EMPIRICAL FOUNDATIONS OF LEGAL DOGMATICS

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1. *Introduction*

Legal dogmatics or the doctrinal study of law consists in interpretation and systematization of valid legal norms. It comprises most commentaries and discussions about law, except general jurisprudence, legal sociology, legal philosophy and history of law. Besides, it does not comprise the law-making activity. Discussions carried on by the State organs, e.g., courts, applying and/or making law, are very akin to dogmatics but remain outside its limits. Although more influential on the European Continent than in the Common Law countries, legal dogmatics exists in every modern State.

Legal dogmatics discusses legal norms. But what are norms ? E.g., when does the legal norm "who kills another man should be sentenced to imprisonment from 5 years" exist ? The following facts had been most often pointed out as identical with its existence:

1) the existence of an inscription of the shape "who kills another man should be sentenced to imprisonment from 5 years",

2) the fact that judges think, as a rule, that they should sentence any killer to imprisonment from 5 years (1).

3) the high probability that any killer who has been accused will be sentenced to imprisonment from 5 years (2).

The existence of the norm could be identified with any one of those facts, or with any two of them, or with all three (3). The

(1) This can be connected with the view that the law is not protected by force but consists of rules about the behavior of State organs constituting a machinery of force. See N. BOBBIO, Law and Force, *The Monist*, vol. 49, No. 3, 1965, pp. 321 ff., and the literature quoted here.

(2) This interpretation is discussed in the unpublished paper *On the Logic and Ontology of Norms*, by G. H. von Wright.

(3) See A. ROSS, *Directives and Norms*, London, 1968, pp. 82 ff.

choice depends on linguistic conventions answering what should be called a norm. Besides, "while the lawyer is inclined to think of a legal norm as a meaning content (as a directive) abstracting from the social facts of the law in action, the tendency of the sociologist is to do exactly the opposite" (4). Discussing the legal dogmatics, I will rather accept the lawyers' convention, identifying a norm with a meaningful inscription (5). Meaning and legal validity can be interpreted as properties of such inscriptions. This assumed, propositions formulated in the legal dogmatics can be divided, as follows (6).

1. Basic propositions. They refer to the shape of inscriptions contained in the Constitution, in codes, statutes, judicial decisions, and other texts of valid law (7). Here is an example: "In this book there is an inscription whose shape is 'All legislative Powers herein granted shall be vested in a Congress of the United States, which consists of a Senate and House of Representatives' ".

2. Propositions about the meaning of inscriptions in the ordinary language, e.g., "this inscription means...".

3. Propositions presenting the effects of the juristic interpre-

(4) *Ibid.*, p. 81.

(5) This requires three comments. First, the existence of the unwritten moral (not legal !) norms can be identified with the existence of the respective linguistic utterances, expressed in the spoken language. Second, only the existence of a legal norm, not its validity, is identical with the existence of an inscription. A norm contained, e.g., in a project of a future code exists, i.e., is formulated, without being valid. Third, the above opinion leads to the conclusion that there are as many norms of a given shape as there are copies of the text containing the respective inscriptions. Therefore, some authors prefer to define a norm as a class of similar inscriptions, comp. L. NOWAK, *Próba metodologicznej charakterystyki prawoznawstwa* (An Essay on the Methodological Character of Jurisprudence), pp. 3 ff.

(6) Comp. *ibid.*, p. 153.

(7) I assume that all legal norms are written. Even a customary law is continually written out in thousands of judicial decisions. The unwritten custom was not yet legal. I follow Austin's view that the custom becomes legal only when followed in the (written) judicial decisions. However, Sir C. K. ALLEN, *Law in the Making*, London, 1958 (sixth ed.), pp. 67 ff., is of the opposite opinion.

tation (or judicial method, or legal thinking). Here are some examples: "In the juristic language this inscription means...", or "This inscription leads to the following consequences...", etc. The juristic interpretation is carried out by means of peculiar methods and does not refer to the common use of words and phrases only ([8]).

4. Propositions about validity, e.g., "This inscription is valid law".

The above classification omits propositions *de lege ferenda*, since they belong rather to legal sociology than to the dogmatics ([9]).

In the present paper I aim at showing that propositions about legal norms, formulated in the legal dogmatics, are empirically meaningful. They can be, as a rule, confirmed or falsified on grounds of basic propositions although, in order to show this, some peculiar juristic arguments must be accepted. Besides, legal norms themselves have quasi-empirical significance. They relate to reality in a similar but not exactly the same way as empirically meaningful descriptive statements do.

Such a discussion presupposes some views on fundamental semantic and philosophical questions. This makes the subject discussed below very complex. For that reason, some important questions will be merely outlined without elaborating in detail. But this is the common difficulty of jurisprudence. E.g., L. Petrażycki, in order to build his psychological theory of law, had to create entirely new parts of logic, philosophy, sociology and psychology ([10]). Therefore, I hope the Reader will forgive eventual oversimplifications occurring in this work.

([8]) Therefore, the so-called linguistic or grammatical construction of statutes does not belong to the peculiar juristic interpretation, although very often is its starting point.

([9]) The distinction is more difficult in the Common Law but I cannot discuss that question in the present paper.

([10]) Comp. L. PETRAŻYCKI, *Tieoria prava i gosudarsva v sviazi s tieoriej nravstviennosti* (Theory of Law and State in Connection with the Theory of Morals), S. Pieterburg, 1909.

2. *Behavioristic View on Language*

Can such propositions as "in this (legal) text there is a statement whose meaning is..." be inferred from basic propositions like "in this text there is an inscription whose shape is..." ? Generally speaking, can propositions about meaning be confirmed of falsified on grounds of basic propositions about physical, observable objects, events or facts ? I think that the proper answer is in affirmative provided that one assumes additional basic propositions concerning observations made by a person learning his mother tongue. Let us call such a person the Learner. He learns the language by imitation of his mother, or father or elder brother, etc., whom we call the Teacher. We will present here a very simple model consisting of basic propositions (in short Bp) referring to the Learner's observations, and of theoretical propositions (in short Tp) the Learner infers from them.

(Bp 1.1.) Once the Teacher showed me this and said "a door".

(Bp 1.2.) The next time the Teacher showed me this and said "a door".

..... etc.

(Tp I.) The Teacher connects the word "a door" with a door.

(Bp 2.1.) Once the Teacher showed me this and said "an open door".

(Bp 2.2.) The next time the Teacher showed me this and said "an open door".

..... etc.

(Tp II.) The Teacher connects the phrase "an open door" with an open door.

(Bp 3.1.) Once the Teacher said "open the door !"; he said it when the following conditions have been fulfilled:

a) there was a door,
b) it was not open,
c) I could open it, and
d) he showed his interest in making the door open.

(Bp 3.2.) The next time the Teacher said "open the door !";

he said this when the similar conditions (a-d) have been fulfilled.

..... etc.

(Tp III.) The Teacher uses the sentence "open the door!" when the conditions (a-d) are fulfilled.

(Bp 4.1.) Once the Teacher showed me something and said "a door or a window" and it was a window.

(Bp 4.2.) The next time the Teacher showed me something and said "a dog or a cat" and it was a dog.

..... etc.

(Tp IV.) The Teacher uses the phrase "there is A or B" if there is A; he uses the phrase if there is B, as well.

Let us quote, now, some propositions formulated in the higher stage of learning language by the Learner. These propositions (5.1.-6.2.) are basic, observational ones, or at least could be easily inferred from the basic propositions.

(5.1.) Once I imitated the way the Teacher uses words and I tried to influence another person's behavior by those words and I succeeded to do this.

(5.2.) The next time I imitated the way the Teacher uses words and I tried to influence another person's behavior by those words and I succeeded to do this.

..... etc.

(Tp V.) When I use words like the Teacher does, I am very often understood.

(Tp V_a.) People very often use words like the Teacher does; especially, they very often use them in the same conditions and connect them with the same objects.

(6.1.) Once I used words unlike the Teacher does and I tried to influence another person's behavior by those words and I failed to do this.

(6.2.) The next time I used words unlike the Teacher does and I tried to influence another person's behavior by those words and I failed to do this.

..... etc.

(TP VI.) When I use words unlike the Teacher does, I am very often not understood.

(TP V_a, confirmed once more) People very often use words like the Teacher does.

Now, some additional explanations are required.

Explanation 1. The above model of learning language is ostensive. The Teacher shows the Learner some objects and connects some words with them. He uses the words in definite situations. Of course, ordinary language as a whole cannot be learned in such a way. But the primitive, ostensive language of the Teacher is, in fact, a starting point of further learning. Namely, the more complex parts of ordinary language are learned contextually, by observing how people connect some new uses of words with contexts formulated in the Teacher's language. Besides, the Learner himself can introduce new words and define them on grounds of the learned ones. The use of those new words can be founded on the learned ones in the same way as theoretical propositions of empirical science are founded on the basic ones.

Explanation 2. Neither denotation nor meaning has been defined in the above considerations. The basic propositions 1.1.-1.2. do not say that the word "a door" denotes a door. They merely connect the word "a door" with the class of doors. The basic propositions 3.1.-3.2. do not say what does the sentence "open the door !" mean. They formulate only the conditions of using the sentence.

Explanation 3. The above model of learning language is connected with some behavioristic theories of language. Unfortunately, such theories have been nearly always oversimplified and hence none of them could be fully accepted. Let us quote some examples. Some theories have identified the meaning of an utterance or a word with the common marks of the majority of situations it is used in ([11]). Unfortunately, the marks of these situations alone do not determine the full meaning of an utterance or a word. For example, can one point out when people use

([11]) Comp. L. BLOOMFIELD, *Language*, London, 1935, p. 139.

the word "a cat" ? Of course, they do it not only and not always when seeing a cat. Besides, even when pointing at a cat, people can use not only the word "a cat" but sometimes also the word "meow", e.g., in order to make a cat angry. Has the last word the same meaning as the word "a cat" ? According to another behavioristic theory, formulated by Ch. Morris, not the marks of situations the words are used in, but the human reactions to words are essential. Namely, "if something, A, controls behavior towards a goal in a way similar to (but not necessarily identical with) the way something else, B, would control behavior with respect to that goal in a situation in which it were observed, then A is a sign" ([12]). But unfortunately, many signs and objects denoted by them, do not control any behavior at all. E.g., there is no behavior directed by every use of the word "black" ([13]). Finally, according to the Oxford linguistic philosophy, the meaning is determined by the conditions in which the speaker regards the use of a sentence as proper. The speaker has been supposed "to ask himself what conditions are such that if he were to admit overtly that one of these conditions did not hold, it would be impossible for him, at that time, to perform a given illocutionary act" ([14]), e.g., to report, announce, predict, order or propose something. However, no one else but the speaker himself can know directly what he thinks about the proper conditions of using words. Therefore, the Oxford theory of language seems to be connected rather with the introspection than with the observation of human behavior.

Explanation 4. The actual process of learning and understanding language seems to be more complex than the above theories. The Learner can make some assumptions concerning the Teacher's use of the most primitive words simply by observing the situations those words are used in. Here the first theory seems to be right. Later, the Learner can observe how

([12]) Ch. MORRIS, *Signs, Language and Behavior*, New York, 1955 (2 ed.), p. 7.

([13]) Comp. M. BLACK, *Language and Philosophy*, New York, 1949, p. 78.

([14]) Comp. W. P. ALSTON, *Philosophy of Language*, Englewood, Cliffs, 1964, p. 43.

people react to such words and he can imitate those reactions. Here the second theory is probably right. Still later the Teacher can say him, using the earlier introduced words, on what conditions the more complex words and sentences should be correctly used. Here the third theory is right. Finally, the Learner can observe that when using a given sentence without fulfilling those conditions, he creates astonishment, provokes questions, etc. The process of learning language is multistratal. On each stage of that process, different factors are of the chief importance. The full behavioristic theory of language should take into account all those stages and factors. *The meaning of a word is its use, learned as the correct one in any one of the above stages and ways.* A more precise and uniform behavioristic definition of meaning seems to be impossible.

Explanation 5. People very often use words like the Teacher does. Therefore, the reference to the Teacher could be omitted. One can say directly that the normal, average use of words by people is observed and imitated by the Learner. People actually learn language rather by imitation of a teacher consciously showing them how to use words, not simply by imitation of any speaking person, nevertheless.

Explanation 6. The above model is incomplete and does not constitute any theory of meaning. It is only a preliminary example illustrating (not verifying !) the hypothesis that meaning in ordinary language could be defined in empirically meaningful terms.

Explanation 7. Other persons can confirm the subjective observations made by the Learner. Of course, one cannot know without any doubt that different persons think the same when speaking the same. But this basic difficulty of human knowledge could be avoided only by solipsists.

Let us assume, finally the following set of propositions:

(7.1.) In this text there is an inscription consisting of the words whose shapes are A, B, C.

(7.2.) When learning language I observed human behavior showing that the proper use of the word A is the following one... (that statement can be confirmed on grounds of basic and theoretical propositions similar

to those quoted above in the model of learning language by the Learner).

(7.3.) When learning language I observed human behavior showing that the proper use of the word B is the following one... (confirmed as above).

(7.4.) When learning language I observed human behavior showing that the proper use of the word C is the following one... (confirmed as above).

(7.5.) When learning language I observed human behavior showing that the proper use of such sequences of words as A, B, C, is the following one... (confirmed as above).

(*Conclusion*) The proper use of the inscription whose shape is A, B, C, is the following one...

(Additional definition) The meaning of words is their use, learned as the proper one.

(*Final conclusion*) This inscription, whose shape is A, B, C, has the following meaning...

The above considerations show that propositions about the meaning of legal texts in the ordinary language could be verified on grounds of basic propositions formulated by the Learner. It means they could be verified by any person, since everybody has learned his mother tongue.

3. *Empirical Foundations of the Juristic Interpretation*

However, legal dogmatics deals not only with the ordinary meaning but also with the juristic interpretation of a legal text, making its application effective, useful and just. Has such an interpretation empirical foundations ? There is no need to show that juristic statements, formulated in effect of it, could be directly verified on grounds of basic propositions. As we have seen in the previous Section, the basic propositions can constitute a direct empirical foundation of propositions about the ordinary meaning of a legal text. Therefore, if a direct logical connection between the juristic statements and the propositions about the ordinary meaning of the legal text is shown, then one

can establish the indirect connection between juristic interpretation and the basic propositions. One can show the empirical foundations of the juristic interpretation, then.

An interesting attempt to fulfill this task has been connected with K. R. Popper's view that many social phenomena can be explained only if one assumes that the human behavior is rational ([15]). Legal dogmatics has been understood as an empirical science provided that the lawgiver is rational ([16]), i.e., creates only such legal norms that, according to his opinion, would lead to the best effects. Lawyers and jurists are supposed to assume that the lawgiver fulfils at least three theories of rational behavior, i.e., the theory of rational verbal behavior, the theory of rational accepting of norms as valid and the theory of rational legislation ([17]). Among many others, the following postulates have been quoted as consequences of these assumptions: (1) if X is a rational lawgiver he observes the syntactical rules of language ([18]), (2) if X is a rational lawgiver he does not create incompatible norms ([19]), and (3) if X is a rational lawgiver he does not establish norms which due to their formal structure are always fulfilled or always violated ([20]). Statements formulated on grounds of such assumptions could be empirically verified to the same degree as the statements expressed in many social sciences also presupposing some standards of rational behavior.

Unfortunately, this conception could be strongly criticised. Its author has written himself: "Jurists implicitly admit as a fundamental assumption the thesis that the real legislator is a rational legislator .They accept this assumption in a dogmatic manner, without verifying it" ([21]). But what is the source of this strange dogmatism ? I think that, contrary to the author's

([15]) Comp. K. R. POPPER, The Unity of Method in the Natural and Social Science, (in:) D. BRAYDBROOKE (ed.), *Philosophical Problems of the Social Sciences*, London - New York, 1965, p. 40.

([16]) Comp. L. NOWAK, *Próba...*, *o.c.*, p. 78.

([17]) *Ibid.*

([18]) *Ibid.*, pp. 89 ff.

([19]) *Ibid.*, p. 92.

([20]) *Ibid.*, pp. 93 ff.

([21]) *Ibid.*, p. 166.

opinion, the above assumption is not a hypothesis at all. There are no meaningful hypotheses that could not be falsified in any circumstances. I think that, instead of a hypothesis, it is only a directive accepted by lawyers and jurists, a directive that they should interpret law according to definite standards of rationality. Jurists do not assume that the real lawgiver is rational, they only accept the rule that they themselves should be rational. This presupposed, all the mystery disappears. Of course, no directive, unlike a hypothesis, could be verified or falsified, since directives are neither true nor false, neither confirmed nor falsified by any facts. In fact, lawyers and jurists very often interpret law according to standards of rationality, e.g., according to the following directives: (1′) legal norms should be interpreted according to the syntactical rules of language they are formulated in, (2′) legal norms should be interpreted in such a way that they must not be incompatible with each other, and (3′) legal norms should be interpreted in such a way that none of them would be, due to their formal structure, always fulfilled or always violated. Lawyers and jurists themselves behave according to such directives. They make law rational even if the lawgiver did not do this. The obvious fiction that the lawgiver is always perfectly rational is quite unnecessary and, besides, very similar to appealing to the purposeful creation by God in order to justify the accomodation of animals to environment. Generally speaking, when assuming standards of rational behavior, the legal dogmatics seems to be akin to such social sciences, as economics. But when assuming them not as hypotheses but as directives, the dogmatics is different from any empirical science.

This creative, not purely cognitive, nature of legal dogmatics leads, e.g., to the following consequences. If two "ordinary" social scientists know the same empirical data and if they are both reasoning according to accepted standards of rationality, they draw, as a rule, the same conclusions. The rules of scientific reasoning are so constructed, that their application very often leads to uniform conclusions, further confirmed by empirical data. On the contrary, two lawyers knowing the same data and being retional, can reach entirely incompatible conclusions. Let us quote an example from a story by Herman Melville.

Billy Budd hit the boatswain who accused him without any reason. The captain condemned him to death because killing a superior is a dangerous crime and only the severe punishment could preserve discipline of the crew. The first officer argued that Billy Budd was not guilty because he had strong reasons to be agitated and, besides, the killing was accidental. Both the captain and the first officer were rational but had accepted different scales of values ([22]) and, therefore, reached incompatible conclusions. In the ordinary sciences, like economics or sociology, such conclusions could be regarded as hypotheses and verified or falsified. In the legal discourse, as we have seen above, such a verification is impossible and one cannot simply say who is right and who is wrong. The rules of legal thinking are not adapted to formulating purely descriptive, very probable and uniform hypotheses. They are far more loose and seldom logically necessary. Only when cumulated, supporting one another, can they lead to strong conclusions. They are "like a piece of cloth, the total strength of which will always be vastly superior to that of any single thread which enters into its warp and woof" ([23]).

The discussed creative nature of the legal dogmatics is also connected with the persistent question of justice. Lawyers and jurists continually try to reconcile two principles — first that the interpretation of law should be strict, without arbitrary corrections, and second that the law should be just ([24]). Justice often requires corrections of the literal meaning of law. Therefore, in the legal dogmatics there exists a continual need of a compromise between the principle of strict interpretation of law and the principle of justice. The current concept of justice is very complex but the following principle seems to be its widest generalization: (a) Similar objects should be treated in a similar

([22]) For the above view and example, see Ch. PERELMAN, Désaccord et rationalité des décisions, quoted from the Polish translation, (in:) *Fragmenty filozoficzne.* Seria trzecia, Warszawa, 1967, pp. 359 ff.

([23]) Ch. PERELMAN, Self-Evidence and Proof, *Philosophy*, vol. 33, 1958.

([24]) See A. PECZENIK, Doctrinal Study of Law and Science, *Österr. Zeitschrift für öffentliches Recht*, vol. XVII/1-2, 1967, pp. 128 ff.

way ([25]). Lawyers and jurists are often of the opinion that similar persons and acts should be treated in a similar way. The same reasoning is also applied to similar cases and norms, e.g., the so-called *argumentum a simile* consists in applying legal norms not only to cases to which they directly refer but also to other, similar cases.

The principle of justice (a) can be also expressed in a slightly narrower formulation (b): If the previously observed objects belonging to class Z should be treated as P, all objects belonging to class Z should be treated as P. This formulation is similar to the so-called "principle of induction" (c): If the previously observed objects belonging to class Z have the property P, all objects belonging to the class Z have the property P. Literally, the only difference between (b) and (c) is a difference between "should be treated as P" and "have the property P". But the more important difference concerns the question of verification. Inductive generalizations founded on (c) are stated hypothetically and are rejected if they contradict basic propositions about individual facts. In the legal dogmatics, on the contrary, generalizations founded on the principle of justice (b) or (a) may be in open contradiction to the ordinary meaning of legal norms established on grounds of the basic propositions. They cannot be falsified at all and, therefore, can be often incompatible with each other. On the other hand, in the "ordinary" empirical sciences such an incompatibility is very rare, since nearly always one of the incompatible hypotheses can be falsified. Shortly speaking, (1) the procedure of formulating juristic generalizations founded on the principle of justice is very akin to the procedure of formulating scientific generalizations but (2) the juristic generalizations founded on the principle of justice are verified in another way than the scientific ones. The statements formulated in result of the juristic interpretation are to some extent determined by empirical data, are formulated according

([25]) This principle is founded on Ch. Pereaman's principle of formal justice, see his *De la Justice,* 1951 (quoted from the Polish translation, Warszawa, 1959, pp. 30 ff.), but is still more general. Comp. also M. G. SINGER, *Generalization in Ethics,* London, 1963, p. 17.

to directives strictly connected with the data, but are not empirically tested in such a way as the ordinary scientific hypotheses are. The legal dogmatics seems to be a half-empirical or quasi-empirical discipline.

4. *Empirical Foundations of the Legal Validity*

Not only propositions about the ordinary meaning of legal texts and propositions formulated in result of the juristic interpretation but also the third kind of propositions formulated in legal dogmatics, namely the propositions about the legal validity, seem to have empirical foundations.

There are many theories of legal validity. We will see that at least according to three of them, propositions about the legal validity have clear empirical foundations.

1. According to the so-called realistic theory of legal validity a norm is valid if it is efficacious ([26]). I do not need discuss the question of efficacy in detail. What is important is that a norm is efficacious if definite human behaviors are, as a rule, concordant with it. Therefore, the statements about legal validity could be verified on grounds of: (1) statements about human behaviors and (2) statements about the concordance between behaviors and norms. The statements about human behaviors are very clearly empirically meaningful to the same degree as other statements formulated in sociology. The statements about the concordance between behaviors and norms are in the same situation as statements about the meaning of a norm. If the meaning of a norm can be established on grounds of empirical observations then the concordance between the norm and reality can be established in this way, as well. And we have seen in the Sections 2 and 3 that propositions about the ordinary and juristic meaning of norms could be understood as having empirical foundations. Therefore, the propositions about the legal validity, established according to the realistic theory, could be understood as empirically meaningful, too.

([26]) See, e.g., A. Ross, *On Law and Justice*, London, 1958, p. 70.

2. According to the Pure Theory of Law ([27]) a norm is valid if it has been created in the way prescribed in higher norms. The validity of higher norms can be established according to still higher norms, and so on. The highest norm, the *Grundnorm* is valid only if the normative order as a whole is efficacious. And we have seen that the statements about efficacy have empirical foundations. The statements such as "the norm M had been created in the way prescribed in the other norm, N" have empirical foundations, as well. They are verified on grounds of: (1) statements about human behavior the creation of the norm M consists of, and (2) statements about the meaning of the norm N. Both kinds of statements have, as we have seen above, empirical foundations. Therefore, propositions about legal validity, established according to the Pure Theory of Law, could be understood as empirically meaningful.

3. In the paper "Juristic Definition of Law" ([28]) I have suggested another definition of legal validity. Namely, the norm N is primarily valid and legal if, and only if, there are many texts which, without any collision with the ordinary juristic language, can be described, as follows. (1) They say what the norm N means, and (2) in order to establish that meaning they quote some interpretative rules, and (3) those rules express the compromise between the principle of strict interpretation and the principle of justice. It is very clear that this conception of validity depends on the meaning of norms and some interpretative rules. If the statements about their meaning have empirical foundations, and I have tried to show that it is so, then the propositions about the legal validity, established according to the discussed conception, could be understood as empirically meaningful, too.

5. *A Norm as a Qualifying Proposition. Norms and Reality*

I have discussed, so far, how various types of arguments formulated in the legal dogmatics could be verified on grounds

([27]) See, e.g., H. KELSEN, *What is Justice?*, Berkeley, 1957, pp. 266 ff.
([28]) *Ethics*, vol. 78, No. 4, July, 1968, pp. 255 ff.

of the basic propositions and, therefore, are empirically meaningful. But lawyers and jurists not only formulate descriptive statements about meaning and validity of some norms, but sometimes create the norms themselves. Of course, the arbitrary creation of a norm could not be called a scientific, empirically justified, activity. But in spite of that, norms and their creation can be either connected with reality or not. Norms are never empirically meaningful in the same sense as the descriptive statements are. But sometimes they relate to reality in a very similar way as empirically meaningful descriptive statements do. Therefore, one can say that some norms have quasi-empirical significance. In fact, nearly all norms formulated by lawyers and jurists have. I have discussed that question in detail in the paper "Norms and Reality" ([29]). But I think that some points should be repeated here. In some respects I will supplement the previous discussion by the new considerations.

The semantic analysis of descriptive statements consists, in principle, in considering the relation of statements to events to which they refer. The correspondence between a descriptive statement and the event to which it refers, means that the statement is true, their discordance means that the statement is false. The relation of a descriptive statement to an event it refers to — serves to qualify the statement as true or false. On the other hand, norms are neither true nor false. The relation of a norm to an event it refers to — serves to qualify not the norm itself, but that event. Norms qualify events as forbidden, obligatory, permitted and not-obligatory. From the semantic point of view a descriptive statement is qualified by reality while a norm qualifies it ([30]). Besides, norms sometimes call some events specially. For example, a given legal norm can qualify some minister's activities as obligatory and, at the same time, call them "an activity of the State".

I have applied this conception of a norm to defining it and to defining the semantic entailment of norms. The basic idea

([29]) *Theoria*, Lund, 1968, pp. 117 ff.

([30]) I think this view can be interpreted as concordant with the semantic analysis by N. RESCHER, Semantic Foundation for Conditional Permission, *Philosophical Studies*, vol. 18, 1967, pp. 56-61.

was the following one: Norm A entails norm B if, and only if, the qualification of events by norm A includes the qualification of events by norm B. I will not repeat here the full definition elaborated in other papers. However, before discussing the question of the quasi-empirical significance of norms, we must launch into some details, not discussed so far. Those details, because of their rather technical nature, can be omitted by the Reader interested only in the general discussion on legal dogmatics. But they could not be omitted by the author, since they have been used in order to criticise the present conception. The semantic analysis of descriptive statements relates to their intension and extension. The term "intension" is used in order to explicate the less precise term "meaning". The term "extension" is used to explicate such terms as "denotation", "equivalence", etc. The terms "Morning Star" and "Evening Star" have the same extension, since they denote the same object, but have different intension and meaning. The criticism of the above conception of norm consists chiefly in arguing that it explains only the intension of norms but not their extension ([31]). Some writers even think that norms have no extension and do not relate to reality at all ([32]). This leads to the most extreme version of the so-called normativism, i.e., to the opinion that there is an insuperable gap between norms or the so-called world of Ought and reality or the so-called world of Is. Therefore, the extension of norms must be discussed before any remarks about their quasi-empirical significance.

Let us discuss, at first, the extension of descriptive statements.

The basic assumption concerning that question is the following one:

(S) All true statements have the same extension. All false statements have the same extension ([33]).

([31]) Comp. J. WOLEŃSKI, Spór o "znaczenie normatywne" (The Discussion on the "Normative Meaning"), (in:) *Naturalistyczne i antynaturalistyczne interpretacje humanistyki*, Poznań, 1966, pp. 12-13.

([32]) Comp. K. OPAŁEK, *The Problem of "Directive Meaning"*, a manuscript to be printed in the book prepared as a tribute to Alf Ross.

([33]) Comp. R. CARNAP, *Meaning and Necessity*, Chicago, 1960 (Third Impression), p. 26.

The common extension of all true statements and the common extension of all the false ones, have been constructed in at least three ways:

(S1) The extension of a descriptive statement is its truth-value. Namely, the extension of any true statement is the Truth, while the extension of any false statement is the Falsity ([34]).

(S2) The extension of any true statement is the actual world. The extension of any false statement is "zero-extension" ([35]).

(S3) The extension of any true statement is the L-true (necessary) proposition. The extension of any false statement is the L-false (impossible) proposition ([36]).

Obviously, this conception of extension cannot be directly applied to norms. It is especially clear with respect to the formulation (S1). The extension of a norm could not be identified with its truth-value (the Truth or the Falsity), since we have assumed that the norms are neither true nor false. However, the relation between a norm and reality is in some respects similar to that between a descriptive statement and reality. Namely, not only a descriptive statement but also a norm could be compared with the event (the fragment of reality, the fact, the object or the state of affairs) to which it refers. A descriptive statement is qualified by the event as true or false while a norm qualifies the event as forbidden, obligatory, permitted or not-obligatory. In this sense, although a norm has no extension understood as its truth-value, it has a quasi-extension, since it qualifies a given event. Some writers have argued that this is not even a quasi-extension, because a normative qualification of reality is contained in the norm itself, while the extension is always established in result of the comparison between a statement (e.g., a norm) and reality. But this criticism is inadequate. A norm "contains" the potential qualification of an event, not the actual one. A norm "John should not kill Peter" only

([34]) *Ibid.*
([35]) This is Lewis's view, quoted *ibid.*, p. 94.
([36]) *Ibid.*

potentially qualifies John's killing Peter as forbidden. In order to establish an actual qualification one must compare the norm with reality and see whether John and Peter exist, whether John killed Peter, etc. If there is no Peter and John at all, then the norm is empty, has no quasi-extension. Thus, we can formulate the first version of the quasi-extension of a norm. Namely:

(N1) The quasi-extension of a norm consists in the normative qualification (as forbidden, obligatory, etc.) of a given actually existing event.

The quasi-extension in this sense could be established only by comparing a norm with reality and in this respect is akin to the extension of a descriptive statement. This assumed, we can also formulate the normative equivalent of the extension in the sense (S2). Namely:

(N2) The quasi-extension of any obligatory norm is the sum total of obligatory events ([37]). The quasi-extension of any forbidding norm is the sum total of forbidden events. The quasi-extension of any permitting norm is the sum total of permitted events.

Finally, we can formulate the normative equivalent of (S). Namely:

(N) All obligating norms have the same quasi-extension. All forbidding norms have the same quasi-extension. All permitting norms have the same quasi-extension.

The last assumption, (N), concords with both (N1) and (N2). Only the normative equivalent of (S3) could not be constructed, but this requires the separate discussion. Thus, the conclusion remains that the quasi-extension of norms is conceivable. Therefore, we can discuss further aspects of the relation between norms and reality. Especially, we can discuss the following conception of the quasi-empirical signification of norms:

(DN1) The norm N_d is directly applicable to some events by the person A, if A can point out what events are qualified by the norm, and if A can do it relying entirely on observational evidence.

([37]) Namely, it is the sum total of the events qualified as obligatory by any norm belonged to the discussed order.

(DN2) The norm N_i is indirectly applicable, if either N_i or its negation follows from a consistent set of directly applicable norms.

(DN3) The norm N_s is quasi-empirically significant, if every competent individual can ascertain that it is at least indirectly applicable.

This conception is very akin to the following conception of the empirical significance of descriptive statements:

(D1) The statement S_d is directly verifiable by the investigator A, if he can ascertain whether S_d is true or false, relying entirely on non-inferential (observational) evidence ([38]).

(D2) The statement S_i is indirectly verifiable if "either S_i or its negation follows (strictly or with probability) from a consistent (...) set of verifiable statements ([39]).

(D3) The statement S_s is empirically significant, if it can be at least indirectly verified by every competent individual.

It is easy to see that only difference between the empirical significance of descriptive statements and the quasi-empirical significance of norms is the following one. A descriptive statement is verifiable and empirically significant, if one can ascertain by what events it is qualified as true or false. On the other hand, a norm is applicable and quasi-empirically significant, if one can ascertain what events it qualifies. The concept of applicability of norms is akin to verifiability of descriptive statements. Both those concepts refer to the relation between a proposition (descriptive or normative) and reality. The sole difference is that norms are conversely related to reality than descriptive statements are. Of course, this difference is very akin to that occurring between the extension of a descriptive statement and the quasi-extension of a norm.

One can construct not only the conception of quasi-empirical significance of norms but also the conception of quasi-empirical significance of normative terms. The last conception is akin to

([38]) Comp. H. MEHLBERG, *The Reach of Science*, Toronto, 1958, p. 250.
([39]) *Ibid.*, p. 299.

the empirical significance of terms in descriptive discourse. According to H. Mehlberg's criterion, the theoretical term Q has empirical significance if, and only if, it can be defined in reference to observational terms, say F and G — in the following way: (1) if one observes that x is F, then x is Q, and (2) if one observes that x is G, then x is not Q ([40]). Similarly enough, one can accept the following convention. The theoretical term Q_n is quasi-empirically significant and, at the same time, a normative one if, and only if, it is commonly understood in the way being explicable by Definition I *or* Definition II.

Definition I:

(N1) if a valid norm qualifies an observable object or event x in the way W, then x is Q_n, and

(N2) if a valid norm qualifies an observable object or event x in the way V, then x is not Q_n;

Definition II:

(N1′) if a valid norm calls an observable object or event x as F, then x is Q_n, and

(N2′) if a valid norm calls an observable object or event x as G, then x is not Q_n.

The detailed justification of the above convention has been presented in the paper "Norms and Reality" ([41]). But even without repeating it, we can formulate the following conclusion: both norms and normative terms relate to reality in a very akin way as descriptive statement and empirically significant terms do.

6. *Reality Qualified by Norms*

We have seen above that the relation between norms and reality can be interpreted in a way making the constructions of the quasi-empirical significance of norms and normative terms possible. But of course, these constructions are possible only because we assume that norms qualify the natural reality, i.e.,

([40]) *Ibid.*, pp. 136 f., 291-292.
([41]) See above Note 29.

the same reality about which one speaks when discussing the question of empirical significance in general. However, many writers are against this, ontologically naturalistic ([42]) assumption. They quote or at least approve, not always consciously, the following arguments:

1. The legal concept "a forbearance from doing..." cannot be defined empirically. Therefore, the statements containing that concept relate to supra-empirical states of affairs ([43]).

2. Some general terms, used in legal and juristic languages, do not denote uniform classes of entities. They denote miscellaneous groups of objects, having nothing empirical in common. Therefore, the common nature of objects belonging to the same class can be only supra-empirical.

3. Language constitutes reality. The normative language constitutes a peculiar, normative, supra-empirical reality. States of affairs ([44]), discussed in the legal and juristic language, cannot be empirical, since they can be identified only according to the content of legal norms ([45]).

4. The so-called facts, discovered in legal process are merely constructions, often different from the empirical reality ([46]).

([42]) In §§ 1-5, I have discussed another, methodological, aspect of naturalism. Methodological aspects of naturalism had been also discussed in detail by J. KMITA and L. NOWAK, *Studia nad teoretycznymi podstawami humanistyki* (Studies on the Theoretical Foundations of Social Sciences), Poznań, 1968, but they accept some general philosophical assumptions rejected in the present paper.

([43]) Comp. F. STUDNICKI, O prawniczych rozumowaniach subsumpcyjnych (On Juristic Subsumptive Reasonings), *Studia Filozoficzne*, No 1 (48), 1967, pp. 126 ff.

([44]) In the present paper, I use the terms "an event" and "a state of affairs" interchangeably in spite of the well known convention that a state of affairs actually exists or is only possible while a fact or an event actually exists and cannot be conceived as merely possible, see L. WITTGENSTEIN, *Tractatus Logico-Philosophicus*, London, 1922, esp. the sentence 2; comp. also B. WOLNIEWICZ, *Rzeczy i fakty. Wstęp do pierwszej filozofii Wittgenstein* (Things and Facts. An Introducton to the First Wittgenstein's Philosophy), Warszawa, 1968, pp. 122 ff.

([45]) Comp. F. STUDNICKI, *O prawniczych, o.c.*

([46]) Comp. J. FRANK, Preface to "Law and the Modern Mind", New York, 1930; K. OPAŁEK, J. WRÓBLEWSKI, *Współczesna teoria i socjologia*

I will discuss these antinaturalistic arguments one after another trying to show that they are erroneous.

7. *Can "a forbearance" Be Defined Empirically ?*

Jurists very often speak about such states of affairs as killing by forbearance from doing something. These states of affairs have been supposed to be supra-empirical, containing not only fragments of empirical reality but also something else. Therefore, statements about them have been regarded as peculiar "qualifying phrases", not statements in the logical sense ([47]). The following example has been quoted as the most favourable to that view: the mother had not given a child food and the child died; a judge called the above mother's behavior killing. Now, where are supra-empirical elements of that killing ? The terms "the mother", "a child", "food" and "to die" are obviously empirically meaningful. But not only the mother had not given the child food. A milkman, or a baker had not done this, either. Only the mother is called "the killer", nevertheless, since only she has a duty to give the child food. The concept "a duty" has been often regarded as empirically meaningless and, therefore, the state of affairs called "killing by not giving food" has been supposed to be supra-empirical. But the concept "a duty" is *not* empirically meaningless. The phrase "John has a duty to do A" means that a valid legal norm says that John should do A. And we have assumed above that one can point out empirical observations making any norm, e.g., the norm "John should do A" meaningful and legally valid. Finally, the very fact that one can call a killer a killer only because one knows some linguistic statements, i.e., legally valid norms about killing, does not make the concept "a killer" supra-empirical, either. Without knowing some utterances, without knowing language, one cannot call

prawa w Stanach Zjednoczonych (The Contemporary Jurisprudence and Sociology of Law in the United States), Warszawa, 1963, pp. 184 ff. See also an elaborate analysis in Le Fait et le Droit (a collection of essays ed. by Centre National de Recherches de Logique), Bruxelles, 1961.

([47]) See above Note 43.

anything by any name. Without knowing what other persons confirming his experiences would say, no physicist would dare to say that he had discovered something. The normative, e.g., legal and juristic discourse seems to depend on language to the same degree as any other discourse does.

All this leads to the conclusion that the concept "killing by not giving food" can be defined without using empirically meaningless terms. Generally speaking, the juristic definition of "a killer" can be formulated, as follows: A killer is a person who caused someone's death *or* a person who has had a duty to prevent someone's death and did not do this duty. What could be called supra-empirical is only the belief that even killing by forbearance is a cause of death, e.g., the mother's forbearance from giving a child food is a cause of the child's death ([48]). In the ordinary language the word "the cause of S" is understood as "something that had created S". Without explicating this unclear formulation we must state that in the ordinary language there is a very strong feeling that only facts, states of affairs, etc. for example human acts, can be causes of anything, while the lack of facts, etc., e.g., a forbearance from giving food, cannot. If someone presupposes this meaning of the word "a cause" and afterwards says "the mother's forbearance from giving food was the cause of the child's death", his use of the word "a cause" is inconsistent. He can do, then, only of two things: either to change the definition of "a cause" or to seek for supra-empirical causes of the child's death. The first alternative is probably less intuitive but more promising. Indeed, why not define the term "the cause of S in the juristic sense" as "something that created S or the forbearance from fulfilling a duty to prevent S" ? Neither the difference between juristic and ordinary meaning of "a cause" nor the fact that the juristic definition of a cause covers very different states of affairs makes "a cause" supra-empirical. But of course, the best solution is to explicate the concept "killing by forbearance" as we have done above, without using the word "a cause" at all.

([48]) See W. WOLTER, O tzw. przyczynowości zaniechania (Forbearance and Causality), *Państwo i Prawo*, No 11, 1954, pp. 520 ff.

8. *Are the Non-uniform Juristic Concepts Supra-empirical ?*

I freely admit that the only juristic definition of "to kill" is contained in legal norms about killing. I admit, moreover, that the scope of the term "killing" and the borders of the class of killings, as understood in the juristic language, have been created under influence of evaluations and practical reasonings. But there is nothing else in that scope, within those borders, as (very multifarious) empirical facts. Finally, I think that the status of the majority of terms used in order to describe social phenomena is exactly the same. Practical reasoning had decided what are the limits of the classes of greetings, promises, dinners, furnitures, etc. But this does not mean that there is anything supra-empirical within those limits. Of course, many juristic definitions of legal terms clearly appeal to evaluations. What is "a wicked practice" mentioned in the Polish Penal Code ? Clearly this, and only this, what a judge would decide, according to his own evaluations, to call "wicked". But all the "wicked practices", in spite of the fact how they could be identified as such, are strictly empirical ones.

Let us quote, now, the famous distinction by G. E. Moore: "If I am asked "What is good ?" my answer is that good is good and that is the end of the matter. (...) I do not mean to say that *the* good, that which is good, is thus indefinable (...). Well "the good", "that which is good", must therefore be the substantive to which the adjective "good" will apply: it must be the whole of that to which the adjective will apply (...). It may be true that all things which are good are *also* something else (...). And it is a fact that Ethics aims at discovering what are those other properties belonging to all things which are good. But far too many philosophers have thought that when they named those other properties they were actually defining good; that those properties, in fact, were simply not "others", but absolutely and entirely the same with goodness. This view I propose to call "naturalistic fallacy". " ([49]).

([49]) G. E. MOORE, Principia Ethica, quoted from P. W. TAYLOR (ed.), *The Moral Judgement*, Englewood, Cliffs, pp. 7-10.

I think Moore would agree with the following view. One cannot define the property "good", but can enumerate good objects. All these objects could be empirically observed, even if goodness itself cannot. Similarly enough, I think that one cannot define the property *wicked,* but all the wicked practices could be only empirically done and empirically observed. Moore has distinguished adjectives like "good" or "wicked" from names like "a good thing" or "a wicked practice". Who says that the term "wicked" can be defined by substitution because wicked practices are empirical, probably makes the naturalistic fallacy. But who says "wicked practices are supra-empirical because the term 'wicked' cannot be defined by substitution", makes what I suggest to call the supra-empirical fallacy. Both the fallacies consist in mixing up adjectives with names.

Although one can enumerate and empirically observe all the so called wicked practices, one must choose between the following two interpretations:

1. Peter calls something "wicked" because he feels it is wicked. Peter feels it is wicked because it is actually wicked. The adjective "wicked" denotes an objective but supra-empirical property. This interpretation is probably the most akin to Moore's opinion.

2. Peter calls something "wicked" because he feels it is wicked". The adjective "wicked" does not denote any objective property, nevertheless. "Wicked" means nothing more than "called wicked" or "felt as wicked".

One can easily see that the same question can be formulated in respect to the sense data. Namely, we must choose between the following two interpretations:

1′. Peter calls this lemon "yellow" because he sees it is yellow. He sees it is yellow because it is actually yellow. The adjective "yellow" denotes an objective property.

2′. Peter calls this lemon "yellow" because he sees it is yellow. The adjective "yellow" does not denote any objective property nevertheless. There are no objective properties at all. "Yellow" means nothing more than "called yellow" or "seen as yellow".

I think, however, that the above comparison should not lead

to far-reaching conclusions like Einstein's opinion that "ethical axioms are found and tested not very differently from the axioms of science" ([50]). For there are at least two important differences between yellow and wicked. Namely:

1. Yellow is seen while wicked is not.

2. There is common agreement on what is yellow but not on what is wicked.

Therefore, according to the so-called common sense, yellow is objective (comp. 1') while wicked is not (comp. 2). I will follow this common sense tradition. I do not think that quoting the common sense is the best argument but what else can one do when making a choice without any empirical foundations ? Thus, I think that:

1. The states of affairs called "wicked" are empirical but the property *wicked* itself is not.

2. The property *wicked* is not supra-empirical, either. It simply does not exist. "Wicked" means "called wicked".

3. The term "wicked" understood as "called wicked" is empirically meaningful, if it fulfils the criteria discussed in the Section 5 of the present paper.

Finally, some remarks about defining legal names (not adjectives !) like "a wicked practice", "a theft", "a murder", etc., seem to be useful. I think that at least a definition by enumeration of examples is often possible. One can say: "E_1, E_2, ... E_n (and, eventually, other similar objects) are to be called thefts". Any example of a theft, quoted in such a definition, could be described by empirical terms only. For example, the theft of John's pen committed by Peter exists if, and only if, the two conditions are fulfilled: (1) Once John had gone to the place called a shop, had given a person called a shopman a few pieces of paper or metal called money and had received the pen, or once John's father had given him the pen, saying "I give you this because today is your birthday", or... (etc., etc., — here hundreds of similar alternatives should be quoted), and (2) Peter had taken the pen and started to use it and did not say to

([50]) Comp. A. EINSTEIN, The Laws of Science and the Laws of Ethics, (in:) H. FEIGL, M. BRODBECK (ed.), *Readings in the Philosophy of Science*, New York, 1953, p. 780.

John or to someone else "this is my pen", or... (etc., etc., — here hundreds of alternatives should be quoted again). The following additional remarks seem to be necessary:

1. Such a definition would report the meaning or use of the word "a theft", and other equivalent words, in the legal and juristic languages, i.e., in the languages containing not only descriptive statements but also norms.

2. In various legal systems different definitions of "a theft" are possible. Therefore, the word "a theft" is ambiguous.

3. The majority of legal systems formulate criteria of deciding, on grounds of observation, whether a given act is a theft. Only if a legal system does not formulate such criteria, the word "a theft" is in this system empirically meaningless. This does not mean, however, as we have seen above, that the acts of stealing something are themselves supra-empirical.

4. Such a definition of a theft must be very long, since the explanations, contained in the legal texts, answering what is "another person's property", etc., are full of other peculiar legal words, requiring further similar definitions. Nevertheless, if all those definitions can be formulated, the last reason for calling the term "a theft" supra-empirical would prove to be false.

9. *In What Sense Does Language Constitute Reality?*

There are also more general philosophical reasons for the assumption that the states of affairs quoted in juristic and legal definitions and, generally speaking, in the normative discourse, are supra-empirical. Norms are different from the descriptive statements. Therefore, many writers have thought that norms must relate to particular states of affairs, different from those described in descriptive statements. This opinion is founded on the famous maxim "language constitutes reality" ([51]). Conse-

([51]) See, e.g. E. SAPIR, The Status of Linguistics as a Science, (in:) *Selected Writings of Edward Sapir*, 1951, p. 162. See also A. SCHAFF, *Język a poznanie* (Language and Cogniton), Warszawa, 1964, pp. 79-130. A similar idea is expressed in Wittgenstein's Tractatus, see the sentence 5.6.

quently, the normative language must constitute the normative reality. What does it mean, however, that language constitutes reality ? Two interpretations seem to be the most important.

Interpretation 1. Any description of reality is ambiguous. Theoretical terms like "an electron" can be interpreted in many ways. Even using observational terms only, one cannot describe reality without any gaps. Consequently, descriptions of the same fragments of reality in two different languages, L_1 and L_2, can agree with all previous experiences but can become non-equivalent if the future experiments are accomplished. Choosing L_1 or L_2 one creates different images of reality. But, of course, one does not create different realities.

Interpretation 2. Peter sees a yellow lemon. Then, according to the meaning postulates of the English language, he should be ready to approve of the statement "this lemon is yellow", i.e., to admit that the statement is true. For the following ostensive definition belongs to the English language: The meaning of the word "yellow" is such that, in the normal conditions of observation, whatever looks yellow should be called yellow ([52]). However, the statement "this lemon is yellow", when uttered by Peter seeing the lemon, is subjective. It would become "objective", similar to scientific statements, only when the other persons looking at the same lemon would commonly agree that it is yellow. Such an agreement could be expressed only if all of them were speaking in the same language, containing the above ostensive definition of "being yellow" ([53]). It means that formulating simplest statements like "this is yellow" depends on language. Of course, language determines our way of speaking about observations. Some philosophers, nevertheless, think that

([52]) Comp. H. MEHLBERG, *The Reach, o.c.*, pp. 135, 291. He suggests, however, a slightly different definition: "the actual meaning of 'being yellow' is such that, by definition, whatever looks yellow to me probably is yellow". But similar use of the word "probably" has been criticised by K. R. POPPER, *The Logic of Scientific Discovery*, New York, 1959, pp. 254 ff. Therefore, I have quoted the definition founded on views of W. Mejbaum, see O twierdzeniach bazowych (On Basic Statements), (in:) *Teoria a doświadczenie*, Warszawa, 1966, pp. 11-128.

([53]) See the further discussion on that subject in K. AJDUKIEWICZ, *Logika pragmatyczna* (Pragmatic Logic), Warszawa, 1965, pp. 224 ff.

also what is observed depends on language. They quote the following examples: (1) An Eskimo knows more names of the kinds of snow that an European does; therefore, an Eskimo sees more kinds of snow (54). (2) Today I see different water in the river than I did yesterday. I think, however, that I see the same river, e.g., the Thames. The name "The Thames" helps me to identify the water seen today and yesterday as one and the same Thames (55). Generally speaking, many observations are classified in such a way that they constitute my whole picture of the object called "the Thames". Does language determine our way of seeing the world, then ? I do not believe in this. I do not believe that an Eskimo *sees* more kinds of snow than an European does. An European would see any snowflake an Eskimo had seen. An Eskimo would divide snow in more kinds, since he knows more names. But an European whom an Eskimo showed examples of these kinds, woulds see differences between them, although he is unable to quote their names. For "we must admit that human beings have far more concepts (distinctive cognitive capacities) than words for expressing them" (56). Even deaf-and-dumb persons have such capacities. Even a dog distinguishes various sensations. A dog distinguishes the smell of its master from the smell of a neighbor. Its master does not distinguish the smell of his dog from the smell of the neighbor's one. Does the dog know a richer language (or vocabulary) of smells ? Language cannot create new sensations nor observations. Language can merely classify what is looked at, heard, etc. It constitutes classes of observations, not observations themselves. All instances of "the yellow" belong to a given class. All instances of "killing" belong to another one.

Legal norms and juristic statements can classify fragments of reality in a peculiar way, since legal and juristic terms have peculiar meaning. For example, the class of acts called "killing" in the legal and juristic language is broader than such a class

(54) Comp. A. SCHAFF, *Język a poznanie, o.c.*, p. 221.

(55) Comp. W.V.O. QUINE, *From a Logical Point of View*, Cambridge, Mass., 1961, pp. 68, 75.

(56) Comp. M. BLACK, *Models and Metaphors*, Ithaca-New York, 1962, pp. 248-249.

in the ordinary language, since only the first one contains the so -called killing by not giving food. But any professional, scientific or technical terminology calls, and therefore classifies, elements of reality in a peculiar way. Not everything called water by a sailor is called water by a chemist. This fact has nothing to do with pecularities of the normative discourse. One can speak about the same reality using descriptive statements and using norms. The illusion that norms relate to another, supra-empirical reality, has been created by the fact that norms relate to reality in another way, i.e., regulate, not describe it. The maxim "language constitutes reality" cannot become a sufficient foundation for the opinion that statements formulated in the normative discourse relate to peculiar, supra-empirical states of affairs.

10. *Can Courts Establish Facts ?*

The opinion that the normative discourse relates to a peculiar, supra-empirical reality, is sometimes connected with the view that a State organ, e.g., a court, cannot discover actual facts, relevant to a given case. Among others, the following arguments have been quoted in favor of such a fact-scepticism ([57]).

1. A State organ, when trying to establish relevant facts, cannot use all possible scientific methods, since it has not the required means, qualifications, etc. Therefore, a State organ could make serious mistakes.

2. When witnesses disagree in their opinions, a State organ has a practically unlimited freedom to believe some of them and disbelieve others. In effect the prejudices an organ believes it calls facts, and the facts it disbelieves it calls prejudices.

3. A State organ, when trying to find facts, must observe rules or evidence. For example, the so-called hearsay evidence cannot be quoted in the Common Law countries. Therefore, a State organ is isolated from many, sometimes true, informations.

4. A State organ establishes facts according to presumptions

([57]) See above Note 46.

of law. For example, the Sec. 32 of the Polish Civil Code says: "When several persons died in the same danger, it is presumed that they died at the same time". One can easily see that this presumption is very often false.

I do not think, however, that the above arguments are correct.

1. Of course, a State organ cannot use *all* the scientific methods. But no scientist, no human being at all, could do it when trying to discover anything before his death. In this respect the fact-finding methods used in courts are not peculiar at all.

2. Not only a State organ but also a historian must choose between various statements, documents, etc. In this respect the fact-finding methods used in courts are no more biased as those used in historiography.

3. Not only a State organ but also any sane person must isolate himself from some informations. For example, no scientist would believe "hearsay evidence" about an experiment that could not be repeated.

4. Presumptions of law do not require believing in fictions, they only say which legal rules should be applied to a given kind of cases. Let us assume, e.g., that John and his son Peter died in the same accident. If John died first, their estate should be divided between heirs in one way. If Peter died first, the estate should be divided in another way. If both died at the same time, the estate should be divided in a third way. The Sec. 32 of the Polish Civil Code, in spite of its formulation, does not command a judge to believe that John and Peter had died at the same time. It rather can be translated, as follows: "When several persons died in a common danger, the judicial decisiors connected with their death should be carried out according to the legal norms that would be applied if they had died at the same time".

11. *Conclusions*

1. Propositions about the ordinary meaning of legal texts, formulated in legal dogmatics, can be confirmed or falsified on grounds of basic propositions.

2. The peculiar juristic interpretation is logically connected with basic propositions, but is justified in another way than scientific generalizations are. The chief difference is that, instead of the principle of induction, the juristic interpretation assumes the principle of justice.

3. Propositions about the legal validity, formulated in legal dogmatics, can be confirmed or falsified on grounds of basic propositions.

4. The norms formulated in legal dogmatics, and the normative terms used in all kinds of legal thinking, are quasi-empirically meaningful, i.e., they relate to reality in a very akin, although not identical, way as descriptive statements and purely descriptive terms do.

5. The reality the norms relate to — is the naturalistic one. There is no peculiar normative reality, constituted by the normative language.

General Conclusion. The legal dogmatics is an empirical, although in some respects peculiar, science.

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