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PREFACE

Anyone reflecting on the methodology of legal reasoning faces a difficult task. The number of methodological theories in jurisprudence and the vast literature on the subject are not the only problems that have to be taken into account. Perhaps the most striking difficulty concerning the methodology of legal argument is the heated debate between jurists, legal theorists and philosophers of law that has been recurring since at least nineteenth century.

Therefore a justification is needed for writing yet another book concerning the methods of legal reasoning; a book that aims to cover a lot of what has already been proposed in legal theory. We believe that there is such a justification. First, the perspective that we adopt in the present book is unique, at least in some respects. We venture to look at the methodology of legal reasoning "from the outside", i.e. from a more general, philosophical perspective, while taking into account the "hard reality" of law. This perspective enables us to ask questions about the justification for the methods of legal argument presented.

Second, we do not want to defend one, paradigmatic conception of legal reasoning. On the contrary, we put forward the thesis that there is a plurality of argumentative methods. The plurality, however, does not lead to relativism in legal decision-making.

Third, we reject any hierarchy of the methods of legal reasoning, and take the view that one can speak only of the precision and flexibility of different methodologies.

Finally, we would like to show that the methodological conceptions of jurisprudence constitute a coherent element of the humanistic methodology. The important aspect here is that the methodology of legal argument is much more precise and much better developed than the "general" humanistic methodology. However, this does not mean that there are no peculiarities of legal methodology, as we try to highlight in the course of our presentation.

This is a substantial revision of our book that appeared in Polish under the title "Metody Prawnicze" (Zakamycze Publishing House, Kraków 2004). Chapters 1 and 3 have undergone the biggest revision and a new chapter 6 has been added.

Jerzy Stelmach, *Bartosz Brożek*
Kraków – Kiel, September 2005

CONTENTS

CHAPTER 1

CONTROVERSY OVER LEGAL METHOD IN THE NINETEENTH AND TWENTIETH CENTURIES

1.1 THREE STANCES

A fundamental question that already preoccupied jurists in Roman times concerned the existence of a "legal method". A positive answer to that question led, in turn, to controversy over how to characterize the method, or methods, used in legal reasoning. Consequently, three substantially different perspectives on the methodology of legal argumentation developed in nineteenth and twentieth century legal philosophy.

1.1.1 The Rejection of Method

The first of these stances, by far the rarest, although very important for the purposes of the discussion in question, not only puts into doubt the scientific character of jurisprudence, but questions the very existence of any legal methods.

Kirchmann. This opinion was expressed, *inter alia*, by von Kirchmann, who in 1847 delivered a lecture entitled *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*. Attacking the historical school established by Savigny and Puchta, Kirchmann not only criticized the condition of jurisprudence but even put into doubt the usefulness of legal knowledge, which he labeled valueless and parasitic.[1]

A similar, although less radical, stance was adapted later by Hutcheson and the *Critical Legal Studies* movement.

Hutcheson. Hutcheson, a representative of the intuitionist version of American realism, claimed that a judge who has to decide a concrete case must have recourse to his own intuition and imagination, since every case is only a stimulus to which the judge reacts in order to make a good (just) decision. This reaction is an irrational, intuitive, or emotional *hunch*, a *tentative faculty of mind*, a kind of imagination or intuition that is characteristic of good lawyers.[2] Therefore, there is no objectively reconstructible method of legal reasoning.

Critical Legal Studies. The representatives of *Critical Legal Studies*, in turn, believe that the traditional methods of investigating and teaching law are useless. For them, "law is politics"; consequently, there is no such thing as the method of law. The space for the possibility of critical studies is created only when an anti-positivist, anti-legalistic and anti-formal attitude towards the law is adopted. The consequent critique leads to the "deconstruction" of traditional methodology. Some elements of this way of thinking can be traced in contemporary postmodern philosophy. From a general philosophical perspective it has to be observed that postmodernism "begs the question" while showing the bankruptcy of all methods, for it does it with the use of some methods, like deconstruction. A more sympathetic account of such schools as *Critical Legal Studies* illustrates that postmodernism does not claim the bankruptcy of methodology, but only shows precisely its limitations, relativity and pluralism.

1.1.2 Methodological Heteronomy

According to the second, more moderate stance, jurisprudence has some features of a "real science" but only under the assumption that it uses methods of other scientific disciplines, like mathematics, logic, physics, biology, or – in some cases – linguistics, sociology or economics. Jurisprudence enjoys, therefore, the status of a science but only at the cost of losing its methodological identity and autonomy. This stance cannot be analyzed exclusively within the context of Droysen and Dilthey's well known distinction between naturalistic and anti-naturalistic paradigms in science. Jurisprudence can take advantage not only of the methods of social sciences and humanities, but also of methods developed in logic and natural sciences. Such distinctions as "naturalistic – anti-naturalistic" are, in fact, pointless, and as far as legal theory is concerned – false. In jurisprudence, "outside" methods are very rarely straightforwardly applied. Rather, there has always been a kind of adaptation of methods to suit the specific needs of lawyers. We will return to this point in Section 1.2 of the present chapter.

Analytic philosophy of law. The most rigorous attempts to incorporate mathematical, logical and linguistic methods into jurisprudence have been made by analytic philosophers. In analytic legal theory, as in analytic philosophy, one can distinguish between two "methodological types" or "wings": logical (*horse-shoe analysis*), and linguistic (*soft-shoe analysis*), which is usually confined to the analysis of ordinary language.

The proponents of the "hard", logico-mathematical methodology in jurisprudence developed deontic logics, i.e., logics of such concepts as

"forbidden", "obligatory" and "allowed". One should also acknowledge their formal attempts to deal with concrete legal-theoretic problems, such as the idea of a legal system, and the theory of legal rules and principles. Among the "hard" analytic philosophers who contributed to jurisprudence, one should mention G.H. von Wright, O. Becker, J. Kalinowski, A. Ross, J. Woleński, C. Alchourron and E. Bulygin.

The "soft" methods of analysis were applied by those philosophers of law who followed the Oxford School of Ordinary Language and the "second" philosophy of L. Wittgenstein. These thinkers commonly prioritized ordinary language over artificial formal systems. They did not attempt to reform given conceptual schemes. On the contrary, their aim was to describe as precisely as possible how analyzed concepts function in ordinary language. Among "soft" analytic legal philosophers the name of H.L.A. Hart deserves special attention.

Legal realism. Legal realism is, in turn, an example of naturalistic methodology in law. According to realists, jurisprudence can be labeled "a science" only when it uses methods developed in natural sciences, or at least in empirically oriented disciplines such as sociology or psychology. Legal theory should, moreover, be descriptive in character. This kind of methodology was employed by the school of free law, American realism, sociological jurisprudence, Scandinavian realism and L. Petrażycki.

School of free law. The conception of naturalistic jurisprudence was designed to oppose legal positivism, which was criticized, *inter alia*, by representatives of the school of free law. In a work, *Methode d'interpretation et sources en droit privé positif*, published in 1899, Geny says that continental positivism assumes wrongly that the only source of law is statute law. He goes on to argue that in the process of legal interpretation one should take into account also three other sources of valid law: customs, authority and free investigation of a judge. Independent court-decisions are, ultimately, the results of the judge's will, the needs of society and balanced private interests. The main representative of the school, Kantorowicz, advanced similar theories.[3]

Petrażycki. Petrażycki aimed to develop an adequate theory of law. He argues that such a theory can be constructed when based on psychology of emotions, which he developed himself. The psychological analysis enables Petrażycki to identify a class of phenomena that is characteristic both of moral and legal emotions.[4]

American realism. American legal realism, like sociological jurisprudence, applied the methods of empirical sociology, and also of psychology and economics. Questioning positivist formalism, American realists claimed to turn to practice and to investigate "real law," especially the behavior of judges. The instigator of this movement was Holmes. In his "manifesto" paper *The Path of the Law*, Holmes argued that, in order to explain what law is, it is necessary to adopt the perspective of the hypothetical "bad man", who is not interested in the problem of justifying legal decisions or the rationality of law; rather, he is concerned with predicting how the judge will act in given circumstances.[5] Amongst the most important representatives of American realism one should mention Llewellyn, Frank and Moore.[6]

Sociological jurisprudence. From the many sources of American sociological jurisprudence Comte's sociology, Bentham's utilitarian philosophy, German jurisprudence of interests, and American legal realism should be mentioned. The most important representative of this school is Pound. According to him, law should realize and protect six social interests: common security, social institutions (like family, religion and political rights), sense of morality, social goods, economic, cultural and political progress and protection of an individual's life. The last of these "social interests" Pound deems to be the most important.[7] In order to realize those goals a new sociological jurisprudence, Pound argues, must be developed.[8]

Scandinavian realism. Scandinavian legal realism, like American realism, regards law as an empirical fact. However, American realists treated law as a kind of behavior of a certain social group, consisting of people professionally preoccupied with resolving conflicts; Scandinavian realists, on the other hand, searched for the "essence" of legal phenomena in the psychological reactions of individuals. Hence such concepts as "law" or "obligation" are regarded by Scandinavian realism as psychological facts. The father of this school, Hägerström, deems valueless all ideas and concepts that are not developed within the context of what is real. Therefore, the world of norms and rules propounded by natural law, or by legal positivism is unacceptable. Concepts such as "law", "obligation" and "validity" are purely metaphysical without a reference to empirical facts. They make sense only if we associate them with concrete emotions or psychological reactions caused by the use of such notions. Lundstedt and Ross are among other representatives of the Scandinavian school.[9]

Apart from analytic philosophy and legal realism, there are also other traditions that utilized methods developed in non-legal disciplines. Attempts have been made to adapt to legal aims methods found in systems theory, economics, argumentation and hermeneutic philosophies. As a result, several legal-theoretic conceptions have developed, and among them the systems theory of law, the economic analysis of law, theories of legal argumentation and legal hermeneutics.

Systems theory. Systematic analyses were applied already in nineteenth century sociology, as exemplified in Comte's work. Describing the methods of sociology, the founder of positivism offered some examples from biology, demonstrating analogies between living organisms and society. This idea was further developed in the 1970s by two biologists, Maturana and Varela, who formulated the theory of so-called autopoietic systems. An autopoietic system controls the process of its creation (a nice example of such a system is a cell). The opposite are heteropoietic systems, which are incapable of self-regulation, i.e., they must be controlled from "the outside". In the 1980s attempts were made to formulate a theory of autopoietic systems in the social sciences, including legal theory. That this happened was mainly due to Luhmann and Teubner, who claimed that autopoiesis, i.e., the ability to self-regulate, is a characteristic of some social systems in developed societies. A legal system, regarded as a set of communicative acts, can be considered to be such a system. Its function is not, as is usually claimed, to regulate social life and to solve social conflicts, but to secure and promote the normative expectations of a society.[10]

Although the ideas of Luhmann and Teubner were inspired heavily by biological and sociological theories, it should be noted that Kelsen, who developed the concept of a "pure theory of law" and advocated the methodological autonomy of law, wrote in a somewhat similar spirit.

Economics of law. The economic school developed in the 1970s in the USA. The school, being a conservative movement, rejected the more "left" *Critical Legal Studies*. Its representatives made use of the ideas of British utilitarianism, especially the work of J. Bentham and J.S. Mill, and of the theses of American realism and sociological jurisprudence. The main representative of Law & Economics, Posner, tried to show that the processes of creating and interpreting law comply with some economic rules. The law is, or at least should be, economically effective, i.e., its aim is to minimize social costs and promote the increase of social welfare. A rational decision is a decision that is economically

justified, and, hence, leads to the maximization of the welfare of the given society.[11]

The argumentation and hermeneutic theories of law are far harder to interpret and analyze than those theories discussed above. We will analyze them in detail in Chapters 4 and 5. Here we limit ourselves to a few general remarks.

Argumentation theory. Contemporary argumentation theories are based on various philosophical traditions, from ancient logic, rhetoric, dialectics, hermeneutics and eristic to contemporary conceptions of analytical ethics (Stevenson, Toulmin or Baier), constructivist theory of practical advice (Lorenzen and Schwemmer) and the practical and theoretical discourse of Habermas. It is justifiable, then, to say that argumentation theories are based on methodological conceptions developed in other scientific disciplines (philosophy, logic, linguistics).[12]

Legal hermeneutics. Similar things can be said of legal hermeneutics. The nineteenth and twentieth century concepts of legal hermeneutics developed as a result of the absorption of various kinds of general hermeneutics: the "methodological" as created by Schleiermacher and Dilthey, and the "phenomenological" as developed by Heidegger and Gadamer. Legal philosophy also witnessed some attempts to develop analytic hermeneutics, based on Wittgenstein's later philosophy. One should bear in mind, however, that in Roman times jurists had already attempted to describe the most important principles of legal method constituting a special legal hermeneutics. In the seventeenth and eighteenth centuries several works devoted exclusively to legal hermeneutics were produced; in this context one should mention Eckhardi's *Hermeneutica iuris*, *recensuit perpetiusque notis illustravit*, Wittich's *Principia et subsidia hermeneuticae iuris*, or Sammet's *Hermeneutik des Rechts*. The transition between old legal hermeneutics and the contemporary version that adopts the ideas of general philosophical hermeneutics is marked by von Savigny's theory of interpretation, outlined in *Juristische Methodenlehre*.[13]

1.1.3 Methodological Autonomy

The third of the stances presented here assumes that jurisprudence enjoys, at least to a certain degree, a methodological autonomy and develops its own, "inner" criteria of what constitutes a science. In this case we have to look at normative anti-naturalism, which ultimately declares that legal science should work out its own methodology, different from that of logic, mathematics and natural sciences on the one

hand, and that of other social and humanistic sciences on the other. This thesis, concerning the methodological autonomy of jurisprudence, is defended, usually, with ontological and pragmatic arguments. As a consequence, jurisprudence determines itself the minimal – material or procedural – conditions for the acceptance of its theses. Naturally, the "border" between this stance and the two discussed earlier is not as sharp as it may seem at first glance. Autonomy cannot mean methodological isolation. Lawyers have always employed not only "their own" methods, but also techniques developed in other disciplines. Thus, controversy arises over the question of whether jurisprudence is methodologically autonomous, and not over whether one can use, in addition to "legal" methods, tools adapted from other sciences. The latter question is usually answered positively. According to the theory of methodological autonomy, however, one can make use of such "adapted" methods only if they support what is achieved by specifically "legal" arguments.

Roman jurisprudence. The thesis that law is methodologically autonomous was advocated by Roman jurists. Although Roman jurisprudence did not develop any general philosophy of law, as Roman lawyers concentrated on concrete legal issues, nevertheless it addressed some problems of an abstract nature concerning legal ontology, axiology and methodology.[14]

As regards methodology, several types of written works occurred. Among them one should mention problem-oriented treaties (*Quaestiones, Disputationes, Epistulae* and *Digesta*), commentaries, textbooks (mainly on *Institutiones*), works concerning important legal concepts and rules (*Regulae, Definitiones, Sententiae, Opiniones, Differentiae*), instructions for civil servants (*Libri de officio*), monographs and collections of *formulae* and court decisions. As a by-product of their main "practical" activity, the Roman jurists constructed the fundamentals of general legal disciplines: methodology and theory of interpretation. In particular, such concepts as *definitio, regula, interpretatio* or *rationes decidendi* were elucidated and defined. Furthermore, several important directives of legal interpretation were formulated.[15] Even today, hundreds of Roman legal topoi are used both in legal practice and for theoretical purposes (especially in relation to theories of argumentation, see Chapter 4).

Historical school. The idea of the "full" methodological autonomy of legal science was expressed clearly in two nineteenth century schools of thought: the German historical school and legal positivism. The first step towards postulating this autonomy was the "detachment" of legal

philosophy from general philosophy. The step was taken by Kant in "Metaphysical elements of legal theory" and by Hegel in "Principles of the philosophy of law". But the beginning of the heated debate about legal method is marked by Savigny's *Juristische Methodenlehre*.

Savigny rejects both the *a priori* deductive methodology offered by natural law theorists and formal-dogmatic methods, which, until then, had been used in legal science. Instead, he proposes empirical research of law as a historical social fact. The law is a product of the national spirit, originating from the natural inner forces of that spirit. It is not, therefore, a simple expression of the will of the legislator.

One has to remember, however, that although Savigny's conception contributed to the establishment of the methodological autonomy of legal sciences, it was based on ideas from "outside the law", especially from Hegel's philosophy and Schleiermacher's hermeneutics.

Legal positivism. From this point of view, legal positivism seems to be methodologically "purer". However, despite appearances, the term "positivism" has been used in reference to different conceptions and schools. One can maintain that, in order for a theory to count as positivistic, it has to include at least some of the following seven theses: (1) legal norms are created and not "discovered", as the proponents of natural law maintain, (2) creation of law is an expression of the will of the sovereign, (3) law consists exclusively of norms or rules, (4) lawyers should obey the law without any exception, i.e., all legal decisions should be made on the basis of legal norms (rules), (5) there exists no necessary connection between law and morality or between the law as it is and as it should be, (6) research of legal concepts has to be distinguished from historical, sociological, or psychological research, (7) the legal system should be considered a "closed logical system", in which every decision can be inferred from predetermined norms or rules using logical tools.

According to these criteria, Austin's theory of law, the continental *Begriffsjurisprudenz*, Kelsen's normativism and Hart's analytic legal theory count as positivist. By contrast, Dworkin's conception of law challenges three of the seven theses mentioned above (3, 4 and 5). Therefore, Dworkin's work cannot accurately be classified under the heading "positivism".

Within legal positivism, substantial effort has been devoted to analysis of fundamental legal concepts. This analysis serves both as a basis for carrying out the process of legal interpretation and as the conceptual framework for legal dogmatics and philosophy of law. Such analysis was carried out by all the main representatives of legal positivism, including

Austin, Hart and Kelsen. The most detailed formal-dogmatic analyses of law were offered by proponents of the continental version of legal positivism that – not without a reason – is called *Begriffsjurisprudenz* (jurisprudence of concepts). One should mention in this context the names of: Jhering, Geber, Winscheid, Binding, Bergbohm, Merkl, Liszt, Thon or Bierling.

Did legal positivism persuasively demonstrate that jurisprudence is a special kind of normative science that has its own methods of argument? It seems that the answer should be negative. The only exception is Kelsen's *Reine Rechtslehre*, for although radical, this conception is consequential enough to be successfully defended. The "methodological purity" of other kinds of legal positivism is, however, questionable. Positivist analysis very often mixed up elements from the sphere of what is (*Sein*) and the sphere of what should be (*Sollen*). The methods it employed often had a sociological or psychological pedigree (Austin, continental positivism, Jhering's jurisprudence of interests).

1.2 METHODS OF LEGAL REASONING

What has been said so far shows that it is hard to settle the discussion concerning the methodology of legal reasoning. There are several different stances in this controversy: on the one hand, it is questioned whether methods of legal argumentation have any autonomy, or even whether such methods exist, whilst on the other hand, philosophers defend the autonomous character of legal methodology. Another noteworthy aspect of the debate is its terminological chaos, which makes reaching a clear conclusion even more elusive. This terminological chaos has already been displayed here, at the most general level. We wrote about "the methods of legal reasoning", "the methods of legal argument", "the method of jurisprudence", and "the methods used by lawyers". In order to clarify some basic terminological issues, let us identify three different categories of application of "the methods of legal reasoning". First, those methods can be applied in legal practice (by judges, prosecutors, barristers) in the process of creating and interpreting law. Let us call this application of the methods in question *practical*. Second, one can speak of *legal-dogmatic* application of those methods, i.e., their application within specialist analyses carried out in various areas of law. Finally, one can point to the *theoretical* application thereof; this occurs in legal theory and legal philosophy.

The philosophical traditions described in the previous section each explored different aspects of the application of "the methods of legal

reasoning", only rarely confining their analysis exclusively to one category. For instance, legal positivism developed "tools" both for legal practice and legal dogmatics. Legal realism proposed the use of psychological and sociological methods both in legal theory and legal practice. Analytic philosophy proposed methods to be used primarily in philosophical reflections on what the law is, but those methods could just as easily be applied in legal dogmatics and legal practice. Hermeneutics, in turn, attempted to reconstruct the basic structures of any act of understanding, i.e., legal-theoretic and legal-dogmatic as well as "practical". Finally, argumentation theories can easily be applied both in legal practice and legal dogmatics.[16]

One can make similar remarks – concerning potential applicability in two, or even three, different categories – about most conceptions of method of legal reasoning presented above. The same may be said of the structure of this book: although emphasis is placed on the methods that can be used in legal practice, we present also "tools" that are applicable to legal-dogmatic and legal-theoretic questions. In any event, the "borders" between "practical", "legal-theoretic" and "legal-dogmatic" applications of a specific method are often far from sharp.

The next terminological problem we encounter is the lack of a commonly accepted definition of "a method". We could have proposed one of our own, saying, for example, that a method is a set of rules of proceeding, that determine what actions must be undertaken in order to achieve a given aim. We have not done so, for any definition could easily dismiss many legal-theoretic traditions as not offering a proper "method". Clearly, this would result in a severe restriction on what we discuss.

Analysis of legal methodological theories enables the separation of those theories into three groups. Each group offers a different perspective on whether a method of legal reasoning can be said to exist, and on the autonomy of that method. According to the first group, lawyers reason applying no identifiable method. The second group claims that lawyers do use certain methods, but those methods are adapted from other disciplines: sociology, economics, linguistics or psychology. Within this group, there are two subtypes: the first claims the "pure adaptation", i.e., the method as used in law does not differ from the method as used in its original discipline. The second subtype, in turn, suggests that law's adopted methods are modified to take into account the special character of law. Finally, the third group asserts both the existence and the autonomy of specifically 'legal' methods of reasoning.

It is difficult to settle the controversy between proponents of the three stances. It seems, however, that there are strong reasons to consider abandoning both the first conception, which questions the very existence of methods of legal reasoning, and the third, which claims their full autonomy. We have already indicated that the first stance is troublesome, in our discussion of Hutcheson's ideas and the *Critical Legal Studies* movement. Is not it true that Hutcheson's hunch can be regarded simply as a kind of intuitive method? Further, *Critical Legal Studies* scholars tend to deconstruct all legal methods, i.e., to show all the assumptions standing behind the traditional methodology. Such deconstruction does not inevitably lead to the conclusion that there are no methods of legal argument. Rather, it is possible to reach a more moderate thesis: that there is no unique method of legal reasoning. From this point of view, the *Critical Legal Studies* movement is not an example of the first stance, but rather recognizes the pluralism and relativism of the methods of legal reasoning.

Equally problematic are those theories which defend the autonomy of the methods in question. The only significant theory that asserts the claim to autonomy is Kelsen's. It is, however, based on very strong ontological assumptions and as such cannot serve as a commonly acceptable defense of the third stance.

These considerations allow us to formulate two conclusions. First, there is no unique, universally acceptable methodology of legal reasoning, as there is no "special" legal method. Both the heteronomy and the pluralism of such methods must be stressed. Heteronomy – because there exists no specifically "legal" method. Pluralism – because there exists no unique method of legal reasoning. Second, it is necessary to point out that the "heteronomic" methods used by lawyers are in a way "specific". This "specificity" arises because any method used in law is subject to certain modifications and limitations, mainly because the creation and interpretation of law are regulated by certain procedures imposed by valid law (think, for instance, of legal presumptions or the distribution of the burden of proof). This conclusion does not concern, of course, the application of the methods in question to legal-theoretic considerations.

Finally, it must be stressed that one cannot establish any hierarchy, or system of application of the different methods of legal reasoning. The order in which they are applied is determined by the individual case, the difficulties it involves, the interpretive context, and – perhaps most importantly – the methodological habits of the interpreter. Moreover, it is easy to imagine that the same "interpretive activity" could be taken as a manifestation of applying two different methods.

1.3 LOGIC – ANALYSIS – ARGUMENTATION – HERMENEUTICS

Below we will consider four methods used by legal practitioners and theoreticians: logic, analysis, argumentation and hermeneutics. Here, two questions should be answered. First, do those four methods exhaust the entire spectrum of methods used in legal thinking? And second: what are the relationships between logic, analysis, argumentation and hermeneutics? Are they independent of each other, or do they overlap?

It is difficult to answer the first question. On the one hand, one can name several "methods" that are not instances of one of the four mentioned. A good example is the psychological theory of Petrażycki. On the other hand, however, the four listed methods (or better: groups of methods) not only have a historically established position but also are applicable to all the spheres we described above, i.e., in creating and interpreting law, in legal-dogmatic analyses and in legal theory. Therefore there is some justification backing our choice.

As for the second question: the "borders" between logic, analysis, argumentation and hermeneutics are not sharp. In popular textbooks it is usually held that there are two types of analysis: descriptive and reconstructive. Descriptive analysis aims to describe how ordinary language functions. Reconstructive analysis, on the other hand, tries to reform ordinary language with the use of logical tools. In contemporary philosophy (and legal theory) a strict differentiation between logical and descriptive analysis is impossible. Elements of both types of analysis are mixed together, as in the case of the "third way" – between the Scylla of description and Harybdis of reconstruction – developed by J. Hintikka.[17] He proposes to build formal "explicatory models" that would aim, not at reforming ordinary language, but at precise explanation of some of its fragments.

Logic is therefore a tool of analysis. One could ask why we have decided to treat logic separately from analysis. There are several reasons. First, unlike "analysis in general", logic is rather a uniform method and can hence be defined relatively easily. Second, logical methods can be presented nicely from a historical perspective, which enables their consequent development to be tracked.

The relationship between logic and argumentation is more complicated, mainly because there are different theories of argumentation. Those theories reconstruct the ways in which we use arguments. Argumentation theories concentrate, then, on relationships between arguments, on comparing them, and on bigger structures consisting of

many arguments. They say much less about how concrete arguments are built. As regards this issue, two stances are possible.

According to the first, represented, e.g., by R. Alexy,[18] arguments should be built in compliance with the rules of logic. From this perspective, logic and argumentation are complementary. The second stance – exemplified in Ch. Perelman's new rhetoric – says that the arguments used in complex argumentation structures do not have to be logically correct. This does not mean, however, that Perelman regards logic as useless. Logical schemata may serve as a special kind of *topoi*. Moreover, many of the classical legal *topoi* that play a crucial role in rhetorical argumentation, as for instance *argumentum a fortiori* or *a contrario*, can be regarded as logically valid arguments. Nevertheless, logically invalid arguments can also be rhetorically effective. Therefore, in Perelman's conception, logic does not occupy any special position and is only a possible source of *topoi*. Argumentation and logic are not, on this account, complementary.

Informal analytic methods can also be reconciled with argumentation theories. For instance, economic analysis can serve both to build arguments and to provide us with criteria for evaluating complex argumentation structures. It must be admitted, however, that the relationship between analysis and argumentation is not inevitable. As already observed, the main aim of argumentation theories is to explain how different arguments are to be compared with others and measured; the problem of constructing arguments, fundamental from the point of view of logic and analysis, is not that important for argumentation theories. It should be added, however, that in contemporary legal theory some attention is paid to the structural features of argumentation resulting in the development of logics, which take into account aspects of the process of argumentation on the one hand, and create informal "logics of argumentation" on the other.

It seems, at least at first sight, that analysis has nothing to do with hermeneutics. It turns out, however, that even those two methods are linked in various ways. One example can be found in analytical hermeneutics. This is connected with the "later" philosophy of L. Wittgenstein. Many analyses of "language games", presented by Wittgenstein, resemble the methods and results of hermeneutic philosophy. Among the "analytic hermeneutic philosophers" one usually mentions: G.H. von Wright, P. Winch and W.H. Dray. Also some legal-theoretic works have an analytical-hermeneutic character, like for instance *Das Verstehen von Rechtstexten* by Hruschka, or some of Aarnio's works.[19]

Analytical hermeneutics cannot be easily classified as one of the two types of hermeneutics: methodological or phenomenological. It is much

closer, of course, to the methodological type, which puts text and the problem of its interpretation in the central place. However, phenomenological hermeneutics, which proposes an alternative-to-traditional ontology, does not have to contradict analysis either. One of the main representatives of hermeneutics, A. Kaufmann, paraphrased a well known phrase of Kant's, claiming that: "Analysis without hermeneutics is empty, while hermeneutics without analysis is blind".[20]

Some interaction, although not as clearly visible as those mentioned above, can be traced "in-between" hermeneutics and logic and hermeneutics and argumentation. The existence of such interaction should not be surprising, for all the four methods are accounts of the same phenomenon: human reasoning. On the other hand, the existence of some similarities and "common grounds" between logic, analysis, argumentation and hermeneutics does not mean that we can speak of one theory. Although we are considering four attempts to account for the same phenomenon, those attempts are drawn from diametrically different perspectives.

Finally, we must stress that the four essays presented below are independent of each other and are self-contained. Because of that, there are some repetitions in the course of the book. We have allowed them for the sake of the coherence of the presentation.

NOTES

1. See J.H. von Kirchmann, *Die Wertlosigkeit der Jurisprudenz als Wissenschaft,* Berlin 1847, p. 14 ff.
2. See J.C. Hutcheson, *Judgment Intuitive*, Chicago 1938, p. 21.
3. See J. Stelmach and R. Sarkowicz, *Filozofia prawa XIX i XX wieku* [Philosophy of Law in 19th and 20th Centuries], 1st ed., Kraków 1998, p. 89 ff.
4. See L. Petrażycki, *Teoria państwa i prawa* [Theory of State and Law], v.I, Warszawa 1959–1960, pp. 72–73, 123.
5. See O.W. Holmes, "Path of the Law", in *idem*, *Jurisprudence*, New York/London 1994.
6. See K. Llewellyn, *Brumble Bush*, New York 1969, p. 12 ff.
7. See R. Pound, *Outlines of Lectures on Jurisprudence*, Cambridge 1943, p. 104 ff.
8. See H. Lloyd, *Introduction to Jurisprudence*, New York/Washington 1972, p. 366.
9. See A. Ross, *On Law and Justice*, London 1958, p. 45 ff.
10. See G. Teubner, *Recht als autopoietisches System*, Frankfurt am Main 1989, p. 49 ff.
11. See R. Posner, *Problems of Jurisprudence*, Cambridge/London 1990, p. 360 ff.
12. Cf. J. Stelmach, *Kodeks argumentacyjny dla prawników* [Argumentation Code for Lawyers], 1st ed., Kraków 2003, p. 31.
13. Cf. J. Stelmach, *Die hermeneutische Auffassung der Rechtsphilosophie*, Ebelsbach 1991, p. 19 ff.

14. Cf. W. Litewski, *Podstawowe wartości prawa rzymskiego* [The Basic Values of Roman Law], Kraków 2001, pp. 22, 51–52.
15. Cf. W. Litewski, *Jurysprudencja rzymska* [Roman Jurisprudence], Kraków 2000, pp. 23, 119–133.
16. Cf. R. Alexy, *A Theory of Legal Argumentation*, translated by R. Adler and N. MacCormick, Clarendon, Oxford 1989.
17. Cf. J. Hintikka, "Epistemic Logic and the Methods of Philosophical Analysis", *Australasian Journal of Philosophy* 46, 1968, pp. 37–51.
18. Cf. R. Alexy, *Theory . . .*, *op. cit*.
19. Cf. J. Stelmach, *Współczesba filozofia interpretacji prawniczej* [Contemporary Philosophy of Legal Interpretation], Kraków 1995, pp. 71–72.
20. Quoted after K. Opałek, "Główne kierunki niemieckiej teorii i filozofii prawa po II wojnie światowej" [Main Currents in the German Theory and Philosophy of Law After the Second World War], in *idem, Studia z teorii i filozofii prawa* [Studies in Theory and Philosophy of Law], Kraków 1997, p. 41.