LEGAL REASONING IN LEGAL INTERPRETATION

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Introductory Remarks

1. In the legal sciences and in logical analysis there are violent controversies between the formalist and antiformalist attitudes. Loosely speaking, the former asserts and postulates the necessity of formal logical thinking in law, whereas the latter denies it, stressing the role of necessarily more or less free evaluations and argumentative techniques. Both attitudes transcend the purely theoretical level and are deeply involved in the ideology of legal functions, assume some ideals as to what law and its operation should be.

In this controversy there is a manifest lack of sufficiently precise formulation of the complicated problems it involves, and of any neat separation between the conventionally postulated terminology, statements about facts and postulates for legal processes. Among legal processes relevant to the formalist-antiformalist controversy we can single out the interpretation of law and the application of law performed by the competent organs on the one hand, and the analysis, systematization and elaboration of the conceptual apparatus of the law in question by "dogmatic" legal sciences on the other.

All of these activities are to be approached from various points of view among which the construction of theoretical models, the description of actual processes and their evaluation are most prominent.

The scope of this paper is to present the formalist and antiformalist controversy about legal interpretation as the paradigm of legal reasoning. Legal interpretation is central to practical legal activities, and at the same time forms a focal point of any "legal dogmatics".

2. "Interpretation" is a term not restricted to the realm of law. We have, therefore, to go briefly over the principal meanings

of this term to precise the use we choose for our research.

First, there is "interpretation" *largissimo sensu* designating an understanding of all cultural objects. In this meaning, it plays a leading role in widely known types of methodology in which the "cultural sciences" or "humanities" are to be sharply differentiated from the "sciences". The former have to do with the objects cognized necessarily by their "interpretation", assigning them some cultural sense, whereas the latter treat their objects not as a culture, but simply as nature (1). One "interprets" here, e.g. works of art, written texts and all instruments form a paleolithic ax to a contemporary computer.

Secondly, there is "interpretation" *sensu largo,* used in connection with the expressions of written or spoken language, especially of legal texts. Any text has to be "interpreted" in the sense of assigning meanings to some complexes of certain physical objects, symbols or signs. Everyone uses a legal text if and only if he has in this sense "interpreted" it (2).

Thirdly, there is "interpretation" *sensu stricto.* This designates those situations when there is doubt about the proper meaning of a legal text and, therefore, when it cannot be used with an "immediately given meaning". Then, to eliminate these doubts the interpreter uses certain means to determine the meaning he is searching for (3). We are concerned with analogous situations

(1) Comp. e.g. for neokantian thought H. RICKERT, *Kulturwissenschaft und Naturwissenschaft,* Tübingen, 1911; for existentialist phenomenology C. COSSIO, *La teoria egologica del derecho y el concepto juridico de libertad,* Buenos Aires, 1964, 2 ed., p. 54-100; for the concept of general hermeneutics E. BETTI, *Teoria generale della interpretazione,* Milano, 1955, 2 vol.; the same author, *Die Hermeneutik als allgemeine Methodik der Geisteswissenschaften,* Tübingen, 1960; the same author, Una teoria generale della interpretazione, *Rivista intern. di filosofia del diritto 2,* 1965, p. 236-262. The general discussion of naturalist and antinaturalist attitude in the methodology of the humanities — comp. J. KIMTA, L. NOWAK, *Studia nad teoretycznymi podstawami humanistyki,* Poznań, 1968, chapt. I, II, V, VI.

(2) E.g. A. NAESS, *Interpretation and Preciseness,* Oslo, 1953, p. 45 and ff, Z. ZIEMBIŃSKI, *Logika praktyczna,* Warszawa, 1965, p. 254 and ff.

(3) E.g. J. WRÓBLEWSKI, *Zagadnienia teorii wykładni prawa ludowego,* Warszawa, 1959, p. 109-142; the same author, Semantic Basis of the Theory of Legal Interpretation, *Logique et Analyse,* 21/24, p. 404-

in using common language. The expressions of this language are as a rule understood immediately in standard situations, and only when doubts arise, does one use the rules of language to determine the doubtful meaning.

I shall use the term "interpretation" in the last mentioned meaning, because it seems to be the most handy for our present purpose. But it seems advisable to restrict further the scope of our investigation, since even within such interpretation *sensu stricto* there are many different varieties presenting quite essental differences from the theoretical point of view. We shall limit our interest to the so called "operative interpretation", that is to say, to an interpretation carried out by the State organ when deciding the case (4). Our standard example will be judicial activity within the system of statute law in contemporary systems. This does not commit us to any conceptions of the differences either between operative and doctrinal interpretation, judicial and authentic or legal interpretation, or the judicial activities in statute law and common law systems. This should only present an unjustified extraposition of our assertions, which should be made with due caution because of the differences existing between all kinds of exemplified interpretations, and measured by the assessed degree of these differences.

3. Legal interpretation in the sense determined above can be analyzed by using three principal kinds of "material": "psychological material", "decisional material" and a "theoretical material".

"Psychological material" means here the psychic process by which the interpretative decision is reached. This psychological or socio-psychological machinery is as interesting and vital for interpretative research as it is difficult to be dealt with. "Decisional material" is composed of the interpretative decisions

409; K. MAKKONEN, *Zur Problematik der juridischen Entscheidung*, Turku, 1965, § 5, C. Comp. G. GOTTLIEB, *The Logic of choice*, London, 1968, chapt. VII.

(4) Comp. E. FERRAJOLI, Interpretazione dottrinale e interpretazione operativa, *Rivista intern. di filosofia del diritto*, 1, 1966, p. 290 and ff. passim; J. WRÓBLEWSKI, Zagadnienia teorii wykładni..., *op. cit.*, chapt. III, § 1.

and justifications, if any, of these decisions. The area of this kind of material depends on the normatively prescribed and/or traditionally accepted ways of justifying interpretative decisions which form an important part of the so-called "style" of decision (5). This material is easily and intersubjectively accessible. Last but not least, there is the "theoretical model" as a theoretical construction of legal interpretation based on certain postulates heuristically evaluated. It is constructed so as to enumerate the particular steps of interpretative activity relevant for its theoretical analysis. It is based on certain assumptions as to the meaning of linguistic expressions used in law, determined by linguistic directives connected with particular contexts of an interpreted legal norm.

Interpretation could be, thus, analysed as a psychological process, as a result of this process in the form of a justified interpretative decision, or in the form of a theoretical model. Our starting point will be the last mentioned theoretical model, but we will have to use also data derived from "psychological material" and "decisional material".

4. The meaning (or meanings) of any expression of a given language is determined by the directives of meaning proper for that language. There are several kinds of such rules, but this is not the place to discuss them (6).

The language in which legal texts are formulated can be termed "legal language", which has some characteristics differentiating it from the common language of everyday life on a semantic and pragmatic though not on a syntactic level (7). For our present purposes, it will be sufficient to focus attention on the

(5) Comp. J. GILLIS-WETTER, *The Styles of Apellate Judicial Opinions*, Leyden, 1960, passim. K. LLEWELLYN, On the Good, the True and the Beautiful in Law, *The Univ. of Chicago Law Review*, 9, 1942, p. 224 and ff., 231 and ff., 244 and ff. H. DÖLLE, *Vom Stil der Rechtssprache*, Tübingen, 1949; H. TRIEPEL, *Vom Stil des Rechts*, Heidelberg, 1947, chapt. VII-IX.

(6) Comp. K. AJDUKIEWICZ, Sprache und Sinn, *Erkenntnis* 1934, p. 101-116.

(7) Comp. B. WRÓBLEWSKI, *Język prawny i prawniczy*, Kraków, 1948; J. WRÓBLEWSKI, *Zagadnienia teorii wykładni...*, *op. cit.*, chapt. V, § 2, G. KALINOWSKI, *Introduction à la logique juridique*, Paris, 1965, chapt.

directives of meaning which determine the meanings of expressions in legal language.

We can specify two kinds of such directives. First, directives which are binding both in legal language and in the corresponding language of everyday life. When the legal norm is "clear" (8) — that is, when there are no doubts concerning its meaning in a concrete fact situation decided by the court, then one usually employs such directives. We are not interested in such directives because they do not enter into the field of operative interpretation.

Secondly, there are directives specific to legal language. These directives are controversial because the meanings ascribed to norms with doubtful meanings by various interpreters are not consistent. From the interpreters' point of view these directives are the formulations of the semantic directives of legal language determining the "true" meaning of legal texts. From the point of view of the theoretical analysis, however, these directives are the rules of interpretative behaviour assumed as valid by the interpreter. These directives are the object of operative interpretation used to remove doubts as to the meaning of the legal norm in the decision-making process.

In the contemporary statute law systems the law-applying organ has to decide any case properly presented (9). Directives of legal interpretation have, hence, to be formulated in such a way that they enable us to determine the meaning of each legal norm, as the "true" and unique meaning, with a degree of precision sufficient for the needs of legal decision. This peculiarity is a consequence of the fact that the judicial decision-

II, § 2, 3; A. A. USZAKOW, *Oczerki sowietskoj zakonodatielnoj stilistiki /cz. I/*, Perm 1967, chap. II, III.

(8) The object of a legal interpretation is named "legal text", "legal provision", "legal norm", "legal rule" etc. For our purposes we adopt the term "legal norm" as a rule expressed in (or constructed of) a legal text formulated in a legal language.

(9) Comp. J. WRÓBLEWSKI, *Zagadnienia teorii wykładni...*, *op. cit.*, p. 104-106; A. G. CONTE, *Saggio sulla completezza degli ordinamenti giuridici*, Torino, 1962, p. 76 and ff., 95 and ff; P. FORIERS, Les Lacunes du droit (in) *Etudes de Logique juridique*, Bruxelles, 1967, vol. 2, p. 59 and ff.

maker has a legal duty to justify his decision in a given case by reference to a valid legal norm (or norms) [10]. If so, he cannot deny the decision stating that the legal norm in question has a meaning not precise enough to specify the legal consequences of the facts of the case, or stating that the norm has more than one meaning. It is evident, that the semantic directives of ordinary language are different, since there is no such necessity. Even in the doctrinal interpretation of legal norms, that is, an interpretation which can be performed from the point of view of an impartial observer, there is no such necessity — a scientific commentator can always say, that a norm has more that one meaning and that, therefore, a choice of one of them is determined by some extra-linguistic factors [11]. This is not the case with the operative interpretation we are referring to. This peculiarity of directives of interpretation has far-reaching effects on their formulation, on their operation and on the relation between evaluation and "pure" legal reasoning in interpretative process.

Directives of legal interpretation can be grouped in various ways. For us it will be sufficient to single out two basic groups — directives of the first and of the second degree — and to make in each of them certain subdivisions.

In legal language, as in many other languages, we have to apply a contextual approach, assessing the fact that the meaning of a linguistic expression is determined by the context of its use [12].

[10] The problems of the justification of legal decision by legal norms is discussed in J. WRÓBLEWSKI, *La règle de la décision dans l'application judiciaire du droit* (in print).

[11] Comp. e.g. N. BOBBIO, *Scienza e technica del diritto,* Torino, 1934, p. 40; Ch. B. NUTTING, The Ambiguity of Unambigous Statutes, *Minnesota L. R.,* vol. XXIV, 1940, p. 516.

[12] Comp. e.g. T. SEGERSTEDT, *Die Macht des Wortes,* Zurich, 1947, p. 37, 49, 53 and ff.; C. K. OGDEN and I. A. RICHARDS, *The Meaning of Meaning,* London, 1948, 8 ed., p. 23; Ch. MORRIS, *Signs Language and Behaviour,* New-York, 1946, p. 8 and ff. Discussion by A. NAESS, *Interpretation and Preciseness, op. cit.,* p. 112 and ff.; J. WRÓBLEWSKI, *Zagadnienia teorii wykładni..., op. cit.,* chapt. II, § 3.

Interpretative directives of the first degree are the rules indicating how the meaning of a legal norm is determined by the use of elements of fundamental contexts of this norm. There are three kinds of contexts relevant to the meaning of a legal norm: the language in which it is formulated; the legal system it belongs to; and the functional context of its operation, including various complex economic, political, cultural and other social factors of the genesis and operation of the norm in question. We call the groups of directives corresponding to fundamental contexts linguistic, systemic and functional directives of legal interpretation ([13]).

Interpretative directives of the second degree determine the use of the first degree ones and are divided into two groups. There are directives which regulate the use of the first degree interpretative directives stating the sequence in which they are to be applied and the conditions of their application (procedural directives). There are also directives which determine a preferential choice among various meanings assigned to legal norm as a consequence of the use of various sets of interpretative directives of the first degree (preferential directives) ([14]).

5. We can now construct the theoretical model of legal interpretation based on the assumptions stated in the earlier parts of the paper. It is constructed in a very simple way, but it is sufficient for our subject-matter ([15]). There are four stages of legal operative interpretation.

5.1. The first stage of the theoretical model is concerned with the starting-point of legal operative interpretation. As it has been said above the need of such interpretation arises when there is a doubt about the "proper" or "true" meaning of the norm to be applied in the case in question. But the doubt itself seems to be of an evaluative nature. The dilemma between "clear meaning" and "doubt", related to the old but controversial rule

([13]) J. WRÓBLEWSKI, *Zagadnienia teorii wykładni...*, *op. cit.*, p. 1143-147, 191 i n. Chapt. V, § 3, Chapt. VI, § 1, point 2, 3; point 1, B; § 3, point 2; chapt. VII.

([14]) ut supra, chapt. VIII, § 1.

([15]) ut supra, chapt. III, § 2.

"*interpretatio cessat in claris*" ([16]), cannot be solved by a simple "yes" or "no" ([17]).

5.2. The second stage consists in the use of the first degree interpretative directives, that is linguistic, systemic and functional directives, in the way determined by the procedural second degree interpretative directives.

If the result of this operation is the determination of the meaning of the norm in question with a required degree of precision, then one goes over to the fourth and last stage, that is to the formulation of the interpretative decision /5.4/. If the result is not satisfactory, one has to pass to the third stage /5.3/.

5.3. The third stage of our model takes place if and only if the results of an application of the first degree directives of interpretation are divergent, that is to say e.g. when the interpreted legal norm according to the linguistic directives has the meaning M_l, according the systemic directives has the meaning M_s and according to functional directives has a meaning M_f. The interpreter, then, has to choose between these divergent meanings and the choice has to be made according to the preferential interpretative directives of the second degree. The choice in question having been made, there remains one meaning assumed to be the "proper" or "true" one.

5.4. The last stage consists in the formulation of an interpretative decision asserting the "true" meaning of the norm in question. The interpretative decision is, of course, formulated in many ways. The standard formula for legal practice is "the norm N has the meaning M". It is significant that this formula does not mention the directives of interpretation because it is

([16]) V. G. FOSTERUS, *Interpres sive de interpretatione iuris libri duo*, Wittenberge, 1613, p. 385, 387, 418.

([17]) Comp. the views adhering to the rule cited above in the text e.g. W. F. CRAIES, *A Treatise on Statute Law*, London, 1936, 4 ed., p. 67; C. E. ODGERS, *The Construction of Deeds and Statutes*, London, 1952, p. 180; for opposed views comp. P. VANDER EYCKEN, *Methode positive de l'interprétation juridique*, Bruxelles-Paris, 1907, p. 18, 344 and ff. About the vagueness of "clear meaning" concept comp. Ch. B. NUTTING, *op. cit.*, p. 513 and ff.; M. RADIN, *Statutory Interpretation*, Harvard L.R. 43, 1929-1930, p. 881; E. BETTI, *Interpretazione delle legge e degli atti giuridici*, Milano, 1949, p. 183 and ff.

related to the idea that meaning in question is "the true", "the proper", "the objective" sense.

From the theoretical point of view, however, this formula has to be completed by a reference to the directives of legal interpretation and evaluations determining their use. There can be many formulas for expressing interpretative decisions. For our purposes it is sufficient to assume, that this decision can be reduced to the formula "The norm N has the meaning M in legal language J according to the interpretative directives D_1, D_2 ... D_n used in the manner determined by accepted valuations

$$\overset{D_1}{V_1}, \overset{D_1}{V_2}, \ldots \overset{D_1}{V_n}, \overset{D_2}{V_1}, \overset{D_2}{V_2}, \ldots \overset{D_2}{V_n}, \ldots \overset{D_n}{V_1}, \overset{D_n}{V_2}, \ldots \overset{D_n}{V_n}".$$

This formula of interpretative statement shows clearly the necessity of relating the asserted meaning to the group of interpretative directives and to the evaluations determining their use. The choice of these directives is based on evaluations but could be partly determined by the legal system the interpreted norm N belongs to. The same could be true also of the choice of evaluations determining their use.

There remains, however, always a more or less large lee-way for legal interpretation determined by characteristics of evaluations in question. There are also other factors influencing the interpretative discretion, such as the kind of legal system, the ways of formulating the interpreted legal norm, the normatively and/or practically determined ideology of the interpretative process and so on ([18]). Legal reasonings grasped by formal or argumentative logic always depend on these evaluation assumptions and can be controlled by any logic only within its scope.

6. There are several ways of approaching legal interpretation. Let us outline briefly three kinds of approach relevant to the formalist-antiformalist controversy, namely descriptive, evaluative and logical approach.

The descriptive approach is here defined as a description of the interpretative activity of a determined group of state organs within a determined time. Such description can be based on the

([18]) Comp. J. WRÓBLEWSKI, *Zagadnienia teorii wykładni...*, *op. cit.*, chap. IV, § 1 /4 A/.

material of decision and/or on the psychological material. One should not blur the differences between these two kinds of material. The former is confined to the formulation of decisions with their justifications. The latter is a description of psychic processes leading to an interpretative decision. The justification of the interpretative decision could be either an expression of the psychic process of reaching it, or only an *ex post* rationalization of the decision without any relation to the "real" reasonings of the interpretative process. From the descriptive point of view one can be interested in any of the two materials, but one must not confuse them.

There are three essential central areas which appear in the descriptive approach: first, the gathering of the relevant materials of interpretative behaviour, such as material of decisions or psychological material; second, the determination of the factors influencing the interpretative process and the formulation of the regularities, if any, governing them; third, the formulation of prognostic statements concerning the future interpretative behaviour, that is their general trends, and/or the determined future interpretative decisions (19).

7. The evaluative approach to legal interpretation consists in the evaluation of the interpretative behaviour and/or interpretative decision.

There are many possible varieties of such an evaluation, but let us enumerate the two most typical: first, an evaluation from the point of view of a determined set of interpretative directives; second, an evaluation from the point of view of an extra-legal axiological system.

The first kind of evaluation is the most common occurrence in the discussion of interpretative activities and interpretative decisions. The result of such an evaluation is expressed by the qualification of an interpretative decision in question as *secundum legem, praeter legem* or *contra legem*. It can be shown that these qualifications are misleading (20). They assume the objective existence of some "*lex*" with which the decision is com-

(19) ut supra, chap. III § 1 /3/.

(20) J. WRÓBLEWSKI, Interpretatio secundum, praeter et contra legem, *Państwo i Prawo* 4/5 1961, p. 615 and ff. passim.

pared. We have here, however, to do in fact with the comparison of two sets of meanings determined by the use of two sets of interpretative directives. A stricter terminology would be that of *interpretatio secundum, praeter* and *contra interpretationem.* The most typical case of evaluative controversy is that between the results obtained by the use of static and of dynamic theories of legal interpretation.

The second kind of evaluative approach depends of an extra-legal axiological system, e.g. moral system. One can qualify an interpretative decision as morally "good" or "bad". Without entering into details of how far such an evaluation refers to the interpreted legal norm itself and how far to the interpretative decision, one can see that there is an implicit postulate for a determined kind of interpretation which can be always expressed in the form of an interpretative directive. Analogous remarks can be formulated for such qualifications of interpretative decisions as "politically good (wrong)", "purposeless" ([21]) etc.

8. The third kind of approach consists in the treating of interpretative reasonings according to a logical system.

There are two kinds of necessary assumptions pertaining to the logic in question and to the interpretative process.

For the logic in question one has to assume (a) that there are formal logical calculi which can be "interpreted" (in the logical sense of this term) by norms ([22]) and other expressions appearing in formulations of interpretative reasonings by the formulae of this system ([23]) or (b) that there exist some determined rules of

([21]) Since there is the elusiveness and several kinds of "proliferation" of purposes (G. GOTTLIEB, *The Logic of Choice, op. cit.*, p. 109-114) the interpreter must take a choice of purpose and this choice always can be challenged.

([22]) Such an assumption is untenable e.g. from Kelsens latest views: he denies the admissibility of an application of the principle of contradiction and the principle of inference to legal norms. H. KELSEN, *Recht und Logik,* Forum, 12, 1965, p. 421 and ff., 495 and ff., the same author, *Derogation* (in) Essays in Jurisprudence in Honor of Roscoe Pound, Indianopolis-New York, 1962, p. 339 and ff. Discussed in A. G. CONTE, In margine all ultimo Kelsen, in *Studia Ghisleriana,* vol. Stud. Giuridici, Pavia, 1967, p. 113-125.

([23]) Comp. e.g. G. KALINOWSKI, *op. cit.*, chapt. III, §§ 3, 4; chapt. IV, § 3.

a logic of argumentation ([24]). Then one can test the validity of interpretative reasonings by the formulae of this system ([25]).

For the interpretation one has to assume (c) that the interpretative process is "rational". "Rationality" in this context is not easily defined and in many cases is not indifferent to the formalist-antiformalist controversy. For the formalist attitude rationality can be treated very narrowly, especially when identified with the fulfilment of the assumption (a) above formulated. Antiformalists seek a wider concept of rationality, more adequate to the intuitions of ordinary use — they speak about rationality of evaluations and of complex activities constituted by cognitive and evaluative elements such as creation, application and interpretation of law ([26]). One can say that operative interpretation is rational, when it is a function of two elements: of a knowledge of the applied norm and consequences of its application with different meanings, and of a system of values determining evaluations and preferences of the interpretative process (comp. point 7 below) ([27]). This assumption is valid at least for the material of decisions, when the decision is justified by the applied norms and accepted rules of legal interpretation. This assumption does not determine the kind of logic we have to do with here, but only the existence of logical criteria for testing the validity in question. If so, then these assumptions do not commit us to take an formalist or anti-formalist attitude provided we use the terms "justification" and "logic" in the widest meanings.

([24]) Comp. Ch. PERELMAN and L. OLBRECHTS-TYTECA, *La nouvelle rhétorique.* Traité de l'argumentation, Paris, 1958, vol. 2; Ch. PERELMAN, *Justice et Raison,* Bruxelles, 1963, chapt. XI, XIV, XVI; Th. VIEHWEG, *Topik and Jurisprudenz,* München, 1965, 3 Aufl.; J. STONE, *Legal System and Lawyers' Reasonings,* Stanford, 1964, chapt. VIII, §§ 7-9.

([25]) It was argued, however, that such kind of logic lacks any criteria for qualifying the rationality of reasoning. Comp. J. HOROWITZ, La logique et le droit, in *Etudes de logique juridique, op. cit.,* p. 51-52.

([26]) For the determination of the meaning of the term "rationality" in this context see G. GOTTLIEB, *The logic of Choice, op. cit.,* p. 29-31, 154-155, 164-173.

([27]) Such concept of the rationality of the operative interpretation is a species of a general concept of a rational behaviour comp. J. KMITA, L. NOWAK, *op. cit.,* p. 110-111. Compare also note 26 above.

9. In legal interpretation there are many evaluations relevant to the controversy between the formalist and anti-formalist positions we are interested in. All these evaluations can be grouped in three sets: first, evaluations as a starting point for the interpretative process; second, evaluative elements in the formulation of interpretative directives; third, the evaluative choice of interpretative directives ([28]).

9.1. Evaluations are the starting point of an operative interpretation. The assertion that an applied norm is "clear" or is "doubtful" depends on several factors. The main occurrences of such a doubt seem to arise in the following situations: (a) when because of a lack of a sufficient degree of precision in the terms of the norm in question it is not clear whether the particular case is covered by it or not; (b) when the norm in question, taken in its immediate understanding, would contradict other norms with acknowledged meanings or with their consequences; (c) when the application of the norm, taken in its immediate understanding according to the evaluations of the norm-applying organ, would be contrary to certain goals, unjust, contrary to equity etc.

The last mentioned situation under letter (c) is patently evaluative. One evaluates the immediate understanding of the legal norm in question, as contrary to accepted goals (instrumental evaluation) or as contrary to certain extra-legal axiological systems (as e.g. moral evaluations etc.). If one evaluates positively the meaning of the norm in question, in its immediate understanding, one declares this norm to be "clear" and, thus, interpretation takes no place. If, on the contrary, one evaluates it negatively, the interpretation is badly needed.

The second of the mentioned situations under letter (b) is based on the postulate of consistency of the legal system. If the need for consistency is granted ([29]), then the ascertaining of such

([28]) Comp. J. WRÓBLEWSKI, Właściwości, rola i zadania dyrektyw interpretacyjnych, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 4, 1961, p. 95-105.

([29]) For the discussion of the problems of consistency of legal systems comp. ed. Ch. PERELMAN, *Les Antinomies en Droit,* Bruxelles, 1965;

an inconsistency can have a purely linguistic character, not requiring any evaluations.

The first-mentioned situation under (a) can be a consequence of the characteristics of legal language, or a reflex of evaluations of the above-mentioned type. From a semantic point of view many terms used in legal norms have no clear-cut area of their designata and there is a "penumbra" in which there are doubts as to whether a given fact belongs, or does not belong, to the class designated by the term in question ([30]). Legal language, like ordinary language, has an "open texture" and, hence, the lack of precision seems unavoidable ([31]) "Penumbral problems" are an instance of interpretatory doubts, which can be, however, evaluatively tinted too. *Ex hypothesi* penumbral problems cannot be solved by purely semantical means, because of the lack of precision of the term in question. The solution, then, has to come from other sources, in which evaluations of several kinds play their part.

If so, then we can state, that the solution of the question whether the norm in question is "clear" or is "doubtful" depends at last in two typical situations on evaluations. The law-applying organ has always two possibilities — to declare the norm in question "clear" and to apply it with the meaning it has in its immediate understanding, or to qualify it as "dubious" and proceed to interpret it.

9.2. Interpretative directives are the rules for determining the meaning of legal norms or their parts. Investigating the evaluations in these directives we have to analyse them from two points of view.

G. GAVAZZI, *Delle antinomie*, Torino, 1959; J. WRÓBLEWSKI, *Zagadnienia teorii wykładni...*, *op. cit.*, chapt. VI, § 2, point 1. Comp. note 32.

([30]) Comp. H. L. A. HART, Positivism and the Separation of Law and Morals, *Harvard Law Review*, vol. 71, 1958, p. 607 and ff.; G. GOTTLIEB, *The Logic of Choice*, *op. cit.*, p. 101, 108 and ff. For empirical study of penumbra problem in the understanding of legal text comp. J. WRÓBLEWSKI, Zagadnienie jednolitości i pewności rozwmienia tekstów prawnych, *Państwo i Prawo* 3, 1966, p. 550 and ff.

([31]) H. L. A. HART, *The Concept of Law*, Oxford, 1961, p. 124 and ff. 132, 140, 143; Comp. F. WAISMANN, Verifiability, in ed. A. FLEW, Logic and Language, First Series, Oxford, 1951, p. 119 and ff.

Firstly, we analyze directives of legal interpretation taking into account how are determined the conditions in which the interpreter has to use these directives.

We have here two groups of directives: (a) directives unconditionally commanding certain interpretative activities; (b) directives commanding certain activities but providing certain conditions or exceptions; For example: (a) the interpreter has to use the syntax or grammar of the legal language ([32]); (b) directives commanding the ascription of the same meaning to the same term at least within the same legal act, with the exception of cases when for relevant reasons one has to ascribe different meaning ([33]); it is to be assumed that words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning ([34]).

The first group (a) is based on certain elementary characteristics of the legal system and legal language generally accepted in spite of controversies about their theoretical justification. These directives are, hence, value-free. The second group (b) is based mostly on "evidency", which can be linked either with "logical" elements e.g. consistency ([35]) or with properties of legal language ([36]) or with various evaluations such as "relevant reasons" or "clear reason" ([37]) etc.

([32]) Comp. e.g. J. WRÓBLEWSKI, *Zagadnienia teorii wykładni...*, *op. cit.*, p. 248 and ff.; MAXWELL, *On the Interpretation of Statutes*, London, 1962, ed. 11, p. 3; W. F. CRAIES, *op. cit.*, p. 149.

([33]) Comp. e.g. E. BEAL, *Cardinal Rules of Legal Interpretation*, London, 1896, p. 149. Ch. ODGERS, *op. cit.*, p. 191. Compare the "canon of singularity" C. K. OGDEN and I. A. RICHARDS, *op. cit.*, p. 88 and the observations of H.L.A. Hart on the "defeasible concepts" H. L. A. HART, The Ascription of Responsability, in ed. E. FLEW, *Essays in Logic and Language*, *op. cit.*, p. 148, 156.

([34]) MAXWELL, *op. cit.*, p. 3.

([35]) Comp. rules discussed by MAXWELL, *op. cit.*, chapt. VII; The most significant second degree interpretative directive dealing with cosistency in the so-called "The Golden Rule" comp. J. WILLIS, Statute Interpretation in a Nutshell, *Canadian Bar R.*, 1, 1938, p. 12; E. R. HOPKINS, The Literal Rule and the Golden Rule, *The Canadian Bar R.*, 1937, p. 695.

([36]) Comp. rule cited to note 34.

([37]) Comp. MAXWELL, *op. cit.*, p. 12.

Secondly, we analyze directives of legal interpretation taking into account how is determined the manner in which the interpretative activity has to be made. From this point of view directives of interpretation form a very heterogeneous group indeed. For us it is sufficient to point out that there are many directives which necessitate evaluation, e.g. the interpreter has to consider all the norms related to the interpreted norm ([38]), has to avoid injustice ([39]) etc. There are evaluations of many kinds involved here.

We can state, then, generally, that interpretative directives are, with certain exceptions, dependent on evaluations. An interpreter has to evaluate in order to use them. This fact is quite widely known and serves as an argument in the discussion about the role and function of these directives in the law-interpreting and law-applying processes.

9.3. Directives of legal interpretation can be grouped into complexes called normative theories of legal interpretation. These theories form a coherent sample of directives sufficient to solve any interpretative problems. There are many ways of classifying normative theories of legal interpretation. The most important for us is, however, a classification having as its criterion the basic values of interpretation ([40]).

We have, then, on the one hand static theories and on the other dynamic theories. The former assume basic values of legal security, legal certainty and legal stability, the latter

([38]) Comp. W. F. CRAIES, *op. cit.*, p. 125 and ff.; MAXWELL, *op. cit.*, p. 32-37.

([39]) Comp. MAXWELL,, *op. cit.*, p. 193, 200 and ff.; J. WRÓBLEWSKI, Oceny i normy moralne w wykładni prawa, *Zeszyty Naukowe Uniwersytetu Łódzkiego, nauki hum.-społ.*, ser. I, 22, 1961, p. 8-18; E. WASKOWSKI, *Teoria wykładni prawa cywilnego*, Warzawa, 1934, p. 114; F. DE SLOÒVERE, Equity and Reason of Statute, *Cornell L.Q.*, vol. XXI, 1935-36, p. 599. Exceptional is a second degree interpretative preferring plain meaning even in a situation, when it is manifestly unjust comp. a decision cited in J. WILLIS, *op. cit.*, p. 10.

([40]) J. WRÓBLEWSKI, Zagadnienia teorii wykładni, *op. cit.* and the bibliography cited there. Chapt. IV, § 1; the same author, *Semantic Basis...*, *op. cit.*, p. 415 and ff.

the maximum of adequacy of law to exigencies of "life" understood as the complex of socio-economical, ideological and cultural relations of the time of interpretation. The different basic values of both types of normative theories of interpretation are related to different concepts of meanings of interpreted legal norms. According to static theories the meaning of a legal norm is constant. It does not change in time and is fixed by the normgiver himself. This meaning is not seldom described as a "will of the normgiver". This "will" is conceived as a psychic fact. It is a psychological meaning of the norm which is the semantic construction of meaning closest to the typical forms of static theories of interpretation. According to dynamic theories of interpretation the meaning of the legal norm changes in relation to the changes of the complex context in which it is interpreted, that is in the above mentioned context of "life". The meaning of the legal norm is not any psychic fact, but rather a kind of response of an interpreter to it in a determined situation. The closest semantical construction would be here that of a behavioural meaning.

The different evaluational assumptions characteristic of each group of normative theories of legal interpretation bear upon the choice of the interpretative directives they are composed of. Especially marked differences appear in the sets of second degree interpretative directives. Static theories are as a rule in favour of meanings determined by linguistic and systemic directives, whereas dynamic theories prefer the result of functional directives. These differences can in many situations lead to different interpretative decisions, and, hence, to different application of law.

Of course our opposition of static and dynamic theories of legal interpretation deals with ideal types rather than with theories used in practice. We have here various normative theories of legal interpretation more or less close to these two types. The opposition, however, between static and dynamic theories puts in a strong light the significant fact, that the choice between complex sets of interpretative directives is determined ultimately by certain evaluations.

There is a question, whether there is any possibility of for-

mulating interpretative directives common to static and dynamic theories of legal interpretation ([41]). There are such directives common to all normative theories of legal interpretation which assert that: (a) there is meaning of the legal norm at least partially independent of interpretative activities; (b) interpretative activity can be rationalized by determining the interpretative directives governing it; (c) interpretative directives of various normative theories of interpretation are comparable. These "common directives" can be used without any commitment to the basic choice of static or dynamic values. Their occurence can be explained either as a result of a compromise of higher level values of justice and legality accepted by both groups of normative theories of legal interpretation ([42]) or as a consequence of commonly accepted construction of a "rational normgiver ([43]).

These "common directives", however, are not sufficient to determine a meaning of the legal norm in all situations, and, therefore do not form any normative theory of legal interpretation ([44]). This situation is relevant for our discussion of evaluative elements of legal interpretation, because it shows that the existence of these "common directives" do not exclude in all situations the necessity of evaluation. In the formulation of these directives there are evaluative expressions which have to be filled with concrete evaluations (compare point 9.2 above) and the starting point of operative interpretation is, as always, not free of evaluations (point 9.1 above).

10. According to the assumptions necessary for a logical approach to legal interpretation (point 8) the interpretative process has to be "rational" in the sense, that it can be "justified". We have, hence, do to with the decisional material which includes the argumentation justifying the determination of the meaning of the legal norm in question. The empirical decisional material

([41]) J. WRÓBLEWSKI, *Zagadnienia teorii wykładni...*, *op. cit.*, chapt. VIII, § 2.

([42]) Comp. A. PEKZENIK, *Wartość naukowa dogmatyki prawa*, Kraków, 1966, § 25.

([43]) Comp. L. NOWAK, *op. cit.*, p. 83-94.

([44]) Comp. J. WRÓBLEWSKI,, *Zagadnienia teorii wykładni...*, *op. cit.*, p. 416 and ff.

is, of course, widely differentiated according to various "styles" of decisions. But we are not interested here in comparative research into such styles ([45]). It is sufficient for us to assume that there is always a possibility of justification and that its occurrence in empirical material depends on various factors such as the style of decision, the normative legal requirements of justification, the legal tradition and so on.

The problem is what kind of reasoning is involved in a justification of a interpretative decison. There are two principal views taken in a logical discussion of legal science: first, that there are systems of formal logic which can be used as the reference for interpretative reasonings; second, that the logic in question is not any formal calculus but a kind of argumentative logic. These two views are highly relevant for the formalist-antiformalist controversy we will speak later about.

Let us now proceed, without committing ourselves to this controversy, to outline briefly these two principal views in reference to the theoretical model of legal interpretation discussed above (point 5).

For an analysis of the first view we have to assume the possibility of "interpreting" (in the logical sense) some formal calculi with expressions used in the interpretative reasonings (comp. point 8 assumption (a)). Such an assumption is very controversial. There are several questions to be answered, e.g. whether a calculus of this kind covers the logic of names, relations and propositions or only some kinds of modal or deontic calculi; whether there is a formal logic adequate for the purposes of law in general, and for the scope of legal interpretation in particular. Let us here assume that all questions are answered in the positive, that needed assumptions are fulfilled. We may ask, then, what are the characteristics of the reasonings involved in legal interpretation ?

It seems that the legal reasonings involved here are relatively simple logical operations. Let us return to our theoretical model of legal interpretation. If one has a set of directives of legal interpretation adequate for the determination of a doubtful

([46]) Comp. note 5 above.

meaning, then one has only to use them coherently. And for such a use, the "if ... then" reasonings do not require any very sophisticated logical constructions besides the rules of legal language and legal conceptual apparatus. It seems that there lies an explanation of the fact, that in legal practice, the critical arguments of the "*non sequitur*" type used in discussion of interpretative decisions are rather exceptional. The controversies are related not with any "formal reasonings" but with the assessement of their premisses ([46]). And these are *ex hypothesi* outside the realm of the calculi dealing with the relations of classes, of relations or of normative and/or others propositions, or of norms, etc.

For discussion of the second view asserting that the logic involved in legal interpretation is a non-formalized argumentative logic, it is sufficient to point out the decisive factors determining the outcome of interpretative process. Let us, once more, refer to our theoretical model. Provided that in legal interpretation we do not make any "formal logical" errors (as explained in reference to the first view above), the determining factors are: doubt as the starting point for operative interpretation; the choice of interpretative directives or of normative theories of legal interpretation; the use of the interpretative directives in question. All of these elements involve evaluative choices ([47]). These choices determine the assumptions for interpretative reasoning.

If a logic of argumentation can direct these choices, then it deals with the determination of assumptions for the interpretative reasoning. Even if this is not the case, still it can deal with an area of problems wider than any formal logic.

A logic of argumentation could direct the evaluative choices

([46]) Comp. G. GOTTLIEB, *The Logic of Choice, op. cit.*, p. 17, comp. 70; J. WRÓBLEWSKI, Il modelo teorico dell'applicazione della legge, *Rivista internazionale di filosofia del diritto*, I, 1967, p. 19 the same author, O tak zwanym sylogizmie prawniczym /in/ *Zagadnienia prawa karnego i teorii prawa*, Warszawa, 1959, p. 235 and ff.

([47]) For more general problem of the evaluative choices involved in the application of law comp. J. WRÓBLEWSKI, *Il modello teorico dell'applicazione..., op. cit.*, p. 26 and ff.; G. GOTTLIEB, *The Logic of Choice, op. cit.*, chapt. X, J. NOWACKI, *Analogia legis*, Warszawa, 1966, chapt. VIII, IX.

only under condition of providing the adequate scale of values ([48]). Such scale should determine types of situations in which one ought to state the doubts as to the meaning of legal norms, how to choose the interpretative directives and how to use them, when this use requires evaluations. A construction of such a scale is considered here only purely theoretically, since no one has tried to construct it within a logic of argumentation. And no wonder, since the evaluations here involved are highly complicated, change from case and are often conflicting. To construct such a scale would not be practically possible, and theoretically dubious, although it would have very great importance in the logical approach to legal interpretation. Practically such a scale would determine the complete normative theory of legal interpretation and, hence, it would require the assumption of a determined systems of values and not only the "formal" relations between values. It seems that, therefore, it is not possible to go beyond partial scales among which one has to choose and which do not englobe all the values the interpreter is interested in. A logic of argumentation cannot, hence, precise standards of validity for interpretative reasonings analogous to the requirements of the first of positions stated above.

We conclude, then, that both from the first and the second position the validity of interpretative reasonings can be tested only partially. From the first position one can — after making certain assumptions — test the "formal" validity of reasonings, which is mostly concerned with the consistent use of interpretative directives. From the second position, showing a preference for the logic of argumentation, one has to assume the validity of the first position for a part of interpretative reasonings and to construct a partial scale of values determining the required preferences.

11. Legal interpretation appears as one of the central points in many legal controversies and also in the theoretical and logical analysis of the peculiarities of legal reasoning. It seems,

([48]) On the general problems of constructing evaluative scales for the needs of law-making, legal interpretation and application of law comp. J. WRÓBLEWSKI, Zagadnienia zastosowania maszyn matematycznych w prawoznawstwie, *Studia Prawno-Ekonomiczne*, 1, 1968, p. 66 and ff.

therefore, that the analysis of characteristics of legal interpretation could be relevant to the formalist — antiformalist controversy which is polarizing logical opinion to-day (49).

It is evident, however, that these two attitudes are only broadly determined, and that we must define them precisely enough for our task. We have, then, to formulate some definitions by postulates hoping, that they cover the more or less vague intuitions of both the formalist and antiformalist attitude in problems of legal interpretation (50). Each attitude has three versions which can sometimes appear in combination.

The formalist attitude is defined as an attitude fulfilling at least one of the three groups of conditions: (A) asserts that legal interpretation is a logical process, (A_1) that is it can be put in a "logical form"; and/or (A_2) that interpretative directives have a "logical nature"; (B) asserts that legal interpretation (B_1) can be channelled by the use of interpretative directives as rules of "rational" behaviour; and/or (B_2) that these directives can by made binding by legal enactement and at least in this situation play the channelling role; (C) postulates that legal interpretation should be a "rational", "logical" etc. process conferring on the interpretative decisions a high degree of certainty.

Antiformalist attitude is defined by postulates contrary to those defining the formalist attitude. The antiformalist attitude is defined, hence, as fulfilling at least one of the following three groups of conditions: (A′) asserts that legal interpretation is an alogical process, that therefore (A'_1) it cannot be put in a "logical form" and/or (A'_2) that interpretative directives, if any, have no "logical nature"; (B′) asserts (B'_1) legal interpretation cannot be channelled by interpretative directives and/or (B'_2) that even if enacted, these directives cannot play any channelling role; (C′) postulates that legal interpretation should not

(49) Comp. e.g. Ch. PERELMAN, *Justice et Raison, op. cit.*, chapt. XIV, J. HOROWITZ, *op. cit.*, p. 43 and ff. passim; J. KALINOWSKI, *Logique formelle et Droit, Annales de la faculté de droit et des sciences économiques de Toulouse,* tome XV, fasc. 1, 1967, p. 198-210; G. GOTTLIEB, *The Logic of Choice, op. cit.*, chapt. II and p. 11, 73, 168.

(50) Comp. e.g. N. BOBBIO, *Giusnaturalismo e positivismo giuridico,* Milano, 1965, p. 93 and ff.

be "rational" "logical" etc. because even were this possible, it would not be advisable to bar the way for adapting law to actual needs by legal interpretation.

12. Let us discuss the two attitudes in the light of our analysis, using the postulates defining the models outlined above.

12.1. (*ad* A_1, A'_1). The controversy depends on the notion of "logical form" and the "content" referred to. We can use the term "logical form" in the widest sense covering all kinds of formal logic. If so, then the essential question is, whether we have in mind "decisional material" or "psychological material". The former consists in the interpretative decisions with their justification, the latter is constituted by psychic processes of interpretative activity (point 3 above). Decisional material can be put into "logical form", and within our legal culture interpretative decisions are in fact justified in a "logical" or "rational" way. There are criticisms directed against this kind of justification but, when precisely formulated, they are directed more against their assumed role, than against the possibility of their logical formulation (see below point 12.3).

It seems, that there are no particular problems of formalization concerned with the psychological material of legal interpretation. There is a broader question of the relation of psychic processes of reasoning in any field and the possibility of describing them in some "logical form". There is the controversy between the psychological and apsychological approach in logical theory, now belonging to the history of science. It is sufficient to state here, that assuming a sufficiently rich logic one can put the psychological material into logical form. But there is no reasonable doubt, that the logical form of the justification (decisional material) and the logical form of the psychic process (psychological material) are not always isomorphic.

12.2 (*ad* A_2, A'_2) The controversy about the "logical nature" of interpretative directives is somewhat vague. If by "logical nature" is meant here, that all the directives in question are logical rules ([51]), then one can say, that there are no such logical

([51]) P. E. NEDBAJTO, *Primienienje sowietskich prawowych norm*, Moskwa, 1960, p. 419, comp. 389.

systems to which all these directives belong. If the thesis is restricted to some directives of legal interpretation, labelled traditionally sometimes as "logical development of norms" ([52]), then there are several attempts to formulate logical theorems which will provide a theoretical basis for such directives ([53]). If by "logical nature" is meant, that the use of interpretative directives leads to such determined results as the use of formal logical rules, then at least it is not true for all directives with an evaluative component (point 9.2 above).

If, last but not least, by the "logical nature" of interpretative directives is meant that one can formalize them analogously to the formalization known in contemporary logic, then one has to do with a problem solved analogously to that discussed in reference to the assertions A_1, A'_2 (above point 12.1).

12.3 (*ad* B_1, B'_1) The controversy about the channelling role of interpretative directives must be discussed depending on the kind of role in question and kinds of directives one considers.

Two principal roles of interpretative directives are to be differentiated: a rationalizational and a heuristic ([54]).

The role of rationalization is that of justifying the interpretative decision without any reference to the ways in which it has been reached. This role is essential for interpretative directives used in the material of decisions. These directives, used according to the accepted rules of inference, do justify the decision. One can debate, however, whether one has choosen the directives in question correctly, which presupposes an evaluative approach (point 9.3 above). Interpretative directives in their rationalizational role do channel the justification of interpretative decisions.

The heuristic role of interpretative directives refers to the

([52]) E.g. E. WASKOWSKI, *op. cit.*, chapt. III.

([53]) Comp. e.g. G. KALINOWSKI, *Introduction à la logique juridique*, *op. cit.*, p. 162-170; U. KLUG, *Juristische Logik*, Berlin, Heidelberg, New York, 1963, 3 ed., passim.

([54]) Comp. J. WRÓBLEWSKI, *Właściwości, rola i zadania dyrektyw interpretacyjnych*, *op. cit.*, p. 106-111. G. GOTTLIEB uses the terms "guidance" and "justification"; G. GOTTLIEB, *The Logic of Choice*, *op. cit.*, p. 71 and ff., 87, 153, 159.

psychic process of interpretation. It is a question to be answered on the basis of empirical research whether, and to what an extent, these directives help in the search for the meaning of an interpreted legal norm. It seems that there are no grounds to venture any general statements about this role. In certain situations it could be so, that one seeks methodically the proper meaning of the interpreted norm and only with this step completed does one decide the case. In other situations, one intuitively grasps how the case should be decided and only then seeks the norms or the interpretations of norms which would justify this decision.

One can, however, be sure, that the blurring of difference between the role of rationalization and the heuristic role of interpretative directives leads to serious mistakes. Especially one should not "infer" from the scepticism about the channelling heuristic role of interpretative directives (even if this scepticism were substantiated by adequate empirical research), that these directives have no role at all, or that their role of rationalization is only a pure mystification ([55]). And one should not from the role of rationalization "infer" that interpretative directives do play always a heuristic role "reflected" in the justification of an interpretative decision ([56]). Both errors result

([55]) Comp. e.g. from American legal literature. J. DEWEY, Logical Method and Law, *Cornell Law Quarterly*, vol. X, 1924/25, p. 22. M. RADIN, Statutory Interpretation, *Harvard Law Review*, vol. XXXIV, 1930, p. 863; the same author, Realism in Statutory Interpretation, *California Law Review*, vol. XXIII, 1935, p. 156; the same author, A Short Way with Statutes, *Harvard Law Review*, vol. LVI, 1942, p. 388; R. POUND, The Political and Social Factor in Legal Interpretation, *Michigan Law Review*, vol. XLV, 1947, p. 599; H. W. JONES, Statutory Doubts and Legislative Intention, *Columbia Law Review*, vol. XL, 1940, p. 957; the same author, Extrinsic Aids in the Federal Courts, *Iowa Law Review*, vol. XXV, 1939/40, p. 737 and ff.; Ch. NUTTING, The Relevance of Legislative Intention Established by Extrinsic Evidence, *Boston Law Review*, vol. XX, 1940, p. 601; the same author, The Ambiguity of Unambigous Statutes, *Minnesota Law Review*, vol. XXIV, 1950, p. 509. For the general discussion see J. WHITERSPOON, Administrative Discretion to Determine Statutory Meaning: "The High Road", *Texas Law Review*, vol. XXXV, 1956/57, p. 73-83.

([56]) Comp. e.g. from American legal litterature: H. SILVING, A Plea

from a lack of discrimination between two kinds of roles and between two kinds of interpretative materials.

The channelling role of interpretative directives depends also on their formulation. The most important characteristic is here the occurrence of evaluative elements in many directives, both in the conditions and in the manner of their use (point 9.2, 9.3). One can venture the assertion, that this kind of directive does not channel the interpretative activities with the degree of determination which is possible for the unconditional value-free ones (comp. point 9.1). It would be erroneous to extrapolate the channelling characteristics of both groups of interpretative directives in both directions. A formalistically biased view is prone to treat interpretative directives generally as if they were unconditional and value-free. Antiformalistic opinion, if it acknowledges their role at all, asserts their generally evaluative character. In this respect the antiformalist position is fairly close to the real situation.

12.4 (*ad* B_2, B'_2) The controversy concerns the role of normatively enacted interpretative directives. In several legal systems of to-day we find enacted interpretative directives. Probably, according to the lawmakers' views, they are chanelling interpretative activities. But there is the question whether this kind of chanelling is or ever can be effective. The adherents of an affirmative answer are formalistically biased and postulate even a codification of "interpretative law" ([57]). They seem to identify the heuristic and the rationalizational role of the directives in question, and to neglect the strongly evaluative character of many of them. The adherents of the negative answer reject their heuristic role and neglect their role of rationalization, stressing

for a Law of Interpretation, *University of Pennsylvania Law Review*, vol. XCVIII, 1950, p. 499 and ff.; Q. JOHNSTONE, Evaluation of the Rules of Statutory Interpretation, *Kansas Law Review*, vol. III, 1954, p. 1 and ff.; R. H. JACKSON, The Meaning of Statutes-What Congress Says or what the Court Says, *American Bar Association Journal*, vol. XXXIV, 1948, p. 535 and ff. For general discussion see J. WHITERSPOON, Administrative Discretion to Determine Statutory Meaning: "The Low Road", *Texas Law Review*, vol. XXXVIII, 1960, p. 392-438.

([57]) E.g. H. SILVING, *A Plea for a Law of Interpretation*, *op. cit.*, p. 511, 526-528.

their evaluative character. Hence, antiformalistically, they negate their channelling role and the soundness of their enactement.

It seems, that both extreme attitude have weak foundations. One cannot hope that any "interpretative law" could be able to eliminate the lee-ways of interpretative activities, to eliminate the evaluative element from interpretative process. Interpretative law would consist also of norms some of which in some contexts could be doubtful and require an interpretation. There are, however, some channelling effects of the enactment of certain interpretative directives. Such directives can have a channelling role when determining the meanings of certain terms through legal definitions ([58]), when pointing out the lawmakers preference for some kinds of interpretative evaluations or showing their preference for some normative theories of interpretation ([59]). Even setting aside the very controversial and empirically not verified heuristic role of interpretative directives, we can assert, thus, that the normative formulation of interpretative directives at least can influence the formulation of the decisional material. And, hence, enactement of some interpretative directives is a factor channelling the ways of justification of interpretative decisions. And the justification of an interpretative decision put forth in a form of a "deduction" gives it certain kind of obiectivity ([60]) and is a vital factor for any control of such a decision.

12.5. (*ad* C, C′). There is controversy about the "rational" or "logical" character of legal interpretation as a postulated or a rejected quality of interpretative process. Such controversy is purely ideological. The determining factor is, whether one postulates that legal interpretation is a means for achieving legal certainty, legal security legal stability and similar values, or the interpretative adaptation of the "law in books" to the

([58]) Comp. e.g. Interpretation Act, 1889, cf. MAXWELL, *op. cit.*, p. 399 and ff. *Polish Penal Code,* 1969, chapt. XVII.

([59]) E.g. Polish Civil Code, art. 4 "Prescriptions of civil law should be interpreted and applied according to the principles of constitution and goals of the Polish People's Republic".

([60]) Comp. O. BRUSIIN, *Ueber das juristische Denken,* Kopenhagen — Helsinki, 1951, p. 110.

current needs of actual life. The conflict is, hence, between the basic values of static and dynamic theories of legal interpretation. Each group of the theories of interpretation can be related to different attitudes within the formalist-antiformalist controversy, but of course in a somewhat loose way ([61]).

13. The formalist-antiformalist controversy has been analyzed above only on the plane of legal interpretation. Two attitudes were defined in relation to interpretative problems and relatively sharply opposed. I have shown, that according to our analysis of legal interpretation, the radical formulations of both attitudes are not justified, but in their moderate formulations are not inconsistent — they refer to different groups of interpretative directives, to various materials of interpretation and to various elements of interpretative processes. The controversy between static and dynamic attitude is not relevant when one has to do with interpretative directives not depending on assumption of static or dynamic values.

Ending our analysis it is worth while to stress the relation of both attitudes with the opinions on the problem of "logic in law", because these opinions are influencing the discussed formalist-antiformalist controversy.

Generally speaking, the formalists would like to reserve the name of "logic" only as a designation for formalized calculi such as mathematical logic, formalized systems of modal logic, of logic of norms etc. Antiformalists treat "logic" more widely including in it also all kinds of sciences about argumentation in law and revive the classical notions of rhetorics and *topoi*, enriching their content by modern tools of contemporary sciences ([62]). There are, of course, many problems of defining for-

([61]) Comp. e.g. the dynamic position taken by antiformalist attitude P. FORIERS, L'état des recherches de logique juridique en Belgique, in *Études de logique juridique*, vol. 2, *op. cit.*, p. 41. The moderately static position taken within a formalist attitude P. E. NEDBAJLO, *op. cit.*, 331-335, 415-421.

([62]) Comp. notes 24, 49. The opposition of two attitudes in historical doctrinal perspective: M. VILLEY, Questions de logique juridique dans l'histoire de la philosophie du droit, in *Études de logique juridique*, vol. 2, *op. cit.*, p. 3 and ff. passim.

malism and antiformalism as positions taken with regard to logic in law. It would be sufficient to state that according to our view on legal interpretation there is a place both for logic in formalist and in antiformalist perspective. The former can be used to describe some elements of the material of decisions provided the adequate translation of peculiar legal arguments into determined system of logical calculus. The latter can be used for an analysis of psychological material, for an analysis of the process of taking a decision within the procedural forms of legal controversy, to an analysis of decisional material taking into account all evaluative conflicts. It seems, therefore, that the antiformalist concept of logic has a wider field of application, at least in legal interpretation, than the formalist one.

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