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Methods of Legal Reasoning

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themselves history. His distinction between objective time and historical time roughly corresponds to the distinction made within hermeneutics between "objective history" and "subjective historicity" (*Geschichlichkeit*). Thus, a non-linear – phenomenological – conception of time was supplemented with a phenomenological-hermeneutical analysis of "the experience of the law". G. Husserl argued that the essence of legal cognition is the reduction of legal ideas to an ontological level, on which "what the law is" can be revealed. This process of reduction is at the same time a process of actualizing the law itself – applying it in concrete situations – because the act of reduction uncovers the basic (original) structure of every possible law – the structure which has an *a priori* character. In consequence, according to G. Husserl, legal order is the basic phenomenon of the social world.[30]

Maihofer. In turn, Maihofer's ontology of law, outlined in his study *Recht und Sein,* has distinctly Heideggerian roots. Maihofer attempted to transfer "fundamental ontology" to the terrain of philosophical–legal reflection. The hermeneutics of *Dasein* (the being capable of self-understanding) is intended to enable Maihofer to construct an existential ontology of the law. Maihofer emphasized that phenomenology enables the discovery of a new dimension of being and an order inherent in it – the order which law is also a part of.[31]

Gadamer. Gadamer also expressed directly his opinion about legal hermeneutics. As was mentioned, Gadamer asserted that there is one – general and universally valid – philosophy of understanding, which strives to answer questions about conditions for the possibility of understanding in general, and thereby questions about conditions that make understanding of the law possible. Legal hermeneutics at best might possess an "exemplary meaning" (*exemplarische Bedeutung*) for other particular hermeneutics, as well as for general hermeneutics. According to Gadamer, the distance between humanistic hermeneutics and legal hermeneutics is not as large as it is usually considered to be. Accordingly, legal hermeneutics is in fact not a special case, but it does make the scope of problems to be tackled within historical hermeneutics as broad as it was in the past; in consequence, one witnesses a return to an old-time unity of the hermeneutical problem – one may say that the lawyer and the theologian meet anew the philologist. If the lawyer – acting in his capacity as judge – endeavors to interpret the text of a statute (to reconstruct the original sense of the text and enable its application), then he acts exactly as he would in the course of any other understanding.

Understanding is most strictly connected with interpretation and application. More accurately, interpretation and application are integral parts of the hermeneutical experience, i.e. of the process of understanding. The point to be stressed is that application is inherent in (pervades) all forms of understanding – it is not to be construed as a later (secondary) stage at which one applies something general, that has been earlier understood, to a concrete case. Thus, application is the actual understanding of the general, which the interpreted text provides for us.[32]

Kaufmann. Gadamer's work in the philosophy of law was continued above all by Kauffman, who provides an ontologically oriented conception of legal hermeneutics. The key problems in his considerations are the understanding, interpretation and application of law, and the relationship between law and statutes.

According to Kauffman, the law emerges (is constituted) during the hermeneutical act of understanding.[33] Thus, the law does not exist before interpretation – it has to be found, created. The interpretation of law, the process of making legal decisions, and even the whole administration of justice constitute a fully creative process. Underlying this process is the distinction between the law and a statute. A statute has its source in a legislator's authority. As for the law, it really exists – it stems directly from the being; it has its source in the natural order of things, its existence is therefore primary – independent of any authority. A statute is only one aspect of law's realization. The relationship between the law and a statute is just like the relationship between an act and potential, or reality and possibility. Ultimately, both a statute itself, and abstract ideas of law such as the concept of just law are, in Kaufmann's view, only possible forms of law. The essence of the law is located in the fact that it is unavailable (*unverfügbar*), concrete and historical. Its positive character constitutes its existence, and rightness – its essence. The law expresses "the primary analogy" – correspondence – between "is" and "ought". Legal cognition should take account of this analogy.

Kaufmann reckons that only through hermeneutics – the ontology of understanding – will it be possible to overcome the one-sidedness which has encumbered both conceptions of the law of nature and positivistic conceptions. For this reason he rejects the ontology of substance assumed in classical theories of the law of nature. Such ontology would create the danger of, *inter alia*, objectivity which is undesirable from the perspective of the hermeneutic approach. Objectivity has been replaced with "the historicity of the understanding of law". Law emerges through the act of understanding, it comes into existence, or happens at a specific

temporal (historical) moment; it is not a state but rather an act. To put it differently, the law is a relationship between a norm (which is usually general) and a concrete case, a relationship which is finally manifested in the person. In this way the ontology of substance is replaced with the existential ontology of relationships.[34]

The law is therefore the result of a process Kaufmann calls "legal realization" (*Rechtsverwirklichung*). "Concrete law" is the "product" of the hermeneutical process of a sense's development and realization (*Sinnentfaltung – Sinnwerwirklichung*). The essence of interpretation is ultimately the act of understanding – the capacity to interpret is synonymous with the capacity to understand. Three degrees (stages) can be distinguished in the process of legal realization (*Rechtsverwirklichung*). The starting-point is abstract – extra-positive and extra-historical – legal principles (ideas). Then we pass through the general – formal-positive – norms contained in a statute (the second stage) to the concrete – material-positive – historical law (the third stage). This concrete historical law is established in the process called "finding the law" (*Rechtsfindung*), which consists in "establishing coherence" and "seeking correspondence" between actual states of affairs (*Lebenssachverhalte*) and norms or, to put it differently, "bringing them closer to each other".[35] The establishment of a legal decision – the act of finding a legal solution – is achieved through a historical act of understanding which appeals directly to an original analogy contained in the concept of the law. For the act of understanding brings together subject and object, duty and being, norms and an actual state of affairs.[36] The syllogistic model of the interpretation and application of law has been decidedly rejected by Kaufmann. For the understanding of a legal text designates a certain ambivalent – creative – productive process. The hermeneutical understanding of a text is not something receptive; it is rather a practically shaped act in the course of which concrete historical law emerges.

According to Kaufmann, legal hermeneutics is a special example of the philosophy of understanding, in which there is – besides ontological – a methodological and practical moment. Proceeding, hermeneutics implies, is practical in character. Thanks to hermeneutics it is possible to transform jurisprudence and the philosophy of law into a theory of action (*Handlungswissenschaft*). The ontology of understanding has been transformed by Kaufmann into the ontology of relationships, which, in turn, has enabled him to build a personalized philosophy of law. The concept of law thus leads us to the concept of analogy and this in turn directs us to the concept of relationships, and once again to the concept of the person. The person is not a substance, but a relation, or,

more accurately, the structural unity of what may be defined as "*relatio*" and "*relata*". The idea of law is the idea of the personally understood man, neither more nor less. In recognizing (understanding) the essence of the human person, we recognize (understand) the very essence of law.[37] The concept of the person is inter-linked in Kaufmann's theory with other components of hermeneutical experience such as, for example, pre-understanding (*Vorverständnis*) and the hermeneutical circle. These elements of hermeneutical cognition are justified by the ontological assumption that they are grounded in the structure of individual existence – the person.

Numerous references to the conceptions of Gadamer and Kaufmann can be found in contemporary jurisprudence – both within legal dogmatics and the philosophy of law. An attempt to apply hermeneutics – in the form proposed, among others, by Kaufmann – to the needs of penal law was made by Hassemer in his work *Tatbestand und Typus. Untersuchungen zur straftrechtlichen Hermeneutik*. Hinderling, in turn examines the possibility of using Gadamerian hermeneutics for the purposes of constitutional law; the results of his research are presented in *Rechtsnorm und Verstehen. Die methodischen Folgen einer allgemeinen Hermeneutik für die Prinzipien der Verfasunsauslegung*. Finally, the hermeneutical account of the philosophy of law can be found in Stelmach's work *Die hermeneutische Auffassung der Rechtsphilosophie*.[38] Representatives of the classical current *Methodenlehre*, especially Larenz and Esser (discussed earlier), also made reference to Gadamerian hermeneutics. Occasional remarks on phenomenologically understood legal hermeneutics were made by such authors as Kriele, Baeyer, Leicht, Rottleuthner, Fikentscher, Haba, Fuhrmann, Ellscheid, Neumann, Schroth, Haft, Philipps, Schild, Scholler, Müller-Dietz, Hegebarth, Brito, Calera, Ollero, Saavedra, Zaccaria and Alwart.[39]

5.4 THE UNDERSTANDING OF THE LAW

What is not known about hermeneutics has already been outlined in Section 5.1.2. Now the time has come to attempt to answer at least some of the questions we posed there. Two problems seem particularly interesting in the context of considering the frontiers of the application of hermeneutics in legal argument. Those are the claim to universality made by the philosophy of understanding and the nature of hermeneutic cognition (the core of the latter problem is whether hermeneutic cognition is direct or indirect).

5.4.1 Claim to Universality

Starting from Schleiermacher, all modern hermeneutics aspired to be in some sense universal – at least as a method of the interpretation and understanding of texts, as the methodology of the humanities or – finally – as the ontology of understanding. This claim of hermeneutics (also legal hermeneutics) can also be justified by the kind of problems the philosophy deals with. Hermeneutics is universal, because the problem of language (the philological aspect of each interpretation, history and "things" which are objects of hermeneutic cognition such as, for instance, life, spirit, culture or being understood as individual existence) is universal. Hermeneutics is also universal because hermeneutic experience is of a specific nature: within this experience, in transcending boundaries between general and concrete, theoretical and practical, and between understanding, interpretation and application, one achieves cognitive unity. Finally, hermeneutics (at least its phenomenologically oriented variant) is universal, because it is "the first science" – the starting-point and essential element of every possible cognitive process no matter what the object of that process.

The claim to universality was formulated more narrowly by hermeneutics understood as a kind of humanistic epistemology. The anti-naturalistic thesis which holds that two otherwise objective methodologies – the methodology of explanation (used by the natural sciences) and the methodology of understanding (used exclusively by the humanities) – entails that the universality of hermeneutics is to be limited to the field of humanistic cognition. Those lawyers who were on a quest to find their methodological identity often made use of anti-naturalistic hermeneutics. Were they right in doing so? In our view, they were not. The division of methodologies into the methodology of explanation and the methodology of understanding is entirely groundless, which was clearly realized by representatives of the variant of hermeneutics built on phenomenological bases. Not only do we lack one acceptable definition of understanding, but there are also numerous controversies concerning the process of explanation. What's more, in humanistic, as in every other type of cognition, appeal is made to both explanation and understanding. It is also difficult to defend theses that there exist specific "humanistic objects" (like, for instance, the law). Even if their ontological character could justify identifying them as specific, this would not be sufficient reason to use only one type of method to examine them.

The choice of a method will depend on the complexity and the nature of an interpretative case, the habits of an interpreter, and the interpretative

tradition, rather than on – ultimately entirely arbitrary – methodological decisions. Thus, in the same case, one interpreter will appeal to logic, another to analysis or argumentation, and still another to hermeneutics. Consequently, in view of the above reservations, it must be conceded that attempts to prove the separateness and methodological autonomy of the humanities (including jurisprudence) on the grounds of anti-naturalistic hermeneutics is unfeasible.

The concept of universalism was understood differently, and more broadly, by hermeneutics that was understood as a kind of ontology. Hermeneutics is universal because it tackles the fundamental problem of the understanding of individual being (*Dasein*) and appeals to – intuitive – methods that enable one to know the very essence of this being. Ultimately, hermeneutics thus understood may constitute the starting-point of every cognitive process, without excluding the possibility of applying other methods (say, logical and analytical) in further stages of the process. Thus, were we to have the universally valid hermeneutics, which is both the ontology and epistemology of understanding, we should be glad and consider the earlier problems of hermeneutics as resolved. Yet even then, the following dilemma would arise: either the process of hermeneutic cognition is regarded as purely intuitive, which gives rise to questions about the sources of this cognition and the criteria for its verification, or the process of hermeneutic cognition is regarded as a kind of indirect cognition, i.e. one which appeals to numerous prior theses and assumptions which may fail to be unquestionable. In the first case, one is threatened either by relativism (because one cannot know for sure that conclusions reached in the pure act of phenomenological cognition are ultimate and indefeasible) or – at best – by psychologism (because one will have to justify phenomenological conclusions by appealing to some type of introspective psychology). In the second case, one is bound to get entangled in virtually unsolvable controversies concerning the conditions of hermeneutic cognition (which are: the linguistic character of understanding, historicity, pre-understanding and the hermeneutical circle).

5.4.2 The Nature of Hermeneutic Cognition

The issue of the nature of hermeneutic cognition – its interpretation and essence – probably gives rise to the highest level of controversy. In all modern hermeneutical conceptions, understanding was conceived as a kind of fundamental and primitive cognitive process, conditioning "deeper" insights into the nature of examined objects. Furthermore, phenomenological hermeneutics treats understanding not only as a cognitive

capacity (competence), but also as a property of the individual being – human existence (*Dasein*). However, the issue becomes complicated when attempts are made to clearly establish the nature of this cognition – especially whether it is direct or indirect.

Understanding as direct cognition. The most elementary associations lead us to regard understanding as a kind of primitive capacity which makes no appeal to prior knowledge (experience), theses or assumptions. Hermeneutics was understood in this way by Socrates, who thereby built his conception of philosophy as "deprived of the Archimedean starting-point"; St. Augustine, who wrote about inspired understanding; Schleiermacher, who distinguished the clairvoyant type of understanding; and by the representatives of phenomenology, for whom understanding was the primitive capacity, conditioning the knowledge of "things themselves".

According to the representatives of phenomenology, understanding is a kind of intuitive cognition which enables one to capture a phenomenon in its concreteness, as well as its *a priori* essence. Let us recall that Husserl distinguished many kinds of intuition corresponding to kinds of direct data: rational, irrational (used in emotional acts) and, of course, phenomenological (capturing the concreteness, as well as the essence, of a phenomenon). The representatives of phenomenological hermeneutics, however, were reluctant to pronounce on the nature of the process of understanding. Even the most careful reading of Gadamer's work *Wahrheit und Methode* does not allow unequivocal theses about the essence of understanding to be constructed. In particular, it is not clear whether understanding is a form of direct cognition. A positive answer to this question would give rise to the subsequent questions: which faculties make this kind of cognition possible? what kinds of intuition ultimately compose the capacity called understanding? Phenomenological epistemology may be accepted or not, yet its deeper meaning and significance cannot be denied. Phenomenological hermeneutics engenders many more problems: its representatives decline – almost in a programmed response – to give answers to most questions concerning the nature of the process of understanding; they point out that they are moved by the Socratic reluctance to construct philosophies built on trust in previously accepted theoretical beliefs.

In our opinion, understanding is a type of cognition which may possess an intuitive character. In the process of understanding, one uses both intuition which may be described as rational, and "pure" phenomenological intuition. It is the latter type of intuition that opens the way

to direct cognition. It is commonly used by lawyers, even when they know nothing about phenomenology and hermeneutics. This kind of intuition usually constitutes a starting-point for the process of interpretation; without this intuition it would be impossible to recognize the *a priori* essence of the phenomenon of law and the fundamental relationships (e.g., claim – obligation) which exist in law. Another argument supporting the thesis that understanding is a direct cognition is found in the view – strongly emphasized by Gadamer – of the unity (simultaneity) of processes of understanding, interpretation and application. This view can be reasonably defended only if the very essence of a thing (phenomenon) being examined is reached.

Thus, understanding is a type of direct – intuitive – cognition. But is it anything more than that? Phenomenology is a philosophy of consciousness, that is, a variety of the philosophy of *cogito*, i.e. rationalism. Rational intuition appeals to general notions and earlier accepted theorems and definitions. At this stage of hermeneutical cognition "language enters understanding" and "hermeneutical logic" is substituted for primitive hermeneutical intuition.

Understanding as indirect cognition. The overwhelming majority of early hermeneutical theories (including those proposed in the nineteenth century) conceived of hermeneutics as an indirect method of cognition. Hermeneutics was simply the art of interpreting and understanding texts. This understanding and interpretation of texts is made possible by universally valid rules of interpretation. In some cases, it is not only through the medium of rules of interpretation, but also through psychological facts that we are able to reach understanding and an interpretation. This dual conception of the process of understanding (as direct and indirect cognition) was not suppressed by phenomenological hermeneutics. It was Gadamer who devoted particularly great attention to such properties of the process of interpretation and, consequently, hermeneutical cognition, as its linguistic character and historicity. The issues of pre-understanding and the hermeneutical circle will also reappear continually. The point to be stressed is that all these properties confirm in some way the theory that hermeneutical cognition is indirect in nature.

The linguistic character of understanding. Phenomenologically oriented hermeneutics attached particular importance to the theory of the linguistic character of the process of understanding Let us recall that both Schleiermacher and Dilthey highlighted the primitive character of the philological aspect of all hermeneutics, and of every process of

understanding. According to Gadamer, the only being that can be understood is language. Knowledge of the world is possible only through the medium of language; language, in addition, determines the horizons of hermeneutical ontology. In Gadamer's view, language is not only the means through which we experience the world and the equipment with which we enter this world, but also an expression of our possession of the world. The boundary between language and the material world, which is distinct within other philosophies, loses its sharpness within phenomenological hermeneutics. Without going into the details of this relationship, we shall confine ourselves to observing that everything given to us in the process of understanding (in hermeneutical experience) is given through the medium of language. This thesis is accepted both by "old" and "new" hermeneutics. When seen from this philological (in others' view – analytical) perspective, hermeneutical cognition turns out to be fully discursive and thereby indirect.

A similar situation holds in relation to legal hermeneutics (it is worth noting that legal hermeneutics rarely goes beyond the traditional hermeneutics of texts – Kaufmann's philosophy of legal understanding is an exception). The understanding, interpretation and application of law always concern some entities of language (deontic sentences, rules or norms). At the level of interpretation, "what law is" is no more than a certain linguistic expression. A starting-point of the lawyer's work is in principle linguistic interpretation, though it is a matter of dispute whether this interpretation is made in a hermeneutical or analytical way (assuming that the division of these two approaches is at all practically viable). In either case, though, one has to appeal to a language, principles (semantic, syntactic and pragmatic) of that language, and different levels of rules of interpretation, which either already exist and are universally accepted and applied in similar cases, or which have to be formulated for the needs of an interpretative case. Thus, the assumption that the understanding of law is realized through the medium of language is equivalent to the assumption that hermeneutic cognition is indirect.

The historicity of understanding. The process of understanding has not only a linguistic but also a historical character. Gadamer stresses that hermeneutical experience, if examined beyond its historical context, would be a mere philosophical abstraction, and the very philosophy of understanding would be nothing more than a continuation of an earlier metaphysical philosophy which was questioned by phenomenology. The theory of the historicity of understanding is another argument in support of the view that hermeneutical cognition may be – and most

frequently really is – indirect. This is because, in this process, appeal is made to numerous historical assumptions, prior knowledge, and tradition, which should be applied (i.e. concretized and actualized) to a concrete interpretative case. According to Ricoeur, interpretation and tradition are two sides of historicity, and the chain: tradition – text – interpretation can be read in all possible directions.

The problem of historicity is of particular significance in the context of legal interpretation. It is connected with the important issue of the role of tradition in legal interpretation, and with the issue of "legal application" which is an integral component of hermeneutical experience, along with understanding and interpretation. Each process of understanding and application becomes an element of interpretative tradition. It is hard to imagine legal interpretation entirely beyond its historical context – beyond the tradition (shaped in the case of our continental system of law by two millennia), whose elements are constantly present in each interpreter's consciousness. An interpreter enters "an interpretative situation" with previously acquired legal knowledge, intuitions, prior conceptions of basic legal institutions, her whole legal pre-understanding.

In the process of understanding and interpretation, an interpreter must apply this general historical knowledge to a concrete case, that is, she must concretize and actualize it. Ultimately, the essence of legal thinking (the understanding of law) will always be the process of concretizing, i.e. the application of an interpreted (understood) general text (general norm) to a concrete case. However, hermeneutical concretization cannot be reduced – at least in Gadamer's view – to a deductive operation. Legal hermeneutics emphatically abandons "the syllogistic model of legal application", and Gadamer himself stresses that understanding is concretization, which yet is connected with preserving hermeneutical distance, whatever that means.[40]

Besides concretization, the second condition of the understanding and application of law is actualization. It is true that appeals to the past (tradition) are made in the process of actualization, yet such appeals are intended to modify and change it, i.e. to adapt it to a concrete case, which "happens in the present". Legal hermeneutics supports dynamic accounts of the process of legal interpretation and application, and rejects psychological – subjective – accounts. Legal interpretation should result in "adapting the law to the requirements of life". The velocity of changes taking place in social and economic reality makes the operation of actualization necessary. The interpretation of law which is to assist in reconstructing – in the name of legal constancy and safety – the will of

a historical legislator is not acceptable from the standpoint of legal hermeneutics.

Ultimately, the fact that understanding has the property of historicity entitles us to assert that in many, or most, cases hermeneutic cognition will fail to have a direct – purely intuitive – character.

Pre-understanding and the hermeneutical circle. Further justification for the view that hermeneutic cognition is indirect appears to flow from considerations devoted to pre-understanding and the hermeneutic circle. It is important not to formulate fixed opinions as far as the problem of pre-understanding is concerned: on the one hand, one may appeal to this concept in order to prove that hermeneutical cognition is direct, provided that one defines pre-understanding as an intuitive capacity to know the very essence of things – capacity making no use of any prior knowledge; on the other hand, one may appeal to it in order to prove that hermeneutic cognition is indirect, provided that pre-understanding is understood as a historically conditioned, prior knowledge.

One should also refrain from formulating firm opinions about to the hermeneutic circle. If the methodological version of the principle of the hermeneutical circle is assumed, one may assert that this principle confirms unequivocally the thesis that hermeneutic cognition is direct. This principle is an interpretative principle – an element of a broader and informally understood humanistic and legal logic. The situation will look different if one assumes the phenomenological version of this principle: in this version, the hermeneutic circle is a description of an ontological and structural moment of understanding, rather than a methodological principle capturing a cognitive moment; in Heidegger's terminology, it is expressive of the pre-structure of *Dasein*. In this account, the hermeneutical circle, like pre-understanding, is at best one of those properties of the process of understanding which decide about the direct character of hermeneutic cognition.

5.4.3 Applications

One reason why legal hermeneutics may preserve its claim to universality is that it may constitute a starting-point – or at least an element – of each cognitive process connected with the law, irrespective of the level of generality of theses formulated during this process. By means of hermeneutics one may perform practical tasks, i.e. make legal interpretations, make legal decisions and justify those decisions. Hermeneutics can also be applied in legal dogmatics (a theory of dogmatics), making it possible to formulate and justify theses which may be reasonably

defended only when "the hermeneutic approach" is accepted. Finally, hermeneutics enables one to build a certain type of legal philosophy or theory. The possible presence of hermeneutics on all levels of a lawyer's cognitive activity (practical, dogmatic and theoretical) seems ultimately to confirm the claim to universality raised by this philosophy of interpretation.

Let us start from the level of practical applications. We shall not appeal to concrete cases for that would require value judgments to be made regarding which cases are more, and which less typical of hermeneutics. Besides, the facts of a concrete case and an interpreter's attitude, rather than some prior "hermeneutical intention" often determine "the hermeneutical character of interpretation". Legal hermeneutics, like other humanistic hermeneutics, has always been presented as a theory (art) of textual interpretation and understanding. Until the eighteenth century it was hardly possible to separate hermeneutical "theories" from other theories. Only in the nineteenth and twentieth centuries did legal hermeneutics become a more specific philosophy of interpretation. Within this philosophy, the problem of understanding is emphasized, and understanding (at least within phenomenologically oriented hermeneutics) is identified or treated as synonymous with interpretation and application. Legal thinking also becomes enriched by "new" hermeneutic concepts, such as the hermeneutic circle, concretization and actualization. Hermeneutics becomes one of the basic points of reference for all the problems that appear in contemporary theories of interpretation. Linguistic interpretation can be performed either in an exclusively analytical (linguistic), or in an analytical–hermeneutical way, and in our view, it is difficult to conceive of any third possibility. Whilst making systematic or functional interpretations, in turn, one uses, albeit often unconsciously, hermeneutical methods.

Thus, the principle of the hermeneutical circle, upon which systematic interpretation is in fact based, is used and appeal is made to the hermeneutical account of the processes of concretization and actualization. The only reasonable alternative for an interpreter is resort to the analytical (analytical-positivistic) approach. The point to be stressed, though, is that the difference between this approach and the hermeneutical one is not as substantial as it may at first seem to be. Legal hermeneutics too has many interesting things to say about the issue of application. Application is regarded, first, as synonymous with interpretation and understanding, and, second, as reducible to the following two operations – concretization and actualization. In this context, hermeneutics provides truly original and at the same time really interesting insights:

hermeneutical concretization has nothing in common with the positivistic conception of syllogism, neither does actualization reflect the dynamic (objective) theories of interpretation advanced, for instance, by adherents of legal realism. These facts underlie the originality of the hermeneutical account of the legal decision making process (*Rechtsfindung*, *Rechtsgewinnung*), law's application (*Rechtsanwendung*, *Rechtsapplikation*), and realizing the law (*Rechtsverwirklichung*). Finally, hermeneutics enables an interpreter to make an interpretation on an "existential level". A need for this kind of interpretation arises in hard cases, where standard methods do not suffice to make an acceptable legal decision; in such cases, an interpreter can only appeal to ontological analysis, i.e. reach to the very essence of the process of understanding – to individual existence (*Dasein*).

Hermeneutical interpretation can also be used in the course of formulating and justifying the tenets of the theory of legal dogmatics. As mentioned earlier, such attempts were made many times in the contemporary science of law within different legal disciplines. The phenomenological analysis of such concepts as, for instance, "claim", "obligation", and "promise" made by Reinach can be used in particular in a theory of civil law. Hermeneutics, as proposed by Esser and Larenz, can be successfully applied in different dogmatic disciplines, especially in civil and penal law. Hinderling examined the possibility of applying general – Gadamer's – hermeneutics in the interpretation of constitutional law, and Hassamer suggested building hermeneutics which might be applied above all in penal law.[41]

Finally, hermeneutics was also used – on a theoretical level – as a method of philosophy and legal theory. In some cases, it was a method, in others a kind of cognitive attitude, whilst in still others it was an entirely autonomous type of legal philosophy. Hermeneutics was described by Betti as a method of the humanities and jurisprudence, and many representatives of *Methodenlehre* (e.g., Engisch, Larenz, Esser) treated it as a cognitive attitude. It was conceived of as a type of legal philosophy by Reinach (the author of the purely phenomenological philosophy of law), Gadamer (who also tackled the problem of legal hermeneutics) and – above all – by Kaufmann.

In relation to the hermeneutical philosophy of law, there arose many misunderstandings and absurd opinions stemming both from the lack of clarity in hermeneutics itself, and from the lack of competence of those who attacked it thoughtlessly and aggressively. Hermeneutics introduced into legal thinking and legal philosophy many new elements (deserving of more careful examination than has thus far been carried out by

various authors) and new questions which most probably cannot be given definitive answers. Thus the views and conceptions of such authors as Reinach, Esser, Larenz, Kaufman, cannot be dismissed as superficial in contemporary philosophies of law. Reinach's excellent phenomenological analysis of the concept of law and other fundamental concepts of the science of law, and Kaufmann's hermeneutical account of law as an ontologically complex object may confirm this thesis.

In conclusion, whether hermeneutics is liked or otherwise, it has become one of the most important, most broadly discussed and, at the same time, most controversial methods of contemporary humanities and jurisprudence. Hence the reason this specific philosophy of interpretation could not be discounted in the present discussion of jurisprudential methods.

NOTES

1. See E. Gellner, *Words and Things. An Examination of, and an Attack on, Linguistic Philosophy*, London, 1979, p. 17.
2. J. Stelmach, *Die hermeneutische . . ., op. cit*., p. 50 ff.
3. H. Coing, *Die juristischen Auslegungsmethoden und die Lehre der allgemeinen Hermeneutik*, Köln-Oppladen, 1959, p. 8.
4. J. Stelmach, "Die inntuitive Grundlagen der Jurisprudenz", in H. Bauer, D. Czybulka, W. Kahl, A. Vosskuhle (editors), *Umwelt, Wirtschaft, und Recht*, Tübingen, 2002, p. 161 ff.
5. P. Ricoeur, *Egzystencja i hermeneutyka. Rozprawy o metodzie* (Existence and Hermeneutics. Discourses on Method), Warszawa, 1985, p. 195 ff.
6. W. Dilthey, *Pisma estetyczne* (Writings on Aesthetics), Warszawa, 1982, p. 304.
7. F. E. D. Schleiermacher, *Hermeneutik aund Kritik*, Frankfurt am Main, 1977, p. 75.
8. The representatives of phenomenological hermeneutics criticized this view, treating it as a manifestation of unjustifiable psychology. See P. Ricoeur, *Existence . . ., op. cit*., p. 314.
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CHAPTER 6

METHODS OF LEGAL REASONING FROM A POSTMODERN PERSPECTIVE

6.1 A SUMMARY

At the end of the book we would like to make an attempt – hopefully a justified one – to summarize and review our analyses. First, we would like to look at our considerations from a broader perspective which includes those stances that have not been given due attention above. Second, we would like to provide additional justification for the choices we made and guard against some obvious objections. Finally, we would like to offer some conclusions concerning the methodology of law that follow, we believe, from our considerations.

Arbitrariness

Let us begin with the objection that stresses the arbitrariness of the choice of methods we present. We have already dealt with this issue in Chapter 1. Here, we would like to restate those observations adopting a considerably broader perspective. Observe that the choice of methods presented – although arbitrary to certain extent – is not accidental. If we were to compose a list of philosophical conceptions of thinking (not necessarily legal, but thinking in general), it would most certainly include logic, analysis, argumentation and hermeneutics. Moreover, it is difficult to think of any other philosophical approach that would make an obvious addition to the list. Anyway, any such addition would be objectionable.

Metatheoretical Perspective

This general remark is closely tied up with two further problems. First, the four described methods should not be considered as "technologies of interpretation". We have rather presented the possible bases on which a coherent theory of law and a method of interpretation can be constructed. Our claim is not the simple one that lawyers or theoreticians of law can use logic, analysis, argumentation or hermeneutics. This thesis is true only in the sense that the four stances are "platforms" on which a coherent and applicable method or technique of interpretation can be built. Second, we claim that all such techniques are ultimately reducible to one of the four perspectives or to a combination thereof.

The acceptance of such assumptions leads to the result that our analyses are not confined to the philosophy and theory of law. We believe that the presented methods determine the boundaries of any possible theory of humanistic interpretation. Naturally, the examples we offered as well as the problems we addressed concerned mostly legal discourse. We tried to show, however, that the legal applications of logic, analysis, argumentation and hermeneutics are based on more general conceptions, which in turn are applicable to all humanistic disciplines. It is noteworthy that this can be shown in connection to considerations concerning legal methods. It stems from the fact, we believe, that among the humanistic methodologies, methodology of law is particularly well developed. Heated debates concerning the very existence of a method in law have been raging at least since the nineteenth century. In such circumstances "the methodological consciousness" of lawyers and legal theoreticians is particularly sensitive.

Relationships Between the Methods: The Three Theses

The next important issue to consider is the problem of the relationships between logic, analysis, argumentation and hermeneutics. We have addressed it in detail in Chapter 1. Here, a more systematic account will be offered. The issue can be resolved with one of the following three theses.

Let us begin with the weakest thesis. One can maintain that logic, analysis, argumentation and hermeneutics "have something in common" because they aim to account for the same phenomenon, i.e., the phenomenon of thinking. This is a very simple solution, and does not explain much. It shows, however, why some operations of intellect may be treated as manifestations of the application of two different methods, e.g., argumentation and hermeneutics. Such an account results in serious difficulties. For instance, as we have tried to show in Chapter 2, logic cannot provide a basis for constructing a complete theory of legal reasoning, as it is concerned only with one aspect thereof, i.e., the formal aspect. Moreover, a conception that explains the interconnections between logic, analysis, argumentation and hermeneutics by the fact that all four concern the same phenomenon, does not contribute to the understanding of what those interconnections consist in.

The second thesis reads: logic, analysis, argumentation and hermeneutics are complementary theories of legal reasoning. The complementariness thesis can be interpreted in two ways. First, one can maintain that the four enumerated methods deal with different aspects of legal reasoning. Such an interpretation is justified, e.g., by the relationship that holds between logic and analysis or logic and argumentation. For instance, in

Alexy's theory of argumentation the rules of classical logic are fully observed but the theory amounts to more than that. The postulate of applying the laws of logic is only one of the rules of rational discourse, all of which have to be observed to obtain a rational practical decision. However, not all of the four basic methods are complementary in the analyzed sense. For example, hermeneutics aims at describing complete human cognitive activities, not only their aspects.

Second, the complementariness thesis can be understood as follows: different methods are applicable to different legal cases. On this account the simplest ("algorithmic") cases are solved with the use of logical and analytic methods, more difficult cases with the use of argumentation techniques, while the hardest require hermeneutic intuition. The obvious weakness of such a solution is the need to justify why different legal cases are solved with the use of different standards of reasoning. Moreover, the distinction between simple and hard cases is problematic – or, anyway, is a matter of degree.

The third thesis concerning the interconnections between logic, analysis, argumentation and hermeneutics says that the tools offered by the four philosophical stances should be combined to construct a coherent method of legal reasoning. In particular, the combination of logic, analysis and argumentation seems to suit such a construction. This idea is realized, at least to certain extent, in Alexy's theory as well as in the conception presented in Chapter 4. The problem is that if we assume that there exists only one correct "hybrid" method, we must then ask, what the criterion is for establishing its correctness.

We are far from advocating one of the three theses, although the first seems too trivial, and the third – at least from the general philosophical perspective – too strong. We propose, instead, to look at the four methods as possible bases for constructing concrete conceptions of legal reasoning. One can wonder, of course, what criteria should be met by such a conception. We claim that it is relatively easy to name at least two of them: first, the conception should be coherent; and second, it should serve its function, i.e., determine when the minimal requirement of rationality of legal reasoning is fulfilled.

The general aim of our analyses made it difficult to base the presentation of the four methods on particular examples of legal reasoning. Making use of examples – especially as regards argumentation and hermeneutics – would be difficult for numerous reasons, not least because it is relatively easy to choose examples justifying any thesis. On the other hand, it is impossible to treat every type of legal case separately. The strength of the methods we presented lies in the fact that they can

help us to deal with hard cases, i.e., those that are unlike any known case and, consequently, are difficult to imagine. In other words, our aim was to present a set of tools and criteria for choosing between them in order to show how to deal with any legal problem; we did not try to argue that a given method suits a given class of legal cases.

Let us repeat: it was not our task to construct a coherent "technology of interpretation". We aimed to present a general philosophical framework within which such "technologies" can be constructed. Because of that, we were unable to analyze all the bottom-line consequences resulting from adopting one of the four conceptions.

6.2 DILEMMAS OF THE CONTEMPORARY PHILOSOPHY OF LAW

Our analyses were therefore metatheoretical in character. We believe that such analyses are of extreme importance as they are often neglected in the legal-theoretic considerations. The contemporary philosophy of law, particularly the Anglo-Saxon version, is usually based on a set of tacit assumptions, both methodological and ontological. It suffices to say that British and American legal theorists confine themselves very often to the methods and techniques of analytic philosophy. We do not claim that this is a mistake. We would stress that it is not the only possible approach and that a certain level of "methodological consciousness" requiring metatheoretical reflection can only help us in legal-theoretic undertakings. The situation of the "continental" philosophy of law is even worse: with minor exceptions, it is practiced either *modo analitico*, in connection to the Anglo-Saxon conceptions, or with the use of the tools offered by postmodernism, broadly understood. This is a very limiting alternative.

Contemporary Positivism

In order to substantiate the above stated claims let us have a closer look at some of the contemporary debates in the philosophy of law. We believe that many of the problems with which legal theorists are preoccupied today result from the lack of methodological rigor. It seems that the most hotly debated subject of the contemporary philosophy of law is the soundness of positivism. In this context, the first problem is the very definition of legal positivism. One can maintain, however, at least with some degree of adequacy, that the contemporary positivists defend the following three theses: (1) the so-called *social sources thesis*, which says that it is social practice or social facts that constitute the sources of law, (2) the so-called *conventionality thesis,* according to which criteria of legal validity

are conventional, and (3) the so-called *separability thesis,* which claims that there is no necessary connection between law and morality, i.e., moral criteria do not constitute a "test of validity" of legal norms.[1]

All those theses have their strong opponents and advocates. Among the opponents one should mention Dworkin who argues that any legal system consists not only of rules but also certain standards, of which some (principles) are of moral pedigree. Dworkin shows that hard cases, such as *Riggs vs. Palmer* described in Chapter 2, cannot be explained within the positivistic conceptual scheme. The court that decided not to grant Elmer Palmer rights to his inheritance acted according to a legal principle, which had not been explicitly enacted by the legislator and has an obvious moral provenance.[2]

The soundness of Dworkin's arguments is questioned by the so-called "soft" positivism. According to this account, the separability thesis says only that there is no necessary conceptual relationship between legal and moral rules. The thesis says nothing, the advocates of soft positivism argue, about their actual relationship. The distinction of two levels – the conceptual and the factual – leads, however, to serious troubles. One of them is pointed out by Raz.

According to Raz there is one feature of law that makes the distinction between the conceptual and the factual untenable. He argues in the following way. At the outset he distinguishes between two kinds of reasons: those that justify beliefs and those that justify actions. The latter concern the sphere of the practical and are reasons "for a person to perform an action when certain conditions obtain".[3] Among reasons Raz distinguishes between first-order (reasons for action) and second-order (reasons for acting for a reason) reasons.[4] The second-order reasons can be of two kinds: positive (reasons to act for some reason) and negative (reasons not to act for some reason). The latter are called exclusionary reasons.

Within this conceptual scheme Raz defines rules: they are a combination of a first order reason to act and an exclusionary reason. They instruct us, therefore, to act in a certain way and to ignore other reasons for action.[5] Raz maintains, furthermore, that law has a claim to authority. This metaphorical expression means that law is a social institution that consists of rules. In other words, the authority of law displays itself in the fact that it provides us not only with reasons for acting but also with exclusionary reasons not to act in the opposite way. It follows from it, that for law to remain law, i.e., to realize its claim to authority, it has to be understood as a social fact independent (both conceptually and actually) from moral norms.[6]

Conclusions

We believe that the contemporary debates concerning positivism are, to a great extent, futile. There are different arguments justifying this opinion. First, the participants of the debate are trying to answer an ontological question (what is law?) without assuming any particular ontology. The discussions are carried out without taking into account what the contemporary ontology has to offer. Moreover, some philosophers, e.g., Raz, claim that their aim is to capture "the nature of law". Only a very peculiar interpretation of the term "nature" can save us here from serious philosophical problems, as looking for the "nature of law" presupposes both a kind of intellectual intuition capable of grasping "essences of things" and the essences themselves. Such a solution is, naturally, acceptable but only within a concrete philosophical stance, e.g., phenomenology. But Raz and his advocates do not go that far.

Second, the very idea of asking ontological questions may be put into doubt. Although one can maintain that ontological decisions are important for developing a coherent conception of legal reasoning, adopting the question "What is law?" as the starting point of any philosophizing concerning law may seem a bad choice.

6.3 THE EPISTEMOLOGICAL APPROACH

Ontological debates lead, ultimately, nowhere. The strength of arguments backing rival conceptions is very often equal or incommensurable. Furthermore, there is no commonly valid metatheoretical criterion of determining "the right" ontology of law. The same may be said of legal axiology. Some values are contrasted or compared with others but the discussion inevitably leads to ontological dilemmas. It seems natural and justified, therefore, to turn towards epistemology. When it is impossible to construct a commonly acceptable philosophy of law (or, in other words, answer to the question "What is law?"), there remain only epistemological considerations. But two questions follow immediately: is the choice of epistemology which is released from the chains of ontology fully free or even possible? Consequently, should we assume that the process of legal cognition is indeterminate, dynamic and creative and hence it is impossible to determine the limits thereof?

The Limits of Legal Cognition

A positive answer to both questions posed at the end of the previous paragraph leads to serious consequences, which sound unintuitive for traditionally trained lawyers. Such a solution makes us believe that

theory of law (or jurisprudence) is a discipline without the "Archimedean point of departure" (no matter how we understand it), which in turn leads to cognitive or interpretational relativism. This stance is accepted, at least to a certain extent, in some of the conceptions presented in Chapter 1, namely the theories of Kirchmann, Hutcheson, some phenomenological versions of hermeneutics and Critical Legal Studies. For Kaufmann, a main representative of "ontologically oriented" legal hermeneutics, legal cognition is completely intuitive, dynamic and creative. Similar theses are advocated within some postmodern conceptions, which question all kinds of ontological or epistemological *aprioricity*. Is this approach justified?

We believe it is not justified for the following reasons. First, it is impossible to separate completely legal epistemology and ontology. Even if the radical Kantian assumption concerning the unknowability of the "thing in itself" (*Ding an sich*) is accepted, we have to admit that this thing has at least an indirect influence on our cognitive acts. In consequence there is no pure (i.e., free from ontological assumptions) legal epistemology. Moreover, no one would question the thesis that almost all people have very strong, "archetypical" convictions concerning "the nature of law" as well as a number of ontological intuitions which influence the choice of legal methodology. Second, the choice of epistemology results in a limitation of the number of applicable methods or techniques of interpretation. Therefore, after an epistemological (methodological) choice is made, it is not justified to speak of a total interpretational freedom. Finally, we believe that there exist at least two easily distinguishable – if not opposite – discourses in law: theoretical and practical. Their epistemological peculiarity limits severely our freedom of choosing methods and techniques of interpretation.

Two Discourses

The limits of legal thinking or, in other words, of any possible legal epistemology are determined by two discourses: theoretical and practical. The theoretical discourse is based on the criterion of truth, while the practical takes advantage of "softer" normative criteria: rationality, reasonableness, justice, validity or efficiency. Both discourses interlace, but they do not interfere with one another. We make transitions from the theoretical to the practical or *vice versa*. The lack of recognition of the fundamental differences between the two discourses is, so we claim, the source of many futile debates in the philosophy of law. The thesis that the findings of theoretical discourse are the sole basis for normative decisions is mistaken and leads to some forms of cognitivism.

The opposite thesis is likewise false. Theoretical discourse enjoys certain influence on the practical. It is not, however, a logical connection. Practical discourse has to adjust to the results of the theoretical (the theses formulated within practical discourse must be consistent with the theses established by theoretical discourse). In other words, theoretical discourse sets the limits of any possible practical discourse. It is clear, therefore, that the relationship between the discourses is asymmetrical. Practical discourse (i.e., its limits and structure) depends on the findings of the theoretical but not *vice versa*.

Theoretical discourse. Theoretical theses are used both in legal practice and philosophy. The theses are formulated within the legal theoretical discourse, which is autonomous in relation to the practical. This autonomy results from the fact that the theoretical discourse is "governed" by the criterion of truth, "stronger" and more precise than the criteria of evaluating the findings of practical discourse. Theoretical discourse is, furthermore, purely "scientific". The contemporary philosophy of science shows that it does not mean complete certainty. Nevertheless, the successes of science make us believe that the theses of theoretical discourse at least "approach the truth".

Practical discourse. Practical discourse is not completely autonomous, as it is carried out within the limits imposed by the theoretical discourse. It is likewise not purely "scientific", as it uses criteria other than truth (i.e., rationality, reasonableness, etc.). The particularity of practical discourse results from two distinct, but interrelated facts. First, normative statements (directives, norms, rules) have a different epistemological status from the descriptive expressions: if they have meaning at all, they are not sentences which can be evaluated as true or false.[7] Second, the so-called hard cases have a very peculiar feature: they can have, we believe, more than one "right answer". The criterion of truth is replaced in this context with other, "softer" or less determinate normative criteria. The statements formulated within practical discourse cannot therefore meet the requirements which are set for scientific theories. Ultimately, it is the case at hand, skills and backgrounds of the participants of the discourse, level of interpretational complication of the case together with the social, political and economic contexts which decide – or at least influence – the choice of the method or technique of interpretation.

These remarks are not designed to show that within the practical discourse there are no methodological constraints. As we have tried to show, some of those constraints result from the fact that we are dealing with a

practical – and not theoretical – discourse. Furthermore, once certain choices are made – regardless of how we arrive at them – the chosen method should be applied coherently and consequently.

The epistemological version of the philosophy of law consists therefore in distancing oneself from ontological debates, while insisting on conceptual discipline and realizing the importance of the distinction between practical and theoretical discourses.

6.4 UNFINISHED PROJECTS

The state of the post-modern (i.e., contemporary but not necessarily postmodern) philosophy and theory of law and a diagnosis thereof results in turning towards legal epistemology. One may ask: why is it so? We would like to suggest a somewhat provocative answer to this question. We believe that all the stages in the development of legal theory (or even of humanities), i.e., the "classical", the "modern" and the "postmodern", produced no more than certain unfinished projects. Consequently, the general "science" of law becomes slowly a relict – a discipline which is useless and usually misunderstood. Not needed by either lawyers or philosophers, it is still there through the long tradition and academic inertia. Most of its debates remind one of the scholastic discussions concerning the number of evils or angels that can be placed on the head of a pin. That is the reason why we have decided to present four basic methods – or methodological stances – which are still important for the humanistic methodology and, more importantly, are applied in actual legal cases.

We would like to conclude our analyses with a short reflection on three most important, albeit never completed, projects developed within the modern and contemporary philosophy and theory of law.

Classicism

The term "classicism" is rich in meanings, but occurs very rarely in legal-theoretic discussions. Let us use it to designate the "project" of the eighteenth and nineteenth centuries, founded on "classical philosophy", i.e., on scholasticism (in particular, Thomism), Enlightenment (Hobbes, Rousseau, Kant) and idealism ("Fichte", Schelling, Hegel). These philosophical conceptions share a belief in a supra-positive law (divine law or natural law). Naturally, there is more that divides those conceptions than unites them. It suffices to mention the sources of law, its justification etc. As a result, the project could not have been completed for three reasons. First, there were serious internal tensions within the project; in other

words, the diversity of ideas within it was irreconcilable. Second, it was philosophically "one-sided", as it paid its attention to the concept of natural law. Because of that, the project got old fairly quickly in face of the developments and changes in European social, political and economical reality of the nineteenth century. Third, at the same time there emerged rival conceptions, the majority being ostensibly critical towards the classical project and formulated in the spirit of modernity. In this context one should mention the German historical school and, especially, legal positivism.

Modernism

The modernistic breakthrough was a reaction to the political and economical changes in Europe in the nineteenth and at the beginning of the twentieth century. In such a context, legal theory's aim was to provide justification for the development of democratic societies, the systems of public security within the limits of the rule of law and the principles protecting the free market. Those ends were to be realized with the use of new legal-theoretic conceptions, which followed strict ontological and methodological rigors. In this way the tasks of the philosophy and theory of law were understood within legal positivism (both the continental in its various incarnations – *Gesetzespositivismus*, *Begriffsjurisprudenz*, normativism, and the analytically oriented positivism of Austin and Hart). The same may be said of legal realism, some schools of philosophical analysis and some conceptions of legal argumentation. There are many reasons of the crisis of the "modernistic project". First, one should mention the ontological extremism of the mentioned conception, the "fetishisation" of "one and only" account of what is law. Second, the methodological rigor of the modernistic project was too severe. Third, the high level of complication of at least some of the conceptions of interpretation developed in the twentieth century made them inapplicable in practice. Fourth, there were no rational criteria for choosing between rival theories of law.

Postmodernism

"Postmodernism" is a very fashionable word, but it is hard to say what signifies in relation to the philosophy and theory of law. It can even be asked whether there is such a thing as a "postmodern project" in those two disciplines. Postmodernism is, arguably, a reaction to modernism, an attempt to deconstruct, to use another fashionable word, all paradigms, particularly ontological ones. Instead of limitations and methodological rigors we get "free epistemology" in which "anything goes". One can use

any method which suits some social or individual ends. Interpretational decisions are made within an open, unlimited "narration". The elements of this way of thinking can be found in several contemporary conceptions of law and legal reasoning, such as Critical Legal Studies, Kaufmann's hermeneutics, Luhman's and Teubner's system theories and Habermas' discursive theory of law. Although this project is still alive – and even "fashionable" – we believe it will inevitably get the label "unfinished". There is a plethora of reasons for this. First, the project is placed in an ontological and methodological vacuum. It is based on a philosophy without any "Archimedean point", without any initial assumptions; hence, it is neither justifiable nor refutable. Second, postmodernism is a set of – sometimes totally – different, incoherent conceptions, so that one can even doubt whether it is a project (even in the very loose sense of the word which we apply here), or rather a number of ideas that can answer any question whatsoever. Third, some of the postmodern theories are formulated in very obscure and complicated language which disguises old conceptions and makes them appear fresh and original.

NOTES

1. Cf. S. Bertea, "On Law's Claim to Authority", *Northern Ireland Legal Quarterly*, vol. 52, no. 4, p. 402.
2. Cf. R. Dworkin, *Taking Rights Seriously*, *op. cit*., *passim*.
3. J. Raz, *Practical Reason and Norms*, London, Hutchinson, 1990, p. 19.
4. *Ibidem*, pp. 39–40.
5. *Ibidem*, pp. 39–48.
6. Cf. J. Raz, *Ethics in the Public Domain*, Oxford, Clarendon, 1994.
7. After 100 years of the debate concerning the meaning of normative statements, we believe that it is moderate noncognitivism that has the strongest argument behind it. Both cognitivism and extreme noncognitivism (e.g., emotivism) seem less persuasive.

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