LEGAL DECISION AND ITS JUSTIFICATION

Jerzy Wróblewski

1. There are many meanings of "Legal Decision". The main intuitions of the meaning of this term in legal language and in common language are: (a) decision taken by an authorized organ of the state; (b) decision determined by law; (c) legally valid decision. It is not my task to reconstruct the various uses of "Legal Decision" in particular languages. I take the judicial decision as the paradigm of legal decision (1) that is to say I shall analyze judicial decision as a model of the legal decision.

It is a simplification of my task since I can put aside a systematic survey of all kinds of legal decisions and I do not take into account their peculiarities. At the same time my analysis concerns the most complicated and minutely regulated kind of legal decision because other kinds of legal decisions are institutionally much simpler.

2. Judicial decision, as the paradigm of legal decision, can be treated as a solution of a conflict, based on legal rules, and deciding the case by assigning duties, obligations, powers and other legal modalities to the adressees of the decision.

In the systems of statute law there are some basic characteristics of judicial decision. The most important for our topic are: (a) the court is bound to decide any case properly presented for the decision; (b) the decision has to be based on valid legal norms; (c) judicial decision is institutionally controlled, except the hierarchically top decisions; (d) the control in question is based on the justifiability of the controlled decision.

3. The characteristics of judicial decisions stated above give a framework of institutional guarantees of the "objectivity" of the decision, the highest standards of this "objectivity" based on legal norms in any global society organized by legal norms.

Hence judicial decisions are thought of as the decisions giving "justice under the law".

The "objectivity" of judicial decision expressing "justice under the law" implies the justification of this decision. Roughly speaking this justification consists in a demonstration that the decision is based on the applied legal norm. I would not like to discuss here the controversial ideologies of judicial decision-making. These ideologies appear as a continuum: from Montesquieu's view of judicial decision as a mechanical application of general legal norm for a case to the "free judicial decision" based mostly on the evaluation of the circumsances of the concrete case. The discussion of the justification of legal decision can be meaningful only within the context of such ideologies of judicial activity that postulate that the decision should be justified by legal norms.

4. "Justification" of legal decision has three principal meanings: "psychological justification"; "logical justification *sensu stricto*" and "logical justification *sensu largo*".

4.1. Psychological justification of legal decision consists in an explanation of the decision by psychical phenomena. Each decision is, generally speaking, a choice between various alternatives of behaviour the decision-maker is aware of. Hence these phenomena can be viewed as "reasons" for the decision and, in some psychological sense, as a justification of this decision. Each decision *ex hypothesi* can be justified in this way. This kind of justification is, however, outside our interest here.

4.2. Logical justification *sensu stricto* is limited to the field of the propositions and the formal logic dealing with them.

A proposition is justified by other propositions if it can be inferred from them by the accepted rules of logical inference. This kind of "justification" is synonymous with "demonstration" of the truth of a proposition within the above mentioned field.

The use of this kind of justification for legal decisions requires an acceptance of several assumptions. Simplifying the problem I reduce these assumptions to two: either (a) there is

a formal logic of norms adequate for a formal logical justification of any legal decision, or (b) legal decisions and reasonings justifying them are governed by the formal logic of propositions. There is no place here to discuss in detail these assumptions. It seems to me, that assumption (a) in the present status of the formal calculi of the logic of norms is not fulfilled yet (2); assumption (b) is hard to accept in the anticognitivist philosophical attitude and, hence, the practical use of the logic of propositions in the area of norms is not sufficiently explained neither in metalogic nor in general philosophy.

4.3. Logical justfication *sensu largo* consists in giving proper reasons for legal decision. These reasons are the premisses for an inference of the decision according to the accepted directives of inference. Neither are these premisses restricted to propositions nor can these directives of inference be reduced to rules of the formal logic of propositions. It is my contention that this concept of justification is operationally adequate for analyses of the justification of legal decisions.

5. The concept of logical justification *sensu largo* requires some explanatory comments.

5.1. Logical justification *sensu largo* covers all reasonings for which the adjective "rational" is currently used. It covers, hence, not only the field of a formal logic of propositions and of norms, but also that of practical reasonings dealing with norms and evaluations. In other words such justification is proper to use within the framework of the logic of argumentation (3) which englobes formal logic as its part. From now on I shall use simply the term "justification" for "logical justification *sensu largo*".

Especially important for any justification of legal decision is that the decision treated as "individual norm" can be inferred from a "general norm" of an applied statute and from the propositional statements of facts. The semantically different status of these premisses and the relations of norms and propositions call for this wide concept of justification.

5.2. Legal decision is justified by its premisses and the rules of inference. The concept of justification has to be sufficiently ample to be used adequately for the current notions of "rationality" of such a decision (4).

Rational decision is a justified decision. Rationality is relative to the amount of knowledge of the decision-maker, to his evaluations and to the rules of inference accepted by him. Justified decision is relative to the norms, evaluations and inferences taken into account by the decision-maker.

5.3. There are two kinds of justification of legal decision: internal and external justification.

Internal justification deals with the validity of inferences from given premisses to legal decision taken as their conclusion. The decision in question is internally justified if the inferences are valid and the soundness of the premisses is not tested. In this respect internal justification is a "formal" justification and is not adequate for an analysis of the practical operation of legal decision and for its institutional control.

External justification of legal decision tests not only the validity of inferences, but also the soundness of premisses. The wide scope of external justification is required especially by the paradigmatic judicial decision because of the highest standards imposed on it.

6. Judicial decision, taken as the paradigm of legal decision, can be treated as a result of more or less complicated reasonings and is justified by various techniques.

6.1. The psychology of judicial decision is of no interest here (comp. point 4.1). The psychological process of reaching a decision can be quite independent on the justification given *ex post facto*. We are interested in the logical analysis of justification and not in the comparative generalizations of the data from the various styles of judicial decisions. My topic is the discussion of what are elements of justification of legal decision in a theoretical model taking into account all relevant issues as presented in judicial decision and its justification.

6.2. For this purpose it is convenient to single out three kinds of judicial decisions. "Interpretative decision" determines the meaning of the applied legal norm. "Decision of evidence" states that the fact of a case has taken place. "Final decision" determines the consequences of the proved facts of the case according to the dispositions of the applied legal norm.

The final decision takes into account the interpretative decision and the decision of evidence. The separation of these kinds of decisions involved in the application of law by a court in a system of statute law ([5]) does imply neither any evaluation of their relative importance nor suggests their sequence in the psychological process of decision-making. Each of the three decisions requires proper justification.

7. Interpretative decision ([6]) is needed when the law-applying organ has doubts concerning the meaning of the norm to be applied. This is an "operative interpretation" ([7]) which takes place when there is no "isomorphy" ([8]) between the case in question and the legal norm at hand.

7.1. For the determination of the meaning of the norm one uses interpretative directives as rules regulating how one has to seek the "true" meaning of a norm. These directives have a heuristic role and/or a role of rationalization. Dealing here with the justification of interpretative decision we are interested only in interpretative directives used as tools for rationalization. These directives require evaluations at least for two reasons: (a) when the directives are not imposed by law, the interpreter has to make an evaluative choice deciding which directives to use and in which way to use them; (b) the directives can evaluatively determine the interpretative behaviour.

7.2. Interpretative decision has to be justified by the interpretative directives and the evaluations determining their choice and their use.

The formula of interpretative decision making explicit the justificatory elements is following:

"The norm N has the meaning M according to the interpretative directives $DI_1 \ldots DI_n$ and evaluations $V_1 \ldots V_n$ necessary for the choice and for the use of the $DI_1 \ldots DI_n$"

7.3. Internal justification of interpretative decisions is relatively simple in situations when the content of $DI_1 \ldots DI_n$ is sufficiently precise and the values $V_1 \ldots V_n$ sufficiently determined. The looseness of these two elements of justification makes the statements of internal justification very difficult if not impossible, when the reconstruction of interpretative directives and/or evaluations is not possible.

7.3. External justification of interpretative decision is more complicated.

Interpretative directives can by imposed by legal norms and, then, in the regime of the rule of law one has to use them. The correctness of their use requires a formulation of relational statements ([9])describing the interpretative behaviour as consistent or inconsistent with legal norm containing the directives of interpretation. In general such kind of interpretative directives formulated in law is not sufficient for the needs of legal interpretation and, hence, the interpreter has to choose other directives from various sets put forth in legal science or in legal practice. This choice can be qualified as justified or not.

Analogous comments can be referred to evaluations. These evaluations can be partly reconstructed from the law, but in general the results of this are far too general for the determination of interpretative behaviour. There is thus a need for a choice of extra-legal values and all argumentative techniques can be related with the justification of these choices.

8. Decisions of evidence ([10]) are *prima facie* decisions expressed in propositions of the form e.g. "Fact F has occurred at time t and in place p". This is an elementary form of an existential statement. A demonstration of its truth or falsity depends on its relation to other statements from which it is inferred. These statements are "evidence". The simplest form of the decision of evidence would be: "F has occurred in t, p according to accepted evidence $E_1 \ldots E_n$".

8.1. To simplify our analysis let us assume that the fact of the case F is denotated in the applied legal norm descriptively and that it is a "simple", "positive" fact and that its existence can be stated empirically according to the current methodological paradigm of natural sciences or according to the common sense or common experience. If we denominate these directives of accepting evidence "rules of empirical evidence" then the formula of the decision of evidence is:

> "F has occurred in t,p. according to accepted evidence $E_1 \ldots E_n$ based on the rules of empirical evidence $REE_1 \ldots REE_n$"

Justification of such kind of decisions of evidence is closely similar to the demonstration of the truth of the statements in natural science, if the rules of empirical evidence are those accepted in such science. Legal systems can impose such kind of evidence and then the justification of the decision of evidence can be a logical justification *sensu stricto* (comp. point 4.2.).

8.2. In legal systems, however, we have also other directives of evidence which are binding *ex lege* and are not empirical rules. These rules, which I name "rules of legal evidence" are either not empirically valid or even not empirically meaningful. Rules of legal evidence have various historical forms from the mediaeval rules of proof to the contemporary rules for the exclusion of evidence or legal presumptions. I cannot discuss new important differences between these kinds of rules of legal evidence. Important for us here is that the justification of a decision of evidence depends upon the consistency of the behaviour of the court with legal norms expressing the rules of legal evidence. This relation is formulated in the above-mentioned relational statements. If these statements are true, then the decision of evidence is justified. Hence we have the second formula:

> "F has occurred in t,p. according to accepted evidence $E_1 \ldots E_n$ based on the rules of legal evidence $RLE_1 \ldots RLE_n$"

8.3. These two formulas of 8.1 and 8.2. make explicit the justification of the decision of evidence. I assumed, however, that the fact of the case F is a "descriptive", "simple" and "positive" fact. This is not always the case, because we have to do with more complicated facts: facts determined evaluatively (e.g. immoral behaviour); facts determined negatively (e.g. omission of due care); facts determined by the relation to norms (e.g. unlawful exercise of power) etc. Not discussing the complicated problems of the evidence of such kinds of facts it is patent, that at least in some situation to make a decision of evidence concerning these facts it is necessary to evaluate. The justification of the decision of evidence has, therefore, to refer to evaluations.

The formula of the decision of evidence which makes explicit the main requirements of justification for various kinds of facts is:

> "F has occurred in t,p. according to accepted evidence $E_1 \ldots E_n$ based on the rules of empirical evidence $REE_1 \ldots REE_n$ and/or on the rules of legal evidence $REL_1 \ldots REL_n$ and/or on evaluations $V_1 \ldots V_2$".

8.4. Internal justification of the decision of evidence expressed in the formulas of points 8.1. and 8.2. does not involve evaluations. For the formula of point 8.3., however, internal justification depends on the degree of preciseness of the evaluations $V_1 \ldots V_n$.

External justification, if the law determines rules of legal evidence and/or imposes the use of the rules of empirical evidence, for simple cases presents no differences with the internal justification. If, however, we have to do with evaluations as in choosing the directives of evidence or choosing relevant values as in the formula in point 8.3., then our previous comments to the external justification of interpretative decision are to be applied (point 7.3).

9. The final judicial decision determines the consequences of the proved fact according to the applied legal norm in the determined meaning ([11]).

9.1. The consequences of the fact F can be determined by the applied legal norm either strictly or with some lee-ways. In the former case the task of determining consequences is merely mechanical, in the latter it is a matter of choice.

This choice within lee-ways has a degree of freedom depending upon the content of the legal system. If this system contains norms formulating the directives of choices of the consequences, then the court is bound by them as by any other legal norms. Such directives can e.g. determine circumstances which are to be taken into account when choosing between various kinds of possible consequences or when fixing the "quantity" of a consequence. These directives, however, generally do not eliminate all lee-ways given by legal norms and hence, there remains some area for evaluative choices.

> The formula of the final decision is, hence, as follows: "According to the norm N in the meaning M the fact F which has occurred in t,p. has for its legal consequences $C_1 \ldots C_n$ according to the directives of the choice of consequences $DC_1 \ldots DC_n$ and evaluations $V_1 \ldots V_n$"

9.2. Internal and external justification of the final decision are analogous to those of interpretative decisions (point 7.2; 7.3). For the external justification of the decision in question there is, however, an additional factor: the justification of the final decision depends on the justification of the corresponding interpretative decision (point 7.1) and of the decision of evidence (point 8.3). This dependence is clearly expressed in the formula above (point 9.1).

10. Justification of a legal decision is a means for controlling its content. Internal justification deals with the formal validity of reasonings linking the premisses and the decision. Directives of inference are partly determined by the accepted logic and partly imposed by the legal norms ([12]). Analysis of these directives is the object of logico-legal research.

External justification of legal decision deals with the choices of various directives and with evaluations needed during their use. These directives and evaluations appear in the in-

terpretation of norms, in assessing evidence of the facts of the case and in the determination of the legal consequences of these facts within the provided lee-ways of decision. That justification can be hardly reduced to formalized techniques.

Taking into account the complexity of the justification of legal decision one has to assess its great social significance. Legal decision has to be based on law and has to be rational. Justification is a means for controlling the dependence of a decision upon law and for determining its rationality depending upon norms, facts and values. If legal decisions are functional parts of the legal control through law, then the decision-maker has to be able to justify his decisions within the legal, conceptual and ideological framework of his activities.

NOTES

(1) This assumption is one of the basic theses of the Egology, because in it the judge is "el canon del sujeto cognoscente" (C. Cossio, *La teoria egologica del derecho y el concepto juridico de libertad*, Buenos Aires, 1964, 2 ed., p. 29 33 and ff., 124 and ff.

(2) Comp. G. Kalinowski, *Introduction à la logique juridique*, Paris, 1965, chapt. III and esp. p. 137.

(3) Comp. C. Perelman-L. Olbrechts-Tyteca, *Traité de l'argumentation*, Paris, 1958, 2 vol.; C. Perelman, *Justice et raison*, Bruxelles, 1963, chap. XII, XIV, XVI; P. Foriers, *L'état des recherches de logique juridique en Belgique*, (in) *Études de logique juridique*, Bruxelles, 1968, vol. II; T. Viehweg, *Topik und Jurisprudenz*, München, 1965, 3 ed.; J. Stone, *Legal Systems and Lawyers', Reasoning*, Stanford, 1964, chap. VIII, § 8, 9.

(4) Comp. J. Wróblewski, *Podstawa normatywna i reguła decyzji w sadowym stosowaniu prawa*, Studia Prawno-Ekononiczwe 3, 1969, p. 26-30; J. Kmita, L. Nowak, *Studia nad teoretycznymi podstawami humanistyki*, Poznań, 1968, chap. II, § 3; G. Gottlieb, *The Logic of Choice*, London, 1968, p. 25 and ff., 154 and ff., 166 and ff.; P. A. Freund, *On Law and Justice*, Cambridge, 1968, chapt. V.

(5) Comp. the concept of the application of law J. Wróblewski, *Il modello teorico dell'applicazione della legge*, Rivista intern. di filosofia del diritto 1, 1967, p. 12; P. E. Nedbajło, *Primienienje sowietskich prawowych norm*, Moskwa, 1960, p. 11; K. Makkonen, *Zur Problematik der juridischen Entscheidung*, Turku, 1965, p. 13.

(6) Comp. generally J. Wróblewski, *The Semantic Basis of the Theory of Legal Interpretation*, Logique et Analyse 21/24, 1963; the same author, *Legal*

Reasonings in Legal Interpretation, Logique et Analyse 45, 1969; the same autor, *Zagadnienia teorii wykładni prawa ludowego*, Warszawa, 1959, chapt. II-V.

(7) L. FERRAJOLI, *Interpretazione dottrinale e interpretazione operativa*, Rivista intern. di filosofia del diritto 1, 1966.

(8) K. MAKKONEN, *op. cit.*, p. 84-96, 175.

(9) J. WRÓBLEWSKI, *Statements on the Relation of Conduct and Norm*, Logique et Analyse 49/50, 1970.

(10) Comp. J. WRÓBLEWSKI, *Il modello...*, *op. cit.*, p. 15-18; K. ENGISH, *Logische Studien zur Gesetzanwendung*, Heidelberg, 1969, 2 ed., p. 32-82; PERELMAN, *Justice...*, *op. cit.*, chapt. XIII; GOTTLIEB, *op. cit.*, chapt. IV.

(11) WRÓBLEWSKI, *Il modello...*, *op. cit.*, p. 19 and ff.

(12) Comp. KALINOWSKI, *op. cit.*, chapt. IV; PERELMAN, *Justice...*, *op. cit.*, chapt. XIV, XV.