

INTRODUCTION TO LAW
and LEGAL LANGUAGE
the script of the lecture

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Preface

The script we are presenting is an outcome of a cooperation of representatives of various groups of academic community who have met each other at the Faculty of Law, Administration and Economics at the University of Wrocław. These were students attending a lecture on *Introduction to Law*, PhD students from the Department of Legal Theory and Philosophy of Law, and the author of these words who is a fellow in the Department mentioned above. When teaching the course on *Introduction to Law* I saw ever more clearly the need for a written exposition of presented issues. During lectures, as well as in working classes (taught by my colleagues from the Department) we were finding as highly problematic the lack of a book which would expose in a coherent and compact manner content matters comparable with those forming a Polish *Wstęp do prawoznawstwa* course. I hope that the presented book will be helpful for students studying these issues – not only in the frames of Introduction to law course, but also within other similar academic courses, as for instance Legal Language or Law's Encyclopedia.

The script is very traditional in nature, for it was written in the way traditionally reserved for this genre of study. The main part of the content was prepared by students, using their own notes from lectures, complemented with further discussions with the lecturer and individual reading. The final editorial interventions are of minimal scope, being limited to clarifying some more ambiguous parts or eliminating obvious mistakes. The advantage of that fact is, among others, that one can reasonably expect a coherency between a level of complexity of the book and this of students' perception.

As one may notice, the book is also an outcome of a broad thought-exchange within an academic community. Therefore it may be treated as an attempt to realize the ideals of university study, where the border between transferring knowledge and awaking for own inquiry often fades away. Personally, I may add that such an awaking inspires also the waking person to more careful listening to what is waking.

Of course, all of this is not very pragmatic. But if this very way of understanding a university goes to the opposite direction then contemporarily dominant view on higher education, maybe it is even more needed.

The detailed division of work is following: Stefania Kolarz has prepared chapters VI and VII. Emilia Kopeć is an author of chapters V and IX, and Krzysztof Leszczyński – chapters III and IV. Jakub Łakomy has written chapters II and X and he also suggested a magnificent place for our meetings on a well at the historic courtyard of Ossolineum. As for me, I have prepared chapters I and VIII and edited the whole of the book.

I would like to express my gratitude to all the authors for our cooperation and inspiring discussions and wish all the Readers a fruitful reading.

As the presented version is still a draft, I apologize for all possible material and/or editorial mistakes; I also ask for not distributing it without my permit.

Maciej Pichlak

Wstęp

Skrypt, który przedstawiamy, jest efektem współpracy przedstawicieli różnych grup wchodzących w skład społeczności akademickiej, którzy spotkali się na Wydziale Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego: studentów będących słuchaczami wykładu *Introduction to Law*, doktorantów w Katedrze Teorii i Filozofii Prawa tegoż Wydziału oraz niżej podpisanego, będącego pracownikiem we wspomnianej Katedrze.

Prowadząc zajęcia z przedmiotu *Introduction to Law* coraz wyraźniej dostrzegałem potrzebę pisemnego wykładu omawianych zagadnień. Zarówno podczas wykładu, jak i ćwiczeń (prowadzonych przez moje koleżanki i kolegów z Katedry) doświadczaliśmy braku opracowania, które w spójny i przystępny sposób prezentowałoby treści porównywalne z tradycyjnym polskojęzycznym kursem ze *Wstępu do prawoznawstwa*. Mam nadzieję, że niniejsze opracowanie może służyć jako realna pomoc dla studentów w tym zakresie.

Skrypt ten ma bardzo tradycyjny charakter – powstał bowiem w sposób tradycyjnie zastrzeżony dla opracowań określanych tym właśnie mianem. Przeważająca część tekstu napisana została przez studentów, na podstawie własnych notatek z wykładów, uzupełnionych późniejszymi dyskusjami z wykładowcą oraz indywidualną lekturą. Końcowe zmiany redakcyjne miały zakres minimalny, ograniczając się do doprecyzowania niektórych bardziej niejednoznacznych ustępów czy usunięcia ewidentnych pomyłek. Ma to i tę zaletę, że uprawdopodobnia zgodność poziomu merytorycznej złożoności tej książki z poziomem studenckiej percepcji.

Jest zatem skrypt ten jednocześnie wynikiem szerokiej wymiany myśli w łonie akademickiej społeczności. Tym samym może być poczytany za próbę urzeczywistniania ideałów kształcenia uniwersyteckiego, w ramach którego dochodzi do zatarcia granicy między przekazem wiedzy a budzeniem do własnych dociekań naukowych. Od siebie dodać mogę, że takie budzenie inspiruje także budzącego do uważniejszego wsłuchania się w to, co budzące. Oczywiście nie jest to zbyt pragmatyczne. Ale jeśli takie właśnie rozumienie uniwersytetu idzie w kierunku przeciwnym do dominującego obecnie trendu w szkolnictwie wyższym, może tym bardziej jest nam ono potrzebne.

Szczegółowy podział prac przedstawia się następująco: Stefania Kolarz przygotowała rozdziały VI i VII. Autorstwa Emilii Kopeć pozostają rozdziały V i IX, a Krzysztof Leszczyński – rozdziały III i IV. Jakub Łakomy jest autorem rozdziałów II i X, a także pomysłodawcą wspaniałego miejsca dla naszych spotkań przy studni na historycznym dziedzińcu Ossolineum. Niżej podpisany przygotował rozdziały I oraz VIII, a także dokonał redakcji całości.

Dziękując wszystkim autorom za współpracę i inspirujące dyskusje, życzę Czytelnikom udanej lektury. Jako że prezentowana wersja ma wciąż charakter roboczy, przepraszam za wszelkie możliwe niedociągnięcia merytoryczne czy edytorskie; proszę również o nierozpowszechnianie jej bez mojej zgody.

Maciej Pichlak

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Chapter I

The Legal Concept of Law

1. Four approaches to the law

The law is a fascinating phenomenon that surrounds us in almost every second of our life. It affects the way we act, the way we think and the way we perceive ourselves. As **Ronald Dworkin** said: “We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who owe things” (*Law’s Empire*, ___)

But what the law is? The answer is far from being simple. Looking for the answer in books, we find a plenty of different viewpoints and narratives on the law over centuries. Even if we limit our investigation to the modern times, there is a number of different schools and intellectual perspectives and each of them presents its own standpoint in this debate.

The dispute concerns not only a question 'what the law is?' but also '**where should we search for it?**', that means, what kind of being the law is? To what sphere of reality does it belong or, to put it in other words, what is **the ontological characteristics** of law?

We may distinguish **four most influential approaches to the law** in contemporary legal science (legal scholarship), based on different possible answers to the question posed above: a **linguistic, an axiological, a psychological and a sociological approach**.

a) **The linguistic approach** perceives the law as a **collection of linguistic acts (utterances)**. Such utterances are called norms or provisions. Legal norms are formulated in a specific language (so termed 'legal language'). The viewpoint that the law is first of all a linguistic phenomenon is the dominant one in the contemporary legal science. Also laymen usually understand the law as a system of norms or provisions.

Linguistically oriented legal research distinguishes between **two basic types of the legal language**: a language of legal texts (law-making instruments), and a language of legal practice and legal science. Nevertheless, the very distinction is not free of controversies, being more clear in so called civil law systems and rather blur in **legal systems of common law**.

b) **The axiological approach** perceives the law as **an expression of values** which usually are regarded as prior and independent from the law in their existence. This kind of approach is **typical of philosophies of natural law**, yet it is not limited to these. The dominant view in Polish legal science was for decades skeptical toward this approach, treating it as a consequence of **philosophical idealism** (as opposite to materialism). This view is still widely

Komentarz [p1]: Ronald Dworkin (1931 – 2013) – A north American legal philosopher, the author of so called 'interpretative' philosophy of law.

Komentarz [p2]: Ontology (from the Greek ontos – 'of that which is') – philosophy of being (that what is, reality) and it's nature.

Komentarz [p3]: linguistic approach – see more in chapter IV.

Komentarz [p4]: This distinction is mirrored in the Polish language by a differentiation between terms 'język prawny' and 'język prawniczy', what is hardly translatable.

Komentarz [p5]: Distinction between civil law and common law – see chapter VII.

Komentarz [p6]: Axiology (from the Greek axios – worth, valuable): philosophy of values.

Komentarz [p7]: Philosophy of natural law – see chapter II.

Komentarz [p8]: Idealism – a philosophical standpoint that affirms the objective existence of values and other non-material beings.

spread e.g. in numerous Polish textbooks for 'Introduction to the Law' courses. However, nowadays the very opposition between idealism and materialism in philosophy is questioned and we may observe **the growing interest in axiological problems** among legal scholars.

c) **The sociological approach** conceives of the law as a social phenomenon. According to this approach, the law might be understood as e.g. **acts of social agents (social practices), social relations or social institutions**. This kind of approach is **typical of so called legal realism** and is related to a distinction between 'law in books' (which is a matter of interest of linguistic approach) and 'law in action' (how the law 'works' in the social reality).

Komentarz [p9]: Agent (in social science): an acting subject, a participant of social practices.

Komentarz [p10]: legal realism - see chapter II.

d) **The psychological approach** regards the law as a psychological phenomenon, **existing first of all in human beings' minds**. There are more radical and modest versions of this approach. The former treat the law as a fiction, a kind of 'group illusion', whereas the latter admit that it has some kind of objective existence but focus on the problem how such an objectively existing law is mirrored by psychological process of human mind.

Except the four approaches listed above we may distinguish others. Among them, two are the most influential in contemporary jurisprudence: **economical and political approach**. Both interpret the law as rather dependent and instrumental: the former in relation to economical interests and the latter to a (real or symbolic) power of some social groups or classes.

Furthermore, it should be remembered that the above approaches might be merged together in someone's actual – theoretical or practical – perspective. Thus we may meet e.g. a linguistic–sociological approach (theories of legal argumentation) or linguistic-axiological approach (legal hermeneutics, interpretative theory of law).

In this book, in accordance with the dominant perspective in Polish jurisprudence, **we shall choose the linguistic approach as a basic one**. Nevertheless, it will be often combined with sociological and axiological insights. Although this merely represents a typical viewpoint in our legal culture, it should be realized that this is not the only possibility – such a choice is never neutral and may be disputable.

2. Legal system and legal order

According to the linguistic approach we have chosen, the law is usually defined as **a system of valid norms: a legal system**. Each word in this crude definition (system, norm, validity) begs for an explanation; we shall offer such in **further chapters**. For this moment, let us limit ourselves to some preliminary remarks: **the (legal) norm** is a rule of conduct, that is reconstructed from texts of binding legal instruments; and **the (legal) system** is an organized and internally coherent collection of such norms.

Komentarz [p11]: legal system – see chapter VII
legal norm – see chapters IV and V
validity – see chapter III

The legal system, regarded this way, is created first and foremost by an official political authority, that is a legislator, and is contained in legal texts issued by this legislator. Nevertheless, such a definition – equating the law with the totality of legal texts – is too narrow. It simply does not cover everything what counts as the law.

For this reason it is suitable to introduce also another concept: the concept of **legal order**. The legal order has broader scope than the legal system, since it includes also some **extra-textual, not written rules and principles** which are necessary for a proper understanding, interpreting and applying the law. While thinking about the law, **legal professionals (lawyers)** usually take into account also these extra-textual elements – even if they hardly ever do it consciously.

Komentarz [p12]: The term 'legal professional' means everyone who works professionally with the law – that is judges, prosecutors, barristers, attorneys, etc. The term 'lawyer' in anglo-saxon countries traditionally has a narrower scope. In spite of this, for the sake of brevity, we shall use them as synonymous.

While the legal system is rather 'flat' in nature, containing only one layer – the layer of norms reconstructed from legal texts – the legal order is best perceived as **a multilayered phenomenon**. Below we present some theoretical attempts to capture this multilayered nature of the law.

1) **Ronald Dworkin**, in his powerful critique of **legal positivism**, distinguished two kinds of rules that are legally relevant: **'typical' rules and principles**.

Komentarz [p13]: legal positivism - see chapter II

a) **Rules:** may be found in legal texts and are valid due to the fact that they meet some formal criteria (termed by Dworkin 'a test of pedigree'). These are legal rules in a positivistic sense.

b) **Principles:** are not written in texts of law-making instruments, but are a part of 'institutional morality'. They are basic moral principles, generally accepted in a particular legal culture. Principles are valid not on the ground of formal but material criteria: their practical weight (significance) and institutional acceptance. Dworkin offers examples of such principles, formulated explicitly in court decisions, e.g.: **'No one should be allowed to profit from their own wrongdoing'**.

Komentarz [p14]: rules and principles – see more in chapter V

2) Also some versions of legal positivism acknowledge the multilayered nature of the legal order. **Herbert L.A. Hart**, one of the most distinguished representatives of this school, offered an idea of law as a system of primary and secondary rules.

Komentarz [p15]: Herbert L.A. Hart (1907-1992) – an English analytical philosopher, one of the most important legal philosophers in the XX century. His book *The Concept of Law* (1961) is treated as a founding act of a contemporary legal positivism.

a) **Primary rules** are simple ‘duty-imposing’ rules (e.g. It is prohibited to: ...cross the street on the red light; ...steal; ...step into the sacred forest *etc.*).

b) **Secondary rules** are ‘power-conferring’ rules what means that they do not just impose a duty to act in a certain way but they create a competence to take some actions of special significance (conventional acts). According to Hart, we may distinguish three types of secondary rules:

– **Rules of change** give an answer to a question how the system of primary rules may be changed: new rules enacted and the old ones abrogated.

– **Rules of adjudication** answer a question who possesses an authority to settle disputes as for application of primary rules.

– **Rules of recognition** define the criteria under which other rules may be recognized as legally valid (as a part of the legal system).

It is remarkable that never all the secondary rules (and particularly the rules of recognition) may be written in legal texts. In other words, it is logically impossible to formally issue all the rules belonging to the legal system. Some of them just work in practice, as a common but implicit knowledge or a scheme of conduct.

3) **Zygmunt Ziemiński**, another representative of legal positivism, claimed that in each legal order one may find ‘**a normative conception of sources of law**’ which answers the question ‘what count as the law?’ or ‘which specific legal norms belong to the legal system?’. Ziemiński distinguished three main components of such a ‘normative conception’: ideological foundation of the system, validation rules and exegesis rules.

a) **Ideological foundations of the system** deliver an answer to a question about a political sovereign and a legitimacy of the system as a whole.

b) **Validation rules** define relevant sources of law – facts that result in creation of new legal rules (provisions). There are two basic groups of such facts, which allow to distinguish textual and non-textual sources of law.

c) **Exegesis rules** regulate the process of ‘working’ with texts of law-making instruments; they allow for a reconstruction of a collection of legal norms from these texts. According to Ziemiński, there is a further sub-division of these rules into three groups: interpretation rules, inferential rules and collision rules. We shall clarify each component of the normative conception of sources of law in further chapters.

Komentarz [p16]: Conventional act: see chapter IV.

Komentarz [p17]: Zygmunt Ziemiński (1920-1996) – famous Polish legal philosopher, representative of legal positivism and analytical theory, the co-author of derivational theory of legal interpretation (see chapter IX) and a theoretical distinction between legal provision and legal norm (see chapter VI).

Komentarz [p18]: ideological foundation of the system – see chapter III.

Komentarz [p19]: validation rules – see chapter XI
interpretation rules – see chapter IX
inferential rules – see chapter X
collision rules – see chapter VII

3. Three levels of the law

One of the most holistic theoretical representation of the multilayered nature of law is an idea of three levels of law, offered by **Kaarlo Tuori**. Tuori's theory treats on a modern legal system, particularly within the European legal culture, as a historic type of law. This is a positivistic theory in that sense that all three levels of law are created in and by some social practices – they are 'positive' that means: socially established rather than being inferred from any ideal, metaphysical sources.

The three levels of the law are: a surface level, a legal culture and a deep culture of the law.

a) Surface level is the level of legal provisions formulated in law-making instruments and other 'typical' sources of law. This is the most intuitive, the most visible and the most obvious layer of the law. But in the same time it is the most turbulent and unstable one. This layer of the law is created by a political legislator.

b) As compared with the surface level, **a legal culture** is not only produced by acts of the legislator, but it is also created by legal practice and legal scholarship. Tuori's theory focuses on a professional legal culture (**legal culture sensu stricto**), as opposed to a legal culture of the whole society. The legal culture contains values, principles, and concepts which are anchored in beliefs and practices of the specific legal community. One may distinguish legal cultures of each nation state (like Polish, German, Spanish, Hungarian legal culture etc.), although cultures of different European countries show significant similarities to each other. On the other hand, within the one 'state culture' we may observe the sub-cultures of different social groups (e.g. different legal professions – a legal culture of judges, of prosecutors etc.). Generally speaking, it is to be remembered that culture rarely is a homogenous phenomenon - different, and even contradictory elements may co-exist within one culture.

Tuori distinguishes following components of the concept of legal culture:

- **methodical elements** (paths of legal reasoning and argumentation, e.g. rules of legal interpretation, collision rules, argument *a simili* or *a contrario*)
- **conceptual elements** (basic legal concepts, e.g. a legal norm, a legal entity, private and public law, a source of law etc.)
- **normative elements** (general legal principles, e.g. a presumption of innocence in a criminal law, *lex retro non agit* etc.)
- **general doctrines** (more comprehensive doctrines that bring a *prima facie* order in other components of legal culture, e.g. an accepted doctrine of sources of law, different theories of legal interpretation, a doctrine of human rights etc.)

Komentarz [p20]: Kaarlo Tuori (born 1948) – Finnish legal scholar, a professor of University of Helsinki. His research interests cover a legal theory, constitutionalism, and the European Union law.

Komentarz [p21]: theories of legal interpretation – see chapter IX

c) **the deep culture of law** is built by the most basic qualities of the law and the way it is perceived. These qualities are common for all modern legal cultures, thus allow to distinguish the 'modern' law as a historic type of law. Clear enough, also other types of law possess their own deep culture, which is characteristic of them and allow to distinguish each of them from other historic types of law. The deep culture is usually unconscious, but at the same time the most stable layer of the law. Within the European legal culture, the common view presents the law as e.g. formally rational, internally coherent, autonomous, institutional. Also some material standards – e.g., the idea of human rights protection – may be included into the deep culture of law.

The deeper layers of the law (legal culture and deep culture) play several **functions for the legal order:**

- they constitute the very legal order (without them, it would be impossible for the law to exist);
- they legitimate the law;
- they define limits of the law.

From these general functions stem also more practical roles of the deeper layers, namely:

- they are the **source of typical arguments** within legal reasoning, and
- they are **the yardstick for criticism** of particular decisions (both law-making and law-applying) within the legal practice.

This means, among others, that knowing the surface layer of law – the level of legal texts' wording – is not sufficient to be a skilled lawyer; what is even more important for someone who wants to participate in the professional legal practice is **a practical experience in using the non-written elements of deeper layers of law.**

Chapter II

Basic Philosophical Conceptions of Law

1. Natural law

[The natural law is] nothing else than the rational creature's participation in the eternal law.

Thomas Aquinas

Natural law is a system of norms which are common to all the people and derived from **nature** rather than from the rules of society, or positive law. Just laws are **immanent** in nature; hence, they should be "discovered" or "found" rather than "created" in legislative acts. Natural law does **not refer to the laws of nature** (eg. theory of gravity, theory of evolution), the laws that science aims to describe.

According to natural law theories, the moral standards that govern human behavior are **objectively derived from the nature** of human beings and the nature of the world.

[Internet Encyclopedia of Philosophy IEP, *Natural Law*, <http://www.iep.utm.edu/natlaw/>]

Natural law may refer to the use of **reason** to analyse a human nature and deduce from it binding rules of behavior. The term 'natural law' is opposed to the 'positive law' of a given political community, society or nation state and thus can function as a standard for criticism of that law. Furthermore, also in the process of interpretation of positive law its content cannot be known without a reference to the natural law.

In natural law concepts **moral propositions possess** a quality which is sometimes called '**objective standing**' in the sense that such propositions are the bearers of objective truth-value; that is, **moral propositions can be objectively true or false**. Such a viewpoint in moral philosophy is termed as a **cognitivism**.

Many natural law concepts share the claim, as stated above, that **standards of morality are in some sense derived from, or entailed by, the nature of the world and the nature of human beings**. Thomas Aquinas, for example, identifies the rational nature of human beings as that which defines moral law: "The rule and measure of human acts is the reason, which is the first principle of human acts". According to this common view, since human beings are by nature rational beings, it is morally appropriate that they should behave in a way that conforms with their rational nature.

Komentarz [p22]: Thomas Aquinas 1225 – 1274) was a Dominican priest of the Catholic Church, and a philosopher and theologian in the tradition of scholasticism. His concept of natural law has been very influential in subsequent centuries.

Komentarz [p23]: immanent – present as a natural part of sth; present everywhere.

Komentarz [p24]: law of nature - scientific generalization based upon empirical observation

Komentarz [p25]: Cognitivism is the ethical view that ethical sentences are propositions so they are objectively true or false, such as propositions concerning empirical reality and therefore ethical values can be objectively recognized.

[Internet Encyclopedia of Philosophy IEP, *Natural Law*, <http://www.iep.utm.edu/natlaw/>]

2. Legal positivism

The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry.

John Austin, *The Province of Jurisprudence Determined*

Legal positivism is a school of jurisprudence which advocates the belief that the **only valid laws are those written rules**, regulations, and principles **that have been expressly enacted**, adopted, or recognized by an official political authority. There is **no inherent or necessary connection between the validity conditions of law and standards of ethics or morality**. Therefore the law is seen as being conceptually separate (though of course not separated in practice) from moral norms and ethical values. Legal positivism perceives the law as created by lawmakers.

[<http://legal-dictionary.thefreedictionary.com/Legal+positivist>; http://en.wikipedia.org/wiki/Legal_positivism]

What is crucial for the legal positivism is the way it answers the fundamental question of jurisprudence: "What is law?" Legal positivism attempts to define law by firmly **affixing its meaning to written decisions made by official political bodies** that are endowed with the legal power to regulate particular spheres of social relations and human conduct.

If a principle, rule, regulation, decision, judgment, or other law is recognized by an authorized governmental body or official, then it is qualified as the law. Conversely, if a behavioral norm is enunciated by anyone or anything other than authorized official entity, the norm is not qualified as legally binding, no matter how many people are in the habit of following the norm or how many people take an action to legitimize it.

Legal positivism is often contrasted with natural law. According to the natural law school of jurisprudence, as elaborated earlier, all written laws must be informed by, or made to comply with, universal principles of morality, religion, or justice; hence, a law that is not just (legitimated) may not rightly be called 'law'. Legal positivists generally acknowledge the existence and influence of non-legal norms as sources to consult in evaluating human behavior, but they contend that these norms are only aspirational, for persons who contravene them. By contrast, positivists emphasize that **legal norms are binding and enforceable by**

Komentarz [p26]: **John Austin** (1790 – 1859) a British jurist and legal philosopher. One of the "founding fathers" of legal positivism. Author of canonical book in jurisprudence: "The Province of Jurisprudence Determined" (1832).

Komentarz [p27]: **validity** – see more in chapter III

force, by the police power of the government, such that individuals who violate the law may be made to face serious consequences including fine or imprisonment.

To sum up, we should point out that in literature concerning the topic, it is commonly agreed that the majority of versions of legal positivism share two following theses:

1) **The social sources thesis (pedigree thesis)** asserts that legal validity is a function of certain social facts. For instance, John Austin, borrowing heavily from **Jeremy Bentham** in that respect, argues that the principal distinguishing feature of a legal system is the presence of a sovereign who is habitually obeyed by the most people in the society, but is not in the habit of obeying any determinate human superior.

2) **The separability thesis.** In its most general form, the separability thesis asserts that **law and morality are conceptually distinct**. As Herbert Hart describes it, the separability thesis is no more than the “simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so”.

Legal positivism is an internally disparate legal theory. An abovementioned characteristics relate to some versions of this legal philosophy, namely these which are the most popular in literature.

[Internet Encyclopedia of Philosophy IEP, *Legal Positivism*, <http://www.iep.utm.edu/legalpos/>]

3. Legal realism

The life of the law has not been logic; it has been experience (...) The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Oliver Wendell Holmes Jr., *The Common Law* (1881)

Legal realism is a philosophical conception of law which claims that we should look for legal rules/norms in **judicial decisions** and other acts of applying law. Those decisions are based on the premises which should be searched in the **interests of particular social groups**, social classes, public policy and in the ‘minds’ of law applying judges. Law is neither based on some formal acts (legal instruments) like in legal positivism, nor on universal authority as in natural law theories.

Legal realists often hold a **relativistic view** that the law is nothing more than what a particular court says on a given day, and that the outcome to a legal dispute will vary according to the

Komentarz [p28]: **Jeremy Bentham** (1748 –1832) an English jurist and philosopher. One of the most relevant proponents of legal positivism and philosophical utilitarianism.

Komentarz [p29]: **Oliver Wendell Holmes, Jr.** (1841 – 1935) an American jurist, Associate Justice of the Supreme Court of the United States from 1902 to 1932. One of the most famous critics of legal formalism and proponents of legal realism.

political, cultural, and religious persuasion of the presiding judge. Some realists, such as Jerome Frank (a prominent representative of U.S. jurisprudence during the 1920s and 1930s), insisted that judge's personality and psychological characteristics also sway the judicial decision-making process. Justice of the U.S. Supreme Court Benjamin N. Cardozo went so far to characterise judges as **legislators in robes**.

[<http://legal-dictionary.thefreedictionary.com/Legal+Realism>]

Realists, such as Justice Cardozo, questioned the formalists' assumption that the law could be autonomous and objective, or produce demonstrably certain outcomes. In *The Nature of the Judicial Process*, Cardozo argued that the law is a malleable instrument that allows judges to mold amorphous words like *reasonable care*, *unreasonable restraint of trade*, and *due process* to justify any outcome they desire.

Ontologically speaking, law is social fact, not a value or abstract norm decoded from the text. That is why, while speaking about legal realism, there is often underlined a **distinction between 'law in books' and 'law in action'**.

Epistemologically speaking, law can be explored and examined not by reading legal text, but through **sociological research** – careful examining concrete social facts, words, behaviors, judicial rulings and opinions.

Consequently, this school of legal philosophy challenges the orthodox view under which law is characterized as an autonomous system of rules and principles that courts can logically apply in an objective fashion to reach a determinate and apolitical judicial decision.

Legal realists maintain that **adjudication** is an inherently subjective system that produces inconsistent and sometimes incoherent results that are largely based on the political, social, and moral opinions of state and judges. Realists argued that the law frequently equates the dominant power in society with pervasive economic interests. The philosophy examines the law from a **'real world' perspective**, and suggests that this is not the actual legislation that shapes legal outcomes, but what judges will enforce and what a legal community or general population will accept.

[<http://legal-dictionary.thefreedictionary.com/Legal+Realism>]

Many legal realists share the belief in the importance of **interdisciplinarity** while approaching to the law. Many of the proponents of this school are interested in sociological and anthropological insights to the study of law. Karl Llewellyn's book *The Cheyenne Way* is a prominent example of this tendency.

Komentarz [p30]: ontology – see chapter I.

Komentarz [p31]: epistemology (from the Greek episteme: knowledge, science) – philosophy of a nature, conditions and a scope of cognition.

Another belief shared by many realists is the belief in **legal instrumentalism**, the view that the law should be used as a tool to achieve social purposes and to balance competing social interests.

The above characteristics concern mainly American legal realism, which is the earliest and the most popular version of this legal philosophy. Other instances of this perspectives are Scandinavian legal realism and Leon Petrażycki's psychological philosophy of law.

Chapter III

Validity and legitimacy of law

1. Four conceptions of validity

First of all, 'validity of law' may be defined as "an act of being effective or binding, or having legal force". Hence, it is related to binding force, applicability, lawfulness. Validity or invalidity of the law determines whether the law is in force and may efficiently perform in a concrete legal system.

Komentarz [p32]: Definition of validity according to The American Heritage Dictionary of the English Language. Boston, MA: Houghton Mifflin, 1992.

We distinguish four conceptions of validity:

- a) Axiological
- b) Factual (behavioral)
- c) Thetic
- d) Systemic (formal)

a) **Axiological conception** defines validity of a norm in terms of values it serves, in other words, the norm is valid due to axiological justification. Axiological criterion in that context is usually equated with moral standards. We may distinguish two versions of the axiological conception: one of them based on a positive criterion (strong interpretation), the other one based on a negative criterion (moderate version). The former assumes that norm's accordance with the value system is a sufficient condition (the only necessary one) for its validity, i.e. if a norm is judged positively in the value system, it is enough for it to be valid, regardless of the other features of that norm.

Komentarz [p33]: sufficient condition
– conditio per quam est

The latter assumes that a norm is not valid if it is not in accord with the value system (as says the Roman principle : *lex iniusta non est lex*), however the norm's accordance with the value system is not enough for the norm to be valid, as - additionally - formal and thetic conditions for validity have to be taken into account in this version of axiological conception of validity. Whatever the version - radical or moderate, axiological validity assumes that every legal order or prohibition must be preceded by the evaluation of the behaviour (ordered or prohibited) in terms of good and evil. The validity of law in the axiological sense directly corresponds with law's legitimacy.

Komentarz [p34]: necessary condition
– conditio sine qua non

b) **Factual conception** derives its name from social facts determining validity of the law. It assumes that the law is valid if it 'works' in practice, which means it is observed by the

citizens or applied and enforced by the authorities. Strong interpretation of this conception (employing a positive criterion) assumes that if the law is applied, it is *ipso facto* valid, regardless of the other features of that law, i.e. applying the law is the only necessary condition for validity. This strong interpretation of the factual conception may be applied to justify a validity of customary law. Moderate interpretation treats a factual criterion of validity as a negative one i.e. it assumes that if law is not applied, it is not valid (so called *desuetudo*), however, this version regards applying the law as a merely additional condition for the law's validity, alongside with conditions of thetic and formal validity.

Komentarz [p35]: *desuetudo* – a doctrine that recognizes a norm as invalid as a result of long and continued non-use

c) **Thetic conception** assumes that the law is valid on condition that it has been established by a special entity- the lawgiver - able to enforce obedience to that law. The lawgiver derives their competence from coercion (using force) or prestige (respect they enjoy). In this conception validity is strictly related to command, which may lead to 'the paradox of bandit' – theoretically, a bandit using a gun, which makes him a subject able to enforce obedience to whatever rule he establishes, could be the lawgiver, competent to create valid law. That paradox is solved if we consider the society's habit of obedience (rather than coercion) the basis of validity, since this demands that the law be generally accepted by the society. Such a solution is provided by H.L.A. Hart's concept of **internal point of view**.

Komentarz [p36]: **internal point of view** – see para. 2

d) **Systemic (formal) conception** is based on the principle that the norm is valid if it belongs to the legal system. As such, the norm has to fulfill the following formal criteria:

- i. it has been properly introduced to the legal system (by the competent legislator and according to the procedures)
 - OR it is inferred from such norm (according to accepted rules of inference);
- ii. it is not contradictory to other norms belonging to the system (including inferential consequences)
 - OR if it is contradictory, it doesn't lose its binding force according to accepted collision rules;
- iii. it has come into force following its promulgation;
- iv. it has not been formally derogated.

As shown above, the validity of a norm in systemic conception depends on formal attributes of the norm (by whom and how it has been established) and its relations to other norms in the system. This conception of validity of law is most frequently applied in legal science, as well

as in legal practice. It is also exceptional in comparison to other three conceptions, as it is strictly formal – on the contrary, the other three conceptions somehow relate validity to the reality.

In our (Polish) legal system thetic and formal conceptions of validity are dominant.

2. Internal and external point of view

The concept of an internal and external aspect of norm has become popular owing to H.L.A. Hart's theory of internal and external point of view, contained in his book *The Concept of Law*. The basic, simplified, idea of it is that one may look at the law from the inside or from the outside. The first perspective is the one **of the participants in the legal system** – lawyers, legal officials (e.g. judges, prosecutors), as well as citizens observing the law, while the second one is the point of view **of the outsiders that observe the legal system** – sociologists, anthropologists etc. The central idea here is that the external point of view can describe the behavior of legal actors, but the internal point of view is required to understand reasons for observing the law by those actors and a meaning they attribute to legal actions.

Prior to Hart's *Concept of Law* positivist doctrine associated law and its binding force with a threat of sanction. Internal point of view enables one to understand that the power of law relies rather on people's belief of imposed obligation than on a fear of sanction. Internal point of view means that people comply with the law because they accept its existence and the duty to obey it. Nevertheless, it does not amount to people's positive reflection on to law. On the contrary – subjects to the law comply with it even if they do not agree with its righteousness or justification. In Hart's theory the sole essence of law is therefore a **social acceptance**. A legal rule exists only insofar as it is believed by human beings to impose legal obligations on them. In other words people's inner conformist attitude towards certain rules constitutes law.

External point of view asserts the existence of law upon observation of certain regularities occurring in society, i.e. people following rules. Nonetheless, without internal point of view it is impossible to conceive the difference between law and a mere habit or routine.

A rule constitutes law only if both internal and external point of view account for it. Not only must the rule be obeyed – which is visible from the external point of view – but also subjects to the law need to possess the conviction that they have obligation to follow such a rule.

3. The concept of legitimacy

Legitimacy of law can be defined in terms such as justification of law or righteousness of law. The concept is related to the notions of validity, morality or justice. Different meanings of legitimacy are essential issue here. Legal doctrine deems legitimacy an ambiguous concept and distinguishes two perspectives on it: normative (critical) perspective and sociological one.

a) Normative perspective - is critical and reflexive; from that point of view we claim whether some actions or institution is wrong or right.

b) Sociological perspective - is strictly theoretical; is based on making assertions about legitimacy beliefs and people's attitudes in the society described.

There are multiple ways of legitimizing the law, depending on:

- its content;
- the procedure, according to which it has been issued;
- agreement as to obey it or not;
- characteristics of the lawgiver;
- reason;
- religion
- or effectiveness.

Over the years legal doctrine has created multiple concepts of legitimacy of law. They can be basically divided into two categories:

- autonomous legitimacy (self-legitimacy, with references to internal sources, e.g. legitimacy in legal positivism);
- extra-legal legitimacy with transcendental references (e.g. to the God as the source of law - the divine law).

Conceptions of legitimacy lead to the same **paradoxes** as all other theories, namely:

a) circular argument, in which theory and proof support each other, which in this case means that legitimacy goes around in a circle from one source to another and creates an infinite loop,

b) regressive argument, in which each proof requires another proof, going backwards without an end (*regressus ad infinitum*), in this case meaning that legitimacy is derived from one superior norm to another, and so on, without stipulating the first self-legitimate norm,

c) the axiomatic argument, in which there is a stipulated assumption that is not to be proved, which is a base for further argumentation, in this case it would be stipulating some self-legitimate source of all legitimacy (e.g. God, or to the nature).

Komentarz [p37]: Munchhausen Trilemma – a term indicating the only three ways of proving any theory, none of which leads to the objective truth or certainty. They consist of: circular argument/vicious circle; regressive argument/regressus ad infinitum; and the axiomatic argument, which is a solution to the paradox of regressus ad infinitum.

Chapter IV

The norm from the linguistic point of view

1. Basic functions of utterance

As it was already mentioned in chapter 1, **the law is perceived to be mainly linguistic phenomenon**. Thus, as far as the norm is concerned, the findings of semiotics need to be taken into consideration. Semiotics is the general study of signs. It is divided into three branches:

- a) **semantics** concerning relations between signs and things they refer to or their meaning,
- b) **syntax** concerning relations between signs in complex formal structures,
- c) **pragmatics** concerning relations between signs and the practice of using them.

Pragmatics deals with the functions of utterance (speech act), which are listed below:

- A) descriptive;
- B) expressive;
- C) suggestive;
- D) performative.

A) Descriptive function. Utterance fulfilling descriptive function is a sentence in a logical sense (a proposition). It describes reality and can be either true or false. Such sentences are divided into:

- **analytical sentences** – whether it is true or false is inferred directly from the meaning of the very words used in the sentence, e.g. “A triangle has three sides and three angles”;
- synthetic sentences – it is necessary to possess extra-linguistic knowledge to decide whether the sentence is true or false, e.g. “It is raining today”.

Logical sentence **does not amount** to a grammatical sentence! “I love you!”, “Come on, play with us!”, “Is Warsaw the capital of Poland?” – all those are grammatical sentences, but none of them is a logical sentence.

B) Expressive function is realized when an utterance expresses feelings, emotions, opinions, evaluations etc. Such utterances are sincere or insincere – for example: “I am tired. This lecture is a total mistake”.

Komentarz [p38]: Let us note a controversy about the possibility of formulating any purely analytical sentences concerning social phenomena (such as the law).

The first sentence in the above example expresses feeling, while the second one consists of an evaluation. Expressive utterances may include different evaluations. Some of them are fundamental (unrelativised), others are relativised – systemically or instrumentally. Fundamental evaluations have a following structure: “X has value V” (e.g. “Theft is bad”). Systemically relativised evaluations have the model of “X has value V in the value system S” (e.g. “Theft is bad according to the Christian value system”). Instrumentally relativised evaluations have the structure of “X has value V as means to goal G” (e.g. “Theft is bad, because it can cause remorse”).

C) Suggestive function is fulfilled by utterances aiming to affect someone’s conduct. Those utterances may be assessed as effectively or ineffectively affecting the addressee.

They may have the form of:

- a suggestion (e.g. “If I were you, I would buy that car”)
- a command (e.g. “close the door!”)
- a request (“May I ask for water, please”)

Suggestive function is fulfilled by utterances called directives.

D) Performative function is fulfilled by utterances, called performatives, aiming to change social reality, to create something. Performative function can be characterized by a situation when linguistic expression creates new reality, e.g. whilst getting married or transferring ownership. This question will be developed in the paragraph 3 (“Conventional act”).

2. Kinds of directives

As mentioned before, directives are specific utterances, which fulfill suggestive function.

They indicate specified behavior in specified circumstances. Directives include such phrases as “it is forbidden to”, “it is advised to”, “it is requested that”. Following kinds of directives are distinguished among others:

a) Norm of conduct – its form (wording) has categorical character. It is an unconditional command or prohibition of certain behavior in specified circumstances. It is targeted at a specific entity. It may be formulated either in categorical or hypothetical manner. The former being “Each one with an attribute A, who found themselves in the circumstances C ought to behave in the way W”, while the latter has the form “If one with attributes A found themselves in the circumstances C, they ought to behave in the way W”.

b) Instrumental directive – it is an utterance of conditional character, having the following form “If one wants to achieve state of affairs S they should behave in the way W”. Its applicability depends on one’s will to achieve the certain goal.

c) Rules of performing conventional act – they belong to instrumental directives, e.g. “If you want to vote for this solution, you should raise your hand”. They stipulate certain context in which the utterance should be made in order to be performative (effective in changing reality). They origin from cultural conventions. Rules of performing conventional act can be legal rules (e.g. rules of preparing last will).

d) Rules of sense – they belong to norms of conduct. They stipulate the interpretation of certain behavior, indicating the way that someone’s act should be understood, e.g. “If someone is raising his or her hand, that should be interpreted as voting for this solution”.

Two other kinds of utterances which are related to directives (not being such by themselves) should be mentioned here:

a) Optative – it is an emphasized form of evaluating utterance, whose function is somewhat between expressive and suggestive one – it can be classified between norm of conduct and opinion. It is an utterance without an addressee. It expresses a wish, a desire that something would happen, without obliging any particular subject to do anything. Example: “May it rain today”.

b) Deontic sentence is a proposition (in a logical sense – not a directive!) stating that certain behavior is ordered, prohibited, indifferent or allowed according to a certain norm. (E.g. “tortures are forbidden according to the Constitution of the Republic of Poland”.)

3. Conventional act

Conventional act is a **psychophysical act (verbal utterance or nonverbal gesture) affecting reality (performative function) due to gaining new social meaning on condition that it is performed according to the fixed rules** (rules of performing conventional acts that originated from cultural conventions). It has to be performed intentionally by an aware subject. The conventional act: may be **of legal significance** (causing legal effects) – if the rules that form the basis of it are legal rules defining a subject entitled to perform it – or it may **bear no legal significance**. Some examples of conventional acts are as follows:

- saying “Yes, I do” while asked by a competent official during marriage (as to the North American form of wedding);

- “I bequeath all of my property to my son” in the last will;
- “I’d like fish and chips, please” as an order in a restaurant;
- taking one’s hat off or taking a bow as a way to greet someone (without legal significance).

4. Legal norm as a speech act

Legal norm is a specific type of directive, being the fundamental element of the system of law. Hence, legal norms fulfill suggestive function of utterance. They are not sentences in a logical sense, because they do not have descriptive character. They provide an answer for the question “what should be”, not “what is”. Note that legal norms can also be instrumental directives (e.g. rules of performing a legal act). Legal norms organize and control public life through the will of the public authorities. They may be regarded as valid or invalid, depending on an accepted concept of **validity**. Legal norm is commonly perceived as an utterance of the lawgiver. Since it is not directly formulated in the legal acts and – as the outcome of reconstruction from legal **provisions** – is mainly a subject of legal scholarship, a legal norm is treated as ‘a construct of legal doctrine’, as Z. Ziemiński proposed.

Komentarz [p39]: Validity of tee Chapter 3.

Komentarz [p40]: reconstruction of a norm from provisions – see chapters 6 and 9.

5. The role of structural and contextual factors in deciding the status of utterance

By principle, the exact function of each utterance can be decided on the ground of the structure of this utterance. Characteristic forms of utterances commonly ascribed to certain functions were already shown in previous paragraphs.

Nevertheless, the structure of an utterance is not the only factor determining its function. For this reason, **for the sake of determining the actual meaning of each utterance, the context is needed**. For instance the following utterance “Oh, it’s so late!” may have three different functions: it may describe the reality, it may express an opinion, or it may be a suggestion, let us say for guests to leave. Another example: “While announcing a sentence by a court, everyone stays” could be regarded descriptive statement, since it describes reality, whereas that same utterance includes certain circumstances and expected behavior, just like a norm of conduct, which means it may also fulfill a suggestive function. In addition to that, the utterance above could even be a legal norm if it was, for example, enacted in an act codifying legal **procedure**. Furthermore, contextual factors play a vital role in the case of performative **utterances**.

Komentarz [p41]: In legal English, we would rather say ‘everyone shall stay’, which still may have either descriptive or suggestive function, according to the context.

Komentarz [p42]: performative utterance – see para. 3

6. The structure of legal norm

In contemporary legal science a legal norm is commonly regarded as an extra-textual element of the law. It is not directly included in legal instrument and should be reconstructed from them by an interpreter of law instead.

A legal norm consists of three necessary substantive components:

- a) **an addressee** – the subject to whom the norm is addressed, which can be: a physical person, a legal person or an organizational unit that lacks legal personality (e.g. administrative agency, private partnership etc.);
- b) **a scope of application** – scope of circumstances in which the norm shall be applied;
- c) **a scope of regulation** – scope of conducts that are ordered, prohibited or allowed by the norm.

An addressee and scope of application together form the hypothesis of a norm, while scope of regulation is included in the disposition of a norm. If the premises of the hypothesis are fulfilled, the disposition shall be applied.

In the Polish legal scholarship in the past prevailed a concept of a norm constructed from three structural elements: (1) a hypothesis, (2) a disposition, (3) and a sanction as consequences of violating the norm. This notwithstanding, in modern legal theory dominates an approach that a legal norm is formed by two elements only: a hypothesis and a disposition (resp., an addressee, a scope of application, and a scope of regulation). Sanction is treated as another legal norm. This is related to the concept of sanctioning and sanctioned norm. Legal doctrine states that in the legal system there are pairs of two norms linked together: one of them is **threatened with a sanction (sanctioned norm)** and the other **is imposing a sanction (sanctioning norm)** in the case of breaking the first one.

For example, let us imagine a following provision” It is prohibited to cross the street on the red light under a threat of a fine”. From this, we may reconstruct the following norms:

First norm: Addressee: pedestrian; hypothesis: red light flashing; disposition: crossing the street (forbidden).

Second norm: Addressee: policeman; hypothesis: breaking the first norm by the pedestrian; disposition: putting a fine on the pedestrian (ordered).

One may distinguish three types of sanctions:

- a) penal sanction (punishment, e.g. imprisonment);
- b) executive sanction (enforced execution of a legal obligation that has not been previously fulfilled; e.g. enforcing someone to pay the due),
- c) sanction of nullity (deprivation of legal force, commonly used in private law; e.g. an agreement that breaks the law does not cause legal effects).

Chapter V

Types of norms

Introduction

“Norms of conduct are language utterances [...] expressed in the form of order or prohibit of future behavior” (A. Bator). Several types of norms can be distinguished, according to which the recipient can obtain the information about its character – for example the scope of regulation, addressees, latitude etc.

Each division is based on different criterion.

Basic types of norms:

- 1) General and individual
- 2) Abstract and concrete
- 3) *Ius cogens* and *ius dispositivum*
- 4) Rules and principles
- 5) Policies

1. General and individual norm

The division is based on the way of describing an addressee which can be indicated as a part of a group (distinguished by some general attributes) or as a particular entity (distinguished using personal, unique features).

In general norms an addressee can be described e.g. using the criterion of profession (doctor), social role (mother), role in social relation (debtor-creditor) etc. The norm is general even if there exist only one person which may be characterized by such general qualities. For example, any norms specifying their addressee as a *Minister of Justice* are regarded general,

Komentarz [p43]: Note that: individual norms enable to extract a particular entity from the wider range of addressees. The individual norms are created –in particular – in the law applying process.

because the addressee is described by some general attributes (a governmental position in this case), however there is only one ministry of justice at the time.

On another hand, any norms specifying an addressee using for example: name, national identification number (in Poland: PESEL), Tax identification number etc. are individual. The single entity can be distinguished in such cases.

2. Abstract and concrete

The division is based on a manner of describing a legal obligation (prohibit, order, permission). If the criteria of norm's applicability, and a prescribed conduct, are specified as a particular situation, then the norm is concrete. If the type of conduct is described in a repeatable way, using non-contextual designation, then the norm is abstract.

E.g. "Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life" (U.S. Federal Law). This provision contains an abstract norm because it can be applied not only to one, single case, but it gives a universal description of the behavior in some sort of situations.

However, if the sentence is rewritten in a more specified way the norm would turn out to be concrete: "Alex Potter who is guilty of murder in the first degree shall be punished by imprisonment for life". Obviously, now the situation described by the norm is unique – it is a particular case of Alex Potter's murder.

As we can conclude from above: Legal norms are always abstract and general. As a result of the law applying process they become concrete and individual.

Komentarz [p44]: Note that: abstract norm becomes concrete in the law applying process.

3. *Ius cogens* and *ius dispositivum*

The division is based on the scope of latitude in applying and modifying a particular norm by its addressees. *Ius cogens* (termed also *peremptory norm*) prohibits addressees to modify its content. In other words, it must be strictly applied. *Ius cogens* is characteristic of public law.

Ius dispositivum are relatively applied rules. Only if the legal relationship was not arranged otherwise *ius dispositivum* is binding. It is characteristic of private law. For instance, the Article 360 of the Polish Civil Code states: *In the absence of a different stipulation as to the time of payment of interest, it shall be payable each year at the end of the year (...).*

4. Rules and principles

Generally, a **principle is an ambiguous term** which may be interpreted at least in a threefold way:

1) Normative sense: Principles are legal norms explicitly formulated in a legal text; these are norms of a special importance for the whole legal system, a branch of law, a particular statute or a particular legal institution.

2) Descriptive sense: Principles are not explicitly formulated in a legal text and can be reconstructed from sets of particular rules in a process of induction. Therefore they establish models of forming legal institutions. For instance, the principle of a welfare of child in the Polish family law – it is not explicitly expressed in a legal text of Family and Custodian Code, yet it is commonly conceived as one of the basic principles of this branch of law.

3) Non-positivist sense: The most influential non-positivist interpretations of the concept of legal principle have been offered by Ronald Dworkin and Robert Alexy. Below the Dworkin's theory is presented.

One of the aims of Dworkin's theory of legal principles is to undermine the legal positivism. His idea, when compared to positivistic viewpoint, is based on a different way of functioning of legal norms. The main point of his theory is that legal decisions (particularly courts' verdicts) are based not only on legal rules, explicitly enacted by a legislator in legal provisions, but also on some kind of standards which are not formulated in a legal text.

Those standards, that are valid due to their material weight and an institutional acceptance in a legal practice, are termed **principles by Dworkin**.

The main differences between principles and 'typical' rules according to Dworkin are following:

Rules are valid because they meet formal criteria (so called test of pedigree). They have precise scope of application; therefore they are applied in 'all or nothing' mode. In the case of a collision between the rules, one of them is repealed and is not binding any more. Any 'middle' solution cannot be applied.

Principles are valid because of the material significance. They are accepted and applied generally by lawyers. Their scope of application is imprecise; it depends on a wider context. For these reasons they need to be applied in a 'more or less' mode. Ergo, the principles may differ in importance (what holds true even for one principle, depending on the particular case). The collision not necessarily leads to repealing one of the principles. Rather, a procedure of 'weighing' is employed in such a case: the significance of each principle for the particular case at hand is decided, but all of them remain binding.

Komentarz [p45]: There is a dissent on the matter if principles can be a sufficient legal ground for a decision. Dworkin claims such a possibility, however another legal philosopher Robert Alexy refutes this thesis, claiming that principles cannot be legal ground for decision because of their merely optimizing character.

5. Policies

Policies are norms establishing the aim which is to be achieved by addressees of a particular legal instrument. Usually they appear in constitutional provisions. In a sense, they describe general aspirations of the lawgiver, without giving more precise prescriptions as for the way of achieving them. Policies may be either quite technical and precise (e.g., guaranteeing a certain amount of electric energy produced with a use of 'green technologies'), or axiological and open for various interpretations. The second type is typical for constitutional rules, like: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland" (The Constitution of the Republic of Poland, Art. __). In this norm the lawgiver points out that her aim is to protect marriages in active (e.g. by issuing proper legal instruments) but also passive way (abstaining from acts harmful to marriages).

Chapter VI Legal Provisions

1. The concept of legal provision; difference between norm and provision

Legal provision, also called a 'legal regulation', is an **editorial unit of legal texts**. Generally, it is a sentence in a grammatical sense. It can be e.g. an article, a point, a paragraph, but it can be also a clause in a document. Legal provision usually contains some elements of legal norm. On the other hand, **legal norm** is an extra textual theoretical construct, giving a directive of public authority and defining a rule of conduct that should be obeyed in a particular case. A norm is reconstructed from legal provisions (or, more often, a few provisions) in a process of legal interpretation, in which the norm's addressee, scope of application and scope of regulation are decided. **Thus, it should be stressed that legal norm does not equal legal provision.**

Komentarz [p46]: While studying about legal provisions you can come across such term as 'legal regulation' which is a synonym of legal provision.

Regarding relations between legal provision and legal norm, two basic situations may be distinguished:

- partition of legal norm in legal provisions: the legal norm needs to be reconstructed from more than one legal provisions;
- condensation of legal norms in legal provision: more than one legal norm might be reconstructed from one legal provision.

Komentarz [p47]: Legal norm and its elements – see chapter IV

2. Selected types of legal provisions

We can distinguish such basic types of provisions, commonly met in modern legal systems, as:

- a) legal presumption
- b) legal fiction
- c) referring clause
- d) general clause
- e) meta-regulation (second-order regulation)

a) Legal presumptions

There exist factual and legal presumptions. Those two groups should not be confused. Since the factual presumption is not a legal provision, it is essential to conceive the difference between them.

Factual presumption is a process in which a court decides to treat a particular fact as if it has happened, despite it has not been definitely proved. This act belongs to a sphere of judicial discretion, as defined by a principle of free consideration of evidence. In this case a court makes a presumption on the ground of his own knowledge about everyday life. E.g. a jealous husband is often considered to be a murderer.

Legal presumption is a kind of provision that obliges the court to treat some fact as if it has happened, despite it hasn't been proved. They can be divided into refutable and irrefutable, however the second type is to be met only exceptionally.

The second possible distinction allows to differentiate material and formal legal presumptions.

Material presumption contains a preliminary condition, something that need to be proven for the presumptions to make an effect. Without proving this preliminary fact, our presumption cannot be applied. Thus, a logical structure of material presumption may be expressed as follows:

IF ...(*fact A is proved*)... THAN ...(*fact B is presumed*)

Some instances of this type of provision are to be found in the Polish Civil Code, that states (Art. 32): “If some people lost their life due to a common danger [Fact A], it is presumed that they died at the same time [Fact B]”.

Formal presumption does not require any fact to be proven as a preliminary condition.. It is applied automatically and we are not obliged to prove anything.

Examples:

- a presumption of innocence in the criminal law;
- a presumption of *bona fides* (good faith) in the civil law.

b) Legal fiction

Legal provision sometimes prescribe to treat a particular situation as if another one has happened; more precisely: to qualify their outcomes equally, although the situation that one refers to did not happen at all. It should be outlined that compared situations do not need to be similar in any ‘extralegal’ sense.

E.g., the Art. 1020 of the Polish Civil Code states: “The heir who has disclaimed the inheritance shall be excluded from succession as if he had not survived the opening of the succession”. Clear enough, such a person is still alive, but the act he performed causes the same consequences as death in the field of the law of succession.

Legal fiction can be also considered to be a scheme of legal argumentation in which we decide to treat some fictional facts as existing (E.g. a fiction of a common knowledge of law – *ignorantia iuris nocet*).

c) Referring clauses

Provision that refers usually to other provisions. They can point some other elements within the legal system or some standards outside of the law. In the first case it can be e.g. **another provision** or a cluster of provisions called **legal institution**, as well as the whole **legal instrument** (a document containing legal provisions, e.g. a statute, directive etc.). To illustrate the last possibility: the Art. 22 of Polish law on personal data protection (*ustawa o ochronie danych osobowych*) refers to the provisions of the Polish Code of administrative procedure.

Komentarz [p48]: legal institution – a cluster of provisions bound together due to some functional links (e.g. an institution of legacy, of marriage, of court's verdict etc.)

When the provision indicates an extra-systemic standard, it can be a rule belonging to **another legal system** or a **non-legal system** (e.g. a professional code or some habitual standards – see Art.354 §1 of Polish Civil Code according to which the debtor should perform his obligation bearing in mind existing customs).

Blank regulation is another category of this sort of provisions. It refers to some regulations that do not exist at the moment and which should be enacted in the future.

Komentarz [p49]: The term 'blank regulation' is sometimes used in another meaning, as a regulation with too general and vague content.

d) General clause

General clause is an expression that refers to extra-legal criteria, especially ethical values, but also moral rules etc. and which requires an evaluation based on some axiological assumptions.

General clause may be formulated:

- indirectly, by using indefinite terms like 'human dignity', 'inhuman treatment', 'welfare of child' etc.;
- directly, by indicating an axiological system that it refers to; e.g.: principles of humanitarianism or others.

e) Second order regulations

Second order regulations, also called 'meta-regulations', in their substance do not concern any entity and his/her conduct, but other regulations in the legal system. Examples of the second - order regulations are following:

- i. provision establishing **a scope of validity** (establishes a scope of validity in dimensions of time, territory, and subjects);

Komentarz [p50]: Validity of law: see chapter 3.

- ii. provision defining a date of coming into force;
- iii. abrogative clause (repealing the whole legal instrument or individual provisions);
- iv. **general abrogative clause** (does not state explicitly which provisions are repealed, but indicates a more generally defined group, for instance: “all provisions that are in contradiction with regulations of this instrument are abrogated”);
- v. amendment (adding new or changing already existing provisions). An amendment of a particular provision can be introduced by the lawmaking instrument of the same legal force and type. An amendment can be narrow or wide, yet the line between them is quite hard to indicate and it is decided on particular cases. A legal text often includes a lot of amendments. In order to make it clear which rules are still binding, a **consolidated text** is introduced. It is not a new legal instrument, but an original text with all amendments included;
- vi. law-making delegation. A parliament can transfer its law-making competence to another authority that normally does not possess such a competence. An instrument established this way has an equal binding force as a ‘normal’ parliamentary act . There exist some distinctions in law-making delegation:
 - free delegation: each authority is able to pass its competences to another one;
 - constrained delegation: law-making competences can be passed only if constitutional roles allow for it.According to the Polish constitution the law-making delegation is possible only in exceptional cases, like e.g. a state of emergency, when the President is able to impose instruments (‘ordinals’) with equal binding force as parliamentary acts.
- vii. Intertemporal. Intertemporals regulate situations when a new legal instrument is introduced, regulating the situations, acts, or relations previously regulated otherwise. The intertemporals decide which rules – the new or the former one – is applicable to those situations which took their origins under the previous regulation;
- viii. legal definition (explaining terms used in legal instrument).

Komentarz [p51]: In the Polish legal system it is prohibited to use general abrogative clauses.

Chapter VII Legal System

1. The notion of a legal system

A term 'system' is referred to a **set of internally organized elements which are related to each other**. According to the legal doctrine the components of legal system are legal norms.

Legal science distinguishes also different systems like e.g. a system of sources of law.

Two main authors of the entire legal system are legislators and lawyers.

The difference in their role in law creating process can be explained with an example of a car: a lawyer is buying a Ferrari from a lawgiver, but instead of receiving a ready-to-use vehicle, she is provided only with elements of that machine that she has to link. Analogically, a lawgiver provides a lawyer just with some elements (legal provisions) and the role of a lawyer is to solve individual cases taking into consideration the whole system.

[For a wider explanation of this example see: J. Jabłońska-Bońca, *Wprowadzenie do prawa. Introduction to law*]

While a **concrete legal system** is a set of norms valid in a clearly indicated time-spatial circumstances (Polish law, French law, etc.), a **legal system as a type** is referred to a theoretical construct distinguished according to characteristic traits of some group of concrete legal systems. Among those types of legal systems we differentiate e.g.:

- Civil law: characteristic of states where legal system has arisen from Roman law; also called "statutory law system" (e.g. in Poland, France, Germany);
- Common law: characteristic of Anglo-Saxon states (England, U.S.)
- Bijuridical law: combines common and civil law (Scotland);
- Customary law: Mongolia, Sri Lanka;
- Religious law: characteristic of Muslim countries (Saudi Arabia, Sudan, Iran).

2. Formal and material relations in legal system

Formal relation is a relation of competence between two norms; this relation is most clearly visible in a hierarchy of norms. The content of norm situated higher in the hierarchy gives **justification and ground for validity** of the second one (the inferior one).

Material relation deals with a content of norms. The content of the norm situated higher in the hierarchy determines the content of the inferior one. This kind of relation between two norms (superior N_1 and inferior N_2 which is inferred from N_1) may have a strong interpretation

Komentarz [p52]: Source of law: see chapter 10.

(N₂ is valid because it is an inferential consequence of N₁) or a weak interpretation (N₂ is valid because it is not in contradiction to N₁). Material relation deals with vertical (hierarchy of norms) and horizontal (the division into branches of law) systematization of the legal system.

3. Postulates of legal system

Postulates of the legal system are basic qualities that legal system should possess. We may distinguish two basic postulates of the modern legal systems:

- **postulate of completeness:** no lacunas (loopholes) in the system;
- **postulate of coherence:** no collisions between norms.

By using rules of inference and collision rules legal practice attempts to construct a system which satisfies both these demands. The justification of such an activity of legal practice is delivered by a construction of 'a rational lawgiver'.

Komentarz [p53]: A rational lawgiver – see Chapter __.

4. Loopholes in the law

Loopholes (lacunas) can be divided into axiological and constructional.

A) **Axiological lacuna** is an outcome of comparing existing legal system with an ideal one.

That is to say, values accepted in a particular society in a given time create the point of reference in aforementioned comparison. One may come across different sorts of lacunas:

- **Extra legem:** the lack of a norm that should exist in the legal system (according to our opinion) is assessed negatively. E.g. “People who interrupt during the lectures should be hanged” – it is obvious that such a norm does not exist, but some lecturers would welcome a kind of regulation like this with gratitude.
- **Contra legem:** the existence of a norm is judged negatively; we assume that the norm covers a subject that should not be regulated or simply does it wrongly according to our point of view. E.g., let us imagine a norm stating: “Students with names starting on K and M may graduate without passing the exams”. If such a norm did exist in a legal system, it would be probably assessed as introducing unfair and unjustified differentiations among students.
- **Præter legem:** the existing regulation is judged negatively as too general. E.g. “Students should be acquired with a scholarship”; although it is commonly accepted that (some) students get scholarships, too general character of this norm makes it useless in practice as it lacks of information about categories of entitled students, conditions, procedures, amount of a scholarship etc.

Komentarz [p54]: axiological: related to values

B) Constructional lacuna is an outcome of analyzing internal relations between norms within the system by itself.

- **Specific lacuna:** the lawmaking process is unfinished, what results in a situation when there lacks a regulation that should be issued according to another norm. E.g. according to a parliamentary act there should be an ordinance introduced to execute this act, yet it does not exist.
- **Technical lacuna:** despite the fact that the lawmaking process has been finished, the regulation is incomplete, e.g. a new agency was established however there is no procedure to appoint someone to this post.

5. Collisions in the law

Collision in the legal system is a situation when **two norms refer to the same issue but they cannot be both applied**. Collisions are divided into logical (contrariety and contradiction), praxeological and axiological.

A) Logical collision can appear on the level of a language wording (meaning) of norms. They are outcomes of legislator's mistakes. Logical collisions are also termed 'virtual' or 'formal'. This kind of a deficiency in the legal system can be eliminated with a use of **collision rules**, what is usually done *in abstracto*.

- **Contrariety:** norms have (partially) equal hypothesis but different disposition. One can breach both of them. E.g. someone is obliged to be in two different places at the same moment: on the Introduction to law and Constitutional law lecture. It is impossible to observe both of norms (either one is on the Introduction to law or on Constitutional law lecture), but on the other hand it is possible to breach both of them (instead of going on the Introduction to law or Constitutional law lecture one goes to the cafeteria).
- **Contradiction:** while breaking the first norm, one acts in compliance with the second one. E.g. one norm obliges and the second one prohibits to be on the same lecture.

B) Praxeological collision is related to a sphere of implementing the norms in practice. E.g. norms serve contrary goals. With this kind of collision an implementation of both norms might be sometimes possible but problematic: implementing of one norm may make an implementation of another one much more difficult (or aimless) or implementing of the

Komentarz [p55]: Collision rules – see para. 7

Komentarz [p56]: in abstracto: in an abstract manner; in detachment of particular circumstances of a case

second norm eliminates the effects of implementation of the first one. E.g.: N_1 states 'Open the door' while N_2 – 'Close the door'. And to offer but one more example: Teachers (according to N_1) are obliged to improve their professional skills, however (according to N_2) they have more and more administrative burdens; thus it is theoretically possible to observe both norms, but it is rather problematic in practice.

C) **Axiological collision** appears on the level of values that norms serve and refers to a collision between those values. In this case both norms can be implied but only to some extent. E.g. reliability versus promptness of the trial; the problem of bringing up child in beliefs of its parents versus observing the autonomy of a child at the same time.

6. The procedure of 'weighing'

Praxeological and axiological collisions are outcomes of a complexity of the reality and they are also called '**real**' or '**substantive**' collisions. To solve such problems we generally use collision rules (see below), but in some cases we may balance (weigh) norms, which means that we may decide **which one is more significant in that particular case, in concrete circumstances of a problem at hand** (*in concreto*).

Dworkin indicates that some types of legal norms – i.e. legal principles – cannot be applied in 'all or nothing' fashion. Dimension of weight (relevance) of such principles is various, although they are formally equally binding. In the case of collisions a judge needs to balance between norms; she can decide which one is more significant to find a solution in a particular matter (she can do it only *in concreto* as the procedure of weighing requires reference to a real situation). Remarkably none of those two principles under the procedure of weighing is being repealed.

Komentarz [p57]: *in concreto*: in reference to circumstances of particular case

Komentarz [p58]: Ronald Dworkin - see chapter I

Komentarz [p59]: Legal principles – see chapters I and V

7. Collision rules

We use collision rules in the case of collision between two valid norms. By using collision rules we are able to solve this kind of problem.

One may distinguish following **first order collision rules**:

- a) *Lex superior derogat legi inferiori* – superior norm suppresses inferior norm. While applying this rule one has to refer to the hierarchy of norms existing in a given system and therefore this rule is often called a 'hierarchical rule'. E.g. in the case of conflict

between norms arising from parliamentary act and executive order, norms of the parliamentary act should prevail as higher in the hierarchy;

- b) *Lex specialis derogat legi generali* – particular norm suppresses general norm (substantive rule). Noticeably, the detailed norm ‘replaces’ the general norm only to the extent to which it constitutes the exception to the latter, under proviso that the detailed norm is not lower in the hierarchy than the general norm. Thus, the general norm is not repealed – it is merely not applied in this particular case;
- c) *Lex posterior derogat legi priori* – the norm that was issued later suppresses the norm that was issued earlier (chronological rule).

Whenever the use of first order rules leads us to a contradiction, we employ **second order rules**:

- a) *lex inferior posterior non derogat legi superiori priori* – later inferior norm does not suppress earlier superior norm;
- b) *lex inferior specialis non derogat legi superiori generali* – inferior particular norm does not suppress superior general norm;
- c) *lex posterior generalis non derogat legi priori speciali* – later general norm does not suppress earlier particular norm.

In other words, we may note that first order collision rules are applied in a fixed order: at first we apply the hierarchical rule, then (by principle) the substantive one and at last the chronological one.

8. Branches of law

The ‘branch of law’ is a ‘**sub-system**’ of a legal system of a specific state that can be distinguished (and which can be named) on the ground of clearly identifiable sphere of social relations (subject), entities, mode of regulation or historical conventions. Respectively, several disciplines of legal scholarship termed ‘legal dogmatics’ are concerned with explanation, interpretation, structuring and justification of the wording of legal provisions from individual branches of law. An internal systematization of the legal system differs slightly between states. In Poland for instance exist such branches of law as, e.g.: constitutional law, administrative law, criminal law (substantive), civil law (substantive), law

Komentarz [W60]: Legal dogmatics: disciplines of a legal science that are concerned with particular branches of a legal system, e.g.: study of civil law, study of criminal law etc.

of civil procedure, law of criminal procedure, law of administrative procedure, international public law, labour law, financial law, family law and others.

9. Divisions within a legal system

The basic division of the legal system is a division by type of regulated social relations:

- a) civil law: standardizes relations between equal subjects of the law and provides them with ‘tools’ they can use to organize their private affairs according to their own will and responsibility;
- b) criminal law: defines acts that are recognized as criminal deeds, like culpable acts prohibited under a threat of penalty, and standardize the principles of criminal liability;
- c) administrative law: regulates the activity of administrative agencies.

Norms of the legal system of law are also divided into:

- a) substantive law: norms that directly regulate the respective social relations and that are addressed to citizens as their addressees. They define who should act how in what circumstances and specify consequences of a lack of compliance with law;
- b) political law: includes the norms that define the organization of public authorities, their competencies and legal form of exercising those competencies;
- c) procedural law: regulate all the questions related to the modes of proceedings by public authorities.

Finally, legal system might be divided into private and public law, according to the classic principle formulated by Ulpian: *Publicum ius est quo ad statum rei Romanae spectat, prviatum quo ad singulorum utilitatem* (Public law is the law which applies to the government of Roman Empire; private the law is that which applies to the interests of individuals).

Nowadays, while considering the division into public and private law we have to remember that both groups are not so strictly separated, they intermingle.

	Private law	Public law
Sphere of organization	mutual relations between people and their organizations	relations between the state and the society

function	Regulating free activity of society in social and economic sphere; based on cooperation and compromise.	Protects general, collective, social interests; the state is able to use coercion and penal methods.
entities	Parties are equal; physical (natural) persons, legal entities and other organizations that lack legal subjectivity.	Parties have subordination relations; public authorities and citizens.
Application of norms	Ius dispositivum – relatively applied norms, the norms of Civil Code can be modified if both parties want to do so.	Ius cogens (peremptory norm) – strictly applied norms
In case of breaking the law	Initiative of parties (private law is for diligent); <i>ignorantia iuris nocet</i>	By principle the state operates <i>ex officio</i>
Examples of branches	Civil law (substantive), Family and custodianship law	Constitutional law, administrative law, criminal law, financial law, public law on commercial activities; civil, criminal and administrative procedures; international public law

Komentarz [W61]: Legal subjects: see chapter XI

Komentarz [W62]: Ius dispositivum, ius cogens – see chapter V

Chapter VIII

Legal Interpretation

1. Introduction

Legal interpretation is an activity which aims at deciding the exact content (meaning) of a legal norm. Sometimes the term legal interpretation is used to call an outcome of such a procedure – the established meaning of legal norm. As one may notice, the process of interpreting norms is one of the pivotal elements of professional activity of lawyers.

One of the crucial both theoretical and practical questions is the one about the accepted limits of legal interpretation. As a matter of fact, this also one of the most disputable issues. Various competing theories propose different catalogues of such limits, among which the most relevant are:

- the legal text;
- the will of the lawgiver;
- rules of interpretation accepted in the legal culture;
- existing practices (e.g. past judicial decisions);
- extra-legal factors (political goals, economical effectiveness, socially accepted moral standards etc.);
- individual opinions of the interpreter.

Below we discuss main distinctions of various kinds of interpretation, according to the following criteria: a context of interpretation, a subject performing interpretation, its method and outcomes.

1. A division of interpretation according to the context.

In that respect, we may distinguish interpretation conducted *in concreto* and *in abstracto*. The first one is performed in the context of a specific, individual case. A typical example of such an interpretation is to be found in the frames of court proceeding or law applying by a public administration. Interpretation in abstracto is made in deprivation of any particular features of the case. It is represented mainly by legal scholarship; in some legal systems (like in Poland) also e.g. constitutional courts possess a competence for this type interpretation.

2. A division of interpretation according to the subject

Generally speaking, everyone is obviously allowed to perform an act of interpretation of legal norms. This notwithstanding, interpretation performed by some groups of subjects possesses a distinguished status. In some cases, such an interpretation is formally binding. For these reasons, one may speak about:

a) An authentic interpretation is the one performed by the author of the legal text (lawgiver). Its formal binding force may vary, but it usually equals the binding force of the interpreted legal text – under the proviso that its author possesses a competence to perform such an interpretation. In Polish legal system, this type of interpretation is, by a principle, limited solely to internally binding legal instruments. As for the universally binding law (like e.g. parliamentary acts), there is no distinct procedure of its authentic interpretation. Some (abstract) interpretative directives may be established only in legal norms themselves. So termed legal definitions are often treated as an instance of such interpretative directives, thus an instance of the authentic interpretation.

The authentic interpretation, by its very nature, is performed and binding *in abstracto*.

b) A legal interpretation is a binding interpretation performed by a subject to whom the legislator has granted a special competence. What is characteristic of this form of interpretation, and differs it from operational interpretation, is the fact that it is performed and binding *in abstracto*. The legal interpretation may vary as for a scope of its addressees, i.e. subjects who are bound by its outcomes.

Today the Polish legal system recognizes the instances of legal interpretation performed by the Ministry of Finance (as for an interpretation of tax law), the Supreme Court (*Sąd Najwyższy*), and the Supreme Administrative Court (*Naczelny Sąd Administracyjny*). In the legal system of the European Union, so called preliminary rulings of the European Court of Justice, as an outcome of prejudicial questions of Member States courts, may be regarded as a form of interpretation combining elements of legal and operational interpretation.

c) An operational interpretation is the one performed by an organ applying the law (first of all courts and administrative agencies). It is made in a particular case under decision (*in concreto*). A scope of its binding force may vary and, in principle, it defines a borderline between legal systems of civil law and of common law. In the first one, characteristic among others of the countries of continental part of Europe (including Poland), the outcomes of

operational interpretation are binding *in concreto* – solely in the particular case under decision. In common law legal , accepting the case law, the outcomes of precedential interpretation performed by a court may be binding *in abstracto* – in similar cases in the future.

d) A doctrinal interpretation is the one performed by representatives of legal scholarship. Historically speaking, in some legal systems it could have a binding force to some extent (cf. the legal system of ancient Rome or so termed books of authority in the English legal system). In present times, doctrinal interpretation possesses no binding force, however it may have a significant impact in actuality.

3. A division of interpretation according to the methods

The interpretation of legal text may be performed with a use of different methods, each of them proposing different rules of interpretation (interpretative directives). Among various possible methods, three are widely recognized as most relevant: linguistic, systemic, and functional.

a) A linguistic interpretation aims at deciding a linguistic meaning (scope and content) of a legal text. Each time when an interpreter concerns an issue of linguistic meaning of terms used in a legal text, it may be regarded as an instance of linguistic interpretation. Next to general linguistic rules of natural language (semantic rules, rules of syntax, and pragmatic rules), there are some specifically legal rules of linguistic interpretation distinguished. The most significant in that respect are, for instance:

lege non distinguende: What the law does not distinguish, one should not distinguish in interpretation (no exceptions should be made which have no justification in the legal text itself);

per non est: No piece of legal text may be regarded as superfluous;

a presumption of common language: (i) terms used in a legal text should be understood in their common meaning, unless there are good reasons to attribute different meaning to them; (ii) in the case of ambiguity of some term, one should choose the most obvious meaning;

a presumption of legal language: terms that possess some special meaning in a legal language should be understood in that meaning, unless there are good reasons to attribute different meaning to them;

a presumption of professional language: Terms that possess some special meaning in a special field of knowledge should be understood in that meaning, unless there are good reasons to attribute different meaning to them.

b) A systemic interpretation considers an interpreted regulation in its relations with other rules in the legal system. Particularly speaking, the systemic interpretation contains three groups of standards, related to: a location of a rule in the legal system, fundamental principles of the system, and basic qualities of the system. The most relevant interpretative directives belonging to this type of interpretation are:

argumentum a rubrica: During interpretation, a location of the rule in the external and internal organization of the legal instrument should be respected. 'External organization' means here a position of the particular legal instrument in the entire legal system (both as for a hierarchy and a branch of law), whereas 'internal organization' – an internal systematization of the legal instrument.

The rule should be interpreted in accordance with and with respect for basic principles of the legal system.

In the case of taking a legal principle into account, one should point a specific provision or provisions, from which the principle might be reconstructed.

A legal rule should not be interpreted in the way leading to lacunas in the legal system.

A legal rule should not be interpreted in the way leading to collisions between norms.

A legal rule should be interpreted in accordance with hierarchically higher rules.

c) A functional interpretation is a broad concept for these methods of interpretation which focus on axiological and/or pragmatic aspects of interpreting the law. This is the least systematized and rigorous among the distinguished methods, yet seems to be necessary in a contemporary legal system. The best known interpretative directives of functional kind are:

Ratio legis: the rule should be interpreted in accordance with and with respect for its *ratio legis* (reasons for enacting the rule).

One should take the expected consequences of particular interpretation of the rule into account.

Argumentum ad absurdum: One may not choose an interpretation that leads to absurd, ridiculous or unacceptable consequences.

During interpretation, one should take into account accepted ethical values and moral principles.

During interpretation, one should take into account basic principles of political, social and economic system.

Since different methods of interpretation may lead to different, and even conflicting results, it is necessary to define the mutual relations between various these methods. So called second-order interpretative directives serve this goal. According to them, the most legal orders accept **a principle of priority of linguistic interpretation**. The principle, read as a rule of procedure, requires that a process of interpretation always starts from the linguistic interpretation, which precedes the systemic and functional one. The principle regarded as a rule of preference gives a greater weight to the outcomes of the linguistic interpretation when compared with the outcomes of two other methods. In traditional view, the principle of priority of linguistic interpretation contains the following requirements:

the linguistic interpretation establishes limits for the systemic and functional kind of interpretation;

the systemic and functional interpretation are subsidiary and may be used only there where linguistic interpretation does not offer a precise result;

in extraordinary cases, the limits of linguistic interpretation may be overcome with a use of two other types of interpretation, but there must be presented relevant reasons for such an exception.

4. A division of interpretation according to the outcomes.

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Chapter IX

Legal Inference

1. Introduction

Legal inference is a part of legal exegesis (legal reasoning). It is a process of inferring one norm which has not been explicitly formulated by the lawgiver from another one which has been explicitly formulated by the legislator. **A relation between legal inference and legal interpretation** is based on the matter of reasoning: in the first one the legal norm not explicitly formulated in any legal text is being inferred as a consequence from the other, existing norms. The second is a process of reconstructing existing norms from legal provisions.

By legal inference **lacunas** in law can be removed – according to an assumption of the rational lawgiver, the norm inferred from existing norms remains in conformity with the will of the lawgiver. The lawgiver is not able to express all necessary norms in provisions; in consequence, norms indirectly expressed are valid as well.

The following abbreviations will be used beneath:

N1: a norm which is explicitly expressed in the legal text,

N2: a norm which is being inferred from N1.

The basic types of legal inference are:

- 1) Logical inference;
- 2) Instrumental inference:
 - a. Instrumental order rule,
 - b. Instrumental prohibit rule;
- 3) Axiological inference:
 - a. A simili:
 - Analogia legis,
 - Analogia iuris,
 - b. A contrario,
 - c. A fortiori:
 - A maiori ad minus,
 - A minori ad maius.

2. Logical inference

Logical inference is based on **logical relations** between the scope of particular elements of both norms. According to logical inference, N2 is valid by narrowing the scope of application of existing norm N1. It refers to linguistic rationality, analytical relations between terms. There is no increase in a normative content.

3 conditions for logical inference:

- a) The scope of addressees of N2 fulfills the scope of addressees of N1.
- b) The scope of application of N2 fulfills the scope of application of N1.
- c) Execution of action **ordered by N1** fulfills the action ordered by **N2**, or Execution of action **prohibited by N2** fulfills the action prohibited by **N1**.

Example:

N1: "It is prohibited for the minor to buy alcohol"; N2: "John Smith aged 17 cannot buy himself a beer"; where N1 is an abstract–general norm, while N2 is a concrete–individual norm.

N1: "Everyone being in a territory of a particular state is obliged to respect its law"; N2: "A group of German tourists in Poland is obliged to respect the Polish law", where both N1 and N2 are abstract–general norms.

As we can conclude from above either abstract–general or concrete–individual norms can be inferred.

2. Instrumental inference

Instrumental inference consist in claiming that N2 is valid by proving that it is **causally necessary** for the performance of N1. It refers to praxeological rationality, cause–effect relations between acts prescribed in both norms.

A) Instrumental order rule: what is a necessary condition for application of the norm is ordered.

A logical structure of this type of reasoning is following:

N1 orders S1 to be done.

S2 is necessary for S1 to exist.

Conclusion: N2 ordering S2 is obligatory.

Komentarz [W63]: Necessary condition: *conditio sine qua non*

Example:

N1: "Law students are obliged to take a final exam on Introduction to Law on 30.01.2016".

"To take an exam, it is required to receive a positive mark from classes within the same course".

N2: "Until 30.02.2000 students are obliged to receive a positive mark from classes".

B) Instrumental prohibit rule: prohibited is what is a sufficient condition for breaching the norm N1.

Komentarz [W64]: Sufficient condition: *conditio per quam*

A logical structure of this type of reasoning is following:

N1 orders S1 to be done.

S2 makes S1 impossible to exist.

Conclusion: N2 prohibiting S2 is recognized as valid.

Example:

N1: "Law students are obliged to take a final exam on Introduction to Law on 30.01.2016".

"Being on a holiday makes it impossible to take an exam".

N2: "it is prohibited to fly to the USA for one week holiday on 29.01.2016".

3. Axiological inference

Axiological inference is based upon claiming that N2 is valid by referring to an **axiological rationality** of the lawgiver, relations on a level of *ratio legis* of both norms.

A) Inference *a simili*

This type of inference occurs in two forms: *analogia legis* and *analogia iuris*.

Analogia legis has a following structure:

State of affairs S1 is not regulated.

S1 is *similar in relevant respect* to S2.

S2 is regulated by N1 which binds specific legal consequences with S2.

Conclusion: There is a valid norm N2, which binds the same or similar consequences with S1.

Komentarz [W65]: Analogia legis is based on inferring N2 from one particular norm.

Example: N1: "For administration students lectures are not obligatory"; therefore N2: "For law students lectures are not obligatory".

A structure of *analogia iuris* is following:

N1, N2, (...) Nx prefer a value X over a value Y;

therefore: A general principle preferring a value X over a value Y may be recognized as legally binding;

and thus (conclusion): Nx+1 preferring a value X over a value Y is valid.

Example: N1, N2, (...) Nx form a collection of norms preferring child's welfare over parents'. Thus, a general principle of a protection of child's welfare may be recognized as legally binding. From this it may be concluded that Nx+1, referring to unregulated situation between parents and a child, is valid if it can be justified as an expression of the above principle.

Inference *a simili* is generally **prohibited**:

- on exceptions,
- on *lex specialis* rule,
- in criminal law to disadvantage of an accused,
- in tax law to disadvantage of a taxpayer.

B) Inference *a contrario*

This type of inference may be regarded as a prohibition of using *analogia legis*. It has a following structure:

State of affairs S2 is not regulated.

S2 is *not identical* to S1 (although it might be similar in some important respects).

S1 is regulated by norm N1 which binds specific legal consequences with S1.

Conclusion: One should not bind the same consequences with S2.

The most common versions of argument *a contrario* are:

- N1 orders to reach a state of affairs S1. Therefore, N2 prohibiting to reach S2 (any state of affairs besides S1) is valid.
- N1 prohibits to reach a state of affairs S1. Therefore, N2 permitting to reach S2 (any state of affairs besides S1) is valid.

Examples:

- N1: "Students are obliged to wear gala dresses on during exams". N2: "It is prohibited to wear t-shirt and jeans during exams".

Komentarz [W66]: Analogia iuris is based on inferring N2 from an entire set of norms which all express the same general principle

- N1: "It is prohibited for a minor to buy himself a beer". N2: "A minor may look at a can of beer in a shop".
- N1: "It is prohibited to use a mobile phone when driving a car". N2: "It is permitted to use a mobile phone during a stopover".

C) Inference *a fortiori*

A general idea lying behind this type of reasoning states that if N1 is binding, than N2 with a **stronger axiological justification** than N1 is binding as well. One may distinguish two forms of argument *a fortiori*:

A *maiori ad minus*: if N1 imposes or permits to do more (e.g. to take more arduous duties), then N2 imposing or permitting to do less (e.g. less arduous duties) is valid.

E.g. N1: "It is permitted to drink during lectures". N2: "It is permitted to drink during breaks".

A *minori ad maius*: if N1 prohibits the violation of legally protected right to a lesser extent, then N2 prohibiting to breach to a bigger extent is valid.

E.g. N1: "It is prohibited to smoke cigarettes in a ward". N2: "It is prohibited to smoke cigarettes in an operating room".

Chapter X Law-Creating

1. The concept of sources of law

A term **source of law** leads to many ambiguities in jurisprudence, as it has several established meanings. Below it will be used in its most common meaning. According to that, sources of law (latin: fontes iuris oriundi) are **facts/acts which** on the basis of specific 'normative conception of sources of law' shared by the legal doctrine, **are thought to be the ground for validity of legal norms binding in the specific legal system.** In a **positivist legal culture** the sources of law are first and foremost **texts** which have been issued by a public authority in specific forms. They are the effect of law-making process. They consist of legal regulations (legal provisions).

Komentarz [p67]: Normative conception of sources of law – see chapter I

Komentarz [p68]: legal positivism – see chapter II

2. Basic forms of law-creating: legislation and practice. Characteristics of legislation

There are two basic forms of **law-creating: legislation** and **practice**. **Legislation** is defined in literature as a **unilateral, governing, formalised, conventional act of public authorities that are competent to establish the law.** This act results in creating **binding legal text**, which introduces a new rule of conduct into a particular legal system. The legal text created in the legislative process is called also **a legal instrument**. Below we will use the term 'legal instrument' as equivalent to 'legislative source of law', yet one should notice that this term has a wider scope, covering also such acts as private contracts, administrative decisions, courts verdicts etc.

Also **practice** can be a form of law-creating. It has to be **consolidated/perpetuated and steady**. Such a practice establishes 'a custom'. **The Custom** is an established pattern of behavior that can be objectively verified within a particular social setting. A claim can be carried out in defense of "what has been always done and accepted." **Customary law** exists where a certain legal practice is observed and the relevant actors consider it to be law.

Law-making is a dominant form of law-creating in civil law culture. It is prevalent worldwide, although it generally co-exists with other forms of law creating (especially in common law legal culture).

There are various public authorities which are competent to establish the law. Generally speaking, law can be made by a single person (eg. King, Prime Minister) or by collective bodies (eg. Parliament). The latter process is a complex one – it involves several stages, eg.:

- a) submission of a draft for a consideration;
- b) discussion;
- c) amendment;
- d) voting;
- e) ordering its promulgation.

[J. Jabłońska-Bońca, Wprowadzenie do prawa. Introduction to law, Warszawa 2008]

3. Types and hierarchy of the sources of law

In general, **the higher position of the authority in the hierarchy of public authorities, the greater legal force of instruments established by this authority**. Law-making instruments that are established differ in terms of legal force. The specific legal instrument may have equal, greater or lesser legal force than another instrument.

Legal instrument with lesser legal force should not be inconsistent with an instrument of greater legal force. The latter **abrogates** an instrument with lesser legal force (the second one loses its binding force). The one with greater force **determines the shape and scope** of norms in the one with lesser legal force. There is a duty to establish instruments with lesser legal force when it is necessary to implement norms contained in the ones with greater force.

[J. Jabłońska-Bońca, Wprowadzenie do prawa. Introduction to law, Warszawa 2008]

The system of sources of law will be exemplified here by the Polish regulation in that matter. The sources of the Polish law are divided into two categories: **universally binding law** and **internal law**. As for the first group, the Article 87 of the Polish constitution states:

“1. The sources of universally binding law of the Republic of Poland shall be: the Constitution, parliamentary statutes, ratified international agreements, and executive orders.

2. Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.”

Furthermore, it has to be mentioned here that another source of universally binding law is the **European Union Law**. However, the precise position of this law in the system of sources of law is a difficult theoretical problem and will not be elaborated here.

Komentarz [p69]: See: Formal and material relations in legal system, chapter VII.

Komentarz [p70]: Abrogation: see chapter VI

Acts of internal law bind only the organs and organization units of public administration which are subordinated to the issuing organs.

The examples of such acts are: resolutions adopted by the Sejm, Senate and the Council of Ministers, orders issued by the President of the Republic of Poland, the Prime Minister and ministers, the acts of local law which are not universally binding and non-ratified international agreements.

1) Constitution

The constitution is a legal instrument with the **highest legal force**. The constitution is passed and amended under the **special procedure**. It regulates the general issues concerning political, social and economic order of a state. It grants powers to public authorities and formulates the basic principles of the law.

The history of Polish constitutionalism provides a number of such acts issued in Poland. The latest one is the abovementioned Constitution of **2 April 1997**, upheld by the National Assembly i.e. the Sejm and the Senate acting together.

2) Parliamentary acts

Parliamentary acts, termed also as 'statutes' or simply 'laws' are **basic acts of the universally binding law**. The subordination of statutes to the Constitution means that the norms of the statute must remain within the limits of the Constitution. Usually to come into force they require to be **promulgated**, that is officially published. In Poland, the statutes are adopted by the Sejm in cooperation with the Senate and need to be signed by the President. The right of **legislative initiative** belongs to the Sejm, Senate, the President and to the Council of Ministers, as well as to a group of at least 100,000 citizens.

3) International treaties

Ratified international agreements also belong to universally binding law. In Poland they possess **the legal force equal to the parliamentary act**. Once a treaty is promulgated, it becomes a part of the domestic Polish legal system and may be **applied directly**. **Ratification** is within the competence of the President of the Republic of Poland. Some types of treaties require a prior consent expressed in the statute before ratification (Art. 89 of Constitution). In the case where such an agreement contradicts with the statute, the agreement prevails.

4) Executive order (Ordinance)

Executive orders belong to a 'sub-statute' law and are issued in order to **implement the statute**. Therefore, they have to be issued **on the ground of a specific authorization** contained in the statute. In Poland, executive orders are issued only by those organs that are expressly listed as authorized in the Constitution: the President, the Council of Ministers, the Prime-Minister, the ministers, and the National Council of Radio Broadcasting and Television (*Krajowa Rada Radiofonii i Telewizji*).

5) Local laws

The acts of local law are binding within territory where the issuing organ exercises its powers. They are issued by local authorities: communal, municipal, etc. These acts may only be issued **on the basis provided in the statute and within the limits prescribed in the statute**. They belong to 'sub-statute' law just like executive orders and possess equal legal force.

4. Promulgation, abrogation, amendments

In order to come into force, the legal instrument (both universally binding and that of internal law) needs to be **published – promulgated**. International agreements by principle are published in the same manner as statutes. Legal instruments officially announced in the respective **public journals** are considered authentic texts; i.e. original, binding and final.

Abrogation (derogation) is a process of repealing the whole legal instrument or individual provisions by a new legal instrument.

Amendment is a partial modification of the binding instrument by another instrument with the same or greater legal force.

Komentarz [p71]: The Polish public journal for promulgating universally binding law is 'Dziennik Ustaw', for local laws 'Dziennik Urzędowy Województwa', and for other acts 'Monitor Polski' or other 'dzienniki urzędowe'

5. Law-creating practice: customary law and case law

“Ex non scripto ius venit, quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur”.

“The unwritten law is the law which was proved by its application; for ancient customs, being sanctioned by the consent of those who adopt them, assume the form of law”.

Justinian, *Institutiones*

In order to describe a customary law, let us quote Bruce Benson words from his *The Enterprise of Law*: “Law can be imposed from above by some coercive authority, such as a king, a legislature, or a supreme court, or law can develop "from the ground" as customs and practice evolve. Law imposed from the top — authoritarian law — typically requires the support of a powerful minority; law developed from the bottom up — customary law — requires widespread acceptance. Friedrich August von Hayek explained that many issues of law are not: «whether the parties have abused anybody's will, but whether their actions have conformed to expectations which other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities.»

Customary law is recognized, not because it is backed by the power of some strong individual or institution, but because each individual recognizes the benefits of behaving in accordance with other individuals' expectations, given that others also behave as he expects. Alternatively, if a minority coercively imposes law from above, then that law will require much more force to maintain social order than is required when law develops from the bottom through mutual recognition and acceptance”.

[Bruce Benson, *The Enterprise of Law*]

An acknowledgement of the customary norm occurs when a state authority makes a decision based on a customary norm. It is a governing and conventional act, which incorporates such norm to the system of applicable standards. **Precedent decisions of courts** are acts of acknowledgement of customary norms.

In order to ensure that an ‘unwritten’ standard becomes the law, it is necessary to:

- a) define the established conduct reasonably precisely (circumstances of application);
- b) ensure common conviction about the binding nature of a norm (*opinio iuris*);
- c) ascertain, that the will of the state to include the norm in the binding law has been expressed.

The case law is constituted by decisions of courts which become sources of binding law *pro futuro*. Those rulings can be cited as **precedents** in the future cases. Norms derived from these rulings are distinguished from statutory law which are the statutes and codes enacted by

legislative bodies. In common law systems case law and statutory law coexists, although the latter gains importance. Countries, where case law has significant impact on the system of law, are: USA, Great Britain, Canada, India, Australia, New Zealand, and Kenya.

A model example of case law system is a common law system in Great Britain, which has 13th century origin. Precedents in Great Britain arise from the settlement of specific cases, that is why this legal system is called 'the case law'. As stated above, precedents here are independent sources of law – they constitute independent grounds for court's decisions.

[See: J. Jabłońska-Bońca, Wprowadzenie do prawa. Introduction to law, Warszawa 2008]

6. Precedents *de iure* and *de facto*

The essence of *de iure* precedents (binding precedent) is that they **impose a duty to act in a way which is consistent with the reasoning of the decision contained in these precedents.**

Violation of precedent equals violation of the law.

Such precedents are not a source of law in the civil (statutory) law system (thus also in Poland). Individual decisions are based on statutory norms which are general and abstract.

Stare decisis principle – the principle of constancy of the decision which applies to the courts of the same or lower position in the hierarchy of authorities. According to this principle, every court is bound by the precedent established by the court of a higher instance and the precedent may be overruled only by the court that established it or the court of a higher instance or by the statutory law. Judges are therefore, generally speaking, obliged to apply precedents that have been established in their rulings.

Another type of precedent are those termed *de facto* precedents. The term 'precedent' is used here to describe those judicial decisions that constitute a model (example, argument) for further decisions. In this sense we can say that a decision of an authority applying the law constitutes a precedent for another decision if it has a specific, clear, and real impact on that second decision, although **formally it was not binding as a source of law** for that second decision.

Such *de facto* precedents (persuasive precedents) are becoming more and more popular in the statutory legal systems. Formally (*de iure*) these decisions have no binding force for the future, but *de facto* they are considered in the process of applying the law as additional arguments justifying the decision made.

7. The structure of precedents

In each precedent we can distinguish:

- 1) ***Ratio decidendi***: essence of the ruling, which contains general rule/norm/principle, which has been the reason for judicial decision and the legal reasoning supporting it. This specific norm is now a precedent, a basis for settling all similar specific cases in the future.
- 2) ***Obiter dicta***: intrinsic, unique and secondary features of the case examined, which do not become the source of law.