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Methods of Legal Reasoning

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Of course, the procedural account of practical, legal discourse may (just as the topical–rhetorical account) give rise to doubts. Problem-thinking – preferred within the topical–rhetorical approach – has been replaced with systematic thinking. Systematic thinking, though, can plausibly be defended only if one accepts a number of idealistic (normative) presuppositions, which, as a rule, are of meta-theoretical nature. This is because the procedural theory of legal discourse only constructs presuppositions and conditions for the "proper" theory of legal argumentation. The possibility of applying such a complex theory in practice is in fact very limited. Besides, not all theses and rules are self-evident in an analytical or common-sense way, and the catalogue can in principle be supplemented and modified arbitrarily. In consequence, the procedural theory of a discourse cannot be definitely "closed", and each example is only one of many possible versions.

What distinguishes the topical–rhetorical account of a discourse from the procedural one is something that may be termed "an argumentative perspective". Topical thinking takes a concrete problem (a particular legal issue) as its starting-point; only then does it adapt to that problem a given type of argumentation, drawing from topics that can be applied to that problem. Thus, problem-thinking is inductive in its nature: we begin with a concrete issue (normative fact), which we subsequently interpret by appealing to "common places" of legal thinking, i.e. to specific topics. Procedural theories of a practical legal discourse propose the reverse way of proceeding. In an attempt to prove the rightness of the premises assumed to justify argumentative decisions, we appeal in the first place to the general rules of a practical discourse and the rules of a legal discourse. These rules enable us to ascertain whether a proposed solution to a concrete case fulfils the criterion of "an ethical minimum", i.e. the criterion of formally understood rationality or rightness. It is not until this test is passed that an argumentative dispute may be finished. Thus we are dealing with a kind of systematic proceeding, which can be described as deductive, since the argumentation begins "from what is general" (i.e. from rules (axioms) of a (practical and legal) discourse) to reach "what is particular" (i.e. a solution to a concrete legal problem).

Ultimately, however, both topical and procedural conceptions provide an answer to the question of whether legal decisions should be made solely on the basis of legal norms (rules). Even though procedural theories favor systematic thinking in the law, they nevertheless admit the possibility of appeal to extra-legal elements, such as the general rules of a practical discourse, in a legal discourse.

4.3 LEGAL ARGUMENTATION

The time has now come to attempt to summarize the above discussion of legal argumentation. At the beginning of this chapter it was suggested that theories of a legal discourse in jurisprudence "want" to occupy the place between formal logic and "hard analysis" on the one hand, and hermeneutics on the other. This opinion can be confirmed in light of what has already been established. The procedural theories of legal argumentation make use – to a relatively large extent – both of logic and of all types of linguistic analysis. Topical–rhetorical theories of a legal discourse, which reject systematic methods in the analysis of law, make use (just as hermeneutical philosophy does), in the first place, of informal logic and "soft analysis". Theories of legal argumentation depart from the standards of thinking about law, which were fixed by legal positivism, the law of nature and legal realism. Within these theories, according to the spirit of Kantian philosophy, ontological problems have been eliminated, and the center of gravity has fallen on methodological issues. These are theories of purely interpretative nature, and, accordingly, they assert that a concrete (real) law emerges only as a result of the process of argumentation. Their orientation is anti-positivistic, because they assume that decisions made in a legal discourse may be based not only on legal norms (rules), but also on the general rules of a practical discourse, ethical standards, arguments and legal topics.

In our view, it is not possible to show correctly and rationally that any one conception of a legal discourse is better than another. We deem controversies over this issue to be entirely academic. The complexity of the structure of a practical, legal discourse, the openness of theories of argumentation to all other philosophies of interpretation, and, accordingly, the constant possibility of their modification and improvement, and the impossibility of applying most of these theories in argumentative practice (the more theoretically sophisticated a theory of argumentation, the less practically useful it becomes) are all reasons which support the assertion that it is necessary to use both (discussed above) approaches. That is, the topical–rhetorical approach as well as the procedural approach should be combined with a view to producing an adequate theory of a practical, legal discourse, i.e. a theory that can be realized – applied in interpretative and argumentative practice. The topical–rhetorical conception – if deprived of the theoretical (systematic) perspective provided by the procedural approach – will be too narrow (lame). The procedural theory, in turn will be too wide (leaping) if detached from topics that can be interpreted materially.[26]

Opposing the problem approach and the systematic approach, and persistently trying to prove that the former or the latter characterizes legal thinking makes little sense, for the simple reason that we appeal to both approaches when we make interpretative decisions, or when we conduct a more widely understood legal discourse. Moreover, these types of thinking are interlinked: problem (topic)-thinking turns into systematic thinking and vice versa – this is precisely what the *sui generis* dialectic of a legal discourse consists of. Joining the two perspectives – topical–rhetorical and procedural – enables the avoidance of one more objection, which can almost always be raised, namely, that theses or rules of a purely formal, procedural and normative nature are often confused with theses or rules possessing a material, descriptive and empirical character. The conception of a practical discourse proposed below possesses features characteristic of both normative theory (in the part of the conception which concerns formal rules of a legal discourse) and descriptive theory (in the part which concerns legal topics that can be interpreted materially).

4.3.1 Claim to Universality

Legal argumentation as a method is intended to be of universal application. This is by no means surprising, given that similar claims are set up in the other philosophies of interpretation, i.e. logic, analysis and hermeneutics, though each asserts its claim slightly differently. Since we regard the distinction (already made in the earlier part of this book) between practical and theoretical discourse as plausible, we can examine this thesis, concluding that it is only with reference to its specific field of application that legal argumentation is universal. Naturally, this field is the field of practical cognition. Thus, according to this thesis, a proper argumentation can be led only within a practical discourse (and what is more, this argumentation is to be limited only to "hard cases" – see Section 4.3.2, rule 5). As for a theoretical, legal discourse, however, it is open to all the other scientific methods (logic, analysis), arguably with the exception of argumentation (since one does not discuss facts). Thus, argumentation may be regarded as a specifically 'legal' method, because it enables us to operate in the world of practical (normative) reasoning, where it is no longer possible to decide issues according to the criterion of truth and falsity. Just as logic and the methods of analysis are irreplaceable in a theoretical discourse, argumentation is irreplaceable in a practical discourse. It follows from this fact that the claim to universality contained within theories of argumentation can reasonably be discussed only in relation to a practical discourse. From this perspective,

it is possible to affirm that only phenomenologically oriented hermeneutics may justifiably assert a full claim to universality (i.e. with reference to both kinds of discourse). This is because "the problem of understanding" has neither ontological nor methodological limits.

The universality of argumentation, however, can also be defended along different lines. For example, by attempting to demonstrate the universal validity of general rules of practical discourse, a universally valid procedure and ethics for all possible communications between people can be established. Accordingly, the rules thus interpreted are fully transcendental in nature and, for that reason, the scope of their application cannot be limited to a practical discourse, still less to a legal discourse.

4.3.2 Structure of Legal Discourse

Now the time has come to deal in more detail with legal discourse. As the foregoing considerations imply, both views of a practical legal discourse ought to be discussed: procedural (formal) and topical–rhetorical (material). General rules establish a universally valid procedure for every possible practical discourse (including legal discourse). These rules enable criteria determining the viability of a practical discourse or, more precisely, concrete argumentative decisions, to be formulated. The criteria are rationality and rightness. To put it more simply, a practical discourse is rational and right if, and only if, it is conducted in accordance with general rules (to be discussed below). The rules are elementary, which is why accepting them is not a matter of the good will of participants in a discourse, but a sort of ethical imperative. In excluding these rules from a practical discourse, every possibility of achieving a morally acceptable communication is excluded. The indefeasibility (universal validity) of these rules follows from the fact that they are purely formal (alluding to Kant's philosophy, we might say that these rules are *sui generis* categorical imperatives of a practical discourse, determining not the content but the form of concrete argumentative resolutions), and from the fact that they can be justified (confirmed) in many different ways (e.g., by appealing to common sense, the criterion of self-evidence, or to the Kantian conception of practical reason, which implies the existence of universally valid ethical intuitions confirmed by the universally valid moral law – the formally understood categorical imperative). In relation to legal topics, and in consequence, to final argumentative resolutions, general rules play the role of sanctioning rules. Without these rules, an argumentation, based solely on material premises, could always be undermined. Bearing in mind the fact that the functions of a legal discourse are not only ethical but also instrumental, it is necessary to reasonably limit a number of

general rules commonly regarded as basic. The rationale for doing so is that, by leading to feasible argumentative resolutions, a legal discourse should above all put an end to an interpretative controversy. And criteria of rationality and rightness that are too rigorous might lead to the detachment of a practical discourse from a concrete argumentative case.

It is the stage of application (the topical–rhetorical stage), which guarantees that a legal discourse will be realized. At this stage, one becomes entangled in problem-thinking about a legal issue (being the object of a discourse), as one begins to appeal to material legal topics. A selection of topics will be different in each legal discourse (only general rules will remain the same); more specifically, it will turn on the difficulty level and argumentative context of a given case, as well as on the traditions and the habits of participants in the legal discourse engendered by this case. In a legal discourse, depending on the place where they appear, topics (arguments and legal principles) may play either the role of *loci communes* or *loci specifici*. Some arguments and principles may be interpreted in a legal discourse as "common places" (*loci communes*), since their application is universal both in the law (in relation to all kinds of legal reflection) and in other practical discourses (this concerns the majority of arguments and at least some principles, such as, for instance, *pacta sunt servanda*, *ignorantia iuris nocet*, *audiatur et altera pars*, which can be appealed to also in other discourses – for instance, ethical or political). There are also topics which, in a legal discourse, play the role of "special places" (*loci specifici*). These are above all specialized (i.e. referring to a concrete kind of legal reflection) legal principles (such as, for instance, *lex specialis derogat legi generali*, *nullum crimen*, *nulla poena sine lege poenali anteriori*, whose application beyond a legal discourse can hardly be imagined: in non-legal discourses, it is rather the converse of the former principle that is accepted; and, as for the latter, as a rule, it refers only to criminal law).

This issue is highlighted, since, according to Aristotle and Perelman, legal topics (general rules of the law) are only "special places" (*loci specifici*) of the law. As mentioned above, this view flows from their conviction that "common places" (*loci communes*) are always connected with a general – unspecialized – type of reflection. Of course, from the standpoint of a general, practical discourse (if such discourse may exist at all autonomously), legal topics may be treated only as "special places" (*loci specifici*), because they concern a specialized kind of reflection connected with the law. We also want to point out that, although from the standpoint of the topical–rhetorical approach, topics form the material content of a legal discourse, many arguments and principles can be interpreted

in a formal way. Such an assumption essentially undermines the opposition (accepted by the proponents of the topical account of legal argumentation) between two types of thinking in a practical discourse – namely, problem thinking and systematic thinking: topics, if interpreted materially, may be an element of the former; if interpreted formally – of the latter.

In our view, an analysis of the structure of a practical discourse should embrace general rules of a practical discourse, the rules of passage (joining a general discourse with a legal one) and legal topics (arguments and legal principles). General rules and rules of passage determine the formal and procedural character of a legal discourse, while legal topics inform its material content. These rules and topics will be discussed below in the order proposed above.

General rules. Here, a catalogue is constructed of rules, which appeal to the criterion of self-evidence. That is to say, we are take into account only rules, which can hardly (or which simply cannot) be questioned from the viewpoint of common sense or from the viewpoint of elementary ethical standards. In this sense, they are universally valid and indefeasible. A formal (in the sense which Kant gave to the categorical imperative) character of these rules enables defining the criteria of rationality and rightness to be used while assessing decisions made in the course of a practical discourse. This is because an argumentation satisfies the "minimum" requirements of rationality or rightness (i.e. it can be accepted, or regarded as valid) if and only if it is made in accordance with these rules. General rules establish both the procedure and formally understood ethics of a practical discourse. Thus, ultimately, a list of these rules should embrace only those, which are uncontroversial, universally accepted and unequivocal (as far as the way they are formulated is concerned). There is a danger that every attempt at building a catalogue of these rules may provoke a difficult controversy as to whether successively proposed rules are universally valid and should always be complied with in a practical discourse:

1. *One should engage in a practical discourse only if one is convinced that the discourse can justifiably be called right*. More specifically, one should be above all convinced that the methods used in the discourse are right; the conviction of the rightness of the discourse's objective is of somewhat lesser importance. If an argumentative discourse has been conducted in accordance with general rules, and, consequently, with procedure accepted through these rules, then the final result – being rational and right – also has to be acceptable in an axiological

sense. Thus, one needs to be convinced of the rightness of the rules of argumentation. Otherwise there would be a danger of a participant molding the discourse to a result she has earlier accepted as right, and then trying to achieve it at any price – *per fas et nefas*. Were that to be the case, then the only effectively applicable criterion in a legal discourse would be efficiency (understood eristically). In a practical, argumentative discourse, which appeals to the transcendentally understood criteria of rationality and rightness, the principle that "the end justifies the means" cannot be accepted.

2. *A practical discourse ought to be conducted in such a way that the principle of veracity may be respected.* This rule also seems uncontroversial. In a discourse, one may not lie, tell untruths, or omit to tell the truth by remaining silent. It is also forbidden to invoke any circumstance that might justify lying (e.g., some sort of external pressure or coercion). What is more, even lying "in a good cause" is not allowed. Even though the view that the principle of veracity ought to be realized in a practical discourse without exception is defended, it is important at the same time to be mindful of the possibility of limiting this principle in a legal discourse. Examples of limiting the principle of veracity in a legal discourse are provided especially by legal rules concerning criminal action, which formally sanction the right to "passing over truth in silence".[27]
3. *A practical discourse ought to be conducted in such a way that the principles of freedom and equality are respected.* A practical discourse ought to proceed in accordance with the formally understood principles of freedom and equality. This means that, in the course of a discourse, we must proceed in accordance with at least eight special rules that follow: (1) an argumentative discourse ought to be accessible to everyone possessing sufficient knowledge of the discourse's object and, in some cases (e.g., in the case of a legal discourse), a justifiable interest in it, (2) each participant in a practical discourse ought to possess the same privileges and be subject to the same limitations, (3) additional privileges and limitations can be introduced only if agreed by all the participants in a practical discourse (these privileges and limitations ought to affect each of them to the same degree), (4) each participant in a legal discourse ought to have the same opportunities to participate in it, especially with respect to opening the discourse, submitting theses and presenting views, giving answers, suggesting that the discourse should be suspended or finished, (5) no participant in a legal discourse may be subject – in connection with the discourse – to pressure or to any limitations, unless these limitations affect each

participant to the same degree, (6) each participant in a practical discourse ought to justify the thesis she submits in the discourse, or to answer a question, if another participant requires that she do so, (7) if a person wishes to treat one participant in a discourse differently from the others, she is obliged to justify her doing so, (8) if a decision (or the establishment of a fact) made in the course of a practical discourse satisfies only some of those participating in the discourse, the remaining participants ought to agree to that decision (or that establishment of fact). The content of rules 4–8 reflects the principles formulated by Habermas and Alexy.[28]

4. *A practical discourse ought to take the basic principles of language communication into account*. This rule also is a fundamental one, since a practical discourse ought to satisfy the condition of inter-subjective communicability, expressed by the following seven special rules: (1) a practical discourse ought to be transparent, (2) a practical discourse ought to be conducted by means of the most simple language possible, (3) in a practical discourse, a concept can be given a different meaning than that accepted in ordinary language only if this meaning is accepted by all participants in the discourse, (4) each participant in a practical discourse who uses some predicate to define an object ought to use the same predicate with reference to every object having similar – essential – properties, (5) each participant in a discourse should give the same meaning to a given expression[29], (6) each participant in a practical discourse ought to use the methods of language analysis, possibly extensively, (7) the course and the results of a practical discourse ought to be generalizable. The rule of generalizability played a crucial role in the theories of argumentation (Perelman, Schwemmer, Habermas and Alexy wrote extensively about it). This rule also contains the essence of the condition of inter-subjective communicability of a practical discourse: if argumentation could not be generalized, then a practical discourse could not satisfy the conditions of openness and transparency.
5. *A practical discourse ought to be conducted only in hard cases*. This rule seriously limits the scope of application of a practical discourse – it implies that it is necessary to narrow the "claim to universality" of a practical discourse, discussed above. At the same time, though, it is important to remember that, in principle, the whole philosophy of humanistic interpretation has been "invented" for hard cases, i.e. cases which cannot be interpreted and adjudicated by means of standardized (algorithmic) methods. Another question arises concerning the role of a practical discourse: is there one, and only one, rational

and right decision in a given hard case, or are there many such decisions? Let us recall that, according to Hart, a judge who has to adjudicate in a case should appeal only to legal rules. Only when there are no applicable rules (which is typical for hard cases), she must have recourse to extralegal standards. This requirement, however, does not exclude the possibility that a judge will pass an entirely new – precedential – judgment in a given case: she is limited by the rules of valid law, yet she has unlimited freedom in making her final decision.

Dworkin approaches this problem in a different way. He admits that a judge may appeal not only to rules but also to legal standards (principles, i.e. legal topics and policies), yet at the same time he asserts that there exists only one right decision (right answer) in a hard case, and that the judge-Hercules should find it. We are convinced, though, that a hard case may have more than one – rational and right – solution (which, by the way, may be the reason why it qualifies as a hard case). In order to settle a hard case, one must appeal to the rules (norms) of valid law, general rules of a practical discourse, as well as legal topics. A legal discourse not only allows us to discuss possible varying decisions in a hard case, but also provides us with the criteria for choosing one decision from amongst those proposed (the criteria of choice are formulated in the process of the external justification). A rule which confines a practical discourse only to hard cases has a decidedly anti-eristic and anti-sophistic character. It is possible to derive from this rule a ban on undertaking a practical discourse without good reasons for doing so, e.g., only for the needs of "games of negotiation", which give rise to expansive, though superfluous, argumentation. When fully engaging in a practical discourse, it is necessary to be convinced of its rightness (and, consequently, of its necessity), and of the fact that the case being interpreted is a hard one.

6. *A practical discourse ought to take account of established facts*. This rule expresses the conviction that at each stage of a practical discourse we should make use of facts already established in a theoretical discourse, as well as of those which can be established in the future. Alexy spoke in this sense about the rules of transition (*Übergansregeln*) from a practical discourse to a fully cognitive discourse, appealing to empirical theses, purely theoretical theses and theses based on language analysis.[30]
7. *A practical discourse ought to move directly towards its end*. This rule establishes at least two important principles: "the economy of argumentation" and "the directness of a discourse". This rule, just like

rule 5, has an anti-eristic and, in some cases, also anti-rhetorical character. It prohibits the use in a legal discourse of methods (eristic and rhetoric) which might unjustifiably prolong an argumentative controversy. To give some examples, it is forbidden to begin a discourse with exceedingly lengthy introductions, the purpose of which is only "to tire the opponent", to introduce into a discourse many superfluous digressions and questions, to make partial summaries which make it difficult to follow the main plot, to create apparent complications, to call persistently into dispute the opponent's theses which are obviously correct, or to engender chaos and confusion. At least five special rules can be related to the rule of the directness of a legal discourse: (1) each participant in a practical discourse should confine herself to submitting only such theses, rules and arguments which she is convinced will contribute directly to the settlement an interpretative case (being the object of the discourse), (2) no participant in a practical discourse may submit a thesis which contradicts already accepted theses, unless she sufficiently justifies it or convinces all other participants in the discourse that the thesis is to be accepted, (3) no participant in a discourse should contradict herself, (4) each participant in a discourse who submits a thesis not connected directly with the discourse's object should present her reasons for having done so, (5) each participant in a practical discourse who attacks a thesis which is not connected directly with the discourse's object should present her reasons for having done so.

8. *A practical discourse ought to allow for generally accepted standards, practices and customs*. The principle of inertia (*Prinzip der Trägheit*) provides that decisions which have already been accepted in a legal discourse are not to be changed or rejected without sufficient grounds. This principle implies that in a practical discourse generally accepted argumentative standards (topics), practices and customs should be taken into account as often as possible. According to Perelman, this principle is fundamental for our spiritual and social life. Since this principle treats the process of interpretation as a historical sequence of events, which ultimately shape our argumentative pre-understanding (*Vorverständnis* or *Vorurteil*), it can be said that it leaves a practical discourse open to tradition. Yet this principle has also been criticized on various grounds. Some saw in it a manifestation of argumentative conservatism – of a static understanding of a practical discourse. What may count as an argument against treating it as a universally valid principle of legal discourse is the fact that, according to rule 5, an argumentative discourse should be pursued only in hard cases,

which often change standards, practices and customs previously established and confirmed by argumentative tradition. Yet, undoubtedly, the principle in question strengthens the principle of the economy of argumentation, because if a standard (a rule etc.) satisfying the criteria of rationality and rightness has been accepted and applied, then it should not be changed without sufficient reason. By giving this principle only a formal meaning (since we do not propose what the material content of standards, practices and customs invoked in a discourse should be), we are able, to include it in our catalogue of general rules of a practical discourse.

Rules of passage. These rules concern "passage" of "transition" from a general, practical discourse to a particular, legal discourse as well as from formal assumptions (deductive, systematic thinking) to material assumptions (problem, inductive thinking, i.e. thinking connected with legal topics and the valid law). The rules of passage enable one to understand the essence of the relationship between a general, practical discourse and a legal discourse, and, in consequence, to make more precise the thesis about "the specificity of a legal discourse" (our version of *Sonderfallthese*). This is so because a legal discourse is, on the one hand, a development of a general discourse – one of its special cases. On the other hand, though, a general discourse exists only in practical applications. If detached from particular discourses, it becomes a collection of general rules and principles determining some "ideal procedure"; the problem, though, is that it is unclear where this procedure should be applied. Only by combining this discourse with concrete material topics and material law do we achieve a complete whole. On the other hand, it is important to remember that a legal discourse is a specific discourse, mainly because it has to be pursued in connection with valid law, which may limit the scope of application of at least some general rules. Both issues find expression in the following three rules of passage:

1. *A legal discourse ought to accommodate the general rules of a practical discourse*.
2. *A legal discourse ought to be pursued in direct connection with valid law*. This rule remains closely related to four other rules: (1) a legal discourse's participants must not defend themselves by claiming their ignorance of the rules of valid law, (2) a legal discourse's participants should make extensive use of dogmatic arguments, yet at the same time, (3) they must not invoke rules of valid law which are not directly connected with the case (which is the discourse's object of concern),

(4) in a legal discourse the use of a concept which is given a different meaning than that commonly accepted is allowed only if there exists a legal definition of this concept, or if the newly proposed definition has been accepted by all participants in the discourse.

3. *The scope of application of general rules in a legal discourse can be limited only if explicitly demanded by the rules of valid law*. Limitations in question may concern the following situations: (1) different positions of parties in legal proceedings, which may lead to limiting rule 3, which spells out the principle of the freedom and equality of every participant in a discourse (what needs to be emphasized in this context is the special position of a judge, who is independent and plays the role of an arbiter in a controversy), (2) an accused person's right of refusal to respond to questions, or to offer explanations, and the right of refusal to offer explanations vested in those sharing close relationships with the accused – these rights may cause the limitation of rules 2 (the principle of veracity), and 6 (the principle of taking account of established facts), (3) a barrister's duty to undertake only legal actions that support an accused person, and an accused person's right not to provide evidence against herself; these principles may lead to the limitation of rules 2 and 6, (4) the duty of a barrister and a legal adviser to keep secret all information gathered in connection with a case – this duty may limit rules 2 and 5, (5) hearing in private, which may limit rule 4, point 1 (the rule of transparency), (6) the necessity of using legal definitions in a legal discourse, which may limit rule 4, point 3 (the principle of ordinary language).

Legal topics. A space between general rules of a practical discourse and valid law is filled by legal topics. It is thanks to topics that we can connect general – formal – rules with a concrete – material – case. At this stage of argumentation, problem thinking is substituted for systematic thinking, appealing to general rules and principles. Thus, an argumentative process begins from the general, and then progresses towards the particular, concrete issue in dispute; this is a procedural stage of a legal discourse. Later, by discussing and deciding the controversy at issue, the direction of thinking shifts and there is a move from the particular to the general. At this topical–rhetorical stage of a legal discourse, we carry out the inductive task of generalizing the decision that has already been made (since according to rule 7, point 4, the course and the result of each practical discourse can be generalized). Only by combining these two argumentative perspectives can we achieve a coherent method of legal interpretation, and simultaneously succeed in avoiding the one-sidedness

implied by the acceptance of only procedural, or only topical–rhetorical, conceptions of a legal discourse.

The term legal topics, is intended to cover both arguments and legal principles. Let us recall that topics can be treated in a legal discourse either as common places (*loci communes*), if they concern universal issues, or as special places (*loci specifici*), if they concern specialized legal issues (issues that are specifically legal and – usually – connected with a concrete field of the law). The fact that in a legal discourse one combines particular topics with a concrete legal case allows one to interpret those topics materially. However, we have already pointed out that it is also possible to confer a formal meaning on at least some topics. Finally, a legal topic is each argument which is generally known, as well as being accepted and justified by a valid legal tradition (in the European legal culture the tradition in question is Roman law). Legal topics often provide strong – barely defeasible – arguments in a legal discourse. They never guarantee, however, absolute certainty because a case may always emerge in which a given argument or legal principle cannot be applied. What may count as the only exception to this regularity, are legal principles explicitly expressed in the rules of valid law. Then they are simply norms valid within a given system of law.

Arguments. In principle, these are certain rules of legal logic (informally understood) whose level of reliability (strength) and potential scope of application in a legal discourse are highly differentiated. It should also be noted that all of the arguments mentioned below (the catalogue is, of course, not exhaustive) can be used, not only in a legal discourse, but also in other kinds of practical discourse. Here, the 16 arguments that we consider to be the most important are considered.[31]

1. *Argument a simili,* or argument from analogy (similarity), is one of the most frequently used arguments in a legal discourse. The conviction underlying this type of argument is that we have the right to apply the same interpretation in similar (analogous, comparable) normative situations. Argument *a simili* may be used in a legal discourse in different situations: with direct reference to a concrete legal norm, a whole statute (*analogia legis*), a legal order, i.e. a system of internal law (*analogia iuris*), a precedent, a custom, or, finally, any other legal rule or principle. This argument may be used only if a similarity is shown between the case being decided and another – earlier decided – case.
2. *Argument a contrario* is the reverse of argument *a simili*: the latter demands reasoning "from similarity", whereas the former demands

reasoning "from difference". The borderline between these two arguments is by no means distinct, however. These arguments are very often used in interpretative (argumentative) situations. To give an example, a hypothetical legal norm dealing with the succession of the sons of a deceased may be interpreted, by means of argument *a simili*, as applying also to the daughters of a deceased, or by means of argument *a contrario*, as applying solely to his sons, since only they are explicitly mentioned in the norm. Which argument is used in a practical discourse will ultimately depend on whose interests are being represented in a dispute.

3. *Argument a fortiori* literally means "argument from the stronger (scope)". This argument appears in two forms: argument *a minori ad maius*, where a narrow inference is given a wider scope, and argument *a maiori ad minus*, where a wide inference is given a narrower scope. Argument *a minori ad maius* is constructed on the basis of a negative rule (a prohibition): if less is forbidden, then more is also forbidden (e.g., if it is forbidden to injure a person, then it is forbidden to kill a person). The argument *a maiori ad minus*, in turn, is based upon a positive rule (permission): if more is allowed, then less is allowed (e.g., if one is allowed to kill a person in self-defense, then one is allowed to injure a person in self-defense). According to Kalinowski, the argument *a maiori ad minus* can be treated as a theorem of formal logic, provided that everything less important is contained in the more important (if all X may do A and each B is A, then all X may do B). Yet the logical character of even this argument was called into question. Take Perelman's example, which undermines Kalinowski's interpretation. In accordance with the argument *a maiori a minus*, a person entitled to buy three bottles of alcohol in a liquor shop, may also purchase one bottle of alcohol. Yet a statute in force in Belgium in 1919 prohibited sales of less than 2l of alcohol. Thus, one could purchase one bottle with a capacity of 2l, but not three bottles each with a capacity of half a liter. Nowadays, analogous situations exist in various kinds of wholesale trade.
4. *Argument ab exemplo,* i.e. "from example", often appears in a legal discourse. What can be regarded as exemplary are some other kinds of a practical discourse, particular theses, rules or principles formulated in the course of this – exemplary – discourse as well as precedent decisions concerning particular cases. Argumentation *ab exemplo* is numbered among the less formal methods of analytical philosophy. In a legal discourse argument *a simili* and *a contrario* are often used interchangeably. In point of fact, argumentation "from

example" and "from exemplary cases" are to a large extent based upon the assumption of similarity (analogy) between "an exemplar" and an object (an argumentative case) to which this exemplar is extended.

5. *Argument per reductio ad absurdum* is used above all in formal logic, where its structure is fairly simple. Suppose we want to prove that statement A is true. We can do this indirectly, assuming that the contradictory statement, i.e. non-A is true. In proving that statement non-A is false, we prove by means of the law of double negation that statement A is true. In a practical (legal) discourse, though, we do not prove truthfulness, but rationality and rightness. Yet we must proceed in a similar way. We may prove that thesis A is rational or right by proving that the opposite thesis, i.e. non-A is absurd. Thus, it is possible indirectly to confirm the rationality and rightness of initial thesis A. Use is made of a certain type of reasoning *per reductio ad absurdum*, because we show that thesis non-A is nonsensical (e.g., that a rational and fair legislator passed a nonsensical or unjust rule).
6. *Argument a rerum natura*, i.e. "from the nature of things", assumes that in a legal, as well as in any other, discourse, one should not formulate theses and make decisions which cannot be – ontologically – realized. This argument, built upon material grounds, cannot in principle be questioned in a legal discourse. It allows us to reject norms or legal rules which prescribe impossible actions. Fuller considered this argument to be one of eight conditions to be fulfilled for the law to come into being.
7. *Argument a loco communi*, i.e. "from common places", appeals to general topics connected with unspecialized fields of a practical discourse (including a legal discourse), to fundamental values, general rules of a practical discourse and at least some legal arguments and principles.
8. *Argument a loco specifici*, i.e. "from special places" appeals to special topics connected with the specialized fields of a legal discourse, to specifically legal arguments and principles, and to precedents from similar argumentative cases.
9. *Argument a cohaerentia*, i.e. "from coherence" is based upon the assumption that a legal discourse should be free from contradictions as far as possible. This argument underlies the requirement that each thesis which stands in conflict with theses already accepted by participants in a legal discourse should be removed. Let us recall that rule 7 (especially points 2 and 3) also concerns these issues.

10. *Argument a completudine*, i.e. "from completeness", in turn, is based upon the assumption that a legal discourse should be as complete as possible. This argument underlies the requirement that each thesis which might cause "an argumentative gap", or constitute a threat to coherence should be removed from a legal discourse. Rule 7 (especially points 4 and 5), mentioned in the context of argument *a cohaerentia*, is concerned, at least indirectly, with this issue.
11. *Systematic argument* presumes that a legal discourse constitutes a certain closed, ordered, coherent and consistent whole, i.e. a system. This argument is strictly connected both with argument *a cohaerentia* and argument *a completudine*. It entitles us to require that each thesis which is not contained in a legal discourse, i.e. which is neither a rule of the system nor a consequence of a rule (argument or principle) be removed from the discourse. Of course, adherents of the purely topical approach will question this argument, because it prioritizes, against their convictions, a systematic way of thinking and arguing.
12. *Teleological argument* is a kind of reasoning focused upon the objective of a legal discourse. This argument enables one to emphasize and ultimately confirm a presupposed objective. According to rules 1 and 7 of a legal discourse, argumentation should be aimed at directly deciding an issue and should be conducted in the conviction of its (i.e. argumentation's) rightness. Thus, one may question all argumentative theses that do not serve the realization of an objective which was assumed as formally right and accepted by all.
13. *Psychological argument* may help in explaining the motives of participants in a legal discourse. Its scope of application, though, is rather narrow. Besides, it is not by chance that this kind of argument was often used in various sophistic and eristic conceptions.
14. *Sociological argument* concerns the behavior of participants in a legal discourse. This argument appeals to purely material (empirical) premises. For that reason theses formulated by reference to this argument are not easy to question, though it must be conceded that the application of these theses in the practical part of a legal discourse is limited.
15. *Historical argument* is based on the assumption that every concrete discourse occurs in a given time and is preceded by something, i.e. has its own history. From rule 8, spelling out "the principle of inertia", it follows that in a practical discourse (including a legal discourse), universally accepted (i.e. being a part of tradition which has been

accepted and regarded as valid) standards (topics), practices and customs should be taken into account.

16. *Economic argument* can be related above all to the principle of argumentative economy expressed in rule 7. To put it simply, a legal discourse should be maximally efficient, it should involve the minimum effort necessary, and generate a rational and fair decision which yields maximum benefits. This argument can also be helpful in constructing a criterion for evaluating the economic efficiency of the results of a legal discourse. Posner, one of the founders of the school of economic analysis of law, asserts that the law in its essence is – or at any rate should be – economically efficient. Subjects who apply the law (judges, officials, all the participants in a legal discourse) must be directed by an economic calculation of the costs of the legal decision available to them. A legal decision may be described as good, rational and efficient in the economic sense only if it contributes to the maximization of social wealth.

Legal principles. A second group of legal topics embraces legal principles, which can be interpreted broadly or narrowly. According to Dworkin, a legal principle is a standard which should be observed, not because it improves or protects some desired state of affairs, but because it is a requirement of justice, honesty or some other dimension of morality.[32] Ultimately, Dworkin distinguishes legal principles from other standards (policies) and legal rules. He asserts that the basic difference between rules and legal principles lies in how they function, not in their content. Legal rules are those norms that are applicable in an all-or-nothing fashion, which implies that legal rules are either satisfied or not satisfied. Legal principles, by contrast can be applied to varying scope and degree (they are graded). We support a broader concept of legal principles, one which embraces all standards that are not directly reflected in the provisions of valid law (principles, policies, norms of customary law, general theses about the law and the methods of its examination formulated by legal dogmatics and legal philosophy and theory, legal "sayings") as well as at least some general legal rules (with the passage of time some legal principles become rules/norms of valid law). In our view, controversy over the frontiers separating legal principles from other standards and legal rules cannot be resolved. One may consider as a legal principle every general statement about the law that has "entered" a given legal tradition and been universally accepted. Concrete solutions to hard cases are most often underpinned by legal principles. Therefore, legal principles are a result of problem-thinking, and they are reached

through an inductive generalization of particular theses formulated with a view to deciding concrete cases. It follows that the level of validity of legal principles in a legal discourse is not constant. According to the assumptions made here, one may encounter legal principles which are directly expressed in the provisions of valid law, legal principles which rest on tradition (their roots often extending as far back as Roman law) and are recognized by lawyers as valid, and, finally, principles which seldom appear in a legal discourse (if they do appear, they are questioned). As a result, it is hardly possible to draw up a catalogue (code) of such principles. All the more so because some previously accepted principles have fallen out of use, and new standards and customs have appeared which more and more frequently play the role of principles in a legal discourse. In our view, the division of principles into general, interpretative and special ones, proposed below, makes possible a rational classification of the basic types of legal principle[33]:

1. *General principles* are connected with "unspecialized places" in a legal discourse, which is why they are appealed to without limit and – in addition – are applied in other kinds of practical discourse. These are some examples of the most important rules of this type: (1.1) *Pacta sunt servanda*, i.e. agreements ought to be observed (put differently: agreements are valid). (1.2) *Lex neminem cogit ad impossibilia*, i.e. a statute (law) may not require anyone to do what is impossible. We have already written about this principle in presenting argument 6, *a rerum natura*. (1.3) *Exceptions should be interpreted strictly and are admissible only in special cases*. Rule 7, points 1, 2, 4, and 5 concerned this principle. (1.4) *Nemo iudex indoneus in propria causa*, i.e. no one can be a proper judge in her own case. (1.5) *Res iudicata pro veritate accipitur*, i.e. an adjudication ought to be accepted as true. The principle of "the validity of an adjudication" is commonly accepted in the law. Legal validity is the normative counterpart of truthfulness. (1.6) *Audiatur et altera pars*, i.e. one ought to hear the other side. This topic is closely connected to the principle of freedom and equality expressed in rule 3. (1.7) *Nemini permittitur venire contra factum proprium*, i.e. one cannot oppose her own position. Recall that rule 7, point 3 introduced a ban on self-contradiction. This principle is connected with another important topic for a legal discourse: *patere legem, quam ipse tuleris*, i.e. submit to a law which you have established. (1.8). *In obvious cases proceedings ought to be brief*. This topic is closely related to the principle of argumentative economy – rule 7.
2. *Principles of interpretation* concern more specific problems connected with the interpretation of valid law and play an important role in a

legal discourse. Again, only a few examples will be presented here: (2.1) *Clara non sunt interpretanda*, i.e. what is clear does not need to be interpreted. This well-known principle is nevertheless controversial: if practical, legal discourse is conducted in full scope only in hard cases (rule 5), then – at least according to some theorists of law – the provisions of valid law must always be interpreted irrespective of how clear these provisions are. (2.2) *Lex retro non agit*, i.e. law does not have retroactive force. Another version of this principle says*: lex prospicit non respicit*, i.e. law looks forwards not backwards. This topic, having its source in Roman law, became one of the fundamental principles of the contemporary state of law. Yet even though it is commonly accepted in lawmaking practice, one may encounter legal regulations that consciously violate it. (2.3) *Ignorantia iuris nocet*, i.e. ignorance of the law is no excuse. Thus, if ignorance of the law cannot be treated as an excuse, by implication people are required to possess a minimum of legal competence. This topic is closely related to the principle: *iura scripta vigilantibus*, i.e. law has been written for those exhibiting due care. Negligence, like ignorance, may not constitute any excuse in a legal discourse. (2.4) *Lex non obligata nisi promulgata*, i.e. law which has not been promulgated is not valid. According to Fuller, the requirement that legal acts be promulgated is one of eight conditions which make the law possible.[34] (2.5) *Lex superior derogat legi inferiori*, i.e. law (a legal act) of a higher degree annuls law (a legal act) of a lower degree. In systems of continental law this principle is considered absolute. (2.6) *Lex posterior derogat legi priori*, i.e. later laws annul earlier laws. This principle is to be applied when two or more legal acts come into play. (2.7) *Lex specialis derogat legi generali*, i.e. a special law annuls a general law. If it is not possible to choose between topics 2.5 and 2.6, then one should apply the "substantial principle". (2.8) *Lex posterior generali non derogat legi priori speciali*, i.e. a general law does not annul an earlier special law. Appeal can be made to this principle when it is necessary to choose between topics 2.6 and 2.7. This principle is then a derogation rule of second degree.

3. *Special principles* are applied in "specialized places" of a legal discourse, because they concern concrete areas of law, especially civil and penal law. The following principles are relevant to civil law: (3.1) *Trust deserves to be protected* so far as, for instance, possession in good faith is concerned. (3.2) *Impossibilium nulla obligatio*, i.e. an obligation to do an impossible act is invalid. (3.3) *It is prohibited to conclude contracts which impose obligations on the third party*. (*3.4*) *Ne ultra petita*, i.e. one should not adjudicate beyond a claim. (3.5) *One*

ought to remedy a caused damage and give back what has been gained without legal basis. (3.6) *Nemo plus iuris ad alium transferre potest, quam ipse habet*, i.e. *no one can transfer more law on the other than one herself has*. Both in civil and penal law two further principles are to be applied: (3.7) *Quisquis praesimitur bonus*, i.e. the presumption that everyone acts in good faith (is innocent). (3.8) *In dubio pro reo* or *in dubio pro libertate*, i.e. where doubt exists a decision should be made in favor of the accused (defendant), or in favor of freedom. Let us now give some examples of principles relevant to criminal law. (3.9) *Law should not yield to the violation of law*. This principle corresponds to topics known in Roman law: *vim vi repeller licet*, i.e. force can be repelled by force, and *vim vi repeller omnia iura permittunt*, i.e. all laws allow the use of force to suppress violence. (3.10) *Lawlessness is forbidden*. (3.11) *Nullum crimen, nulla poena sine lege poenali anteriori*, i.e. an action is not criminal and cannot be punished if it was not a crime under penal law at the moment when it is was carried out. This principle is usually explicitly stated in law – in the Polish Penal Code it is contained in article 1.

4.3.3 Applications

The above analysis implies that the claim to universality raised by the method of argumentation is rather specific and is subject to serious limitations. Methodology worked out by a practical, legal discourse can be directly applied only in the field of normative reasoning. Besides, this discourse should be fully performed only in hard cases. In other situations the methods of a practical, legal discourse are used to a limited degree; it remains the fact, though, that appeal is always made to some solutions (procedural or topical–rhetorical) typical of this methodology.

A practical, legal discourse will clearly be most fully used in legal practice, especially in the process of legal interpretation, justification of interpretative decisions, and – at least to a certain degree – lawmaking. Theses formulated in the theory of legal dogmatics, as well as in the philosophy and theory of law by means of tools worked out by a practical discourse, can be justified provided that these theses are normative in character. Should a thesis be descriptive (theoretical), then theoretical discourse will decide whether it is true or false and, accordingly, whether it should be accepted and included in a set of theorems of a legal discipline.

In conclusion, let us repeat once again that it is only necessary to appeal to methods of argumentation if the potential of "harder" methods (logic and analysis) has been exhausted in practical discourse (let us add that this potential is limited in the normative sphere) and one does not

wish to appeal to the "soft" (intuitive) methods established in phenomenologically oriented hermeneutics.

NOTES

1. G. Kalinowski, *Introduction à la logique juridique*, Paris, 1965, pp. 163–164.
2. K. Szymanek, *Sztuka argumentacji. Slownik terminologiczny* [The Art of Argumentation. Terminological Dictionary], Warszawa, 2001, pp. 286–288; M. Korolko, *Sztuka retoryki. Przewodnik encyklopedyczny* [The Art of Rhetoric. Vademecum], 2nd edition, Warszawa, 1998, p. 19, 3 ff.
3. Ch. Perelman, *Logika prawnicza. Nowa retoryka* [Legal Logic. New Rhatoric], Warszawa, 1984, p. 145.
4. M. Korolko, *The Art . . .*, *op. cit*., p. 64 ff.
5. Aristotle, *Topiki. O dowodach sofistycznych* [Topics. On Sophistic Arguments], Warszawa, 1978, books I–VIII, pp. 3–235.
6. Aristotle, *Topics . . .*, *op. cit*., books I–VIII, p. 264.
7. Aristotle, *Topics . . .*, *op. cit*.; A. Schopenhauer, *Erystyka czyli sztuka prowadzenia sporów* [Eristics or the Art of Discussion], p. 45 ff; K. Szymanek, *The Art . . .*, *op. cit*., p. 45.
8. J. Stelmach, *Code . . .*, *op. cit*., p. 33.
9. R. Alexy, *Theory . . .*, *op. cit*., p. 51.
10. J. Habermas, *Vorstudien und Ergänzungen zur Theorie der kommunikativen Handelns*, Frankfurt am Main, 1984, p. 160, p. 174 ff.
11. See R. Alexy, *Theory . . .*, *op. cit*., p. 273.
12. J. Habermas, *Wahrheitstheorien*, in H. Fahrenbach (ed.), *Wirklichkeit und Reflexion*, Pfullingen, 1973, p. 239 ff.
13. See N. Luhmann, *Legitimation durch Verfahren*, 4th edition, Frankfurt am Main 1983.
14. R. Alexy, *Theory, op. cit*. . . ., pp. 33–38, 263–272, 356–359; J. Stelmach, *Code . . .*, *op. cit*., pp. 26–31.
15. Ch. Perelman, *Legal . . .*, *op. cit*., pp. 160–162.
16. As for arguments, Perelman appeals to the classification of G. Tarello presented in the article "Sur la spécificité du raisonnement juridique", *Archiv für Rechts-und Sozialphilosophie* 7 (1972), pp. 103–124, whereas as regards the classification of legal principles, he draws on a juxtaposition made by G. Sruck and described in *Topische Jurisprudenz. Argument und Gemeinplatz in der juristischen Arbeit*, Frankfurt, 1971, pp. 20–34.
17. Ch. Perelman, *Legal . . .*, *op. cit*., pp. 129–139; J. Stelmach, *Code . . .*, *op. cit*., pp. 85–106.
18. Ch. Perelman, *Legal . . .*, *op. cit*., pp. 145–147.
19. Th. Viehweg, *Topik und Jurisprudenz*, 5th edition, München, 1974, pp. 19–30.
20. Ch. Perelman, *Fünf Vorlesungen über die Gerechtigkeit*, München, 1967, pp. 158.
21. Ch. Perelman, *Justice, Law and Argument*, Boston, 1980, p. 73.
22. R. Alexy, *Theory . . .*, *op. cit*., pp. 225–232.
23. *Ibidem*, pp. 234–235.
24. *Ibidem*, p. 285.
25. A. Aarnio, R. Alexy, A. Peczenik, *Grundlagen der juristischen Argumentation*, in W. Krawietz, R. Alexy (eds.), *Metatheorie juristischer Argumentation*, Berlin, 1983, p. 42.

26. A distinction between adequate, lame and leaping theories was introduced by Petrażycki. See L. Perażycki, *Wstęp do nauki o prawie i moralności* [Introduction to the Theory of Law and Morality], Warszawa, 1959, pp. 128, 139, 153.
27. See a statute from June 6 1997, Polish Code of criminal law (Book of Statutes, No 89, position 555 with later changes), art. 74, 175, 182, and 186.
28. J. Stelmach, *Code . . .*, *op. cit*., pp. 47–50.
29. Rules 4 and 5 are mentioned by R. Alexy in *Theory . . .*, *op. cit*., pp. 234–235.
30. R. Alexy, *Theory . . .*, *op. cit*., p. 255.
31. See J. Stelmach, *Kodeks . . .*, *op. cit*., pp. 72–86; also, Ch. Perelman, *Logika . . .*, *op. cit*., pp. 90–95.
32. R. Dworkin, *Taking . . .*, *op. cit*., p. 22. See also J. Stelmach, R. Sarkowicz, *Philosophy . . .*, *op. cit*., p. 50 ff.
33. See G. Struck, *Topische Jurisprudenz . . .*, *op. cit*., pp. 20–34; also J. Stelmach, *Kodeks . . .*, *op. cit*., pp. 86–105.
34. L. L. Fuller, *Moralność prawa*, Warszawa, 1978, p. 68.

CHAPTER 5

HERMENEUTICS

5.1 INTRODUCTION

Hermeneutics is one of the oldest and most disputed of all the philosophies of interpretation. There exist equally eminent advocates and opponents of this philosophy. Its opponents, at least in contemporary philosophy, were most frequently adherents of analytical philosophy. They perceived hermeneutics as a threat to their own philosophical autonomy, and, in consequence, attacked it, its fundamental assumptions and, in their view, its unclear and imprecise language with surprising vehemence. They often acted, in the spirit of the principle derided by Gellner, whereby if you cannot prove the convictions of a rival are false, you should declare that they make no sense.[1] Mutual tensions lost their significance with the passage of time, one reason being that there appeared different "frontier hermeneutics", in particular analytical hermeneutics and hermeneutics understood as a theory of communication.

5.1.1 The Beginnings of Hermeneutics

The term "hermeneutics" comes from the Greek word *ἑρμηνέιν* which denotes the art of prophesying, translating, explaining, interpreting. Over time, the meaning of this term was enriched and supplemented. The genesis of the notion of hermeneutics is also associated with the name of the messenger of the gods, Hermes, who, as is well known, was believed to have created language and writing. In philosophy this word appeared in Aristotle's *Peri hermeneias*. The term he used – "*hermeneia*" – expressed a connection between interpretation and understanding, since *heremeneia* is a meaningful enunciation which says "something about something" and grasps reality by means of expressions. It should be stressed, though, that the above mentioned work of Aristotle was no systematic exposition of hermeneutics but only a part of *Organon* – a part comprised of a description of a certain kind of logical grammar. This logical grammar was to deal with analysis of the structure of language – the structure of propositions – without being limited to the examination of their truthfulness. In modern times the term "hermeneutics" appeared

in the title of a whole work of Dannhauer – *Hermeneutica sacra sive methodus exponendarum sacrarum litterarum* (published in 1654).

Until the nineteenth century, hermeneutics was being developed mainly in the form of particular "theories" formulated in the fields of theology, philology and jurisprudence. It was only due to Schleiermacher and Dilthey that general philosophical (humanistic) hermeneutics arose. As a result, hermeneutics no longer denoted only the art of interpretation and understanding of texts: Dilthey elevated it to the objective, universal methodology of the humanities, which he called "the methodology of understanding", whereas Husserl, Heidegger and Gadamer interpreted hermeneutics as the ontology of understanding. As mentioned, there appeared also "frontier" accounts of hermeneutics. At the same time, the scope of application of hermeneutical philosophy was on the increase. Apart from the disciplines already mentioned – theology, philology and jurisprudence – hermeneutics was also to find its application in history, sociology, psychology, political sciences and even economics.

The first period of development (until the end of the eighteenth century) of the philosophy of interpretation under discussion can be illustrated by presenting three particular hermeneutics: biblical, philological and legal.

Biblical hermeneutics. Biblical hermeneutics was already known to the authors of Halakha and Aggadah. Hermeneutics was then understood as an art of the exegesis of the Biblical text. The art of exegesis, explanation and interpretation of the Scriptures was perfected by successive rabbinic generations. Over time, a conception of revealed, inspired and prophetic understanding also emerged, which was to play an important role in late Christian hermeneutics based on Jesus' activity.

As a result of "the Christ's event" there arose an extremely important and fast developing trend in biblical hermeneutics, whose main objective was to explain the whole of the Scriptures. In the first centuries of Christianity there existed a sharp conflict over interpretation, which gave rise to an urgent need to construct a uniform theory of Scriptural interpretation. This theory was to ensure uniform understanding of the whole biblical tradition. "New hermeneutics" was to make possible the choice of a proper theory of biblical interpretation. The first works devoted to the interpretation of the scriptures – works that established rules of interpretation enabling internal coherence to be reached in the understanding of the Old and New Testament – arose as early as the second and third century A.D. At that time two hermeneutic schools, the Alexandrian and Antiochian, concerned with explanation of the Scriptures were

already active. Among the main representatives of the Alexandrian school are Justin, Tertulian, and Origen; this school developed an allegoric interpretation of the Bible. According to Origen, one can assign three dimensions of meaning to the Scriptures: corporal, i.e. historical and available to all the faithful, psychological, and pneumatic (spiritual), which can be reached only by a few scholars analyzing the scriptures. One may obtain spiritual insight only by means of the allegorical interpretation. The Antiochian school was founded later than the Alexandrian one in the fourth and fifth centuries by Theodoros and Diodoros. This school promoted a literal interpretation of the Scriptures. The allegorical method preferred by the Alexandrian school was replaced with a critical method of exegesis based on philological and historical research.

Yet, at that period, St. Augustine was author of the most influential and coherent theory of biblical interpretation. In book three of his *De doctrina christiana*, he presented his view of the role and function of biblical hermeneutics and conducted a philosophical analysis of the process of understanding. In particular, he undertook an analysis of the notion of a sign, which he defined as a medium of thought, stressing at the same time that every theory of exegesis must have its own theory of sign and of meaning. He developed a conception of the reasons for the Bible's incomprehensibility and described the core rules governing interpretation of the Scriptures. Having made due allowance for the significance of historical and philological research, he went much further, undertaking an analysis of the phenomenon of understanding as something which is conditioned by faith. Thus, he attained the concept of a mystical – illuminated – understanding underlying the real (inspired, revealed) interpretation of the Scriptures.

Of course, in the discussed period, many other philosophers and theologians (for instance, Eucherius from Lyon in the fifth century, Julius African in the fifth century, Cassiodor in the sixth century) also tackled the problem of biblical exegesis.

In modern times, a work of special significance was Flacius' *Clavis Scripturae Sacra* (1567), which is the author's attempt to set forth rules for interpreting the Bible in the form of a systematic set. The application of these rules was to enable the accomplishment of universally valid understanding of the Scriptures. Flacius also formulated a general hermeneutical principle, according to which a part of a work can be understood only if it is related to the whole work, and to its other parts. Thus, presumably for the first time, the principle of a hermeneutical circle was spelled out. In Flacius' view (before Flacius a similar view was