MGR WOJCIECH ZOMERSKI

SUMMARY OF DOCTORAL DISSERTATION

„LEGAL DOGMATICS AND LEGAL EDUCATION IN THE PERSPECTIVE OF POST-ANALYTICAL THEORY OF LAW"

Legal dogmatics is an umbrella notion that is used to describe legal sciences that deal with systematization and interpretation of positive law. Understood in such a way, legal dogmatics has been a subject of the general theory of law, within which reflections upon philosophical, methodological and social basis of legal sciences are undertaken. In the past few decades, Polish theory of law has been particularly interested in the problem of scientificity of legal dogmatics. Legal theoreticians have been considering whether and in which sense legal dogmatics might be characterized as a scientific discipline and what kind of scientific criteria does it have at its disposal. This question has been addressed among others by Jerzy Wróblewski, Zygmunt Ziembiński, Kazimierz Opałek, Aleksander Peczenik, Stanisław Ehrlich, Adam Podgórecki as well as Leszek Nowak.

The subject of this dissertation is theoretical legitimization strategies of legal dogmatics. Legal dogmatics is understood herein as an academic discourse posing mainly interpretative and validation statements in order to systematize the black-letter law. The problem of legitimization emerges due to the practical character of legal dogmatics: its final product (the systematized law) substantially differs from its scientific subject (the black-letter law). Since legal dogmatics "co-creates" its subject (law), that eventually authoritatively governs citizens' life, the legitimization of this discipline becomes an issue of the highest importance, especially in the democratic reality. In the dissertation two legitimization strategies are distinguished: thesis of scientificity of legal dogmatics and thesis of its apolitical character. Specific considerations are carried out at three levels: (1) reconstruction of theoretical models of legal dogmatics, (2) assessment of their relation with the sphere of legal education, (3) consideration of the role of legal dogmatics in the democratic society.

In the dissertation six theoretical models of legal dogmatics are distinguished and discussed. They are split into naturalistic concepts (an inductive concept of Aleksander Peczenik, an idealization concept of Leszek Nowak, a concept of legal dogmatics as socio-technique of Zygmunt Ziembiński) and antinaturalistic ones (a concept of participating in the legal culture of Mark Zirk-Sadowski, a concept of participating in the political community of Lech Morawski, a juriscentric concept of legal dogmatics of Artur Kozak). Subsequently, the

dissertation addresses each of these concepts and considers whether and how theoretical legitimization strategies of legal dogmatics have changed over the time. A naturalistic account of a scientificity thesis assumes that legal dogmatics has at its disposal a method of exploring the content of law just as natural sciences have a method to explore the external world. In an antinaturalistic perspective legal dogmatics is seen as a science distinct from natural sciences. While lawyers are not limited by restrictions of scientificity, as it is a case in natural sciences, they are limited by values of the political community and legal culture that they live in. It is argued however that that despite this evolution – dictated above-all by changes in the theoretical sphere (the fall of scientism) – the antinaturalistic model "inherits" main features of its naturalistic predecessor, e.g. an assumption of the existence of the method allowing to determine the content of law, regardless of the subjective characteristic of a given interpreter, as well as a programme "distrust" towards the political. Eventually, it is claimed that this might be problematic in the democratic reality, in which the strong emphasis on the procedures of justification and verification is put and the lawyer is expected to participate in a social dialogue.

As one of the aims of this dissertation is to investigate the relation between theoretical legitimization strategies of legal dogmatics and the functioning of legal discourse, the dissertation addresses a problem of legal education. However, legal education is not seen as an autonomous legitimization strategy, but rather as an element of a given concept of legal dogmatics and in the result a condition for its realization. This is based on a meta-theoretical assumption that legal dogmatics is a complex social practice which is also shaped by a theoretical discourse devoted to legal dogmatics, as well as a way that the law is taught. In this sense, legal education might be treated as "litmus paper" – a sphere of practices that allows to verify whether and to what extent given concepts of legal dogmatics are corresponding with reality. In other words, addressing the problem of legal education allows to verify the character of discussed theoretical concepts of legal dogmatics, namely whether they were of descriptive or prescriptive character or whether they were solely thought of as the legitimizing concept.

Finally, the dissertation considers whether theoretical legitimization strategies, along with the existing model of legal education, enable lawyers and law to fulfil their role in the democratic society. It is assumed that since democracy is a currently binding socio-political system, democratic procedures constitutes the last instance for all important social practices, including such socially important ones as law. It is worth to note however, that democracy is understood herein very broadly and philosophically, namely as the form of life constituting the ethical ideal for the whole mankind in all spheres of life, rather than a formally understood political system.

The varied and broad character of the above-outlined scientific problem (theoretical discourse, educational practices, practical and political discourse) impacts the scientific perspective adopted in this dissertation, that might be described as "post-analytical" one. Such a decision is not dictated by a negative assessment of analytical theory of law or even further-reaching conviction of its dawn, but it is based on the assumption that a subject of this dissertation requires the adoption of more "flexible" and transdisciplinary research perspective. In this perspective, the contribution of analytical legal theory is not rejected, but problems addressed by the former are tackled through a different framework regarding the ontology of law, as well as assumed aims of legal theory. This dissertation is also inspired by findings of American pragmatists (John Dewey, Charles S. Peirce, Richard Rorty, Cheryl Misak). This is justified above-all with a fact that in this very tradition, as in any other, the attention to the relation between democracy and education has been drawn, as well as the social context of a production of any knowledge (including a scientific one) has been underlined.

The subject and aims of this dissertation correspondence with its structure. In Chapter 1, the genesis of legal dogmatics and its theoretical definitions are discussed. This is followed by a proposal of two alternative ways of defining legal dogmatics that are adopted in this dissertation (legal dogmatics *sensu stricto* – legal dogmatics *sensu largo*). Subsequently, the adoption of the post-analytical research perspective is justified, as well as normative premises are addressed (defined as the strengthening of a social legitimization of law). Simultaneously, the attention to a relation between the adopted scientific perspective and the sphere of legal education is drawn. Finally, in the last part of this chapter, a subject of the dissertation is defined in detail. It is underlined that the dissertation seeks the answers for the following questions: how does legal theory explain, conceptualize and legitimatize practical character of legal dogmatics? (Chapter 2 and 3), whether and what are its practical consequences? (Chapter 4), as well as, whether what *is* coincides with what *ought* to be? (Chapter 5).

In Chapter 2, the thesis that legal theory has been legitimizing legal dogmatics with a scientificity thesis is elaborated. Before particular accounts of this thesis are discussed, firstly a summary of a discussion on methodological status of legal sciences (naturalism – antinaturalism) is given. Subsequently, it is wondered, how this discussion has been reflected in the discussion on a scientific character of legal dogmatics. This allows eventually to split the discussed concepts of legal dogmatics into naturalistic and antinaturalistic ones. Then, accounts of the scientificity thesis in each of the given concepts are discussed. It is argued that despite a visible evolution in the theoretical image of legal dogmatics – dictated above all by changes in

a theoretical sphere (the fall of scientism) – the antinaturalistic account shares its features with the naturalistic one. Moreover, the attention to internal tensions within the discussed concepts is drawn. Authors of naturalistic concepts assume on the one hand the similarity between legal and natural sciences and on the other they admit implicitly that the former are significantly different from the latter. The identification of tensions within the discussed concepts, as well as their limited explanatory potential, lead in the conclusion to the hypothesis that the thesis of similarity between legal and natural sciences had above all the *legitimization* character rather than *representative* or *normative* one, meaning that it has been thought as a *justification* of legal dogmatics rather than its *explanation* or *regulation*. It is argued that this phenomenon might be explained by the broader context of the origin of naturalistic concepts: theoretical (the scientist intellectual climate) as well as extra-theoretical (the authoritarian social and political reality, in which there was a great need for the protection of autonomy of law against the political power).

In Chapter 3, the thesis that legal theory has been legitimizing legal dogmatics by the apolitical thesis is elaborated. Before this problem is discussed in detail, firstly a significant distinction between politics (equated with political power) and the political (equated with the social surrounding and prevailing preferences in the society) is brought in, as well as three variants of the apolitical thesis are characterized (traditional – modern – postmodern). Subsequently, it is argued that – in contrast to the problem of scientificity discussed in Chapter 2 – this problem was not addressed explicitly in most of the discussed concepts. Therefore, it is argued that in order to characterize given concepts in the regard of relation of the law and the political, one has to examine such threads as: the adopted concept of legislator and rationality, the assumed function of legal dogmatics, the problem of being limited of legal text as well as the intention of the legislator, and a vision of language and degree of being bound by interpretative rules. In the last part of this chapter, a summary of my considerations is given. It is pointed out that legal theory has been traditionally assuming the far-reaching autonomy of the law and lawyers from the political. A potential explanation of this phenomena is given and the attention to potential dangers associated with it is drawn. It is argued that the apolitical thesis in its naturalistic account has been dictated by an alienation of a political authorities in the times of real socialism. The antinaturalistic model – despite democratic changes in a political sphere – "inherits" this distrust towards the political power. For this reason, one may argue that theoretical images of law alienate lawyers from their social surrounding which might eventually lead to the delegitimization of legal dogmatics and more importantly – co-construed by the latter – law.

In Chapter 4, the thesis that legal education might serve as "litmus paper" is elaborated. To this end, educational consequences of the discussed concepts of legal dogmatics are reconstructed (vocational – expert – citizen model of legal education). This is followed by a summary of the dispute over a practical or theoretical model of legal education. In this regard, it is argued that this opposition shall be rethought. Subsequently, the theoretical and socio-legal image of the existing model of legal education is reconstructed and subsequently confronted with the discussed concepts of legal dogmatics. This leads me to the conclusion that although legal education – along with naturalistic premises – has vocational character, however an associated with naturalism thesis of the existence of the legal method resembling one from natural sciences, had the character of the theoretical illusion at most. In principle, law students do not solve any cases, do not learn how to interpret the law, and their whole learning process is limited to the passive memorization of the knowledge served during lengthy lectures and reproducing the latter seminars. What becomes *the Ersatz* of the legal method, is a training that aims to subordinate legal adepts to findings of legal science, by instilling in the former subordination to authorities as well as by repressing from their conscience that law is an interpretative activity. Such a conclusion confirms the hypothesis of the solely legitimization character of theoretical images of legal dogmatics. Moreover, it allows to address a question, whether the existing model of legal education is normatively justified and desirable. My answer in this regard is negative. It is argued that the existing model of legal education does not educate lawyers who would feel responsible for the law and who would be thus ready to participate in the democratic game. This in turn means that the existing model of legal education might be dangerous in the light of the legitimization of law understood as a complex and socially significant practice.

The dissertation is finished with Chapter 5 devoted to the role of legal dogmatics in the democratic society. In this chapter, the summary of my consideration is given. It is argued that existing models of legitimization of legal dogmatics have exhausted their potential. The explanation of the role and character of legal dogmatics as an example of a naturalistic science was the result of the alienation of the political authorities in the times of the real socialism. Nowadays this narrative is neither shared nor – as it seems – necessary. The antinaturalistic model, that replaced the naturalistic one, shares many features and drawbacks of its naturalistic predecessor, notably it is streaked with a similar distrust towards the political. What has been repressed, eventually comes back. Current events show that this model leads to the alienation and potential delegitimization of – the construed by legal dogmatics – law. For this reason, I argue for the alternative concept of legal dogmatics, by its explicit definition in practical

categories, emphasizing of the role it might play in democracy (*democratic legitimization of law and its science*) as well as underlining the critical potential of legal education (*legal education as critique*). It is argued that this concept would serve in more efficient manner the social legitimization of law and in the result the integrity of the whole political community. In this sense, my proposition has the character of a hypothetical imperative pointing out what shall be done, if one wants to protect the law in the confrontation with the social surrounding. In the very conclusion to this chapter, the question is addressed, whether the realization of my proposition would not lead to the loss of stability of the legal system. In this regard, it is argued that this potential accusation presupposes that such a thing as "stability of legal system" is on our disposal. There are more and more data that reveals that this presupposition might be false. In this sense, doubts articulated in this dissertation concerning the existing images of law are not dictated by any decision or subjective preference, but they have arisen due to the irresistible impression that those images are – as basis for social actions – failing us. Such a conclusion allows me to finish this dissertation with the famous sentence from Giuseppe di Lampedusa's novel *Leopard*: 'If we want things to stay as they are, things will have to change. Do you understand?'

Wrocław, 05.04.2020 r.

Wojciech Zomerski