(x) \wedge \neg\texttt{mentally\_ill}(x) \wedge \neg\texttt{married}(x)) \rightarrow \texttt{capacity}(x))$$

18_years(*john*)

¬mentally_ill(*john*)

¬married(*john*)

---

capacity(*john*)

We reached this conclusion by applying to the formalization of Article 1 and to the known facts the simple scheme of *modus ponens*. The same scheme can be applied in the second situation, in which John, in addition to being over 18 years old, is married. This time we conclude on the basis of Article 3 that John does not have the capacity to perform legal acts:

∀x(married(x) → ¬capacity(x))

married(*john*)

¬capacity(*john*)

Determination of the logical consequences of legal norms in both situations is more complicated in the case of the nonmonotonic formalization. In DL the first situation looks as follows. We have three legal norms:

A1: 18_years(x) ⇒ capacity(x)

A 2: mentally_ill(x) ⇒ ¬capacity(x)

A3: married(x) ⇒ ¬capacity(x)

and the following facts obtain:

18_years(*john*)

¬mentally_ill(*john*)

¬married(*john*)

From those premises only one argument can be built

18_years(x) ⇒ capacity(x)

18_years(*john*)

---

capacity(*john*)

Since we have only one argument, its conclusion – capacity(*john*) – is the logical consequence in the first situation.

In the second situation, besides the formulas representing our three norms, we have also:

$$\texttt{18\_years}(\textit{john})$$

$$\texttt{married}(\textit{john})$$

We can now construct two arguments leading to contradictory conclusions:

(A)

$$\frac{\texttt{18\_years}(x) \Rightarrow \texttt{capacity}(x) \qquad \texttt{18\_years}(\textit{john})}{\texttt{capacity}(\textit{john})}$$

and

(B)

$$\frac{\texttt{married}(x) \Rightarrow \neg\texttt{capacity}(x) \qquad \texttt{married}(\textit{john})}{\neg\texttt{capacity}(\textit{john})}$$

In order to determine the logical consequence in the second situation we must compare arguments (A) and (B), or, more precisely, "weigh" two legal norms occurring in the arguments: Article 1 and Article 3. As the second provision constitutes an exception to the first, it can be placed "higher" in the ordering, and hence argument (B) prevails over argument (A). Therefore, it is the conclusion of argument (B) – $\neg\texttt{capacity}(\textit{john})$ – that is the required logical conclusion in the second situation.

It turns out, then, that DL, which displays structural resemblance and modularity, leads to relatively complicated application of legal norms (determining the logical consequences in the given case). Classical formalizations are simpler in this regard. This advantage of classical calculi diminishes, however, as soon as cases more difficult than the application of Articles 1–3 are at stake. For instance, let us look at Riggs vs. Palmer. In the classical formalization, after the exception resulting from the principle "No man shall profit from his own wrong" has been introduced, we have the following, complex formula:

$$\text{R: } (\forall x)\,(\forall y)\,((\texttt{dies}(x) \wedge \texttt{grandfather}(x, y) \wedge \neg\texttt{wrong}(x)) \rightarrow \texttt{inherits}(y, x))$$

We will not apply this norm in Riggs vs. Palmer, since one of the conjuncts is not fulfilled, i.e., $\neg\texttt{wrong}(x)$ does not obtain (for Elmer did wrong).

In DL we have:

R: $(\texttt{dies}(x) \wedge \texttt{grandfather}(x, y)) \Rightarrow \texttt{inherits}(yx)$

P: $\texttt{wrong}(x) \Rightarrow \neg\texttt{profit}(x)$

In the analyzed case the following facts obtain:

$\texttt{dies}(\textit{francis})$

$\texttt{grandfather}(\textit{francis}, \textit{elmer})$

$\texttt{wrong}(\textit{elmer})$

this enables us to construct two arguments:

(A)

$(\texttt{dies}(x) \wedge \texttt{grandfather}(x, y)) \Rightarrow \texttt{inherits}(yx)$

$\texttt{dies}(\textit{francis})$

$\underline{\texttt{grandfather}(\textit{francis}, \textit{elmer})}$

$\texttt{inherits}(\textit{elmer}, \textit{francis})$

and

(B)

$\texttt{wrong}(x) \Rightarrow \neg\texttt{profit}(x)$

$\underline{\texttt{wrong}(\textit{elmer})}$

$\neg\texttt{profit}(\textit{elmer})$

and since benefiting from inheritance is profitable ($(\forall x)\ (\forall y)\ (\texttt{inherits}(y, x) \rightarrow \texttt{profit}(x))$), the conclusions of both arguments contradict one another. Comparing arguments (A) and (B) we "weigh" the norms $(\texttt{dies}(x) \wedge \texttt{grandfather}(x, y)) \Rightarrow \texttt{inherits}(yx)$ and $\texttt{wrong}(x) \Rightarrow \neg\texttt{profit}(x)$. The New York Court of Appeals gave priority to the latter norm and concluded that in Riggs vs. Palmer the logical conclusion of argument (B) prevails.

Let us modify the case slightly and imagine that Elmer killed his grandfather but did it unintentionally. He most certainly did wrong and, according to the principle employed by the court, he should not benefit from his act. The application of rule R as formalized in classical logic leads to the conclusion that, in the modified circumstances, Elmer does not benefit from Francis' inheritance. It could be argued, however, that the modified case is different from the original and that it is unjust to deprive Elmer of his rights. Such reasoning can easily be represented in

DL. Here, in the process of "weighing" the norms of arguments (A) and (B), priority would be given to the first of the norms. It is clear, then, that the flexibility of the "complicated" application of norms in DL may have profound practical consequences.

2.5.5 Two Remarks

At the end of our presentation of DL we would like to add two remarks. First, the substitution of the idea of "transmission of truth" with the idea of "transmission of justification" enables one to regard DL as a logic that captures some pragmatic aspects of legal reasoning, and to look for a pragmatic notion of logical consequence. Second, nonmonotonic systems may serve as a basis for questioning the thesis that the role of logic is confined to the context of justification. The complicated procedure of applying norms in DL can be seen as an attempt to capture the formal aspects of the context of discovery.

2.6 SUMMARY

Our analyses of the logical reconstruction of legal reasoning, although not all-embracing, may serve as a basis for some conclusions regarding the nature and limits of applying logical methods. First and foremost, they show that there is no common agreement over what the logic of legal discourse looks like. It should be added that the formalisms that we presented are not complementary. These are, in most cases, formal systems that are incompatible. For instance, the proponents of defeasible logics put forward arguments against classical logic, whilst the constructors of the deontic logic of action oppose the way obligation is defined in SDL.

Secondly, every attempt to develop a logic of legal discourse faces two kinds of problem. On the one hand, there are issues of general, philosophical nature; the Jørgensen Dilemma, considerations of various kinds of obligation, and objections against labeling nonmonotonic systems "logics" are cases in point. On the other hand, there are more specific problems, such as the various paradoxes of deontic logic. What is important, however, is that these problems do not result in the abandonment of attempts to construct a logic of legal discourse; on the contrary, they only encourage new research in the field.

We would like to stress one more thing: the important role intuition plays in constructing normative logics. It is intuition that stands behind the feeling of "a paradox" in certain situations. This is not to say that intuition decides everything, but its role should not be underestimated.

There is one more characteristic feature of contemporary research on normative logic: the way in which new systems develop to overcome recurring paradoxes leads through more and more complex semantics. This "semantic strategy" has recently been extended by the addition of a pragmatic ingredient. We must stress that this feature of contemporary normative logic – intuition plus semantics, with a bit of pragmatics – can be found in almost any logical research carried out nowadays.

It is necessary yet to ask what the conclusions of our analyses of the limits of applying logical methods should be. It should be observed that the contemporary logic of legal discourse aims to "conquer" more than classical logic did. It is appropriate to recall the question of whether the role of logic should be confined to the context of justification, or attempts to analyze logically such hard cases as Riggs vs. Palmer. This shows that there is no such thing as issues that cannot be analyzed from a logical point of view. Even hard cases have a logical dimension. Naturally, it is not the case that logic establishes algorithms for solving every legal case imaginable. However, with the expansion of logical methods, it is impossible to identify any strict limits on the application of formal tools. The only indication of such limits may be the fact that the role of logic remains to point out when, on the basis of given premises, we can accept some conclusion. However, this is also the aim – at least *prima facie* – of analysis and argumentation and, one could even argue, also of hermeneutics.

In concluding, we would like to mention those logics, which have not been discussed above: the logic of induction and probability logic. Our omission of those logics does not mean that they are unimportant for modeling logically legal reasoning. They can serve well the reconstruction of some arguments regarding evidence. We have decided, however, not to present them because there is nothing "peculiar" about their application in legal discourse. In other words, these formalisms are not connected with practical discourse in any special way.

Apart from those mentioned above, it is possible to find other kinds of "logic" in literature: informal, discursive, dialectical, etc. We have deliberately inserted quotation marks around "logic", for the theories in question have nothing to do with how logic is understood in this chapter. We do not want to say that we regard those conceptions as useless. Their introduction would ruin, however, the coherence of our presentation. Furthermore, they are based on ideas that resemble those on which theories of legal argumentation, discussed in Chapter 4, are based.

NOTES

1. Cf. A. Tarski, "O pojęciu wynikania logicznego" [On the Concept of Logical Consequence], *Przegląd Filozoficzny*, vol. 39, 1936, pp. 58–68.
2. The logical form of ordinary language expressions is not usually "visible at first sight". Thus, in order to judge the logical validity of arguments carried out in ordinary language, they are usually "translated" (paraphrased) into the chosen logical equation. As we will see, such paraphrasing is rarely universal or unproblematic.
3. Cf. J. Etchemedy, *The Concept of Logical Consequence*, Harvard University Press, 1990, p. 5 ff.
4. It seems obvious that one can reconstruct logically legal arguments (e.g., judicial reasoning) only from the point of view of justification; what "really happens" in the judge's head must be disregarded, whilst what is intersubjectively controllable is taken into account.
5. These are not, of course, all the possible functors. In a two-valued logic there are 16 possible functors.
6. One can demonstrate this with the following example: if we assumed that norms have the form of material implication, then all norms that had a false (or contradictory) hypothesis would be true (valid).
7. W.V.O. Quine, *Methods of Logic*, 4th edition, Cambridge, Massachussets., 1982, p. 45 ff.
8. Cf. G. Priest, *An Introduction to Non-classical Logic*, Cambridge, 2001, p. 13.
9. Cf. K. Ajdukiewicz, "Okres warunkowy a implikacja materialna" [Conditionals and Material Implications], *Studia Logica*, IV, 1956.
10. Cf. G. Restall, *Introduction to Substructural Logics*, London–New York, 2000.
11. In this argument we apply, of course, *modus ponens,* but for the sake of simplicity we omit the step of universal instantiation, as we do also in the examples below.
12. The terminology used is due to J. Wróblewski. Cf. his *Sądowe stosowanie prawa* [Judicial Application of Law], 2nd edition, Warszawa, 1988.
13. A survey of modal logics can be found in: G.E. Hughes, M.J. Cresswell, *A New Introduction to Modal Logic*, London–New York, 1996.
14. And Stig Kanger and Jaakko Hintikka.
15. That is how it looks in the propositional calculus. In modal predicate logic semantics is, of course, more complex, but the main ideas are the same.
16. Aristotle, *Etyka Nikomachejska* [Nicomachean Ethics], 1147a, in Aristotle, *Dziela Wszystkie* [Collected Works], vol. V, Wydawnictwo Naukowe PWN, Warszawa, 2000, p. 216.
17. Cf. J. Kalinowski, *Logika norm* [Logic of Norms], Daimonion, Lublin 1993, pp. 48–63.
18. This shows that Pp is the so-called weak permission, which means that $\neg p$ is not obligatory, but does not guarantee that p is not obligatory, as is the case with strong permissions.
19. Cf. R. Hilpinen, "Deontic Logic", in L. Goble (ed.), *The Blackwell Guide to Philosophical Logic*, Malden–Oxford, 2001, pp. 159–182.
20. Cf. J. Wolenski, *Logiczne problemy wykladni prawa* [Logical Problems of Legal Interpretation], Zeszyty Naukowe UJ, Warszawa–Kraków, 1972.
21. See J. Carmo, A.J.I. Jones, "Deontic Logic and Contrary-to-Duties", in D. Gabbay (ed.), *Handbook of Philosophical Logic*, 2nd edition, vol. IV, Dordrecht, 2001, pp. 287–366.

22. Cf. G.H. von Wright, "Ought to be – Ought-to-do", in E.G. Valdes, W. Krawietz, G.H. von Wright and R. Zimmerling (ed.), *Normative Systems in Legal and Moral Theory – Festschrift for Carlos E. Alchourrón and Eugenio Bulygin*, Berlin, 1997, pp. 427–438 and J.W. Forrester, *Being Good and Being Logical – Philosophical Groundwork for a New Deontic Logic*, New York, 1996.
23. For instance: Meinong, Hartmann and Chisholm, cf. J.F. Horty, *Agency and Deontic Logic*, Oxford, 2001.
24. Cf. *ibidem*.
25. It is not Geach's original example but its revised version proposed by J.F. Horty and N. Belnap in "The deliberative *stit*: a study of action, omission, ability, and obligation", *Journal of Philosophical Logic*, 24, 1995, pp. 583–644.
26. Cf. K. Segerberg, "Getting started: beginnings in the logic of action", *Studia Logica*, 51, 1992.
27. From the mathematical point of view an action in the universe of possible worlds W is therefore a two-argument relationship, i.e., a set of ordered pairs $<u, w>$, such that $u, w \in W$.
28. Here, we are dealing, once again, with the weak permission.
29. Cf. J.F. Horty, *op. cit*.
30. Therefore, we have the following structure: $<Tree, <, Agent, Choice>$, where *Tree* is a set of moments, $<$ is the relation that orders the moments, *Agent* is the set of agents and *Choice* is a function ascribing to every agent α at the moment m a subset of the set H_m of all the histories "going through" m.
31. For the details, see J.F. Horty, *op. cit*.
32. *Ibid*., p. 55 ff.
33. *Ibid*., p. 59 ff.
34. We would not like to suggest that logics of action are developed only in order to solve the "Fred and Ginger problem". There are also other problems in which those logics are developed. One can point out, for instance, the definition of other-than-standard deontic operators, the analysis of mutual relations between those operators or the problem of expressing the conflict between obligations, etc.
35. Cf. J. Jørgensen, "Imperatives and Logic", *Erkenntnis* 7, 1938, pp. 288–296.
36. See for instance J. Woleński, *Z zagadnień analitycznej filozofii prawa* [Issues in the Analytical Philosophy of Law], Zeszyty Naukowe UJ, Prace Prawnicze, Warszawa–Kraków, 1980.
37. J. Kalinowski in *Le problème de la vérité en morale et en droit*, Lyon 1967 argues to contrary.
38. Cf. the discussion in *Ratio Juris*, caused by R. Walter's paper "Jørgensen's Dilemma and How to Face It", *Ratio Juris* 9, pp. 168–171.
39. H.L.A. Hart, "Ascription of responsibility and rights", in A. Flew (ed.), *Logic and Language*, Blackwell, 1951, p. 152.
40. Such a thesis seems more justified in relation to common law systems than continental systems. However, as shown below, the idea of defeasibility can be useful for analyzing certain aspects of legal reasoning as carried out within the continental tradition.
41. On other problems that caused the development of nonmonotonic systems see J.F. Horty, "Nonmonotonic Logic", in L. Goble (ed.), *Blackwell Guide to Philosophical Logic*, Malden–Oxford, 2001, pp. 336–361.

42. Beside the nonmonotonic logics, the so-called formal theories of belief revision have also been used to solve the "Tweety problem".
43. Cf. H. Prakken, G. Vreeswijk, "Logics for Defeasible Argumentation", in D. Gabbay and F. Guenthner (eds.), *Handbook of Philosophical Logic*, Kluwer Academic Publishers, Dordrecht, 2002, 2nd edition, vol. 4, pp. 219–318.
44. The presentation will be based on the idea of a defeasible logic as developed by H. Prakken in *Logical Tools for Modelling Legal Argument*, Dordrecht, 1997.
45. This premise could also be reconstructed with the use of the material implication $\rightarrow$, which naturally is still at our disposal. The resulting formalization would be easier, as every argument that is based on $\rightarrow$ prevails over an argument based on $\Rightarrow$ (see below).
46. As this presentation is elementary, we apply here a simplified definition of attack.
47. See H. Prakken, *op. cit*.
48. In order for this formalization to "work" we need additional information that Article 2 is "higher" in the ordering than Article 1, with the result that, in the case of a conflict between both articles, it is the argument based on Article 2 that prevails.
49. Here, one has yet to update the ordering between the defeasible implications.
50. One can presumably formalize those provisions in classical logic with the use of a smaller number of formulas. However, even this alleged formalization would be much more complex than the one in DL.
51. Cf. R. Dworkin, *Taking Rights Seriously*, Harvard University Press, 1977.

CHAPTER 3

ANALYSIS

3.1 INTRODUCTION

It is difficult to define analysis. The main reason for this is that there are many procedures labeled "analysis". Here, of course, we are concerned only with a few of them; for instance, chemical analysis will not be considered. We shall be preoccupied only with those analytical tools which can be used in reasoning, interpretation or argumentation.

In what follows three basic meanings of the notion of analysis will be identified and a short history presented of each. Then two methods of analysis, which play an important role in the philosophy of law will be described. These methods are linguistic analysis and economic analysis.

3.1.1 The Notion of Analysis

Historically speaking, a plethora of definitions of analysis have been offered. It is convenient to start with three paradigmatic examples. The Ancient Greek mathematician, Pappus, says:

> For in analysis we suppose that which is sought to be already done, and we inquire from what it results, and again what is the antecedent of the latter, until we on our backward way light upon something already known and being first in order. And we call such a method analysis, as being a solution backwards (*anapalin lysin*).[1]

Descartes, in turn, in the 13th of his work "Regulae ad directionem ingenii" remarks:

> If we are to understand a problem perfectly, we must free it from any superfluous conception, reduce it to the simplest terms, and by a process of enumeration split it up into the smallest possible parts.[2]

Several hundred years later B. Russell put forward yet another definition of analysis:

> We start [the analysis] from a body of common knowledge, which constitutes our data. On examination, the data are found to be complex, rather vague, and largely interdependent logically. By analysis we reduce them to propositions which are as nearly as possible simple and precise, and we arrange them in deductive chains, in which a certain number of initial propositions form a logical guarantee for all the rest.[3]

The quoted definitions seem to describe distinct, albeit not entirely different, procedures. In the first definition analysis is a search for logical reasons (let us label it $analysis_1$). In the second it is "decomposition" ($analysis_2$). Finally, in the third definition, analysis is a translation into a certain language, which meets specific conditions, like simplicity or precision ($analysis_3$). Of these three conceptions[4] – analysis as a search for logical reasons, analysis as decomposition and analysis as translation – it is $analysis_2$ that seems best to correspond with our intuitions. In the dictionaries of various European languages "analysis" is usually understood as a method that leads from complex concepts to more simple ones. Analysis – thus defined – is usually contrasted with synthesis, which is a process of building complex entities from simple elements.

Let us note that $analysis_2$ differs from the two other conceptions as it has as its subject concepts – which are to be decomposed into simpler concepts. $Analysis_1$ and $analysis_3$, on the other hand, concern sentences or propositions. Only propositions can have logical reasons and only sentences can be translated into other sentences (sentences can also be decomposed but then they are treated as syntactic phenomena and not as bearers of meaning). It has to be noted that this difference is not as important as it may seem at first sight. One of the members of the Vienna Circle and a great representative of analytic philosophy, R. Carnap, defined logical analysis in the following way: "The logical analysis of a particular expression consists in the setting-up of a linguistic system and the placing of that expression in this system".[5] The expression in question can, of course, refer to a specific concept. Therefore, there may exist very close links between $analysis_2$ and $analysis_3$.

3.1.2 History of the Concept

Ancient thinkers applied different methods of analysis. It is of special interest to observe the procedures of searching for proper definitions. This method is usually tied with the name of Socrates and is illustrated well in many of Plato's dialogues. The Socratic method is an example of $analysis_2$. $Analysis_1$, in turn, can be found in those fragments of dialogues where Plato puts forward a hypothesis and seeks reasons for its acceptance. $Analysis_1$ is also carried out in Aristotle's "Analytics", the work that founded logical research. It is interesting to note that, in antiquity, only $analysis_1$ was theoretically described (especially in the already quoted work of Pappus).

In the middle ages, especially after the "renaissance" of the twelfth century, analytical methods were widely used, as witnessed in the achievements

of the scholasticism. One can easily agree with J.M. Bochenski,[6] that analysis of a comparable level of precision recurred not earlier than the twentieth century. The middle ages, by contrast, did not offer any new, fully developed methods of analysis (with the exception of some theories of John Buridan).

The works of Descartes constituted the next important step in the methodological discussion of analysis. In "Discourse on method" one finds a passage, which distinguishes between four principles of reasoning and describes one of them as follows:

> Divide each of the difficulties I examined into as many parts as possible and as may be required in order to resolve them better.[7]

There are few doubts what Descartes has in mind here: analysis as decomposition ($analysis_2$). This conception of analysis was popularized in the famous "Logic of Port Royal", a book written in Cartesian spirit by Arnauld and Nicole. The work, published in 1662, was used as the basic textbook on logic as late as the nineteenth century, influencing the common acceptance of $analysis_2$. The methods of $analysis_2$ can be found in the works of the greatest philosophers of modern times: Leibniz, the British empiricists, and Kant.

The third of the meanings given to analysis – analysis as translation – started to enjoy the status of an important methodological concept after the so-called linguistic turn in philosophy, which occurred with the publication of the works of Frege, Moore, Russell and Whitehead. It is convenient here to devote a few words to the reasons why the "linguistic turn" caused a change in how the notion of analysis was understood. Speaking somewhat boldly, philosophers before the linguistic turn, and at least since Descartes, were interested in what constitutes thinking or reasoning. "The inner discourse" or as the author of the "The discourse on method" would put it, "the chain of ideas in the human mind", constituted the subject of the philosophers' interest. This interest was supplemented with a peculiar understanding of reasoning, which was based on a metaphor of seeing: for Descartes "to think" means "to see ideas with the mind's eyes". It is not surprising then that, in such a framework, what interests philosophers are ideas or concepts and the method of analysis leads to decomposing the complex images into simpler ones. After the linguistic turn the situation changes: sentences now occupy the central place that had been reserved for concepts (even though concepts play an important role in some kinds of analytic philosophy).[8]

This is not to say, however, that the idea of analysis as decomposition is completely unknown to philosophers of the linguistic turn. B. Russell wrote:

> *Analysis* may be defined as the discovery of the constituents and the manner of combination of a given complex. The complex is to be one with which we are acquainted; the analysis is *complete* when we become acquainted with all the constituents and with their manner of combination, and know that there are no more constituents and that that is their manner of combination (. . .).[9]

This passage suggests that it is not always possible to differentiate between the three kinds of analysis outlined above. One can even say that there are not three kinds of analysis, but three aspects of the same process and that the different aspects play more or less important roles depending on the aim of the analysis, the philosophical assumptions accepted, etc.[10] However, such a solution – simple as it may be – makes a precise definition of analysis impossible.

To sum up: analysis cannot be easily defined. That said, one can identify three models of analysis and any given method is likely to resemble more or less one of those models. For example, mathematical analysis is first and foremost connected with the search for logical reasons. Anyway, the three presented models can serve as a basis for characterizing any applied (or postulated) methods of analysis.

3.1.3 Analytic Philosophy

In the twentieth century there emerged a philosophical movement that is usually referred to as "analytic philosophy". It would be inappropriate to characterize analytic philosophy as a school of thought that uses analysis as its method; there are numerous other philosophical traditions making use of analysis. The problem is that because of the diversity of schools labeled "analytic" it is difficult to establish the necessary or sufficient conditions for referring to someone as an "analytic philosopher".

J.M. Bocheński maintains that there are four keywords pertinent to analytic philosophy: analysis, language, logic and objectivism.[11] Bocheński understands analysis as opposed to philosophical synthesis; the task of a philosopher is not to construct all-embracing systems but to solve concrete problems. The keyword "language" refers to accepting language as the basic medium of philosophizing. "Logic", in turn, underlines analytic philosophers' trust in formal tools. Finally, "objectivism" is opposed to any kind of subjectivism.

The above mentioned principles are realized to varying degrees in different schools of analytic philosophy. For instance, members and

followers of the Vienna Circle put special emphasis on applying logical methods. The Oxford School of Ordinary Language, by contrast, dismissed logic as useless and concentrated on painstaking analysis of how words are actually used in ordinary language. Bocheński's proposal is not, therefore, a definition of analytic philosophy but only indicates the principles important to analytic philosophers.

Analytic philosophers are usually divided into two "wings" (camps). The first wing is occupied by the reconstructionists, whose aim is to reform ordinary language using logical tools. The second wing – the descriptionists – aims only to describe how ordinary language functions and uses methods of an informal character. The methods of reconstruction are often referred to as "hard", whilst descriptive techniques are called "soft". Therefore, we have "hard" (formal) analytic philosophers on the one hand, and "soft" (anti-formal) on the other.

Today the above mentioned division is questionable. But in the middle of the twentieth century there were good reasons to justify it. The "formal approach" was represented then by members and followers of the Vienna Circle (who, after the Second World War stayed in the United States or in the United Kingdom). On the other hand, the "anti-formal" methods were applied by Wittgenstein in Cambridge and by the Oxford School of Ordinary Language. The differences between the two approaches were clearly visible then, as was the animosity between the representatives of both wings of analytic philosophy.

G.E. Moore is considered the "founding father" of analytic philosophy. His *Principia Ethica* (1903) marks symbolically the beginning of a philosophy that – being in opposition to neo-Hegelianism – concentrated on conceptual analysis based on common sense. Moore can easily be classed as a representative of the anti-formal wing of analytic philosophy. The same may be said of the "second" philosophy of L. Wittgenstein or the Oxford School of Ordinary Language.

Around the time Moore "founded" anti-formal analytic philosophy, the "formal" wing began to emerge. German logician G. Frege is usually regarded as the first representative of this way of philosophizing. In addition to Frege's work, as a milestone in the history of logic – and of "hard" analysis – one should also mention Russell's and Whitehead's *Principia Mathematica*, published in 1910–1913. In the spirit of *Principia* L. Wittgenstein wrote his first major work, *Tractatus Logico-Philosophicus*. The idea of applying logical methods in philosophy was radicalized by the Vienna Circle, founded by M. Schlick in 1920s. Among members of the Circle one should mention O. Neurath, R. Carnap and F. Waissmann. Less radical, but still logically oriented, was another

distinguished philosophical school: the Lvov-Warsaw School, with its founder K. Twardowski and famous members: J. Łukasiewicz, S. Leśniewski, K. Ajdukiewicz, A. Tarski, T. Kotarbiński and others.

More contemporary methods of analysis, represented mainly by American and British philosophers, cannot easily be classified as formal or informal, although in some cases such a classification is to a certain extent justified. For instance, W.V.O. Quine can be labeled a representative of "hard" analysis; J. Hintikka likewise. G. Evans, on the other hand, used rather "soft" methods. However, some first rate philosophers, such as H. Putnam, M. Dummett and D. Davidson, do not easily qualify as representatives of either of the two groups.

Of the many approaches employed by analytic philosophers we examine below only linguistic analysis, which is characteristic of the Oxford School of Ordinary Language. There are several reasons for this. First, the methodological richness of analytic philosophy makes it impossible to present everything. Second, linguistic analysis is a method that is relatively well defined. Third, it has played an important role in legal theory and the philosophy of law. Finally, it is a model example of anti-formal analysis.

In Chapter 2 we also wrote about hard analysis; the chapter is devoted to presenting different attempts at the logical reconstruction of legal reasoning. The logical systems presented there are tools of "hard analysis". This formal analysis consists in translating (paraphrasing) natural language expressions into certain logical systems and in drawing conclusions from the obtained formalizations. Although in Chapter 2 we did not pay proper attention to the actual process of paraphrasing, in all those places where legal arguments are logically reconstructed a paraphrase has been employed. The development of logical methods presented in Chapter 2 is also an illustration of another kind of analysis. The logical systems we described constitute the analysis$_2$-definition of a legal norm, and some of them – of the concepts of obligation, permission, etc.

The decision to devote separate chapters to logic and analysis is not designed to exaggerate the differences between "soft" and "hard" analysis. What we had in mind was the coherence of the presentation. An historical approach to the logical reconstruction of legal reasoning enables one to show the development of formal methods and identify the key logical problems of legal reasoning. From this perspective mixing up "hard" with "soft" methods would make less clear the picture of logical research in legal theory.

We have to add one terminological remark. Below we will describe linguistic analysis which – in its purest form – was applied by the members of

the Oxford School of Ordinary Language. As already indicated, it is a model example of "soft", anti-formal analysis. Instead of "linguistic analysis" one can also say: "linguistic philosophy". Linguistic analysis (philosophy) has to be distinguished from the philosophy of language. Linguistic philosophy is identified by a certain method, whilst philosophy of language is identified by a certain subject. Philosophy of language can therefore be developed with the use of linguistic analysis but also of formal methods, phenomenology, etc. Linguistic philosophy, in turn, is not confined to developing a theory of language; it may concern any philosophical problem.

3.2 LINGUISTIC ANALYSIS

We would like to look now at the basic assumptions of linguistic analysis, in particular the special role it attaches to ordinary language. Then several important legal-theoretic conceptions that have grown out of linguistic analysis will be presented.

3.2.1 History and Basic Assumptions of Linguistic Analysis

Philosophical analyses which are labeled "soft" can be found in the writings of one of the "founding fathers" of analytic philosophy, G.E. Moore. In such works as *Principia Ethica* (1903), Moore developed a common sense philosophy, which made extensive use of analysis of the ordinary meaning of words. Similar methods were applied by other philosophers belonging to the Cambridge School of Analysis such as J. Wisdom, M. Black and S. Stebbing.

In reference to linguistic analysis one cannot fail to mention the "second" philosophy of L. Wittgenstein. Wittgenstein claimed to have solved all the major problems of philosophy in *Tractatus logico-philosophicus* and, after publishing it in the early 1920s, decided not to follow any "academic career". He returned to Cambridge and to philosophical thinking at the beginning of the 1930s. He developed then a new conception, which – in opposition to the one employed in *Tractatus* – abandoned logic in favor of analyzing ordinary language in its diverse forms.

Linguistic analysis in its classic form was developed in Oxford by J.L. Austin and his followers. Austin, the author of *How to Do Things with Words* (1962), put ordinary language at the center of philosophical attention, maintaining that analysis of the subtle ways in which ordinary language functions is the proper way to approach philosophical problems. Among other representatives of the Oxford School one should mention P.F. Strawson and G. Ryle. One should also add to this list J. Searle, although he did not regard himself as a linguistic philosopher.

Strawson devoted much attention to linguistic analysis as a method and showed that it can be applied to all traditional philosophical disciplines, including metaphysics (*Individuals*, 1959). Ryle was a highly influential figure in British philosophy from the 1930s. His main work is *The Concept of Mind* (1949), in which Cartesian dualism is attacked. Searle, before turning to the problems of the philosophy of the mind, developed further in *Speech Acts* (1969) the Austinian conception of illocutions, which we describe below.

Among the legal philosophers making use of linguistic analysis one should mention H.L.A. Hart, and some elements of this kind of analysis can also be traced in the works of R. Dworkin or J. Raz. It is not improper to mention K. Opałek, who in his monograph "Z teorii dyrektyw i norm" (1974) applied both "hard" and "soft" methods to analyze such concepts as "directive", "norm" or "imperative".

It is difficult to state precisely what linguistic analysis consists of. One could say that it is the analysis of concepts that are used in ordinary language; this, however, is neither precise nor adequate. We will begin our attempt to describe linguistic analysis by looking at what Strawson has to say on the matter.

The most characteristic feature of linguistic analysis is the special role of ordinary language. Strawson says that concepts which are basic from the philosophical point of view – if there is such a thing – are to be looked for in non-technical, ordinary language and not in specialized languages.[12] Those specialized languages, which include the language of sciences, are secondary relative to ordinary language, for getting acquainted with the theoretical concepts of various sciences assumes earlier familiarity with the pre-theoretic notions of everyday practice. Strawson says that ordinary language is based on the so-called conceptual scheme, a general structure of our every day and scientific thinking[13]; the aim of philosophizing is to discover and analyze this structure. This is, naturally, a very strong assumption, although some reasons backing it can be formulated. For instance, one can observe with Austin that

> our common stock of words embodies all the distinctions men have found worth drawing, and the connections they have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in our arm-chairs of an afternoon – the most favored alternative method.[14]

What is striking in this passage is the phrase "the survival of the fittest", which allows us to call Austin's argument that ordinary language has a special status – the "evolutionary argument": if ordinary language

results from a very long evolution, one can conclude that it "fits" the world well. In other words: if it is an efficient tool, it surely encodes some knowledge about the world.

The evolutionary argument – as persuasive as it is – is not sufficient for Austin to claim that ordinary language is the "last word" in philosophical thinking. As the author of *How to do Things with Words* observes himself:

> [The ordinary language] embodies, indeed, something better than the metaphysics of the Stone Age, namely, as was said, the inherited experience and acumen of many generations of men. (. . .) [But] certainly, ordinary language is not the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it *is* the *first* word.[15]

What Austin says does not only weaken the conclusions of the evolutionary argument. In this quoted passage one can find much more: a certain idea of linguistic analysis, which is an alternative to that of Strawson. According to Strawson, the analysis of the conceptual scheme, which is hidden beneath the ordinary language is the final aim of philosophy. Austin, on the other hand, suggests analyzing the way ordinary language functions; but the analysis in question is designed only as a point of departure for philosophy and not as its final aim. Only through an analysis of language can one prepare the ground for serious philosophical undertakings. From what has been said we can label Strawson's idea of analysis the maximalist approach, and Austin's the minimalist.

Below we will see examples of both minimalist and maximalist approaches. Hart's analyses presented in Section 3.2.2 are maximalist rather than minimalist. Speech acts theory, presented in Section 3.2.3, is an example of the minimalist program.

The most important objection to the program of linguistic analysis can be formulated as follows: philosophy which confines itself to describing how concepts function in ordinary language is a caricature of what it ought to be, namely the serious pursuit of important problems. Anti-formal philosophers reply to this with the following metaphor, which may be labeled "grammatical". Most of us are able to use our language without making many serious mistakes. This does not mean, however, that we are aware of all the rules of grammar. Like a linguist, who discovers the rules of grammar, a philosopher analyzes rules that govern our experience, but of which we are not (and do not have to be) aware. Such analysis cannot be termed a mere "caricature".

Another problem is connected to a specific feature of linguistic analysis that is very strongly stressed by Strawson. The aim of linguistic

analysis is not to discover "elementary factors". It is rather, speaking metaphorically, an attempt to draw a map of the conceptual scheme. The author of *Individuals* appeals to us to abandon the idea that analysis has to lead towards simplicity. He suggests, instead, imagining a model of a net, a system of interconnected units such that every unit can be understood properly from the philosophical perspective only when its interconnections with others are captured.[16]

It is plain to see that this philosophical method does not fit any of the three models of analysis we identified above. It has nothing to do with searching for logical reasons, or translating from a complex language into a simpler one. Moreover, Strawson expressly states that it does not assist in achieving greater simplicity. We believe, however, that one should not take for granted what Strawson says. Is not it true that the Strawsonian conceptual scheme is something basic? It is the task of a philosopher to discover the scheme, but also to relate philosophical problems to it. For instance: Strawson addresses the problem of Cartesian dualism – a serious philosophical issue by any standards – by determining that, in the conceptual scheme, there exists a concept of a person which differs in some important respects from the concept of a thing. The problem of dualism can now be analyzed against the background of this reconstructed fragment of the conceptual scheme of ordinary language. Therefore, the aim of analysis according to Strawson is not only to discover (describe) the conceptual scheme, but also to deal with philosophical problems by relating them to that scheme (this will be illustrated below, especially in Section 3.2.2). One can say therefore that linguistic analysis in its maximalist form is an example of analysis$_3$. We will come back to this controversial issue later.

The proponents of linguistic analysis are aware of the many objections raised against their method, and they have formulated various responses. In order to assess more accurately the benefits and limits of applying linguistic analysis to law, it is necessary to look more closely at how the method works in practice.

3.2.2 Legal Conceptual Scheme

Let us look more closely at how H.L.A. Hart used the methods of linguistic analysis in order to elucidate "the concept of law". Hart's undertaking can be seen from the maximalist perspective as an attempt to show how the concept of law functions in our conceptual scheme. Consequently, one will not find in Hart's analysis a definition of law that characterizes it by reducing it to more elementary elements. Moreover, in *The Concept of Law* Hart adapts an anti-definitional approach. This

approach is connected to the diagnosis of ordinary concepts of language that was popular in J.L. Austin's school.

Such concepts are necessarily vague. Accordingly, every concept has a core of determinate meaning and a penumbra of indeterminacy; in other words, there are objects that are certainly covered by the concept's denotation, but there are also many borderline cases – objects which cannot easily be placed inside or outside the concept's denotation. In the case of such concepts, defining – understood traditionally, as determining the set of necessary and sufficient conditions for predicating the given concept of the given object – is pointless for it leads to the elimination of borderline cases, and therefore creates a false picture of how the concept functions in ordinary language.

This anti-definitional approach does not, however, mean that one cannot say anything about ordinary language concepts. On the contrary: the principle of the primacy of ordinary language enables the subtle analysis of various concepts and interrelations between concepts. As a result, however, we never arrive at a simple definition. As Hart puts it himself in his *opus magnum*: "(. . .) this book is offered as an elucidation of the *concept* of law rather than a definition of 'law' ".[17]

Hart commences his discussion by criticizing the definition of law proposed by a nineteenth century English philosopher, J. Austin, the author of *The Province of Jurisprudence Determined*[18]. Austin's definition is usually reduced to the following slogan: "law is an order backed by a threat of sanction". In order to illustrate how Hart attacks Austin's definition by means of linguistic analysis, let us quote a longer passage from *The Concept of Law*. Considering in which situations the word "imperative" is appropriate, the English philosopher writes:

> [They] can be illustrated by the case of a gunman who says to the bank clerk: 'Hand over the money or I will shoot!' Its distinctive feature which leads us to speak of the gunman *ordering* not merely *asking* still less *pleading with* the clerk to hand over the money, is that, to secure compliance with his expressed wishes, the speaker threatens to do something which a normal man would regard harmful or unpleasant, and renders keeping the money a substantially less eligible course of conduct for the clerk. If the gunman succeeds, we would describe him as having *coerced* the clerk, and the clerk as in that sense being in the gunman's power. Many nice linguistic questions may arise over such cases: we might properly say that the gunman *ordered* the clerk to hand over the money and the clerk obeyed, but it would be somewhat misleading to say that the gunman *gave an order* to the clerk to hand it over, since this rather military-sounding phrase suggests some right or authority to give orders not present in our case. It would, however, be quite natural to say that the gunman gave an order to his henchman to guard the door.[19]

This passage typifies the way in which "anti-formal" philosophers argue. Hart presents a simple counter-example to challenge Austin's definition.

The sentence uttered by the gunman – "Hand over the money or I will shoot" – can be called an order backed by a threat of sanction, but it is not "law". In this way Hart shows that Austin's definition over-simplifies how the concept of law functions in ordinary language.

By developing many similar distinctions, Hart continues his analysis of Austin's definition. He shows that even if we changed the definition, saying that the orders in question must be general and commonly obeyed, we would still be far from determining how the concept of law operates. This can easily be observed when norms which confer powers, or determine proper procedures, e.g., for the writing of a will, are taken into account. These are *legal* norms, but they are not general and commonly obeyed orders backed by the threat of sanction.

This analysis of how the word "law" is used leads Hart to claim that law consists of a union between primary and secondary rules. Primary rules are rules that confer powers or state obligations. Secondary rules are *about* the primary rules: they determine how to introduce, change and interpret the primary rules. Among the secondary rules there is also the rule of recognition, which enables us to say which legal rules are valid.

This hypothesis of the concept of law is then analyzed by Hart in various contexts; the problems of the sovereign, justice, morality, and international law are addressed with the goal of elucidating the concept of law in mind. The last of these issues is of special interest for, reflecting on the question whether international law can be labeled "law", Hart applies a method sometimes called "argumentation from paradigms".[20] The method involves determining whether a given phenomenon can be called "X" by showing either that the phenomenon fits well a paradigm, a "model" X, or that it differs from it and in what respects. Applying this strategy, Hart asks whether international law is an exemplary incidence of the union of primary and secondary rules. His answer is, for various reasons, negative. Having analyzed the problems of international law, such as the lack of sanctions and lack of a uniform rule of recognition, Hart concludes that there are some analogies between international law and state law, which is a paradigm of the union of primary and secondary legal rules. International law is, therefore, a phenomenon which displays some, but not all, of the features of a "model" law.[21] Let us note that Hart's method does not demand a conclusive answer to the question of whether international law is law. It is sufficient to say that it is a borderline case. This, of course, stems from the fact that Hart does not aim to give a precise definition of law, but only to demonstrate how the concept of law functions in ordinary language. This approach is different from the one proposed by Austin in *The Province of Jurisprudence Determined*. Having

defined the "positive law", Austin does not hesitate to claim that international law is not positive law for it is not enacted by a sovereign.[22]

The above example can lead to the false conclusion that linguistic analysis cannot help to deal with "authentic" problems and can only serve to criticize other approaches. Leaving aside the fact that – as Wittgenstein would put it – many authentic problems are just pseudo-problems resulting from our lack of understanding of how language works, linguistic philosophy is filled with attempts to solve old philosophical problems. Such attempts can also be traced in Hart's work. For instance, the Oxford philosopher considers the concept of obligation, criticizing the so-called predictive theory thereof. In short: being obliged means that there is a sufficiently high probability of sanction if the obligation is not fulfilled. Hart puts forward two arguments against this sociological conception. First, he observes that the validity of a rule should not be confused with its applicability, as it is only applied because it is considered valid.

Second, he says in the "linguistic" spirit:

> If it were true that the statement that a person had an obligation meant that *he* was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g., to report for military service but that, owing to the fact that he had escaped jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction is saying this, and such statements are often made and understood.[23]

It is characteristic that, in addition to criticizing the predictive interpretation of obligations, Hart proposes his own solution to the problem of the relationship between the concept of obligation and statements concerning the efficiency of legal system. He claims that those statements can be regarded as presuppositions of statements, which refer to the validity of legal norms. In order to grasp this conception it is necessary to say a few words about the concept of presuppositions.[24]

The phenomenon called "presupposition" was mentioned initially by Frege but it was given the status of a full-blown philosophical problem in Strawson's paper "On Referring".[25] Strawson's idea was a reply to Russell's solution of a certain logical puzzle. The puzzle was connected with the sentence: "The present king of France is bald". Because of the fact that France is a republic, and there exists no king of France, the quoted sentence should be deemed false. For the same reason, however, its negation: "It is not the case that the present king of France is bald" also seems false. And here we encounter a real problem, for accepting that both sentences are false we break the basic law of logic, i.e., the principle of the excluded middle.

Russell solved the problem by saying that the logical structure of the two sentences is significantly different from what their grammatical form suggests. The sentence "The present king of France is bald" is logically a conjunction of three sentences: "There exists x, and that x is king of France" and "x is bald" and "there is only one x". This sentence is false because the first of the conjuncts is false ("There exists such x, that x is king of France"). Analogously one can deal with the sentence "It is not the case that the present king of France is bald".

Strawson criticized Russell's solution mainly because of the artificial distinction between grammatical and logical structures of a sentence.[26] He suggested instead that the concept of presupposition be used. We say that a sentence p is a presupposition of a sentence q (or, in other words, that q presupposes p), if the possibility of ascribing any logical value to q and $\neg q$ depends on p being true. We are able to say that q (or $\neg q$) is true or false if and only if the presupposition of q – the sentence p – is true. The analyzed sentences "The present king of France is bald" and "It is not the case that the present king of France is bald" can be established as truth or false under the condition that their presupposition – the sentence "There exists the present king of France" – is true. If the presupposition is false – as is the case in our example – the analyzed sentences cannot be designated as either true or false. Usually it is maintained that sentences which cannot be given the value of truth or falsehood are senseless.[27]

Let us return to the problem of the relationship between statements concerning obligations and statements concerning the efficiency of law. Hart suggests that the latter are presuppositions of the former. He does not use here, presumably, the notion of presupposition in its exact meaning. Rather, he intends to say that a full meaning of statements concerning obligations can be grasped only under the assumption that statements concerning law's efficiency are true.[28]

We would like to add one observation here. It seems that the entire method of linguistic analysis, especially the maximalist approach, is a search for "loosely" understood presuppositions. In trying to discover the elements of the conceptual scheme one asks what concepts are presupposed by the given linguistic phenomena.

3.2.3 Speech Acts Theory

One of the most important achievements of linguistic philosophy is the analysis of various aspects of language. It explores not only how certain concepts, like "law", function in language, but also what these "ways of functioning" are. An important thread in this research is the analysis

of practical discourse (both ethical and legal) and the demonstration of the role rules play within it.[29] The concept of a rule is one of the central subjects of Wittgenstein's *Philosophical Investigations*. Other authors analyzing this subject are, *inter alia*, A. Ross,[30] K. Opalek[31] or R. Dworkin.[32]

Another important aspect of linguistic philosophy is the theory of speech acts. Let us look more closely at this. The conception of speech acts was developed initially by J.L. Austin and later developed further by J. Searle and others.

Austin developed first the theory of performatives. He analyzed a class of linguistic expressions that had been disregarded by earlier philosophers. Some favorite Austinian examples of expressions belonging to the class are, for instance: "I name this ship 'the Queen Elizabeth'" (uttered in circumstances when a bottle of Champagne is smashed against the helm of a ship); "I give and bequeath this watch to my brother" (in a will); "I do" (as an answer to the question "Do you take this woman as your wife?"). Austin observes that such expressions play a different role than the sentences which we use to describe the world: they are uttered with the aim of changing the world. The utterance (in specific circumstances) of the first expression causes a specific ship to be called "Queen Elizabeth" from that moment on; of the second – that the will as regards a specific watch has been expressed; and of the third (assuming the same answer from the woman) – that a marriage has been concluded.

Those and similar expressions Austin labels performatives and characterizes them in the following way. They:

> (A) do not 'describe' or 'report' or constitute anything at all, are not 'true or false'; and (B) the uttering of the sentence is, or is a part of, the doing of an action, which again would not normally be described as, or as 'just', saying something.[33]

Performative expressions cannot be ascribed truth or falsehood, they can be however described as successful (fortunate, happy) or unsuccessful (unfortunate, unhappy). For instance, if the will is not written in the legally correct way, then the sentence "I give and bequeath this watch to my brother" will be unsuccessful – in other words, it will be an unfortunate performative. Similarly, the "I do" of the prospective husband uttered in the presence of a person who has no power to conduct a marriage ceremony would be an unhappy performative.

What is characteristic of the given examples is that there exists a certain conventional procedure which determines the necessary conditions of a successful action (and therefore of the happiness of a performative). In the case of the will and the marriage, the procedure is regulated by legal norms; in the case of the naming of a ship, the rules of custom set

the procedure. Those performatives which do not follow the procedure are unfortunate.

However, as Austin observes, not every performative is tied to a conventional procedure. If one says: "I promise to come tomorrow", the very uttering of those words – independent of any external circumstances – results in the making of a promise, and hence changes the world; the expression "I promise to come tomorrow" is therefore a performative expression, for it fulfills the Austinian specification of such expressions. The only thing that can "go wrong" in this situation, and result in the performative being unfortunate, is my intention: if I uttered the words "I promise to come tomorrow" with no intention of fulfilling the promise, one would be in a position to say that it is an unfortunate performative.

Austin pays a lot of attention to situations in which performatives turn out to be unfortunate (so-called infelicities). These considerations are of special interest for us. Austin developed a typology of infelicities. It has to be stressed, first, that we are addressing a typology and not a classification (logical division). This shows that Austin does not want to simplify the described phenomena and intends to present mechanisms governing the use of language in the full richness of the complicated and sometimes vague connections between them. It may seem surprising and unnecessary to dedicate so much effort to a typology of infelicities. In fact, however, it is sufficient to observe that a description of "what can go wrong" is a *modo negativo* analysis of the phenomena that obey the rules, i.e., the typology of infelicities helps us to draw the boundaries of the set of happy performatives.[34]

The way Austin develops his typology requires our special attention, for the method characteristic of linguistic philosophy manifests itself clearly in this process. We have already observed this in referring to Austin's desire to pay the richness of ordinary language its due. Another typical analytic maneuver Austin applies in his work is to present a long list of examples in favor of, or against, the proposed hypothesis. The use of simple linguistic intuitions is visible even in the way Austin labels different kinds of infelicities. Those cases in which a performative is unhappy because a certain procedure has not been followed, Austin calls *misfires*; the situations, in which "something went wrong" because of the attitude of the speaker, are termed *abuses*. This distinction is commented upon as follows:

> When the utterance is a misfire, the procedure which we purport to invoke is disallowed or is botched: and our act (marrying etc.) is void or without effect etc. We speak of our act as a purported act, or perhaps an attempt – or we use such an expression as 'went

through a form of marriage' by contrast with 'married'. On the other hand, in the (. . .) cases [of abuses] we speak of our infelicitous act as 'professed' or 'hollow' rather than 'purported' or 'empty', and as not implemented, or not consummated, rather then as void or without effect. But let me hasten to add that these distinctions are not hard and fast (. . .).[35]

What strike us in the quoted passage are not only the numerous linguistic examples, but also Austin's abstention from introducing exceptionless distinctions.

Among the misfires Austin distinguishes errors regarding the invocation of a procedure and the execution of a procedure. The first class includes situations in which there exists no proper convention and situations in which an existing procedure is wrongly applied. In the second class there are flaws (the procedure is partially wrongly executed) and hitches (the procedure has not been completed). Austin distinguishes also between different kinds of abuse, identifying insincerities (where I give a promise but do not intend to fulfill it) and infractions or breaches (where I promise something but do not fulfill it later). Naturally, for each category Austin presents a long list of examples. For instance, in considering insincerities he distinguishes between "not having the requisite feelings" (e.g., "I congratulate you" said when I do not feel at all pleased), not having the requisite thoughts (e.g., "I find you not guilty" when I do believe you are guilty), or "not having the requisite intentions" (e.g., "I promise" when I do not intend to do what I promise). Austin comments in detail on the distinctions, pointing out various features of insincerities and observes: "the distinctions are so loose that the cases are not necessarily easily distinguishable: and anyway, of course, the cases can be combined and usually are combined. For example, if I say "I congratulate you!", must there really be a feeling, or rather a thought, that you have done or deserved well?[36]

As in the case of other above mentioned distinctions, Austin points out the limitations of the introduced typologies, underlining their vagueness, etc. This arises, once again, from the philosopher's conviction that his aim is not to offer a simplified sketch of language, but to record all the nuances thereof. There are numerous other examples of vague or uncertain conceptions in Austin's works. The most striking, probably, can be found in the very structure of *How to Do Things with Words*. The work is constructed in a very peculiar way: the first part of it introduces the concept of a performative and distinguishes between performatives and constatives (expressions describing reality); the second part, in turn, questions the usefulness of the notion of a performative and introduces a new theory of the expressions with which we "do something in the

world". It is interesting to look closer at the reasons (and the method) that led Austin to abandon the concept of a performative: those reasons are as important as those that prompted the development of Austin's initial theory.

Austin observes, first, some similarities in the behavior of performatives and constatives. Let us inspect the following sentence: "John's children are bald", uttered in a situation when John has no children. The presupposition of the sentence "John's children are bald" – i.e., the sentence "John has children" – is false. According to the theory of presuppositions we discussed earlier, a sentence, whose presupposition is false, can be ascribed neither truth nor falsehood; we say such a sentence is senseless. According to Austin the sentence "John's children are bald", even if John has no children, cannot be called senseless; it should rather be described as "void".

This observation allows us to see the similarity between the described situation and, for instance, a situation in which a bridegroom's "I do" is uttered but some procedural conditions have not been fulfilled, i.e., a situation of a misfire. In this context Austin suggests that the sentence "John's children are bald", uttered in a situation where John has no children, should also count as a misfire. The same can be said of the sentence "A cat is on a mat", uttered even though I do not believe that a cat is on a mat. This situation is similar to the one in which I say "I promise", although I do not intend to keep the promise. Both can be labeled "abuses".

Austin summarizes these remarks in the following way: "[It] suggests that at least in some ways there is danger of our initial distinction between constative and performative utterances breaking down".[37] This conclusion leads us to the essential question: is it possible to develop a precise criterion for distinguishing between performatives and constatives? Austin considers first a grammatical criterion: performatives are expressions that use verbs in first person singular present indicative active (e.g., "I promise", "I give", etc.). This criterion will not do, however. In performatives one can use verbs in the third person (e.g., "You are hereby authorized to pay . . .", "Passengers are warned . . ."), in plural ("We promise . . ."), in various tenses ("You did it" instead of "I find you guilty"), in passive ("You are obliged. . .") and in different moods ("I order you. . .").

Consequently, instead of a purely grammatical criterion, Austin proposes a criterion that can be labeled "a paraphrase criterion": a performative is every expression that is "reducible, or expandable, or analyzable into a form or reproducible in a form, with a verb in the first person

singular present indicative active".[38] But in such a case we are entitled to say that the sentence "I read a book" is a performative, although it seems not to be. The above definition should therefore be augmented with the condition that performatives are expressions that include (or their paraphrase includes) some special verbs; "to promise" is such a verb, but "to read" is not.

Austin observes that those special verbs display a certain asymmetry as regards their use in first person singular present indicative active and their use in different persons and tenses. For instance, the utterance of "I promise" is certainly an extra-linguistic action but "You promised" or "He promised" are only descriptions of such actions. Similar things can be said of such verbs as "to bet", etc. The asymmetry cannot be observed, however, in the case of such verbs as "to read" or "to walk".

There exist verbs, however, that show the futility of Austin's attempt. For instance, the verb "to state" exhibits the asymmetry in question ("I state . . ." as opposed to "You state, that . . .") but to call this a performative verb is problematic (similarly with the verb "to classify"). On the other hand one can insult someone with verbs but the paraphrase "I insult you" seems inadequate.

It turns out, then, that all the attempts to formulate a criterion differentiating performatives from constatives fail. Neither the grammatical criterion nor the paraphrase criterion with the addition of the class of "asymmetrical" verbs can do the work demanded. This result causes Austin to rethink the problem. It is helpful to pause here for a moment and ask what the reasons are that caused Austin to abandon his initial theory, and what role the assumptions underlying his method played in his decision. We should ask why Austin even cares that the distinctions he introduced are not exceptionless. Is not it true that vagueness is something natural for ordinary language, and that the fact that some divisions are not exclusive and precise does not mean they are wrong or useless? The only answer that is in compliance with the method of linguistic analysis, is to say that the distinction between performatives and constatives presents wrongly the function of ordinary language. The next natural question: how do we know that this theory is *wrong*, has the following answer: the analyzed examples show a more adequate and elegant conception. The conception in question is the theory of speech acts.

A speech act is a basic unit of linguistic communication. The examples that motivated the abandonment of the distinction between performatives and constatives show that every speech act can be viewed from different perspectives; thus one can say that every speech act has at least two "dimensions": performative and constative. Austin proposes that speech

acts be looked at from three different angles: one can treat them as expressions that have certain meaning, as utterances that have certain conventional force and as expressions that cause a certain result which is not determined conventionally.

Pursuing this argument, Austin distinguishes between three aspects of a speech act: the so-called locutionary act, illocutionary act and perlocutionary act. A speech act as a locutionary act is the act of saying something; at the same time, as an illocutionary act, it is performing some other thing (e.g., asking, ordering, sentencing, apologizing); finally, as a perlocutionary act it is bringing about some consequence in the actions, thoughts or feelings of the listeners or the speaker. Let us revert to an Austinian example. A speech act in which someone says to me "Shoot her" is:

- a locution: he said to me "Shoot her" meaning by "shoot", shoot, and referring by "her", to her;
- an illocution: he urged (or advised, or ordered) me to shoot her;
- a perlocution: he got me to shoot her.

Austin's analysis does not stop at this distinction. The philosopher considers the adequacy of his conception, paying attention to the relations between locutionary, illocutionary and perlocutionary acts, and the criteria for distinguishing between them. We will not follow these analyses in detail, although they constitute a good example of the application of the method of linguistic analysis. We would like to mention, however, that the Austinian theory is not "the last word" of linguistic philosophy as regards speech acts. There were numerous philosophers that tried to develop it further. Of special interest is J. Searle's work, *Speech Acts*.[39] Searle criticizes the differentiation between locutionary and illocutionary acts, pointing out that it is not unusual that meaning constitutes illocutionary force (as is the case with "I promise to do this"). In such cases it is impossible to distinguish between locutionary and illocutionary acts.[40]

Searle set out to replace Austin's theory with one of his own. Searle treats speech acts as units of linguistic communication that consist of an *utterance act*, a *propositional act*, an *illocutionary act* and a *perlocutionary act*. The utterance act is the act of uttering certain words. The propositional act is the act of expressing a certain proposition. Both illocutionary and perlocutionary acts, as described by Searle, can be broadly compared to their Austinian counterparts. We will not analyze in detail Searle's conception. The conception is another illustration of how linguistic analysis operates and of the problems it encounters. The richness of ordinary language makes it easy to find counter-examples to any hypothesis. This does not mean, however, that such fallible

hypotheses and theories are useless; it is certain that they say something important about language and about how we use it.

Another illustration of this fact is the so-called typology of speech acts. In the last chapter of *How to Do Things with Words* Austin identifies five general classes of speech acts labeling them with "the following, more-or-less rebarbative names"[41]: *verdictives*, *exerctives*, *commissives*, *behabitives*, *expositives*. Verdictives are typified by the giving of a verdict; a list of verbs characteristic of those acts includes: "acquit", "convict", "find (as a matter of fact)", "calculate", "measure", "analyze". Exerctives are the exercising of powers, rights or influence ("nominate", "dismiss", "order", "vote for", etc.). Commisives are typified by promising or otherwise undertaking ("promise", "contract", "declare intention", etc.). Behabitives, in turn, concern attitudes and social behavior ("welcome", "bid farewell", "toast", "condole", etc.). Finally, expositives – difficult to define, as Austin admits himself – locate our utterances in a structure of argumentation or discussion ("I reply . . .", "I give as an example . . .", "I assume that . . .").

It is not surprising that a closer analysis of the relationships between the mentioned categories reveals that this is not an exhaustive classification but only a typology. It is equally unsurprising that Austin's typology was subjected to severe criticism, notably by Searle, who proposed his own taxonomy of speech acts.[42] To date, there have been developed several such typologies, sometimes employing very complicated conceptual structures. Research concerning speech acts is carried out today not only by philosophers, but also by linguists and jurists. Of special interest are pragma-dialectical analyses, i.e., analyses of argumentation structures consisting of numerous speech acts.[43]

At the end of our analysis of the application of linguistic methods to the conception of speech acts we should observe that this theory has special import for legal theory and the philosophy of law. One does not need to go to great lengths to show that the notion of illocution (or performative) is necessary for an adequate account of legal language.

3.2.4 The method and Its Limits

Methods. From what has been said so far, we can formulate several remarks about the methods of linguistic analysis. First of all one can say that those methods are based on a general directive that may be expressed in the following way:

Put forward hypotheses concerning the problem that interests you, and test them on examples motivated by intuitions regarding the use of ordinary language.

This directive is formulated in a very general way, which is inevitable if one wishes to state a directive that embraces both maximalist and minimalist approaches to linguistic analysis. The general directive can be applied in particular cases using different "procedures". In the course of our presentation we have identified and described some of them. One example is developing typologies, a method often applied by proponents of the minimalist approach. The fact that they construct typologies rather than logical divisions is rooted in features of ordinary language, such as vagueness. Other procedures of linguistic analysis include argumentation from paradigms and – especially interesting – the method of presuppositions. It has to be stressed that the list of methods covered here does not exhaust the list of methods serving the realization of the general directive of linguistic analysis. The examples are highly characteristic, but they do not comprise the whole list.

It is appropriate to consider which of the models of analysis is represented by linguistic methods. This question can be troublesome, especially in the case of Austinian "minimalism". We have analyzed Austin's conceptions of language, but these do not aim to solve a particular philosophical problem, they try only to capture some features of the "basic medium" of philosophizing. Austin's method is, however, also capable of dealing – at least initially or on a preparatory basis – with extra-linguistic problems. For instance, in "A Plea for Excuses" (1956) the philosopher considers the problem of freedom. Strawson's maximalist method, on the other hand, aims to discover the conceptual scheme. This "discovering" is, however, connected with reducing or relating analyzed problems to the scheme. Therefore, one can call it, as well as Austin's approach, analysis$_3$.

In linguistic analysis there are also methods of reasoning that may count as instances of analysis$_2$. A good example is found in Austinian typologies. Finally, some methods used by "soft" analytic philosophers can be labeled analysis$_1$. Recall the method of presuppositions that we described above. It displays a striking resemblance with analysis$_1$. The difference is that, whereas in analysis$_1$ one seeks logical reasons for the analyzed sentences, the method of presuppositions consists in looking for sentences presupposing the given ones. In both cases the relationship between what is given and what is searched for has a logical character.

Our considerations inevitably lead to the conclusion that a precise definition of linguistic analysis is impossible. Moreover, one should not really speak of linguistic analysis as one, unique method. Rather, what we have here are different strategies for dealing with philosophical problems that each aim at realizing the general directive we formulated: put forward

hypotheses concerning the problem that interests you and test them on examples motivated by intuitions regarding the use of ordinary language.

The limits. Our discussion of linguistic analysis was centered on the legal-theoretic problems. The discussion has shown that this method can serve legal philosophers well. It is not surprising then that linguistic analysis has been used to investigate numerous problems, ranging from legal language, discourse and the ontology of law, to more specific problems, like the validity of norms. It is not difficult, either, to envisage applying this kind of analysis in the field of legal dogmatics and legal practice.

An interesting relationship between the methods of linguistic analysis and the interpretation of law was observed by R. Sarkowicz, who developed a three-layer conception of legal interpretation.[44] Among the three layers of interpretation, he identifies the level of presuppositions, on which the interpreter reconstructs the worldview, the system of values, and the conception of social institutions as assumed by the legislator. These pieces of information are presuppositions (in a loose sense of the word) of legal text. Therefore, in Sarkowicz's conception, one of the characteristic methods of linguistic analysis becomes an important component of the process of legal interpretation.

Summary. In summarizing our presentation we would like to underline three issues.

First, the method of linguistic analysis is based (especially in the maximalist version) on a very strong defense of the distinguished role of ordinary language. From this assumption important consequences follow in the results of the analyses. In particular, features of ordinary language, such as vagueness and imprecision, are "inherited" by the results of linguistic analysis.

Second, it would be difficult today to find any theorists who apply linguistic analysis in its pure form. Despite this, many fruitful analyses do take advantage of linguistic methods.

Third, some of the conceptions of "soft" analytic philosophers have profound importance. Historically speaking, one cannot overlook the fact that linguistic analysis highlighted a sphere of language that was not properly analyzed in a philosophical world dominated by theories of the Vienna Circle. This sphere includes practical discourse and the pragmatic dimension of language. From a more contemporary perspective, "soft analysis" has given rise to achievements, such as speech acts theory, which are regarded as highly important contributions to legal theory and the philosophy of law.

3.3 ECONOMIC ANALYSIS OF LAW

3.3.1 Law and Economics

Economic analysis of law – i.e., applying economic tools to the analysis of what the law should be – is not a new idea. Some elements of this approach can be traced in the writings of Machiavelli, Montesquieu and the representatives of the German historical school. Economic analysis of law *par excellence* originated, however, in the Anglo-Saxon world. This is hardly surprising, given that the Anglo-Saxons built the foundations of economics itself, as witnessed by the Scottish Enlightenment and the philosophies of Bentham and Mill.

Already in 1897, one of the greatest representatives of American realism in legal theory, O.W. Holmes, wrote:

> For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.[45]

Holmes' prophecy had already become reality by the beginning of the twentieth century, when American, German and Scandinavian jurists attempted to apply economic methods to the analysis of law.[46] Economics was not, however, the only perspective they adopted. Economic tools were only part of the theoretical arsenal used by legal realism.

Out of this tradition the Chicago School of Law & Economics originated. It is usually held that the school was established in the 1970s. However, by the end of the 1950s, research on the borderline between law and economics was undertaken. Amongst the seminal articles of those times one should mention R. Coase's "The Problem of Social Cost" (1960), A. Alchian's "Some Economics of Property Right" (1965) and G. Calabresi's "Some Thoughts on Risk-Distribution and the Law of Torts" (1961). In 1972 R. Posner published his *Economic Analysis of Law*, defending the thesis that the traditional institutions of common law are economically effective. In this way the Chicago School was fully established in the mid-1970s. Posner is regarded as its main representative. The idea of applying economic tools to law proved useful enough to prompt research in various academic centers in the United States and around the world. Today it is difficult to count the many schools carrying out their research under the heading of the economic analysis of law.[47] Both the variety and number of enthusiasts of the economic analysis of law make it impossible to talk about a unified research program. It seems however that all the representatives of Law & Economics share a basic thesis, which says that the law is (or should be) economically effective (i.e., it leads or should lead to economically effective allocation of goods).

This basic thesis is surrounded by some troublesome issues. An explanation must be given, for instance, of what exactly constitutes "an economically efficient allocation of goods". Economists and lawyers have offered at least two explanations. First, one can speak of Pareto-efficiency. The allocation of goods is Pareto-efficient in the given society if it is not possible to better the situation of any member of the society without worsening the situation of others. Secondly, one can apply Kaldor–Hicks efficiency: the allocation of goods is efficient if it is impossible to better the sum of the welfare of the society, even with the assumption that the situation of some of the members of the society can be worsened. It is not our aim to analyze the above mentioned definitions of efficiency. We need only stress that the concept of economic efficiency is not univocal, and that controversy over the understanding of efficiency plays an important role in debates concerning the foundations of the economic analysis of law.

The problem of defining economic efficiency should be placed within a more general framework. The basic thesis of Law and Economics demands that efficiency is taken as the main indicator of what the law is (should be). This suggestion seems to contradict traditional conceptions of what a legal system is: according to the traditional account, the legal system should secure justice, not efficiency. For the proponents of Law and Economics, however, there exists no tension between justice and efficiency. We can even say that efficiency is an economic explication of justice. One does not have to add that this assumption is controversial. We leave the issue here, only highlighting its existence.[48]

Another premise of the economic analysis of law is based on the fact that economic models employ the concept of a person who acts rationally (*homo oeconomicus*). This assumption is often questioned by psychologists who maintain that much human behavior is far from being "rational". This particular objection can be challenged by saying that the criticized assumption has proved useful – at least to a certain degree – in the history of economics. One should add here that, in contemporary economics, models are built in which the assumption in question is in various ways "loosened".[49]

Let us observe further that the basic thesis of the economic analysis of law can be read in two ways: descriptively or normatively. In the first case we will say that the law is economically efficient. In the second – that it should be. The pioneers of Law and Economics attempted to justify the descriptive thesis. For instance, one of the aims of Posner's *Economic Analysis of Law* is to show that the precedents of American courts in tort law lead to economically efficient results. As time has passed, more

emphasis has been placed on the normative dimension of the basic thesis.[50] Below we will read the basic thesis normatively for it enables us to show that the tools of economics can serve not only the theory of law, but also legal practice.

3.3.2 Idea of Economization

Let us look at the following example. Let us assume we have a simple legal system consisting of just one norm:

(A) Whoever causes damage to someone else must redress it.

The obligation expressed in (A) is not very precisely determined. Almost all the concepts used in its formulation give rise to interpretational problems. How should one define "damage"? What does it mean that a person A caused damage to a person B? Should it be the case that only those actions of A that directly result in a damage count as torts? What does it mean to "redress" the damage? These are the questions to be answered in the process of interpreting of (A). What are the criteria of interpretation to be employed?

Let us look at the following situation. John has caused damage to Adam. Therefore, on the basis of (A), he has to redress it. But in certain circumstances we may ask: should John redress the entire damage? Such a question is sound in a situation in which Adam's behavior contributed to the damage. What are the criteria for answering it?

Let us try to build a simple economic model, which can serve as a basis for the required answer. What indicators need to be taken into account? It is clear that we need to know the value of the damage. Let us call it S. Let us assume further that Adam could have undertaken an action that resulted in no damage. Such an action naturally has its own cost. Let K_P stand for the cost of Adam's preventive actions. The comparison of S and K_P does not tell us much. Obviously, if the cost of the preventive action K_P is higher than the damage S, then undertaking the preventive action would be irrational.

Let us consider now whether we should expect the plaintiff (in our case: Adam) to undertake preventive action when $K_P < S$. The answer to this question will be positive only if the damage occurs in every case in which the plaintiff refrains from acting. If, however, the plaintiff's refrain does not in every case result in damage, the inequality $K_P < S$ is useless. Let us assume then that by P we will understand the probability of damage where the plaintiff does not undertake the preventive action. Let us assume, further, that undertaking the preventive action eliminates the possibility of the damage. In such circumstances, every time the unit cost

of prevention is lower than the unit cost of the damage ($K_P < P \cdot S$), it is rational to undertake preventive action. Let us illustrate this using our example. Assume that the damage S, John has caused to Adam is 100. Let the probability of the damage P equal 10%, and the cost $K_P - 4$. It is easy to observe that $K_P < P \cdot S$, for $4 < 10$. It would be rational then for Adam to undertake preventive action. If he refrained from doing this, the court could say that his behavior contributed to the damage. John will not, therefore, be responsible for the entire damage.[51]

Let us look more closely at how the court's reasoning runs here. John has caused damage to Adam; the damage amounts to 100 and the question the court has to answer reads: should John redress the entire damage, or only a part of it? The court will choose the former possibility only if Adam's behavior did not contribute to the damage. When can one say that this is the case? Our simple economic model suggests that it is the case when the unit cost of prevention is lower than the value of the damage multiplied by the probability of its occurrence.

The model presented above is, of course, quite simplistic as it rests on many idealistic assumptions. We have assumed, for instance, that the preventive actions reduce to 0 the probability of the occurrence of the damage. What if, however, the preventive actions reduce the probability only by half? Let us inspect the table below (from now on by P we understand the probability of the occurrence of the damage in the given circumstances):

	K_P	P (%)	S	**Expected damage**	**Total social costs**
Situation 1	0	10	100	10	10
Situation 2	4	5	100	5	9

Under these changed circumstances, in Situation 1, in which the plaintiff does not undertake the preventive actions, the social cost is 10. In Situation 2, in which preventive actions are undertaken reducing the probability of the occurrence of the damage to 5%, the social cost equals 9 (that includes the expected damage and the cost of the preventive action). Since the social costs in Situation 2 are lower, this is the desired situation; the plaintiff should therefore undertake the preventive actions. If he refrained from doing so and damage occurred, the court will hold him responsible for contributing to the damage. If P_1 stands for the probability in Situation 1, and P_2 for the probability in Situation 2, the rule forming the basis of the court's decision can be formulated in the following way: if $(P_2 \cdot S) + K_P < P_1 \cdot S$, then the plaintiff contributed to the damage.

Another assumption made in the model constructed above was risk-neutrality. A risk-neutral person values the certainty of receiving 5,000 USD equally with a 50% chance of receiving 10,000 USD. A risk-averse person, by contrast, values the certainty of receiving a certain amount of money more highly than a 50% chance of receiving double that sum. Finally, a risk-lover prefers a 50% chance of receiving 10,000 USD to the certainty of receiving 5,000 USD. If we replaced our assumption of risk-neutrality with the assumption that the person in question is risk-averse, the difference in the total social cost between Situation 1 and Situation 2 would increase: in Situation 2 the risk of the occurrence of damage is lower than in Situation 1, and this constitutes an added value for the risk-averse person (note, however, that there may be no good reason to abandon the assumption of risk-neutrality in constructing a model for the purpose of answering a general interpretational question).

The following further assumptions are also implicit in the model given above: (a) that the parties' level (frequency and duration) of activity does not affect the determination of the cost of the preventive actions; (b) that the court is capable of determining precisely the costs and results of both parties' actions; (c) that all the costs are measurable and can be expressed in monetary terms.[52] It is vital to question whether acceptance of these assumptions is sound. In other words: how do the assumptions influence the results of the analysis, and is their influence significant enough that the assumptions should be analyzed themselves? With regard to risk-neutrality and the level of activity, it is possible to extend the mathematical structure of our model to include those additional factors. Assumptions (b) and (c), however, highlight an essential problem concerning the economic analysis of law.

One of the greatest difficulties with the economic analysis of a legal case is the "economization" of the case, i.e., quantification, estimation of the costs and values of states of affairs and actions. If John damages Adam's car, which is worth 10,000 USD, then the value of the damage can easily be estimated. Imagine, however, that John's car crashes into Adam's bicycle. If the only thing damaged is the bicycle, the values can be straightforwardly calculated. But if Adam breaks his leg in the accident, the situation becomes more complicated. And in such a case how can one verify whether or not Adam contributed to the occurrence of the damage? How should the cost of the preventive actions be calculated?

The problem of estimating the amount of the damage is not only troublesome for the economic school; this is a typical problem in legal practice. In civil codes one usually finds some rules that help to determine the values in question. In other systems the rules are developed by the courts.

Therefore, the indicated problem does not exclusively affect the economic analysis of law.

From the above discussion a picture can be constructed in which application of the economic method is divided into three stages. In the first stage a case is "economized", i.e., the relevant aspects of the case are quantified and expressed in monetary terms. At the second stage, a suitable economic (mathematical) model is developed to assist in answering the questions that arise in the case. Finally, at the third stage, conclusions are drawn from that economic model. Problematic decisions are made in all the three stages. In the first stage actions and states of affairs to which it is difficult to ascribe a definite economic value are nonetheless "estimated". In the second stage one can always question whether the constructed model takes into account all the important factors, or whether it is based on over-simplistic assumptions. The third stage, leading "from economics back to the law", can also be troublesome, although the principle that governs it – to promote solutions minimizing the total social cost – seems clear.

The three-stage account of the application of the economic method is, of course, a simplification. For instance, the first stage cannot be completely detached from the second; the possible economic models determine what can be "economized" in a given case. Similarly, the conclusions we draw from the model do not have to end the analysis. If they are unacceptable then they may lead to a revision of the model or to a new "economization" of the case. Even so, the three-stage scheme described above does give a satisfactory account of the key elements of the economic method.

3.3.3 Limits of the Method

The limits of the application of economic analysis to law will now be considered. In order to do this, several examples from various areas of law (especially private law and criminal law) will be addressed more closely, and some typical situations faced by lawyers will be analyzed (interpretation of law, creation of law, determination of sanction to be applied, etc.).

It is not surprising that economic analysis has been used most widely in private law, in which economic efficiency may be considered the highest aim. In the example presented in the previous section, the construction of an economic model proved useful in the interpretation of a generally stated legal norm constituting tort liability:

Whoever causes damage to someone must redress it.

Imagine now a legislator who is about to introduce such a norm, but they want to make more precise the concept of tort liability. Let us

assume that the legislator has to choose between two different ways of determining liability. The first bases liability on the condition that the actor could have undertaken steps to minimize the probability of the occurrence of damage. If the action that caused the damage was undertaken with due care the agent is not liable; otherwise he/she is held responsible for the damage (this type of liability is called negligence). The second way of determining liability involves declaring responsible anyone who has caused damage, irrespective of whether or not he acted cautiously (this is called strict liability). From the economic perspective, the first conception assesses liability according to whether the agent incurred the relevant cost of the preventive actions (=acted with due care) or not. In the second conception the agent is held liable irrespective of any costs he incurred to undertake the preventive actions.

Let us consider which of the conceptions should be applied by the legislator. From the point of view of the economic analysis of law, the question is which of the models of liability leads to the most economically efficient solution, i.e., which minimizes the total social cost. Let us look at the two tables:

Preventive actions	K_S	P (%)	S	**Expected damage**	**Total social cost**
No	0	20	100	20	20
Yes	4	5	100	5	9

Preventive actions	K_S	P (%)	S	**Expected damage**	**Total social cost**
No	0	20	100	20	20
Yes	4	18	100	18	22

K_S stands here for the costs of the preventive actions. In the case of the first table the preventive actions that cost 4, reduce the probability of the occurrence of the damage from 20% to 5%. In this way the social cost without the preventive actions equals 20, with them it equals 9. This means that undertaking of the preventive actions is reasonable, for it leads to better results in terms of social cost. The second table illustrates a situation in which the preventive actions reduce the probability of the occurrence of the damage only by 2%, from 20% to 18%. In this case the total social cost without prevention is 20, whilst, with it, it is 22. This time refraining from the preventive actions is the optimal decision.

Consider now what would be reasonable behavior for an agent in both cases depending on the conception of liability accepted. In Situation 1, accepting the conception of negligence leads to the following results: (a) if

the agent does not act with due care (cost 4), he will have to redress the entire damage (20), whilst (b) if he acts with due care (cost 4), he will not be held liable, therefore his costs are limited to the cost of the preventive actions (4). It is clear, then, that a rational actor would rather pay 4, in order to avoid paying 20. If, in Situation 1, the strict liability conception is adopted, the agent who does not undertake the preventive actions would pay 20, otherwise – 9 (costs of prevention + the costs if damage). Therefore, in Situation 1, the agent would choose the economically efficient route of undertaking the preventive actions no matter which conception of liability is followed. Let us observe, however, that in the case of strict liability his costs are significantly higher than in the case of negligence (9 to 4). This means that the frequency of his activity will be much lower with strict liability than with negligence (for higher costs will make the activity less efficient).

In Situation 2, following the conception of negligence leads to the agent paying 4, if preventive actions have been undertaken, and paying 20 if they have not. Rational behavior requires undertaking those preventive actions, which in Situation 2 lead to a solution that is economically inefficient (social cost 22). The conception of strict liability, on the other hand, results in the agent who undertakes the preventive actions paying 22, or 20 otherwise. In this case there will be no prevention, which is an efficient solution. Let us observe that in cases like Situation 2, acceptance of the negligence approach leads to inefficiency and enables the agent to increase the frequency of his activities (low cost that equals 4). Strict liability, by contrast, is an efficient solution in Situation 2, and decreases the frequency of the activities in question (high costs equaling 20).

The following conclusions can be drawn from the analysis of the problem above: should negligence or strict liability be chosen? It is easy to observe that in such cases as Situation 1, undertaking the preventive actions produces desirable results: the probability of the occurrence of damage decreases from 20% to 5%. The efficiency of preventive actions in Situation 2 is much worse (from 20% to 18%). What does this say about the kind of activity described by the tables? The activities in Situation 2 have to be dangerous, for the probability of the occurrence of damage is in their case very high, and the preventive actions do not help considerably here. Demolishing old buildings is a good example of such activity. From the point of view of a society, the level of frequency of this activity should be as low as possible. Thus strict liability is recommendable here. The activities of Situation 1, on the other hand, are less dangerous, for it is relatively easy to decrease the possibility of damage in their case. Building a highway may serve as an example. This activity

is often socially acceptable and the law should encourage it. Acceptance of the conception of negligence, rather than strict liability, acts as encouragement, for its costs are lower than those of strict liability.

A short survey of legal regulations in different countries shows that legal systems comply with this analysis. In the United States, Germany, France or Poland, tort liability is usually based on negligence or similar ideas. Only dangerous activities are treated differently, using strict liability or something similar.

The examples discussed above may give the impression that application of the economic analysis of law is restricted only to those parts of private law that concern torts. It is true that that area of law was explored in early works on Law and Economics. Today, however, economic analysis is applied to all kinds of problems in private law. A lot of work is devoted to the concept of property, and there are also important contributions concerning contract law. An interesting shift of perspectives may be observed here. Consider interpreting the provisions of an agreement. In the provisions of law, the main purpose of interpretation – from the economic point of view – is to reduce social cost. Agreements, however, should be interpreted in a way that minimizes the costs of the parties. Proponents of the economic analysis of law also analyze other areas of private law, such as insurance law, legal procedure, etc.[53]

More problematic is the application of the economic method to criminal law. An exception is the determination of a sanction, and designing the system of sanctions, which does seem to fit with economic analysis. J. Bentham wrote in 1788: "the profit of the crime is the force which urges man to delinquency: the pain of the punishment is the force employed to restrain him from it. If the first of these forces be the greater, the crime will be committed; if the second, the crime will not be committed".[54] Bentham's observation can be presented as a simple economic formula. Let Z stand for the income expected from the crime, K for the loss connected with the punishment, and P for the probability of punishment. Someone who acts rationally will commit a crime only if the expected income will be higher than the cost of punishment multiplied by the probability of punishment:

Crime will be committed if $Z > P \cdot K$.

As in the previous cases, this model is significantly simplified. It can naturally be extended in various ways, for instance by taking into account different attitudes towards risk (one can suppose that there are a relatively high number of risk lovers amongst criminals). Especially problematic is the estimation of the value of Z, P and K. For example, the expected income, or cost, of many types of crime should include such

factors as "psychological value". This is an important problem, but the analysis here is *ex definitione* simplified. It is only necessary for present purposes to outline what the economic method is.

Suppose for instance that we would like to determine whether it is rational – within a given system of sanctions and law enforcement – to enact norms that apply more severe sanctions and to increase the expenditure on law enforcement. In order to answer this question let us return, for a while, to the perspective of a potential criminal. According to the model above, the crime will be committed if $Z > P \cdot K$. Clearly the probability of punishment P depends on the state of law enforcement. The value of K, on the other hand, is connected to how the system of sanctions is designed. One has to add that this system has its economic dimension. If most crimes are punished with imprisonment, then the expenses for penitentiary system are high.

On the one hand, therefore, we have the social costs resulting from crimes, and on the other, the costs of prevention, which are equal to the expenses of law enforcement. A system of criminal law is efficient if the costs of prevention are lower than the costs of the crimes that were avoided because of the prevention. In other words, investing in law enforcement is efficient up to the point when the marginal cost of prevention equals the marginal cost of the crime avoided thanks to the additional prevention.[55] These simple dependencies are helpful in resolving the question of whether to increase expenditure on law enforcement and/or whether to introduce more severe sanctions: the move will be rational as long as the system of criminal law remains efficient.

This solution is not, of course, the result of a painstaking economic calculation; it follows rather from general considerations, which are nevertheless based on a simple economic model. More precise analyses can be carried out, for instance, regarding what kind of sanction is the most efficient for specific types of crimes. One can consider, e.g., whether it is better to apply monetary or non-monetary sanctions.[56] The sanction should be determined in a way that deters the potential criminal from committing the crime. Therefore, with the given probability of punishment P, K has to be calculated in such a way that $Z < P \cdot K$ holds. If this aim can be achieved with monetary sanctions then these should be applied. The reason for this is simple: from the economic point of view monetary sanctions are less expensive than the non-monetary, because they enable us to avoid expenses for penitentiary system.

It is easy to identify some factors that prevent monetary sanctions from serving their purpose (i.e., they fail to deter). One such factor is the limited property of the potential criminal. If a sufficiently deterring

monetary sanction was significantly higher than the value of the property then non-monetary sanctions would have to be applied (including imprisonment). Similarly, the lower the probability of punishment is, the more severe the monetary sanctions have to be (in order that $P \cdot K > Z$); in such a case it may turn out that, even for a potential criminal who has some property, the level of K will be so high that it will not serve its purpose as a deterrent. The application of non-monetary sanctions can also prove necessary when the expected income from a crime (Z) will be so high that the rule $Z < P \cdot K$ would make K extremely high.[57] Therefore, the monetary sanctions do not serve their function, either in the case of a person who has limited property, or in the case of a rich man who is planning to steal 1 million USD. The soundness of this analysis is reflected in the fact that, in penal codes, most "basic" crimes carry non-monetary sanctions.[58]

This, and other economic analyses of sanctions, can provoke two kinds of objection. First, one can question the assumption that people who commit crimes act rationally. Second, the "economization" of punishment makes us forget about a basic dimension of criminal law, namely the notion of a just punishment.

It is indeed the case that the simple model of behavior for the potential criminal is based on an assumption that the acting person is rational and that he/she will calculate potential income and loss. As has already been stated, the assumption of rationality is the basis for most of the economic models. The problem is, however, that unlike private law, in criminal law this assumption seems highly counter-intuitive. This is because, traditionally, criminologists and sociologists speak of crimes in psychological and sociological terms, underlining the a-typical qualities of criminals. This, however, does not constitute a decisive argument against the application of economic analysis to criminal law. It can – at the very least – serve as an alternative to traditional criminology. Observe, for instance, that a lot of crime is committed in anticipation of profit. Moreover, the rationality assumption is also questioned in relation to the classic economic models. Despite this, the assumption proves useful, because what is analyzed is not the behavior of a specific person; we apply economic tools to model the behavior of certain markets (of wheat or of crimes!) in which their members "statistically" act in a rational way.

The second of the mentioned doubts, which concerns the substitution of justice with efficiency, has already been analyzed above. Let us repeat here that economic efficiency can be treated as an explication of justice. If this controversial thesis is accepted then one should not speak of a "substitution" of justice with efficiency. A sanction which is optimal in

terms of economic efficiency is also just. Moreover, the acceptance of the thesis that efficiency is an explication of justice facilitates not only the analysis of how sanctions should be applied, but also of the most basic concepts concerning criminal responsibility. In literature, different analyses concerning intent, error, self-defense, etc. can be found.[59] On the other hand, the dismissal of the thesis that efficiency is an explanation of justice, does not necessarily lead to questioning the usefulness of the economic analysis of criminal law. On this second reading, the economic analysis may be regarded as an alternative approach to the problems of criminal policy.

Apart from private and criminal law, other areas of law can also be analyzed with the use of the economic method – for instance legal procedures, or constitutional law.[60] The latter is connected to a field of research which makes extensive use of economic analysis, e.g., political science and the theory of social choice. The problems analyzed in this context aim not only to answer questions of what the law should be, but also enable one to look at the role of legal systems from a more general perspective. A good point of departure for such analyses is the notorious Coase Theorem. Coase, the Nobel Prize winner for economics in 1991, published at the beginning of the 1960s a famous article, "The Problem of Social Cost".[61] In the article a theorem is formulated that can be reconstructed in the following way: in a world where the transaction costs equal zero, the allocation of goods is efficient irrespective of the initial distribution of property rights.[62] The notion of "transaction costs" used above causes heated debates in economic and legal-economic literature. Usually by "transaction costs" one means either the cost of establishing and maintaining property rights, or the cost of transferring the property rights.[63] Coase Theorem says in effect that if there are no such costs then, no matter how the legal system is built, (irrespective of the initial distribution of property rights), an efficient allocation of goods will be achieved. In other words, assuming that the transaction costs equal zero, the form of law has no importance; what counts is whether there is any law or not.

One should not of course conclude that – because of what the Coase Theorem says – the law is useless, or that we can enact anything in the belief that the market will "take care of itself". Nevertheless, some interesting conclusions for legal theory and philosophy follow from the theorem as it points out an important relationship between the form of law and transaction costs. In reality those costs never equal zero, and hence the way the legal system is built matters. If, following proponents of Law and Economics, it is assumed that law should promote economic

efficiency then, on the basis of the Coase Theorem, at least two directives for creating (or interpreting) law can be formulated. The first says that – if possible – legal norms should minimize transaction costs. According to the second, if high transaction costs cannot be eliminated, then the law should aim at an efficient allocation of goods not counting on the "invisible hand of the market".

Not all the assumptions behind, and consequences following from the Coase Theorem will be considered here. It is only necessary to show that economic analysis can be suitably applied to the most general legal-theoretic issues. Moreover, economic analysis here does not consist in the construction of a mathematical model (although the Coase Theorem has a very precise mathematical form).

A good summary of the examples presented above is given in the following words of G. Becker: "Indeed, I have come to the position that the economic approach is a comprehensive one that is applicable to all human behavior, be it behavior involving money prices or imputed shadow prices, repeated or infrequent decisions, large or minor decisions, emotional or mechanical ends".[64] The method of economic analysis can be applied not only in private law but in any area of law, including most general problems of the philosophy of law, such as the justification of the existence of law.

3.3.4 Conclusions

The analysis in the previous section demonstrates that there are various branches of the economic analysis of law: they use various tools, take advantage of mathematical modeling more or less directly, and are based on different assumptions. They are all similar, however, in that they aim to express a legally relevant case in the language of economics and to attempt to draw conclusions in which economically efficient solutions are promoted.

Admittedly, the assumptions standing behind the economic analysis of law are objectionable. The "substitution" of justice with efficiency, "calculating" of values that seem unquantifiable, the acceptance of the counter-factual model of *homo oeconomicus* – all this is problematic. One can argue, however, that the weakness of the economic method is also its strength. In applying this method, it is not necessary to have recourse to intuitions, or other vague categories. Moreover, although it is true that economic models (especially those presented above) simplify significantly the modeled reality, there is no reason why they could not be extended, taking into account all these important elements highlighted by our case (illustrated in Section 3.3.2). Still, the presented method,

based on the principles of economics, displays consistency and is also of some consequence. If the economic method is applied only in the sphere of private law, then two kinds of utility, or justice (one for private law, and another for other areas of law) must be justified. From this point of view it seems only reasonable to apply the economic method in any area of law, and to any legal issue whatsoever.

3.4 SUMMARY

3.4.1 Features of Analysis

In this chapter two special methods of analysis have been discussed: linguistic and economic. Economic analysis can relatively easily be identified as analysis$_3$, i.e., analysis as translation. A proponent of Law and Economics attempts to "translate" the case that interests her into the language of economics and interprets the obtained result. It is difficult to classify linguistic analysis in a similar way. It displays the features of analysis$_3$, but in some contexts also of analysis$_1$ and analysis$_2$.

It is appropriate to point out now the most important feature of the presented methods and, more generally, of any kind of analysis. In analysis$_1$ one seeks logical reasons for the analyzed sentence; the reasons have to be self-evident or accepted earlier on some basis. Analysis$_2$ leads to decomposition of a given entity into more basic elements. Finally, analysis$_3$ aims to translate the "interpreted case" into a language, which is simpler, clearer, "more basic". This key feature of any analytic method can be, somewhat broadly, expressed in the following way: any analysis leads to reducing (expressing) the analyzed case (example) to a certain *chosen conceptual scheme* (the conceptual scheme thesis). In the case of economic analysis, the scheme in question is the conceptual scheme of contemporary economics. Linguistic analysis, in turn, reduces *analysanda* to the conceptual scheme of ordinary language. The conceptual scheme thesis is, as has been observed in describing the two methods, both the weakness and the strength of analysis. It is a weakness because it is easy to object to the selection of a "chosen" conceptual scheme as an arbitrary decision. It is a strength because the choice of such a scheme makes analysis a well determined method, the assumptions of which can be easily identified and, the results of which can be estimated similarly easily.

3.4.2 Analysis in Law

It is difficult to assess the possible applications of analysis in law. From what has been said so far it follows that, in legal reasoning, at least analysis$_2$ and analysis$_3$ are of certain value. Analysis$_1$, i.e., the search for

logical reasons, cannot be straightforwardly applied, although one cannot exclude it (the similarity between analysis$_1$ and the method of presuppositions has already been remarked upon). The examples discussed above, in which analytic methods are applied to law show that lawyers find it hard to accept a single conceptual scheme as "the chosen" one. It is relatively easy to find legal applications of various domain-related analytic methods; at the same time it is maintained, or at least assumed, that there exists a pluralism of conceptual schemes. Lawyers construct their arguments taking advantage of economics, common sense, ordinary language, ethics, etc.

A good illustration of this is found in the various "theories" of legal dogmatics and legal practice. Precepts of civil law (e.g., concerning property), of criminal law (the structure of crime), and of constitutional law (construction of the proportionality principle) can all be treated as instances of analysis (analysis$_2$ or analysis$_3$). They are analyses, however, that are confined to a specific domain and make use of various "conceptual schemes" (usually referring to the vague category of common sense); in other words they do not form part of any wider project which analyzes the entire legal system within the framework of a unique, chosen conceptual scheme.

This suggests that what lawyers do cannot be called analysis (it is not possible to have an analysis without a chosen conceptual scheme). Naturally, this is only a descriptive diagnosis: a statement of how things are, rather than a statement of what lawyers should do. On a normative level one can support the application of "full blooded" methods of analysis. However, the idea of using only some analytic tools in legal discourse, which would be easier to accept by the lawyers than a "full blooded analysis", leads to some theoretical problems. One can maintain, of course, that various analytic methods should be used (locally) for constructing arguments. But in that case, a new theory is needed, one that is capable of comparing arguments built with the use of analytic methods based on different conceptual schemes. Argumentation theories may provide an answer to this theoretical challenge.

NOTES

1. Quoted after J. Hintikka, U. Remes, *The Method of Analysis*, Dordrecht, D. Reidel, 1974, p. 8.
2. R. Descartes, *Regulae ad directionem ingenii*, Rodopi Bv Editions, 1998.
3. B. Russell, *Our Knowledge of the External World*, Routledge, London 1993, p. 214.

4. Similar types of analysis are identified by M. Beaney, in "Analysis", *Stanford Encyclopedia of Philosophy*, plato.stanford.edu. Beaney tags them: *regressive analysis*, *decompositional (resolutive) analysis* and *transformative (interpretive) analysis*.
5. R. Carnap, "Die Methode der logischen Analyse", in *Actes du huitième Congrès international de philosophie, à Prague 2–7 Septembre 1934*, Prague: Orbis, 1936, p. 143.
6. See for instance J.M. Bocheński, "Subtelność" [Subtlety], in *idem*, *Logika i filozofia. Wybór pism* [Logic and Philosophy. Selected Writings], PWN, Warszawa 1993, pp. 133–149.
7. Descartes, *Discours de la méthode*, French and European Pubns, 1965.
8. Cf. I. Hacking, *Why Does Language Matter to Philosophy*, Cambridge University Press, 1975.
9. B. Russell, *Theory of Knowledge*, George Allenand Unwin, London, 1984, p. 119.
10. That is how M. Beaney puts it, see his "Analysis", *op. cit*.
11. J.M. Bochenski, "O filozofii analitycznej" [On the Analytic Philocophy], in *idem*, *Logic . . .*, *op. cit*., p. 38 ff.
12. P.F. Strawson, *Analysis and Metaphysics*, Oxford, 1992, p. 2 ff.
13. See the entry "Metaphysics" in: *The Concise Encyclopedia of Western Philosophy and Philosophers*, Routledge, 1992.
14. J.L. Austin, "A plea for excuses", *Proceedings of the Aristotelian Society*, 1956–7, p. 125.
15. *Ibidem*, p. 126.
16. See *Analysis . . .*, *op. cit*., p. 15 ff.
17. H.L.A. Hart, *The Concept of Law*, 2nd edition, Oxford University Press 1994, p. 213.
18. J. Austin, *The Province of Jurisprudence Determined*, Hackett Publishing, Indianapolis, 1998.
19. H.L.A. Hart, *The Concept . . .*, *op. cit*., p. 19.
20. Cf. J. Woleński, "Wstęp. Harta *Pojęcie prawa*" [Introdution: Hart's *The Concept of Law*], in H.L.A. Hart, *Pojęcie prawa*, J. Woleński (transl.), PWN, Warszawa 1998, p. XIX. See also J. Woleński, *Issues . . .*, *op. cit*.
21. H.L.A. Hart, *The Concept . . .*, *op. cit*., chapter X *passim*.
22. *The Province . . .*, *op. cit*., p. 201.
23. *The Concept . . .*, *op. cit*., p. 84.
24. Cf. J. Woleński, "Introduction . . .", *op. cit*.
25. P.F. Strawson, "On Referring", *Mind* 59, 1950, pp. 320–344.
26. Cf. A. Grobler, "Presupozycje" [Presuppositions], in R. Wójcicki, *Ajdukiewicz. Teoria znaczenia* [Ajdukiewicz. Theory of Meaning], Prószyński i S-ka, 1999, pp. 96–105.
27. A semantics for presuppositions was developed by B. van Frassen, "Presuppositions, supervaluations, and self-reference", *Journal of Philosophy* 65, pp. 136–152.
28. J. Wolenski, "Introduction. . .", *op. cit*., p. XX.
29. Cf. R. Alexy, *Theory . . .*, *op. cit*.
30. A. Ross, *Directives and Norms*, London, 1968.
31. T. Opalek, *Z teorii dyrektyw i norm* [Theory of Directives and Norms], Warszawa, 1974.
32. R. Dworkin, *Taking Rights . . .*, *op. cit*.
33. J. Austin, *How to do Things with Words*, 2nd edition, Oxford, 1976, p. 5.
34. A. Stroll claims that the analysis of what "does not count as normal" in order to establish "what is the normal case" is one of the most characteristic features of Austin's philosophy". See A. Stroll, *Twentieth Century Analytic Philosophy*, Columbia University Press, New York, 2000, pp. 170–171.

35. *How to do Things . . .*, *op. cit*. p. 16.
36. *Ibidem*, p. 41.
37. *Ibidem*, p. 54.
38. *Ibidem*, pp. 607–608.
39. J. Searle, *Speech Acts*, Cambridge University Press, Cambridge (Mass.) 1977. We have to mention that Searle stresses that his book is a work in the philosophy of language and is not an example of linguistic philosophy. However, although Searle's argumentation contradicts sometimes Austin's methodology, Searle's debt towards Austin is obvious. See also A. Grabowski, *Judicial Argumentation and Pragmatics*, Księgarnia Akademicka, Kraków 1999, 61 ff.
40. See for instance J. Searle, "Austin on Locutionary and Illocutionary Acts", *The Philosophical Review,* vol. LXXVII, no. 4, 1968, pp. 405–424; A. Grabowski, *Judicial . . .*, *op. cit*., p. 77 ff.
41. *How to do Things . . .*, *op. cit*., p. 151.
42. Cf. A. Grabowski, *Judicial . . .*, *op. cit*., chapter III.
43. Cf. *ibdem,* chapter V.
44. Cf. R. Sarkowicz, *Poziomowa interpretacja tekstu prawnego* [Three Level Conception of Legal Intepretation], Wydawnictwo UJ, Kraków, 1995.
45. O.W. Holmes, "The Path of Law", *Harvard Law Review* 10, 1897, p. 469.
46. Cf. H. Pearson, *Origins of Law and Economics – The Economists' New Science of Law. 1830–1930*, Cambridge, Cambridge University Press, 1997.
47. Cf. E. Mackaay, "Schools: General", in *Encyclopedia of Law and Economics*, http://encyclo.findlaw.com.
48. Cf. L. Kaplow, S. Shavell, "Fairness vs. Welfare", *Harvard Law Review*, February 2001, pp. 967–1380; R. Posner, *Economic Analysis of Law*, Aspen Publishers, 6th edition, 2002.
49. Cf. Th. S. Ulen, "Rational Choice Theory in Law and Economics", in *Encyclopedia of Law and Economics*, *op. cit*.
50. Cf. J.D. Hanson, M.R. Hart, "Law and Economics", in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Blackwell, Malden – Oxford 2000, pp. 311–331.
51. Such a rule was actually formulated by Justice L. Hand in *US vs. Carroll Towing Co*. case; cf. J.D. Hanson, M.R. Hart, "Law and . . .", *op. cit*.
52. Cf. J.D. Hanson, M.R. Hart, "Law and . . .", *op. cit*.
53. Cf. S. Shavell, *Foundations of the Economic Analysis of Law*, Belknap, 2004.
54. Quoted after E. Eide, "Economics of Criminal Behavior", in *Encyclopedia of Law and Economics*, *op. cit*., p. 346.
55. The marginal cost is the additional cost incurred for production of an addition unit of the given good or of conducting the given service. In our example the marginal cost of prevention is the additional cost for law enforcement, while the marginal cost of crime is the cost of crimes that are avoided thanks to the investments in law enforcement.
56. Cf. S. Shavell, *Foundations . . .*, *op. cit*.
57. Cf. *ibid*. See also K. Pawłusiewicz, B. Brożek, "Prawo karne w świetle ekonomicznej analizy prawa (Uwagi krytyczne)" [Criminal Law in Light of the Economic Analysis of Law. Critical Remarks], *Państwo i Prawo*, 12, 2002.
58. Cf. S. Shavell, *Foundations . . .*, *op. cit*., chapter 24.
59. Cf. S. Shavell, *Foundations . . .*, *op. cit*.; K. Pawłusiewicz, B. Brożek, "Criminal Law . . .", *op. cit*.

60. See S. Shavell, *Foundations . . .*, *op. cit*.
61. R.H. Coase, "The Problem of Social Cost", *Journal of Law and Economics*, 3, 1960, pp. 1–44.
62. See S.G. Medema, R.O. Zerbe, "The Coase Theorem", in *Encyclopedia of Law and Economics*, *op. cit*., *passim*.
63. See D.W. Allen, "Transaction Costs", in *Encyclopedia of Law and Economics*, *op. cit*., *passim*.
64. G. Becker, *The Economic Approach to Human Behavior*, Chicago, The University of Chicago Press, 1976. p. 81.

CHAPTER 4

ARGUMENTATION

4.1 INTRODUCTION

As a philosophy of interpretation, argumentation provides the humanities, including legal theory, with methods which appeal to logic and analysis (both discussed in the preceding chapters), as well as to hermeneutics (to be discussed in the final chapter of this book); it therefore has a wide application. Given that this philosophy occupies a position amidst formal logic and "hard" analysis on the one hand, and "soft" hermeneutics on the other, it is rightly described as "the third way" in the methodology of the humanities. By means of argumentation one can justify interpretative theses of normative character. This kind of justification is usually based upon the criteria of fairness, equity, validity, reliability or efficiency, rather than on the criterion of truth (these criteria can be regarded as counterparts to the criterion of truth which are to be applied in the normative sphere). Proposed definitions of the first three of these criteria usually appeal to the notion of rationality; as regards the criterion of efficiency, its definitions are based on empirical (psychological) considerations rather than on the notion of rationality.

Even though argumentation rejects the criterion of truth, replacing it with the above mentioned counterparts, it nevertheless aspires to be consistent, both with logic and with every kind of rational analysis. More specifically, argumentation aims both to create its own analysis – informal logic – and to draw widely from various other methods of analysis (ranging from linguistic to economic). However, the uniqueness of argumentation, which enables one to distinguish it from more formal methods, lies in its openness to other philosophies of interpretation, hermeneutics in particular. It is difficult to refute the fact that the basic rules determining the criteria for accepting practical discourse are justified by an appeal to intuition. The only controversial issue is what kind of intuition is invoked when these rules are formulated – namely, whether this intuition is purely rational (analytical), phenomenological (assumed by the proponents of hermeneutics), or, rather, psychological. The role of psychological intuition is particularly important in theories

which hold that the aim of a discourse is to persuade an opponent, to win a dispute at any price – in other words, in those theories which assert that argumentation is to be evaluated solely in terms of its efficiency.

Furthermore, argumentation is a specifically "legal" method. A history of the most important theories of argumentation may serve as a justification of this thesis: they either arose from legal theory or were invented with a view to being applied primarily in the field of law. Two views are typical in this context. The first one (formulated by Perelman) holds that legal argumentation (a judge's reasoning) is paradigmatic for all other types of practical reasoning. The second one (whose author is Alexy), in turn, holds that practical legal discourse is a special example of general argumentative discourse (it is the so-called *Sonderfallthese*). Whether these views are convincing or not is of course another issue, to which we will return in Section 4.2. It should be noted here, though, that these views express an unequivocal conviction that a practical discourse occupies a particular position within the framework of a general discourse and for that reason deserves separate and special treatment.

4.1.1 Philosophies of Argumentation

Contrary to popular opinion, controversy about good reasons in practical discourse began, not in twentieth-century metaethics and legal theory, but in the ancient philosophical schools. The proponents of contemporary theories of argumentation continue to pursue the methodological investigations begun by specialists in hermeneutics, dialectics, topics, and – at least to some extent – even sophistry and eristic. The fact that philosophies of argumentation draw on such different traditions and sources has given rise to an endless discussion about their essence and the scope of their application. This discussion is usually pursued at the meta-theoretic level; in consequence, the problem of practical applications of particular conceptions is almost entirely left out of the account. Theories of argumentation which appeal to different, not always compatible, sources, provoke the justifiable objection of eclecticism. Some of these theories contain elements of two different approaches – transcendental (objective) and psychological (subjective). Moreover, some philosophers want to attribute the characteristics of formal logic to the informal logic of argumentation, and, in consequence, to assess a practical, argumentative discourse by means of the criterion of truth. Furthermore, one has often given to particular – key – concepts of the philosophy of argumentation different, constantly redefined, meanings with the sole view of immediately justifying one's thesis. Terminological confusion and the multiplication of philosophical problems have

resulted in decreasing interest in the theories of argumentation at the end of the twentieth century. The "existence" of these theories seems to be confirmed only by seminars, conferences and a huge number of publications. The theories, themselves, however, have not exerted any serious influence on legal practice; research of the theories of argumentation has remained unknown to most representatives of legal practice, and useless to those few who have become acquainted with it. For all this, it must be conceded that in many hard cases, in which interpretation based on logic and analysis "is not sufficient", and in which one does not wish to apply relativistic (to a greater or lesser degree) hermeneutics, the only method that guarantees certainty and objectivity is argumentation. It is, in our view, one of the most important methodological alternatives for humanities as a whole and (above all) for jurisprudence. Accordingly, we shall attempt to present this philosophy of interpretation, describing in Section 4.3 a variant of it which, in our opinion, can be universally applied.

Let us begin, however, with a historical digression. As was said earlier, the problem of argumentation (together with questions concerning the understanding, interpretation and justification of interpretative decisions) was taken up by representatives of the ancient philosophical schools.

Hermeneutics. Problems connected with argumentation were discussed very early on in the oldest hermeneutical theories, especially in biblical, philological and legal hermeneutics. These theories were to provide universally valid rules concerning the interpretation and understanding of all kinds of texts (religious, literary, philosophical and legal). These universal rules were to be used in the very process of interpretation as well as in the context of that interpretation's application and justification. Thus hermeneutics, at least in the early stages of its development, was strictly connected with the philosophies of argumentation, especially with logic, dialectics, rhetoric and topic. Even though in the nineteenth century, hermeneutics became fully independent of the above philosophies (there arose general humanistic hermeneutics), its ties with them remained relatively close. In support of this claim, it is appropriate to recall the views of Schleiermacher, Dilthey, Misch, Lipps, Betti, Gadamer, or Ricoeur (regarding nineteenth- and twentieth-century philosophy of hermeneutics), and, for instance, Reinach and Kaufmann (regarding the philosophy of law). Hermeneutics will be dealt within Chapter 5.

Logic. There is also a close connection between the philosophies of argumentation and logic. Since antiquity, authors of various theories of argumentation have appealed to logic. Logic was used either directly – as

a method of argumentation – or indirectly – as one of the methodological foundations of a given philosophy of discourse (logic, for instance, made more precise the criteria for the acceptability of an argumentative discourse). Of course, the philosophies of argumentation appealed to various formal and more informal (soft) conceptions of logic. The resultant dilemma can be generalized in the following way: (1) Theories of argumentation are supposed to attain maximum precision, or, to put it differently, to make possible the logical justification of theses advanced in an argumentative discourse. This explains why these theories frequently appeal to formal conceptions of logic, including classical logic, as well as different varieties of deontic and modal logic. (2) However, the possibility of formal logic's application in practical discourse turned out to be very limited. Thus, advocates of philosophies of argumentation have at their disposal at best less formal varieties of logic (frequently constructed only for the purposes of these philosophies).

In consequence, every philosophy of argumentation developed its own logic, and those logics varied greatly in terms of their value and scope of application. Another difficulty was that in antiquity the term "logic" was associated with other terms, which – like logic – were also important for argumentation (including analytics – the most easily understandable – as well as dialectics, rhetoric and topic). Besides, in those times, in at least some contexts, the terms "logic" and "dialectics" were used as synonyms; the point to be emphasized, though, is that in antiquity the term "logic" was already associated with such activities as thinking, reflecting and calculating, whereas the term "dialectics" was associated directly with discourse, i.e. with dialogue. A more strict definition of both terms can be found in Aristotle's works: he asserted that logic and analytics enable the derivation of true (apodictic) conclusions, whereas dialectics can serve only as a tool for deriving conclusions which can be regarded as right (i.e. probable). The reason why Aristotle treated dialectics, rhetoric and topic as different in nature from logic, was that they constituted a means of persuading opponents in a discussion, rather than of establishing the truth. Differences in the function of these two groups of theory underly Aristotle's distinction between logical conclusions – based on the criterion of truth – and dialectic conclusions – based on the criterion of rightness. This distinction is of special, if not fundamental, importance for contemporary theories of argumentation. We pay special attention to relations between various notions in the philosophies of argumentation. This is for the simple reason that the differences between these philosophies are frequently derived from the differences in the way these relations are understood. The point to be emphasized is that giving

arbitrary – torn from context – meanings to these notions is likely to give rise to rather fruitless academic discussions, which – fortunately – have little effect on those philosophies of argumentation that are of real importance.

Dialectics. Even though dialectics aspires to be a rather strict (in the logical sense) method, it can be most aptly characterized as a "soft" method of argumentation which aims to yield conclusions that are probably right. This is consistent with Aristotle's view, according to which dialectics is a method of practical philosophy appealing to the criterion of good, rather than a method making use of the criterion of truth (the latter criterion is used within theoretical philosophy). However, there exist some arguments which testify to the existence of a close relationship between logic and dialectics. More specifically, argument *a fortiori* and *argumentum per reductio ad absurdum* – frequently used in practical discourse – are simultaneously logical and dialectical in nature. According to Kalinowski, argument *a fortiori* in the form *a maiori ad minus* (if one is allowed more, then one is allowed less) can be regarded as a theorem of formal logic, provided that everything which is less important is contained in what is considered as more important.[1] Analogously, it seems that *argumentum per reductio ad absurdum* can be "transferred" from formal logic to the area of normative reasoning.

Let us, however, return to history. For Socrates, dialectics was a method of conducting a discussion (a philosophical controversy) embracing two separate parts: negative – elenctic, and positive – maieutic. The elenctic method (i.e. a method of refutation) involves pressing the false thesis of a disputant to its absurd consequences. This method was designed to purge a disputant's mind of false views. An important component of this method was irony, which provisionally assumes a disputant's false thesis to be true and forces the disputant – by means of skilled argumentation – to formulate a true thesis inconsistent with the one she initially defended (thus, this is in fact *argumentum per reductio ad absurdum*). "Socratic irony" in fact rests on "the knowledge of one's ignorance" – a particular capacity to recognize falsity, which should be acquired by every participant in a discussion. The maieutic method, i.e. "the obstetrician's method", in turn, consists of "eliciting the truth". The role of a person leading a discussion is essentially to ask questions and thereby "help the truth come to the world". According to Socrates, what constitutes the starting-point of a dispute is the establishment, by asking the simplest questions, of commonly known and empirically verified facts; more complex facts were to be established by means of analogy at

a later stage of the dispute. This kind of inductive generalization led to defining "common places" (Aristotle was to speak in this context about topics), i.e. universally valid theses.

According to Diogenes Laertios, the term "dialectics" was first used by Plato, who understood it to mean the activity of permanently applying reason, as well as acquiring practice in this activity. Plato uses dialectics both in order to investigate the world of ideas and to explain phenomena. In Phedo, he comes to the conclusion that the only truly scientific way of analyzing phenomena consists of an appeal to dialectics, rather than to teleological or causal considerations. Plato gives the term "dialectics" a very broad meaning: in his view, it is a method of pursuing a discourse (a conversation – a philosophical dialogue), a method of establishing relations between different theses, and philosophy *tout court*. It is philosophy *tout court*, because it enables one to grasp the world of ideas and phenomena in a non-empirical way. Given that dialectics is a science of ideas, i.e. about true autonomous beings, it can rightly be called metaphysics, i.e. philosophy *tout court*. Accordingly, since dialectics explores the relations between general notions and theorems containing these notions and ideas, it is a deductive method, which gives rise to and underlies logic in a strict sense.

Dialectics was also a central object of concern for Aristotle. He treated his logic and analytics as preparation for dialectics. The object of logic is merely the form of statements, whereas the object of dialectics is the content – the substance – of statements. An analysis of form (as something which is general) should precede an analysis of content (as something which is particular). According to Aristotle, the main goal of dialectics is ultimately discussion, though he also asserts that dialectics may serve as a tool for finding out the truth (in one of his works, he states that theses should be treated logically – through the prism of the criterion of truth, and dialectically – through the prism of the approval or the opinion of others, i.e. according to appearance). As was mentioned above, Aristotle distinguished logic (and analytics) – theory intended to provide true (apodictic) conclusions – and dialectics – theory intended to yield conclusions which pass as right, or find themselves in circulation where they pass as right. Thus, ultimately, the main function of dialectics is not to decide whether a given thesis is true or false, but, rather, to enable an audience to be persuaded that a given thesis is right; it is therefore a method of practical rather than theoretical philosophy. (A similar interpretation of Aristotle's dialectics was put forward by Schopenhauer in his *Eristic*.)

The philosophies of interpretation formulated in the nineteenth and twentieth centuries often made use of dialectic methods. Philosophy of

interpretation in the nineteenth century was developed, above all, by Schopenhauer (mentioned above), who was the author of a very influential conception of *eristic dialectics*. As for the twentieth century, it is worth mentioning (besides hermeneutics, which often drew on the method of dialectics – *vide* Reinach, Gadamer, Kaufmann) the views of Perelman, who built his philosophy of argumentation on "classical" – dialectical – grounds.

Rhetoric. Rhetoric may also confirm the interaction and close relationships between different argumentative methods and techniques. This discipline, which was originally purely philological, found its application in various philosophies of interpretation relatively early on, thus becoming (beside dialectics and topics) the third of the most important components of almost every theory of argumentation. This term always referred to the skill (art) of good, honest and reliable persuasion in speech and in writing. To be numbered amongst the most eminent representatives of ancient rhetoric are – from Greek philosophy – Gorgis, Isokrates, Aristotle, Demetrius from Faleron, Dionysus from Halocarnas, Hermogenes from Tarsus as well as – from Roman philosophy – Cicero and Quintilian. Over the course of time, the term "rhetoric" began to be used, not only in reference to oratory art, but also to the theory of prose, manuals of public speaking, a sort of pedagogical system, and of course, a certain type of philosophy of argumentation. The division of rhetorical disciplines corresponds to the structure of preparing and making a speech. The first stage (invention) involves collecting arguments that are relevant to a given case; the second one (composition) consists in constructing a speech which must be adapted to the given case; the third one (elocution) involves determining the requirements of style, as well as the rules and conditions of correct and precise expression – through the medium of language – of one's thoughts; the fourth stage (mnemonic) concerns memorizing the text of a speech; and the final stage (*actio*) encompasses all the techniques of delivering a speech (specifying how to impress the audience by one's voice, gestures, posture, mimic). The goal of a speech – which was an efficient persuasion – was to be attained by simultaneously affecting the reason, will and emotions of the audience. The following principles were ranked amongst the basic prescriptions of the art of rhetoric (i.e. the art of properly shaping "a persuasive message"): the principle of limitability (a speech should be an inherently coherent "living organism"); the principle of adequacy – of "a rhetorical tact" (a speech should take account of all relevant circumstances); the principle of functionality (a speaker should make use of rhetorical means of persuasion

in a reflective and purposeful way). Finally, the kind of speech to be delivered determined the "repertoire" of rhetorical techniques to be used (for instance, the following kinds of speeches were distinguished: encouraging, discouraging, accusing, defending; and, in addition, laudatory and circumstantial speeches, such as, welcome and farewell speeches).[2]

For Aristotle, rhetoric is the art of finding adequate means of persuasion in every situation. One may even say that rhetoric and dialectics are in fact the same discipline, since both share the same goal – to convince by means of speech – and both appeal to the same criterion of evaluation – efficiency. It should be emphasized, though, that rhetoric emphasizes this criterion more strongly than dialectics. Dialectics also appeals to the criterion of rightness, and even to the criterion of truth (since it retains close relations with logic and analytics). Developing Aristotle's definition of rhetoric, Perelman states the goal of rhetoric to be the analysis of discursive techniques designed to elicit or strengthen support for theses submitted to an audience for acceptance. This means that rhetoric is a way of convincing by means of discourse, rather than by means of the truth. For that reason, according to Perelman, rhetoric *sensu largo* also embraces dialectics and topics. Rhetoric cannot be identified with formal logic, since it is not possible to prove the truthfulness of premises which are used in the process of discourse. In a practical discourse, the degree to which particular theses are accepted may vary, since a controversy concerns values, or, put more precisely, the rightness of theses as opposed to their truth. Besides, one of the main goals of a practical discourse is to convince someone to accept one's reasons; thus, convincing always entails convincing *someone* (one or many persons) – and is therefore directed at an audience.[3] The rhetoric of Aristotle, Cicero and Quintilian became a starting-point for one of the most influential contemporary philosophies of argumentation – namely, "the new rhetoric" of Perelman (to be discussed in detail in the next section of this chapter).

Topics. Philosophy (or rather, the problems) of argumentation based on topics is connected with rhetoric (arguably most closely), as well as with logic and dialectics. The word "*topos*" meant in Greek and Latin "a place" from which a speaker or a writer derives "an inventive material". A *topos* may be located either in an indefinite place – a thought – or in a definite place – a sign, a symbol, a gesture, a word, a text. According to Aristotle (who – incidentally, does not provide a definition of *topos*), *topoi* were "elements" or "premises" out of which a dialectician could construct his syllogisms, and a rhetorician, his enthymemes. The structure of a dialectic syllogism differs from that of a logical syllogism.

The former variety of syllogism is intended to show the rightness of a thesis (it has therefore a distinctly normative tinge). An enthymeme, in turn, is a rhetorical (shortened) syllogism i.e. a syllogism in which one of the premises (an obvious one) is implicit rather than stated. It consists therefore of two parts – a supposition and a conclusion – and discounts a major premise owing to its being obvious (to give an example, it follows from the minor premise "Socrates is a man" that "Socrates is mortal"; the implicit – obvious and thereby unmentioned – major premise is "all men are mortal"). A rhetorical syllogism may be either logical (when both of its implicit and stated premises are descriptive sentences), or normative (when one or both of its premises – including the implicit one – assumes the form of a directive or a value judgment).[4]

Aristotle distinguished common and special *topoi*. He understood common *topoi – loci communes* – to be "places" (in thought or memory) referring to general (universal) issues, and constituting a starting-point, as well as a basis, for all practical discourses; by special *topoi – loci specifici* or *loci propriae causae* – in turn, he understood "places" inherent in a concrete case or located in a given branch of knowledge (*topoi* of the latter type were frequently use in legal discourse). To summarize, topics is a method for establishing relations between notions that are crucial in a given discourse (these notions appear in the thesis of a discussed problem and, later, in hypotheses that are supposed to explain and justify that thesis).

In *Topics*, Aristotle examines four kinds of relations: definitional relations, relations concerning *genus*, essential characteristics (*proprium*), and accidental characteristics (*accidens*). He concludes that problems emerging in every discussion fall under at least one of these relations. In the next eight books of *Topics*, Aristotle offers an analysis of mutual relationships between notions generated by combinations of the four types of relation. In consequence, he formulates 382 rules (he calls them *topoi*) that capture general interrelations between particular categories of notions.[5] Therefore, *topoi* are not purely material (since they do not refer to a concrete object or notion) – they always concern entire categories of notions and may therefore function in a discourse as "common places". Put differently, *topoi* constitute arguments which are simultaneously universal and "non-specific", because they do not belong to a concrete discipline (this is true with reference to *loci communes*, though of course not to *loci specifici*), and are not a type of purely scientific (logical) argumentation. The universality and "non-specificity" of dialectic and rhetorical syllogisms lies in the fact that they make possible – unlike classical formal logic – simultaneous argumentation in favor of two different

aspects of a disputed issue. Topics – an ancillary discipline of the type *ars inveniendi* – may help other philosophies of argumentation to find good reasons (arguments, premises), thus facilitating success in an interpretative controversy.

An interest in classical topic and rhetoric arose anew in the twentieth century, owing especially to schools of legal philosophy, which will be explored in more detail in Section 4.2.

Eristic and sophistry. Eristic and sophistry have the same philosophical origins (since eristic techniques were widely used and taught by sophists) and the same goal, which is to win a dispute at any price – *per fas et nefas* (i.e. by permissible and forbidden means) – without paying much heed to the plausibility of advanced reasons. By relating these disciplines to dialectics, Schopenhauer makes their scope even broader. Hence the reason he speaks, in his treaty on argumentation, about "dialectic eristic". This classification, introduced by Aristotle, takes into account not only logical and dialectic inferences, but also eristic and sophistic ones. In the case of eristic inferences, the form is correct, but the statements themselves are not true – they only appear to be true. As for sophistic inferences, their form is fallacious – it only creates an appearance of truth. However, it is difficult to agree with Schopenhauer's claim that the goal of dialectic eristic is to prove the rightness of advanced theses. This was the goal of dialectics (rather than dialectic eristic), which suggests that the justification of advanced theses' rightness was another – besides proving truth – objective of discourse. Justifying the rightness of an advanced thesis was the objective of rhetoric and topics, but certainly not of eristic and sophistry. Eristic and sophistic discourse had only one goal – to win a dispute; and each was to be evaluated only according to the criterion of efficiency. Rightness always makes reference to some morally acceptable good, whereas efficiency makes reference only to purely instrumental values. It is not merely by chance that neither Plato nor Aristotle held eristic in high esteem. According to Aristotle, eristic is a dishonest way of conducting a verbal struggle in a discussion, and the relationship between an adherent of eristic and a dialectician resembles the relationship between a person who draws false diagrams and a geometer.[6]

Eristic and dialectic use an extensive repertoire of methods and techniques. The most important and frequently used "eristic catches" are: (1) the use of eristic expansion, i.e. acting in a way that introduces chaos into an argument to confuse an opponent, (2) introducing side plots, which have little bearing on the discussed issue, with a view to diverting an opponent's attention from crucial theses, which, if developed, might be

"dangerous" for the other party, (3) appealing to the true or apparent acceptance of a thesis by the audience (by pointing out that an opponent's views are inconsistent with the views of the audience, irrespective of whether such inconsistency exists), (4) fighting an opponent with his own weapon, i.e. turning his arguments to one's own advantage (*retorsio argumenti*), (5) making use of *sui generis* dialectics of "thesis – antithesis", where an antithesis that is defended by an opponent is formulated in such an unconvincing and absurd manner that the opponent is led to question and reject it and thereby to assume a thesis which he initially rejected, (6) "fabricating consequences", meaning deriving, via fallacious inference, theses from an opponent's statements that those statements did not actually contain, (7) concealing the end one really pursues in an argument; this can be achieved, for instance, by "eristic expansion" and making a discussion drag on, (8) responding to an opponent's sophistic argument with another sophistic argument, (9) requiring an opponent to justify his self-evident theses, (10) ironically admitting one's incompetence in order to suggest that theses advanced by an opponent are simply preposterous.[7]

Most (it cannot be said for sure whether all) of the eristic and sophistic "methods" stand in contradiction with the rules of rational discourse, which serve to provide a right (and according to some philosophers even true) solution to the matter in hand. Rightness undoubtedly constitutes the basic criterion for evaluating a practical discourse, yet another important criterion is efficiency. Provided that an argument fulfils necessary requirements of "minimum morality", there is nothing to prevent it appealing to methods which ensure maximum efficiency, as well as – if it is at all possible – to eristic techniques (so long as these techniques do not violate the principles of rational discourse). Consider, for instance, *retorsio argumenti*, which amounts to turning an opponent's argument to one's own advantage (to give an example of this argument's application: when an opponent says "he should be indulged, since he is still a child", we may reply "since he is still a child, he should be punished so that these bad habits do not become rooted in him"). In a practical (normative) discourse in which two or more right solutions are possible, one is justified in using this kind of argument, all the more so as it does not necessarily infringe upon other rules of the rightness of a discourse. This observation is especially important, given that a generally negative opinion about eristic argumentation is expressed here.[8]

Schopenhauer, author of the treaty *Eristic, or Art of Leading a Dispute* which was devoted to eristic dialectics, initiated renewed discussion of eristic in the contemporary philosophies of argumentation.

Contemporary theories of argumentation. Contemporary theories of argumentation were most often formulated in response to growing conflict between the most important philosophies of argumentation. The "positivistic-analytic" and "phenomenological-hermeneutic" paradigms took their final forms. Besides, mainly owing to psychoanalysis, psychological interpretation maintained an important position in the humanities. Controversy over the choice of a method of humanistic interpretation became even more vigorous in connection with discussion – pursued mainly in the areas of metaethics and legal philosophy – concerning the epistemological (semantic-logical) characteristics of normative statements. In consequence, the main goal of theories of argumentation in the latter half of the twentieth century was to find an epistemological equilibrium – a *sui generis* "third way" between competing philosophies of interpretation. The philosophy of argumentation was supposed to substitute formal logic, together with analysis (which are inapplicable or applicable on a limited scale in practical – normative – discourse) and the "softer" method of phenomenological hermeneutics, relying upon intuition. The result of this process was the rise of a wide variety of philosophies of argumentation.

Some of these philosophies were still formulated on the basis of analytical philosophy – in connection with controversy over "good reasons" in ethics. An important contribution to construction of the analytical theory of practical discourse was made by Wittgenstein, Ayer, Stevenson, Austin, Hare, Toulmin and Baier, among others.[9] Thus, for instance, Hare bases his theory of argumentation on analysis of the language of morals and, in consequence, introduces a distinction between the descriptive and prescriptive (evaluative) meaning of ethical predicates. The two main rules – the rule of universality and the rule requiring ethical statements to be prescriptive – upon which every moral argumentation rests confirm this distinction. And even though the rules of moral discourse are different from the rules of argumentation in exact sciences, they appeal to the same criteria of rationality.

An investigation devoted to the use of constructivist method (logic) for the needs of practical advice was conducted by Lorenzen and Schwemmer. According to Schwemmer, "constructivist ethics" (rational moral discourse) relies upon two fundamental principles: the principle of reason (*Vernunftsprinzip*) – called also the principle of advice (*Beratungsprinzip*), and the moral principle (*Moralprinzip*).

As for Habermas, he found a basis for justifying the rational conception of discourse in the consensual theory of truth. This theory enabled him to distinguish an action and a discourse (a dialogue). He treats discourse as a process of rational communication which takes place in a

communicative community and, in addition, in an ideal situation of speech, which enables the participants of a discourse to arrive at "right conclusions", i.e. at an agreement (a consensus). Whilst theoretical discourse is to be evaluated according to the criterion of truth (since in this kind of discourse empirically verifiable and logically decidable theses are being formulated), a practical discourse is to be evaluated through the prism of rightness (since in this kind of discourse, attempts are made to justify the rightness of normative statements). However, the point to be stressed is that what constitutes the final criterion both of truth and rightness is consensus legitimated by the "force of the better argument" and reached in the process of rational language communication. This process can be said to fulfill the demands of rationality only if it observes some formal rules such as, for instance, the rule of the equality of participants in a discourse (the members of a communicative community), the rule of freedom of argumentation, the rule of veracity, and the rule canceling privileges, and the compulsion of any participant in a discourse.[10]

In a relatively short time, the discussion concerning rational discourse had permeated the field of legal philosophy. This process was mainly due to Viehweg, the author of *Topik und Jurisprudenz* (published in 1954) as well Perelman and Olbrechts-Tyteca, the authors of *La nouvelle rhétorique. Traité de l'argumentation* (published in 1958). The latter was the first of a whole series of works devoted to the problems of legal argumentation and written by the representatives of the Brussels school (especially by its leader, Perelman). One work that made a considerable contribution to the maintenance and revival of the diminishing interest in problems of legal argumentation was Alexy's *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der jurstischen Begründung*. Classical philosophies of argumentation, such as ancient topics and sophistry, provided a point of departure both for Viehweg and for Perelman. As for Alexy, he draws on different sources, in particular: the philosophy of Kant (the Kantian conception of practical reason), analytical philosophy and Habermas' discourse theory. As a result, his procedural theory of legal discourse has little in common with the ancient philosophies of interpretation. Both conceptions of discourse will be discussed at greater length in the next section.

4.1.2 Criteria of a Practical Discourse

A fundamental problem of every philosophy of argumentation concerns the choice of which criteria are to be used to "measure" a discourse, and thereby decide whether it should be accepted or rejected. It is suggested that this problem is not only the most important, but also the most

controversial one. First, a given criterion is at issue, next – the scope of its application: the problem here is whether a given criterion should be used only in the process of internal justification – *interne Rechtfertigung*, only in the process of external justification – *externe Rechtfertigung*, or in both (internal justification questions whether a proposed solution follows logically from premises assumed in a discourse, whereas external justification aims to assess the rightness of the very premises).[11]

Let us, however, return to the problem of the criteria of a practical discourse. The earliest theories of argumentation were intended to provide an answer to the question of when a given discourse should be accepted or rejected. This question was answered in at least three ways. According to some philosophers, the only acceptable and final criterion of an argumentative discourse is truth: if one can demonstrate that a proposed solution to a controversy is true, then acceptance of this solution is not only possible, but rather demanded from all the participants of a discourse. Other philosophers opted for a "softer" criterion – namely, that of rightness (a winning solution is one that can be demonstrated to be the most right – just – one). Having given up the claim to logical certainty (truthfulness), these philosophers wanted to relate the criterion of rightness to rationality (what is right in the ethical sense, must be rational as well; and conversely, a rational solution should be accepted as right by all participants in a discussion). Still other philosophers held that the only justifiable and valid criterion for evaluating a practical discourse is efficiency. A total separation of the criterion of efficiency from the criteria of truth and rightness led to a radically instrumental and relativistic understanding of argumentative discourse, which found its expression, for instance, in sophistic and eristic conceptions.

Truth. It was within those philosophies of argumentation which made allowance for the methods of logic and analysis that truth was regarded as a basic criterion for evaluating solutions advanced during a discourse. Aristotle had already pointed out that logic and analysis should serve as tools for deriving true (apodictic) conclusions. The situation of dialectics is more complex: it is to serve either truth alone (Plato), or both truth and rightness (Aristotle) – in the latter case, dialectics is a theory intended to yield conclusions which pass as valid or find themselves in circulation where they pass as valid (*probabilia*).

It should be stressed that the relationship between logic and dialectic has always been a close one (an analysis of a certain type of argument formulated within normative logics shows this clearly, as was shown in the above discussion of dialectics). Truth returns as a criterion for

evaluating argumentative resolutions in contemporary conceptions. The conviction, held by some representatives of the philosophies of argumentation, that this criterion can be applied may be a result either of the adoption of a cognitive view of the meaning of normative predicates and statements (directives and norms), or of some "moderately" non-cognitive views. If we assume that directives (norms) are statements which can be assigned logical values, then, of course, we can also assume that argumentation, invoking these kinds of statement, can be assessed by means of purely logical categories. In some cases, however, even if we deny that directives (norms) have cognitive sense, we are not thereby forced to forgo entirely the possibility of constructing certain types of logic (formal or informal) which might be used as a tool for constructing a criterion – based on truth – for evaluating a practical discourse.

Without getting involved in philosophical controversies which, in our view, cannot be resolved, we wish to point out that in the process of argumentation people very often appeal to theses and arguments that are simply true or false. These theses and arguments, however, are being formulated within a discourse that can be called theoretical. Theses and arguments of normative nature are formulated within the other kind of discourse – namely, practical. As usual, this kind of discourse appeals to other criteria: rightness and efficiency. The necessity of making a distinction between these two kinds of discourse was understood by Aristotle, who distinguished theoretical and practical philosophy. Let us recall that theoretical philosophy is based on the criterion of truth, whilst practical philosophy is based on the criterion of good – rightness. Also Kant distinguished, and even placed in opposition, two cognitive powers of the transcendental subject – namely, theoretical (scientific) reason, which appeals to the criterion of truth, and practical (norm-giving) reason, which appeals to the criterion of formally understood rightness. A distinction between the two kinds of discourse can also be found in Habermas' works. In his view, a theoretical discourse is measured by truth, whereas a practical discourse is measured by rightness, yet, ultimately, both discourses appeal to the same criterion, which is consensus reached in a rational way.[12]

In our opinion, the process of legal cognition (broadly understood as interpretation) encompasses two interlinked discourses: theoretical and practical. By mixing theses formulated within each type of discourse, participants in a discussion often become embroiled in heated, though at the same time fruitless, controversy. Multiple argumentative conclusions are fully discursive, cognitive and logically verifiable. We have at our disposal a whole repertoire of scientific means – both strictly formal (such

as, for instance, logic or "hard" analysis) and empirical. As is well known, there should be no controversy over logically provable and empirically verifiable conclusions. Thus, controversy may arise only as a result of incompetence or opportunism, becoming in consequence an expansive – eristic – sort of argumentation that aims to yield success at any price – even at the expense of truth. Confusion in argumentation will become aggravated if cognitive theses are given a normative sense (that is to say, if we discuss the rightness of statements which we have already recognized as unquestionably true), or if normative theses (that is to say, theses that are to be evaluated by means of other criteria than the criterion of truth) are given a fully cognitive sense. For that reason, one should thoroughly examine a thesis formulated in the process of a discourse before one decides whether it can be evaluated in terms of its truthfulness and falsity or, rather in terms of some other criteria – such as rightness, justice, validity, reliability, or efficiency. In our view, only the latter kind of theses can be the object of a "proper argumentation", i.e. a practical discourse.

At this point, we would like to turn our attention to some terminological issues. In discussing the concept of argumentation from a historical perspective, we have associated it with such terms as hermeneutics (though in a rather limited sense), logic, dialectics, rhetoric, and, finally sophistry and eristic. All these terms identified various philosophies, methods and techniques directly connected with an argumentative process (activity). At the same time, the concept of discourse has been used to analyze its two varieties – theoretical and practical. One could justifiably introduce further distinctions – for instance, between general and special discourse (the latter type of discourse embraces legal discourse, among others). The concept of discourse, however, may give rise to many doubts on account of its ambiguity (which is increased by the fact that it is "fashionable" in the sense that it is invoked by many areas of knowledge to explore essentially different processes). It seems difficult – if not impossible – to give a sound definition of this term: it would be difficult to build an analytic definition (i.e. reflecting the received – historical – sense) of the concept of discourse, since that would require that a whole range of intuitions concerning the meaning of this concept be taken into account. Accounting for all these intuitions would almost certainly make the concept fuzzy. More specifically, in the process of creating such a definition, it would be necessary to allow for the fact that the concept of discourse refers to cognitive process, communication, logical argumentation, discussion, making a speech, convincing through the medium of speech etc. Thus, the concept was used to designate both

general processes of cognition and communication, as well as special activities connected with ways of leading a discussion.

On the one hand, given the lack of a plausible criterion for choosing between these meanings, it must be conceded that the choice of only one of them would have to be qualified as arbitrary and therefore unjustifiable; on the other hand, a definition that accounted for many different meanings would be useless for more specialized kinds of analysis and, in addition, inconsistent with the principle of the economy of argumentation. A synthetic (stipulative) definition of the concept of discourse, in turn, would be arbitrary, for the simple reason that it would have to be based on only one intuitive view (that of the author) of which of the concept's many plausible meanings is "the most plausible".

Rightness. It follows from the preceding considerations that it is rightness that should constitute the measure, standard, or criterion for evaluating a practical discourse. If it is really the case that a practical discourse (argumentation) cannot be "measured" by means of the criterion of truth, it is necessary to adopt some other measure or criterion, such as that of rightness, for example. Of course, the concept of rightness is by no means clear, and, accordingly, in trying to provide its definition, we encounter the same problems we have run into when examining the concept of discourse. Thus, first, we have at our disposal many other concepts which in some cases can be used as its synonyms, especially the concepts of rationality (i.e. "trans-logical" rationality which is precisely rightness), fairness, validity, reliability, and even efficiency if it can be legitimated in a rational way). Second, rightness is always associated with certain moral values, which determine some "ethical minimum" which must be complied with for every practical discourse to be possible. Third, the concept of rightness may be interpreted materially or formally, i.e. procedurally (the latter interpretation seems more adequate if rightness is to be used as a criterion for evaluating practical discourse). Fourth, notwithstanding all the reservations outlined, rightness may be connected with truth, because both discourses – practical and theoretical – are interlinked. In consequence, as was emphasized by Habermas, truth in a sense legitimates rightness and rightness, in a sense, legitimates truth. Fifth, rightness may also be conceived of as efficiency. It may plausibly be argued that only what is right may work efficiently – bring about real effects (we mean here rational efficiency rather than "efficiency at any price", which is characteristic, for instance, of eristic). It is particularly evident in the case of economic arguments, which are frequently put forward in practical discourse: they imply that for a solution to be right it must be

economically efficient, i.e. that one should not sacrifice efficient solutions for the sake of solutions which realize some abstract ideal of fairness or rightness, yet are impossible to realize. Sixth, rightness can be replaced with other (most often formally – procedurally understood) criteria, for instance those of reliability or validity, on condition that these criteria have a moral dimension. Seventh, what is of special significance for the understanding of the criterion of rightness are its connections with the concept of rationality, especially when this concept is given more formal and procedural interpretation; accordingly, those things are right which are simultaneously – from the standpoint of formal rules of the accepted procedure – rational.

It seems that evaluation of the majority of theses formulated in the course of argumentative discourse is not possible unless the criterion of rightness is applied. We are, so to speak, doomed to apply this criterion, given the impossibility of directly applying strictly logical criteria, which would justify – by demonstrating their truthfulness – solutions adopted in discourse (these solutions can simply be directives or norms, or take the form of special kinds of normative statement). In addition, we also have at our disposal the instrumental criterion of efficiency; however, the use of it beyond an ethical context (without making due allowance for the requirements of rightness) may lead to multiple abuses in argumentation and, in consequence, to flagrantly unfair resolutions in a dispute. The thesis that other criteria – such as, for instance, fairness, rationality, validity or reliability – enable the construction of a more precise criterion for evaluating practical discourse is not very plausible: A "new word" may be gained, but the same definitional problems that plague the discussion of rightness remain.

Efficiency. Undoubtedly, efficiency can be one valid criterion for evaluating legal discourse, since what is ultimately at stake is success in an argumentative dispute. The problem boils down to the question: should success be achieved at any cost? Difficulty in offering a precise definition of this criterion stems from the fact that it can be understood in at least three different ways.

First, it can be interpreted in a purely formal and rational way. Efficiency in a practical discourse would be attained by applying a previously accepted procedure. In consequence, the result would be both fair (because consistent with the requirements of a procedure accepted by all members of a discourse) and rational (for the same reason). A procedure determines both the formally understood ethics and logic of a discourse. Efficiency, understood in this way, appeals to the concept of instrumental

rationality (the result of a practical discourse is legitimated by a procedure applied in a given case of argumentation). This is precisely how the problems of discourse and rationality (as a criterion for evaluating the results of discourse) were conceived in theories of communication (meaning the theories of Habermas and Apel), and in theories of system (above all Luhmann's theory[13]). The above interpretation of the concept of efficiency does not rule out the possibility of associating the concept with the criterion of rightness (as formally, or procedurally, understood), which we analyzed earlier.

Second, the criterion of efficiency may be referred to empirical reality rather than the social world presupposed by our normative considerations. Accordingly, a practical discourse can be described as efficient if it functions in the real – empirical – world. It was due to utilitarianism that this account of efficiency was introduced into philosophies of argumentation and then developed by the representatives of pragmatism and American legal realism. These three views – utilitarianism, pragmatism and American legal realism – suggest that actual law (law in action) is the law that produces real effects in a given social sphere. Thus understood, the criterion of efficiency certainly narrows the criterion of rightness, though it does not necessarily contradict it. Not every right (fair) solution is efficient, but every efficient solution is right (fair), since it realizes some values which are fundamental from the point of view of utilitarian, pragmatic or realistic ethics.

It becomes easier to examine this interpretative tradition when one analyzes legal cases. It may be the case that law (a legal verdict) which is fair (rational in a metaphysical sense) requires the impossible, or that law (a legal verdict) which is fair (both in a metaphysical and instrumental sense) turns out to be totally inefficient (for instance, from the economic point of view). What is to be done in such a situation? According to the advocates of the presented view, one should appeal to the criterion of efficiency. Efficiency understood in this way does not have to be (and, in fact, was not in the philosophies discussed) an ethically neutral category. These philosophies only assumed a different hierarchy of values, according to which the most fundamental values were those which enabled the construction of an empirical criterion for assessing the results of a practical discourse. For the representatives of utilitarianism this value was pleasure (happiness), for the adherents of pragmatism – utility, and, for instance, for the proponents of economic analysis of law – social wealth. Conflict between the criteria of rightness and efficiency might arise only if the latter criterion were entirely separated from an ethical context (i.e. values understood in a material or formal way) and used in a purely

instrumental – operational – way. Of course, in such a case priority should be given to the criterion of rightness.

Third, rightness may be referred only to a positive result, that is to say, to the assumption that an argumentative dispute has to be won at any price (*per fas et nefas*) – by using permissible and forbidden methods – in accordance with the principle "the end justifies the means". Success in an argumentative dispute was to be achieved by different sophistic and eristic techniques and methods, as well as by psychological artifices proposed within some contemporary philosophies of argumentation. Thus understood, efficiency has no ties with ethics – a practical discourse is not to be evaluated through the prism of fundamental values. Interesting in this context, is Perelman's distinction between two kinds of activity undertaken in the course of argumentation; these activities – convincing and persuading – are correlated with two types of audience, respectively, universal and particular. In those philosophies of argumentation which appeal to morality, it has always been emphasized that the function of a discourse is convincing, which is – in the last instance – directed at some "ideal audience". Convincing, relies both upon rightness and rationality, upon, as Perelman put it, the objective "validity of an argument": it is the main – and what's more, "ethically active" – goal of a practical discourse. Persuasion is a little different as it can only be evaluated using the criterion of efficiency, understood in a purely instrumental and subjective sense. Persuasion is directed at a particular audience, at concrete people upon whom one attempts to enforce some solution, irrespective of whether this solution satisfies even the minimum requirements of rightness and rationality. Hence, in the case of a particular audience, argumentative theses are regarded as justified even when accepted only by part of the auditorium. Thus, a situation may emerge where, in spite of errors (or even abuses) committed in a practical discourse, one may achieve the final result, that is to persuade part of the audience to accept the proposed solution, thereby succeeding in the argumentative dispute, in defiance of the requirements of rightness and rationality. This is the reason why it is argued here that a narrowly – instrumentally and subjectively – understood criterion of efficiency cannot be used automatically as the measure of a practical discourse.

4.2 TWO CONCEPTIONS OF A LEGAL DISCOURSE

It is possible to engage endlessly in controversies surrounding practical discourse's reception of the philosophy of argumentation, multiply divisions and classifications. However, the discussion here will be confined to

two, important and characteristic, conceptions of practical discourse: (a) procedural; (b) topical–rhetorical. Although these conceptions appeal to somewhat different philosophies of argumentation, they are nevertheless complementary to each other. In order to speak reasonably about legal discourse, it is necessary to explore not only the problem of the reception of philosophies of argumentation directed at legal discourse, but also (above all) the problem of the autonomy and specificity of this discourse, i.e. the problem of the relationship between general discourse and legal discourse.

According to the first view of this relationship, there exists only one – universal – general discourse. It is within the framework of this discourse that universally valid and rules are formulated to be applied later in all kinds of argumentation. Thus, there exists only one philosophy of argumentation, and its different applications (this kind of situation exists in hermeneutics, especially in its phenomenologically oriented variety, discussed in the following chapter). On the above understanding of philosophy of argumentation, the distinction between general discourse and particular discourses essentially loses its significance, retaining only a didactic meaning.

The second view describes these relations from the opposite perspective. The "argumentative reality" is the reality of concrete (particular) discourses – the only discourses that actually exist. Advocates of this view often assumed that a certain type of discourse, say legal or ethical, is of paradigmatic significance for all other practical discourses. According to Perelman, the paradigmatic discourse is the legal one. He asserts that the reasoning of a judge is exemplary, not only for other types of legal reasoning, but also for other – particular – practical discourses. Yet whether Perelman's view is correct is a matter of some dispute. In our opinion, the reasoning of a judge should be regarded as an "exception" rather than an "exemplary case", i.e. generalizable, "universal pattern". It is difficult not to notice the specificity of the reasoning of a judge even with reference to legal discourse: the judge is a fully autonomous arbiter, rather than a participant in a discourse who possesses the same – equal – rights as other participants. Participants in other particular discourses hardly ever make use of legal argumentation (and – *a fortiori* – of the type of the reasoning applied by a judge), one reason being that they lack the required legitimation (the specificity of legal discourse, which lies, in particular, in its close connections with valid law, make this kind of argumentation inaccessible to representatives of other humanistic disciplines).

Finally, according to the third view, legal discourse is a special case of general practical discourse – this view is the so-called *Sonderfallthese*,

formulated most distinctly by Alexy. He distinguishes three interpretative theses concerning the fact that legal discourse is a special case of general practical discourse: *Sekundaritätsthese*, *Additionsthese*, *Integrationsthese*.[14] We shall discuss them briefly. *Sekundaritätsthese*, i.e. a thesis about "the façade character of legal discourse", asserts that, in cases which cannot be decided exclusively on the grounds of the rules of valid law, it is general practical discourse that constitutes the real basis for making a decision; the role of legal discourse is to provide only "secondary legitimation" and thereby conceal "behind the façade of valid law" the real reasons for the decision. *Additionsthese*, i.e. a thesis about "the complementary character of general practical discourse", implies that legal argumentation is sufficient only up to the point where specific legal arguments are exhausted and, in consequence, it becomes necessary to supplement them with arguments from general practical discourse. *Integrationsthese*, a thesis about "the integrality of discourse", says that specific legal arguments should be used in conjunction – at every stage of a given discourse – with arguments from general discourse. *Sonderfallthese*, the thesis presented here, also gives rise to many doubts: note, for, instance, that the first two theses are descriptive, whereas the third one is arguably normative. True, it is hard to call into dispute the view that legal discourse is specific, yet it is not clear in relation to what it is specific (to a general discourse, or rather to other, particular practical discourses?). Furthermore, considering the fact that a general discourse can hardly be applied independently of some particular discourse, it may plausibly be argued that a general discourse does not exist as such – it exists only in concrete applications, that is to say, as some practical discourse. Only some general rules (common places – *loci communes*) have, so to speak, independent existence: they constitute a recurring element of every particular practical discourse and thereby fulfill the role of peculiar "argumentative axioms".

The above reservations notwithstanding, it seems that the third view is – on certain conditions – acceptable; we wish to stress, though, that should some additional presuppositions be accepted, the first view may also be defended. Contrary to appearances, these two views can be easily reconciled with each other.

4.2.1 The Topical–Rhetorical Conception of Legal Discourse

In the second half of the twentieth century many attempts were made to make use of ancient philosophies of argumentation for the purposes of the law. Intensification of the controversy over choosing a method of jurisprudence, the growing criticism – especially after 1945 – of legal

positivism, as well as disappointment with the methodologies proposed by analytical philosophy and hermeneutics, naturally contributed to increased interest in theories of argumentation. These theories were to enable construction of a philosophy of interpretation which would constitute a methodological alternative for legal theory – the *sui generis* "third way" between analytical philosophy and hermeneutics. It is presumably not by chance that the first conceptions of legal argumentation (those of Perelman and Viehweg) drew from the reliable traditions of ancient topics and rhetoric. It should be noted, though, that over time, the connections between legal argumentation and this tradition became looser (it is clearly visible both in later works of Perelman as well as in the German current *Methodenlehre*) and, accordingly, theories of legal argumentation started to be regarded as "specifically 'legal' methodologies".

Perelman. In 1958 *La nouvelle rhetorique*: *Traité de l'argumentation* by Perelman and Olbrechts-Tyteca was published. The authors treated this work as the renewal (reception) of the tradition of ancient rhetoric, especially as represented by Aristotle, Cicero and Quintilian. In his later works, Perelman frequently returned to issues connected with classical topics and rhetoric, yet he introduced multiple changes to solutions advanced in antiquity, especially by Aristotle. Both the continuity and change can be easily tracked, for instance, in his later work, *Logique juridique. Nouvelle rhétorique*, published in 1979.

Perelman considers topics to be an essential element of every possible theory of argumentation. In particular, he scrutinizes the Aristotelian problem of relations between common and special places. "Common places" (*loci communes*) – viewpoints or values to be taken into consideration during every discussion – enable a speaker to formulate theses, rules or maxims to be used in the process of a given discourse (usually in its initial phase). "Common places" stand in the same relation to "unspecialized reflections" as "special places" (*loci specifici*) stand in relation to special disciplines. To give an example, general principles of the law are only *loci specifici* of the law (as a special discipline), whereas the most general theses (like those analyzed by Aristotle in his *Topics*) are a point of departure for "an unspecialized reflection" and fulfill in every discourse a role analogous to the role fulfilled by axioms in a formal system. Having chosen "common places", a speaker must see to it that they become "present" in the consciousness of her interlocutors, or of the audience. This goal is to be realized by the various techniques (above all rhetorical ones) of a discourse. An especially important role in bringing "common places" to the consciousness of the audience is played by

rhetorical figures which include reinforcing (an oratory development of a theme), repetition, using apparently indirect speech, visualizing (an event is described suggestively so that it may be "seen" by the audience) and – finally – reversing tenses (this technique frequently leads to violation of the grammatical rules concerning the sequence of tenses, yet it enables a speaker to increase the effect of her argumentation).[15]

Perelman tries to describe the main types of legal topic, making a separate catalogue of arguments and legal principles.[16] Both types of topic fulfill the same role in legal discourse – that is, they enable the conducting and completion of an argument, and the interpretation of valid law. Topics do not possess a strictly logical structure, since, as Perelman points out, they do not refer to the form, but to the object of reasoning; in other words, they help establish principles on the basis of valid law. Perelman (following Tarell) numbers the following arguments amongst such *quasi*-logical arguments (i.e. arguments in a narrower sense): *a contrario*, *a simile* (or *per analogiam*), *a fortiori*, *a completudine*, *a cohaerentia*, *per reductio ad absurdum*, teleological, *ab exemplo*, systematic, naturalistic, psychological, historical and economic. He also analyzes a catalogue (drawn up by Struck) of 64 principles of the law (legal topics).[17]

Especially interesting in the context of Perelman's consideration of topics, is the question of relations (which we have already discussed) between "common places" and "special places". Specifically, it should be noted that an apparently distinct line between both types of topic (general and special) is no longer easy to draw in the case of legal discourse. This is due to two reasons. First, legal discourse depends on a whole range of external circumstances connected, *inter alia*, with the complexity level of an interpreted case, tradition and even the psychological situation of an interpreter. These circumstances will influence the choice of certain principles (which in point of fact make it possible to enter upon argumentation). It may turn out that the same topics will be regarded in some situations as general topics – unspecialized – *loci communes*, and in other situations – as special (detailed, specialized) topics – *loci specifici*. It is the context and time of use that will decide whether the same principles are used either as *loci communes* or as *loci specifici*.

Second, multiple legal topics (arguments and principles) are of universal nature. They can be used also in other practical discourses, where they fulfill the role of unspecialized general principles (this observation applies to such arguments as, for instance, *a simili*, *a contrario*, or *a fortiori*) or principles: *pacta sunt servanda* (contracts ought to be observed), *clara sunt interpretanda* (what is clear requires no interpretation) or *nemo iudex idoneus in propria causa* (no one can be a good judge in her own

case). Thus, one can hardly agree with the view that these topics are of a specifically legal nature and thereby constitute "special places" (*loci specifici*) only in legal discourse. According to Perelman, rhetoric is a technique of legal discourse aimed to bring about the "effect of presence" i.e. to make topics "present", both in the consciousness of interlocutors and the audience. However, the role Perelman attributes to rhetoric goes much further: it is on the basis of rhetoric that he builds his whole conception of argumentation. This "new rhetoric" decidedly exceeds the scope of rhetoric as understood in antiquity. It is by means of the "new rhetoric" that Perelman builds a procedurally oriented theory of legal argumentation (to be discussed in Section 4.2.2).

According to Perelman, the main task of rhetoric is analysis of those discursive techniques designed to elicit or strengthen support for theses submitted for discussion. As mentioned earlier, Aristotle defined rhetoric as the art of finding usable means of convincing in every situation. Now, Perelman accepts this definition, but he supplements it by adding four detailed theses of the nature of rhetoric: (1) The goal of rhetoric is to convince by means of a discourse. In the process of a discourse, one is allowed to make use of the techniques of rhetoric *sensu largo* (which, in addition, embraces topics, dialectics and all the other techniques applied during disputes and discussions), (2) Rhetoric makes no use of formal logic. In the process of a practical discourse, one does not attempt to locate truth (since it is not possible to prove the truthfulness or falsity of normative statements), but, rather, to convince the audience, (3) Truth – as an objective category – can be described as "impersonal", whereas convincing can be described as "personal" (since the act of convincing is always directed at a person or persons, i.e. to some audience), (4) The category of convincing can be graded. The degree to which a thesis is accepted may vary where a dispute concerns values other than truth. What is more, the degree to which a thesis is accepted may depend on the type of audience to which the argumentation is directed (the audience may be either universal or particular; it should be noted, though, that it is necessary to persuade, rather than convince, the latter type of audience).[18]

As has been illustrated, rhetoric and topic – two formerly distinguishable philosophies of argumentation – were tied by Perelman so that they now form a coherent whole – a new theory of legal argumentation, which, as will be shown, can also be interpreted procedurally.

Viehweg and the current Methodenlehre. *Topik und Jurisprudenz* – a book by Viehweg published in 1954 – gave rise to discussion about the possibility of applying topic in legal interpretation (this discussion can be

situated within the framework of the "fundamental discussion" pursued in the German science of law, where it is called *Methodenlehre*). As a matter of strict fact, it should be noted that in 1928 Salomon – a legal philosopher – spoke about topic as a method of jurisprudence; it remains true, however, that it was not until the book by Viehweg had been published that the main discussion of this issue developed. The ancient philosophies of argumentation, especially the topic of Aristotle and Cicero, provided a starting-point for Viehweg (just as for Perelman).[19]

Viehweg tries to show that legal reasoning, the work of lawyers and legal method each have the nature of a topic. Accordingly, his approach is decidedly anti-positivist. Let us recall that legal positivism – emphasizing the methodological autonomy of jurisprudence – stresses the systematic aspect of legal thinking (reasoning), whereas topic, proposed by Viehweg, exemplifies the anti-systematic, focused on specific problems, approach to legal method. Legal positivism (its two classical versions – *Gesetzposistivismus* and *Begriffsjurisprudenz* as well as Kelsen's normativism) presupposed that legal thinking (reasoning) – corresponding to the structure of the system of valid law – possesses a logical structure. This presupposition found its expression in the conception of a legal syllogism (regarded as the basic type of legal reasoning commonly applied in the process of legal interpretation), and, later, in the Kelsenian conception of a static system, i.e. one in which hierarchical connections between norms in a given system are unquestionably of a legal (inferential) nature (within such a system, one can directly derive the content of a lower norm from the content of a higher norm).

The method of topic is thoroughly different (the very word "method" is perhaps not quite appropriate in this context – Viehweg himself preferred describing topic as "an argumentative technique"). Topic is simply a certain technique of thinking focused on particular problems – the technique traces its origins back to rhetoric and its goal is to solve concrete dogmatic problems. It is by no chance that topic, in Viehweg's view, was always an immanent part of civil law (this was perfectly realized by Roman lawyers, who, as is well known, concentrated on solving genuine legal problems, trying to avoid superfluous formalisms). In being simultaneously anti-positivistic, anti-formalistic, anti-theoretical and anti-systematic, topic becomes in many respects close to the hermeneutic approach: topic appears to imply that all "activities" are to serve interpretation and, accordingly, that it is in the process of solving particular problems that "concrete law" comes into being. The approach based on topic remains in exact opposition to all those views (above all legal positivism) which are, so to speak, "of paradigmatic nature", i.e. which

assume some methodological axioms, true and universally valid types of reasoning, and appeal to the notion of an *a priori* accepted and uniquely possible system.

Of course, the topic approach to the method of legal reasoning (if it is a method!) may engender many doubts. In applying topics (both general and special) in legal discourse, one also introduces elements of systematic thinking and uses a sort of argumentative logic. Moreover, in legal discourse, these topics (arguments and principles) are continually applied, since they are considered to be the universally valid standards of legal thinking. One may, therefore, justifiably assert that legal topic is also associated with systematic thinking, because reasoning based on it relies upon the rules of some sort of – informal – logic.

Numerous philosophers, as well as the theorists of law representing the strand of *Methodenlehre,* took part in a discussion over the possibility of using topic as a method of jurisprudence. There was no lack of critical opinions of Viehweg's conception. The main objections raised were that the representatives of topic did not advance any plausible arguments against the systematic and formal (axiomatic–deductive) method of the analysis of law, and that the alternative method they put forth (which is in fact a mixture of questions unconnected with one another) implies that an accidentally invoked *topos,* rather than valid law, will determine a concrete legal solution. Esser – an otherwise moderate advocate of the method of topic – points out that it does not make much sense to radically oppose systematic reasoning and reasoning based on topic, given that topics themselves (being in fact general rules or principles) legitimate thinking in terms of a system (as already noted in the preceding paragraphs). The place of topic is, in Esser's view, in the area of jurisdiction. In particular, the interpretative activity of a judge is a paradigmatic example of thinking focused on particular problems (which is a characteristic of topic). All in all, according to Esser (as well as to Viehweg), the function of topic boils down to finding reasonable arguments, which help an interpreter to properly describe facts relevant to a given case, as well as to make the final decision (i.e. establish a legal norm appropriate for the case).

According to Kriele the essence of topic as applied in the science of law can be summarized by three theses: (1) legal arguments are not deductive, (2) these arguments are essentially legitimated by the opinion of the majority, (3) they must be analyzed in each particular case and may not neglect any single view or opinion. Even though Engisch and Larenz questioned multiple particular assumptions of Viehweg's conception, they nevertheless share his view that it is not possible to apply

the axiomatic–deductive method in legal reasoning. As for Zippelius, he asserted that legal topic plays a particularly important role in the process of interpretation concerning axiological gaps in the law (so-called *Wertungslücken*). More specifically, topic enables one to apply general clauses to a concrete case. Of primary importance for the rise of topical–rhetorical theories of argumentation were the works of representatives of the Brussels school (especially Perelman, whose conception of rhetoric and topic we have already discussed). What salvaged and intensified falling interest in the issues of legal topic was the work of Struck *Topische Jurisprudenz, Argument und Gemeinplatz in der juristischen Arbeit* (published in 1971).

At this point it would not be inappropriate to query whether the discussion devoted to the topical–rhetorical conception of legal discourse amounts to "much ado about nothing". It is submitted that the answer to this question should definitely be negative for the following reasons. In our view, topic and rhetoric open up the possibility of constructing realizable (applicable) philosophies of argumentation. The applicability of these philosophies flows, among other things, from the fact that "the elements of topics" are incessantly present in legal thinking (legal argumentation), which as a rule is focused on particular problems (particular cases). It is hard to overestimate the significance of a second reason: the problem of topic concerns an absolutely fundamental issue, namely whether the solutions to legal cases must be based solely on legal rules or norms. Positivists (for instance Hart and Kelsen) gave different, though always positive, answers to this question. According to Hart, legal decisions must be based on legal rules, yet judges are free to choose or formulate these rules (when, for instance, they establish a precedent). Kelsen, by contrast, asserted that judges have no such liberty: a norm is either derived (deduced) from an immediately higher one belonging to a system of valid law (in the case of a static system), or passed in accordance with a competence contained in a norm belonging to a system of valid law (in the case of a dynamic system). However, according to Dworkin – who, as is well known, rejects the positivistic approach – legal decisions may be taken on the basis of both legal rules and standards (the latter embraces principles and policies). In point of fact, the new word "standard" designates an old idea – namely, some legal topic. The first type of standard – principle – refers to basic moral values (justice, honesty etc.), whilst the second type – policies – refers to economic, political or social values.

It is worth pointing out one more – rather paradoxical – fact: the conception of law and legal discourse based on topic was initially realized in systems of precedent law, not in systems of continental law (the latter system is a direct descendant of the tradition of Roman jurisprudence,

which gave priority to thinking focused on concrete problems, and, accordingly, to the methods of interpretation based on topic).

4.2.2 Procedural Conception of Legal Discourse

The procedural approach enables one to look at the issue of legal discourse from a different – more abstract and formal – perspective. By no means do we wish to assert that only two approaches – namely, topical–rhetorical and procedural – are acceptable. Yet it remains the case that these two approaches played an essential role in shaping the contemporary philosophy of argumentation.

In the second half of the twentieth century, theories of argumentation formulated in the field of jurisprudence became paradigms for those examined in the fields of philosophy (ethics), sociology, political sciences and economics. It was also at this time that procedural and formal variants of theories of argumentation began to be formulated more frequently: given that these variants are essentially different from ancient conceptions of argumentation, they cannot be treated simply as acceptance of those conceptions. As a rule, these theories are strongly normative: they are not disturbed by the limitations built into real legal discourse, which depends on the complexity of the case being discussed and its entire interpretative context, tradition, and all the characteristics of those who directly participate in it (meaning limitations of a phenomenological nature – connected with the consciousness level of participants in a discussion – and limitations of a psychological nature, meaning the psychological experience of participants in a discussion). The main ambition of the authors of procedural theories is to create an ideal argumentative model, or, more precisely, to describe formal conditions which must be satisfied by each acceptable, i.e. right and rational, practical discourse. These theories, then, aim to provide a "universally valid", theoretical model to function as a measure of rightness and rationality for every possible practical discourse. Thus, the specified goals of procedural theories constitute both their strength – since if one accepts certain idealistic presuppositions, the goals will hardly be questionable – and their weakness – since, among other things, the goals are usually formulated on the meta-theoretical level, which makes it impossible to apply these theories directly in legal discourse. Besides, procedural theories contain not only purely normative theses, but also some, arguably unwanted, descriptive ones.

Perelman. As announced earlier, we once again return to Perelman's conception. Ancient topic and rhetoric constituted a starting-point for his philosophy of argumentation, and its final result is a procedurally

oriented theory of argumentation, called by him "the new rhetoric". At the root of "the new rhetoric" it is possible to find Aristotle's philosophies of argumentation (especially topic and rhetoric), which Perelman considerably supplements and modifies, as well as Kantian ideas of the transcendental subject and the categorical imperative. As mentioned earlier, the goal of "new rhetoric" is to convince the audience by means of a discourse in decision making situations, i.e. situations in which there exist different practical (normative) alternatives. Thus, the standard for evaluating of an argument is its persuasive force; the criterion of effectiveness is, in Perelman's view, of secondary importance. The main goal of every argumentation is to gain or strengthen the support of the universal audience. In order to achieve this goal, a speaker must adapt her speech to the demands of the universal audience.[20] Thus, the universal audience becomes a key notion in understanding any theory of practical, legal discourse. It is precisely due to this notion that this theory acquired procedural and formal characteristics. This is because the notion of the universal audience is interpreted by Perelman in an abstract, ideal and formal manner. The fact that an argumentation, i.e. certain reasons advanced in the process of a discourse, has been recognized by the universal audience implies that the argumentation is right, valid, rational and objective. Furthermore, the acceptance of argumentative decisions by the universal audience is likely to guarantee the efficiency of the relevant practical discourse.

Doubts may arise here as to whether criteria of efficiency may be established by the universal – purely formal – audience. Aristotle asserted that the task of rhetoric is to convince any unspecialized, but real, audience. In addition to the notion of the universal audience, Perelman introduces the notion of the particular audience. We think that the problem of efficiency should be associated with the latter type of audience: an argumentation can be called efficient if it is accepted by at least part of a particular audience. Moreover, even mutually exclusive argumentative theses can be described as efficient, provided that a speaker succeeds in persuading part of the particular audience to accept his argumentation. As mentioned earlier, Perelman distinguished the notion of convincing (*convaincre*) from the notion of persuading (*persuader*): the former is connected with an arguments' validity and, accordingly, with the concept of the universal audience, whereas the latter is connected with an arguments' efficiency and, accordingly, with the particular audience. The particular audience exists in a specific place and time, for some concrete discourse, whereas the universal audience is the criterion for assessing every possible kind of particular practical

discourse. Perelman emphasized that a speaker must use rational arguments, adjusting them to the categorical imperative as understood by Kant, and that her postulates and reasoning must be valid for the whole human community. The universal audience is made up of all well-informed and reasonable people – the whole community of potential participants in a discourse – or at least some ideal representation of such a community.[21]

Does the above definition of the universal audience provide sufficient reason for treating "the new rhetoric" as a theory of procedural type? It seems that even Perelman would have difficulty in answering this question, the reason being that his theory of argumentation constitutes a specific combination of rules and theses which can be interpreted materially (these rules and theses can be found as early as in the ancient philosophies of argumentation, especially topic and rhetoric), and purely procedural and formal rules and theses (introduced into considerations about practical discourse – practical reason – by Kant). This specific combination of material and formal elements in Perelman's theory is most clearly visible in the relationship between two types of audience: universal and particular.

Alexy. Free from these material intercalations is Alexy's procedural theory of practical, legal discourse. His theory of argumentation appeals to at least three philosophical traditions. These are the Kantian conception of practical reason, analytical philosophy and the theory of Habermas (especially his consensual theory of truth). Alexy presented his theory in the work *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (published in 1978).

Alexy makes a clear distinction between theoretical and practical discourse. He does not deal with theoretical (scientific) discourse, which appeals to the formally understood criterion of truth. His focus is on practical discourse, the goal of which is to provide justification for normative statements. Thus, the starting-point of Alexy's considerations is different from that of Habermas, who also distinguishes the two types of discourse, although he does not juxtapose them so decidedly as Alexy does. This is due to the fact that Habermas regards consensus as a criterion to be applied in evaluating those theses formulated during a theoretical discourse and those formulated during a practical discourse. Alexy's dualist account of both kinds of discourse enables him, by contrast, to justify the thesis of the cognitive specificity of a practical discourse. What is more, not only does a practical discourse appeal to

rules and principles other than those, which "govern" a theoretical discourse, but legal discourse itself is a special example of a general, practical discourse (*Sonderfallthese*).

The procedure of a practical discourse is determined by formal rules. Proceeding in accordance with these rules enables argumentative decisions to be made, which fulfill the requirements of rationality and rightness. The indefeasibility of the rules of a practical discourse stems from the fact that they are confirmed by many types of scientific and philosophical justification: technical, empirical, analytical, transcendental or universal-pragmatic.[22] Thus, to reject these justifications would be to reject elementary scientific intuitions (empirical and analytical) and philosophical ones (appealing to practical reason or common sense). The manner in which these rules are justified, as well as their purely formal character, make them universal; in consequence, these rules play the role of *sui generis* axioms in a practical discourse.

Alexy speaks of several types of formal rule "governing" a practical discourse. These include rules that are basic, appealing to reason, argumentative, justificatory, and, finally, the so-called rules of "passage". Basic rules are formulated on the basis of the most fundamental intuitions concerning the process of language communication; they embrace, in particular, the following rules: (1) no speaker may contradict herself, (2) every speaker may defend only what she herself believes, (3) every speaker who uses a certain predicate to designate a given object should use this predicate with reference to every other similar – in respect of relevant features – object, (4) different speakers may not assign different meanings to the same expression. The following, according to Alexy, is an example of a rule that appeals to reason: upon the demand of some other participant in a discourse, every speaker must justify her thesis and may not invoke any circumstances that would legitimate her refusal to provide such justification. As for argumentative rules, one may point to the rule, which forbids the justification of a situation in which one participant in a discussion treats another participant differently (better or worse) from others. Alexy associates justificatory rules with the principle of generalizability (*Verallgemeinerbarkeitsprinzip*) and he examines its three variants (proposed by Hare, Habermas and Baier). Rules belonging to the last group – i.e. the rules of "passage" – grant every participant in a practical discourse the right to appeal to the arguments of empirical, analytical or theoretical type. That is to say, they enable the participant to "pass", at any point in the discourse, from practical to theoretical discourse.[23]

According to Alexy, what is ultimately at stake in a legal discourse is the process of justifying (*Rechtfertigung*) adjudications (verdicts), i.e.

normative statements of a special kind. Two aspects of this process may come into play – namely, internal justification (*interne Rechtfertigung*) and external justification (*externe Rechtfertigung*). The former is intended to demonstrate that an adjudication (verdict) follows logically from premises assumed for its justification, while the latter is intended to demonstrate the rightness of those premises. The goal of practical, legal discourse is surely to demonstrate the rightness of normative premises assumed for the needs of justification. Alexy presents six groups of rules and forms of external justification: (1) rules and forms of interpretation, (2) dogmatic argumentation, (3) law-making adjudications (precedents), (4) practical argumentation, (5) empirical argumentation, and (6) special forms of legal argument (for instance, such argumentative forms as *a simili*, *a contrario*, *a fortiori*, or *ad absurdum*).[24]

The relationships between a general, practical discourse and a practical, legal discourse are captured in the form of three theses, which constitute the development and specification of the above discussed *Sonderfallthese*. Let us recall these theses: *Sekundaritätsthese*, that is a theory of "the superficial character of a legal discourse", *Additionsthese*, a thesis about "the complementary character of a general, practical discourse" and *Integrationsthese*, a thesis about "the integrality of a discourse". The first thesis asserts that, in cases which cannot be decided exclusively on the grounds of the rules of valid law, it is a general, practical discourse that constitutes the real basis for making a decision – the role of a legal discourse is to provide only "a secondary legitimation"; the second one implies that legal argumentation is sufficient only up to the point when specific legal arguments become exhausted and, in consequence, need to be supplemented with arguments from a general, practical discourse; the third thesis, in turn, says that specific legal arguments should, at every stage of a given discourse, be used in tandem with arguments from a general discourse. Movement from one discourse to another is, in light of the above mentioned theses, not only possible, but also, in many cases of argumentation, simply necessary.

A practical, legal discourse possesses a fully formal structure, made up of the rules of a general, practical discourse as well as special legal rules. Proceeding in accordance with the procedure determined by these rules enables an unquestionably acceptable – from the viewpoint of the criteria of rationality and rightness – result to be accomplished. The idea of procedurally understood rationality is ultimately expressed in the following six principles: (1) consistency, (2) teleological rationality, (3) verifiability, (4) coherence, (5) generalizability, and (6) veracity and openness.[25]

Of course, the procedural account of practical, legal discourse may (just as the topical–rhetorical account) give rise to doubts. Problem-thinking – preferred within the topical–rhetorical approach – has been replaced with systematic thinking. Systematic thinking, though, can plausibly be defended only if one accepts a number of idealistic (normative) presuppositions, which, as a rule, are of meta-theoretical nature. This is because the procedural theory of legal discourse only constructs presuppositions and conditions for the "proper" theory of legal argumentation. The possibility of applying such a complex theory in practice is in fact very limited. Besides, not all theses and rules are self-evident in an analytical or common-sense way, and the catalogue can in principle be supplemented and modified arbitrarily. In consequence, the procedural theory of a discourse cannot be definitely "closed", and each example is only one of many possible versions.

What distinguishes the topical–rhetorical account of a discourse from the procedural one is something that may be termed "an argumentative perspective". Topical thinking takes a concrete problem (a particular legal issue) as its starting-point; only then does it adapt to that problem a given type of argumentation, drawing from topics that can be applied to that problem. Thus, problem-thinking is inductive in its nature: we begin with a concrete issue (normative fact), which we subsequently interpret by appealing to "common places" of legal thinking, i.e. to specific topics. Procedural theories of a practical legal discourse propose the reverse way of proceeding. In an attempt to prove the rightness of the premises assumed to justify argumentative decisions, we appeal in the first place to the general rules of a practical discourse and the rules of a legal discourse. These rules enable us to ascertain whether a proposed solution to a concrete case fulfils the criterion of "an ethical minimum", i.e. the criterion of formally understood rationality or rightness. It is not until this test is passed that an argumentative dispute may be finished. Thus we are dealing with a kind of systematic proceeding, which can be described as deductive, since the argumentation begins "from what is general" (i.e. from rules (axioms) of a (practical and legal) discourse) to reach "what is particular" (i.e. a solution to a concrete legal problem).

Ultimately, however, both topical and procedural conceptions provide an answer to the question of whether legal decisions should be made solely on the basis of legal norms (rules). Even though procedural theories favor systematic thinking in the law, they nevertheless admit the possibility of appeal to extra-legal elements, such as the general rules of a practical discourse, in a legal discourse.

4.3 LEGAL ARGUMENTATION

The time has now come to attempt to summarize the above discussion of legal argumentation. At the beginning of this chapter it was suggested that theories of a legal discourse in jurisprudence "want" to occupy the place between formal logic and "hard analysis" on the one hand, and hermeneutics on the other. This opinion can be confirmed in light of what has already been established. The procedural theories of legal argumentation make use – to a relatively large extent – both of logic and of all types of linguistic analysis. Topical–rhetorical theories of a legal discourse, which reject systematic methods in the analysis of law, make use (just as hermeneutical philosophy does), in the first place, of informal logic and "soft analysis". Theories of legal argumentation depart from the standards of thinking about law, which were fixed by legal positivism, the law of nature and legal realism. Within these theories, according to the spirit of Kantian philosophy, ontological problems have been eliminated, and the center of gravity has fallen on methodological issues. These are theories of purely interpretative nature, and, accordingly, they assert that a concrete (real) law emerges only as a result of the process of argumentation. Their orientation is anti-positivistic, because they assume that decisions made in a legal discourse may be based not only on legal norms (rules), but also on the general rules of a practical discourse, ethical standards, arguments and legal topics.

In our view, it is not possible to show correctly and rationally that any one conception of a legal discourse is better than another. We deem controversies over this issue to be entirely academic. The complexity of the structure of a practical, legal discourse, the openness of theories of argumentation to all other philosophies of interpretation, and, accordingly, the constant possibility of their modification and improvement, and the impossibility of applying most of these theories in argumentative practice (the more theoretically sophisticated a theory of argumentation, the less practically useful it becomes) are all reasons which support the assertion that it is necessary to use both (discussed above) approaches. That is, the topical–rhetorical approach as well as the procedural approach should be combined with a view to producing an adequate theory of a practical, legal discourse, i.e. a theory that can be realized – applied in interpretative and argumentative practice. The topical–rhetorical conception – if deprived of the theoretical (systematic) perspective provided by the procedural approach – will be too narrow (lame). The procedural theory, in turn will be too wide (leaping) if detached from topics that can be interpreted materially.[26]

Opposing the problem approach and the systematic approach, and persistently trying to prove that the former or the latter characterizes legal thinking makes little sense, for the simple reason that we appeal to both approaches when we make interpretative decisions, or when we conduct a more widely understood legal discourse. Moreover, these types of thinking are interlinked: problem (topic)-thinking turns into systematic thinking and vice versa – this is precisely what the *sui generis* dialectic of a legal discourse consists of. Joining the two perspectives – topical–rhetorical and procedural – enables the avoidance of one more objection, which can almost always be raised, namely, that theses or rules of a purely formal, procedural and normative nature are often confused with theses or rules possessing a material, descriptive and empirical character. The conception of a practical discourse proposed below possesses features characteristic of both normative theory (in the part of the conception which concerns formal rules of a legal discourse) and descriptive theory (in the part which concerns legal topics that can be interpreted materially).

4.3.1 Claim to Universality

Legal argumentation as a method is intended to be of universal application. This is by no means surprising, given that similar claims are set up in the other philosophies of interpretation, i.e. logic, analysis and hermeneutics, though each asserts its claim slightly differently. Since we regard the distinction (already made in the earlier part of this book) between practical and theoretical discourse as plausible, we can examine this thesis, concluding that it is only with reference to its specific field of application that legal argumentation is universal. Naturally, this field is the field of practical cognition. Thus, according to this thesis, a proper argumentation can be led only within a practical discourse (and what is more, this argumentation is to be limited only to "hard cases" – see Section 4.3.2, rule 5). As for a theoretical, legal discourse, however, it is open to all the other scientific methods (logic, analysis), arguably with the exception of argumentation (since one does not discuss facts). Thus, argumentation may be regarded as a specifically 'legal' method, because it enables us to operate in the world of practical (normative) reasoning, where it is no longer possible to decide issues according to the criterion of truth and falsity. Just as logic and the methods of analysis are irreplaceable in a theoretical discourse, argumentation is irreplaceable in a practical discourse. It follows from this fact that the claim to universality contained within theories of argumentation can reasonably be discussed only in relation to a practical discourse. From this perspective,

it is possible to affirm that only phenomenologically oriented hermeneutics may justifiably assert a full claim to universality (i.e. with reference to both kinds of discourse). This is because "the problem of understanding" has neither ontological nor methodological limits.

The universality of argumentation, however, can also be defended along different lines. For example, by attempting to demonstrate the universal validity of general rules of practical discourse, a universally valid procedure and ethics for all possible communications between people can be established. Accordingly, the rules thus interpreted are fully transcendental in nature and, for that reason, the scope of their application cannot be limited to a practical discourse, still less to a legal discourse.

4.3.2 Structure of Legal Discourse

Now the time has come to deal in more detail with legal discourse. As the foregoing considerations imply, both views of a practical legal discourse ought to be discussed: procedural (formal) and topical–rhetorical (material). General rules establish a universally valid procedure for every possible practical discourse (including legal discourse). These rules enable criteria determining the viability of a practical discourse or, more precisely, concrete argumentative decisions, to be formulated. The criteria are rationality and rightness. To put it more simply, a practical discourse is rational and right if, and only if, it is conducted in accordance with general rules (to be discussed below). The rules are elementary, which is why accepting them is not a matter of the good will of participants in a discourse, but a sort of ethical imperative. In excluding these rules from a practical discourse, every possibility of achieving a morally acceptable communication is excluded. The indefeasibility (universal validity) of these rules follows from the fact that they are purely formal (alluding to Kant's philosophy, we might say that these rules are *sui generis* categorical imperatives of a practical discourse, determining not the content but the form of concrete argumentative resolutions), and from the fact that they can be justified (confirmed) in many different ways (e.g., by appealing to common sense, the criterion of self-evidence, or to the Kantian conception of practical reason, which implies the existence of universally valid ethical intuitions confirmed by the universally valid moral law – the formally understood categorical imperative). In relation to legal topics, and in consequence, to final argumentative resolutions, general rules play the role of sanctioning rules. Without these rules, an argumentation, based solely on material premises, could always be undermined. Bearing in mind the fact that the functions of a legal discourse are not only ethical but also instrumental, it is necessary to reasonably limit a number of

general rules commonly regarded as basic. The rationale for doing so is that, by leading to feasible argumentative resolutions, a legal discourse should above all put an end to an interpretative controversy. And criteria of rationality and rightness that are too rigorous might lead to the detachment of a practical discourse from a concrete argumentative case.

It is the stage of application (the topical–rhetorical stage), which guarantees that a legal discourse will be realized. At this stage, one becomes entangled in problem-thinking about a legal issue (being the object of a discourse), as one begins to appeal to material legal topics. A selection of topics will be different in each legal discourse (only general rules will remain the same); more specifically, it will turn on the difficulty level and argumentative context of a given case, as well as on the traditions and the habits of participants in the legal discourse engendered by this case. In a legal discourse, depending on the place where they appear, topics (arguments and legal principles) may play either the role of *loci communes* or *loci specifici*. Some arguments and principles may be interpreted in a legal discourse as "common places" (*loci communes*), since their application is universal both in the law (in relation to all kinds of legal reflection) and in other practical discourses (this concerns the majority of arguments and at least some principles, such as, for instance, *pacta sunt servanda*, *ignorantia iuris nocet*, *audiatur et altera pars*, which can be appealed to also in other discourses – for instance, ethical or political). There are also topics which, in a legal discourse, play the role of "special places" (*loci specifici*). These are above all specialized (i.e. referring to a concrete kind of legal reflection) legal principles (such as, for instance, *lex specialis derogat legi generali*, *nullum crimen*, *nulla poena sine lege poenali anteriori*, whose application beyond a legal discourse can hardly be imagined: in non-legal discourses, it is rather the converse of the former principle that is accepted; and, as for the latter, as a rule, it refers only to criminal law).

This issue is highlighted, since, according to Aristotle and Perelman, legal topics (general rules of the law) are only "special places" (*loci specifici*) of the law. As mentioned above, this view flows from their conviction that "common places" (*loci communes*) are always connected with a general – unspecialized – type of reflection. Of course, from the standpoint of a general, practical discourse (if such discourse may exist at all autonomously), legal topics may be treated only as "special places" (*loci specifici*), because they concern a specialized kind of reflection connected with the law. We also want to point out that, although from the standpoint of the topical–rhetorical approach, topics form the material content of a legal discourse, many arguments and principles can be interpreted

in a formal way. Such an assumption essentially undermines the opposition (accepted by the proponents of the topical account of legal argumentation) between two types of thinking in a practical discourse – namely, problem thinking and systematic thinking: topics, if interpreted materially, may be an element of the former; if interpreted formally – of the latter.

In our view, an analysis of the structure of a practical discourse should embrace general rules of a practical discourse, the rules of passage (joining a general discourse with a legal one) and legal topics (arguments and legal principles). General rules and rules of passage determine the formal and procedural character of a legal discourse, while legal topics inform its material content. These rules and topics will be discussed below in the order proposed above.

General rules. Here, a catalogue is constructed of rules, which appeal to the criterion of self-evidence. That is to say, we are take into account only rules, which can hardly (or which simply cannot) be questioned from the viewpoint of common sense or from the viewpoint of elementary ethical standards. In this sense, they are universally valid and indefeasible. A formal (in the sense which Kant gave to the categorical imperative) character of these rules enables defining the criteria of rationality and rightness to be used while assessing decisions made in the course of a practical discourse. This is because an argumentation satisfies the "minimum" requirements of rationality or rightness (i.e. it can be accepted, or regarded as valid) if and only if it is made in accordance with these rules. General rules establish both the procedure and formally understood ethics of a practical discourse. Thus, ultimately, a list of these rules should embrace only those, which are uncontroversial, universally accepted and unequivocal (as far as the way they are formulated is concerned). There is a danger that every attempt at building a catalogue of these rules may provoke a difficult controversy as to whether successively proposed rules are universally valid and should always be complied with in a practical discourse:

1. *One should engage in a practical discourse only if one is convinced that the discourse can justifiably be called right*. More specifically, one should be above all convinced that the methods used in the discourse are right; the conviction of the rightness of the discourse's objective is of somewhat lesser importance. If an argumentative discourse has been conducted in accordance with general rules, and, consequently, with procedure accepted through these rules, then the final result – being rational and right – also has to be acceptable in an axiological

sense. Thus, one needs to be convinced of the rightness of the rules of argumentation. Otherwise there would be a danger of a participant molding the discourse to a result she has earlier accepted as right, and then trying to achieve it at any price – *per fas et nefas*. Were that to be the case, then the only effectively applicable criterion in a legal discourse would be efficiency (understood eristically). In a practical, argumentative discourse, which appeals to the transcendentally understood criteria of rationality and rightness, the principle that "the end justifies the means" cannot be accepted.

2. *A practical discourse ought to be conducted in such a way that the principle of veracity may be respected.* This rule also seems uncontroversial. In a discourse, one may not lie, tell untruths, or omit to tell the truth by remaining silent. It is also forbidden to invoke any circumstance that might justify lying (e.g., some sort of external pressure or coercion). What is more, even lying "in a good cause" is not allowed. Even though the view that the principle of veracity ought to be realized in a practical discourse without exception is defended, it is important at the same time to be mindful of the possibility of limiting this principle in a legal discourse. Examples of limiting the principle of veracity in a legal discourse are provided especially by legal rules concerning criminal action, which formally sanction the right to "passing over truth in silence".[27]
3. *A practical discourse ought to be conducted in such a way that the principles of freedom and equality are respected.* A practical discourse ought to proceed in accordance with the formally understood principles of freedom and equality. This means that, in the course of a discourse, we must proceed in accordance with at least eight special rules that follow: (1) an argumentative discourse ought to be accessible to everyone possessing sufficient knowledge of the discourse's object and, in some cases (e.g., in the case of a legal discourse), a justifiable interest in it, (2) each participant in a practical discourse ought to possess the same privileges and be subject to the same limitations, (3) additional privileges and limitations can be introduced only if agreed by all the participants in a practical discourse (these privileges and limitations ought to affect each of them to the same degree), (4) each participant in a legal discourse ought to have the same opportunities to participate in it, especially with respect to opening the discourse, submitting theses and presenting views, giving answers, suggesting that the discourse should be suspended or finished, (5) no participant in a legal discourse may be subject – in connection with the discourse – to pressure or to any limitations, unless these limitations affect each

participant to the same degree, (6) each participant in a practical discourse ought to justify the thesis she submits in the discourse, or to answer a question, if another participant requires that she do so, (7) if a person wishes to treat one participant in a discourse differently from the others, she is obliged to justify her doing so, (8) if a decision (or the establishment of a fact) made in the course of a practical discourse satisfies only some of those participating in the discourse, the remaining participants ought to agree to that decision (or that establishment of fact). The content of rules 4–8 reflects the principles formulated by Habermas and Alexy.[28]

4. *A practical discourse ought to take the basic principles of language communication into account*. This rule also is a fundamental one, since a practical discourse ought to satisfy the condition of inter-subjective communicability, expressed by the following seven special rules: (1) a practical discourse ought to be transparent, (2) a practical discourse ought to be conducted by means of the most simple language possible, (3) in a practical discourse, a concept can be given a different meaning than that accepted in ordinary language only if this meaning is accepted by all participants in the discourse, (4) each participant in a practical discourse who uses some predicate to define an object ought to use the same predicate with reference to every object having similar – essential – properties, (5) each participant in a discourse should give the same meaning to a given expression[29], (6) each participant in a practical discourse ought to use the methods of language analysis, possibly extensively, (7) the course and the results of a practical discourse ought to be generalizable. The rule of generalizability played a crucial role in the theories of argumentation (Perelman, Schwemmer, Habermas and Alexy wrote extensively about it). This rule also contains the essence of the condition of inter-subjective communicability of a practical discourse: if argumentation could not be generalized, then a practical discourse could not satisfy the conditions of openness and transparency.
5. *A practical discourse ought to be conducted only in hard cases*. This rule seriously limits the scope of application of a practical discourse – it implies that it is necessary to narrow the "claim to universality" of a practical discourse, discussed above. At the same time, though, it is important to remember that, in principle, the whole philosophy of humanistic interpretation has been "invented" for hard cases, i.e. cases which cannot be interpreted and adjudicated by means of standardized (algorithmic) methods. Another question arises concerning the role of a practical discourse: is there one, and only one, rational

and right decision in a given hard case, or are there many such decisions? Let us recall that, according to Hart, a judge who has to adjudicate in a case should appeal only to legal rules. Only when there are no applicable rules (which is typical for hard cases), she must have recourse to extralegal standards. This requirement, however, does not exclude the possibility that a judge will pass an entirely new – precedential – judgment in a given case: she is limited by the rules of valid law, yet she has unlimited freedom in making her final decision.

Dworkin approaches this problem in a different way. He admits that a judge may appeal not only to rules but also to legal standards (principles, i.e. legal topics and policies), yet at the same time he asserts that there exists only one right decision (right answer) in a hard case, and that the judge-Hercules should find it. We are convinced, though, that a hard case may have more than one – rational and right – solution (which, by the way, may be the reason why it qualifies as a hard case). In order to settle a hard case, one must appeal to the rules (norms) of valid law, general rules of a practical discourse, as well as legal topics. A legal discourse not only allows us to discuss possible varying decisions in a hard case, but also provides us with the criteria for choosing one decision from amongst those proposed (the criteria of choice are formulated in the process of the external justification). A rule which confines a practical discourse only to hard cases has a decidedly anti-eristic and anti-sophistic character. It is possible to derive from this rule a ban on undertaking a practical discourse without good reasons for doing so, e.g., only for the needs of "games of negotiation", which give rise to expansive, though superfluous, argumentation. When fully engaging in a practical discourse, it is necessary to be convinced of its rightness (and, consequently, of its necessity), and of the fact that the case being interpreted is a hard one.

6. *A practical discourse ought to take account of established facts*. This rule expresses the conviction that at each stage of a practical discourse we should make use of facts already established in a theoretical discourse, as well as of those which can be established in the future. Alexy spoke in this sense about the rules of transition (*Übergansregeln*) from a practical discourse to a fully cognitive discourse, appealing to empirical theses, purely theoretical theses and theses based on language analysis.[30]
7. *A practical discourse ought to move directly towards its end*. This rule establishes at least two important principles: "the economy of argumentation" and "the directness of a discourse". This rule, just like

rule 5, has an anti-eristic and, in some cases, also anti-rhetorical character. It prohibits the use in a legal discourse of methods (eristic and rhetoric) which might unjustifiably prolong an argumentative controversy. To give some examples, it is forbidden to begin a discourse with exceedingly lengthy introductions, the purpose of which is only "to tire the opponent", to introduce into a discourse many superfluous digressions and questions, to make partial summaries which make it difficult to follow the main plot, to create apparent complications, to call persistently into dispute the opponent's theses which are obviously correct, or to engender chaos and confusion. At least five special rules can be related to the rule of the directness of a legal discourse: (1) each participant in a practical discourse should confine herself to submitting only such theses, rules and arguments which she is convinced will contribute directly to the settlement an interpretative case (being the object of the discourse), (2) no participant in a practical discourse may submit a thesis which contradicts already accepted theses, unless she sufficiently justifies it or convinces all other participants in the discourse that the thesis is to be accepted, (3) no participant in a discourse should contradict herself, (4) each participant in a discourse who submits a thesis not connected directly with the discourse's object should present her reasons for having done so, (5) each participant in a practical discourse who attacks a thesis which is not connected directly with the discourse's object should present her reasons for having done so.

8. *A practical discourse ought to allow for generally accepted standards, practices and customs*. The principle of inertia (*Prinzip der Trägheit*) provides that decisions which have already been accepted in a legal discourse are not to be changed or rejected without sufficient grounds. This principle implies that in a practical discourse generally accepted argumentative standards (topics), practices and customs should be taken into account as often as possible. According to Perelman, this principle is fundamental for our spiritual and social life. Since this principle treats the process of interpretation as a historical sequence of events, which ultimately shape our argumentative pre-understanding (*Vorverständnis* or *Vorurteil*), it can be said that it leaves a practical discourse open to tradition. Yet this principle has also been criticized on various grounds. Some saw in it a manifestation of argumentative conservatism – of a static understanding of a practical discourse. What may count as an argument against treating it as a universally valid principle of legal discourse is the fact that, according to rule 5, an argumentative discourse should be pursued only in hard cases,

which often change standards, practices and customs previously established and confirmed by argumentative tradition. Yet, undoubtedly, the principle in question strengthens the principle of the economy of argumentation, because if a standard (a rule etc.) satisfying the criteria of rationality and rightness has been accepted and applied, then it should not be changed without sufficient reason. By giving this principle only a formal meaning (since we do not propose what the material content of standards, practices and customs invoked in a discourse should be), we are able, to include it in our catalogue of general rules of a practical discourse.

Rules of passage. These rules concern "passage" of "transition" from a general, practical discourse to a particular, legal discourse as well as from formal assumptions (deductive, systematic thinking) to material assumptions (problem, inductive thinking, i.e. thinking connected with legal topics and the valid law). The rules of passage enable one to understand the essence of the relationship between a general, practical discourse and a legal discourse, and, in consequence, to make more precise the thesis about "the specificity of a legal discourse" (our version of *Sonderfallthese*). This is so because a legal discourse is, on the one hand, a development of a general discourse – one of its special cases. On the other hand, though, a general discourse exists only in practical applications. If detached from particular discourses, it becomes a collection of general rules and principles determining some "ideal procedure"; the problem, though, is that it is unclear where this procedure should be applied. Only by combining this discourse with concrete material topics and material law do we achieve a complete whole. On the other hand, it is important to remember that a legal discourse is a specific discourse, mainly because it has to be pursued in connection with valid law, which may limit the scope of application of at least some general rules. Both issues find expression in the following three rules of passage:

1. *A legal discourse ought to accommodate the general rules of a practical discourse*.
2. *A legal discourse ought to be pursued in direct connection with valid law*. This rule remains closely related to four other rules: (1) a legal discourse's participants must not defend themselves by claiming their ignorance of the rules of valid law, (2) a legal discourse's participants should make extensive use of dogmatic arguments, yet at the same time, (3) they must not invoke rules of valid law which are not directly connected with the case (which is the discourse's object of concern),

(4) in a legal discourse the use of a concept which is given a different meaning than that commonly accepted is allowed only if there exists a legal definition of this concept, or if the newly proposed definition has been accepted by all participants in the discourse.

3. *The scope of application of general rules in a legal discourse can be limited only if explicitly demanded by the rules of valid law*. Limitations in question may concern the following situations: (1) different positions of parties in legal proceedings, which may lead to limiting rule 3, which spells out the principle of the freedom and equality of every participant in a discourse (what needs to be emphasized in this context is the special position of a judge, who is independent and plays the role of an arbiter in a controversy), (2) an accused person's right of refusal to respond to questions, or to offer explanations, and the right of refusal to offer explanations vested in those sharing close relationships with the accused – these rights may cause the limitation of rules 2 (the principle of veracity), and 6 (the principle of taking account of established facts), (3) a barrister's duty to undertake only legal actions that support an accused person, and an accused person's right not to provide evidence against herself; these principles may lead to the limitation of rules 2 and 6, (4) the duty of a barrister and a legal adviser to keep secret all information gathered in connection with a case – this duty may limit rules 2 and 5, (5) hearing in private, which may limit rule 4, point 1 (the rule of transparency), (6) the necessity of using legal definitions in a legal discourse, which may limit rule 4, point 3 (the principle of ordinary language).

Legal topics. A space between general rules of a practical discourse and valid law is filled by legal topics. It is thanks to topics that we can connect general – formal – rules with a concrete – material – case. At this stage of argumentation, problem thinking is substituted for systematic thinking, appealing to general rules and principles. Thus, an argumentative process begins from the general, and then progresses towards the particular, concrete issue in dispute; this is a procedural stage of a legal discourse. Later, by discussing and deciding the controversy at issue, the direction of thinking shifts and there is a move from the particular to the general. At this topical–rhetorical stage of a legal discourse, we carry out the inductive task of generalizing the decision that has already been made (since according to rule 7, point 4, the course and the result of each practical discourse can be generalized). Only by combining these two argumentative perspectives can we achieve a coherent method of legal interpretation, and simultaneously succeed in avoiding the one-sidedness

implied by the acceptance of only procedural, or only topical–rhetorical, conceptions of a legal discourse.

The term legal topics, is intended to cover both arguments and legal principles. Let us recall that topics can be treated in a legal discourse either as common places (*loci communes*), if they concern universal issues, or as special places (*loci specifici*), if they concern specialized legal issues (issues that are specifically legal and – usually – connected with a concrete field of the law). The fact that in a legal discourse one combines particular topics with a concrete legal case allows one to interpret those topics materially. However, we have already pointed out that it is also possible to confer a formal meaning on at least some topics. Finally, a legal topic is each argument which is generally known, as well as being accepted and justified by a valid legal tradition (in the European legal culture the tradition in question is Roman law). Legal topics often provide strong – barely defeasible – arguments in a legal discourse. They never guarantee, however, absolute certainty because a case may always emerge in which a given argument or legal principle cannot be applied. What may count as the only exception to this regularity, are legal principles explicitly expressed in the rules of valid law. Then they are simply norms valid within a given system of law.

Arguments. In principle, these are certain rules of legal logic (informally understood) whose level of reliability (strength) and potential scope of application in a legal discourse are highly differentiated. It should also be noted that all of the arguments mentioned below (the catalogue is, of course, not exhaustive) can be used, not only in a legal discourse, but also in other kinds of practical discourse. Here, the 16 arguments that we consider to be the most important are considered.[31]

1. *Argument a simili,* or argument from analogy (similarity), is one of the most frequently used arguments in a legal discourse. The conviction underlying this type of argument is that we have the right to apply the same interpretation in similar (analogous, comparable) normative situations. Argument *a simili* may be used in a legal discourse in different situations: with direct reference to a concrete legal norm, a whole statute (*analogia legis*), a legal order, i.e. a system of internal law (*analogia iuris*), a precedent, a custom, or, finally, any other legal rule or principle. This argument may be used only if a similarity is shown between the case being decided and another – earlier decided – case.
2. *Argument a contrario* is the reverse of argument *a simili*: the latter demands reasoning "from similarity", whereas the former demands

reasoning "from difference". The borderline between these two arguments is by no means distinct, however. These arguments are very often used in interpretative (argumentative) situations. To give an example, a hypothetical legal norm dealing with the succession of the sons of a deceased may be interpreted, by means of argument *a simili*, as applying also to the daughters of a deceased, or by means of argument *a contrario*, as applying solely to his sons, since only they are explicitly mentioned in the norm. Which argument is used in a practical discourse will ultimately depend on whose interests are being represented in a dispute.

3. *Argument a fortiori* literally means "argument from the stronger (scope)". This argument appears in two forms: argument *a minori ad maius*, where a narrow inference is given a wider scope, and argument *a maiori ad minus*, where a wide inference is given a narrower scope. Argument *a minori ad maius* is constructed on the basis of a negative rule (a prohibition): if less is forbidden, then more is also forbidden (e.g., if it is forbidden to injure a person, then it is forbidden to kill a person). The argument *a maiori ad minus*, in turn, is based upon a positive rule (permission): if more is allowed, then less is allowed (e.g., if one is allowed to kill a person in self-defense, then one is allowed to injure a person in self-defense). According to Kalinowski, the argument *a maiori ad minus* can be treated as a theorem of formal logic, provided that everything less important is contained in the more important (if all X may do A and each B is A, then all X may do B). Yet the logical character of even this argument was called into question. Take Perelman's example, which undermines Kalinowski's interpretation. In accordance with the argument *a maiori a minus*, a person entitled to buy three bottles of alcohol in a liquor shop, may also purchase one bottle of alcohol. Yet a statute in force in Belgium in 1919 prohibited sales of less than 2l of alcohol. Thus, one could purchase one bottle with a capacity of 2l, but not three bottles each with a capacity of half a liter. Nowadays, analogous situations exist in various kinds of wholesale trade.
4. *Argument ab exemplo,* i.e. "from example", often appears in a legal discourse. What can be regarded as exemplary are some other kinds of a practical discourse, particular theses, rules or principles formulated in the course of this – exemplary – discourse as well as precedent decisions concerning particular cases. Argumentation *ab exemplo* is numbered among the less formal methods of analytical philosophy. In a legal discourse argument *a simili* and *a contrario* are often used interchangeably. In point of fact, argumentation "from

example" and "from exemplary cases" are to a large extent based upon the assumption of similarity (analogy) between "an exemplar" and an object (an argumentative case) to which this exemplar is extended.

5. *Argument per reductio ad absurdum* is used above all in formal logic, where its structure is fairly simple. Suppose we want to prove that statement A is true. We can do this indirectly, assuming that the contradictory statement, i.e. non-A is true. In proving that statement non-A is false, we prove by means of the law of double negation that statement A is true. In a practical (legal) discourse, though, we do not prove truthfulness, but rationality and rightness. Yet we must proceed in a similar way. We may prove that thesis A is rational or right by proving that the opposite thesis, i.e. non-A is absurd. Thus, it is possible indirectly to confirm the rationality and rightness of initial thesis A. Use is made of a certain type of reasoning *per reductio ad absurdum*, because we show that thesis non-A is nonsensical (e.g., that a rational and fair legislator passed a nonsensical or unjust rule).
6. *Argument a rerum natura*, i.e. "from the nature of things", assumes that in a legal, as well as in any other, discourse, one should not formulate theses and make decisions which cannot be – ontologically – realized. This argument, built upon material grounds, cannot in principle be questioned in a legal discourse. It allows us to reject norms or legal rules which prescribe impossible actions. Fuller considered this argument to be one of eight conditions to be fulfilled for the law to come into being.
7. *Argument a loco communi*, i.e. "from common places", appeals to general topics connected with unspecialized fields of a practical discourse (including a legal discourse), to fundamental values, general rules of a practical discourse and at least some legal arguments and principles.
8. *Argument a loco specifici*, i.e. "from special places" appeals to special topics connected with the specialized fields of a legal discourse, to specifically legal arguments and principles, and to precedents from similar argumentative cases.
9. *Argument a cohaerentia*, i.e. "from coherence" is based upon the assumption that a legal discourse should be free from contradictions as far as possible. This argument underlies the requirement that each thesis which stands in conflict with theses already accepted by participants in a legal discourse should be removed. Let us recall that rule 7 (especially points 2 and 3) also concerns these issues.

10. *Argument a completudine*, i.e. "from completeness", in turn, is based upon the assumption that a legal discourse should be as complete as possible. This argument underlies the requirement that each thesis which might cause "an argumentative gap", or constitute a threat to coherence should be removed from a legal discourse. Rule 7 (especially points 4 and 5), mentioned in the context of argument *a cohaerentia*, is concerned, at least indirectly, with this issue.
11. *Systematic argument* presumes that a legal discourse constitutes a certain closed, ordered, coherent and consistent whole, i.e. a system. This argument is strictly connected both with argument *a cohaerentia* and argument *a completudine*. It entitles us to require that each thesis which is not contained in a legal discourse, i.e. which is neither a rule of the system nor a consequence of a rule (argument or principle) be removed from the discourse. Of course, adherents of the purely topical approach will question this argument, because it prioritizes, against their convictions, a systematic way of thinking and arguing.
12. *Teleological argument* is a kind of reasoning focused upon the objective of a legal discourse. This argument enables one to emphasize and ultimately confirm a presupposed objective. According to rules 1 and 7 of a legal discourse, argumentation should be aimed at directly deciding an issue and should be conducted in the conviction of its (i.e. argumentation's) rightness. Thus, one may question all argumentative theses that do not serve the realization of an objective which was assumed as formally right and accepted by all.
13. *Psychological argument* may help in explaining the motives of participants in a legal discourse. Its scope of application, though, is rather narrow. Besides, it is not by chance that this kind of argument was often used in various sophistic and eristic conceptions.
14. *Sociological argument* concerns the behavior of participants in a legal discourse. This argument appeals to purely material (empirical) premises. For that reason theses formulated by reference to this argument are not easy to question, though it must be conceded that the application of these theses in the practical part of a legal discourse is limited.
15. *Historical argument* is based on the assumption that every concrete discourse occurs in a given time and is preceded by something, i.e. has its own history. From rule 8, spelling out "the principle of inertia", it follows that in a practical discourse (including a legal discourse), universally accepted (i.e. being a part of tradition which has been

accepted and regarded as valid) standards (topics), practices and customs should be taken into account.

16. *Economic argument* can be related above all to the principle of argumentative economy expressed in rule 7. To put it simply, a legal discourse should be maximally efficient, it should involve the minimum effort necessary, and generate a rational and fair decision which yields maximum benefits. This argument can also be helpful in constructing a criterion for evaluating the economic efficiency of the results of a legal discourse. Posner, one of the founders of the school of economic analysis of law, asserts that the law in its essence is – or at any rate should be – economically efficient. Subjects who apply the law (judges, officials, all the participants in a legal discourse) must be directed by an economic calculation of the costs of the legal decision available to them. A legal decision may be described as good, rational and efficient in the economic sense only if it contributes to the maximization of social wealth.

Legal principles. A second group of legal topics embraces legal principles, which can be interpreted broadly or narrowly. According to Dworkin, a legal principle is a standard which should be observed, not because it improves or protects some desired state of affairs, but because it is a requirement of justice, honesty or some other dimension of morality.[32] Ultimately, Dworkin distinguishes legal principles from other standards (policies) and legal rules. He asserts that the basic difference between rules and legal principles lies in how they function, not in their content. Legal rules are those norms that are applicable in an all-or-nothing fashion, which implies that legal rules are either satisfied or not satisfied. Legal principles, by contrast can be applied to varying scope and degree (they are graded). We support a broader concept of legal principles, one which embraces all standards that are not directly reflected in the provisions of valid law (principles, policies, norms of customary law, general theses about the law and the methods of its examination formulated by legal dogmatics and legal philosophy and theory, legal "sayings") as well as at least some general legal rules (with the passage of time some legal principles become rules/norms of valid law). In our view, controversy over the frontiers separating legal principles from other standards and legal rules cannot be resolved. One may consider as a legal principle every general statement about the law that has "entered" a given legal tradition and been universally accepted. Concrete solutions to hard cases are most often underpinned by legal principles. Therefore, legal principles are a result of problem-thinking, and they are reached

through an inductive generalization of particular theses formulated with a view to deciding concrete cases. It follows that the level of validity of legal principles in a legal discourse is not constant. According to the assumptions made here, one may encounter legal principles which are directly expressed in the provisions of valid law, legal principles which rest on tradition (their roots often extending as far back as Roman law) and are recognized by lawyers as valid, and, finally, principles which seldom appear in a legal discourse (if they do appear, they are questioned). As a result, it is hardly possible to draw up a catalogue (code) of such principles. All the more so because some previously accepted principles have fallen out of use, and new standards and customs have appeared which more and more frequently play the role of principles in a legal discourse. In our view, the division of principles into general, interpretative and special ones, proposed below, makes possible a rational classification of the basic types of legal principle[33]:

1. *General principles* are connected with "unspecialized places" in a legal discourse, which is why they are appealed to without limit and – in addition – are applied in other kinds of practical discourse. These are some examples of the most important rules of this type: (1.1) *Pacta sunt servanda*, i.e. agreements ought to be observed (put differently: agreements are valid). (1.2) *Lex neminem cogit ad impossibilia*, i.e. a statute (law) may not require anyone to do what is impossible. We have already written about this principle in presenting argument 6, *a rerum natura*. (1.3) *Exceptions should be interpreted strictly and are admissible only in special cases*. Rule 7, points 1, 2, 4, and 5 concerned this principle. (1.4) *Nemo iudex indoneus in propria causa*, i.e. no one can be a proper judge in her own case. (1.5) *Res iudicata pro veritate accipitur*, i.e. an adjudication ought to be accepted as true. The principle of "the validity of an adjudication" is commonly accepted in the law. Legal validity is the normative counterpart of truthfulness. (1.6) *Audiatur et altera pars*, i.e. one ought to hear the other side. This topic is closely connected to the principle of freedom and equality expressed in rule 3. (1.7) *Nemini permittitur venire contra factum proprium*, i.e. one cannot oppose her own position. Recall that rule 7, point 3 introduced a ban on self-contradiction. This principle is connected with another important topic for a legal discourse: *patere legem, quam ipse tuleris*, i.e. submit to a law which you have established. (1.8). *In obvious cases proceedings ought to be brief*. This topic is closely related to the principle of argumentative economy – rule 7.
2. *Principles of interpretation* concern more specific problems connected with the interpretation of valid law and play an important role in a

legal discourse. Again, only a few examples will be presented here: (2.1) *Clara non sunt interpretanda*, i.e. what is clear does not need to be interpreted. This well-known principle is nevertheless controversial: if practical, legal discourse is conducted in full scope only in hard cases (rule 5), then – at least according to some theorists of law – the provisions of valid law must always be interpreted irrespective of how clear these provisions are. (2.2) *Lex retro non agit*, i.e. law does not have retroactive force. Another version of this principle says*: lex prospicit non respicit*, i.e. law looks forwards not backwards. This topic, having its source in Roman law, became one of the fundamental principles of the contemporary state of law. Yet even though it is commonly accepted in lawmaking practice, one may encounter legal regulations that consciously violate it. (2.3) *Ignorantia iuris nocet*, i.e. ignorance of the law is no excuse. Thus, if ignorance of the law cannot be treated as an excuse, by implication people are required to possess a minimum of legal competence. This topic is closely related to the principle: *iura scripta vigilantibus*, i.e. law has been written for those exhibiting due care. Negligence, like ignorance, may not constitute any excuse in a legal discourse. (2.4) *Lex non obligata nisi promulgata*, i.e. law which has not been promulgated is not valid. According to Fuller, the requirement that legal acts be promulgated is one of eight conditions which make the law possible.[34] (2.5) *Lex superior derogat legi inferiori*, i.e. law (a legal act) of a higher degree annuls law (a legal act) of a lower degree. In systems of continental law this principle is considered absolute. (2.6) *Lex posterior derogat legi priori*, i.e. later laws annul earlier laws. This principle is to be applied when two or more legal acts come into play. (2.7) *Lex specialis derogat legi generali*, i.e. a special law annuls a general law. If it is not possible to choose between topics 2.5 and 2.6, then one should apply the "substantial principle". (2.8) *Lex posterior generali non derogat legi priori speciali*, i.e. a general law does not annul an earlier special law. Appeal can be made to this principle when it is necessary to choose between topics 2.6 and 2.7. This principle is then a derogation rule of second degree.

3. *Special principles* are applied in "specialized places" of a legal discourse, because they concern concrete areas of law, especially civil and penal law. The following principles are relevant to civil law: (3.1) *Trust deserves to be protected* so far as, for instance, possession in good faith is concerned. (3.2) *Impossibilium nulla obligatio*, i.e. an obligation to do an impossible act is invalid. (3.3) *It is prohibited to conclude contracts which impose obligations on the third party*. (*3.4*) *Ne ultra petita*, i.e. one should not adjudicate beyond a claim. (3.5) *One*

ought to remedy a caused damage and give back what has been gained without legal basis. (3.6) *Nemo plus iuris ad alium transferre potest, quam ipse habet*, i.e. *no one can transfer more law on the other than one herself has*. Both in civil and penal law two further principles are to be applied: (3.7) *Quisquis praesimitur bonus*, i.e. the presumption that everyone acts in good faith (is innocent). (3.8) *In dubio pro reo* or *in dubio pro libertate*, i.e. where doubt exists a decision should be made in favor of the accused (defendant), or in favor of freedom. Let us now give some examples of principles relevant to criminal law. (3.9) *Law should not yield to the violation of law*. This principle corresponds to topics known in Roman law: *vim vi repeller licet*, i.e. force can be repelled by force, and *vim vi repeller omnia iura permittunt*, i.e. all laws allow the use of force to suppress violence. (3.10) *Lawlessness is forbidden*. (3.11) *Nullum crimen, nulla poena sine lege poenali anteriori*, i.e. an action is not criminal and cannot be punished if it was not a crime under penal law at the moment when it is was carried out. This principle is usually explicitly stated in law – in the Polish Penal Code it is contained in article 1.

4.3.3 Applications

The above analysis implies that the claim to universality raised by the method of argumentation is rather specific and is subject to serious limitations. Methodology worked out by a practical, legal discourse can be directly applied only in the field of normative reasoning. Besides, this discourse should be fully performed only in hard cases. In other situations the methods of a practical, legal discourse are used to a limited degree; it remains the fact, though, that appeal is always made to some solutions (procedural or topical–rhetorical) typical of this methodology.

A practical, legal discourse will clearly be most fully used in legal practice, especially in the process of legal interpretation, justification of interpretative decisions, and – at least to a certain degree – lawmaking. Theses formulated in the theory of legal dogmatics, as well as in the philosophy and theory of law by means of tools worked out by a practical discourse, can be justified provided that these theses are normative in character. Should a thesis be descriptive (theoretical), then theoretical discourse will decide whether it is true or false and, accordingly, whether it should be accepted and included in a set of theorems of a legal discipline.

In conclusion, let us repeat once again that it is only necessary to appeal to methods of argumentation if the potential of "harder" methods (logic and analysis) has been exhausted in practical discourse (let us add that this potential is limited in the normative sphere) and one does not

wish to appeal to the "soft" (intuitive) methods established in phenomenologically oriented hermeneutics.

NOTES

1. G. Kalinowski, *Introduction à la logique juridique*, Paris, 1965, pp. 163–164.
2. K. Szymanek, *Sztuka argumentacji. Slownik terminologiczny* [The Art of Argumentation. Terminological Dictionary], Warszawa, 2001, pp. 286–288; M. Korolko, *Sztuka retoryki. Przewodnik encyklopedyczny* [The Art of Rhetoric. Vademecum], 2nd edition, Warszawa, 1998, p. 19, 3 ff.
3. Ch. Perelman, *Logika prawnicza. Nowa retoryka* [Legal Logic. New Rhatoric], Warszawa, 1984, p. 145.
4. M. Korolko, *The Art . . .*, *op. cit*., p. 64 ff.
5. Aristotle, *Topiki. O dowodach sofistycznych* [Topics. On Sophistic Arguments], Warszawa, 1978, books I–VIII, pp. 3–235.
6. Aristotle, *Topics . . .*, *op. cit*., books I–VIII, p. 264.
7. Aristotle, *Topics . . .*, *op. cit*.; A. Schopenhauer, *Erystyka czyli sztuka prowadzenia sporów* [Eristics or the Art of Discussion], p. 45 ff; K. Szymanek, *The Art . . .*, *op. cit*., p. 45.
8. J. Stelmach, *Code . . .*, *op. cit*., p. 33.
9. R. Alexy, *Theory . . .*, *op. cit*., p. 51.
10. J. Habermas, *Vorstudien und Ergänzungen zur Theorie der kommunikativen Handelns*, Frankfurt am Main, 1984, p. 160, p. 174 ff.
11. See R. Alexy, *Theory . . .*, *op. cit*., p. 273.
12. J. Habermas, *Wahrheitstheorien*, in H. Fahrenbach (ed.), *Wirklichkeit und Reflexion*, Pfullingen, 1973, p. 239 ff.
13. See N. Luhmann, *Legitimation durch Verfahren*, 4th edition, Frankfurt am Main 1983.
14. R. Alexy, *Theory, op. cit*. . . ., pp. 33–38, 263–272, 356–359; J. Stelmach, *Code . . .*, *op. cit*., pp. 26–31.
15. Ch. Perelman, *Legal . . .*, *op. cit*., pp. 160–162.
16. As for arguments, Perelman appeals to the classification of G. Tarello presented in the article "Sur la spécificité du raisonnement juridique", *Archiv für Rechts-und Sozialphilosophie* 7 (1972), pp. 103–124, whereas as regards the classification of legal principles, he draws on a juxtaposition made by G. Sruck and described in *Topische Jurisprudenz. Argument und Gemeinplatz in der juristischen Arbeit*, Frankfurt, 1971, pp. 20–34.
17. Ch. Perelman, *Legal . . .*, *op. cit*., pp. 129–139; J. Stelmach, *Code . . .*, *op. cit*., pp. 85–106.
18. Ch. Perelman, *Legal . . .*, *op. cit*., pp. 145–147.
19. Th. Viehweg, *Topik und Jurisprudenz*, 5th edition, München, 1974, pp. 19–30.
20. Ch. Perelman, *Fünf Vorlesungen über die Gerechtigkeit*, München, 1967, pp. 158.
21. Ch. Perelman, *Justice, Law and Argument*, Boston, 1980, p. 73.
22. R. Alexy, *Theory . . .*, *op. cit*., pp. 225–232.
23. *Ibidem*, pp. 234–235.
24. *Ibidem*, p. 285.
25. A. Aarnio, R. Alexy, A. Peczenik, *Grundlagen der juristischen Argumentation*, in W. Krawietz, R. Alexy (eds.), *Metatheorie juristischer Argumentation*, Berlin, 1983, p. 42.

26. A distinction between adequate, lame and leaping theories was introduced by Petrażycki. See L. Perażycki, *Wstęp do nauki o prawie i moralności* [Introduction to the Theory of Law and Morality], Warszawa, 1959, pp. 128, 139, 153.
27. See a statute from June 6 1997, Polish Code of criminal law (Book of Statutes, No 89, position 555 with later changes), art. 74, 175, 182, and 186.
28. J. Stelmach, *Code . . .*, *op. cit*., pp. 47–50.
29. Rules 4 and 5 are mentioned by R. Alexy in *Theory . . .*, *op. cit*., pp. 234–235.
30. R. Alexy, *Theory . . .*, *op. cit*., p. 255.
31. See J. Stelmach, *Kodeks . . .*, *op. cit*., pp. 72–86; also, Ch. Perelman, *Logika . . .*, *op. cit*., pp. 90–95.
32. R. Dworkin, *Taking . . .*, *op. cit*., p. 22. See also J. Stelmach, R. Sarkowicz, *Philosophy . . .*, *op. cit*., p. 50 ff.
33. See G. Struck, *Topische Jurisprudenz . . .*, *op. cit*., pp. 20–34; also J. Stelmach, *Kodeks . . .*, *op. cit*., pp. 86–105.
34. L. L. Fuller, *Moralność prawa*, Warszawa, 1978, p. 68.

CHAPTER 5

HERMENEUTICS

5.1 INTRODUCTION

Hermeneutics is one of the oldest and most disputed of all the philosophies of interpretation. There exist equally eminent advocates and opponents of this philosophy. Its opponents, at least in contemporary philosophy, were most frequently adherents of analytical philosophy. They perceived hermeneutics as a threat to their own philosophical autonomy, and, in consequence, attacked it, its fundamental assumptions and, in their view, its unclear and imprecise language with surprising vehemence. They often acted, in the spirit of the principle derided by Gellner, whereby if you cannot prove the convictions of a rival are false, you should declare that they make no sense.[1] Mutual tensions lost their significance with the passage of time, one reason being that there appeared different "frontier hermeneutics", in particular analytical hermeneutics and hermeneutics understood as a theory of communication.

5.1.1 The Beginnings of Hermeneutics

The term "hermeneutics" comes from the Greek word *ἑρμηνέιν* which denotes the art of prophesying, translating, explaining, interpreting. Over time, the meaning of this term was enriched and supplemented. The genesis of the notion of hermeneutics is also associated with the name of the messenger of the gods, Hermes, who, as is well known, was believed to have created language and writing. In philosophy this word appeared in Aristotle's *Peri hermeneias*. The term he used – "*hermeneia*" – expressed a connection between interpretation and understanding, since *heremeneia* is a meaningful enunciation which says "something about something" and grasps reality by means of expressions. It should be stressed, though, that the above mentioned work of Aristotle was no systematic exposition of hermeneutics but only a part of *Organon* – a part comprised of a description of a certain kind of logical grammar. This logical grammar was to deal with analysis of the structure of language – the structure of propositions – without being limited to the examination of their truthfulness. In modern times the term "hermeneutics" appeared

in the title of a whole work of Dannhauer – *Hermeneutica sacra sive methodus exponendarum sacrarum litterarum* (published in 1654).

Until the nineteenth century, hermeneutics was being developed mainly in the form of particular "theories" formulated in the fields of theology, philology and jurisprudence. It was only due to Schleiermacher and Dilthey that general philosophical (humanistic) hermeneutics arose. As a result, hermeneutics no longer denoted only the art of interpretation and understanding of texts: Dilthey elevated it to the objective, universal methodology of the humanities, which he called "the methodology of understanding", whereas Husserl, Heidegger and Gadamer interpreted hermeneutics as the ontology of understanding. As mentioned, there appeared also "frontier" accounts of hermeneutics. At the same time, the scope of application of hermeneutical philosophy was on the increase. Apart from the disciplines already mentioned – theology, philology and jurisprudence – hermeneutics was also to find its application in history, sociology, psychology, political sciences and even economics.

The first period of development (until the end of the eighteenth century) of the philosophy of interpretation under discussion can be illustrated by presenting three particular hermeneutics: biblical, philological and legal.

Biblical hermeneutics. Biblical hermeneutics was already known to the authors of Halakha and Aggadah. Hermeneutics was then understood as an art of the exegesis of the Biblical text. The art of exegesis, explanation and interpretation of the Scriptures was perfected by successive rabbinic generations. Over time, a conception of revealed, inspired and prophetic understanding also emerged, which was to play an important role in late Christian hermeneutics based on Jesus' activity.

As a result of "the Christ's event" there arose an extremely important and fast developing trend in biblical hermeneutics, whose main objective was to explain the whole of the Scriptures. In the first centuries of Christianity there existed a sharp conflict over interpretation, which gave rise to an urgent need to construct a uniform theory of Scriptural interpretation. This theory was to ensure uniform understanding of the whole biblical tradition. "New hermeneutics" was to make possible the choice of a proper theory of biblical interpretation. The first works devoted to the interpretation of the scriptures – works that established rules of interpretation enabling internal coherence to be reached in the understanding of the Old and New Testament – arose as early as the second and third century A.D. At that time two hermeneutic schools, the Alexandrian and Antiochian, concerned with explanation of the Scriptures were

already active. Among the main representatives of the Alexandrian school are Justin, Tertulian, and Origen; this school developed an allegoric interpretation of the Bible. According to Origen, one can assign three dimensions of meaning to the Scriptures: corporal, i.e. historical and available to all the faithful, psychological, and pneumatic (spiritual), which can be reached only by a few scholars analyzing the scriptures. One may obtain spiritual insight only by means of the allegorical interpretation. The Antiochian school was founded later than the Alexandrian one in the fourth and fifth centuries by Theodoros and Diodoros. This school promoted a literal interpretation of the Scriptures. The allegorical method preferred by the Alexandrian school was replaced with a critical method of exegesis based on philological and historical research.

Yet, at that period, St. Augustine was author of the most influential and coherent theory of biblical interpretation. In book three of his *De doctrina christiana*, he presented his view of the role and function of biblical hermeneutics and conducted a philosophical analysis of the process of understanding. In particular, he undertook an analysis of the notion of a sign, which he defined as a medium of thought, stressing at the same time that every theory of exegesis must have its own theory of sign and of meaning. He developed a conception of the reasons for the Bible's incomprehensibility and described the core rules governing interpretation of the Scriptures. Having made due allowance for the significance of historical and philological research, he went much further, undertaking an analysis of the phenomenon of understanding as something which is conditioned by faith. Thus, he attained the concept of a mystical – illuminated – understanding underlying the real (inspired, revealed) interpretation of the Scriptures.

Of course, in the discussed period, many other philosophers and theologians (for instance, Eucherius from Lyon in the fifth century, Julius African in the fifth century, Cassiodor in the sixth century) also tackled the problem of biblical exegesis.

In modern times, a work of special significance was Flacius' *Clavis Scripturae Sacra* (1567), which is the author's attempt to set forth rules for interpreting the Bible in the form of a systematic set. The application of these rules was to enable the accomplishment of universally valid understanding of the Scriptures. Flacius also formulated a general hermeneutical principle, according to which a part of a work can be understood only if it is related to the whole work, and to its other parts. Thus, presumably for the first time, the principle of a hermeneutical circle was spelled out. In Flacius' view (before Flacius a similar view was

held by Melanchton), every written work is created in accordance with the same rules and principles. Accordingly, one may build a universally valid theory of the interpretation and understanding of a text (in this case the Bible) without appealing to tradition. (N.B. this conviction was incompatible with the position of the Trident Council.) Under this account, interpretation becomes a sort of logical game allowing one to reconstruct the structure of an analyzed text. In sum, Flacius' conception undoubtedly constitutes an important stage in the process of building general humanistic hermeneutics.

In the seventeenth and eighteenth centuries there appeared new works concerning the interpretation and understanding of biblical texts. Good examples are the works of the following authors: Dannhauer, the author not only of the afore-mentioned *Hermeneutica sacra sive methodus exponendarum sacrarum litterarum*, but also of *Idea boni interpretis*; Chladenius, the author of *Einleitung zur richtiger Auslegung vernünftiger Reden und Schriften*, and Baumgarten, the author of the five-volume work *Nachrichten von einer Hallischen Bibliothek*. Three scholars from the eighteenth century – Semler, Michaelis and Ernesti – wrote in the same hermeneutical vein – called theological rationalism – to which Baugmarten belonged. Semler undertook an analysis of grammatical and historical interpretation, proposing a specific rational variety of theological hermeneutics, the outline of which is contained in his work *Vorbereitung zur theologischen Hermeneutik*. In principle, Michaelis works along the same lines, grounding his hermeneutical method in philological and historical research. In his view, in the process of interpreting the Bible, one should allow for both historical context and common sense. Finally, Enesti, the author of *Interpretes* dealt with philological aspects of the Scriptures' interpretation. His philological hermeneutics was to ensure the harmony of biblical revelation and rational thinking.

Thus, two hermeneutics – biblical and philological – begin to form one whole, thereby providing the foundations for general humanistic hermeneutics. Philological hermeneutics becomes only one method available to hermeneutics (first biblical, later general hermeneutics). Consequently, it is no longer necessary to separate both varieties of hermeneutics (biblical and philological), because, according to Meier – the author of *Versuch einer allgemeninen Auslegungskunst* – there exists one general hermeneutical theory, which formulates rules to be taken into consideration while interpreting all kinds of signs.

Philological hermeneutics. The origins of philological hermeneutics, in turn, reach back to the beginnings of philosophy in ancient Greece. It

began with attempts to interpret Homer's poetry, which were undertaken mainly for didactic purposes. Philological interpretation enabled the text to be understood from a grammatical and literary perspective; this interpretation was in fact a sort of game between an interpreter and a text. More solid grounds for philological hermeneutics were provided at the moment when it was allied with rhetoric – a discipline concerned, not only with oratory art, but also with more detailed issues, such as, for instance, the composition of a literary text, the principles of creating rhymes, or the conditions under which metaphor may be used. An important contribution to the development of philological hermeneutics in ancient times was made by the Alexandrian school of philology (during the second century B.C.). According to its main representatives – Aristarch and Hipparch – philology is a discipline based on a profound understanding of language, an art of refined critique and interpretation of a literary text. In a somewhat different direction research developed in the Pergamon school, whose main representatives included Crates from Mallos and Aryston from Chios. Pergamon philology was concerned, amongst other things, with stylistics and rhetoric, developing the principle of allegoric interpretation – known already to the Stoics – which was to play a significant role in later philological hermeneutics.

In modern times there appeared many works devoted to philological hermeneutics. The classically philological treaties of authors such as Scoppius, Clericus and Valesius were already, in fact, complete expositions of hermeneutical theories. In the first part of these works, one can find catalogues of interpretative rules, as well as a discussion of applicable philological methods, which make possible the critical analysis and interpretation of literary texts. As we have already pointed out, somewhat later, a number of works were published that were devoted both to philological and biblical hermeneutics (these are already mentioned works of Dannahuer, Baumgarten Semler, Michaelis, Ernesti and Meier).

Philological hermeneutics played an especially important role in nineteenth- and twentieth-century general philosophical hermeneutics. In many ways the conviction that the primary form of hermeneutics is philological was confirmed. Everything begins with, and not infrequently also ends with, language; understanding can be articulated only through language – there exists an exceptional agreement between representatives of different hermeneutical trends as far as this point is concerned. According to Schleiermacher, all that is presupposed by hermeneutics is language. Dilthey spoke about hermeneutics as a theory of the art of understanding the manifestations of life which are fixed in language; accordingly, he asserted that literary critique is inseparably

connected to hermeneutical process (immanently belonging to it). According to Heidegger, "language is the home of being"; Gadamer, in turn, asserted that "the only being that can be understood is language"; in his view, language is the only medium through which we can accomplish both successful communication with a partner and understanding of things themselves.[2] Thus, it should be remembered that both early biblical hermeneutics and contemporary philosophical hermeneutics rested on philological hermeneutics.

Legal hermeneutics. Legal hermeneutics is somewhat different. At least until the eighteenth century it developed separately, forming an integral part of the methodology of jurisprudence. Of course, one cannot claim that legal hermeneutics was completely isolated. Even pragmatically disposed Roman jurists, who dealt primarily with concrete cases, appealed to certain ontological, axiological and methodological conceptions worked out in the fields of general philosophy and particular hermeneutics: biblical and – above all – legal hermeneutics. Undoubtedly, the foundations of the science of legal interpretation were built by Roman jurists. It is possible to question further whether legal hermeneutics existed in the methods cultivated by Roman jurisprudence. The answer to this question will hinge on what definition of "legal hermeneutics" is assumed. If one considers as hermeneutical each theory of interpretation and understanding of a text (in this case – a legal text), then, of course, it will be possible to say that legal hermeneutics had already been developed within the framework of Roman jurisprudence. In the early period, there was a preference for the literal interpretation of a legal text, which – with the passage of time – developed to assume the form of grammatical, philological and historical interpretations. Use was also made of philosophical methods: rhetoric and Aristotelian topics, amongst others; as for the latter method, it was most likely used first by Cicero for the purposes of legal interpretation.[3]

In modern times many works devoted to legal interpretation were produced, yet for the most part they were systematizing, i.e. their objective was to present catalogues of universally valid methods of interpretation with a view to making a "proper" interpretation of the law possible. In this context one can list such works as *Hermeneutica iuris, recensuit perpetuisque notis illustravit* of Eckhardi, *Principia et subsidia hermeneutica iuris* of Wittich and *Hermeneutik des Rechts* of Sammet.

It was not until the nineteenth and twentieth centuries that an essential change occurred in how hermeneutics was conceived and cultivated. Schleiermacher, and later Dilthey, put forward a new, universalistic account of hermeneutics, whose task – in their view – was to work out a

methodological basis for all humanistic disciplines, including jurisprudence. Still another kind of ontological and methodological universalism was brought into play with the phenomenologically oriented hermeneutics of Husserl, Heidegger, Gadamer and Ricoeur. The influence of this variety of hermeneutics on jurisprudence can be described as follows. Jurisprudence believes that philosophical hermeneutics offers the opportunity to solve jurisprudential problems (which are mainly of a methodological nature). The acceptance of entire hermeneutical conceptions, and of its particular theses, has been accomplished. The older, technically understood legal hermeneutics continues to lose significance, becoming in fact a mere object of historical research. The binding link between old legal hermeneutics and more contemporary – philosophical – versions is the conception of Savigny, expounded in his work *Juristische Methodenlehre*. On the one hand, Savigny defended the methodological autonomy of jurisprudence, but on the other hand, he availed himself of solutions proposed by Schleiermacher. Thus, it was not "a pure reception" (which, by the way, will become characteristic for legal hermeneutics inspired by philosophical conception). The thinkers who appealed to the hermeneutical tradition of were Coing and Betti, and to the hermeneutical tradition of Heidegger and Gadamer – Reinach, Maihofer, and Kaufmann. However, it is difficult, if not impossible, to classify unambiguously the views of many contemporary representatives of legal hermeneutics. To give an example: how should the views of Larenz or Esser be classified? Their versions of hermeneutics were modified and transformed to a high degree (mainly for the purposes of a dispute over the method of jurisprudence pursued in the German science of law at the time). We shall return to these issues in Sections 5.2–5.4 whilst considering different versions of philosophical and legal hermeneutics.

5.1.2 What Do We Not Know About Hermeneutics?

Now we would like to deal briefly with the most hotly disputed issues connected with every possible lecture on philosophical hermeneutics. Criticism of these issues usually constitutes the point of departure for all approaches that reject hermeneutics as a philosophy of interpretation. We shall successively present eight of the most frequently formulated objections against hermeneutics. (1) It has often been emphasized that no single, and acceptable to all adherents of the hermeneutic approach, definition of hermeneutics exists. (2) As a result, it is very difficult to set the boundaries between particular hermeneutical conceptions (this concerns internal boundaries), and between those positions which are

hermeneutical and those which are no longer so (this concerns external boundaries). As a result, the concept of "hermeneutics" has often been abused, because it has been used to assess different interpretive philosophies (of the analytical, structuralist and argumentative types), which do not necessarily have much in common with hermeneutics. (3) A similar situation exists in the case of other – for hermeneutical philosophy – basic concepts: understanding, pre-understanding and the hermeneutical circle. Unambiguous definitions of these notions are lacking; besides, these notions are given fundamentally different interpretations in different hermeneutical conceptions. (4) Ultimately, we are not able to determine what is meant by the term understanding: a form of cognition, a form of existence of an individual being, or perhaps both. (5) Even if we assume that understanding is also (besides representing a form of being) a form of cognition, we are not in a position to determine what kind of cognition it is: direct or indirect. As shall be argued more extensively in the last section of this chapter, plausible arguments exist for both alternatives. (6) In assuming that understanding is a form of direct-intuitive cognition, we are confronted with a further problem, namely that of determining what type of intuition we are ultimately dealing with: psychological, analytical or, rather, phenomenological.[4] (7) The thesis of hermeneutical universalism is not entirely clear. Dilthey's defense of this thesis, based on a division of naturalistic and anti-naturalistic methodologies adopted is quite weak, for the division itself gives rise to serious doubts. Moreover, it represents a particular type of universalism, because it is limited solely to the field – difficult to define unambiguously – of humanistic disciplines. It is also risky to defend the phenomenological thesis of hermeneutics' universalism as "the first science". This argument can be refuted by reversing it, i.e. by claiming that hermeneutics finds its main, if not exclusive, application specifically in humanistic disciplines and not in the pure and natural sciences. (8) Ultimately, we do not know exactly how hermeneutics can be applied usefully in interpreting law, or the potential and admissible scope of its application, considering that the object of understanding and interpreting law may often be the regulations (norms) of valid law. This problem is closely connected with another – the freedom of interpretation, which is restricted, at least in continental legal systems, by a prohibition on making interpretations *contra legem*.

Do the above objections provide grounds for rejecting hermeneutics as a method, or philosophy of interpretation? We would answer this question in the negative: we include hermeneutics in a group of the basic methods of jurisprudence. Yet we must be mindful of the specificity of

hermeneutics as a method of jurisprudence. Its specificity lies in the fact that it is not a method in the strict sense of this word. Hermeneutics is different from logic, analysis and argumentation in that its structure, assumptions, procedure, and inter-subjective criteria for acknowledging and rejecting solutions can hardly be reconstructed. Hermeneutics – as a philosophy of interpretation "without the Archimedean starting-point" – does not offer a method, but, rather, intuition – understanding, that is: something which is "softer" and deprived of formal structure. A call for this kind of philosophy of interpretation appears at the level Ricoeur terms reflexive-existential, especially with reference to cases of interpretation that are usually called "hard", where more formal methods are simply insufficient and useless.[5] In order to decide such cases, the interpreter cannot help appealing to unconventional methods. In addition to legal values, they must appeal to social, economic and political phenomena, or – ultimately – to some sort of intuition enabling the understanding of a difficult case.

Moreover, one must not forget that both in general philosophy and in the philosophy and theory of law, most assumed views and theses are also "soft", even if they arise in the field of "harder" methodologies. It is easy to oppose such views and theses (manifesting a similar level of precision) which will have the same or even better justification. It is to be noted, however, that the problem of defining basic notions is encountered not only in the case of hermeneutics, but also in the case of other methods. Similarly to the defenders of hermeneutics, supporters of the application of logic, analysis and argumentation in legal interpretation claim the universality of their methods. Furthermore, a dispute over the usefulness and the scope of application is pursued not only in hermeneutics, but also in remaining methods. Thus, notwithstanding the many fundamental differences between hermeneutics and other methods, they also have many points in common, though these, unfortunately, are often controversial.

5.2 HERMENEUTICS AS EPISTEMOLOGY

We begin our presentation with a discussion of methodological current in philosophical (Section 5.2.1) and legal (Section 5.2.2) hermeneutics. At this point, we wish to enter the reservation that the division here introduced into epistemological and ontological approaches is neither sharp nor unambiguous with reference to some views. The problem of classification will emerge with reference to such philosophers as, for instance, Habermas, Apel, and to such lawyers as – to give two examples – Larenz

and Esser. This is why no special or ultimate significance should be attached to the divisions and systematization proposed below.

5.2.1 Methodological Current in Philosophical Hermeneutics

The new – epistemological – tradition in hermeneutics was initiated by Schleiermacher. Another notable representative of the methodological current in hermeneutics was Dilthey. We shall discuss each of their views in turn.

Schleiermacher. The scientific climate that prevailed in Germany at the turn of the eighteenth century was favorable to Schleiermacher's projects: on the one hand a theory of the interpretation of works of art, proposed by Wickelmann, was developing; on the other hand, there arose the idea of "entering into the spirit of something" (epochs, peoples) in the work of Herder, as well as new philological conceptions of interpretation, developed by Heyne, Wolf and his disciples (especially Heindorf). A breakthrough occurred as far as the attitude of philosophy towards history is concerned. There also appeared a strong need for a "secondary" understanding of the historical world – this need was revealed in the views of scholars from this period such as Hegel, Böckhe, Dissen, Rank, Savigny. A thinker who exerted a considerable influence on Schleiermacher was Schlegel, who encouraged him to take up the task of translating Plato into German.[6]

The sources of Schleiermacher's hermeneutics are complex. They embrace Plato's philosophy (which fascinated Schleiermacher), biblical hermeneutics, philology, literary criticism, philosophy of history, and – finally – psychology. Schleiermacher makes an attempt to create universal (at least from the viewpoint of the humanities), philosophical hermeneutics grounded in philology and psychology. In his view, hermeneutics is not – strictly speaking – theoretical knowledge, but rather a practical art of interpreting and understanding all kinds of text (though mainly written ones).[7] As a practical art, it must be – and it is – closely connected with criticism. Schleiermacher started from philological research, yet he did not confine himself – as his predecessors had done – to drawing up catalogues of universally valid rules of interpretation. He went much further, because he embarked upon an analysis of the process of understanding, which underlies every interpretation. In Schleiermacher's view, a degree of the artistry of interpretation is directly dependent on a degree of understanding; he distinguished two kinds of understanding: clairvoyant and comparative, based on material and grammatical-historical cognition. Both kinds of understanding are complementary – they operate together.

The process of understanding possesses, in Schleiermacher's view, historical and psychological dimensions. In order to reconstruct this process, we must recreate the historical and psychological situations in which the author of an interpreted work found himself. We must endeavor to understand him better than he understood himself.[8] Understanding is a relative and never-ending process. It has a circular character. Schleiermacher devoted much attention to the problem of the hermeneutical circle (which is expressive of the nature of the process of understanding and interpretation), stating that "(. . .) the unity of the whole can be understood on the basis of single parts, and the value of single parts can be established (understood) on the basis of the unity of the whole".[9] Thus, when taking up an interpretative activity, one must begin with a cursory view of the whole work that one wishes to interpret (translate). This initial understanding will be a necessary condition for further interpretation. Schleiermacher gave up the division – assumed by his predecessors – into grammatical, historical, aesthetic and material interpretation. He developed several canons of interpretation, and illustrated their function, using the exegesis of the New Testament as an example.

Thanks to Schleiermacher hermeneutics became a philosophical problem. According to his account, hermeneutics is a universal theory of the cognition of the products – expressed in (written) language – of human words, or, to put it differently, a universally valid method for the humanities. This method appeals to three types of analysis: critical-philological, psychological and historical.

Dilthey. Thus, Dilthey, whilst formulating his conception of hermeneutics, already had at his disposal a prepared theory of humanistic interpretation connected with a philosophical theory of understanding. He was fully aware of this fact, and this conviction found expression in his 1900 essay *The Arising of Hermeneutics*. The objective that Dilthey set himself, though, was different – more far-reaching – to that pursued by Schleiermacher: he attempted to create "a methodology of understanding" for the humanities. The novelty of this, however, is not to be overestimated, because Vico, in his *Scienza Nova*, had already written about the understanding of science, which was to constitute an alternative to the Cartesian model of science based on mathematics. A point of departure for Dilthey was the opposition between natural sciences and human sciences. This anti-naturalistic division was introduced into the methodology of the humanities by Droysen, who distinguished and opposed two aspects of our cognitive reality – namely, nature and history. The purpose of the natural sciences is,

according to Droysen and Dilthey, explanation, whereas the purpose of the humanities is understanding.

In order to capture the essence of the process of understanding, it is necessary to appeal to psychology, which Dilthey treats as a descriptive discipline. In his opinion, what is at issue in the humanities is not a methodical knowledge of psychological processes, but a repeated experience of these processes, that is: an understanding of them. The purpose of the humanities is to know the objectified products of human life, and this knowledge simply amounts to understanding. Thus, understanding is a fundamental category of Dilthey's hermeneutics – the most typical activity encountered in the humanities. This is a process through which one achieves cognition on the basis of those manifestations of psychic life which are given to senses. And even though the manifestations of psychic life which are given to the senses are immensely variable, the very purpose of this sort of cognition ensures that the understanding of these manifestations must have common features. Dilthey's conception of understanding appealed to the psychological principle of the identity of human nature. In particular, understanding can be reduced to the psychological operation of "putting oneself" (*Hineinversetzen*) in the psychological situation of the person whose work is being interpreted. However, in his later works, Dilthey departed from these strongly psychological assumptions.

Under the unquestionable influence of Schleiermacher, Dilthey considered those expressions of human life (spirit) which are fixed in writing to be the privileged objects of understanding. Accordingly, he defined hermeneutics as a theory of the art of understanding the manifestations (which are fixed in writing) of life – of the traces of human existence contained in language. What underpins this definition is his conviction that it is only through language that human inner life (spirit) finds full expression. This is also why Dilthey asserted that the primary, profound meaning of hermeneutics is philological. An examination of these – fixed in writing – manifestations of life, if compatible with rules, is called interpretation. Understanding, which is attained through the medium of interpretation, is objective, because its subject is the whole human species (one can easily notice here a reference to the Kantian concept of the transcendental subject). Understanding is ultimately the most fundamental activity encountered in the humanities. Dilthey also assumed the principle of the hermeneutic circle – described already by Flacius, Ast and Schleiermacher – stating that "(. . .) From what is singular – the whole, from the whole – again what is circular. The whole of a work requires proceeding towards the individuality of the author and towards

literature with which it [its individuality] is connected. Only comparative activity enables me ultimately to understand each and every single work – and even each single sentence – more profoundly than I understood it before. Thus, understanding is realized on the basis of the whole and yet the whole is realized on the basis of what is singular (. . .)".[10]

Ultimately, though, "a methodology of understanding" cannot be reduced to the hermeneutics of a text. Its objects are all the products of human life (spirit). Thus, hermeneutics was elevated to the status of an epistemology of the humanities. Dilthey wanted to provide the humanities with a method equal in objectivity to that at the disposal of the natural sciences. For precision, we must add that the sharp opposition between understanding (characteristic of the humanities) and explanation (characteristic of the natural sciences) which he initially defended was mitigated in his later works. In these works, he asserted that understanding and explanation are two complementary research steps: explanation is usually the initial step, which often takes so long that few succeed in achieving full understanding.

It is easy to notice that Dilthey's hermeneutics also has more complex sources. One can undoubtedly number among them philology and broadly understood literary criticism (for, in Dilthey's view, hermeneutical process is inseparably connected to literary criticism, which immanently belongs to this process), as well as descriptive psychology and anti-naturalistic methodology, which grew from an unfortunate opposition between understanding and explanation. It is difficult to resist the impression that this conception of hermeneutics is not free from contradictions. On the one hand, Dilthey conceives of hermeneutics in an individualistic manner – as "the art of ingenious interpreters", and of understanding as a psychological operation of "putting oneself in" the position, or psychological situation, of the author of an interpreted work; on the other hand, though, hermeneutics is to be an objective and universal method of the humanities, appealing to such categories as "life", "human species", and "history".

Receptions of Dilthey's hermeneutics. All the above remarks notwithstanding, Dilthey's conception became an important source of inspiration for many authors continuing studies in the field of hermeneutics (also its legal variety) and, interestingly enough, informal logic. There was even a Diltheyan school founded in Götingen, in which leading roles were played by Misch, Lipps, König and Plessner.

According to Misch, the world we live in is the world of expressions. Only this world – of language – is universal. Dilthey was still speaking of

a strict connection between experiences, expressions and understanding. According to Misch, we move only in this second world, i.e. in the world of expressions. The "logic of expressions", informally understood, is to ensure a proper interpretation and understanding of this world.

Dilthey's hermeneutical philosophy is also a point of departure for Lipps, who supplements his philosophy with assumptions from existential philosophy and philosophical anthropology. As with Misch, Lipps' logic is informal and this logic aims to enable analysis of the category of "speech", which is fundamental from the point of view of hermeneutical cognition. This category is transcendental, which guarantees that logic used for the purposes of its analysis may be objective, making – in addition – possible "a return to the sources" of our knowledge, i.e. to pre-understanding (*Vorverständnis*). This pre-understanding is a point of departure for every possible further cognition (understanding).[11]

Still another contemporary continuation of Dilthey's thought was given by Betti. Under his account, hermeneutics is both a theory of cognition and a methodology of the humanities. The method of the humanities is reduced to interpretation, mainly the interpretation of a text. Betti is the author of one of the most extensive works devoted to a theory of humanistic interpretation. (N.B. this work bears the meaningful title *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften*.) In systematizing and arranging the results of the efforts of many generations of philosophers, philologists and lawyers, this work brought a period of evolution in hermeneutical theories to a close: the vein which we have termed methodological. The work was started by, *inter alia*, Flacius, Meier, Schleiermacher and Dilthey was thus – at least to some extent – brought to an end.

Analytical hermeneutics. The variety of hermeneutics described as analytical requires separate treatment. This immediately gives rise to doubt over whether hermeneutics can be analytical, given that the most serious objections levied against hermeneutics were formulated by the representatives of analytical philosophy. If the possibility of such a combination is admitted, then all boundaries – even between competing philosophies of interpretation – are entirely reduced in significance. This may have the following – momentous – consequences, which are in accordance with the spirit of postmodernism, a theory which we find hardly acceptable because there are no boundaries, no methodological paradigms (projects), everything, or almost everything is allowed, and one type of reflection turns into another. It poses the threat of anarchy, of the deconstruction of everything that made sense in methodology and led – partly at

least – to acceptable results; postmodernism makes it difficult – or even impossible – either to make a correct exposition of, or to learn a method. The authors of this book are decidedly against such simplification. On the other hand, though, we must be aware of these mutual influences and therefore unavoidable obscurities, since this will enable us to free ourselves of the necessity of pursuing never-ending disputes over the method of the humanities.

Everything seems to turn on the definition of such notions as "analysis", "language", "logic", "objectivism". According to Bocheński, whether or not a philosophy is acknowledged as analytical will depend on how these four notions have been defined. At the same time, we would like to stress that all these notions found a place in the lexicon of hermeneutical philosophy (including the variety which we have termed epistemological – methodological). The representatives of ancient hermeneutics and, later, Schleiermacher and Dilthey spoke about philological analysis. The program of language research was introduced into hermeneutics through the medium of philology. As was emphasized both by Schleiermacher and Dilthey, analysis (interpretation) of a written (oral) text is a pre-condition for fully understanding it. Misch and Lipps also wrote about hermeneutical logic. Dilthey devoted much attention to the issue of the objectivity (universality) of hermeneutic cognition (i.e. of the method of understanding). Thus, apart from well-known differences between analysis on the one hand, and phenomenological hermeneutics on the other, there are many similarities between these views. This fact was clearly realized by the analytical philosopher Bocheński: he noted that both views imply that analysis is necessary, and "want to" proceed objectively ("to the things themselves" – "*zu den Sachen selbst*"); moreover, both views stress the analysis of language. Symptomatic of this is Bocheński's assertion that analytical philosophers should admit the existence of other types of analysis (for instance hermeneutical – our remark: J. S., B. B.) besides their own – rather radical – version of it.

Taking into account all the above remarks and reservations, it is possible to speak of analytical hermeneutics. We mention it during our presentation of the epistemological trend, because analytical hermeneutics is a method of textual interpretation. In twentieth-century hermeneutics one can find numerous references to linguistics and analytical philosophy. The thinker who exerted a deep influence on this kind of thinking was "the second" Wittgenstein. In his *Philosophical Investigations,* he presented the problem of interpretation as a sort of language game played between an interpreter and a text. This account of the problem of interpretation is appealed to particularly willingly by representatives of the

philosophy of law (who will be discussed in the following section, which is devoted to the incorporation of hermeneutical methods into legal interpretation). Hermeneutics has also been cultivated analytically in the terrain of contemporary theology: thanks largely to Fuchs, Ebeling and Robinson, biblical hermeneutics has become "a believing science of language".

Hermeneutics as a theory of communication. Still another conception of hermeneutics was put forward by Habermas and Apel. Under their accounts, hermeneutics is a theory of the processes of ordinary language communication – a theory that possesses from the start some epistemological sense.

In the hermeneutics proposed by Habermas, references can be found to methodological hermeneutics (both its classical and analytical versions), phenomenological hermeneutics (especially the assumptions of Husserl and Heidegger), and even to psychoanalysis. For instance, Habermas appeals to the notion (previously used by Husserl) of *Lebenswelt* (Habermas speaks in this context about *soziale Lebenswelt*), but also to Heidegger's account of understanding (*Verstehen*) and individual existence (*Dasein*). He is, however, skeptical about Gadamer's philosophy of understanding, because, in Habermas' view, hermeneutics fulfils rather limited tasks in the sphere of human practice. These tasks are limited to the explanation and description of the processes of ordinary language communication. In other words, hermeneutics is the art of understanding sense which can be communicated through the medium of language (this account is analogous to Dilthey's). Of paradigmatic significance for hermeneutics thus conceived, would be such notions, or categories, as: communicative action (*kommunikatives Handeln*), communicative competence (*kommunikatives Kompetenz*) and communicative community (*Kommunikationsgemeinschaft*). Ultimately, the task of hermeneutics amounts to an examination of the structure of these communicative actions. The communicative action itself is defined by Habermas as the mutual influence people exert on each other by means of symbols. This influence has to be compatible with valid social norms, which are understood and accepted by at least two actors interacting with each other.

Hermeneutics would ensure the possibility of communication between these actors; it would at the same time condition the self-determination of social groups as well as the process of individualization of members of these groups. According to Habermas, the art of communication has not been acquired by all the members of a given communicative community. For that reason use must be made of hermeneutics, the task

of which is to work out the principles of this art. These principles are meant to improve the process of transmitting tradition and communication between actors. Hermeneutics is meant to fulfill both an important practical function, thereby becoming a concrete skill of language communication, an art of communication acquired by at least some members of a group (communicative community), and a theoretical and metatheoretical function – thereby becoming a theory of every common process of language communication. Hermeneutics, understood as a theory of the process of language communication, makes references to particular positive sciences, yet hermeneutics itself is not a positive science. Thus, ultimately, we may speak about hermeneutical consciousness of science, but not about hermeneutics as occupying – analogously with physics, chemistry, biology etc. – its own separate field of research.[12]

A similar account of hermeneutics was proposed by Apel. In his view too hermeneutics is a theory of the process of language communication, and one of its fundamental aspects is the notion of the communicative community. Unlike Habermas, however, Apel builds his interpretation on the basis of the philosophy of language, which is – additionally – analytical in nature. Apel could justifiably be included in the list of representatives of hermeneutics that we have called analytical. Apel's analyses, contained especially in the second volume of his *Transformation der Philosophie,* serve to confirm this thesis.

Of course, it is neither possible nor necessary to make a sharp and unequivocal distinction between the two hermeneutical traditions – epistemological and ontological. It is true that the ontology of understanding (which appealed to phenomenological philosophy) separated itself from the methodological tradition of the nineteenth-century hermeneutics of Schleiermacher and Dilthey, yet it remains the case that hermeneutics always had both an ontological and an epistemological sense. The only thing that changed the distribution of accents and the general approach: the approach of phenomenological hermeneutics was decidedly anti-psychological. This fact was realized by, for instance, Ricoeur, because he spoke of hermeneutics as an epistemology of interpretation, at the same time as attempting to solve the conflict between psychological and phenomenological hermeneutics. Thus, the problems of vague divisions and the "softness" (defeasibility) of formulated theses emerge once again.

5.2.2 Legal Receptions

Only in the nineteenth century did an essential change in the cultivation of legal hermeneutics take place. This was associated with the rise of

general philosophical (humanistic) hermeneutics, i.e. the epistemological trend described above. Successive attempts were made to use philosophical hermeneutics for the purposes of legal interpretation. The process of incorporation, though, was by no means homogenous. In some cases direct appeal was made to concrete hermeneutical conceptions, especially to Schleiermacher and Dilthey, in others particular solutions offered by general hermeneutics were used and subsequently incorporated into the broader context of discussions concerning, for instance, methods of jurisprudence, the legal decision-making process, adjudication and discovery of the law (*Rechtsfindung*, *Rechtsgewinnung*, *Rechtsverwirklichung*).

Savigny. The binding link between older, eighteenth-century legal hermeneutics and its contemporary twentieth-century versions was provided by Savigny, whose conception of hermeneutics refers to Schleiermacher's philosophy in many essential respects. A sort of paradoxical aspect of *Juristischen Methodenlehre,* proposed by Savigny, was that he aimed to defend the methodological autonomy of jurisprudence by means of methods that were "external" to the science of law – namely, hermeneutical and historical. Let us recall Schleiermacher's assumption that, in the case of comparative understanding (which is the second – besides clairvoyant – type of understanding), we must appeal to material, as well as grammatical-historical, cognition.

He distinguished four basic canons of interpretation: objectivity (autonomy), unity, genetic and technical interpretation. Savigny, by contrast, emphasized that interpretation of the text of a statute, which aims to recreate (reconstruct) the intention of a legislator, should embrace four elements (levels): grammatical, logical, historical, and systematic. Savigny, like Schleiermacher, was an advocate of comparative understanding as well as the grammatical–historical understanding of the act of interpretation. Likewise, he adopted the thesis that the act of hermeneutical cognition (interpretation) is objective in character, and its purpose is to achieve unity between the work of an interpreter and the will of a historical legislator. It was a specific kind of objectivity, which – analogously with Schleiermacher's conception – was to be justified historically and psychologically. Finally, Savigny attached great importance to criticism, the so-called "higher criticism" in particular, whose objective was to restore (rebuild) the meaning of a distorted (incomprehensible) text. This "higher criticism" was to consist of the same elements as any other interpretation. Thus, according both to Schleiermacher and Savigny, the primary form of hermeneutics is philological.

Coing. An important attempt to apply – above all Schleiermacher's – hermeneutics to the needs of the contemporary science of law was made by Coing. He set forth his proposals in an essay entitled *Die juristischen Auslegungsmethoden und die Lehre der allgemeinen Hermeneutik*, in which he examined the possibility of applying the general canons of interpretation formulated by Schleiermacher for the purposes of legal interpretation. He discussed each canon in turn, making various additions and changes of his own: the canons of objectivity (autonomy of interpretation), unity, genetic interpretation, interpretation of factual meaning (Schleiermacher spoke in this case of technical interpretation), and, finally, the canon of comparison. This approach led Coing to the conclusion that all general canons of interpretation find their confirmation and application in jurisprudence, which ensures the universally valid interpretation and understanding of a legal text. Hermeneutics teaches us how to critically assess an interpretation of the law, while at the same time showing that the science of law as an interpretative discipline uses not only exclusively deductive procedures, but also other approaches, even topical ones. Within the framework of this "interpretative discipline" jurisprudence enjoys a specific status, for it is an example of an "applied interpretative discipline". As a result, the 'legal' method, both universal and objective in character, could constitute part of a universal and objective humanistic methodology, while legal hermeneutics would be just one example of the application of general humanistic hermeneutics.[13]

Betti. The conception of legal hermeneutics developed by Betti clearly has its roots in Dilthey's thought. According to him, hermeneutics is simply the science of interpretation. Interpretation is in fact the only method that the humanities possess. In *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften,* Betti discussed the most important kinds of humanistic interpretation, including legal interpretation. Like Dilthey and Coing, Betti understood hermeneutics to be a universally valid and objective method of the humanities. Betti linked cognitive objectivism with axiological objectivism. Legal hermeneutics cannot ultimately be separated from humanistic hermeneutics in general, which assumes an objective and universally valid (for all specific variants of hermeneutics) theory of interpretation and philosophy of understanding.

Larenz and Esser. Representatives of modern philosophy and legal theory make numerous references to a methodological understanding of hermeneutics, especially the German strand referred to as *Methodenlehre*. References to hermeneutics, though, are not, as a rule, systematic;

rather, they serve to justify particular theses. The hermeneutical conceptions of Larenz and Esser constitute an exception to this. It is worth noting, however, that Gadamer's philosophy was a source of inspiration for the conceptions of some authors. This thesis, though, can be disputed on the following grounds. First, these authors make numerous references to Gadamer's views, yet their references are for the most part critical; accordingly, they advance their own proposals and solutions to "Gadamerian problems". Second, even though they reject the Diltheyan account of hermeneutics as an objective method of the humanities, they nevertheless assume – unlike Gadamer – a purely methodological understanding of legal hermeneutics. This is the final argument for covering the views of Larenz and Esser in the section devoted to the epistemological account of hermeneutics.

Larenz seeks justifications for his axiologically oriented theory of types within the framework of legal hermeneutics. Like Gadamer, he rejects the objective conception of understanding, advocated by Coing and Betti. At the same time Larenz does not assign to understanding an ontological meaning: he distinguishes clearly between understanding as a type of cognition and the ontology of law. Thus, ultimately, Larenz does not accept the Gadamerian interpretation of hermeneutics. For instance, the concept of application to him has a different meaning than in Gadamer's theory, and it is not synonymous with the processes of understanding and interpretation. Consequently, in Larenz's view, legal hermeneutics does not possess "an exemplary meaning". Rather, it is a special case on account of a specifically dogmatic interest of "the legal understanding of a statute". Differences between Larenz and Gadamer are also strongly marked over the issues of "pre-judgment" (*Vorurteil*) and "pre-understanding" (*Vorverständnis*). Larenz distinguishes the meaning of both terms, even placing them in opposition to each other. The function of the Gadamerian *Vorurteil* in legal cognition is purely negative – this is "prejudice" (*Aberglaube*) rather than "pre-judgment". "Pre-understanding" (*Vorverständnis*), by contrast, designates a certain kind of interpretative hypothesis, which can be confirmed later by "a successful interpretation"; the hypothesis in question can also be referred to as "the expectation of sense" (*Sinnerwartung*). Ultimately, pre-understanding is a preparation for "adequate understanding", thus it is also a condition for understanding what law is.[14]

Esser represents a different example of "the mixed reception". He attempts to determine a philosophy of interpretation that would be suitable for the needs of legal interpretation. In his view, hermeneutics prepares a social and ideological-critical analysis of the reality of law's

application. Esser, again unlike Gadamer, conceives of the process of interpreting positive law as something dogmatic – rather than historical – in character. It is true that legal hermeneutics makes allowance for the results of philological and historical research; it remains the fact, though, that it uses them in the process of "logical interpretation" only in a dogmatic sense.[15] According to Esser, the process of interpretation can be understood as a kind of practical activity; accordingly, legal hermeneutics can be defined as the science of action (*Handlungswissenschaft*). The process of the interpretation or – more broadly – the application of law is creative in character, for it may "produce the content of norms". However, Esser defines pre-understanding (*Vorverständnis*) like Gadamer, i.e. as a condition for the possibility of understanding. Yet he associates many different intuitions and meanings with this concept, linking it, for instance, with such terms as "interest", "attitude", "motive", "expectation", "background", "the image of a future decision", "initial choice or assessment", and, finally, "prejudice". In the course of building his conception of hermeneutics, Esser – like Larenz – stopped at the level of the methodology of legal understanding. In point of fact, his hermeneutics can be reduced to a theory of law's application (*Rechtsanwendung*) and "finding" a legal decision (*Rechtsfindung*).

Other representatives of the methodological strand of legal hermeneutics included Forsthoff, Engisch, Müller and Kriele.[16] Only occasionally, however, did these authors appeal to the theses of general philosophical hermeneutics, which is why one cannot speak, even generally, of a full reception of this kind of hermeneutics as far as their views are concerned.

5.3 HERMENEUTICS AS ONTOLOGY

Owing to phenomenology a new, ontological, aspect of the problem of understanding developed. Understanding is no longer simply conceived as a method of humanistic cognition, but is also – or, rather, above all – regarded as a property (form) of the existence of being (to which Husserl assigned the name *Lebenswelt* and Heidegger – *Dasein*). Thus, hermeneutics has become the phenomenologically oriented ontology of understanding. Hermeneutics is, however, also a method – after all it has to be. This duality cannot be eliminated even on the grounds of phenomenological philosophy. This fundamental ambiguity is arguably the most serious inconsistency in phenomenology. The rejection of the methodological objectivity of older hermeneutics, accompanied by the assertion that understanding is a form of the existence of an individual

being (*Dasein*) does not seem very plausible or clear, all the more so because phenomenology did not abandon its claim to universality (though it did abandon the claim of objectivity). Hermeneutics is universal, because it is a point of departure for all cognitive activity, it is "the first science" – "without the Archimedean starting-point", which means – besides other things – that hermeneutics is simply a method, albeit a method that is very difficult to interpret. One may argue that hermeneutics is a method of direct cognition, because, built on the basis of phenomenology, it aspires to be "the first science". Yet if one takes into account the fact that, on the grounds of hermeneutics, "things themselves" can be known only through the medium of thoroughly analyzed language, as well as interpretative operations such as actualization, concretization, appeals to pre-understanding and the hermeneutical circle, then one may conclude that hermeneutics is in fact a method of indirect cognition. We shall return to this intricate issue in Section 5.4.

The next point to be stressed is that hermeneutics, like the whole of phenomenology, is anti-psychological. This stance can be justified in relation to phenomenological philosophy and the philosophy of consciousness (a variant of the philosophy of *cogito* – the thinking self), but in relation to hermeneutics, justification is not so easy. The assertion that the process of understanding takes place only at the level of "pure consciousness" is a consequence of numerous shady and highly speculative philosophical assumptions. Whether we interpret certain aspects of the process of understanding (such as, for instance, pre-understanding) in a psychological or phenomenological way will depend on our philosophical convictions and habits, as well as the specificity of a concrete case, rather than on universally valid philosophical truths. Indeed, only the conflict between phenomenological and psychological hermeneutics seems objective.

5.3.1 Ontology of Understanding

Husserl. The foundations for new hermeneutics were provided by Husserl's philosophy. The variant of hermeneutics which he proposed was an alternative to Dilthey's methodology. Husserl criticized both the naturalistic and anti-naturalistic varieties of methodological objectivity. As a result, he rejected the conception of hermeneutics as the epistemology of interpretation. He sought other grounds for its justification, finding them in ontology, in which, in his view, the fundamental meaning has the category of "the world of life" (*Lebenswelt*). This category is primary in relation to the objective, cognitive relations "subject – object". In

other words, life itself, being the primary source of understanding, is prior to objective cognition. Thus, understanding is no longer a method of cognition, having become a mode of being.

Heidegger. In Heidegger's conception, philosophy is equated with the phenomenology of *Dasein*. Hermeneutics is, then – neither more nor less than – the phenomenology of *Dasein*, i.e. the phenomenology of the individual existence possessing the capacity for understanding.[17] Understanding is no longer one of many psychic activities, or a method of interpreting a text; it becomes a mode of being – a characteristic – of individual existence. This is so because *Dasein* possesses the capacity of self-understanding and self-interpretation; thus, understanding must not be reduced to purely cognitive categories. It is true that Heidegger assumes that understanding is realized in language, yet he adds that in thinking, being turns into language (language is the home of being).[18] Heidegger also gave a consistently ontological interpretation to other notions typical of hermeneutical philosophy like, for instance, "the hermeneutical circle": in his view "the circle" does not describe the structure of the process of understanding, but expresses "the existential pre-structure of *Dasein* itself".[19]

Gadamer. A special place in the process of the development of phenomenologically oriented hermeneutics is occupied by Gadamer. His work, *Wahrheit und Methode,* ended a stage of development in humanistic hermeneutics, simultaneously confirming the presence and importance of hermeneutical issues in philosophy.

The philosophical roots of Gadamer are complex. He defines himself as a Platonist posing a Kantian question about the transcendental conditions for the possibility of understanding. He answers this question in the spirit of Heidegger, whom in fact he treats as his main philosophical predecessor. Finally, when classifying his own philosophy, he places it between phenomenology and dialectics.[20] Gadamer realized that for hermeneutics to be a real philosophy of understanding, it cannot confine itself either to humanistic epistemology (Schleiermacher, Dilthey), or to fundamental ontology (Husserl, Heidegger). In his opinion, hermeneutics must remain open, since only then can it preserve its claim to universality. This openness means in particular that hermeneutics links notions which otherwise seem unconnected: general and concrete, theoretical and practical, constructive and critical, whilst at the same time abandoning the traditional quest for truth and objective cognition. When seen in this light, the different definitions of hermeneutics found

in Gadamer's work come as no surprise. Some examples of these definitions include: theoretical knowledge of the conditions for the possibility of all understanding, the continuation of Plato's theory of beauty – new universal aesthetic, and a practical art of understanding and communication.[21]

Yet hermeneutics is above all knowledge about understanding. In the course of building hermeneutics, we begin from the Kantian (normative) question, to which we do not yet provide a Kantian answer. Ultimately, hermeneutics does not stipulate what understanding should be like, but merely describes the conditions under which understanding is at all possible. As for understanding itself, it is a phenomenon of a special kind. Its essence lies in the fact that it is a process – it is something without a definite beginning or end, it is "the very process of happening" during which we reiterate our effort to realize the general in the concrete, and the theoretical in the practical. As is emphasized by Gadamer, "the hermeneutical problem" always embraces three inextricably linked moments: understanding (*subtilitas intelligendi*), explanation (*subtilitas explicandi*) and application (*subtilitas applicandi*). For understanding is realized through the act of interpretation, and the essence of interpretation is expressed in its practical application.[22]

Abandoning the traditional way of presenting the question of truth, Gadamer poses it in such a way that it may also concern the humanities. Within the humanities, the question of truth becomes a question about the conditions for the possibility of understanding. Hermeneutics enables objective, scientific experience to be joined with individual life experience. Thus, the division between the objective and subjective elements of our experience of the external world is reduced in significance. Gadamer – like Heidegger – ultimately assumes that truth is "the disclosure of being" (*Unverborgenheit des Seienden*), which subsequently turns into the openness of language statements. In this context, the dialectic principle of the primacy of question is in force. Thus, truth acquires its own situational and temporal structure.

The historicity of understanding is elevated to the status of one of two fundamental hermeneutical principles (the second one is its language character). According to Gadamer, considerations of the process of understanding lose their sense – especially as regards the issue of hermeneutical application – if they are deprived of their historical perspective (horizon). The process of interpretation pursued beyond the historical horizon of understanding would become anew an abstract and theoretical knowledge of the general principles and rules of interpretation. Our hermeneutical consciousness acts on, develops and is rooted in

history. This historical perspective enables one to be open not only to the past, to the voice of tradition, but also to the present, to what is "here and now" as well as, finally, to the future, for every historical act of understanding contains some projection of a new sense.

The principle of the historicity of understanding is also inter-linked with other components of hermeneutical experience – namely, the hermeneutical circle and pre-judgment (*Vorurteil*). Gadamer examines both the older, formal–methodological principle of the hermeneutic circle and its newer, phenomenological–ontological, version. In particular, this principle captures the connection between the general and the concrete, between the earlier and the present, and between pre-understanding, understanding, interpretation and application.

Gadamer emphasizes that the hermeneutical circle is neither subjective nor objective – it is rather an attempt to describe understanding as a game (mutual influence) between "the movement of tradition" and "the movement of the interpreter". Thus, "the circle of understanding" is not a methodical circle (a method of cognition), but, rather, a description of the ontology and structure of the process of understanding. Also of momentous significance for the historically understood process of understanding, is the concept of pre-judgment (*Vorurteil*), which refers to something that exists before (in a temporal sense) both our knowledge and ignorance.

The second fundamental principle (besides the historicity) of hermeneutical experience (understanding) is its linguistic character. Language is a sort of medium linking all the elements of the process of understanding in one whole. Gadamer makes a reference to Schleiermacher, who insisted that only can be assumed and investigated within hermeneutics is language (he wrote that the only being that can be understood is language). However, Gadamer does not assert that the above thesis requires that hermeneutics be limited to language research, as was suggested by the older, philologically oriented hermeneutics. For language is "the primary equipment of man", with which he comes to the world, and which expresses his possession of this world. It is thanks to language that we cannot only speak, think and interpret, but also – or, rather, above all – understand. Understanding is, in turn, something more than merely speaking, thinking and interpreting – it is also a mode of being of man.

Gadamer's hermeneutics is open – it has no point of departure that could be determined. Yet at the same time it sets up the claim to be universal, just as the problem of understanding and language is universal. Moreover, the hermeneutical problem cannot be confined solely to the methodology of the humanities: "(. . .) Hermeneutics is not simply a

science of the method of the humanities, but, rather, an attempt to determine what the humanities in fact are, the attempt, which is not to be limited to a reflection over the methodological self-consciousness of the humanities. (. . .) Hermeneutics should show us the relationship between the humanities and our whole experience of the world (. . .)".[23] Gadamerian hermeneutics is dialectic (because – in the spirit of Socrates it gives priority to the question), phenomenological (because it describes the phenomenon of understanding as the phenomenon of being), and in addition, it is the philosophy of unity (because it removes the divisions between the general and the concrete, subject and object, language and the material world). This philosophy is realized in the process of communication, in which all historically developed human communities take part.

Ricoeur. As we have already pointed out, the philosophy of interpretation proposed by Ricoeur is a special "boundary" case, from the standpoint of both ontological and epistemological hermeneutics. According to Ricoeur, a specific property of hermeneutical interpretation is its reflectivity. This is because reflection always appeals to symbolic speech, which, in turn – automatically – necessitates interpretation. Ricoeur's hermeneutics appeals to many sources: primarily to phenomenological philosophy, but also to the philosophy of language, theology, and even psychoanalysis. Hermeneutics, in Ricoeur's view, should fulfill three functions. First, it should be an epistemology of interpretation (metatheoretical function). Hermeneutics must fulfill this function when "a conflict of interpretations" (for instance, phenomenological and psychoanalytical) emerges. Such a conflict makes it necessary to build "the hermeneutics of all hermeneutics", within the framework of which one can attempt to reconcile otherwise opposed viewpoints. Second, hermeneutics is simply a theory of the interpretation of symbolic language. Third, and finally, hermeneutics is the practical art of interpreting and understanding this symbolic language, which means that it is its own application (this kind of hermeneutics is used by Ricoeur, for example, in his work *La Symbolique du Mal*). Yet in each of these contexts, hermeneutics is primarily an epistemology, and only secondarily – through semantic analysis and reflection – an ontology (the ontology of understanding). Ricoeur, just like his predecessors Heidegger and Gadamer, asserted that language constitutes the medium of hermeneutical experience. In his programmatic essay *L' existence et l'hermeneutique* he says that all understanding – both ontical and ontological – first finds expression in speech.[24] Language, or, more accurately, symbolic language,

gives rise to the need for interpretation, which, in turn, does not proceed in a temporal void, but is always "built" into some tradition – it has its own history.

Symbolic language is universal. Symbol is present even in ordinary language, which – by its very essence – seems to have little to do with myth.[25] This suggests that hermeneutics is not limited to analyzing particular types of language (for instance, biblical), but concerns itself with the interpretation of all symbolic structures of meaning. According to Ricoeur, the structure of meaning can be called symbolic if its direct, original, and literal sense determines some other – indirect, secondary and metaphoric – sense which can only be captured through the medium of the former.[26] Symbolic signs are not transparent, they require interpretation, in other words, they force one to think (*ils donnent à penser*). Thus, the purpose of the interpretative process ultimately boils down to understanding a symbol. Symbol and interpretation are two correlated notions: anywhere there is a multiform sense, i.e. a symbol, there is an interpretation. Ricouer speaks about three stages of understanding symbol: phenomenological, which consists in understanding the symbol through some other symbol or through all symbols; hermeneutical, the stage at which the proper interpretation of the symbol takes place (only thanks to interpretation can we again hear and understand), and existential, the stage at which "thinking enters the symbol" thereby making possible existential (ontological) interpretation of the symbol.

The concept of hermeneutical experience ultimately embraces three inter-linked elements: a text, i.e. language, in which symbolic meaning structures appear, interpretation and tradition. This "chain": text – interpretation – tradition may be read in all directions, because a text always consists in entering some tradition, and interpretation, in turn, consists in entering some text. Thus the circle of understanding, interpretation and tradition closes.

5.3.2 Legal Receptions

Reinach. One very interesting attempt to apply the phenomenological philosophy of Husserl to the needs of jurisprudence was made by Reinach. Reinach believed that phenomenological analysis lies at the basis of both statements concerning the ontological essence of the law, and statements with a methodological character. He set out his ideas in *Zur Phänomenologie des Rechts. Die apriorischen Grundlagen des bürgerlichen Rechts*, published in 1986. Reinach conceived of the law as an *a priori* category, which we are able to know only thanks to our intuition.

Let us recall that according to Husserl, phenomenology is supposed to enable us to capture what is directly given and evident in the cognitive process. It is not confined solely to the analysis of notions, but attempts to reach – "through these notions" – the *a priori* essence of reality, i.e. "the things themselves". Such cognition is possible only by means of intuition, for it is precisely intuition that expresses the capacity to know what is directly given and evident. Thus, intuition becomes "the principle of cognitive principles", the first and irreplaceable source of all cognition, rather than only one of its forms. Husserl enumerated many kinds of intuition – the number of them is the same as the number of direct kinds of data. Thus, the following kinds of intuition exist: rational, irrational (used in emotional acts), capturing phenomena in their concreteness, and capturing the essence of a phenomenon.[27] The last kind of intuition, which enables knowledge and understanding of the essence of law, would presumably be of special significance for Reinach. Positive law is in a constant state of flux and development. Such contingency, and the tendency to change make it difficult, if not downright impossible, to know the *a priori* essence of law. Thus we must penetrate further and deeper, through positive laws to the "thing itself", to the nature and man with his needs, desires, will and actions.

The essence of these essential presentations is expressed in *a priori* sentences, which at the same time are also statements (axioms) of a phenomenologically oriented science of law.[28] In this way, besides mathematics and pure natural science, we are dealing with a case of a "pure, in the phenomenological sense, legal science". Next, Reinach analyzed the relationship – crucial for an *a priori* science of law, between the notion of a claim (*Anspruch*) and the notion of obligation (*Verbindlichkeit*). He found the source of this relationship in the notion of a promise (*Versprechen*). A promise creates a particular relationship (connection) between two persons, by virtue of which one person may require something, and the other is obliged to fulfill this requirement, or at least to see that it is fulfilled in the future.[29] Thus, ultimately, the law has not only an *a priori* but also a dialogical nature, because it implies that for every question (claim), there must be a corresponding answer (obligation) from a second person.

Husserl. Another philosopher of law, G. Husserl, the author of the work *Recht und Zeit* also referred to Husserl's phenomenological philosophy. He was interested above all in the problem of time in law. He analyzed it using at least some theses from phenomenology and hermeneutics. He assumed that every legal system represents a certain phase in the history of mankind. Thus, legal orders have their own history and they are

themselves history. His distinction between objective time and historical time roughly corresponds to the distinction made within hermeneutics between "objective history" and "subjective historicity" (*Geschichlichkeit*). Thus, a non-linear – phenomenological – conception of time was supplemented with a phenomenological-hermeneutical analysis of "the experience of the law". G. Husserl argued that the essence of legal cognition is the reduction of legal ideas to an ontological level, on which "what the law is" can be revealed. This process of reduction is at the same time a process of actualizing the law itself – applying it in concrete situations – because the act of reduction uncovers the basic (original) structure of every possible law – the structure which has an *a priori* character. In consequence, according to G. Husserl, legal order is the basic phenomenon of the social world.[30]

Maihofer. In turn, Maihofer's ontology of law, outlined in his study *Recht und Sein,* has distinctly Heideggerian roots. Maihofer attempted to transfer "fundamental ontology" to the terrain of philosophical–legal reflection. The hermeneutics of *Dasein* (the being capable of self-understanding) is intended to enable Maihofer to construct an existential ontology of the law. Maihofer emphasized that phenomenology enables the discovery of a new dimension of being and an order inherent in it – the order which law is also a part of.[31]

Gadamer. Gadamer also expressed directly his opinion about legal hermeneutics. As was mentioned, Gadamer asserted that there is one – general and universally valid – philosophy of understanding, which strives to answer questions about conditions for the possibility of understanding in general, and thereby questions about conditions that make understanding of the law possible. Legal hermeneutics at best might possess an "exemplary meaning" (*exemplarische Bedeutung*) for other particular hermeneutics, as well as for general hermeneutics. According to Gadamer, the distance between humanistic hermeneutics and legal hermeneutics is not as large as it is usually considered to be. Accordingly, legal hermeneutics is in fact not a special case, but it does make the scope of problems to be tackled within historical hermeneutics as broad as it was in the past; in consequence, one witnesses a return to an old-time unity of the hermeneutical problem – one may say that the lawyer and the theologian meet anew the philologist. If the lawyer – acting in his capacity as judge – endeavors to interpret the text of a statute (to reconstruct the original sense of the text and enable its application), then he acts exactly as he would in the course of any other understanding.

Understanding is most strictly connected with interpretation and application. More accurately, interpretation and application are integral parts of the hermeneutical experience, i.e. of the process of understanding. The point to be stressed is that application is inherent in (pervades) all forms of understanding – it is not to be construed as a later (secondary) stage at which one applies something general, that has been earlier understood, to a concrete case. Thus, application is the actual understanding of the general, which the interpreted text provides for us.[32]

Kaufmann. Gadamer's work in the philosophy of law was continued above all by Kauffman, who provides an ontologically oriented conception of legal hermeneutics. The key problems in his considerations are the understanding, interpretation and application of law, and the relationship between law and statutes.

According to Kauffman, the law emerges (is constituted) during the hermeneutical act of understanding.[33] Thus, the law does not exist before interpretation – it has to be found, created. The interpretation of law, the process of making legal decisions, and even the whole administration of justice constitute a fully creative process. Underlying this process is the distinction between the law and a statute. A statute has its source in a legislator's authority. As for the law, it really exists – it stems directly from the being; it has its source in the natural order of things, its existence is therefore primary – independent of any authority. A statute is only one aspect of law's realization. The relationship between the law and a statute is just like the relationship between an act and potential, or reality and possibility. Ultimately, both a statute itself, and abstract ideas of law such as the concept of just law are, in Kaufmann's view, only possible forms of law. The essence of the law is located in the fact that it is unavailable (*unverfügbar*), concrete and historical. Its positive character constitutes its existence, and rightness – its essence. The law expresses "the primary analogy" – correspondence – between "is" and "ought". Legal cognition should take account of this analogy.

Kaufmann reckons that only through hermeneutics – the ontology of understanding – will it be possible to overcome the one-sidedness which has encumbered both conceptions of the law of nature and positivistic conceptions. For this reason he rejects the ontology of substance assumed in classical theories of the law of nature. Such ontology would create the danger of, *inter alia*, objectivity which is undesirable from the perspective of the hermeneutic approach. Objectivity has been replaced with "the historicity of the understanding of law". Law emerges through the act of understanding, it comes into existence, or happens at a specific

temporal (historical) moment; it is not a state but rather an act. To put it differently, the law is a relationship between a norm (which is usually general) and a concrete case, a relationship which is finally manifested in the person. In this way the ontology of substance is replaced with the existential ontology of relationships.[34]

The law is therefore the result of a process Kaufmann calls "legal realization" (*Rechtsverwirklichung*). "Concrete law" is the "product" of the hermeneutical process of a sense's development and realization (*Sinnentfaltung – Sinnwerwirklichung*). The essence of interpretation is ultimately the act of understanding – the capacity to interpret is synonymous with the capacity to understand. Three degrees (stages) can be distinguished in the process of legal realization (*Rechtsverwirklichung*). The starting-point is abstract – extra-positive and extra-historical – legal principles (ideas). Then we pass through the general – formal-positive – norms contained in a statute (the second stage) to the concrete – material-positive – historical law (the third stage). This concrete historical law is established in the process called "finding the law" (*Rechtsfindung*), which consists in "establishing coherence" and "seeking correspondence" between actual states of affairs (*Lebenssachverhalte*) and norms or, to put it differently, "bringing them closer to each other".[35] The establishment of a legal decision – the act of finding a legal solution – is achieved through a historical act of understanding which appeals directly to an original analogy contained in the concept of the law. For the act of understanding brings together subject and object, duty and being, norms and an actual state of affairs.[36] The syllogistic model of the interpretation and application of law has been decidedly rejected by Kaufmann. For the understanding of a legal text designates a certain ambivalent – creative – productive process. The hermeneutical understanding of a text is not something receptive; it is rather a practically shaped act in the course of which concrete historical law emerges.

According to Kaufmann, legal hermeneutics is a special example of the philosophy of understanding, in which there is – besides ontological – a methodological and practical moment. Proceeding, hermeneutics implies, is practical in character. Thanks to hermeneutics it is possible to transform jurisprudence and the philosophy of law into a theory of action (*Handlungswissenschaft*). The ontology of understanding has been transformed by Kaufmann into the ontology of relationships, which, in turn, has enabled him to build a personalized philosophy of law. The concept of law thus leads us to the concept of analogy and this in turn directs us to the concept of relationships, and once again to the concept of the person. The person is not a substance, but a relation, or,

more accurately, the structural unity of what may be defined as "*relatio*" and "*relata*". The idea of law is the idea of the personally understood man, neither more nor less. In recognizing (understanding) the essence of the human person, we recognize (understand) the very essence of law.[37] The concept of the person is inter-linked in Kaufmann's theory with other components of hermeneutical experience such as, for example, pre-understanding (*Vorverständnis*) and the hermeneutical circle. These elements of hermeneutical cognition are justified by the ontological assumption that they are grounded in the structure of individual existence – the person.

Numerous references to the conceptions of Gadamer and Kaufmann can be found in contemporary jurisprudence – both within legal dogmatics and the philosophy of law. An attempt to apply hermeneutics – in the form proposed, among others, by Kaufmann – to the needs of penal law was made by Hassemer in his work *Tatbestand und Typus. Untersuchungen zur straftrechtlichen Hermeneutik*. Hinderling, in turn examines the possibility of using Gadamerian hermeneutics for the purposes of constitutional law; the results of his research are presented in *Rechtsnorm und Verstehen. Die methodischen Folgen einer allgemeinen Hermeneutik für die Prinzipien der Verfasunsauslegung*. Finally, the hermeneutical account of the philosophy of law can be found in Stelmach's work *Die hermeneutische Auffassung der Rechtsphilosophie*.[38] Representatives of the classical current *Methodenlehre*, especially Larenz and Esser (discussed earlier), also made reference to Gadamerian hermeneutics. Occasional remarks on phenomenologically understood legal hermeneutics were made by such authors as Kriele, Baeyer, Leicht, Rottleuthner, Fikentscher, Haba, Fuhrmann, Ellscheid, Neumann, Schroth, Haft, Philipps, Schild, Scholler, Müller-Dietz, Hegebarth, Brito, Calera, Ollero, Saavedra, Zaccaria and Alwart.[39]

5.4 THE UNDERSTANDING OF THE LAW

What is not known about hermeneutics has already been outlined in Section 5.1.2. Now the time has come to attempt to answer at least some of the questions we posed there. Two problems seem particularly interesting in the context of considering the frontiers of the application of hermeneutics in legal argument. Those are the claim to universality made by the philosophy of understanding and the nature of hermeneutic cognition (the core of the latter problem is whether hermeneutic cognition is direct or indirect).

5.4.1 Claim to Universality

Starting from Schleiermacher, all modern hermeneutics aspired to be in some sense universal – at least as a method of the interpretation and understanding of texts, as the methodology of the humanities or – finally – as the ontology of understanding. This claim of hermeneutics (also legal hermeneutics) can also be justified by the kind of problems the philosophy deals with. Hermeneutics is universal, because the problem of language (the philological aspect of each interpretation, history and "things" which are objects of hermeneutic cognition such as, for instance, life, spirit, culture or being understood as individual existence) is universal. Hermeneutics is also universal because hermeneutic experience is of a specific nature: within this experience, in transcending boundaries between general and concrete, theoretical and practical, and between understanding, interpretation and application, one achieves cognitive unity. Finally, hermeneutics (at least its phenomenologically oriented variant) is universal, because it is "the first science" – the starting-point and essential element of every possible cognitive process no matter what the object of that process.

The claim to universality was formulated more narrowly by hermeneutics understood as a kind of humanistic epistemology. The anti-naturalistic thesis which holds that two otherwise objective methodologies – the methodology of explanation (used by the natural sciences) and the methodology of understanding (used exclusively by the humanities) – entails that the universality of hermeneutics is to be limited to the field of humanistic cognition. Those lawyers who were on a quest to find their methodological identity often made use of anti-naturalistic hermeneutics. Were they right in doing so? In our view, they were not. The division of methodologies into the methodology of explanation and the methodology of understanding is entirely groundless, which was clearly realized by representatives of the variant of hermeneutics built on phenomenological bases. Not only do we lack one acceptable definition of understanding, but there are also numerous controversies concerning the process of explanation. What's more, in humanistic, as in every other type of cognition, appeal is made to both explanation and understanding. It is also difficult to defend theses that there exist specific "humanistic objects" (like, for instance, the law). Even if their ontological character could justify identifying them as specific, this would not be sufficient reason to use only one type of method to examine them.

The choice of a method will depend on the complexity and the nature of an interpretative case, the habits of an interpreter, and the interpretative

tradition, rather than on – ultimately entirely arbitrary – methodological decisions. Thus, in the same case, one interpreter will appeal to logic, another to analysis or argumentation, and still another to hermeneutics. Consequently, in view of the above reservations, it must be conceded that attempts to prove the separateness and methodological autonomy of the humanities (including jurisprudence) on the grounds of anti-naturalistic hermeneutics is unfeasible.

The concept of universalism was understood differently, and more broadly, by hermeneutics that was understood as a kind of ontology. Hermeneutics is universal because it tackles the fundamental problem of the understanding of individual being (*Dasein*) and appeals to – intuitive – methods that enable one to know the very essence of this being. Ultimately, hermeneutics thus understood may constitute the starting-point of every cognitive process, without excluding the possibility of applying other methods (say, logical and analytical) in further stages of the process. Thus, were we to have the universally valid hermeneutics, which is both the ontology and epistemology of understanding, we should be glad and consider the earlier problems of hermeneutics as resolved. Yet even then, the following dilemma would arise: either the process of hermeneutic cognition is regarded as purely intuitive, which gives rise to questions about the sources of this cognition and the criteria for its verification, or the process of hermeneutic cognition is regarded as a kind of indirect cognition, i.e. one which appeals to numerous prior theses and assumptions which may fail to be unquestionable. In the first case, one is threatened either by relativism (because one cannot know for sure that conclusions reached in the pure act of phenomenological cognition are ultimate and indefeasible) or – at best – by psychologism (because one will have to justify phenomenological conclusions by appealing to some type of introspective psychology). In the second case, one is bound to get entangled in virtually unsolvable controversies concerning the conditions of hermeneutic cognition (which are: the linguistic character of understanding, historicity, pre-understanding and the hermeneutical circle).

5.4.2 The Nature of Hermeneutic Cognition

The issue of the nature of hermeneutic cognition – its interpretation and essence – probably gives rise to the highest level of controversy. In all modern hermeneutical conceptions, understanding was conceived as a kind of fundamental and primitive cognitive process, conditioning "deeper" insights into the nature of examined objects. Furthermore, phenomenological hermeneutics treats understanding not only as a cognitive

capacity (competence), but also as a property of the individual being – human existence (*Dasein*). However, the issue becomes complicated when attempts are made to clearly establish the nature of this cognition – especially whether it is direct or indirect.

Understanding as direct cognition. The most elementary associations lead us to regard understanding as a kind of primitive capacity which makes no appeal to prior knowledge (experience), theses or assumptions. Hermeneutics was understood in this way by Socrates, who thereby built his conception of philosophy as "deprived of the Archimedean starting-point"; St. Augustine, who wrote about inspired understanding; Schleiermacher, who distinguished the clairvoyant type of understanding; and by the representatives of phenomenology, for whom understanding was the primitive capacity, conditioning the knowledge of "things themselves".

According to the representatives of phenomenology, understanding is a kind of intuitive cognition which enables one to capture a phenomenon in its concreteness, as well as its *a priori* essence. Let us recall that Husserl distinguished many kinds of intuition corresponding to kinds of direct data: rational, irrational (used in emotional acts) and, of course, phenomenological (capturing the concreteness, as well as the essence, of a phenomenon). The representatives of phenomenological hermeneutics, however, were reluctant to pronounce on the nature of the process of understanding. Even the most careful reading of Gadamer's work *Wahrheit und Methode* does not allow unequivocal theses about the essence of understanding to be constructed. In particular, it is not clear whether understanding is a form of direct cognition. A positive answer to this question would give rise to the subsequent questions: which faculties make this kind of cognition possible? what kinds of intuition ultimately compose the capacity called understanding? Phenomenological epistemology may be accepted or not, yet its deeper meaning and significance cannot be denied. Phenomenological hermeneutics engenders many more problems: its representatives decline – almost in a programmed response – to give answers to most questions concerning the nature of the process of understanding; they point out that they are moved by the Socratic reluctance to construct philosophies built on trust in previously accepted theoretical beliefs.

In our opinion, understanding is a type of cognition which may possess an intuitive character. In the process of understanding, one uses both intuition which may be described as rational, and "pure" phenomenological intuition. It is the latter type of intuition that opens the way

to direct cognition. It is commonly used by lawyers, even when they know nothing about phenomenology and hermeneutics. This kind of intuition usually constitutes a starting-point for the process of interpretation; without this intuition it would be impossible to recognize the *a priori* essence of the phenomenon of law and the fundamental relationships (e.g., claim – obligation) which exist in law. Another argument supporting the thesis that understanding is a direct cognition is found in the view – strongly emphasized by Gadamer – of the unity (simultaneity) of processes of understanding, interpretation and application. This view can be reasonably defended only if the very essence of a thing (phenomenon) being examined is reached.

Thus, understanding is a type of direct – intuitive – cognition. But is it anything more than that? Phenomenology is a philosophy of consciousness, that is, a variety of the philosophy of *cogito*, i.e. rationalism. Rational intuition appeals to general notions and earlier accepted theorems and definitions. At this stage of hermeneutical cognition "language enters understanding" and "hermeneutical logic" is substituted for primitive hermeneutical intuition.

Understanding as indirect cognition. The overwhelming majority of early hermeneutical theories (including those proposed in the nineteenth century) conceived of hermeneutics as an indirect method of cognition. Hermeneutics was simply the art of interpreting and understanding texts. This understanding and interpretation of texts is made possible by universally valid rules of interpretation. In some cases, it is not only through the medium of rules of interpretation, but also through psychological facts that we are able to reach understanding and an interpretation. This dual conception of the process of understanding (as direct and indirect cognition) was not suppressed by phenomenological hermeneutics. It was Gadamer who devoted particularly great attention to such properties of the process of interpretation and, consequently, hermeneutical cognition, as its linguistic character and historicity. The issues of pre-understanding and the hermeneutical circle will also reappear continually. The point to be stressed is that all these properties confirm in some way the theory that hermeneutical cognition is indirect in nature.

The linguistic character of understanding. Phenomenologically oriented hermeneutics attached particular importance to the theory of the linguistic character of the process of understanding Let us recall that both Schleiermacher and Dilthey highlighted the primitive character of the philological aspect of all hermeneutics, and of every process of

understanding. According to Gadamer, the only being that can be understood is language. Knowledge of the world is possible only through the medium of language; language, in addition, determines the horizons of hermeneutical ontology. In Gadamer's view, language is not only the means through which we experience the world and the equipment with which we enter this world, but also an expression of our possession of the world. The boundary between language and the material world, which is distinct within other philosophies, loses its sharpness within phenomenological hermeneutics. Without going into the details of this relationship, we shall confine ourselves to observing that everything given to us in the process of understanding (in hermeneutical experience) is given through the medium of language. This thesis is accepted both by "old" and "new" hermeneutics. When seen from this philological (in others' view – analytical) perspective, hermeneutical cognition turns out to be fully discursive and thereby indirect.

A similar situation holds in relation to legal hermeneutics (it is worth noting that legal hermeneutics rarely goes beyond the traditional hermeneutics of texts – Kaufmann's philosophy of legal understanding is an exception). The understanding, interpretation and application of law always concern some entities of language (deontic sentences, rules or norms). At the level of interpretation, "what law is" is no more than a certain linguistic expression. A starting-point of the lawyer's work is in principle linguistic interpretation, though it is a matter of dispute whether this interpretation is made in a hermeneutical or analytical way (assuming that the division of these two approaches is at all practically viable). In either case, though, one has to appeal to a language, principles (semantic, syntactic and pragmatic) of that language, and different levels of rules of interpretation, which either already exist and are universally accepted and applied in similar cases, or which have to be formulated for the needs of an interpretative case. Thus, the assumption that the understanding of law is realized through the medium of language is equivalent to the assumption that hermeneutic cognition is indirect.

The historicity of understanding. The process of understanding has not only a linguistic but also a historical character. Gadamer stresses that hermeneutical experience, if examined beyond its historical context, would be a mere philosophical abstraction, and the very philosophy of understanding would be nothing more than a continuation of an earlier metaphysical philosophy which was questioned by phenomenology. The theory of the historicity of understanding is another argument in support of the view that hermeneutical cognition may be – and most

frequently really is – indirect. This is because, in this process, appeal is made to numerous historical assumptions, prior knowledge, and tradition, which should be applied (i.e. concretized and actualized) to a concrete interpretative case. According to Ricoeur, interpretation and tradition are two sides of historicity, and the chain: tradition – text – interpretation can be read in all possible directions.

The problem of historicity is of particular significance in the context of legal interpretation. It is connected with the important issue of the role of tradition in legal interpretation, and with the issue of "legal application" which is an integral component of hermeneutical experience, along with understanding and interpretation. Each process of understanding and application becomes an element of interpretative tradition. It is hard to imagine legal interpretation entirely beyond its historical context – beyond the tradition (shaped in the case of our continental system of law by two millennia), whose elements are constantly present in each interpreter's consciousness. An interpreter enters "an interpretative situation" with previously acquired legal knowledge, intuitions, prior conceptions of basic legal institutions, her whole legal pre-understanding.

In the process of understanding and interpretation, an interpreter must apply this general historical knowledge to a concrete case, that is, she must concretize and actualize it. Ultimately, the essence of legal thinking (the understanding of law) will always be the process of concretizing, i.e. the application of an interpreted (understood) general text (general norm) to a concrete case. However, hermeneutical concretization cannot be reduced – at least in Gadamer's view – to a deductive operation. Legal hermeneutics emphatically abandons "the syllogistic model of legal application", and Gadamer himself stresses that understanding is concretization, which yet is connected with preserving hermeneutical distance, whatever that means.[40]

Besides concretization, the second condition of the understanding and application of law is actualization. It is true that appeals to the past (tradition) are made in the process of actualization, yet such appeals are intended to modify and change it, i.e. to adapt it to a concrete case, which "happens in the present". Legal hermeneutics supports dynamic accounts of the process of legal interpretation and application, and rejects psychological – subjective – accounts. Legal interpretation should result in "adapting the law to the requirements of life". The velocity of changes taking place in social and economic reality makes the operation of actualization necessary. The interpretation of law which is to assist in reconstructing – in the name of legal constancy and safety – the will of

a historical legislator is not acceptable from the standpoint of legal hermeneutics.

Ultimately, the fact that understanding has the property of historicity entitles us to assert that in many, or most, cases hermeneutic cognition will fail to have a direct – purely intuitive – character.

Pre-understanding and the hermeneutical circle. Further justification for the view that hermeneutic cognition is indirect appears to flow from considerations devoted to pre-understanding and the hermeneutic circle. It is important not to formulate fixed opinions as far as the problem of pre-understanding is concerned: on the one hand, one may appeal to this concept in order to prove that hermeneutical cognition is direct, provided that one defines pre-understanding as an intuitive capacity to know the very essence of things – capacity making no use of any prior knowledge; on the other hand, one may appeal to it in order to prove that hermeneutic cognition is indirect, provided that pre-understanding is understood as a historically conditioned, prior knowledge.

One should also refrain from formulating firm opinions about to the hermeneutic circle. If the methodological version of the principle of the hermeneutical circle is assumed, one may assert that this principle confirms unequivocally the thesis that hermeneutic cognition is direct. This principle is an interpretative principle – an element of a broader and informally understood humanistic and legal logic. The situation will look different if one assumes the phenomenological version of this principle: in this version, the hermeneutic circle is a description of an ontological and structural moment of understanding, rather than a methodological principle capturing a cognitive moment; in Heidegger's terminology, it is expressive of the pre-structure of *Dasein*. In this account, the hermeneutical circle, like pre-understanding, is at best one of those properties of the process of understanding which decide about the direct character of hermeneutic cognition.

5.4.3 Applications

One reason why legal hermeneutics may preserve its claim to universality is that it may constitute a starting-point – or at least an element – of each cognitive process connected with the law, irrespective of the level of generality of theses formulated during this process. By means of hermeneutics one may perform practical tasks, i.e. make legal interpretations, make legal decisions and justify those decisions. Hermeneutics can also be applied in legal dogmatics (a theory of dogmatics), making it possible to formulate and justify theses which may be reasonably

defended only when "the hermeneutic approach" is accepted. Finally, hermeneutics enables one to build a certain type of legal philosophy or theory. The possible presence of hermeneutics on all levels of a lawyer's cognitive activity (practical, dogmatic and theoretical) seems ultimately to confirm the claim to universality raised by this philosophy of interpretation.

Let us start from the level of practical applications. We shall not appeal to concrete cases for that would require value judgments to be made regarding which cases are more, and which less typical of hermeneutics. Besides, the facts of a concrete case and an interpreter's attitude, rather than some prior "hermeneutical intention" often determine "the hermeneutical character of interpretation". Legal hermeneutics, like other humanistic hermeneutics, has always been presented as a theory (art) of textual interpretation and understanding. Until the eighteenth century it was hardly possible to separate hermeneutical "theories" from other theories. Only in the nineteenth and twentieth centuries did legal hermeneutics become a more specific philosophy of interpretation. Within this philosophy, the problem of understanding is emphasized, and understanding (at least within phenomenologically oriented hermeneutics) is identified or treated as synonymous with interpretation and application. Legal thinking also becomes enriched by "new" hermeneutic concepts, such as the hermeneutic circle, concretization and actualization. Hermeneutics becomes one of the basic points of reference for all the problems that appear in contemporary theories of interpretation. Linguistic interpretation can be performed either in an exclusively analytical (linguistic), or in an analytical–hermeneutical way, and in our view, it is difficult to conceive of any third possibility. Whilst making systematic or functional interpretations, in turn, one uses, albeit often unconsciously, hermeneutical methods.

Thus, the principle of the hermeneutical circle, upon which systematic interpretation is in fact based, is used and appeal is made to the hermeneutical account of the processes of concretization and actualization. The only reasonable alternative for an interpreter is resort to the analytical (analytical-positivistic) approach. The point to be stressed, though, is that the difference between this approach and the hermeneutical one is not as substantial as it may at first seem to be. Legal hermeneutics too has many interesting things to say about the issue of application. Application is regarded, first, as synonymous with interpretation and understanding, and, second, as reducible to the following two operations – concretization and actualization. In this context, hermeneutics provides truly original and at the same time really interesting insights:

hermeneutical concretization has nothing in common with the positivistic conception of syllogism, neither does actualization reflect the dynamic (objective) theories of interpretation advanced, for instance, by adherents of legal realism. These facts underlie the originality of the hermeneutical account of the legal decision making process (*Rechtsfindung*, *Rechtsgewinnung*), law's application (*Rechtsanwendung*, *Rechtsapplikation*), and realizing the law (*Rechtsverwirklichung*). Finally, hermeneutics enables an interpreter to make an interpretation on an "existential level". A need for this kind of interpretation arises in hard cases, where standard methods do not suffice to make an acceptable legal decision; in such cases, an interpreter can only appeal to ontological analysis, i.e. reach to the very essence of the process of understanding – to individual existence (*Dasein*).

Hermeneutical interpretation can also be used in the course of formulating and justifying the tenets of the theory of legal dogmatics. As mentioned earlier, such attempts were made many times in the contemporary science of law within different legal disciplines. The phenomenological analysis of such concepts as, for instance, "claim", "obligation", and "promise" made by Reinach can be used in particular in a theory of civil law. Hermeneutics, as proposed by Esser and Larenz, can be successfully applied in different dogmatic disciplines, especially in civil and penal law. Hinderling examined the possibility of applying general – Gadamer's – hermeneutics in the interpretation of constitutional law, and Hassamer suggested building hermeneutics which might be applied above all in penal law.[41]

Finally, hermeneutics was also used – on a theoretical level – as a method of philosophy and legal theory. In some cases, it was a method, in others a kind of cognitive attitude, whilst in still others it was an entirely autonomous type of legal philosophy. Hermeneutics was described by Betti as a method of the humanities and jurisprudence, and many representatives of *Methodenlehre* (e.g., Engisch, Larenz, Esser) treated it as a cognitive attitude. It was conceived of as a type of legal philosophy by Reinach (the author of the purely phenomenological philosophy of law), Gadamer (who also tackled the problem of legal hermeneutics) and – above all – by Kaufmann.

In relation to the hermeneutical philosophy of law, there arose many misunderstandings and absurd opinions stemming both from the lack of clarity in hermeneutics itself, and from the lack of competence of those who attacked it thoughtlessly and aggressively. Hermeneutics introduced into legal thinking and legal philosophy many new elements (deserving of more careful examination than has thus far been carried out by

various authors) and new questions which most probably cannot be given definitive answers. Thus the views and conceptions of such authors as Reinach, Esser, Larenz, Kaufman, cannot be dismissed as superficial in contemporary philosophies of law. Reinach's excellent phenomenological analysis of the concept of law and other fundamental concepts of the science of law, and Kaufmann's hermeneutical account of law as an ontologically complex object may confirm this thesis.

In conclusion, whether hermeneutics is liked or otherwise, it has become one of the most important, most broadly discussed and, at the same time, most controversial methods of contemporary humanities and jurisprudence. Hence the reason this specific philosophy of interpretation could not be discounted in the present discussion of jurisprudential methods.

NOTES

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2. J. Stelmach, *Die hermeneutische . . ., op. cit*., p. 50 ff.
3. H. Coing, *Die juristischen Auslegungsmethoden und die Lehre der allgemeinen Hermeneutik*, Köln-Oppladen, 1959, p. 8.
4. J. Stelmach, "Die inntuitive Grundlagen der Jurisprudenz", in H. Bauer, D. Czybulka, W. Kahl, A. Vosskuhle (editors), *Umwelt, Wirtschaft, und Recht*, Tübingen, 2002, p. 161 ff.
5. P. Ricoeur, *Egzystencja i hermeneutyka. Rozprawy o metodzie* (Existence and Hermeneutics. Discourses on Method), Warszawa, 1985, p. 195 ff.
6. W. Dilthey, *Pisma estetyczne* (Writings on Aesthetics), Warszawa, 1982, p. 304.
7. F. E. D. Schleiermacher, *Hermeneutik aund Kritik*, Frankfurt am Main, 1977, p. 75.
8. The representatives of phenomenological hermeneutics criticized this view, treating it as a manifestation of unjustifiable psychology. See P. Ricoeur, *Existence . . ., op. cit*., p. 314.
9. F. E. D. Schleiermacher, *Hermeneutik . . ., op. cit*., p. 187.
10. W. Dilthey, *Writings . . ., op. cit*., p. 316.
11. H. Lipps, *Untersuchungen zu einer hermeneutischen Logik*, 4th ed., Frankfurt am Main, 1976, p. 20 ff, p. 115 ff; also O. F. Bollnow, *Studien zur Hermeneutik*, vol. II, *Zur hermeneutischen Logik von Misch und Lipps*, München, 1982.
12. J. Stelmach, *Die hermeneutische . . ., op. cit*., pp. 44–45.
13. H. Coing, *Die juristischen Auslegungsmethoden . . ., op. cit*., p. 22 ff.
14. K. Larenz, *Methodenlehre der Rechtswissenschaft*, 5th ed., Berlin/Heidelberg/New York/Tokyo 1983, p. 185 ff.
15. J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungspraxis*, Frankfurt am Main 1970, 93 p. ff, p. 136 ff.
16. E. Forsthoff, *Recht und Sprache. Prolegomena zu einer richterlichen Hermeneutik*, 2nd ed., Darmstadt, 1964., K. Engisch, *Logische Studien zur Gesetzesanwendung*, 3rd ed., Heidelberg, 1963, K. Engisch, *Einführung in das juristische Denken*, 8th ed.,

Stuttgart, 1983, F. Müller, *Juristische Methodik*, 2nd ed., Berlin, 1976, M. Kriele, *Theorie der Rechtsgewinnung*, 2nd ed., Berlin, 1976.

17. M. Heidegger, *Sein und Zeit*, 9th ed., Tübingen, 1967, p. 39.
18. M. Heidegger, *Über den Humanismus*, Frankfurt am Main 1949, p. 5.
19. E. Coreth, *Grundfragen der Hermeneutik*, Freiburg–Bael–Wien, 1969, p. 99.
20. H. G. Gadamer, *Wahrheit und Methode. Grundzüge einer philosopischen Hermeneutik*, in *Gesammelte Werke*, vol. I, Tübingen, 1986, p. 312 ff.
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22. H. G. Gadamer, *Wahrheit und Methode. Grundzüge . . ., op. cit*., p. 312 ff.
23. H. G. Gadamer, *Wahrheit und Methode. Grundzüge . . ., op. cit*., p. XXIX.
24. P. Ricoeur, *Existence. . ., op. cit*. p. 190.
25. P. Ricoeur, *Symbolika zła* (Symbolism of Evil), Warszawa, 1986, p. 12.
26. P. Ricoeur, *Existence . . ., op. cit*., p. 19 ff.
27. J. Stelmach, "Intuicja prawnicza" [Legal Intuition], in *Dziedzictwo prawne XX wieku*, Kraków, 2001, pp. 35–36.
28. A. Reinach, *Zur Phänomenologie des Rechts. Die apriorischen Grundlagen des bürgelichen Rechs*, 2nd ed., München, 1953, pp. 11–12.
29. Reinach, *Zur Phänomenologie des Rechts . . ., op. cit*., p. 21.
30. G. Husserl, *Recht und Zeit. Fün rechtsphilosophische Essays*, Frankfurt am Main, 1955, pp. 7, 14, 23, 42, 76.
31. W. Maihofer, *Recht und Sein. Prolegomena zu einer Rechtsontologie*, Frankfurt am Main, 1954, p. 1 ff.
32. H. G. Gadamer, *Wahrheit und Methode. Grundzüge . . ., op. cit*., vol. I, pp. 334 and 346.
33. A. Kaufmann, "Problemgeschichte der Rechtsphilosophie", in A. Kaufmann/ W. Hassemer (editors), *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart*, 4th ed., Heidelberg, 1985, p. 122.
34. A. Kaufmann, "Vorüberlegungen zu einer juristischen Logik und Ontologie der Relationen. Grundlegung einer personalen Rechtstheorie", in *Rechtstheorie 17* (1986), 258 ff; A. Kaufmann, "Die Geschichtlichkeit des Rechts unter rechtstheoretisch-methodologischem Aspekt", in *ARSP Beiheft II* (1988), p. 114 ff.
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37. Kaufmann, "Über die Wissenschaftlichkeit der Rechtswissenschaft", in *ARSP* LXXII/ IV (1986), p. 442.
38. W. Hassemer, *Tatbestand und Typus. Untersuchungen zur strafrechtlichen Hermeneutik*, Köln/Berlin/Bonn/München, 1968, H. G. Hinderling, *Rechtsnorm und Verstehen. Die methodischen Folgen einer allgemeinen Hermeneutik für Prinzipien der Verfassungsauslegung*, Bern, 1971, J. Stemach, *Die hermeneutische . . ., op. cit*., Ebelsbach, 1991.
39. J. Stelmach, *Die hermeneutische . . ., op. cit*., p. 78 ff.
40. H. G. Gadamer, *Wahrheit und Methode. Grundzüge . . ., op. cit*., vol. I, p. 335 ff.
41. See A. Reinach, *Zur Phänomenologie des Rechts . . ., op. cit*.; J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung . . ., op. cit*.; K. Larenz, *Methdenlehre der Rechtswissenschaft . . ., op. cit*.; H.G. Hinderling, *Rechtsnorm und Verstehen . . ., op. cit*.; W. Hassemer, *Tatbestand und Typus . . .., op. cit*.

CHAPTER 6

METHODS OF LEGAL REASONING FROM A POSTMODERN PERSPECTIVE

6.1 A SUMMARY

At the end of the book we would like to make an attempt – hopefully a justified one – to summarize and review our analyses. First, we would like to look at our considerations from a broader perspective which includes those stances that have not been given due attention above. Second, we would like to provide additional justification for the choices we made and guard against some obvious objections. Finally, we would like to offer some conclusions concerning the methodology of law that follow, we believe, from our considerations.

Arbitrariness

Let us begin with the objection that stresses the arbitrariness of the choice of methods we present. We have already dealt with this issue in Chapter 1. Here, we would like to restate those observations adopting a considerably broader perspective. Observe that the choice of methods presented – although arbitrary to certain extent – is not accidental. If we were to compose a list of philosophical conceptions of thinking (not necessarily legal, but thinking in general), it would most certainly include logic, analysis, argumentation and hermeneutics. Moreover, it is difficult to think of any other philosophical approach that would make an obvious addition to the list. Anyway, any such addition would be objectionable.

Metatheoretical Perspective

This general remark is closely tied up with two further problems. First, the four described methods should not be considered as "technologies of interpretation". We have rather presented the possible bases on which a coherent theory of law and a method of interpretation can be constructed. Our claim is not the simple one that lawyers or theoreticians of law can use logic, analysis, argumentation or hermeneutics. This thesis is true only in the sense that the four stances are "platforms" on which a coherent and applicable method or technique of interpretation can be built. Second, we claim that all such techniques are ultimately reducible to one of the four perspectives or to a combination thereof.

The acceptance of such assumptions leads to the result that our analyses are not confined to the philosophy and theory of law. We believe that the presented methods determine the boundaries of any possible theory of humanistic interpretation. Naturally, the examples we offered as well as the problems we addressed concerned mostly legal discourse. We tried to show, however, that the legal applications of logic, analysis, argumentation and hermeneutics are based on more general conceptions, which in turn are applicable to all humanistic disciplines. It is noteworthy that this can be shown in connection to considerations concerning legal methods. It stems from the fact, we believe, that among the humanistic methodologies, methodology of law is particularly well developed. Heated debates concerning the very existence of a method in law have been raging at least since the nineteenth century. In such circumstances "the methodological consciousness" of lawyers and legal theoreticians is particularly sensitive.

Relationships Between the Methods: The Three Theses

The next important issue to consider is the problem of the relationships between logic, analysis, argumentation and hermeneutics. We have addressed it in detail in Chapter 1. Here, a more systematic account will be offered. The issue can be resolved with one of the following three theses.

Let us begin with the weakest thesis. One can maintain that logic, analysis, argumentation and hermeneutics "have something in common" because they aim to account for the same phenomenon, i.e., the phenomenon of thinking. This is a very simple solution, and does not explain much. It shows, however, why some operations of intellect may be treated as manifestations of the application of two different methods, e.g., argumentation and hermeneutics. Such an account results in serious difficulties. For instance, as we have tried to show in Chapter 2, logic cannot provide a basis for constructing a complete theory of legal reasoning, as it is concerned only with one aspect thereof, i.e., the formal aspect. Moreover, a conception that explains the interconnections between logic, analysis, argumentation and hermeneutics by the fact that all four concern the same phenomenon, does not contribute to the understanding of what those interconnections consist in.

The second thesis reads: logic, analysis, argumentation and hermeneutics are complementary theories of legal reasoning. The complementariness thesis can be interpreted in two ways. First, one can maintain that the four enumerated methods deal with different aspects of legal reasoning. Such an interpretation is justified, e.g., by the relationship that holds between logic and analysis or logic and argumentation. For instance, in

Alexy's theory of argumentation the rules of classical logic are fully observed but the theory amounts to more than that. The postulate of applying the laws of logic is only one of the rules of rational discourse, all of which have to be observed to obtain a rational practical decision. However, not all of the four basic methods are complementary in the analyzed sense. For example, hermeneutics aims at describing complete human cognitive activities, not only their aspects.

Second, the complementariness thesis can be understood as follows: different methods are applicable to different legal cases. On this account the simplest ("algorithmic") cases are solved with the use of logical and analytic methods, more difficult cases with the use of argumentation techniques, while the hardest require hermeneutic intuition. The obvious weakness of such a solution is the need to justify why different legal cases are solved with the use of different standards of reasoning. Moreover, the distinction between simple and hard cases is problematic – or, anyway, is a matter of degree.

The third thesis concerning the interconnections between logic, analysis, argumentation and hermeneutics says that the tools offered by the four philosophical stances should be combined to construct a coherent method of legal reasoning. In particular, the combination of logic, analysis and argumentation seems to suit such a construction. This idea is realized, at least to certain extent, in Alexy's theory as well as in the conception presented in Chapter 4. The problem is that if we assume that there exists only one correct "hybrid" method, we must then ask, what the criterion is for establishing its correctness.

We are far from advocating one of the three theses, although the first seems too trivial, and the third – at least from the general philosophical perspective – too strong. We propose, instead, to look at the four methods as possible bases for constructing concrete conceptions of legal reasoning. One can wonder, of course, what criteria should be met by such a conception. We claim that it is relatively easy to name at least two of them: first, the conception should be coherent; and second, it should serve its function, i.e., determine when the minimal requirement of rationality of legal reasoning is fulfilled.

The general aim of our analyses made it difficult to base the presentation of the four methods on particular examples of legal reasoning. Making use of examples – especially as regards argumentation and hermeneutics – would be difficult for numerous reasons, not least because it is relatively easy to choose examples justifying any thesis. On the other hand, it is impossible to treat every type of legal case separately. The strength of the methods we presented lies in the fact that they can

help us to deal with hard cases, i.e., those that are unlike any known case and, consequently, are difficult to imagine. In other words, our aim was to present a set of tools and criteria for choosing between them in order to show how to deal with any legal problem; we did not try to argue that a given method suits a given class of legal cases.

Let us repeat: it was not our task to construct a coherent "technology of interpretation". We aimed to present a general philosophical framework within which such "technologies" can be constructed. Because of that, we were unable to analyze all the bottom-line consequences resulting from adopting one of the four conceptions.

6.2 DILEMMAS OF THE CONTEMPORARY PHILOSOPHY OF LAW

Our analyses were therefore metatheoretical in character. We believe that such analyses are of extreme importance as they are often neglected in the legal-theoretic considerations. The contemporary philosophy of law, particularly the Anglo-Saxon version, is usually based on a set of tacit assumptions, both methodological and ontological. It suffices to say that British and American legal theorists confine themselves very often to the methods and techniques of analytic philosophy. We do not claim that this is a mistake. We would stress that it is not the only possible approach and that a certain level of "methodological consciousness" requiring metatheoretical reflection can only help us in legal-theoretic undertakings. The situation of the "continental" philosophy of law is even worse: with minor exceptions, it is practiced either *modo analitico*, in connection to the Anglo-Saxon conceptions, or with the use of the tools offered by postmodernism, broadly understood. This is a very limiting alternative.

Contemporary Positivism

In order to substantiate the above stated claims let us have a closer look at some of the contemporary debates in the philosophy of law. We believe that many of the problems with which legal theorists are preoccupied today result from the lack of methodological rigor. It seems that the most hotly debated subject of the contemporary philosophy of law is the soundness of positivism. In this context, the first problem is the very definition of legal positivism. One can maintain, however, at least with some degree of adequacy, that the contemporary positivists defend the following three theses: (1) the so-called *social sources thesis*, which says that it is social practice or social facts that constitute the sources of law, (2) the so-called *conventionality thesis,* according to which criteria of legal validity

are conventional, and (3) the so-called *separability thesis,* which claims that there is no necessary connection between law and morality, i.e., moral criteria do not constitute a "test of validity" of legal norms.[1]

All those theses have their strong opponents and advocates. Among the opponents one should mention Dworkin who argues that any legal system consists not only of rules but also certain standards, of which some (principles) are of moral pedigree. Dworkin shows that hard cases, such as *Riggs vs. Palmer* described in Chapter 2, cannot be explained within the positivistic conceptual scheme. The court that decided not to grant Elmer Palmer rights to his inheritance acted according to a legal principle, which had not been explicitly enacted by the legislator and has an obvious moral provenance.[2]

The soundness of Dworkin's arguments is questioned by the so-called "soft" positivism. According to this account, the separability thesis says only that there is no necessary conceptual relationship between legal and moral rules. The thesis says nothing, the advocates of soft positivism argue, about their actual relationship. The distinction of two levels – the conceptual and the factual – leads, however, to serious troubles. One of them is pointed out by Raz.

According to Raz there is one feature of law that makes the distinction between the conceptual and the factual untenable. He argues in the following way. At the outset he distinguishes between two kinds of reasons: those that justify beliefs and those that justify actions. The latter concern the sphere of the practical and are reasons "for a person to perform an action when certain conditions obtain".[3] Among reasons Raz distinguishes between first-order (reasons for action) and second-order (reasons for acting for a reason) reasons.[4] The second-order reasons can be of two kinds: positive (reasons to act for some reason) and negative (reasons not to act for some reason). The latter are called exclusionary reasons.

Within this conceptual scheme Raz defines rules: they are a combination of a first order reason to act and an exclusionary reason. They instruct us, therefore, to act in a certain way and to ignore other reasons for action.[5] Raz maintains, furthermore, that law has a claim to authority. This metaphorical expression means that law is a social institution that consists of rules. In other words, the authority of law displays itself in the fact that it provides us not only with reasons for acting but also with exclusionary reasons not to act in the opposite way. It follows from it, that for law to remain law, i.e., to realize its claim to authority, it has to be understood as a social fact independent (both conceptually and actually) from moral norms.[6]

Conclusions

We believe that the contemporary debates concerning positivism are, to a great extent, futile. There are different arguments justifying this opinion. First, the participants of the debate are trying to answer an ontological question (what is law?) without assuming any particular ontology. The discussions are carried out without taking into account what the contemporary ontology has to offer. Moreover, some philosophers, e.g., Raz, claim that their aim is to capture "the nature of law". Only a very peculiar interpretation of the term "nature" can save us here from serious philosophical problems, as looking for the "nature of law" presupposes both a kind of intellectual intuition capable of grasping "essences of things" and the essences themselves. Such a solution is, naturally, acceptable but only within a concrete philosophical stance, e.g., phenomenology. But Raz and his advocates do not go that far.

Second, the very idea of asking ontological questions may be put into doubt. Although one can maintain that ontological decisions are important for developing a coherent conception of legal reasoning, adopting the question "What is law?" as the starting point of any philosophizing concerning law may seem a bad choice.

6.3 THE EPISTEMOLOGICAL APPROACH

Ontological debates lead, ultimately, nowhere. The strength of arguments backing rival conceptions is very often equal or incommensurable. Furthermore, there is no commonly valid metatheoretical criterion of determining "the right" ontology of law. The same may be said of legal axiology. Some values are contrasted or compared with others but the discussion inevitably leads to ontological dilemmas. It seems natural and justified, therefore, to turn towards epistemology. When it is impossible to construct a commonly acceptable philosophy of law (or, in other words, answer to the question "What is law?"), there remain only epistemological considerations. But two questions follow immediately: is the choice of epistemology which is released from the chains of ontology fully free or even possible? Consequently, should we assume that the process of legal cognition is indeterminate, dynamic and creative and hence it is impossible to determine the limits thereof?

The Limits of Legal Cognition

A positive answer to both questions posed at the end of the previous paragraph leads to serious consequences, which sound unintuitive for traditionally trained lawyers. Such a solution makes us believe that

theory of law (or jurisprudence) is a discipline without the "Archimedean point of departure" (no matter how we understand it), which in turn leads to cognitive or interpretational relativism. This stance is accepted, at least to a certain extent, in some of the conceptions presented in Chapter 1, namely the theories of Kirchmann, Hutcheson, some phenomenological versions of hermeneutics and Critical Legal Studies. For Kaufmann, a main representative of "ontologically oriented" legal hermeneutics, legal cognition is completely intuitive, dynamic and creative. Similar theses are advocated within some postmodern conceptions, which question all kinds of ontological or epistemological *aprioricity*. Is this approach justified?

We believe it is not justified for the following reasons. First, it is impossible to separate completely legal epistemology and ontology. Even if the radical Kantian assumption concerning the unknowability of the "thing in itself" (*Ding an sich*) is accepted, we have to admit that this thing has at least an indirect influence on our cognitive acts. In consequence there is no pure (i.e., free from ontological assumptions) legal epistemology. Moreover, no one would question the thesis that almost all people have very strong, "archetypical" convictions concerning "the nature of law" as well as a number of ontological intuitions which influence the choice of legal methodology. Second, the choice of epistemology results in a limitation of the number of applicable methods or techniques of interpretation. Therefore, after an epistemological (methodological) choice is made, it is not justified to speak of a total interpretational freedom. Finally, we believe that there exist at least two easily distinguishable – if not opposite – discourses in law: theoretical and practical. Their epistemological peculiarity limits severely our freedom of choosing methods and techniques of interpretation.

Two Discourses

The limits of legal thinking or, in other words, of any possible legal epistemology are determined by two discourses: theoretical and practical. The theoretical discourse is based on the criterion of truth, while the practical takes advantage of "softer" normative criteria: rationality, reasonableness, justice, validity or efficiency. Both discourses interlace, but they do not interfere with one another. We make transitions from the theoretical to the practical or *vice versa*. The lack of recognition of the fundamental differences between the two discourses is, so we claim, the source of many futile debates in the philosophy of law. The thesis that the findings of theoretical discourse are the sole basis for normative decisions is mistaken and leads to some forms of cognitivism.

The opposite thesis is likewise false. Theoretical discourse enjoys certain influence on the practical. It is not, however, a logical connection. Practical discourse has to adjust to the results of the theoretical (the theses formulated within practical discourse must be consistent with the theses established by theoretical discourse). In other words, theoretical discourse sets the limits of any possible practical discourse. It is clear, therefore, that the relationship between the discourses is asymmetrical. Practical discourse (i.e., its limits and structure) depends on the findings of the theoretical but not *vice versa*.

Theoretical discourse. Theoretical theses are used both in legal practice and philosophy. The theses are formulated within the legal theoretical discourse, which is autonomous in relation to the practical. This autonomy results from the fact that the theoretical discourse is "governed" by the criterion of truth, "stronger" and more precise than the criteria of evaluating the findings of practical discourse. Theoretical discourse is, furthermore, purely "scientific". The contemporary philosophy of science shows that it does not mean complete certainty. Nevertheless, the successes of science make us believe that the theses of theoretical discourse at least "approach the truth".

Practical discourse. Practical discourse is not completely autonomous, as it is carried out within the limits imposed by the theoretical discourse. It is likewise not purely "scientific", as it uses criteria other than truth (i.e., rationality, reasonableness, etc.). The particularity of practical discourse results from two distinct, but interrelated facts. First, normative statements (directives, norms, rules) have a different epistemological status from the descriptive expressions: if they have meaning at all, they are not sentences which can be evaluated as true or false.[7] Second, the so-called hard cases have a very peculiar feature: they can have, we believe, more than one "right answer". The criterion of truth is replaced in this context with other, "softer" or less determinate normative criteria. The statements formulated within practical discourse cannot therefore meet the requirements which are set for scientific theories. Ultimately, it is the case at hand, skills and backgrounds of the participants of the discourse, level of interpretational complication of the case together with the social, political and economic contexts which decide – or at least influence – the choice of the method or technique of interpretation.

These remarks are not designed to show that within the practical discourse there are no methodological constraints. As we have tried to show, some of those constraints result from the fact that we are dealing with a

practical – and not theoretical – discourse. Furthermore, once certain choices are made – regardless of how we arrive at them – the chosen method should be applied coherently and consequently.

The epistemological version of the philosophy of law consists therefore in distancing oneself from ontological debates, while insisting on conceptual discipline and realizing the importance of the distinction between practical and theoretical discourses.

6.4 UNFINISHED PROJECTS

The state of the post-modern (i.e., contemporary but not necessarily postmodern) philosophy and theory of law and a diagnosis thereof results in turning towards legal epistemology. One may ask: why is it so? We would like to suggest a somewhat provocative answer to this question. We believe that all the stages in the development of legal theory (or even of humanities), i.e., the "classical", the "modern" and the "postmodern", produced no more than certain unfinished projects. Consequently, the general "science" of law becomes slowly a relict – a discipline which is useless and usually misunderstood. Not needed by either lawyers or philosophers, it is still there through the long tradition and academic inertia. Most of its debates remind one of the scholastic discussions concerning the number of evils or angels that can be placed on the head of a pin. That is the reason why we have decided to present four basic methods – or methodological stances – which are still important for the humanistic methodology and, more importantly, are applied in actual legal cases.

We would like to conclude our analyses with a short reflection on three most important, albeit never completed, projects developed within the modern and contemporary philosophy and theory of law.

Classicism

The term "classicism" is rich in meanings, but occurs very rarely in legal-theoretic discussions. Let us use it to designate the "project" of the eighteenth and nineteenth centuries, founded on "classical philosophy", i.e., on scholasticism (in particular, Thomism), Enlightenment (Hobbes, Rousseau, Kant) and idealism ("Fichte", Schelling, Hegel). These philosophical conceptions share a belief in a supra-positive law (divine law or natural law). Naturally, there is more that divides those conceptions than unites them. It suffices to mention the sources of law, its justification etc. As a result, the project could not have been completed for three reasons. First, there were serious internal tensions within the project; in other

words, the diversity of ideas within it was irreconcilable. Second, it was philosophically "one-sided", as it paid its attention to the concept of natural law. Because of that, the project got old fairly quickly in face of the developments and changes in European social, political and economical reality of the nineteenth century. Third, at the same time there emerged rival conceptions, the majority being ostensibly critical towards the classical project and formulated in the spirit of modernity. In this context one should mention the German historical school and, especially, legal positivism.

Modernism

The modernistic breakthrough was a reaction to the political and economical changes in Europe in the nineteenth and at the beginning of the twentieth century. In such a context, legal theory's aim was to provide justification for the development of democratic societies, the systems of public security within the limits of the rule of law and the principles protecting the free market. Those ends were to be realized with the use of new legal-theoretic conceptions, which followed strict ontological and methodological rigors. In this way the tasks of the philosophy and theory of law were understood within legal positivism (both the continental in its various incarnations – *Gesetzespositivismus*, *Begriffsjurisprudenz*, normativism, and the analytically oriented positivism of Austin and Hart). The same may be said of legal realism, some schools of philosophical analysis and some conceptions of legal argumentation. There are many reasons of the crisis of the "modernistic project". First, one should mention the ontological extremism of the mentioned conception, the "fetishisation" of "one and only" account of what is law. Second, the methodological rigor of the modernistic project was too severe. Third, the high level of complication of at least some of the conceptions of interpretation developed in the twentieth century made them inapplicable in practice. Fourth, there were no rational criteria for choosing between rival theories of law.

Postmodernism

"Postmodernism" is a very fashionable word, but it is hard to say what signifies in relation to the philosophy and theory of law. It can even be asked whether there is such a thing as a "postmodern project" in those two disciplines. Postmodernism is, arguably, a reaction to modernism, an attempt to deconstruct, to use another fashionable word, all paradigms, particularly ontological ones. Instead of limitations and methodological rigors we get "free epistemology" in which "anything goes". One can use

any method which suits some social or individual ends. Interpretational decisions are made within an open, unlimited "narration". The elements of this way of thinking can be found in several contemporary conceptions of law and legal reasoning, such as Critical Legal Studies, Kaufmann's hermeneutics, Luhman's and Teubner's system theories and Habermas' discursive theory of law. Although this project is still alive – and even "fashionable" – we believe it will inevitably get the label "unfinished". There is a plethora of reasons for this. First, the project is placed in an ontological and methodological vacuum. It is based on a philosophy without any "Archimedean point", without any initial assumptions; hence, it is neither justifiable nor refutable. Second, postmodernism is a set of – sometimes totally – different, incoherent conceptions, so that one can even doubt whether it is a project (even in the very loose sense of the word which we apply here), or rather a number of ideas that can answer any question whatsoever. Third, some of the postmodern theories are formulated in very obscure and complicated language which disguises old conceptions and makes them appear fresh and original.

NOTES

1. Cf. S. Bertea, "On Law's Claim to Authority", *Northern Ireland Legal Quarterly*, vol. 52, no. 4, p. 402.
2. Cf. R. Dworkin, *Taking Rights Seriously*, *op. cit*., *passim*.
3. J. Raz, *Practical Reason and Norms*, London, Hutchinson, 1990, p. 19.
4. *Ibidem*, pp. 39–40.
5. *Ibidem*, pp. 39–48.
6. Cf. J. Raz, *Ethics in the Public Domain*, Oxford, Clarendon, 1994.
7. After 100 years of the debate concerning the meaning of normative statements, we believe that it is moderate noncognitivism that has the strongest argument behind it. Both cognitivism and extreme noncognitivism (e.g., emotivism) seem less persuasive.

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