ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 24, 1986

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CONCEPTS OF LEGAL SYSTEM AND CONCEPTIONS OF VALIDITY

INTRODUCTION

1. There are three main dimensions of construction of concepts of legal system.

Firstly, the systems can be defined by relations of their elements. The classic normativistic dychotomy of static and dynamic normative systems can be thought of as a first approximation in this line of thinking[1].

Secondly, systems can be identified by a time dimension of their existence. Here the concepts of momentary legal systems are correlated with the notion of a legal order as a sequence of momentary systems[2].

Thirdly, legal systems can be singled out by their space dimension. Then there are concrete legal systems treated as valid in a concrete territory of a given State, or abstract systems as theoretical constructs thought of as sets of essential features of various concrete legal systems used in a macrocomparatistic research[3]. Thus one has to do e.g. with statutory law and common law opposition, or with systems identified as great families of law, etc.[4]

[1] H. Kelsen, *Reine Rechtslehre*, Wien 1960², § 34 (b); Idem, *General Theory of Law and State*, Cambridge 1949, chapt. 10. Kelsen abandoned the possibility of a static system of norms: Idem, *Allgemeine Theorie der Normen*, Wien 1979, chapt. 58. Cf. J. Wróblewski, *Dillemmas of the Normativistic Concept of Legal System*, „Rechtstheorie" 1982, Beinheft 4; Idem, *Systems of Norms and Legal System*, „Rivista internazionale di filosofia del diritto" 1972, 2.

[2] J. Raz, *The Concept of a Legal System*, Oxford 1973², p. 34 sq.

[3] W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa* [Theory of State and Law], Warszawa 1980² — chapt. 19.1.

[4] E.g. R. David, *Les grands systèmes de droit contemporains*, Paris 1969³; J. H. Wigmore, *A Panorama of World Legal Systems*, St. Paul 1928, 3 vol. Compare lack of general typology in M. G. Losano, *I grandi sistemi giuridici*, Torino 1978.

2. There are also many conceptions of validity. The basic relevance in general legal theory have three such conceptions, i.e. of systemic, factual and axiological validity[5]. The first historically is connected with traditions of enacted law and its positivistic theory, the second can be linked with some varieties of practice-oriented realist thought, the third is used paradigmatically in some natural law doctrines.

But one can approach the conceptions of validity starting from the concepts of legal system. Then validity is thought of as a feature of the elements of a given legal system defined by its structure. We will have, then, as many conceptions of validity as many structures of legal system we single out[6].

3. In the present essay I will deal with the varieties of legal systems thought of as a sets of norms. By „norm" I mean here a rule whose meaning is a pattern of due behaviour in a given legal language[7]. For my purposes it is superfluous to divide the norms in such categories as primary and secondary rules[8] or norms of content, of enactment and of validity[9]. Such and other typologies are highly relevant for determined analytical purposes, but we can do without them in the present essay.

Norms are in various relations, and these relations determine concepts of a legal system. I am not interested here with other dimensions of legal systems (point 2).

I will identify the conceptions of validity proper to each of the concepts of systems.

I will use a metatheoretical approach, and analyse the various constructions of legal systems and correlated conceptions of validity treating all of them as possible theoretical models which can be interpreted on two levels. The first level it is a level of concrete theories

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[5] Cf. J. Wróblewski, *Three Concepts of Validity of Law*, „Tidskrift, utgiven av Juridiska Föreningen i Finland" 1982, 5—6.

[6] Cf. J. Wróblewski, *Modelli di sistemi operativi e potenzialità dell'informatica giuridica*, „Logica, Informatica, Diritto" 1978, IV (1); Idem, *Operative Models and Legal Systems*, [in:] *Artificial Intelligence and Legal Information Systems*, vol. 1, ed. C. Ciampi, North-Holland 1982; Idem, *Fuzziness of Legal System*, [in:] *Essays in Legal Theory in Honor of Kaarle Makkonen XVI Oikeustiede Jurisprudentia 1983*, Vammala 1983.

[7] J. Wróblewski, *The Problem of the Meaning of the Legal Norm*, „Österreichische Zft.f.öff. Recht" 1964, 3—4, reprinted Idem, *Meaning and Truth in Judicial Decision*, Helsinki 1983[2].

[8] E.g. H. L. A. Hart, *The Concept of Law*, Oxford 1961, chapt. III, V.

[9] Cf. Wróblewski, *Systems...*, p. 224 sq.

of law, and the second level is their application to concrete legal systems which are functionally operative in determined spacio-temporal dimensions.

4. My thesis in the present essay is that there are five concepts of legal systems singled out according to the used criteria (point 3) and each of them is correlated with a concept of validity. In the following parts of this essay I deal with five concepts of legal systems for which I will give conventional names: (I) „legal system of enacted law" (*LSLE*), (II) „legal system of logically developped law" (*LSFC*), (III) „legal system of interpreted law" (*LSIC*), (IV) „legal system of operative law *(LSOL),* and (V) „principled legal system" *(LSPP).*

In concluding observations I will briefly point out some theoretical vistas connected with the discussed concepts of legal system and conceptions of validity.

I. LEGAL SYSTEM OF ENACTED LAW

5. Legal system of enacted law (*LSLE*) consists exclusively of norms enacted by proper authorities. This is a minimum concept of law in statutory law systems. The enacted norms are identified by proper procedures determining the act of enactment. The *LSLE* corresponds to extremely simplified paradigm of statutory law.

Statutory law is an idealization of the legislative systems operating e.g. in continental Europe if they are described in a formal way, i.e. taking into account only formal hierarchies of the so-called „sources of law", techniques of the law-making and of an application of law, and omitting the differences of the content between these systems[10].

The principal form of the law-making is enactment, and each valid norm is expressed in or constructed from explicity enacted provisions. In those provisions there are sometimes referred functionally highly relevant extra-legal rules such as customs, policies, standards etc.[11]

[10] The opposition between statutory law and common law systems is clearly formal and not exhaustive one. Besides there is a known tendency toward rapprochement between these two systems. I use, therefore, this typology only as a tool of presentation of the problems which depend on some formal characteristics of the systems in question.

[11] Statutory law system assumes, thus, a rather narrow or „positivistic" vision of legal system, which is challenged by those treating it in a more loose way as a LSPP (cf. point 18). e.g. G. Hughes, *Rules, Policy and Decision-Making,* [in:] *Law, Reason and Justice,* ed. G. Hughes, New York-London 1969, p. 123—131; R. Dworkin, *The Model of Rules,* [in:] *Philosophy of Law,* ed. J. Feinberg and

Law-making by practice of decision-making plays obviously subsidiary role, of any.

The *LSLE* is based on an assumption that there are some criteria of identifying the scope of the system, that is of the validity of norms in this system[12]. This assumption can be challenged either by practical experience or on the basis of some theoretical arguments. The former objection holds for hard cases and, therefore, one can say, that the assumption in question is justified at least for a sub-group of norms valid in *LSLE*; this sub-group, however, is identified by purely practical criteria. The latter objection cannot be dealt with without taking into account various visions of the boderline between law and no-law, if any; one has, hence, to assume, that such a dividing line can be drawn at least by convention based on some explicit theoretical and/or practical arguments.

6. *LSLE* is based on the assumption of the conception of a systemic validity *V*(*LSLE*)[13]. The concept of validity identifies the criteria of recognition of a norm as valid in a system[14]. The norm *N* belongs to *LSLE* if: (a) *N* is enacted according to the norms valid in *LSLE*; (b) *N* is not derogated by norms valid in *LSLE*; (c) *N* is consistent with norms valid in *LSLE*; (d) if *N* is inconsistent with norms valid in *LSLE* then either it does not loose its validity according to the accepted rules of conflict of norms or *N* is interpreted in such a way that it ceases to be inconsistent with the norms in question[15].

The conception *V*(*LSLE*) is widely used in legal practice and in positivistically biased legal theory. It is a rather narrow conception

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H. Gross, Encino-Belmont 1975, p. 78, 82 sq., For an analysis cf. T. R. Kearns, *Rules, Principles and the Law*, „The American Journal of Jurisprudence" 1973, 18, p. 120 sq.; S. I. Shuman, *Justification of Judicial Decisions*, „California Law Review" 1971, 3, p. 723—730; R. Alexy, *Zum Begriff des Rechtsprinzips*, „Rechtstheorie" 1979, Beiheft 1.

[12] I assume, then, that legal system is thought of as a system of norms. It is an open question, whether this assumption is necessary, viz. whether one cannot leave this question open and use the conceptual apparatus constructed in a very interesting work of C. A. Alchourrón and E. Bulygin, *Normative Systems*, Wien—New York 1971, chapt. IV (4). I use a traditional approach as a more intuitive within the framework of actual systems of legal informatics.

[13] In the text I will use the symbol *V* (...) for any conception of validity giving in brackets the symbol of a legal system the validity conception is correlated with.

[14] In this sense one can say that the concept of validity depends on the criterion or a set of criteria of identification. Cf. Alchourrón and Bulygin, *op. cit*, p. 72.

[15] Cf. in detail J. Wróblewski, *Sądowe stosowanie prawa* [Judicial Application of Law], Warszawa 1972, chapt. X(2); Idem, *Three Concepts...*, p. 408—414.

of validity and looks a very formal one. The closer analysis, however, demonstrates that one cannot reduce its use to purely formal operations without making some rather complicated assumptions.

7. The fulfillment of (a) is relatively easy to state if one has determined the validity of other norms in the *LSLE* and there are no doubts concerning the procedures and the requirements of possible content of enacted norms thought of as limitations of law-making activities. The occurence of the condition (b) is quite easily stated, if understood as the non-existence of valid norms explicitly derogating the norm *N*.

More complicated problems are those of consistency. We assume that we can speak in a meaningful way about consistency and inconsistency of norms, as we always do in legal dogmatics and legal practice, but not always in logic or in legal theory[16]. This assumption granted, we decide whether the norm *N* is or is not consistent with some valid norm in *LSLE*. In the former case there are no problems, in the latter, however, one has to determine whether the inconsistency is a real one (viz. it is up to the law-maker to change law for discarding it, because it was deliberately put in the system for certain purposes) or is a spurious one (viz. it is up to the person applying law or systematyzing it to remove it as a legislative mistake)[17]. The ascription of an inconsistency to one of the above-mentioned types is based on axiological considerations. We cannot deal, however, with this issue here.

To remove the inconsistency the rules of conflict of laws are applied using the criteria of hierarchy (*lex superior — lex inferior*), of time (*lex anterior — lex posterior*), and of substance (*lex generalis — lex specialis*). If the use of the rules based on these criteria leads to inconsistent conclusions (e.g. when there is an inconsistency between *lex posterior generalis* and *lex anterior specialis*), then the rules of the second level are used[18]. The criteria of hierarchy are well defined

[16] E.g. Kelsen, *Allgemeine...*, chapt. 57—59. Cf. a balanced view of G. H. von Wright, *Norms, Truth and Logic,* [in:] *Deontic Logic, Computational Linguistics and Legal Information Systems,* vol. 2, ed. A. A. Martino, North-Holland 1982, p. 3 sq.

[17] Cf. K. Opałek and J. Wróblewski, *Zagadnienia teorii prawa [Problems of Legal Theory]* Warszawa 1969, chapt. III (3.1); Lang, Wróblewski, Zawadzki, *op. cit.*, chapt. 19.3.1.; Z. Ziembiński, *Problemy podstawowe prawoznawstwa* [Basic Problems of the Legal Sciences], Warszawa 1980, chapt. 4.5.2.; cf. in general G. Gavazzi, *Delle antinomie,* Torino 1959; A. G. Conte, *Saggio sulla completezza degli ordinamenti giuridici,* Torino 1962, chapt. 1.2.2.

[18] Opałek and Wróblewski, *op. cit.*, chapt. III (3.2.); Lang, Wróblewski, Zawadzki, *op. cit.*, chapt. 19.3.2; N. Bobbio, *Des critères pour resoudre les antinomies,* [in:] *Les antinomies en droit,* ed. C. Perelman, Bruxelles 1965.

in statutory legal systems at least in the higher levels of hierarchy of norms and can be stated quite formally[19]. The same holds for the criteria of time. The relation of *lex specialis* and *lex generalis* is, however, not formal one and at least in some cases depends on evaluations[20].

The decision which of the contradictory norms is valid at least in some cases cannot be formulated by using well defined and axiologically neutral criteria based on the description of the texts of the norms in question. This is also the case when the use of the rules of conflicts is not enough and legal interpretation has to be used. And this use depends on a choice of interpretative directives (comp. point 13 below).

The validity in the *LSLE* is, hence, relatively simple if it is determined by the criteria (a) and (b). In these situations $V(LSLE)$ is determined by describing the texts of norms of *LSLE* and law-enactment acts.

The characteristicts of the remaining criteria are controversial. In an anti-positivist thinking it is taken as granted (and even sometimes demonstrated) that at least in some cases the use of the criteria in question require evaluations which *ex hypothesis* cannot be relativized to the content of the norms of *LSLE* in question. If it is so, then to decide the issue one uses some arguments brought in the discourse from outside of the *LSLE*. In traditional thinking all systemic criteria of validity are „formal". Accordingly even evaluations, if necessary, can be relativized to the axiological presuppositions inherent in *LSLE* and, hence, one is not compelled to go outside the law and even one should not do it for the sake of legality.

8. The *LSLE* is evidently not adequate either for in legal theory or for legal dogmatics or legal practice. For each of them legal system is something more than norms enacted by the law-maker.

Firstly, the enacted norms are „valid" in some determined meaning. If this meaning is clear, in a concrete situation, then this immediate understanding is thought of as the meaning of the norm. If, however, there are doubts about the proper meaning of the norm, then one

[19] This conflict rule is not, however, always applied and even acknowledged as valid. Cf. e.g. for heuristics H. T. Klami, *Legal Heuristics*, Vammala 1982, p. 47—53; A. Ross, *On Law and Justice*, London 1958, p. 132, about the role of *lex superior* rule cf. A. Peczenik, *The Basis of Legal Justification*, Lund 1983, p. 66 sq., 133.

[20] Cf. J. Wróblewski, *Lex generalis a lex specialis* [Lex Generalis and Lex Specialis], „Zeszyty Naukowe UŁ" 1963, S. I, nr 28.

has to use an interpretation[21]. The interpretation, either operative in the process of an application of law or doctrinal made within the scope of legal dogmatics, is justified by directives of legal interpretation as arguments or *topoi*. But then a valid norm is an interpreted norm, and we go from the *LSLE* to the legal system of interpreted law (*LSIC*) (point 12).

Secondly, the use of conflict rules can be contested and, therefore, the application of the corresponding criterion of validity could be doubtful.

Thirdly, it is widely admitted that an use of explicit derogation influences not only a derogated norm, but also its consequences. It has been demonstrated, that there are various sets of norms affected by derogation because of their relation with a derogated norm: one has, in fact, to select a minimal set of norms which are implicitly derogated as consequences of derogated norm[22]. A determination of consequences of an explicit derogation appears as highly complicated process, and implies logical inferences from a derogated norm and comparison of the conclusions of these inferences with not derogated norms and their consequences. The *LSLE* is, thus, not sufficient, and one has to draw formal inferences of norms, i.e. to go from the *LSLE* to the legal system of logically developped law (*LSFC*) (point 9).

II. LEGAL SYSTEM OF LOGICALLY DEVELOPPED LAW

9. Legal system, as a rule, is thought of not only as a set of enacted legal norms (*LSLE*) but also includes all formal consequences of these norms. Thus one has to do with the legal system of logically developped law *(LSFC)*. The use of this concept of a legal system is based on a thesis, that there is a formal logic interpreted by norms or by their component parts, and that this logic guarantees a transivity of relevant properties of enacted norms to their formal consequences (*F*-consequences).

The transitivity in question contains at least the transitivity of validity. If the enacted norm is valid, then its *F*-consequence is valid too.

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[21] This is a narrow meaning of „interpretation" (cf. point 12). Traditional doctrine of *claritas* taken as an pragmatical evaluation in concrete situation does correspond with the practical use of this term.

[22] Cf. C. E. Alchourrón, *Normative Order and Derogation,* [in:] *Deontic Logic...* The derogation is possible only by a derogating norm according to Kelsen, *Allgemeine...*, chapt. 27.

10. The formal calculus in question fulfills two conditions; (a) it can be „interpreted" (in the logical sense of this term) by norms and their component parts; (b) the logical derivation transfers the validity of premisses to the validity of the consequences.

The first condition (a) deals with some problems of philosophy and of logic. Philosophically this is the opposition between cognitivism and anti-cognitivism in the question whether norms in general or some kinds of norms can be treated as true or false in a given language. The logical problem is that of constructing a formal culculs adequate for dealing with normative discourse in such a way that all correct inferences between norms could be treated as „interpretations" (in the logical sense of this word), of some theses of this calculs.

„Formal logic" in this context means either formal aletic logic or deontic logic and normative logic, or all of them. The common feature of any formal logic is that it is presented as a formalized calculus, which is „interpreted" in the manner relevant for legal discourse. The difference between aletic logic on the one hand, and the other types of formal logic on the other is that the former deals with true or false propositions and their parts, and several types of relations and classes related with the „world of facts", whereas the latter deals with norms and propositions about norms. The philosophical issue is whether norms are true or false, and if the answer is yes, then whether aletic logic can be used in a legal discourse involving norms and evaluations. There are several ontological, epistemological, axiological, methodological and semiotical issues involved in that controversy[23]. I assume here that at least some types of formal logic are relevant for legal discourse[24]. Were it no so, then the whole construction of *LSFC* would be impossible[25].

This clearly demonstrates that the *LSFC* is based on highly controversial assumptions. In a rather unreflective legal thinking all these controversies are, however, treated as nonexisting. One either accepts them as evident, or rejects them as any application of logic for norms. The first position calls for an identification of formal logic referred

[23] E.g. von Wright, *Norms...*, p. 3; against the relevance of these issues H. N. Castaneda, *Logical Structure of Legal Systems*, [in:] *Deontic Logic...*, p. 25.

[24] J. Wróblewski, *Justification of Legal Decisions*, „Revue internationale de philosophie" 1979, 127—128, p. 280.

[25] One can wonder, whether this is not the case when one accepts the characteristics of legal reasoning asserted by new rhetoric, cf. Ch. Perelman, *Logique juridique*, Paris 1979², part. II; cf. also introduction by A. Giuliani, to the Italian translation of this work *Logica giuridica. Nuova retorica*, Milano 1979 and Idem, *Logica del diritto. Teoria dell'argomentazione*, [in:] *Enciclopedia del diritto*, Milano 1974.

to, the second, excluding inferential relations between norms, excludes the *LSFC*.

The second condition (b) also calls for close attention. It presupposes that validity can be transferred according to the logical relation strictly analogously to that of truth in aletic logic. One feels that this analogy is justified, but a perplexity arises when one is asking the simple „why" question of this justification. The answer could be that there is a protological calculus, which can be used for truth and validity as well[26] or that there is no essential difference between truth and validity because norms are propositions[27]. It is no place here to discuss this rather complicated and controversial issue. Anyway the assumption of this validity transitivity between enacted norms and their formal consequences is necessary condition of any *LSFC* concept.

11. The *LSFC* stimulates, however, serious problems even accepting its premisses (point 10).

Firstly, in the legal discourse there is an open question concerning the scope of formal consequences of enacted norms. There are the so-called legal arguments of the traditional forms of *argumentum a fortiori, a contrario* and *per analogiam*. One can try to describe them using formal calculi, but the results are controversial[28]. Even if one can describe them correctly, the question is under what conditions they can be used as the „rules" of formal calculi.

Secondly, the *LSFC* is a system which is not a finite system in any given moment because all the possible formal consequences are „given" when the *LSLE* is given. This consequence of *LSFC* could run against many cherished beliefs of lawyers.

Thirdly, to the formal consequences of enacted norms are applied all observations connected with the meaning and interpretation of the norms of *LSLE* (point 8). A formal inference starts from an enacted norm with a determined meaning, and if this meaning is doubtful then we have to do not with a formal consequence but with an interpretative consequence proper for the *LSIC* (point 12). In this situation one has to leave the *LSFC* for *LSIC* construction.

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[26] I. Tammelo, *Outlines of Modern Legal Logic*, Wiesbaden 1969, p. 38; Ch. and O. Weinberger, *Logik, Semantic, Hermeneutik*, München 1979, p. 100.

[27] Cf. G. Kalinowski, *Le problème de la verité en morale et en droit*, Lyon 1967.

[28] E.g. J. L. Gardies, *La logique de l'interprétation du droit et la logique du droit lui-meme*, „Archives de philosophie du droit" 1982, 27; G. Kalinowski, *introduction à la logique juridique*, Paris 1965, chapt. IV § 3. About the rhetorical nature of these arguments cf. Perelman, *Logique...*, Nos 8, 33, and p. 56.

Fourthly, the *V(LSFC)* is determined by the *V(LSLE)* proper for *LSLE* plus formal consequences, i.e. the criteria of *V(LSFC)* are those of *V(LSLE)* plus the rules of formal calculi. All observations concerning the *V(LSLE)* conception do apply to the *V(LSFC)* conception.

III. LEGAL SYSTEM OF INTERPRETED LAW

12. To a legal system of interpreted law (*LSIC*) belong not only enacted norms (as in *LSLE*) and their formal consequences (as in *LSFC*) but also interpretative consequences (*I-consequences*) of these groups of norms. In other words in the *LSIC* the rules constructed in the process of interpretation from the norms of *LSLE* and *LSFC* are treated also as valid norms.

The whole concept of *LSIC* depends, of course, on the theoretical conception of legal interpretation. There are several concepts of legal interpretation symbolized here by *I*. I_1 means cognition of any object of culture („cultural interpretation"), I_2 means giving a sense to any linguistically well-formed sign in a given language („interpretation in the wide sense"). I_3 means ascription of a meaning to a sign in the case of doubt („interpretation in a narrow sense"), I_4 means I_3 performed in the process of an application of law („operative interpretation") or I_5 in the dogmatic dealing with law („doctrinal interpretation") etc.[29] In the present paper I will use the I_3 and I_4.

The interpretative decision is justifiable by directives of legal interpretation, which can also guide the interpretator in his task. The directives of legal interpretation are often in conflict, refer to some evaluations and, therefore, have to be chosen by the decision-maker. This choice is ultimately based on values determining the sets of directives of legal interpretation appearing as normative theories or — — more loosely — as ideologies of legal interpretation[30].

The interpretative decision can be put into the standard formula: „the norm *N* has the meaning *M* in the language *L* according to the

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[29] For the main ideas concerning legal interpretation in the present paper cf. J. Wróblewski, *Semantic Basis of the Theory of Legal Interpretation*, „Logique et Analyse" 1963, 21/24; Idem, *Legal Reasonings in Legal Interpretation*, „Logique et Analyse" 1969, 45; Idem, *Meaning and Truth...*, p. 22—48, 71—103.

[30] J. Wróblewski, *L'interpretation en droit: théorie et idéologie*, „Archives de philosophie du droit" 1972, 18; Idem, *Zagadnienia teorii wykładni prawa ludowego* [Problems of Interpretation of the People's Law], Warszawa 1959, chapt. IV; Idem, *Sądowe...*, chapt. VII.

directives of legal interpretation DI_1, DI_2, ..., DI_n and evaluations V_1, V_2, ..., V_n inherent in their choice and use"[31].

13. The conception of validity used in *LSIC*, i.e. *V(LSIC)*, is based on following conditions: (a) there is *LSFC* or at least *LSLE* system and each of them uses the proper conception of validity, i.e. *V(LSLE)* and *V(LSFC)*; (b) there is a set of directives of legal interpretation *DI*, which is a finite set with defined situations of their use; (c) the validity of interpreted norms is transformed into validity of the rules, which one gets by or justifies by the chosen *DI*.

The (a) condition is an assumption which is usually made as evident. I would like to stress that according to the previous observations the assertion of an existence of *LSLE* and *LSFC* is linked with several problems, which are not easy to solve.

The (b) presents several problems. Directives of legal interpretation appear as a rather heterogenous and conflicting set of rules, whose application is based on certain evaluations. One can single out a set of those directives which is fairly commonly accepted in interpretative activities when some widely shared assumptions concerning legal norms, their meanings and some properties of legal language and of legal system are taken as granted. If one agrees with these conditions then we can talk about „commonly accepted directives of legal interpretation"[32]. But these directives are not sufficient to solve all interpretative problems and, hence, neither in legal dogmatics nor in legal practice are thought of as „normative theory of legal interpretation".

To formulate such a theory it is necessary to choose a set of directives of legal interpretation taking definite preference concerning the top values the interpretation has to serve. On the one hand we have to do with the choice of static values (e.g. stability, certainty), and with the dynamic values („adequacy of law and life") on the other[33].

The fulfilment of the (b) condition presents, thus, several problems, which influence the very concept of the *LSIC* and of the correlated *V(LSIC)*.

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[31] W r ó b l e w s k i, *Justification...*, p. 284—286; I d e m, *Sądowe...*, chapt. X(3).

[32] Cf. W r ó b l e w s k i, *Zagadnienia teorii wykładni...*, chapt. VIII § 2; I d e m, *Sądowe...*, p. 143 sq. For comments cf. A. P e c z e n i k, *Wartość naukowa dogmatyki prawa* [The Scientific Value of Legal Dogmatics], Kraków 1966, § 25; L. N o w a k, *Próba metodologicznej charakterystyki prawoznawstwa* [An Essay on the Methodological Features of the Legal Science], Poznań 1968, p. 83—94.

[33] Cf. W r ó b l e w s k i, *Zagadnienia teorii wykładni...*, chapt. IV and litt. cited in note 29.

The condition (c) corresponds with the commonly held intuitions of lawyers. If they treat legal interpretation as a discovery of one single „true" meaning of interpreted legal norm, then the norm in this meaning is really valid norm. If they treat legal interpretation as a sort of creative activity, then a norm created through interpretation is treated as a valid norm. In both extreme constructions the act of interpretation determines the scope of *LSIC:* in the former construction it confirms by discovery what is „really" valid law, and, declares what was valid; in the latter construction interpretative decision has a constitutive power, because is treated as at least partially law-making decision. It is worth mentioning that the latter construction can be more or less convincingly justified for an operative interpretation, but is rather doubtful when it refers to a doctrinal interpretation while sustaining the view that legal science is not a source of law[34].

14. The concept of *LSIC* is silently accepted in practice: when interpreted norms are valid then the rules resulting form interpretation are valid too. But this the *V(LSIC)* is the quite different conception of validity from the *V(LSLE)* or *V(LSFC)* one.

The most serious problems with the *V(LSIC)* are connected with fulfilment of the (b) condition dealt with above (point 13). In the situation of plurality of conflicting directives of interpretation one faces the following theoretical choices: firstly, to reject the construction of *LSIC* as not operative; secondly, to restrict the *LSIC* construction only to the *I*-consequences stated according to the „commonly accepted directives of legal interpretation"; thirdly, to accept all interpretations relativized to any directives.

The first choice is relatively simple one, theoretically can be easily justified but is not adequate for current views either in legal science or in legal practice. It means that one cannot construct the *LSIC* at all.

The third choice seems to be adequate for widely shared opinions in legal science and in legal practice. A consequence of controversial axiology underlying interpretation is that *LSIC* is controversial itself, and validity of its norms, if interpreted, can as a rule be contested. This is a common attitude of a rule scepticism.

The second choice is that a compromise in which a construction of the *LSIC* is preserved at the price of restricting it to some *I*-consequences and upon a condition of reaching an agreement concerning the

[34] J. Wróblewski, *Prawoznawstwo jako „źródło prawa"* [Legal Science as „The Source" of Law], „Państwo i Prawo" 1973, 7; Idem, *La jurisprudence et la doctrine juridique en tant que source de droit*, [in:] *Rapports polonais présentés au neuvième congrès intern. de droit comparé*, Wrocław 1974, p. 56—59.

„commonly accepted directives of legal interpretation". One can argue that this compromise neither satisfies the strivers for a determinancy of legal system (the first choice) nor the common intuitions and practices of interpretation (the third choice).

Only the first choice is based on formal properties of legal system, and this means the rejection of the possibility of the *LSIC*. The other choices, if not made by pure convention, should take into account the views concerning directives of legal interpretation expressed in legal decision-making practice and in legal science.

There is, however, one possibility for changing our conclusion, but it depends only on legislative activity. The law can formulate directives of legal interpretation in the form of statutory norms[35]. If this is the case then *prima facie* one can construct the *LSIC* containing *I*-consequences based on those directives. But there are two comments to be made. Firstly, in our legal culture we have no experience of enacting a statute containing all directives of legal interpretation necessary for practical systematization and application of law. Secondly, directives of legal interpretation, even if enacted as valid legal norms, do use evaluative terms of general clauses which leave rather wide lee-ways for interpretative activities; and, thus, there is an area for evaluative choices not determined by law. And, hence, the problems of construction of the *LSIC* dealt with above are duplicated, although perhaps on a smaller area than in the situation when there are no obligatory directives of legal interpretation.

IV. LEGAL SYSTEM OF OPERATIVE LAW

15. „Operative law" is understood here as law which is thought of as applied or as created in the decisions of competent State organs. The paradigm of applied law in statutory law systems is the law referred to as the basis of decisions or, more strictly, is the law formulated as the rules of decision which justify the decisions[36]. The paradigm of operative law in common law systems is judicial decision as a „judge

[35] Cf. J. Wróblewski, *Właściwości, rola i zadania dyrektyw interpretacyjnych* [Properties, Role and Tasks of the Directives of Interpretation], „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1961, 4, part. III. For a review of American litterature cf. J. Witherspoon, *Administrative Discretion to Determine Statutory Meaning: „The Low Road"*, „Texas Law Review" 1960, 38, p. 392—438. The most radical partisan for the law of interpretation is H. Silving, *A Plea for a Law of Interpretation*, „University of Pennsylvania Law Review" 1950, 98, p. 499 sq.

[36] Cf. J. Wróblewski, *La règle de décision dans l'application judiciaire du droit*, [in:] *La règle de droit*, ed. C. Perelman, Bruxelles 1971.

made law" or, more strictly, the *ratio decidendi* which is either discovered in or created by the judicial decision[37].

Operative law is the „law in action" within the framework dear to the American sociological jurisprudence or to various trends of realistic legal theories. The dychotomy of creation and application of law is not used within this framework, or at least used very restrictively in comparaison with the basic conceptions of statutory law systems and the positivist ideology linked with it[38].

The systemic features of operative law cannot be discussed here. Generally speaking this is the law which is not thought of within the categories of „system-thinking", but rather in those of „problem-oriented thinking" or „case-oriented thinking".

There are two basic manners of treating operative law as a legal system: „radical operative law" *(LSOL^r)* and „moderate operative law *(LSOL^m)* systems. The former identifies law with decisions disposing of concrete cases, i.e. with individual legal norms, the latter treats legal system as a set of general norms used in these decisions and/or decisions themselves.

16. The conception of validity proper for the *LSOL^r*, i.e. *V(LSOL^r)*, appears as the simple form of a factual validity. A norm of *LSOL^r* is valid, if it is used in or referred to in a decision disposing of a case. This is the typical judge-made-law conception which in the simplicist way does not take into account all the intricacies of singling out a *ratio decidendi* and of operation of the doctrine of precedent.

The *V(LSOL^r)* is practically of no use in contemporary systems of statutory law. Even in the past the most extreme partisans of the free law movement do not declared explicitly such conception of validity. An use of this conception of validity and of *LSOL^r* cannot be consistent with basic ideas of statutory law.

The *V(LSOL^m)* is used in statutory law practice and its theory especially in the case of *desuetudo*. A norm is valid according this conception if the following conditions are fulfilled: (a) the norm is *V(LSLE)* or *V(LSFC)* or *V(LSIC)* valid; (b) the norm is used in or referred to in a decision of disposing of the case.

The condition (a) has been discussed above when dealing with corresponding concepts of *LSLE*, *LSFC* and *LSIC* and correlated conceptions of validity.

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[37] Cf. the classic work of R. Cross, *Precedent in English Law*, Oxford 1961, chapt. II, V, VII and cit. litt.; J. Wróblewski, *The Concept and Function of Precedent in Statute-Law Systems*, „Archivum Iuridicum Cracoviense" 1974, 7.

[38] Cf. Wróblewski, *Sądowe...*, chapt. XI, XII and litt. cit.

The condition (b) puts a restrictive clause on norms which are *V(LSLE)* or *V(LSFC)* or *V(LSIC)* valid. This condition can be stated factually by looking at the set of decisions disposing of a cases in some temporal dimension. In this sense also here we have to do with a factual validity, as based on a „fact", viz. the content of decision[39].

17. The *LSOL* and *V(LSOL)* present several theoretical and practical problems, different however for both types of them.

$LSOL^r$ is, as stated above, not adequate for contemporary statutory law systems, and, therefore, we can leave it out of our discussion.

$LSOL^m$ can be used in statutory law systems and is used in them at least when one deals with *desuetudo* thought of as a factual derogation of a norm. In the case of *desuetudo* a norm which *V(LSLE)* or *V(LSFC)* or *V(LSIC)* valid is declared without $V(LSOL^m)$, validity, and this last conception prevails over the others. This calls for some comment.

Firstly, we have to do in such situation with different conceptions of validity, and these conceptions are in conflict. Take e.g. *V(LSLE)* and $V(LSOL^m)$ in the case of *desuetudo*. A norm is *V(LSLE)* and therefore ought to be followed but the fact of not being followed by the State organs is sanctioned by declaration of the lack of $V(LSOL^m)$ validity. The non observance of norm valid in *LSLE* is, thus, transformed into *LSOL*, and assessed as derogation valid in *LSOL*. This is an extremely shocking transformation for any ideology of legality in *LSLE*, *LSFC* and *LSIC*.

Secondly, even accepting $V(LSOL^m)$ there is a relevant problem of what practice of the State organs, for how long period and in what situation justifies the use of *desuetudo* derogation.

Thirdly, one has to take into account, that all the problems related with an explicit derogation in the *LSLE* have to be applied also in this case (cf. point 8).

Fourthly, the *LSOL* concept can be used for dealing with some problems of the *V(LSIC)* validity. One can state that the *I*-consequences are accepted only if the rules resulting from interpretation are used in *OL*. This is, of course, only a possibility to restrict the area of *I*-con-

[39] The use of a rule in a decision can be treated theoretically as a criterion of „factual validity" and if so, then this combination can be used to demonstrate the relevant complementarity of a „systemic" and of a „factual" validity. Cf. Wróblewski, *Sądowe...*, p. 245 sq.; E. Pattaro, *Validità o verificabilità del diritto?*, „Rivista trimestrale di diritto e procedura civile" 1966, 3. There is a question, however, whether there is a general concept of validity subdivided in systemic and factual one, cf. A. G. Conte, *Studia per una teoria della validità*, „Rivista internazionale di filosofia del diritto" 1970, 47.

sequences in a manner fit for a factual operative control. But it has also an evident drawback because its use makes the *LSIC* dependent on the rather accidental decision-making practice.

V. PRINCIPLED LEGAL SYSTEM

18. There are theories according to which legal system includes „principles, policies and other standards" referred to in general norms or used in legal decisions[40]. This reference or use is thought of in these theories as an acknowledgment of their validity in a system consisting of general norms as *LSLE, LSFC, LSIC* and/or individual norms *(LSOL)*. A legal system based on such theories is — conventionally — a „principled legal system" *(LSPP)*.

This is a rather large idea of a system because it consists of all norms referred to in general and individual valid legal norms, which are e.g. rules of morality, religion, mores etc.

19. The *V(LSPP)* can be thought of as adding to the *V(LSLE), V(LSFC), V(LSIC)* and $V(LSOL^m)$ one supplementary criterion for the validity of „principles, rules and other standards". This condition is simple: the rules referred to have to be singled but by the general norms fulfilling the criteria of *V(LSLE), V(LSFC), V(LSIC),* $V(LSOL^m)$ or simply be referred in the *LSOL* decisions.

20. The concept of LSPP has been stimulated by ideological and theoretical reasons of theoretical description of law-applying decisions and elimination of judicial discretion. It is no place here to analyze this peculiar kind of defending some theoretical conceptions under the label of „positivism". Leaving aside this basic issue I will limit by observations only to the problems of the use of *LSPP* and the *V(LSPP)* conception.

Firstly, the *LSPP* makes legal system almost an universal normative system of a society when the general or individual legal norms refer to rules commonly labelled as morality, mores, politics etc. The plurality of normative systems in contemporary societies is a fact. Another fact are widely used references to „extra-legal" „principles, policies and other standards" in the social control through law and the contemporary legislative technique of formulation of legal provisions. The *LSPP* conception practically reduces all rather large part of normative systems

[40] Cf. R. Benditt, *Law as Rule and Principle*, Stanford 1978, chapt. IV and litt. cit. in note 11.

to a legal system, or in other words, ascribes the *V(LSPP)* validity to these systems or to their parts[41].

Secondly, the *LSPP* is the less defined system from all the five discussed here. One can argue, therefore, then the *LSPP* construction is leading not towards the elimination of decisional lee-ways but for sanctioning almost each lee-way existing in decision-making.

Thirdly, the *V(LSPP)* assumes an identification of these „principles, policies and other standards", which in many cases is rather controversial. It was rightly stressed that one of the differences between law and morality is the degree of determination of duties[42].

VI. CONCLUDING OBSERVATIONS

21. Enumerated five concepts of legal systems and corresponding conceptions of validity stimulate three general problems: (a) what is a relation, if any, between the general theoretical singling out of the systemic, factual and axiological validity and the five concepts used in this essay (cf. point 2); (b) what is a relation, if any, between the concepts of legal systems and correlated concepts of validity with the basic types of ideology of application of law; (c) the relative fuzzines of legal system and legal validity conceptions.

22. The *V(LSLE)* is paradigmatic for systemic validity, which is in fact defined as *V(LSLE)*[43]. The *V(LSFC)* can be thought of as making the *V(LSLE)* wider without changing any of its essential characteristics but for use of logic; and no one rationally can be against it.

The *V(LSIC)* is in its deep structure a form of an axiological validity[44]. This *prima facie* paradoxical contention has nothing startling if we take into account the evaluative character of legal interpretation, i.e. its dependence on evaluative choices in spite of the justificatory role of directives of legal interpretation. The conflict of interpretations claiming the validity of different *I*-consequences is an axiological conflict. The rejection of interpretation *IA* by interpretation *IB* means, that according to the evaluations and correlated directives of interpretation

[41] About the general problem of reference of law to extra-legal systems cf. J. Wróblewski, *The Relations between Normative Systems*, „Archivum Iuridicum Cracoviense" 1973, 6.

[42] E.g. L. Petrażycki, *Teoria prawa i państwa w związku z teorią moralności* [Theory of Law and State Related with a Theory of Morality], Warszawa 1959, vol. I § 10.

[43] Cf. note 15.

[44] Wróblewski, *Three...*, p. 417—419.

accepted in *IB* the *IA* is *contra* or *praeter legem*, and *IA* is not a norm which is *V(LSIC)* valid, and *vice versa*.

The *V(LSOL^r)* is clearly a case of factual validity[45]: the decision and its content is a „fact". The *V(LSOL^m)* has a mixed character of systemic and factual validity, but in the extreme case of *desuetudo*, the factual validity prevails.

The *V(LSPP) prima facie* seems to be kind of factual validity, since the „principles, policies and other standards" exist as social „facts". But one can argue that in the deep structure an axiological concept of validity is at stake, because these rules and standards referred to are usually so loose that any identification of their content is in fact an evaluation, and controversies concerning them can be solved only in terms of different values.

23. The concepts of legal systems and conceptions of legal validity have their ideological underpinning. It seems interesting to outline briefly what, if any, are the relations between three basic ideologies of an application of law[46] and the concepts in question.

Ideology of the bound judicial decision, which is linked with the positivist ideas of law and its application evidently is for the *LSLE* and *LSFC* and the correlated conceptions of validity. The *V(LSLE)* is thought of as a set of strictly determined criteria, and the *V(LSFC)* as the application of the classical aletic logic. The *V(LSIC)* is treated as a *V(LSFC)* by elimination of evaluative elements.

The ideology of a free judicial decision in its radical form seems to imply the *LSOL^r* and the *V(LSOL^r)*. In its moderate versions the *LSOL^m* and *V(LSOL^m)* are used. In moderate version also the *LSIC* and *V(LSIC)* is approved of in relation with operative law.

The ideology of a rational and legal decision is determined negatively by elimination of the *LSOL^r* and its validity concept. This ideology stresses the limits of the determination of legal system by evaluative elements and is, therefore, cautious towards *LSIC:* it sees the interpretative lee-ways of the law-maker but is aware of the fact that in legal discourse the *I*-consequences of norms are treated as valid rules. This ideology is also aware of all problems connected with the *LSLE* and *LSFC* concepts and the correlated conceptions of validity. It is problematic how this ideology is related with the *LSPP* concept, but it seems, that it cannot accept the *V(LSPP)* validity stressing, however, the role

[45] Ut supra p. 414—417.

[46] Wróblewski, *Sądowe...*, chapt. XII; Idem, *Ideologie de l'application judiciaire du droit*, „Oesterreichische Zft.f. öffentl. Recht" 1974, 25.

of „principles, policies and other standards" as factors shaping *I*-consequences.

24. The presented concepts of legal systems and of correlated conceptions of validity are linked with some highly relevant characteristics of legal discourse.

The concepts of legal system are strictly related with the correlated conceptions of validity, because system is defined as a set of valid norms. The features of these conceptions determine, thus, the scope of legal system. Moreower the conceptions of validity are more or less fuzzy[47]. This means that the contours of legal systems are not sharply defined when the conceptions of validity at least in some situation do not answer the question „whether the rule *R* is a valid norm in the legal system" without any reasonable doubt. Any conception of validity in which evaluative elements are inherent does not give such determined answer.

The reasonings based on evaluation, in general — and especially the stating of *I*-consequences in the *V(LSIC)* and also — in my opinion — in the *V(LSPP)*, can be treated as transformations in the sense that one cannot make a deductive inference from the *LSLE* to the *LSIC* or *LSPP* system[48].

The fuzziness of basic legal concepts and transformation-character of several reasonings in legal discourse are highly relevant for dealing with any logico-semiotic issues of legal theory[49].

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POJĘCIA SYSTEMU I OBOWIĄZYWANIA PRAWA

Po przyjęciu wstępnych założeń autor metateoretycznie rozważa pojęcia systemu i obowiązywania prawa. Wyróżnia pięć typów tych pojęć opierając się na strukturze systemu prawa oraz analizuje je z punktu widzenia problemów, jakie nasuwa ich określenie i stosowanie.

[47] Cf. Wróblewski, *Fuzziness...*, part. II, IV.

[48] Cf. A. Aarnio, R. Alexy, A. Peczenik, *The Foundation of Legal Reasoning*, „Rechtstheorie" 1981, 4, part. I; A. Peczenik, *The Basis...*, chapt. 1—3.

[49] Cf. A. Peczenik, J. Wróblewski, *Fuzziness and Transformation — Towards Explaining Legal Reasoning* (in print).

„System prawa stanowionego" *(LSLE)* obejmuje normy ustanowione *explicite* przez prawodawcę. Normy obowiązujące w *LSLE* spełniają szereg warunków, charakterystycznych dla prostej wersji obowiązywania systemowego.

„System logicznie rozwijanego prawa" *(LSFC)* obejmuje normy obowiązujące w *LSLE* oraz ich formalne konsekwencje, przez które rozumie się normy wyprowadzone z tych pierwszych za pomocą uznanych reguł wnioskowania.

„System prawa zinterpretowanego" *(LSIC)* obejmuje konsekwencje interpretacyjne norm obowiązujących w *LSLE* i *LSFC*. Konsekwencje te są rezultatem wykładni tych norm uzasadnianej przez dyrektywy interpretacyjne określające, jak interpretator powinien ustalać znaczenie norm prawnych.

„System prawa operatywnego" *(LSOL)* obejmuje normy stosowane w decyzjach stosowania prawa względnie same te decyzje. W wersji radykalnej *LSOL* obowiązują reguły powoływane względnie stosowane w decyzjach lub same decyzje. Jest to postać obowiązywania faktualnego. W wersji umiarkowanej *LSOL* regułami obowiązującymi są te normy *LSLE*, *LSFC* i *LSIC*, które nie zostają uchylone przez ich niestosowanie *(desuetudo)*.

„System prawa zasad" *(LSPP)* rozszerza zakres norm obowiązujących w *LSLE*, *LSFC* i *LSIC* na reguły, do których normy te odsyłają (np. moralność, zasady współżycia, standardy itp.).

Na zakończenie rozważań autor ustala stosunek wyodrębnionych pojęć do: (a) teoretycznoprawnego rozgraniczenia obowiązywania systemowego, faktualnego i aksjologicznego; (b) podstawowych typów ideologii stosowania prawa; (c) stopnia ostrości określenia systemu prawa i normy obowiązującej.