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# AN OUTLINE OF A GENERAL THEORY OF LEGAL INTERPRETATION AND CONSTITUTIONAL INTERPRETATION*

## 1. INTRODUCTION

**1.1.** Legal interpretation plays central role in any legal discourse. In practical legal discourse it has to do with determination of meanings of the legal texts and often influences qualification of facts to which legal rules are applied. In legal theoretical discourse on the level of legal dogmatics the so-called ,,doctrinal interpretation'' is often used for systematizing the law in force and for constructing legal concepts. Legal rules are also interpreted in the law-making activities, when the law-maker has to determine the meaning of the already existing legal texts and to consider the possible interpretations of the rules he is going to enact in the future situations of their use.

**1.2.** Theory of legal interpretation is strongly influenced by practical issues and ideology operative in the application of law. Roughly speaking, there are two opposite tendencies combining ideological, practical and theoretical issues.

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* The essay is a revised version of the text presented during the Third Summer School of the University of the Basque Country in San Sebastian in the volume *La interpretacion de la constitucion*, Donostia 1984. **Abreviations used in the text: Const. A** — Constitution of Austria (1981); **Const. E** — Constitution of Spain (1978); **Const. F** — Constitution of France (1958); **Const. FRG** — Constitution of the Federal Republic of Germany (1949); **Const. I** — Constitution of Italy (1948); **Const. P** — Constitution of Polish People'a Republic (1952), amendment 1982; **Const. USA** — Constitution of the United States of America (1787); **Const. USSR** — Constitution of Soviet Socialist Republics (1977).

One tendency is to treat interpretation as a discovery of meaning inherent in the interpreted legal rule and to treat interpretative activity as a reconstruction of this meaning. The another tendency treats interpretation as an ascription of a meaning to the legal rule determined by various factors, and treats interpretation as a creative activity similar to or analogous with a law-making. There are theoretical constructions of meaning and ideological postulates determining the place due for the interpretator according to each of these tendencies, which do not appear, however, in a pure form but in ideology and theory and not in legal practice.

**1.3.** Constitutional interpretation appears as a special case of legal interpretation. The general theory of legal interpretation covers also constitutional interpretation, although there are special features of the latter connected with the particularities of the role of constitution in the legal system, of its application and of its institutional organization.

My contention is that to deal with the issues of constitutional interpretation in a theoretically sound way one has to use the framework of a general theory of interpretation.

**1.4.** In my essay I will deal with the following topics: (a) conceptions of legal interpretation; (b) typology of legal interpretation; (c) a model of operative interpretation; (d) the interpretative process and justification of interpretative decision; (e) theory and ideology of legal interpretation; (f) the problem of a creativity of legal interpretation and the one right interpretation thesis; (g) institutions and functions of constitutional interpretation.

## 2. THE CONCEPTIONS OF LEGAL INTERPRETATION

**2.1.** There are several conceptions of legal interpretation more or less influenced by the use of the term „interpretation" in practical legal discourse and by general semiotical ideas.

For our purposes it is sufficient to single out three conceptions of legal interpretation and to choose one of them used in the general theory presented here[1].

[1] For the meaning of the term „interpretation" cf. J. Wróblewski, *Legal Reasonings in Legal Interpretation*, „Logique et Analyse" 1969, 45, p. 4 sq., reprinted in J. Wróblewski, *Meaning and Truth in Judicial Decision*, Helsinki 1983², p. 72 sq. and cit. lit.

**2.2.** The interpretation *sensu largissimo* is defined as an understanding of an object as a phenomenon of culture. If we have to do e.g. with a particulary shaped piece of stone then we can ask whether it is a result of natural forces of wind or water, or the human work such as an instrument or a piece of art. In the former case we just are interested in the natural processes dealt with in the area of geology, but in the latter case we ascribe to the piece of stone some value (sense, meaning) treating it as a result of human activity. In other words one ascribes to the material substratum some value (sense, meaning) by interpreting it as a result of man's activities. And this is a „cultural interpretation" used in the humanities and calling for proper philosophical background.

**2.3.** Interpretation *sensu largo* means understanding of any linguistic sign. In other words, to understand a sign of a given language one has to interpret it by ascribing to it a meaning according to the rules of sense of this language. It is evident that, firstly, one has to treat something as a sign of a language (interpretation in the largest sense) and, secondly, to ascribe to it a meaning by understanding it (interpretation in a large meaning).

This synonimity of „interpretation" and „understanding" is used in the area of contemporary semiotics. There is, thus, an analogy between interpreting a formal calculus by some models and interpreting a natural language. If we are interested in a legal language in which legal texts are formulated, then to understand them one has to use interpretation in the large sense. The same holds for any use of natural language in everyday acts of communication.

**2.4.** Interpretation *sensu stricto* means determination of a meaning of a linguistic expression when there are doubts concerning this meaning in a concrete case of communication. There are, therefore, two types of situation of communication: either the direct understanding of a language is enough for concrete communication purposes, or there are doubts which are eliminated by interpretation. The occurence of these two types of situation is commonly known from everyday experience of communication. In the standard situations of everyday life when the common language of the persons participating in an act of communication is used, then one understands what is spoken about in spite of all the known semiotical features of the language in question. When there arises a doubt one uses special instruments such as seeking definitions, dictionnaires or grammar, especially when one of the concerned persons does not speak adequately well the used

language, e.g. it is for her not a native language, or a situational context is far from ordinary etc.

The same holds in legal discourse exemplified by justified judicial decision. In some cases there are no interpretative doubts and no issues concerning the meaning of used rules are discussed, and there are situations when the controversies concerning the meaning of these rules are dealt with. One can name the former a „situation of isomorphy", the latter as „situation of interpretation"[2]. Taking this into account one cannot treat „understanding" of a language as synonymous with its „interpretation".

This use of the term „interpretation" has a long tradition in legal discourse and is connected with the *interpretatio cessat in claris* or *clara non sunt interpretanda* principle. There are, however, serious theoretical criticisms against these principles connected with a call for using the term „interpretation" *sensu largo* (point 2.2).

**2.5.** In my opinion a choice of a conception of interpretation depends on the research purposes within the conceptual framework of a given theory. In fact, for some purposes the strict conception of interpretation is better and for other the large conception is more suitable. I will use the former conception for the following reasons.

Firstly, the conception in question corresponds with to the use of the term „interpretation" in the language of the practical legal discourse in general, and especially to its use in justification of judicial decisions.

Secondly, using the term „interpretation" as synonymous with the term „understanding" one has to single out the situations in which there are no doubts and situations of doubt, when the issue of determination of meaning is evidently relevant in a legal discourse. One has, thus, to introduce, a terminology to identify these two types of situations.

Thirdly, one has to stress that the situation of doubt (situation of interpretation) and that of *claritas* (situation of isomorphy) depend on concrete acts of communication and cannot be dealt with *in abstracto*. The same text is clear or doubious dependent on concrete contexts of its use. The clarity is, thus, a pragmatic notion which is linked with some semantical features of the interpreted legal language

[2] These terms are introduced by K. Maakkonen, *Zur Problematik der juridischen Entscheidung*, Turku 1965, § 5. cf. also G. Gottlieb, *The Logic of Choice*, London 1968, chapt. VII; J. Wróblewski, *Semantic Basis of the Theory of Legal Interpretation*, „Logique et Analyse" 1963, 21/24, p. 404—409, repr. idem, *Meaning...*, p. 33—38.

(cf. point 4.3.1). It seems that some of the arguments directed against interpretation *sensu stricto* are connected with the lack of pragmatic conception of clarity and seem to express a postulate bound with the idea that all legal texts should be interpreted (cf. point 6.4).

**2.6.** According to the semiotical approach to legal interpretation it is also important to identify what is interpreted. There are various views closely connected with theoretical conceptions of (legal) disposition and (legal) rule and their meaning[3]. It is no place here to present the varieties of theories concerning all of them, and I will, therefore, present two types of theoretical positions stressing their links with the conceptions of legal interpretation singled out above.

The first type accepts the following terminological conventions: (a) legal disposition is a part of a legal text singled out as an article, paragraph, a linea etc. according to an used legislative technique; (b) legal norm is a rule constructed from legal dispositions according to an accepted model of its proper (normal) formula; (c) legal dispositions and legal norms have a meaning as expressions of a legal language used in determined contexts; (d) this meaning, depending on the contexts of their use, is either clear or not depending on concrete cases of their use: in the former situation one understand them directly in their *prima facie* meaning, in the latter one interprets them (interpretation in the strict sense).

The second type of convention accepts the following terminology: (a) legal dispositions are linguistic signs of a legal text; (b) a norm is a meaning of these signs which formulates a determined (clear?) rule of behaviour; (c) the norm as meaning is a result of interpretation in a wide sense which determines the structure and content of the norm in question; (d) to understand a disposition means to interpret it and to create a meaning.

The choice between these two sets of conventions is, of course, linked with various theoretical issues. Stressing the dependence of any choice of conceptual apparatus on the aims of research I am for the first type of convention. According to them the object of legal interpretation is always a text of a legal rule, either expressed as a disposition or as a norm, and this rule is formulated in a legal

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[3] Cf. in general W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa* [Theory of State and Law], Warszawa 1986[3], chapt. 17; J. Wróblewski, *Las classes de reglas juridicas*, „Rivista de ciencias sociales" 1984, 25 where the views of R. N. Bobbio, H. L. A. Hart and A. Ross are analyzed. There are synonymous terms of „legal disposition" such as „legal provision", „legal prescription".

language[4]. The standard examples of interpretation is an interpretation of legal disposition, and not of a constructed norm.

Summing up: one interprets texts formulated in legal language when pragmatically these texts are not clear enough for the purposes of communication in determined contexts.

## 3. TYPOLOGY OF LEGAL INTERPRETATION

**3.1.** There are many classifications and typologies of legal interpretation. For our purposes it is sufficient to single out four types of criteria according to which one identifies the particular types of legal interpretation. There are the following criteria: source of interpretation, validity of interpretative decision; type of interpreted text; qualification of interpretation.

**3.2.** The „source of interpretation" identifies who interprets a legal text.

(a) In authentic interpretation the law-maker interprets the text he has enacted. According to the accepted ideas *eius est interpretari cuius est condere legem*, and the law-maker has a competence of an authentic interpretation.

There is an opinion that the so-called legal definitions, thought of as determination of the meaning of terms used in the normative act containing these definitions, are a case of authentic interpretation[5]. The law-maker in fact being aware of the doubts which could concern some of the terms he uses in advance fixes their meaning. It is usually accepted that the authentic interpretation is as valid as the interpreted text itself, provided the proper form is maintained.

(b) In legal interpretation there is a singled out organ of the State which has special interpretative competence. E.g. in Poland the Council of State has the competence of interpretation of statutes (art. 30 sec. 1(4) const. P), and this interpretation has a general validity.

(c) In operative interpretation the law-applying organ interprets

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[4] This is, however, a simplification because one can discuss whether legal norm as a constructed rule is always formulated in the legal language *sensu stricto*.

[5] The nature of legal definition is, however, rather controversial. Cf. e.g. U. Scarpelli, *La definizione nel diritto*, [in:] *Diritto e analisi del linguaggio*, ed. U. Scarpelli, Milano 1976; A. Ross, *La definizione nel linguaggio giuridico*, [in:] *ibidem*; C. E. Alchourrón and E. Bulygin, *Definiciones y normas*, [in:] *El derecho y lenguaje, Homenaje a Genaro R. Carrió*, Buenos Aires 1983.

the rules used in the process of their application in concrete case[6]. The standard example is an interpretation of statutes in judicial or in administrative application of law.

(d) Doctrinal interpretation is the interpretation of law made in the legal sciences in general, and in legal dogmatics in particular. Among the standard tasks of legal dogmatics there is the systematization of the law in force, and this task demands often an interpretation of legal rules correlated with construction of legal concepts[7]. Legal dogmatics analyses also in glosses and commentaries interpretation of law made by the state organs, and especially an operative interpretation, giving his own interpretation.

(e) There is, last not least, interpretation flowing from other sources: interpretation of the parties and their representatives in legal process, which often stimulates operative interpretation; interpretation made in public opinion, especially when evaluation law and law-applying decisions, which is a relevant for identifying the content of the legal consciousness among the particular groups of a society.

**3.3.** The determination of meaning is expressed in interpretative decision, because there is always a choice between different meanings when the *prima facie* meaning of a text is doubtful.

The term „validity" in the legal discourse has many meanings. Legal theory is especially interested in the meaning of „validity of law" or „validity of a legal rule", but one can use this term also in reference to interpretative decision. There are various conceptions of validity: the basic three conceptions (systemic, factual, and axiological validity) are combined with conceptions correlated with the singled out conceptions of a legal system defining their rules of recognition[8].

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[6] The term „operative interpretation" has been introduced by L. Ferrajoli, *Interpretazione dottrinale e interpretazione operativa*, „Rivista internazionale di filosofia del diritto" 1966, 1, and this interpretation has been singled out before without using this term J. Wróblewski, *Zagadnienia teorii wykładni prawa ludowego* [Problems of Interpretation of Socialist Law], Warszawa 1959, chapt. III § 1, and passim.

[7] About doctrinal interpretation cf. A. Aarnio, *On Legal Reasoning*, Turku 1977, chapt. III(4); Idem, *Philosophical Perspectives in Jurisprudence*, Helsinki 1983, chapt. 8.

[8] Cf. in general J. Wróblewski, *Tre concetti di validità*, „Rivista trimestrale di diritto e procedura civile" 1982, 2; Idem, *Three Concepts of Validity of Law*, „Tidskrift utgiven av Juridiska Föreningen i Finland" 1982, 5—6 and lit. cit.; Idem, *Fuzziness of Legal System*, [in:] *Essays in Legal Theory in Honor of Kaarle Makkonen XVI Oikeustiede Jurisprudentia* 1983, p. 319—322 and lit. cit.

For our purposes it is sufficient, however, to simplify the issue saying that there are three meanings of validity used in reference to interpretation. Firstly, the validity of interpretative decision in the sense that all adressees of valid legal norms (A-validity) or a determined group of the addressees of this decision (G-validity) are bound by this decision according to the valid legal rules. Secondly, the validity of interpretative decision in the sense that some persons are interpreting legal texts according to them, and think that this is a proper thing to do, without having any duty to do so (F-validity). The G- and A-validity is imposed by law and, thus, corresponds to the „systemic validity" of legal rules, whereas the F-validity corresponds to „factual validity" of legal rules.

The A-validity of interpretative decision means that all addressees of the law have a duty to understand them according to this interpretation. It is the case of authentic interpretation and of legal interpretation.

The G-validity of interpretative decision is restricted by law to some groups of addressees. Thus e.g. in the judicial procedures in statutory law systems there are forms of judicial interpretation of the higher level court which are binding the lower court when deciding a concrete case. In Polish law there are some qualified forms of resolutions of the Supreme Court which are binding all courts, but not other State organs. According to the decisions of the Polish Supreme Administrative Court the instructions of central administrative agencies as acts of „internal management" cannot impose duties on the citizens, and, therefore, it holds also for interpretation which is included in them — it is valid only for administration and not outside it.

The F-validity of interpretative decision appears when the decision influences the interpretation in a manner analogous to the A- or G-validity, but there is no legal rule imposing such duty. So in statutory law countries the interpretative decisions of highest courts function in average situations as if they had A- or G-validity[9]. It is especially patent for lower courts decisions which use interpretation of the highest court as an argument supporting their own interpretative activity. There are many explanations of this fact, highy important for uniformity and certainty of judicial application of law. But in statutory law systems there is no precedent rule, and there are divergencies in interpretative decisions within the highest courts themselves appearing as rather hard case for the functioning of administration of justice.

[9] Cf. J. Wróblewski, *The Concept and the Function of Precedent in Statute-Law Systems*, „Archivum Iuridicum Cracoviense" 1974, VII, rep. in Idem, *Meaning...*, p. 157 sq.

One can ask whether some doctrinal interpretation appearing as a *communis opinio doctorum* has not such F-validity in the functioning of legal systems, although it never achieves the pedigree of the Roman *responsa prudentium*.

**3.4.** The typology of interpretative decisions according the object of interpretation depends, of course, on the typology of legal rules, and presents no theoretical interest. If one singles out for example constitution, statutes, sub-statutory legal rules, international contracts, and normative acts such as contracts, testaments etc., then one can single out accordingly the types of legal interpretation and ask about particularities, if any.

**3.5.** Typology of interpretation according to its qualification traditionally refers to two issues.

Firstly, there is the opposition of *interpretatio extensiva* and *interpretatio restrictiva*. This widely used qualification, according to the general theory of interpretation, takes place when the different meanings of interpreted legal rule are compared, when using the second degree interpretative directives (see point 4.8).

Secondly, more complicated problem presents the qualification of interpretation as *secundum, praeter* and *contra legem*. The theoretical analysis demonstrates that in fact this qualification deals with a comparison of different interpretations of legal rules, one of which is termed as *lex* (see point 8.4).

In both cases whe have, thus, to do with qualification based on comparison of different interpretations and/or their results, and on evaluative choices of one of them as the proper one.

**3.6.** Constitutional interpretation is put within the framework of the types of interpretation singled out above. This interpretation is identified by its object, i.e. a constitution (point 3.4). There are various possible sources of this interpretation: a parlament as the constitution-making agency, a special organ which has the competence of constitutional interpretation, the organs applying the constitutional rules, the legal science and others (comp. point 2). The most interesting is the case of a constitutional interpretation made by the state organ controlling the constitutionality of statutes (and of other normative acts) (cf. point 8.2) and/or dealing with the cases of constitutional responsibility (cf. point 8.3). E.g. according to art. 93 sec. 1(1) Const. FRG Federal Constitutional Tribunal decides the interpretative issues of that Constitution; according to § 1 sec. 1 of the Organic statute

concerning Constitutional Tribunal of Spain (statute of October 3, 1979) this tribunal is the supreme interpretator of the Constitution.

The validity of constitutional interpretation (point 3.3) is decided by the law in force in particular countries (A- and G-validity) and is based on the authority of interpretative decisions (F-validity).

## 4. A MODEL OF OPERATIVE INTERPRETATION

**4.1.** Operative interpretation is the interpretation made during an application of law, when there are doubts concerning the meaning of applied rules relevant for making a decision (situation of interpretation) (cf. point 3.2(c))[10].

In this situation the law-applying organ has to determine the meaning in question in a manner precize enough for the purposes of decision-making.

The interpretative decision is justified by reference to interpretative directives which are thought of as rules concerning how to determine a meaning of the interpreted text. The choice of the directives in question and often their use depends on evaluations and, therefore, justification of the decision in question has to single out the evaluations (or values) accepted by the decision-maker.

In the first approximation a model of operative interpretation has to single out: (a) doubts, as the starting point of interpretation; (b) use of interpretative directives implying evaluations; (c) making an interpretative decision which, eventually, is or has to be justified.

There is, however, a variety of interpretative decisions and their application leads sometimes to different results. I single out, therefore, two levels of the directives in question: directives of the first level $DI^1$ determine how the interpretator should to ascribe the meaning of a legal rule taking into account the relevant contexts of the rule, i.e. linguistic, systemic and functional context; directives of the second level $DI^2$ determine how the $DI^1$ ought to be used ($DI^2$ of procedure) and how to choose between the different results of an application of $DI^1$ ($DI^2$ of preference).

Taking this into account a general model of operative interpretation singles out the following elements: (a) initial doubt concerning the

[10] The presentation of the problems of operative interpretation is based on following texts of mine: *The Problem of the Meaning of the Legal Norm*, „Österreichische Zeitschrift für öffentliches Recht" 1964, 3—4; rep. *Meaning...*, p. 1 sq.; *Semantic Basis...*; *Legal Reasonings...*; *Zagadnienia teorii...*, chapt. II—VIII; *Sądowe stosowanie prawa* [Judicial Application of Law], Warszawa 1982, chapt. VII.

meaning of a legal rule to be applied, (b) application of $DI^1$ according to the $DI^2$ of procedure; (c) comparison of the results of (b); (d) if the results in question, i.e. meanings of an interpreted rule according to $DI^1$, are different, then the choice of one meaning according to $DI^2$ of preference; (e) formulation of interpretative decision and, eventually, its justification.

A theoretical model of operative interpretation singles out the problems the decision-maker has to solve, but is not any description of an interpretative process (cf. point 5.1).

The model of operative interpretation could be used by analogy to other kinds of interpretation in the strict sense although the doubts in question could be either predicted doubts (in authentic interpretation), or doubts arising in some relevant law-applying processes (legal interpretation), or linked with a systematization of law (doctrinal interpretation). The way of eliminating these doubts is strictly analogous, viz. by reference to interpretative directives and to evaluations.

A constitutional interpretation is an operative interpretation when one has to do with an application of constitutional rules. This is especially the case in the systems where special institutions concerning the control of constitutionality of law-making and of constitutional responsability are functioning (cf. points 8.2, 8.3).

**4.2.** The interpretation in the strict sense *ex definitione* is needed when there are doubts concerning the meaning of a rule, and in operative interpretation these doubts arise in the process of an application of law. There are, thus, either situations of isomorphy or situations of interpretation (cf. point 3.2(c)).

There are constitutional rules which stimulate no doubts, because their wording is practically clear in pragmatic contexts of their use: e.g. the determination of the capital of the state (§ 5 Const. E) or determination of the number of members of parliament (art. 21 sec. 1 Const. P).

There are, however, constitutional rules which in some situations stimulate interpretation.

There are constitutional terms which are openly evaluative, and hence, for semiotical reasons, demand a determination of their meaning when used. E.g. the supreme values of legal order expressed as „liberty", „egality" or „justice" (§ 1 Const. E) for linguistic reasons call for interpretation in any context where there are no strictly defined meanings of those fundamental terms and various political forces tend to use them in a more or less different manner when deciding concrete issues (cf. point 8.4.2(a)). The same holds for all general

clauses and openly evaluative terms in the legal language, but also descriptive terms could be fuzzy (point 8.4.2(c)). Hence the doubts are linked with the linguistic context of an interpreted rule.

The systemic context stimulates interpretative doubts when one compares a rule which in its *prima facie* meaning it inconsistent or incoherent with other rules valid in this system[11]. This is especially the case of any control of the constitutionality of statutes: if there is an inconsistency of a statutory rule and constitutional rule taken in their *prima facie* meaning, then there is a doubt whether one of them, or both of them, are properly understood. Constitutional rules are often thought of as „legal principles" in one of several meanings of this vague term[12], and as principles they play a relevant role in determining the meanings of interpreted rules, which are not „coherent" with them and, thus, stimulate doubts as to their *prima facie* meanings.

There also relevant factors of the functional context of law, viz. of the rules, evaluations, and various opinions concerning the features of the society, and of the state, and the „will" of the law-maker and decision-maker, thought of as relevant for the meaning of interpreted rules. The standard cases of doubt is the conflict between the functions of a rule used in its *prima facie* meaning with the *ratio legis* or purposes of the actual (as opposed to the historical) law-maker. The doubts are stimulated by political elements of the functional context coupled with the fuzziness of constitutional language. E.g. the doubts concerning the meaning of „fundamental principles" in art. 34 Const. F: „la loi détermine les principes fondamentaux" are connected with the idea that this rule determines the „matière réservée à la loi",

[11] The use of the term „consistency" applied to relation between norms thought of as neither true nor false linguistic expressions demands special terminological conventions and/or a special kind of non-aletic logic for normative discourse. The term „coherence" is used in a way transcending the field of logic. For an application of both terms in legal discourse cf. e.f. N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978. For a general logical outline cf. e.g. O. Weinberger, *Rechtslogik*, Wien--New York 1970, chapt. VIII 4(c); Ch. and O. Weinberger, *Logik, Semantik, Hermeneutik*, München 1979, chapt. 7. 11. There is, however, also a view restricting the postulate of consistency for legal system as a system combining the features of „sistemi tetici" and „sistemi proeretici" cf. G. di Bernardo, *L'indagine del mondo sociale*, Milano 1979, part. II, chapt. 2(12); Idem, *Le regole dell'azione sociale*, Milano 1983, p. 184—209.

[12] Cf. a typology of various uses of this term J. Wróblewski, *Le rôle des principes au droit dans la théorie et l'idéologie de l'interpretation juridique*, „Archivum Iuridicum Cracoviense" 1984, XVII, part. I; R. Alexy, *Zum Begriff des Rechtsprinzips*, „Rechtstheorie" 1979, Beiheft 1.

and this means the problem of distribution of law-making power between the parliament and government (cf. point 8.4.2(b)).

The doubts stimulating operative interpretation are linked with an application of law. But analogous doubts appear also in a general analysis and systematization of law in doctrinal interpretation, and the interpretation of constitutional law is no exception.

The existence of a doubt is always related with a concrete use of a legal rule. In operative interpretation the decision-maker always has to choose between stating that the *lex clara est* and stating that the meaning of this *lex* in concrete context of communication is doubtful. The *claritas* and doubt are, thus, situation-dependent (cf. points 4.2; 5.3).

**4.3.** The theory of legal interpretation presented here is based on a semiotical approach. This means *inter alia* that the features of the legal language determine the problems of interpretation[13].

I cannot discuss here all the controversies concerning legal language[14]. I assume that there are several kinds of languages connected with law: language of the texts in which legal rules are formulated (legal language *sensu stricto*), legal language of the decisions of an application of law (legal juridical language), legal language of the legal sciences (legal doctrinal language which is divised into languages of legal dogmatics, legal meta-dogmatics, legal theory etc.). Here I am interested only in the legal language *sensu stricto*, and from now on I will refer to this language as to „the legal language".

The common natural language is the language one uses in standard situations or life as a tool of communication. If we single out a legal language, then this is a species of common language. According to widely shared views, legal language has no syntactic peculiarities, but it has some semantic features due to the influence of the law-maker on shaping the meanings of some of the terms he uses.

[13] Cf. J. Wróblewski, *Legal Language and Legal Interpretation*, „Law and Philosophy" 1985, 4.

[14] About legal language cf. e.g. B. Wróblewski, *Język prawny i prawniczy* [Legal Language and Juridical Language], Kraków 1948, part. II, III; K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa* [Problems Legal Theory], Warszawa 1969, chapt. II. 1. 1.; Z. Ziembiński, *Le langage du droit et le langage juridique. Les critères de leur discernment*, „Archives de philosophie du droit" 1974, XIX; Idem, *Problemy podstawowe prawoznawstwa* [Fundamental Problems of the Legal Sciences], Warszawa 1980, chapt. 22 chapt. 2.2.3.; T. Gizbert-Studnicki, *Język prawny a język prawniczy* [Legal Language and Juridical Language], „Zeszyty Naukowe UJ" 1972, Prace prawnicze 55; Idem, *Czy istnieje język prawny?* [Does the Legal Language Exist?]., „Państwo i Prawo" 1979, 3; Lang, Wróblewski, Zawadzki, *op. cit.*, chapt. 16.1—16.3.

There are also pragmatic peculiarities of this language because it is mostly used in legal discourse and not in everyday communication.

The most relevant features of legal language as a species of common language are fuzziness and contextuality of meaning.

**4.3.1.** Legal language is a fuzzy language. Fuzziness of a language is defined by identifying three areas of references of the names or descriptions formulated in this language[15]. Take as an example the term „man" in a legal rule: „who kills a man ought to be punished by...". The term „man" in legal language is applicable to any student of the law faculty of the University of Lodz (positive core reference), and is not applicable to any bird or fish (negative core reference). There are, however, objects for which the decision whether X belongs to the linguistic class „man" or does not belong to it is not clear and cannot be decided by the semantic rules of the legal language, e.g.: organism without cerebral activity; „artificial organism"; *nasciturus* in some legal systems. This is the penumbra of the term „man", and a fuzzy language has such penumbra zone of reference at least for some its terms and/or descriptions.

The positive and negative core reference appears in linguistically clear cases, and doubts exisist in penumbra. This is the case of doubt stimulated by linguistic context of legal norm, because legal language is a fuzzy language.

There are, however, other dimensions of fuzziness of the legal language. There is a fuzziness resulting from the syntactical structure of legal texts. But even for linguistically clear cases some doubts could arise because of the influence of the systemic and functional context of legal rules.

**4.3.2.** As mentioned above there are three contexts relevant for the meaning of legal rules, viz. linguistic, systemic and functional context (point 4.2). The linguistic context this is the fuzzy legal language briefly described above.

The systemic context is the system the legal rule belongs to. It is assumed that a legal rule has to be thought of as a part of a larger whole, e.g. of a „normative act", of a legal institution of a „branch of law" etc. The largest whole the legal norm belongs to is a legal system, and, hence, the features of this system are thought as relevant for its meaning.

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[15] J. Wróblewski, *Fuzziness...*, p. 315—319 and lit. cit. and cf. the note 13.

There are many theoretical conceptions of a legal system linked with its structure and scope. It is no place here to discuss these highly controversial issues, and I will limit my observations to the features of a legal system necessary to deal with theory of legal interpretation in general, and with constitutional interpretation in particular.

Firstly, legal system is a mixed statico-dynamical system, i.e. there are substantive relations between norms (e.g. of contradiction, of „inference" etc. in some meanings of these terms), and formal relations of delegation (e.g. of conferring law-making competences), with correlated criteria of systemic validity[16].

Secondly, there is a variety of rules belonging to the legal system. Among many typologies of these rules it is important here to stress that there are simple rules determining a psychophysical behaviour as the primary rules, and the rules which regulate competences, adjudication, organization, validity etc. of a rather mixed and complex features, sampled globally as secondary rules[17]. The rules are formulated in various manners, such as identifying the conduct by its description (rules of conduct *sensu stricto*), by outlining the direction of due behaviour (directival rules) or the goals (results) which should be implemented (teleological rules) (cf. point 8.4.1).

Thirdly, legal rules belonging to a concrete legal system are hierarchically ordered according to the hierarchy of law-making authorities, the features of law-making procedures and/or sometimes also criteria of content. The example of the former hierarchy singles out constitution, statutes and other rules, according to the latter *leges generales* and *leges speciales*, principles and „ordinary" rules.

Fourthly, the legal system is thought of as a consistent set of rules. It means that if there appears that some contradictory rules (in a defined sense of the term „contradiction" applied to rules)[18] are valid, then one tends to eliminate these contradictions either by deciding that one of these rules is not valid (or not applicable in case) or that at least one of these rules has to be interpreted in such a way,

[16] Cf. J. Wróblewski, *Systems of Norms and Legal System*, „Rivista internazionale di filosofia del diritto" 1972, 2. Idem, *Towards Foundations of Judicial Reasoning*, [in:] *Metatheorie juristischer Argumentation*, ed. W. Krawietz and R. Alexy, Berlin 1983, p. 245 sq.; Idem, *Operative Models and Legal Systems*, [in:] *Artificial Intelligence and Legal Information Systems*, vol. I, ed. C. Ciampi, Amsterdam—New York—Oxford 1982, p. 218—230; Idem, *Tre concetti...*, p. 586—591; Idem, *Three Concepts...*, p. 408—414.

[17] Cf. H. L. A. Hart, *The Concept of Law*, Oxford 1961, chapt. III, V.; N. Bobbio, *Studi per una teoria generale del diritto*, Torino 1970, p. 175—188.

[18] Cf. note 11 and *Les antinomies en droit*, ed. Ch. Perelman, Bruxelles 1965.

that the contradiction vanishes. The former way is used by an application of conflict of laws directives or by derogation by another rule, depending on the theory[19], the latter way is used in systemic interpretation (see points 4.3.2; 4.5).

Fifthly, legal system is thought of as more or less coherent set of norms. The coherence in question cannot be precizely defined[20]. Loosely speaking we have in mind that the legal system as a whole is based on common axiological assumptions and that legal rules are not only consistent but also axiologically ordered in a harmonious way.

**4.3.3** The third context relevant for the meaning of a legal rules is a functional context. This context is rather complicated. It contains all factors which are related with the creation, application and functioning of law but do not belong to the linguistic and systemic context.

The conception of the functional context implies the general idea of law and of society and a whole theory of a social dependence of law[21]. Law is created, applied and functions in the context of various sociopsychical facts including the extra-legal norms and evaluations, various types of social relations and other law-conditioning factors (e.g. economy, politics, general culture), various views concerning facts relevant for law, etc. Here we have to do also with the „will" of the historical law-maker thought of either as a fact of the past or as a theoretical construct of the legal science and/or legal practice. All the intricate problems of the purposes and interests influencing the law are included.

The influence of functional context on the meaning of legal rules is asserted but is rather controversial. The crucial issue is whether this context is relevant as influencing the will of the historical law-maker, or as a set of factors actually determining the meaning of rule at the time when it is used, applied or analyzed. It is not possible here to outline the features of the functional context in a more detailed way, because of the divergencies between various theoretical in-

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[19] Cf. e.g. N. Bobbio, *Des critères pour resoudre les antinomies*, [in:] *Les antinomies...*; C. E. Alchourrón, *Normative Order and Derogation*, [in:] *Deontic Logic, Computational Linguistics and Legal Information Systems*, vol. II, ed. A. A. Martino, Amsterdam—New York—Oxford 1982; H. Kelsen, *Allgemeine Theorie der Normen*, Wien 1979, chapt. 27, 29; H. T. Klami, *Legal Heuristics*, Vammala 1982, part. II. chapt. 2.3.

[20] Cf. MacCormick, *op. cit.*, chapt. VII.

[21] For general reference cf. J. Stone, *Social Dimensions of Law and Justice*, London 1966.

sights of the functional dependence of law, and its relevance for interpretation issues.

**4.3.4.** Generally speaking, the contextuality of legal language is relevant for the theory of legal interpretation because all three contexts singled out above influence the meaning of legal rules. The contextuality of meaning appears in two ways.

Firstly, any direct understanding of legal rules in the situation of isomorphy presupposes that there are no doubts concerning the influence of particular contexts on the understanding of a rule.

Secondly, in the situation of interpretation one has to take into account the dependence of the meaning in question on each of the contexts, and this dependence is expressed in interpretative directives. There are two levels of interpretative directives. The first level directives are divided in to three basic groups according to the role ascribed to each of the contexts in question.

**4.4.** There are many first level linguistic directives of legal interpretation linked with the features of the legal language and the assumed legislative technique. As example of these directives almost commonly accepted in the ideologies of interpretation in the actual statutory law I will give the following $DI^1$ [22]:

($DI^1$ — 1) Without sufficient reasons one should not ascribe to the interpreted terms any special meaning different from the meaning these terms have in common natural language.

This directive is based on the presupposition that in the legal language one does not use the terms in technical legal meaning, but in specially justified cases. This DI assumes, of course, the correlated directive of law-making technique.

($DI^1$ — 2) Without sufficient reasons one should not ascribe different meanings to the same terms used in legal rules.

This directive presupposes that in the legal language there is no polisemy. This assumption is, however, not accepted if there are sufficiently strong reasons to interpret the same term in different way, and this is the case according to the second level $DI^2$, when the influence of systemic and/or functional context prevails over the relevance of linguistic context expressed in this $DI^1$ — 2 (cf. point 4.8).

($DI^1$ — 3) Without sufficient reasons one should not ascribe the same meaning to different terms.

[22] Cf. J. Wróblewski, *Zagadnienia teorii wykładni...*, chapt. V § 3; Idem, *Sądowe...*, chapt. VII. 3.1.

This directive means that there no synonymy is presupposed in legal language. The „sufficient reasons" clause functions in an analogous way that described for the $DI^1$ — 2.

($DI^1$ — 4) One should not determine the meaning of a rule in such a way, that some parts of this rule would be redundant.

This directive presupposes some properties of the technique of law-making which guarantees that each expression in legal language is relevant.

($DI^1$ — 5) The meaning of complex linguistic sign of the legal language ought to be determined according to the syntactical rules of common natural language.

This directive is based on the thesis, that there are no syntactical particularities of the legal language differentiating if from the common natural language.

**4.5.** From the systemic first level directives of legal interpretation I would mention the following as almost commonly accepted in the systems of law we are speaking about[23].

($DI^1$ — 6) One should notascribe to a rule a meaning in which this rule is contradictory with another rule belonging to the system.

($DI^1$ — 7) One should not ascribe to a legal rule a meaning in which it is incoherent with other rules belonging to the system.

($DI^1$ — 8) One should ascribe to a legal rule a meaning in which it is most coherent with other rules belonging to the system.

These directives are based on the ideas of consistency and coherence of a legal system. The difference between $DI^1$ — 7 and $DI^1$ — 8 consists not only in opposition between negative and positive formulation, but also in a fuzzy notion of the degrees of coherence which is used in practice.

($DI^1$ — 9) One should not ascribe to a legal rule a meaning in which this rule is inconsistent (or incoherent) with a valid principle of law.

($DI^1$ — 10) One should ascribe to a legal rule a meaning in which it is most coherent with a valid principle of law.

These directives deal with the hierarchy of legal system and refer to the notion of a principle of law. If the „principle of law" is understood as a legal rule expressed explicitly in legal dispositions, or constructed from them in an accepted manner, then the „principle of law" is a special case of a legal rule, and $DI^1$ — 9, $DI^1$ — 10 are the special cases of $DI^1$ — 6, $DI^1$ — 7, $DI^1$ — 8. These principles are always

[23] Cf. J. Wróblewski, *Zagadnienia teorii wykładni...*, chapt. VI; Idem, *Sądowe...*, chapt. VII, 3.2. VI, §§ 1—3; Idem, *Le role...*

hierarchically higher than other rules. In this sense one treats constitutional rules as principles hierarchically higher than other legal rules. If principles of law are thought of as other rules than mentioned before, then there is a controversial question whether they are part of a legal system or are extra-systemic rules[24]. In the former case the role of principles is a result of the hierarchical structure of legal system, in the latter case we have to do with an interpretative impact of extra-legal rules on interpretation which ought to be described as a case of functional interpretation.

The relations of consistency and coherence expressed in the systemic directives presuppose these features of a legal system and do refer to all singled out types of rules valid in this system mutually connected within its mixed statico-dynamic structure. The relations, however, of principles with other rules depend on their theoretical identification. It is especially important in case, when the requirement of consistency and coherence is not ascribed to the principles[25].

**4.6.** It is rather hard to formulate functional first level directives of legal interpretation[26] which would be almost commonly accepted within our frame of reference. One of such directives is e.g.:

($DI^1$ — 11) One should ascribe to a legal a meaning according to the purpose of the institution the rule belongs to.

This directive is based on the functional nexus between the legal institution as a whole and legal rules as its constituent parts. It is commonly approved of directive provided one accepts the relevance of the teleological arguments in legal interpretation which depends on the $DI^2$ of procedure.

There are, however, opposite functional first level directives of legal interpretation which express different ideologies (or normative theories) of interpretation (cf. points 6.5—6.7).

($DI^1$ — 12) One should ascribe to a legal rule a meaning according to the purpose of the historical law-maker.

($DI^1$ — 13) One should ascribe to a legal rule a meaning according to the purposes which are implemented by the maker in the law in force in time of interpretation.

($DI^1$ — 14) One should ascribe to a legal rule a meaning according to the purposes this rule ought to implement according to the evaluations of the interpretator.

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[24] Cf. J. Wróblewski, *Fuzziness...*, p. 320 sq., and lit. cit.

[25] Cf. Alexy, *op. cit.*

[26] Cf. J. Wróblewski, *Zagadnienia teorii wykładni...*, chapt. VII; Idem, *Sądowe...*, chapt. VII, 3.3.

An acceptance of each of these directives depends on evaluative choices connected with the ideas of proper interpretation and the role of a determined purposes in an ascription of meaning.

We can formulate analogously three types of directives dealing e.g. with the role of moral norms and/or evaluations, or of political norms and/or evaluations etc. in legal interpretation. Either the views of the historical law-maker, or of the actual law-maker, or of the interpretator are relevant. In each case the law-maker or the interpretator is thought of as representing some attitudes shared by more or less determined groups or ascribed to the society as a whole in some spaciotemporal dimensions. The dilemmas of the „letter" and „spirit" of law, of legal stability and legal change, of certainty and eufunctionality of law, are manifested in the controversies concerning functional directives of interpretation.

**4.7.** The interpretative directives are used to search for a meaning or to justify an interpretative decision. In any case the meaning of an interpreted legal rule depends on these directives.

What types of $DI^1$ should be used, when they are to be used and in what order depends on the second level $DI^2$ of procedure. There is a question e.g. whether the results of linguistic interpretation if the meaning after using linguistic directives is clear ought to be tested by systemic and/or functional interpretation, or not.

There are, e.g. the following controversial $DI^2$ of procedure:

($DI^2$ — 14) one should use sucessively linguistic, systemic, and functional $DI^1$ until the meaning of a legal rule is clear enough for the purposes of interpretation.

($DI^2$ — 15) Always one should use successively linguistic, systemic and functional directives of interpretation notwithstanding the results of using each of them, i.e. the results of any interpretation should be tested by all $DI^1$.

If one compares the results of using the $DI^1$, and this is always the case in the model of operative interpretation when more than one $DI^1$ is used, then there are two possible situations.

In the first situation („situation of confirmation") the meanings determined by different $DI^1$ are the same, i.e. „linguistic meaning" (ML), „systemic meaning" (MS) and „functional meaning" (MF) are the same pattern of due behaviour. If this is the case then the ML = MS = MF is thought of as the meaning of interpreted legal rule.

In the second situation („situation of choice") there is a difference between ML, MS and MF. In operative interpretation there is no possibility to stop the search for meaning at this stage, because there

is a duty to decide the case, and one cannot do it without applying a rule in a determined meaning. Then the $DI^2$ of preference are used. If according to the $DI^2$ of procedure one should use more than one type of $DI^1$, then always one of these two situations occurs, and there is always a possibility of the second situation calling for the use of $DI^2$ of preference.

**4.8.** The $DI^2$ of preference are, as a rule, not as widely analyzed in legal litterature as $DI^1$, and mostly they are not explicitly differentiated from the former.

Theoretically there are many combinations of the relations between ML, MS and MF possible, and, hence, many $DI^2$ of preference determining the meaning which ought to be ascribed to a legal rule in case of each of the combinations in question. Traditionally one singles out the situation of the difference between ML (and/or MS) and MF saying that if MF is „larger" than ML (and/or MS) then this is the case of *interpretatio extensiva*, and in opposite case — this is *interpretatio restrictiva*. Presupposition of this qualification of interpretation (cf. point 3.5) is, that one uses the $DI^2$ of preference of the form:

($DI^2$ — 16) When there is a difference between the MF functional meaning of a legal rule and the ML linguistic meaning (and/or MS systemic meaning), then the former prevails.

The result of using this directive is to qualify the functional interpretation as the extensive or restrictive one.

There are, however more possible relations between the three types of meanings, and, moreover, there are also possible differences of the results of using $DI^1$ belonging to the same type of interpretation. E.g. it may be so, that the use of $DI^1$ — 3 gives another meaning than that of $DI^1$ — 4, and in rapidly changing functional context relevant for the meaning of legal rules the opposition of the results of using $DI^1$ — 12 and $DI^1$ — 13 or $DI^1$ — 14 is almost inevitable. Taking this into account it is sufficient to present the normal formula of $DI^2$ of preference:

($DI^2$ — 17) When there is a difference between a MX meaning according to the $DI^1$ — X directive of interpretation ascribed to a legal rule, and the MY meaning ascribed to it according to $DI^1$ — Y directive of interpretation, the MX prevails.

Where for the variables X, Y one uses the corresponding identificators of used $DI^1$. It is patent that there are deep differences between various ideologies (or normative theories) of interpretation in respect to the acceptance of the $DI^2$ of preference.

**4.9.** The result of using $DI^2$ of preference is the ascription of a meaning to the legal rule thought of as the „real" or „true" meaning According to the defining features of operative interpretation this meaning is sufficiently precize for making an application of law decision possible.

I should stress, however, that the idea of the „true" or „real" meaning of interpreted rule could be misleading if not relativized to the used $DI^1$ and $DI^2$. The meaning in question is ascribed to the legal rule on the strength of these directives, and is justified *inter alia* by them (cf. point 5.3). The difference of these directives could determine the difference of the meaning ascribed to a concrete rule. Hence, having different meanings of a rule due to different $DI^1$ and on $DI^2$ or to their different use because of their value dependence, one has to do with different interpretations which are compared in qualificative terms *interpretatio secundum, praeter* and *contra legem* (cf. point 7.8.3).

If one of interpretations in question is treated as *lex*, then the another interpretation can be compared with the former and, if different, qualified as *praeter* or *contra legem*. One cannot, however, compare an interpretation with a *prima facie* meaning of a legal rule, because *ex hypothesi* this meaning is doubtful, not precize enough to be used in a concrete act of communication.

Taking this into account it is evident that a meaning of an interpreted rule cannot be analyzed without taking into account the directives of interpretation which are used in determining this meaning and/or in justifying it.

**4.10.** The presented model of operative interpretation is applicable to a constitutional interpretation when constitutional rules are applied, and especially when one controls the constitutionality of law or decides the cases of constitutional responsibility (cf. points 8.2, 8.3).

Constitution is formulated in a fuzzy legal language. Constitution appears as a set of legal rules which are singled out according to some formal criteria (constitution in a formal sense) and/or criteria of content (constitution of material sense) as hierarchically highest part of a legal system.

Constitution, as a part of legal system, exists in a changing functional context and is especially strictly related with the essential features of the global society organized in the State. Constitutional rules are interpreted in all three contexts of law, although one of the peculiarities of constitutional interpretation is the role of functional interpretation in general, and of the political factors in particular

(cf. point 8.4.4). The terminology of constitution, as a rule, contains many key-terms which call for interpretation, and even purely descriptive constitutional terms in some situations stimulate interpretation demonstrating the influence of functional context as one of the sources of the fuzziness of legal language and of pragmatic character of interpretative doubts (cf. points 4.2; 8.4.2).

## 5. THE INTERPRETATION PROCESS AND JUSTIFICATION OF INTERPRETATIVE DECISION

**5.1.** In contemporary legal culture in statutory and common law systems it is expected that legal decision is a justifiable decision. This means that a legal decision could be justified by identifying the arguments supporting it (internal justification), and by justifying these arguments as good reasons and the justificatory reasonings as proper reasonings (external justification)[27].

Justification *sensu largo* (JL-justification) covers verification and justification *sensu stricto* (JS-justification)[28].

JL-justification gives reasons for any statement appearing in a discourse. Verification is a JL-justification which deals with sentences, i.e. with statements which are either true or false in a determined language. JS-justification is a JL-justification of statements which are neither true nor false in a given language, viz. are not verifiable. The concept of verification implies some philosophical and logical assumptions. The verification depends on ontology, e.g. materialist, idealist or a materialistically or idealistically oriented culturalist ontology. The dependence on logic accepted in the language in question manifests itself in a verification based on aletic logic or on a non-aletic logic, provided that each logic is a formal calculus interpreted in a determined language.

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[27] About justification in general cf. e.g. A. Peczenik, *The Basis of Legal Justification*, Lund 1983; R. Alexy, *Theorie der juristischen Argumentation*, Frankfurt am Main 1978; papers in *Metatheorie juristischer...*; Aarnio, *On Legal...*, part. II, chapt. 2; Weinberger, *Rechtslogik*, chapt. XIV; S. Jørgensen, *Values in Law*, København 1978, chapt. 7; M. Taruffo, *La motivazione della sentenza civile*, Padova 1975, chapt. IV; U. Scarpelli, *L'etica senza verità*, Bologna 1982, chapt. XI. About internal and external justification J. Wróblewski, *Justification of Legal Decisions*, „Revue internationale de philosophie" 1979, 127—128, reprint in Idem, *Meaning...*, p. 56, sq.; Alexy, *Theorie...*, part. C, chapt. II.

[28] Cf. J. Wróblewski, *Verification and Justification in the Legal Sciences* „Rechtstheorie" 1979, Beiheft 1, p. 196—201.

The JS-justification deals with other argumentative techniques than verification. The quite common name for these arguments is a „non-formal logic", although there are opinions against any use of the term „logic" in this context and for a „rhetoric" or „argumentation", „topics" and so on. In any case this area of reasoning uses arguments linking various statements in a practical discourse. Their qualification is not in terms of truth but, e.g. in those of „good reasons", „persuasiveness", „reasonableness" etc.[29]

Justification we are interested in is, as a rule, a JS-justification: we are interested in arguments justifying interpretative decision.

If a legal decision is internally justified we say that it is an internally rational decision, because it singles out reasons of this decision. If a decision is externally justified then it is an externally rational decision because it is based on good reasons, i.e. reasons accepted by the critic[30].

The need for justification depends either on law specifying when an explicit justification should be made and what arguments are necessary, and/or on uses accepted in legal practice and/or in legal doctrine[31]. But the expectation of justifiability is linked with basic features of our legal culture, or, more generally, of our general culture calling for rationality[32].

The justification of legal decision deals with arguments supporting this decision and, thus, is a matter of justificatory reasonings and their control. Quite different issue is that of the process of decision-making. This process is a psychological sequence of phenomena which result in a legal decision. This process is described by the tools of psychology, if we are interested in the processes of an individual decision-maker, or with the tools of social psychology and the social sciences writ large, if we are interested in a collective decision-making and its determining factors. In any case the description in question deals with empirical material of decision-making process, identifies the factors determining it, searches for some regularities

[29] J. Wróblewski, *Justification...*, p. 279—281 and lit. cit. JS-justification can be compared with „transformation" cf. Peczenik, *The Basis...*, chapt. 1—3; A. Aarnio, R. Alexy, A. Peczenik, *The Foundation of Legal Reasoning*, „Rechtstheorie" 1981, 12, p. 136—158; J. Wróblewski, *Towards Foundations...*, p. 234—247.

[30] Cf. J. Wróblewski, *Justification...*

[31] J. Wróblewski, *Motivation de la décision judiciaire*, [in:] *La Motivation des decisions de justice*, ed. Ch. Perelman and P. Foriers, Bruxelles 1978.

[32] For a general panorama cf. *Rationality To-Day. La rationalité aujourd'hui*, ed. T. F. Geraetz, Ottava 1979; cf. also *Rational Decision* (Nomos VII), ed. L. L. Friedrich, New York 1967².

and, last not least, can predict decisional-trends and/or individual decisions.

Taking this into account it is patent that one should not confound justification of legal decision with a description of the process in which this decision is made. It is not excluded that justification of a decision corresponds with the process of its making. But this is not always and not necessarily so.

There are two errors connected with blurring the difference between justification of a decision and description of decision-making process[33]. Firstly, one asserts that all decision-making process is intuitive, irrational, purely evaluative etc. and therefore, all justifications are either pure „rationalization" or—to put in bluntly — „mystification" made for ideological purposes. Secondly, one asserts that legal decision is a result of a „deductive reasoning" which corresponds with some standarized forms of its justification. Both assertions are faulty, because they treat decision-making process as exclusively irrational (the former) or exclusively „logical" (the latter), and it is a fair hypothesis that the issue cannot be solved by extrapolation of more or less accidental empirical data, if any. Both assertions are faulty, because they do not separate clearly and consistently enough description of process, description of justificatory arguments, functions and/or postulates of justified decision.

**5.2.** An interpretative decision is a species of legal decision, and the observations concerning the difference between justification and description are applicable to it.

I am not interested here in any description of the interpretative decision-making[34], but only in justification of these decisions. The justification in question appears in the texts of the decisions of operative interpretation and in doctrinal interpretation as well (cf. points 3.2 (c) (d)).

The special relevance have justifications of interpretative decision formulated in the law-applying decisions of the courts, especially when the styles of judicial decision-making allows for a large set of arguments. These styles are rather differentiated. The extremaly scarce data are included in the French judicial higher courts decisions,

[33] Cf. J. Wróblewski, *Właściwości, rola i zadania dyrektyw interpretacyjnych* [Characteristics, Functions and Purposes of Interpretative Directives], „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1961, 4, and lit. cit. Idem, *Legal Reasoning...*

[34] Cf. the very good description in J. C. Cueto-Rua, *Judicial Methods of Interpretation of the Law*, Louisiana State University 1981.

the largest material is included in justifications of the English or US higher courts decisions, and, the style of e.g. Polish Supreme Court decisions is mid-way between these two extremes. Leaving out, however, varieties of styles, there is a common assumption behind arguments supporting the decision: the decision should be presented not as an arbitary act, but as a result of a reasoning which can be rationally presented and, thus, rationally controlled too.

There is a comparative research on various styles of justificatory decisions on the surface level[35], and a deep structure analysis of justificatory reasoning implying a theory of this justification. I am interested here in presenting a normal formula of a justified interpretative decision which is based on the theoretical model of operative justification presented above (cf. chapter 4). The fundamental idea is that a justified interpretative decision should identify all arguments determined by the basic problems which have to be solved if the decision should be rational. The concept of rationality is, thus, implied in the normal formula in question.

**5.3.** The model of operative interpretation starts with an assessment of a doubt. Whether there is a doubt or not depends on purely pragmatic factors of an use of a norm in an concrete act of communication (cf. point 4.2). This doubt is, however, presupposed and it seems superfluous to justify its existence.

Justification of interpretative decision calls for identification of factors which are relevant for a meaning of a rule. There are *prima facie* two sets of these factors: interpretative directives and evaluations.

Interpretative directives of both levels, i.e. $DI^1$ and $DI^2$, are the deciding factor in justification of interpretative decision. This is evident taking into account the context dependence of the meaning in question and the role of these directives in linking the meaning with three types of contexts.

Evaluations appear as the second factor justifying interpretative decision. Evaluations influence interpretation on three accounts.

Firstly, there is always a choice whether to state that the meaning of a rule is clear (situation of isomorphy) or that there are doubts (situation of interpretation). At least in some cases this choice is evidently controlled by evaluations (cf. point 4.3).

[35] Cf. e.g. J. Gillis-Wetter, *The Styles of Appellate Judicial Opinions*, Leyden 1960; G. Minin, *Le style des jugements*, Paris 1962[4]; K. N. Llewellyn, *The Common Law Tradition, Deciding Appeals*, Boston—Toronto 1960; H. Triepel, *Vom Stil des Rechts*, Heidelberg 1947, chapt. VII—IX; G. Gorla, *Lo stile delle sentenze. Ricerca storico-comparativa e testi commentati*, Roma 1968, 2 vol.

Secondly, there is always a choice of the $DI^1$ and $DI^2$, because there are many concurrent interpretative directives, and their application results in different determination of meaning. One has to choose among these directives and the ultimate basis of choice appears as an acceptance of an ideology (or normative theory) of legal interpretation (cf. points 6.3—6.7).

Thirdly, the use of $D^1$ and/or of $DI^2$ also may demand evaluations, if the formulation on these directives includes evaluative terms or refers to evaluations. The standard example is reference to „sufficient reasons" as condition of applying or of not applying directive (e.g. $DI^1 — 1$, $DI^1 — 2$, $DI^1 — 3$ cf. point 4.4).

The first account is not relevant for the content of justification, because it explains an existence of interpretative situation itself. The two remaining accounts, however, are evidently relevant for justification determining the choice and use of interpretative directives.

The intepretatively determined meaning of a legal rule is fixed for a legal language and/or for a the interpretative situation itself. Theoretically this relativization presents serious and difficult problems, but I cannot analyse them in the present text[36]. It is sufficient to single out two relevant issues.

Firstly, the determination of the meaning in legal interpretation is often thought of as important for the legal language in which the interpretated rule is formulated. This expectation is linked with several presuppositions of the legal language, and especially the presupposition that each term of this language has only one meaning and that different terms have different meanings (cf. $DI^1 — 2$, $DI^1 — 3$, cf. point 4.4). Moreover in the same direction tend some theoretical and ideological assumptions concerning the unity of legal language as a corollary of the significant features of a legal system (cf. points 4.3.2; 4.5).

Secondly, the unity of a legal system and of a legal language is more a postulate than a fact. The cautious interpretator often explicitly fixes the meaning of a the term in the concrete rule, because he cannot aim at a general determination for the whole legal language. Moreover, the context-dependence of meaning of legal terms is not reduced to the linguistic and systemic contexts, because there is also a changing and extremely complicated functional context too. This context influences any interpretation when a formulation of interpreted rules is not changed in spite of essentially relevant changes of the functional context. The example is the evolution of the Polish legal system, in which for many years the rules enacted in between the and World War

[36] Cf. J. Wróblewski, *Legal Language...*

First and Second period were functioning in the system created after the 1945 y.

Generally speaking, the contextuality of meaning of legal language calls for taking into account the situation of interpretation as relevant, and as a limiting factor of the interpretative decision.

According to the preceding analysis, I present the normal formula of a justified interpretative decision in the following way, using the already introduced symbols:

The legal rule N has the meaning M in the legal language LL and/or in the situation S according to the first level interpretative directives $DI_1^1$, $DI_2^1$, ... $DI_n^1$, and according to the second level interpretative directives of procedure and of preference $DI_1^2$, $DI_2^2$, ... $DI_n^2$, and according to the evaluations $E_1$, $E_2$, ... $E_n$.

**5.4.** Interpretative directives are formulated by legal doctrine, which either deals with them as elements of an ideology or normative theory of legal interpretation, or reconstructs them from an analysis of operative interpretation. Operative interpretation, especially of the appelate or higher courts decisions, usually deals with interpretative issues, and if so, then has to analyze critically the interpretations made by the first level law-applying agencies. This is not, however, the case with authentic or legal interpretation which can decide *ex auctoritate* without giving any reasons.

The arguments for choosing a concrete directive of interpretation are either authority or evaluation justifying a choice or an use of these directives.

The arguments for choosing a concrete directive of interpretation present a rather complex issue. The problem reflects the basic philosophical dilemmas of any axiology. Accepting an analytical approach I single out several types of justification of evaluative statements, i.e. instrumental, conditional and systemic relativization, and for each of them the conditions of their *sensu largo* justification are formulated[37]. According to a noncognitivist axiology, each chain of justifications of evaluative statement has a limit, and this limit appears as the ultimate evaluative choice not justifiable within a given discourse. These ultimate axiological reasons can be only explained, but not justified[38].

In interpretative reasoning these basic choices are expressed in an acceptance of an ideology or normative theory of legal interpretation

[37] Cf. J. Wróblewski, *Statements on the Relation of Conduct and Norm*, „Logique et analyse" 1970, 49—50.

[38] See J. Wróblewski, *Evaluative Statements in Law. An Analytical Approach to Legal Axiology*, „Rivista internazionale di filosofia del diritto" 1981, 4.

(cf. point 6.3—6.7). Going beyond an interpretative discourse these ultimate axiological reasons could be found philosophically in an accepted form of life or can be explained by an acceptance of a determined audience[39]. This last explanation is also useful on lower level interpretative discourse: in fact, some justificatory arguments refer to an acceptance in legal practice (e.g. the F-validity of interpretative precedent decision) or in legal doctrine *(communis opinio doctorum).*

The interpretative decision is, thus, always justified in a relativized way: it depends on the interpretative directives and evaluations. The choices of these directives and of evaluations could also be justified within limits of the justificatory discourse. These limits are theoretically identified as ultimate evaluative choices, and can be explained as values accepted in a given audience such as law-applying organs, legal doctrine, legal community or a given society.

The justification of interpretative decision is always relativized to some arguments. Justification through reasons is always relative to these reasons. Legal operative interpretation is, however, an element of an application of law, and functions in a legal institutional framework. On pragmatical grounds there is always an institutional procedurally final law-applying decision, i.e. a decision which cannot be changed in ordinary procedure. This decision is ultimate *ex auctoritate.* It is an open question whether this holds for a decision of operative interpretation, but this is decided by law. There are some interpretative decisions which have either A- or G-validity (cf. point 3.3). But in any case interpretative decision could be a justified decision according to the normal formula presented above (point 5.3).

**5.5.** It is evident that constitutional interpretation is not an exception from the assertions concerning the processes and justification of interpretative decision.

It is, however, important to stress just now one of the particularities of constitutional interpretation.

The normal formula of justified interpretative decision singles out all relevant arguments but does not determine, of course, what elements of this justification are explicitly formulated in practice of decision-making. According to my hypothesis the nearest practical approximation to this formula is a fully developped decision of an appellate court dealing with interpretative issues in hard case when its style is close to the style of the English and US court-decisions (cf. point 5.2). This is, however, not the case in the average justification of con-

[39] Aarnio, Alexy, Peczenik, *op. cit.*, p. 430—444; Aarnio, *Philosophical...*, chapt. 7, 8.

stitutional interpretation if made as operational interpretation. Notwithstanding this, to justify a constitutional interpretative decision in a rational way one should identify all necessary arguments according to the normal formula, because one can neither leave out the interpretative directives nor evaluations. The particularity of this interpretation is, however, *inter alia* the political character of these evaluations (cf. point 8.4.4).

## 6. THEORY AND IDEOLOGY OF INTERPRETATION

**6.1.** In legal litterature a theory of interpretation is treated either as a descriptive or a normative enterprise. One can attack the use of the term „normative theory of interpretation" arguing that *ex definitione* all theory is descriptive, but this is, of course, a matter of convention linked with some general ideas concerning methodology. In this essay I will use three terms: „descriptive theory of legal interpretation", „normative theory of legal interpretation" and „ideology of legal interpretation"[40].

**6.2.** A descriptive theory of legal interpretation deals either with the process of interpretative decision-making or with the formulated interpretative decisions and their justifications or with both of them together.

I mentioned above what are the principal problems of describing interpretative decision-making process (cf. point 5.1). A descriptive theory deals with these problems eventually aiming at formulating the regularities and predictions concerning legal interpretation.

Descriptive theory of interpretative decisions is centered on the justificatory arguments and justificatory reasonings, and deals with the styles of interpretative decisions in the determined legal and functional contexts.

**6.3.** I have demonstrated that in justification of interpretative decisions the highly relevant role is played by evaluations. The normal formula of justified interpretative decision singles out interpretative directives and evaluations (cf. point 5.3), but in the last resort evaluations determine the choice and uses of these directives.

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[40] For these concepts cf. J. Wróblewski, *Zagadnienia teorii wykładni...*, chapt. III § 1; Idem, *L'interpretation en droit: théorie et idéologie*, „Archives de philosophie du droit" 1972, XVII. Cf. also R. J. Vernengo, *La interpretación juridica*, Mexico 1971, chapt. VI.

Generally speaking, evaluation determines the basic values of interpretation as the interpretative purposes, the values pressuposed in the choice of directives of interpretation, and the values necessary for using at least some of interpretative directives.

A normative theory of interpretation appears as an ordered and complete set of evaluations and correlated interpretative directives which ought to channel interpretative activity and/or to be expressed in justification of interpretative decisions. *Ex definitione* a normative theory of interpretation forms an axiological system justifying all evaluations needed in any legal interpretation in general, and in any justification of interpretative decision in particular.

It is evident that a normative theory of interpretation appears as some ideal construction. It would be impossible to find any such theory in legal doctrine, and it is rather doubtful whether such theory can be constructed at all. I am sceptical, but this is quite a separate problem.

In legal practice and in legal doctrine we have to do not with normative theories of interpretation but with a rather loose sets of values and directives which are neither consistent nor coherent nor complete. I call these sets „ideologies of legal interpretation".

In the following I will deal with ideologies of legal interpretation, and single out two basic types of these ideologies, according to the principal values they accept. These values are related with choices of interpretative directives and supported by some theoretical constructs.

**6.4.** The opposition of descriptive theory of interpretation and an ideology (or a normative theory) of interpretation has a basic importance. Roughly speaking, the former answers the question „how and why an interpretation is done?", the latter the question „how and why the interpretation ought to be done?".

In legal doctrine and in legal practice, however, this difference is quite often blurred. I will take one example, of discussions concerning the conception of interpretation in strict sense and the notion of clarity it is connected with (cf. point 4.3)[41]: If we describe the practice of legal operative interpretation then we see that the argument of *claritas* as the justification of not-discussing the meaning of a rule,

[41] Cf. e.g. M. -van der Kerchove, *La doctrine du sens clair et la jurisprudence de la Cour de cassation on Belgique*, [in:] *L'interpretation en droit. Approche pluridisciplinaire*, ed. M. -van der Kerchove, Bruxelles 1978; G. Tarello, *Interpretazione della legge*, Milano 1980, sec. 33—35, 37; E. Betti, *Interpretazione della legge e degli atti giuridici*, Milano 1971, § 51. J. Wróblewski, *Zagadnienia teorii wykładni...*, p. 129 and lit. cit.; Idem, *Sądowe...*, p. 117 sq.; Makkonen, *op. cit.*, § 5.

or as the end of interpretation, is used. The explication of this fact (e.g. an use of some argumentative technique for covering certain evaluations), does not eliminate this fact which any descriptive theory of operative interpretation takes into account. And, moreover, it can explain why a *lex clara est* in some situational contexts. But when one says, that the use of the conception of interpretation in strict sense is wrong and that the principle of *claritas* ought not to be applied then one formulates a directive of an ideology of interpretation: „one ought to interpret a rule in any situation" and/or „one ought to use all available DI[1] even if the interpretatively ascribed meaning is clear". The criticism of *clara non sunt interpretanda* principle expresses an ideology and not any descriptive theory of legal interpretation.

**6.5.** The one of the principal types of ideology of legal interpretation as the basic values takes legal certainty, legal stability and legal predictability. These values call for unchanging meaning of legal rules and I call these values — „static values", and this type of ideology — the „static ideology of legal interpretation"[42].

It is no place here to define these three values among which the central role plays legal certainty[43]. This certainty, rougly speaking, signifies that the law is as certain as law-making is, or — in other words — that without law-making the law does not change. This lack of change in legal interpretation is correlated with the idea that the meaning of legal rule does not change without changing this rule. The meaning is something ascribed to the act of law-making, to the formulation of a rule by the law-maker.

The theoretical corollary of the static values is a construction of the meaning of a rule as the „will of the historical law-maker". This will is a psychological fact, and this factual character of meaning matters here more, than any concrete explanation of the psychical processes of the law-maker. The meaning is a psychical fact, the theory of meaning belongs to the mentalist semantics.

From these values and the correlated theory of meaning follow consequences concerning proper interpretation. The meaning as a fact should be discovered. All materials which serve this aim are accepted,

[42] Cf. J. Wróblewski, *Zagadnienia teorii wykładni...*, chapt. IV § 1 (38); Idem, *L'interprétation...*, p. 65—68.

[43] Cf. L. de Oñate, *La certezza del diritto*, Milano 1968; M. Corsale, *La certezza del diritto*, Milano 1970; J. Wróblewski, *Wartości a decyzja sądowa* [Values and Juridicial Decision], Wrocław 1973, chapt. IV and lit. cit.; Idem, *Functions of Law and Legal Certainty*, „Añuario de filosofia del derecho" 1973—74, XVII; Idem, *The Certainty of the Application of Law*, „Archivum Iuridicum Cracoviense" 1976, IX.

and the traditionally most highly appreciated instrument are *traveaux préparatoires* as the key to decodify law-makers intentions.

Legal language is, thus, thought of as expressing the „will" of the historical law-maker. The rule expressed in a legal language has a determined meaning which could and should be discovered in spite of all deficiencies of law-maker's formulations. The contextuality of this meaning is not denied, provided that the relevant context is influencing the law-making decision. It is, hence, a historical context determining the historical law-maker.

This rather retrospective point of view determines the choice of interpretative directives. There is a primacy of linguistic and systemic first level directives so far, as they favour the stability of meaning, provided that the two corresponding contexts do not change as the contexts of the historical law-making. There is a deep distrust in the functional interpretation, and if its directives are used, then the functional context is the historical context of the law-making, e.g. the *ratio legis* of the historical law-maker, the morality thought of as relevant for interpretative purposes by the historical law-maker etc. (cf. point 4.6).

A second level interpretative directives of the static ideology is for prevailing the ML and MS meanings over MF meanings (cf. point 4.8), because of the distrust in functional interpretation, which is not a stabilizing instrument of law.

Legal interpretation is thought of as a discovery, and there is neither adaptivity nor creativity in proper interpretation: interpretation should not change the law, because such change would be against any certainty, stability and predictability of law. The scope of legal interpretation and that of law-making is quite opposite, and some political arguments support this attitude in any version of the division of state's power doctrine.

**6.6.** The second principal type of ideology of legal interpretation treats interpretation as an activity adapting the law to the current and future needs of „social life" in the largest meaning of this term.

„Social life" covers the ideas concerning the society with all its structural and functional features thought of as relevant for law and its interpretation. Social life corresponds roughly with the functional context of legal rules and takes into account the actual systemic and linguistic context. Especially relevant elements of social life are solutions of the conflicts of interests, satisfaction of acknowledged needs and aspirations, expectations of various groups, and of a society as a whole, in the economical, political, ethical, cultural etc.

dimensions. Law in part expresses the law-maker's assessment of these needs, but in part law lags behind them. In general, the changes in social life occur quicker than the changes of „the letter of law", notwithstanding that the law also stimulates and anticipates some changes in the social life itself[44].

Legal interpretation is called for adapting law to the needs of social life, to make it more „adequate". This adequacy is the top value of the dynamic ideology of legal interpretation[45]. The meaning of legal rule is, thus, not any fact of the past connected by fictious links with the will of the historical law-maker. Were it so the law would be a government of the dead over those alive. The meaning of legal rules is changing according to the changes of the contexts it operates in.

The legal language is changing according to the functional contexts, in which extra-legal norms and evaluations follow the societal evolution. The systemic context is modified by each act of enactment of new rules and derogation of old ones. The functional context is in constant fluctuation in all dimensions of social life. The task of legal interpretation is to adapt the law to all those changes by ascribing to legal rules adequate meanings. This lack of adequacy is one of the sources of interpretative doubts, influences the fuzziness of legal language (cf. point 4.3.1), and exerts strong pressures on any legal activities, including interpretation.

The meaning of a legal rule is, thus, a changing phenomenon. It could be thought of as a response to the current (or future) needs of social life, as a reaction of an interpretator based on an assessment of these needs and on perception of his own role. This conception of meaning can be ascribed to some behavioral conception of meaning as a response of an user of the language to its use in concrete situations or in some types of situations. This reaction is expressed also in evaluation of all the relevant facts, e.g. of the conflicts of interests, their weighing and channelling according to some leading principles. One can also use the notion of the „will of the actual law-maker" as the meaning of a rule, if this will is expressed in the totality of legal rules in force at the time of interpretation.

The impact of dynamic ideology on legal interpretation is expressed in the first place in the role ascribed to the functional context. This context of the time of interpretation is the source of interpreta-

[44] J. Wróblewski *Change of Law and Social Change*, „Rivista internazionale di filosofia del diritto" 1983, 2, p. 300, 305 sq.

[45] J. Wróblewski, *Zagadnienia teorii wykładni...*, chapt. IV, § 1(3C); Idem, *L'interprétation...*, p. 65—68.

tive evaluations, and determines the preference for functional directives and the basic purpose of interpretation, i.e. the best adaptation of law to the needs of social life. Hence, the result of a functional interpretation, i.e. a MF meaning of an interpreted rule, prevails over the ML and MS meanings. The linguistic interpretation within the dynamic ideology takes into account the pragmatics of legal language, viz. a dependence of meanings of terms, and especially of evaluative terms, on the context of its actual interpretative use. The systemic interpretation within the framework of this ideology takes into account the continous changes of the legal system, and the features of the actual legal system at the time of interpretation decide interpretative issues.

Legal interpretation according to the dynamic ideology is *ex definitione* a „creative" activity. The interpretation creates law in a specific manner, but creates it practically in a more essential sense that the law-making: the applied, i.e. the functioning, law, is the law whose rules are determined in the interpretation.

**6.7.** Both types of ideology of interpretation appear in constitutional interpretation, although are rather not explicitly pronouced. This ideology is hidden behind the role assigned to constitutional interpretation in theoretical constructions and their axiological corollaries.

According to the static ideology an institutionalized constitutional interpretation should guarantee the observation of constitutional rules. The control of constitutionality of law is thought of as the guarantee of law-making according to constitution. It is assumed that constitutional rules have a fixed meaning, and that politically necessary is to follow the constitutional rules because of the role of constitution for the legal system as a whole, and especially for the maintaining of the constitutionally fixed structures, of their functions, and of the citizens rights and liberties. There is a special procedure for changing constitutional rules, and even in some constitutions certain rules cannot be legally changed at all (e.g. art. 139 Const. I). It is so, because the constitution has to safeguard the stability of the most essential legal institutions, and their change is legally possible only in special procedure. The power to change constitution is not ascribed to the parliamentary action proper for changing ordinary statutes. This whole institutional and political underpinning of constitutional interpretation presupposes a static ideology of interpretation, its values and the construction of a unchanging meaning of constitutional rules.

According to a dynamic ideology a constitutional interpretation ought to be adapted to the political needs in the changing context of the state activities. Constitution fixes some principles but constitutional language, at least in many dispositions, is open-ended, uses general clauses which are interpreted according to the policies implemented in the State. In this sense constitutional rules have no fixed meaning, and constitution only expresses „les lignes essentielles de la philosophie politique governamentale"[46]. In this respect the constitutional court appears as „Vertrauensstelle der Regierung"[47] because it defines the place of government *inter alia* by interpretation of constitutional rules. The constitutional interpretation performs political functions, is based on political evaluations (cf. point 8.4.4). The institutionalized constitutional interpretation gives huge political powers to an official interpretator. The US Supreme Court is treated as „the policy-maker", and the history of its activity from the New Deal time to the recent desegregation decisions demonstrates this role, and the changing meanings ascribed to US constitutional rules[48]. The power of constitutional interpretation is so relevant because of the impact of functional context on the meaning of constitutional rules.

## 7. THE PROBLEM OF THE CREATIVITY OF INTERPRETATION AND THE ONE RIGHT INTERPRETATION THESIS

**7.1.** The problem of a creativity of legal interpretation is largely discussed in all theories and ideologies of interpretation. From a metatheoretical point of view first of all one has to determine the sense of the term „creativity". Or, in other words, in what sense an interpretative decision is creative in respect to the rule which is inter-

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[46] G. Burdeau, *Les libertés publiques*, Paris 1961², p. 68.

[47] F. Ermacora, *Grundriss einer allgemeinen Staatslehre*, Berlin 1979, p. 117.

[48] Cf. e.g. A. M. Bickel, *The Least Dangerous Branch. The Supreme Court et the Bar of Politics*, Indianapolis—New York 1962; S. Krislov, *The Supreme Court in the Political Process*, New York 1965; E. V. Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law*, New Haven—London 1962. I should add that in American litterature all courts are treated as political institutions. Cf. in general Th. L. Becker, *Comparative Judicial Politics. The Political Functioning of the Courts*, Chicago 1970; H. Jacob, *Justice in America*, Boston 1972²; Idem, *Law, Politics and the Federal Courts*, Boston 1967; N. Vines and H. Jacob, *Studies in Judicial Politics*, New Orleans 1963.

preted, or in what consists the „normative novelty" of interpretation, if any[49].

Interpretative decision could be creative in two basic meanings of the term „rule-creativity" or „creation of a rule": (a) the interpretative decision is creative if it formulates a general and/or abstract rule which is either A-valid or G-valid, and is not a logical consequence of the interpreted rule; (b) the interpretative decision is creative if it has not an A- or G-validity of the interpreted legal norm but functions as a legal norm because it has F-validity (cf. point 3.3).

If interpretative decision does not fulfill any of these conditions, then is not creative in the loose sense reconstructed in the (a) and (b) definitions.

The (a) definition presupposes a meaning of „creativity" which is hidden in legal discussions.

Firstly, there is an underlying conception that a creativity of rules means a creativity of general and abstract rules as opposed to individual and concrete decisions. If interpretative decision is thought of not as deciding only a concrete case of using legal language but is an ascription of meaning in a legal language, then it creates a rule (cf. point 5.3).

Inference of „logical consequences" of a general and abstract rules, provided a proper „logic" is at hand, is not any „creation of rules". According to the theoretical analysis one cannot treat interpretation as a purely logical operation, and interpretative consequences of a norm as synonymous with its logical consequences[50]. Interpretative directives are not logical rules, but rather „transformations"[51].

One assumes that a general and abstract rule which is stated by interpretative decision is either A- or G-valid, i.e. has the same validity as the interpreted rule. This is assumed in a construction of a legal system: to the legal system belong rules which are either enacted by the law-maker, or are their „logical consequences" or „interpretative consequences". Such construction of a legal system

[49] E.g. G. R. Carrio, *Notas sobre derecho y lenguaje*, Buenos Aires 1965, part. III, chapt. 3; J. Wróblewski, *Décision judiciaire: l'application ou la création du droit*, „Scientia" 1968, 11—12; Idem, *Sądowe...*, chapt. XI and lit. cit. For common law cf. L. J. Jaffe, *English and American Judges as Law-Makers*, Oxford 1969.

[50] Cf. J. Wróblewski, *Legal Reasoning...*, p. 25 sq. and Idem, *Meaning...*, p. 97 sq.; about „logical consequences" and „interpretative consequences" cf. J. Wróblewski, *Operative Models...*, p. 218—230; Idem, *Fuzziness...*, p. 319 sq., p. 323—326.

[51] Cf. Peczenik, *The Basis...*, chapt. 2.3.6; but compare J. Wróblewski, *Towards...*, p. 234—239.

is usually accepted because one treats interpreted norms as valid norms in legal system.

The discussed definition of creativity can be formulated also in another manner saying that an interpretative decision is creative, if its formulation is not determined by law but demands (evaluative) choices of the interpretator. „The law" in this context includes enacted legal rules and their logical consequences, provided the proper theory of inference is at hand. Then creativity lies in the choices, which are also described as evaluations (or „will" as „decision") of the interpretator.

We can conclude that decision of interpretation is creative according to the criterium in question if it is thought of neither as stating the meaning of a rule for a concrete situation only nor as a result of a purely logical operation, and if one ascribes to the rule in interpretatively stated meaning the same validity as is ascribed to the interpreted rule.

Stating that interpretative decision is „creative" according to the definition in question stimulates to compare this creativity with the creativity of a law-maker. In statutory law system linked with the opposition of law-making and law-applying functions one can metaphorically say that the interpretative activity changes law only „incrementally"[52].

The (b) definition of creativity of interpretative decision deals only with functions of this decision and leaves out all relations between a rule in the meaning ascribed to in interpretation and a rule in its *prima facie* meaning.

The case of creativity occurs if and when an interpretative decision factually influences the application of law in a manner analogous to that of enacted legal rules or their logical consequences. In other words, it is creative if it has a F-validity. The case of such interpretation occurs, when the highest or appellate courts interpretative decisions are treated as arguments in forthcoming interpretative activities of the lower courts in statutory law systems (cf. point 3.3). But not all interpretative decisions have this F-validity, either in operative or in doctrinal interpretation.

**7.2.** The problem of creativity of interpretative decision from a descriptive point of view can be solved only taking as granted a determined meaning of the term „creativity", which is linked with a general

[52] Cf. M. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?* [in:] *Law and the Behavioral Sciences*, ed. L. M. Friedman and S. Macaulay, Indianapolis—Kansas City—New York 1977[2].

theory of interpretation. One cannot answer the question whether interpretative decision is creative or is not creative in a general manner by simple yes or no answer.

From a postulative approach we have the question whether the interpretation should be „creative" in the determined meaning of this term. We have to do, hence, with an ideology of interpretation, and any answer depends on the type of ideology in question. According to the static ideology interpretation should not be creative, but should discover the existing meaning of a rule hidden in its linguistic formulation. According to the dynamic ideology — interpretation should be creative, and interpretator works hand in hand with the law-maker creating new rules adapted for new situations.

But these ideologies are functioning in an institutional context. Usually interpretative decisions are controlled, there are interpretative decisions which have at least a G-validity and cannot be attacked by ordinary procedural instruments. This means that institutionally an interpreted legal rule is A- or G-valid in the meaning ascribed to it by interpretation. Who controls this interpretation controls the meaning of legal rules, i.e. controls what functions as the law. And this control institutionally works *ex auctoritate*. In this sense the often cited bishop Hoadly had, perhaps, right stating: „Whoever hath an absolute authority to interpret any written or spoken law, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them"[53].

**7.3.** The one right interpretation thesis is understood here as the thesis stating that: (a) there is a „real" or „true" meaning $M^x$ of an interpreted legal rule; (b) this $M^x$ is in principle cognizable; (c) a legal rule has one $M^x$; (d) the interpretative statement of the form „a rule N has the meaning M" is true if and only if M is $M^x$.

**7.3.1.** The one right interpretation thesis is accepted in any ideology of operative legal interpretation maintaining that the task of interpretation is to discover the meaning of a legal rule which is at least in part independent of the interpretator's activity.

The paradigmatic case is the traditional form of a static ideology stating that the meaning in question is the will of the historical law-maker. But also dynamic ideologies are not free from this thesis if the they treat a changing meaning of a rule as an objective datum, which

[53] Cited in H. Kelsen, *General Theory of Law and State*, Cambridge 1949, p. 153.

has to be discovered by the more or less skilled interpretation. Only in radical forms of the ideology of a free judicial decision the interpretator seems to enjoy an almost unlimited freedom.

In contemporary legal systems the decision-maker has the duty to decide the case in spite of all deficiencies of the valid rules, and he presents his decision as the unique correct decision or — in other words — as the one right decision[54]. This covers also interpretative decision.

It is no place here to explain the reasons of ideological acceptance of the one right interpretation thesis. But this thesis is accepted in operative interpretation, and if there are different interpretations then the divergencies are in the last instance determined by an argument *ex auctoritate*. This is also the case of an authentic and legal interpretation (cf. point 3.2 (a), (b)), but here the question of the one right interpretation is not thought of as relevant because the authority of the decision is given *ex lege*.

**7.3.2.** The open question is, however, whether the one right interpretation thesis is accepted also in doctrinal interpretation. The search for the right interpretation is deeply rooted also in doctrinal interpretation of legal dogmatics, because of its strict analogy with operative interpretation. There is neither duty to find an answer nor a competence of decision-making as in an application of law, but legal dogmatics also searches for the right interpretation. There is a possibility of stating, that a rule offers more than one equally justified possible meanings, and that it is up to the law-maker to decide the issue, but this seems a rather hypothetical case presented in legal theory reflexion on legal dogmatics only. This is, however, a controversial issue.

**7.3.3.** The one right interpretation thesis presents, however, serious problems from the point of view of the general theory of interpretation. According to this approach the one right interpretation thesis ought to be discussed in reference to the normal formula of the justified interpretative decision (cf. point 5.3).

Interpretative decision constructed according to the formula in question makes patent that there is no $M^x$, and that any ascribed meaning is the result of using determined interpretative directives DI and eva-

[54] The most prounced partisan of this thesis is R. Dworkin which denies an existence of judicial discretion. Cf. for discussion of this thesis e.g. N. B. Reynolds, *Dworkin as Quixote*, „University of Pennsylwania Law Review" 1975, 123 and lit. cit.; Peczenik, *The Basis...*, chapt. 5.2.6. and cit. lit.

luations E. The thesis in question is not justified within the framework of our theory provided that we do not use a convention that some set of DI and E *ex definitione* determines the $M^{x}$[55]. This type of convention would be, however, a formulation of an ideology of interpretation, but not its descriptive theory.

From the presented theoretical approach an interpretative decision is neither true nor false in the sense that it corresponds with some $M^{x}$, because this $M^{x}$ does not exist. This decision is, hence, neither true nor false in the classical meaning of these terms. The decision in question can be, however, justified in the large sense by the DI and E as its arguments, and there is a controversial question, whether this is a *sensu stricto* justification or a verification (cf. point 5.2).

I cannot discuss this highly controversial problem here, but to treat interpretative decision as verified by its justifying arguments it is necessary that: (a) there is a relation of inference between justifying arguments and the interpretative decision according to some accepted logic; (b) the „truth of decision" is meant in the sense of logical truth but not as classical truth of *adequatio rei et intellectus;* (c) this truth, thus, expresses the links of inference, but not the truth of premisses, and is synonymous with an internal rationality of interpretative decision only (cf. point 5.2) which can be challenged by an external criticism of these premisses; (d) there are, thus many „true" interpretative decisions, even contradictory...

These consequences demonstrate that to apply the term „truth" to interpretative decision leads to rather baffling consequences or ... expresses an ideology of interpretation. It seems better then to speak only about interpretative decisions justified by singled out arguments, and to ask about the reasons for accepting them, and to present the chain of justificatory reasoning as far as pragmatically needed and possible within a framework of concrete legal discourse.

The criticism of the one right interpretation thesis from the theoretical point of view is useful also in dealing with the qualification of interpretation as *secundum, preater* and *contra legem* (cf. point 3.5)[56].

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[55] One can e.g. propose the convention, that the $M^{x}$ is determined by commonly accepted interpretative directives which do not depend of a choice between static and dynamic ideologies, because are accepted by both of them, and depend on some basic features of legal language, legal system and legal reasoning. About such directives cf. J. Wróblewski, *Zagadnienia teorii wykładni...*, chapt. VIII § 2. But if so, then not each rule has $M^{x}$.

[56] J. Wróblewski, *Interpretatio secudum, praeter et contra legem*, „Państwo i Prawo" 1961, 4—5.

This typology seems to presuppose the one right interpretation thesis. *Lex* it is the rule which has the meaning $M^x$. Each of the singled out types of interpretation is identified by the relation of the meaning of this rule ascribed by interpretation to the $M^x$. This typology is used quite differently when we are aware that the one right interpretation thesis is wrong. The typology in question expresses then the result of comparaison between various interpretations of a legal rule. One of these interpretations approved of and named as *„lex"* and other interpretations are qualified in relation to that *lex*. The qualification question is used, thus, in a persuasive way, because it is supposed that to keep *lex* is good, to go beyond it is bad, and to go against it is the worst thing the interpretator could do.

The qualification of interpretation as *secundum, preater* and *contra legem* appears when the comparison of interpretative decisions is thought of as highly relevant; then the conformity of different interpretations is an important argument for, and a difference against an interpretation. When the difference does not involve basic ideological choices or an argumentative situation then the case does not call for strong terms, and the terminology of *interpretatio extensiva, restrictiva* or *litteralis* is sufficient.

**7.4.** The problem of the creativity of interpretative decision and the one right interpretation thesis evidently applies to constitutional interpretation, and, therefore, does not demand any special comments.

The creativity of constitutional interpretation is especially relevant because of the place and functions of constitution in a legal system. The role of the discussed creativity of this interpretation is, thus, highly important for all areas of legal regulation and activities of the State where the constitution is relevant and/or is applicable. It is clearly patent in opposition between a static and dynamic ideology of constitutional interpretation (cf. point 6.7) and in discussion concerning particular institutions of this interpretation and their functions (cf. chapter 8).

There are no more theoretical reasons to sustain the right interpretation thesis for constitutional rules than for other legal rules, and the same ideological reasons function in favour of this thesis. The awareness of theoretical grounds for rejecting the thesis in question allows for a clear insight into the general relevance of interpretative decisions concerning constitutional rules.

## 8. INSTITUTIONS AND FUNCTIONS OF CONSTITUTIONAL INTERPRETATION

**8.1.** Constitutional interpretation[57] has many functions depending on who is the interpretator, and what are the institutions, if any, determining the validity, if any, of interpretative decisions. It is sufficient to single out three main types of functions of constitutional interpretation.

Firstly, the „function of orientation" consists in giving an information about what behaviour is according or against constitutional rules. This type of orientation is needed in various situations. The law-maker is obliged to act in accordance with constitutional rules, and this, in cases of doubt, depends on constitutional interpretation. This is especially the case of the parliament as a statute-making agency. Also in the regime of legality all state organs and other addressees of a constitution should act taking into account constitutional rules and, sometimes, their decisions depend on constitutional interpretation.

Secondly, the „function of application" appears in operative interpretation of constitution when its rules are normative basis of decision. Thus the parliament acts on the basis of constitutional rules, and so does the government. This is e.g. the case of interpreting constitutional rules directly conferring competences to the state organs. In some legal systems constitutional rules determining the citizens rights and liberties are directly applicable (e.g. art. 1 sec. 3 Const. FGR) (cf. point 8.4.3).

Thirdly, constitutional interpretation has a „controlling function" if there are determined institutions whose task is to control the observation of constitution. There are two main forms of this function connected with special institutions of control: the control of constitutionality of law-making in general, and of statutory enactements in particular, and the institution of constitutional responsibility of some persons for a behaviour against the constitutional rules and, sometimes, against the statutory rules as well. The constitutional interpretation is an instrument of this control.

The three types of functions do not exclude each other. E.g. the parliament as the state organ competent to enact statutes can interpret

[57] I am dealing here with constitutional interpretation only from the perspective of a general theory of interpretation, and, therefore, to discuss the issues from the point of view of constitutional law one ought to use the specialized works e.g. H. G. Lüchinger, *Die Auslegung der Verfassung*, Zürich 1954; K. Forsthoff, *Zur Problematik der Verfassungsauslegung*, Stuttgart 1961; *Verfassungsgerichtsbarkeit in der Gegenwart, Landesberichte und Rechtsvergleichung*, Max Planck Institut, Hamburg 1962; G. Burdeau, *Traité de science politique*, vol. III, Paris 1950.

constitution to determine the guidelines of his legislative behaviour, can apply some constitutional rules interpreting them as a normative basis of his decisions, and the constitutionality of enacted statutes could be controlled by this parliament or by other bodies.

In the following text I will deal only with the controlling function and with the institutions which are connected with it. It seems, that this function and institutions are the proper basis for identification of the particularities of constitutional interpretation on the background of a general theory of interpretation presented here.

**8.2.** There are three basic types of institutional control of legislation, viz. by political body, by judicial-type agency, or through auto-control[58].

**8.2.1.** The control of constitutionality by „political body" is meant as the control by an institution which is thought of as an emanation of parliament, i.e. a body which is, at least in part, elected by the parliament among its members.

There are various institutions of this type: e.g. the French Conseil Constitutionnel (Titel VII of the Const. F). In Socialist States usually the controlling function is placed in the competence of the Council of State (e.g. in Poland 1976—1982, in German Democratic Republic 1968—1974), or in the Presidium of the Supreme Soviet (art. 121 Const. USSR) or in the parliamentary commission which presents his resolutions to the parliament (Romania).

The control by the political body is either preventive or occurs only after the promulgation of a statute.

The results of this control are rather differentiated. The strongest consequences of inconstitutionality are in France: „...une disposition declarée unconstitutionnelle ne peut être promulgée ni mise an application. Les décisions du Conseil Constitutionnel ne sont susceptibles d'aucun recours. Elles s'imposent aux pouvoirs publiques et à toutes les authorités administratives et jurisdictionnelles" (art. 62 Const. F).

**8.2.2.** A control of constitutionality is also ascribed to the organ of the type of a court of justice. There are special constitutional courts (e.g. Italy, Austria, Poland according to the art. 33a Const. P. amended March 26, 1982, Yougoslavia) or the control in question belongs to the competence of the Supreme Court (e.g. Switzerland according to the organic statute of 1974, USA).

[58] This is typology of G. Burdeau, *Droit constitutionnel et institutions politiques*, Paris 1976[17], p. 99 sq.

The consequences of declaration of inconstitutionally are differentiated: the non-application of a statute in a concrete case or preventive injunction (e.g. USA); the returning of the statute to the parliament, and if the parliament does not change its text then its derogation (Yougoslavia); mixed solution, i.e. the non-application, the proceeding before the Court of the Constitutional Guarantees (Const. of the Spanish Republic 1931). In Poland, according to the Constitution, the Constitutional Tribunal only returns the unconstitutional statute to the Parliament to be examined.

According to the statute on Constitutional Tribunal, which implements the cited art. of the Polish Constitution (statute of April 29, 1985) the effects of the declaration of unconstitutionality are different, depending on the normative act it is referred to. If this act is a statute, then the statute in question is returned to the Parliament who decides whether to change it, or to derogate it entirely on partially, or to reject the decision of the Constitutional Tribunal. In the case of declaration of inconstitutionality of a normative act having a sub-statutory level the president of the Constitutional Tribunal demands from the state organ who has enacted the act in question to make the proper amendments or to derogate it entirely or parially according to the decision of the Tribunal. There is also a possibility of making an appeal to the Constitutional Tribunal by the organ of the state for revision of his decision. If the organ of the state does not eliminate the inconstitutionality then the normative act in question looses its validity in the term determined by the Constitutional Tribunal. The same applies also in the case when the normative act of sub-statutory level is declared as contrary to the valid statute in a decision of the Constitutional Tribunal.

**8.2.3.** The auto-control of constitutionality of statutes means that only parliament controls himself when enacting a statute. This is the solution accepted in some systems (e.g. Poland 1952—1976, German Democratic Republic since 1974).

**8.2.4.** All institutions of the control of constitutionality are widely discussed.

On the one hand, the control in question means controlling the legislative activity of parliament treated as the sovereign organ in all republican forms of the state. A control of the parliament is criticized as making of controlling agency a organ functionally above the parliament. This in an argument for an auto-control or at least for a control through a political body depending on the parliament.

On the other hand, one argues that the auto-control is a purely spurious device, because the controlled and the controller are the same institution and *nemo iudex in causa sua*. There are, thus, some arguments for giving the control in question to some special constitutional Court or to impose the duty and competence of control to the supreme court of the state, provided that the court independent. One can argue, however, that the court competent to declare a statute as inconstitutional in fact is a policy-maker standing over the parliament.

This dilemma of judicial control of constitutionality is especially patent in common law systems. The US Supreme Court in the famous decision Marbury v. Madison accepted his competence to control the constitutionality of law interpreting in this direction the Art. III sect. II(1) of Const. US: „The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority". The judicial control of the acts of parliament is excluded in the decisions of the English Courts. It is stated that „[...] the Parliament has supreme power and there was no power in the Courts to question the validity of an Act of Parliament"[59]. Lord Reid speaking for the House of Lords said: „For a century or more both Parliament and the Courts have been careful to act so as not to cause conflict between them. Any such investigations as the respondent seeks could easily lead to such conflict, and I would only support it if compelled to do so by clear authority. But it appears to me that the whole trend of authority for over a century is clearly against permitting any such investigation"[60].

From this example it is clear that the problem of an institutional control of constitutionality of statutes is strictly related with the idea of the place of the parliament as the law-maker in the whole political system and with the relations between the parliament and the controlling agency, expressed in the effects of a decision of inconstitutionality[61].

**8.2.5.** In any case the control of constitutionality presupposes that the controlling agency formulates a relational statement of the formula „the (statutory) rule RS is consistent (inconsistent) with a constitutio-

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[59] Cf. O. Hood Phillips, *Leading Cases in Constitutional and Administrative Law*, London 1979[5], p. 1.

[60] *Ut supra*, p. 6.

[61] There is also a theoretical problem of an „unconstitutional law" connected with the conception of validity. cf. e.g. Kelsen, *General Theory...*, p. 155 sq., 262 sq.; Idem, *Reine Rechtslehre*, Wien 1960[2], p. 275—280.

nal rule RC". The semiotical properties of this type of statements are rather complex[62] but it is sufficient to deal with two issues here.

Firstly, to formulate a relational statement it is necessary to precize the meaning of RS and the meaning of RC as precisely, at it is necessary to make the comparison expressed in this statement. It is a fair pragmatic hypothesis that in ordinary situations the law-maker does not intentionally act against constitution, and, therefore, that he enacts statutes which he thinks consistent with constitutional rules. If it is so, then in each constitutionality issue there is a doubt, whether the meaning ascribed to RS, or to RC, or to both of them, is the proper meaning: a Constitutionality control calls for a constitutional interpretation.

Secondly, the relational statement has a dichotomic structure, presupposing that either RS is constitutional or is not constitutional. This structure corresponds to the institution of the control in question. It is, however, a question whether applying some constitutional rules this dichotomy without rather arbitrary conceptual conventions could be preserved. If it is not the case then one should deal with various degrees of inconstitutionality more in terms of coherence than those of consistency (cf. point 4.3.2).

**8.3.** The controlling function of constitutional interpretation appears also in cases of the constitutional responsibility of persons holding determined posts in the State, and especially of the heads of the State and the top officials of government. Let us take as standard example the members of the council of ministers in a republican state.

There are many forms of responsibility of these persons: a common penal, civil, or administrative responsibility which could be related with their official function or not to be related with them; a parliamentary responsibility linked with their election and dismission by parliament; a special form of political responsibility within the political organisation, usually a party, which they belong to and are linked with in their activity. Last not least there could be a constitutional responsibility linked with the observation of constitutional rules and, sometimes, of statutory rules too.

The constitutional responsibility is functionally close to parliamentary responsibility, because it deals with not-fulfilling the expectations concerning the constitutionally right activity of the top officials. If there is an opinion that parliamentary responsibility plus ordinary responsibility is enough, then there are no reasons for constitutional responsibility. There are, however, arguments that this is not enough,

[62] Cf. J. Wróblewski, *Statements...*, passim.

and the special form of constitutional responsibility is needed. This is the case of existing institutions of this special type of responsibility we will deal with below.

**8.3.1.** The procedural rules determine the organ competent to decide the constitutional responsibility in question, and the procedure of decision-making, and the sanctions for unconstitutional activity.

Without making a comparative law analysis I will give only some examples of the organs deciding the cases of constitutional responsibility. The organ in question is: the Supreme Court (e.g. par. 102 Const. E), the Constitutional Court which also deals with the control of constitutionality of law (e.g. art. 134 Const. I, art. 142 Const. A), the specially elected High Court (e.g. art. 68 Const. F) the special Tribunal of State (e.g. art. 33b Const. P), parliament in the procedure of impeachment (e.g. art. I, sec. II, par. 6, 7 Const. US). These various institutional solutions answer the highly important political question *quis custodiet ipsos custodes?* The cases of constitutional responsibility are rather scarce to-day, and to give the examples one should go back into the history. The recent example of functioning of the this responsibility was the process in Poland against the former Prime-minister P. Jaroszewicz and the former Head of the Planning Commission T. Wrzaszczyk, which started in July 1983, but was discontinued according to the statute of amnesty of July 21, 1984. The possibility of instituting proceedings of impeachment follwing the Watergate case (1972) have pushed R. Nixon to resign from his post of the US President (1974).

In any case to decide whether the constitutionally responsible person has violated constitutional rules it is *inter alia* necessary to apply these rules. And this application, as any application of law, presupposes that the rule in question is used in a determined meaning. If there is a doubt whether the rule in question is to be applied in its *prima facie* meaning, then we have to do with an situation of interpretation and with an operative interpretation (cf. point 3.2(*c*) ). Taking this into account it is practically a fair hypothesis that deciding the issues of constitutional responsibility implies a constitutional operative interpretation, because in ordinary circumstances no one of the top officials of State is acting against constitutional rules.

**8.4.** After describing the place of the constitutional interpretation in the control of constitutionality and in assessing constitutional responsibility, one can ask what are the interpretative problems peculiar for

this interpretation. Constitutional interpretation shares the features of any legal interpretation singled out according to the general theory, but has also some peculiarities.

It seems that there are four principal particularities: variety of constitutional rules; features of terms used in formulation of these rules; applicability of constitutional rules; political character of constitutional interpretation.

**8.4.1.** There is a variety of the types of constitutional rules, but first of all one should presuppose the normative character of the constitution as a whole, or at least of some parts of the constitutional text.

There are views according to which constitution is not a set of rules[63], that constitution formulates only a political programm which has no normative qualities[64], or that some parts of the constitutional text are not normative, e.g. the preamble[65]. There is no place to discuss these problems, which are practically solved either by law (e.g. the direct applicability of the rules concerning the civil rights and liberties according to the art. 1 sec. 3 Const. FRG) or by A-valid interpretative decisions (e.g. the validity of preamble according to the decision of the French Conseil Constitutionnel)[66]. Theoretically the discussion concerning the normativity of constitutional text is meaningul only after defining the meaning of the term „normativity". If by „normativity" one understands that dispositions of the legal text are either directly applicable or applicable after constructing some norms from these dispositions (cf. point 2.6), then one can say, that constitutional dispositions fulfill this definition. In other words, constitutional dispositions either directly or indirectly regulate human conduct in spite of the variety of constitutional rules[67].

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[63] E.g. M. Troper, *Le problème de l'interprétation et la théorie de la supralégalite constitutionnelle*, [in:] *Mélanges Ch. Eisenman*, Paris 1974, p. 150 defines constitution as belonging to the world of *Sein*.

[64] E.g. the constitutional doctrine in Italy treats treated the rules of titles II, III part. I Const. I, determining the moral and social and economical relations as programs (cf. J. Zakrzewska, *Kontrola konstytucyjna ustaw* [Constitutional Control of Statutes], Warszawa 1964, p. 91. Cf. also about the phenomenon of *legge-manifesto* which is contrary to the constitutional rules (R. Bettini, *Il circolo vizioso legislàtivo*, Milano 1983, chapt. 1.

[65] E.g. Kelsen, *General Theory...*, p. 260 sq.

[66] Cf. Zakrzewska, *op. cit.*, p. 45.

[67] About the conception of „indirect" regulation of conduct cf. J. Wróblewski, *Sposoby wyznaczania zachowania przez przepisy prawne* [The Ways of Determining a Behaviour Through Legal Provisions], „Zeszyty Naukowe UŁ" 1964, S. I, 35.

For our purposes it is sufficient to single out the following types of constitutional rules:

(a) The rules of conduct *sensu stricto* directly state that a determined type of conduct is a duty or a right of its addressee, and such rules are common e.g. in criminal law. But there are also such rules in constitution as, e.g. imposing on the president the duty to care about the observation of constitution (par. 5 Const. F) or the duty of the parliament to elect the Council of State (art. 29 sec. 1 Const. P).

(b) The rules of organization determine the organization and competence of the organs of the State, e.g. the number of the members of the parliament, of the Constitutional Court, or the competences of the principal state organs and their mutual relations. These commonly known rules belong to the type of „secondary rules" in H. L. A. Hart's terminology[68].

(c) The teleological rules single out the purposes which should be implemented by the addressees of constitutional rules. E.g. the purposes of the public authorities are: elimination of all obstacles and difficulties in the satisfaction of needs, and in the free participation of all citizens in the political, economical a cultural and social life (art. 9 sec. 2 Const. E), the principal purpose of the State is the universal development of socialist society, development of creative forces of the nation and of each man, bettering of a satisfaction of the citizens needs (art. 4 Const. P). The teleological rules, as all rules, determine a conduct, but these rules formulate the pattern of due behaviour by determining the purposes of this conduct.

(d) The directival rules single out the functions which should be performed by some type of activities or values which should be implemented. Thus e.g. there are rules identifying the highest values of legal order such as liberty, justice, egality, political pluralism, democratic structures (par 1, 6, 7, Const. E); the task of Italian Republic are *inter alia* elimination of obstacles of economical and social order which limit the citizens liberty and equality, hinder the full development of human person and participation of all workers in the political, economical and social organisation of the country (art. 3 Const. I). The functions of the Polish State are: guaranteeing of the citizens' participation in government, safeguarding of the development of various forms of selfgovernment of the working class, development of the productive capacities and economy of the country, planned use and enrichment of the material ressources, rational organization of work, continuous development of the sciences and technics, imple-

[68] Cf. note 17.

mentation of the principles of social justice, reaction to violations of the principles of social coexistence (art. 5 Const. P).

There are no clear-cut boundaries between the types of constitutional rules singled out above, and especially between the teleological and directival rules. The typology is important for the constitutional interpretation issues: the rather large quantity and relevance of the rules of the (b), (c) and (d) types in constitutional texts differentiates the interpretation of constitution from the interpretation of remaining areas of law.

**8.4.2.** Legal language contains many types of terms differentiated according to semiotical criteria. The typology of constitutional terms relevant for constitutional interpretation singles out evaluative, quasi-descriptive and descriptive terms, provided that we assume that there are operative criteria of separating description from evaluation. I make this assumption without going into details[69].

(a) In constitutional texts there are many evaluative terms. Almost in any constitution the key-terms define the political and social axiology. Without reference to particular constitutions one can cite such terms as: „liberty", „equality", „justice" or „social justice", „participation", there are also evaluative terms expressing an axiology of law, e.g. „observation of law" or „due process of law".

The evaluative terms used in legal discourse do demand interpretation when there are doubts whether they are properly used. This is an evident fact of legal practice explained by the general theory of interpretation. Even on the level of political philosophy one discusses whether the principle of the liberty of opinions knows some reasonable limitations[70]. Another example is that of equality — treated as one of the constitutional principles and interpreted in various contexts[71].

(b) We can single out „quasi-descriptive terms" their definition is *prima facie* descriptive, but in its deep structure reveals an evaluative character. This mixed nature prevents any strict definition and opens the question whether not to ascribe these terms either to

[69] Cf. J. Wróblewski, *Evaluative Statements...*, p. 605—608 and cit. lit.

[70] Cf. classical discussion by J. St. Mill, *On Liberty*, chapt. II, Oxford 1948.

[71] E.g. Ch. Wolfers, *Note sur le principe d'égalite dans la jurisprudence du Conseil d'Etat français en matière de réglamentation économique*, [in:] *L'Egalité*, vol. I, ed. H. Buch, P. Foriers, Ch. Perelman, Bruxelles 1971; A. Schneeblag, *Dialectique de l'égalite des groupes et de l'égalité des individus: l'arret „Bakke" de la Cour suprême des Stats-Unis* (1978), [in:] *L'Egalité*, vol. VIII, ed. Ch. Perelman and L. Ingber, Bruxelles 1982; Idem, *Les récents développments en matière d'égalité des sexes dans la droit des Etats-Unis*, [in:] *Ibidem*.

evaluative terms or to the descriptive terms. I do not discuss this problem further here, and I only use one example to illustrate the case.

The term „fundamental principles" is used in a disposition stating that „la loi détermine les principes fondamentaux" (art. 34 Const. F). The notion of principle is theoretically rather vague and there are various meanings in which the term „(fundamental) principle" is used in various legal theories and in legal dogmatics (legal language of doctrine), in legal language of pratice and in the texts of various legal rules in different legal systems. But *prima facie* the term „fundamental principle" should have a descriptive meaning, although is used in quite different ways. The constitutional interpretation of this term made in French Conseil Constitutionnel demonstrates clearly that the real issue is to define the area reserved for statutory regulation, and then the problem is normative: what ought to be regulated by statutes according to the constitution? The answer determines the area of exclusively parliamentary law-making from the area where the government is a competent law-maker. An this is a vital political issue[72].

(c) The descriptive terms are also used in constitutional texts, although these terms could be fuzzy because of the functional context in which they are used.

For example according to art. 11 Const. F „Le président de la République peut soumettre au referendum tout projét de loi portant sur l'organisation des pouvoirs publiques". Le terme „organisation des pouvoirs publiques" was interpreted as synonymous to „constitution" and president de Gaulle has made a referendum for changing the constitution[73].

The right to strike is formulated in art 40 Const. I. The Constitutional Court has declared inconstitutional art. 502 of the Italian Penal Code (1930) which imposed a penalty for strike and lock-out, and at the same time interpreted the disposition of constitution referred to as containing also the right to lock-out[74].

It is patent that interpretation of evaluative, quasi-descriptive and descriptive terms follows the general pattern of any interpretation. The peculiarity of constitutional interpretation, as demonstrated in interpretative practice, is the political underpinning of evaluations inherent in constitutional doubts and in interpretative choices. It

[72] Cf. B. Chautebout, *Droit constitutionnel et science politique*, Paris 1982, p. 606—609; Zakrzewska, *op. cit.*, p. 47 sq.

[73] N. Troper, *La motivation des décisions constitutionnelles*, [in:] *La motivation...*, p. 291.

[74] Cf. Zakrzewska, *op. cit.*, p. 90 sq.

seems that the role of the functional context, and especially of its political components, is very strong. Interpretation of evaluative terms is mostly linked with a sociopolitical axiology, and the controversies concerning the quasi-descriptive and descriptive terms are strictly linked with the political issues of functioning of the sociopolitical and structures. There are, of course, also other elements of functional context as e.g. economy (e.g. planned economy, rational management) or general moral values (e.g. human dignity) or cultural values (e.g. rationality). But it is functional context which mostly stimulates interpretative doubts and influences the interpretative decisions. This seems to favorise the dynamic theory of constitutional interpretation, but not necessarily so — all depends on the rate of societal changes in relation with the time of enactment of the constitution.

**8.4.3.** One of the problems of the operative constitutional interpretation is the applicability of constitutional rules.

First of all one should presuppose that constitution has a normative character according to the accepted meaning of the term „normativity" (cf. point 8.4.1). Then there is the question whether the rules of constitution are applicable in the same way as other rules.

It seems, that there are three groups of rules from the point of view of their applicability.

(a) The rules which are simply directly applicable, i.e. rules whose observation can be stated in a dichotomic way, e.g. usually rules of conduct *sensu stricto* and rules of organisation (cf. point 8.4.1 (a) (b)).

(b) The rules which are gradually directly applicable, i.e. their observation can be stated by reference to a degree of the conformity with the rule. This is the case of teleological and directival rules (cf. point 8.4.1 (c) (d)).

(c) The rules which are indirectly applicable, i.e. rules referinng to statutes which ought to be enacted, and, thus, are applicable only through these statutes. E.g. the rule that the house search is permitted only in cases determined by statute (art. 87 sec. 2 Const. P) or that the marriage is based on the moral and juridical equality of spouses with limits imposed by statute for the sake of the unity of family (art. 29 Const. I).

The difference between the (a) and (b) types of rules demands a comment. The applicability of a rule depends on formulation of a relational statement stating that a conduct is consistent or inconsistent with a constitutional rule (cf. point 8.2.5). This relation in the (a) type of rules is formulated dichotomically provided an interpre-

tation is made, if needed. The (b) type of rules, however, presents some difficulties, because the conduct of the rule — addressee is determined either by formulation of the purpose or of a direction of this conduct. The question is, thus, how to formulate the relational statement.

There are two hypotheses possible. According to the first hypothesis the behaviour is „... according the rule" in question if the purpose is „totally" implemented (teleological rule) or if the behaviour „completely" follows the prescribed line (directival rules). If this hypothesis is accepted, then the (b) type of rules is not different from the (a) type, because the relational statement is dichotomic. The second hypothesis assumes that there are degrees of following the rule, and, hence, a behaviour can be „more" or „less" conform with the rule in question. This *prima facie* corresponds with the technique of law-making channeling human behaviour by these rules in higher degree than the first hypothesis. But if this is the case then constitutional interpretation of these rules has to solve a rather difficult problem of qualification of behaviour when answering the question of constitutionality of law or constitutional responsibility. And there are situations when this is not an easy proposition.

Analogous problems arise outside the area of constitutional interpretation, but in formulation of constitutional texts the cases of gradual direct applicability and indirect are relatively frequent and strongly influence the importance of controlling function of this interpretation.

**8.4.4.** One of the particularities of constitutional interpretation is its political character, which has been stressed when dealing with separate problems above. Concluding my remarks it is convenient to put together some most relevant features of constitutional interpretation determining its political character. It is no not necessary here to define the meaning of the term „political". It is understood here in the most ample and current meaning: something is political if it is connected genetically and/or functionally with the relations between the various groups interested in using the power of the state in preferred directions.

Constitution is a legal and political act. One can argue that each legal rule is political because of the very nature of law, but important here is to stress that constitution is a normative act with the specially pronounced political character. It is so because of the genesis of the constitution, its content and function. The constitution taken as a whole expresses more or less adequately the political relations

of a society organized in a state, fixes the basic structures of the state apparatus, and functions as a safeguard of maintaining and developping the sociopolitical system. Constitution guarantees the citizens' rights and liberties. Constitution outlines, thus, the basic rules of politics expressed in legal forms. The structure of the state, the relations between representative and administrative bodies, the degrees of centralization and decentralization, are fixed together with outlining the principal tasks and, eventually, directions of the activity of the state.

Constitution is thought as the hierarchically highest set of rules of the legal system, and taking into account the consistency and coherence of this system (cf. point 3.2) it functions as a set (or at least as a sub-set) of principles of law (cf. point 4.5).

The constitutional rules are imbedded in political axiology at least through the evaluative terms which refer to political values, but these values do influence interpretation of quasi-descriptive and descriptive terms in cases of doubt stimulated by functional context (cf. point 8.4.2).

Taking this into account it is evident why the institutions of controlling the constitutionality of law and dealing with constitutional responsibility are so strictly linked with general political issues. This is the problem of the place of parliament as a statute-making agency and its supremacy. There is the problem of controlling the functions of the top state organs in performance of their constitutionally determined functions.

The constitutional interpretation implied by its controlling function is, thus, political at least in two respects: firstly, *ex definitione* it guarantees the observation of constitutional rules which have themselves a political character; and, secondly, the function of interpretative decisions is political when it determines the politically relevant issues. And it is so whether the static or dynamic ideology of interpretation prevails.

Taking this into account one can ask whether through constitutional interpretation one transforms the political problems into legal problems or vice versa transforms legal problems into political ones[75]. The general theory of interpretation explains that evaluations do play important role in justification of interpretative decisions and in the processes of interpretative decision-making. There are various types of these evaluations, and among them, not only in constitutional interpretation, there are political, moral, economical and other evaluations. This is not the reason of treating legal interpretation as

[75] Compare E r m a c o r a, *op. cit.*, p. 117, 251.

a „transformation" of extralegal problems to legal problems. What is important for us is to stress that constitutional interpretation, usually, is more closely linked with political issues than interpretation of other rules of statutory and sub-statutory hierarchical level. Interpretation of constitutional rules decides more politically relevant issues and is linked with more political choices than interpretation of other rules. This is the fact influencing the institutionalization of constitutional interpretation, i.e. whether to create special institutions dealing with it in an autoritative way, and what types of issues can stimulate this interpretation, and what kind of validity these interpretative decisions will have.

All these highly politically locaded issues are decided by law, and generally their basic outline is formulated in constitution because of their essential importance. If really „la constitution demande á être interprétée"[76] then our postulate is that the constitutional interpretation ought to be presented as properly justified interpretative decision.

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## ZARYS OGÓLNEJ TEORII WYKŁADNI PRAWA A WYKŁADNIA KONSTYTUCJI

Istnieje szereg pojęć interpretacji prawa. Autor ujmuje interpretację jako ustalenie znaczenia budzących wątpliwość testów prawnych. Jest to ujęcie przydatne dla badań wykładni podejmowanej w procesie stosowania prawa (wykładnia operatywna) i dotyczy wykładni dokonywanej przez naukę prawa (wykładnia doktrynalna), choć w obu rodzajach wykładni odmienne są źródła wątpliwości oraz charakter podejmowanej decyzji interpretacyjnej.

Autor przedstawia typologię wykładni, ze względu na: (a) źródła wykładni, (b) moc wiążącą ustaleń interpretacyjnych, (c) rodzaj interpretowanego tekstu, (d) kwalifikację wykładni.

Model wykładni operatywnej wyróżnia następujące elementy zanalizowane przez autora:

(a) źródła wątpliwości w rozumieniu tekstu prawnego połączone z właściwościami języka prawnego, systemu prawa i kontekstu jego funkcjonowania;

(b) zastosowanie dyrektyw interpretacyjnych pierwszego stopnia, ujętych w trzy rodzaje wykładni prawa, wyodrębnione ze względu na kontekst językowy, systemowy i funkcjonalny (autor formułuje 14 dyrektyw tego typu);

[76] Burdeau, *Les libértes...*, p. 67.

(c) porównanie wyników zastosowania tych dyrektyw i usunięcie ewentualnych rozbieżności przez dyrektywy preferencji drugiego stopnia (autor podaje trzy takie dyrektywy);

(d) sformułowanie decyzji interpretacyjnej uzasadnianej przez powołanie dyrektyw interpretacyjnych oraz ocen potrzebnych do ich wyboru oraz stosowania. Ustalenie interpretacyjne dotyczy znaczenia przepisu lub jego elementu w języku prawnym lub w danej sytuacji jego użycia.

Przy podejściu oceniająco-postulatywnym do wykładni prawa formułuje się ideologie względnie normatywne teorie wykładni prawa. Wyznaczają one podstawowe wartości, które interpretator winien realizować, oraz dyrektywy interpretacyjne. Normatywna teoria wykładni formułuje je w sposób wyczerpujący i wystarczający do rozwiązania każdego zagadnienia interpretacyjnego, ideologia zaś jedynie ogólnie je wyznacza. Ze względu na podstawowe wartości zakładane w ideologii (normatywnej teorii) wykładni autor wyróżnia teorie statyczne (wartości: pewność prawa, stałość prawa, bezpieczeństwo prawne), związane z konstrukcją stałego znaczenia przepisów, oraz teorie dynamiczne (wartość: dostosowanie prawa do życia) zakładające konstrukcję zmiennego znaczenia przepisu.

Dyskutowane zagadnienie twórczego charakteru wykładni oraz istnienia „rzeczywistego znaczenia przepisu" zakłada przyjęcie szeregu konstrukcji pojęciowych. Istnienie takiego znaczenia przyjmuje wykładnia operatywna oraz, z reguły, wykładnia doktrynalna. Z teoretycznoprawnego punktu widzenia, ustalone interpretacyjnie znaczenie przepisu jest uzależnione od przyjętych dyrektyw interpretacyjnych i ocen. Prawdziwość ustaleń interpretacji, przy założonej koncepcji prawdy, zależy od właściwości tej relatywizacji.

Zastosowanie teorii wykładni do wykładni konstytucji wiąże autor z rozważaniem funkcji kontrolnej przepisów konstytucji, w ramach której występuje kontrola konstytucyjności ustaw oraz odpowiedzialność konstytucyjna, co wymaga z reguły dokonania wykładni odpowiednich przepisów.

Istnieją trzy instytucjonalne rozwiązania kontroli konstytucyjności ustaw (przez ciało polityczne, przez instytucję typu sądowego, w drodze samokontroli); każda wymaga dokonania wykładni niezbędnej do sformułowania odpowiedniego zwrotu stosunkowego o zgodności ustawy z konstytucją. Autor omawia również podstawowe rozwiązania w zakresie odpowiedzialności konstytucyjnej związanej z wykładnią niezbędną dla sformułowania zwrotu stosunkowego o zgodności zachowania z konstytucją.

Szczególne problemy wykładni konstytucji wiążą się z następującymi momentami: (a) z różnorodnością reguł konstytucji przy założeniu jej normatywnego charakteru (reguły *sensu stricto*, reguły organizacyjne, reguły celowościowe, reguły dyrektywalne); (b) z rodzajami zwrotów występujących w sformułowaniach konstytucji (zwroty oceniające, zwroty quasi-opisowe, zwroty opisowe); (c) ze stosowalnością przepisów konstytucji (bezpośrednia stosowalność, pośrednia przez ustawy); (d) z politycznym charakterem wykładni konstytucji, która jest najwyższym hierachicznie aktem normatywnym i jednocześnie aktem politycznym.