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LEGAL HEURISTICS AND THE POSITIVISATION OF LAW IN DOGMATIC DISCOURSE

Abstract. The general opinion that the text of the law does not imply its use leads to an understanding of the role that legal dogmatics and legal practice can play in solving this problem. Common thematic field of both those lawyers' activities allows us to distinguish a dogmatic discourse, by which and in which the law is positivised by consolidating applicable (operative) patterns of solving legal problems. These patterns are created by referring to the aspects of text, language, and system of law, but also to the history of the discourse. The positivisation of law is the result of specific legal heuristics, consisting in combining meanings, expectations, values, and existing practices in solving legal problems. Legal heuristics does not boil down to a method, but, rather, is a framework, a context, and a set of conditions for cognition aimed at solving practical problems.

Keywords: legal heuristics, legal dogmatics, positivisation of law, legal argumentation

HEURYSTYKI PRAWNICZE A POZYTWIZACJA PRAWA W DYSKURSIE DOGMATYCZNYM

Streszczenie. Powszechna opinia, że tekst prawa nie wyznacza jego zastosowania prowadzi do zrozumienia roli dogmatyki prawniczej i praktyki orzeczniczej w rozwiązaniu tego problemu. Wspólne pole tematyczne obu obszarów działalności prawników pozwala wyodrębnić dyskurs dogmatyczny, w którym prawo jest pozytywizowane poprzez utrwalanie stosowalnych (operatywnych) wzorów rozwiązywania problemów prawnych. Wzory te powstają przez odwołania do tekstowości, językowości prawa i systemowości prawa, ale również do historii samego dyskursu. Pozytywizacja prawa jest wynikiem określonych heurystyk prawnych, polegających na łączeniu znaczeń, oczekiwań, wartości i istniejących praktyk w rozwiązywaniu problemów prawnych. Heurystyka prawnicza nie sprowadza się do metody, jest raczej ramą, kontekstem i zespołem warunków poznania nakierowanego na rozwiązywanie praktycznych problemów.

Słowa kluczowe: heurystyka prawnicza, dogmatyka prawa, pozytywizacja prawa, argumentacja prawnicza

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1. INTRODUCTION

In principle, the cognition of law has two dimensions – theoretical and practical. It is difficult to differentiate between these two dimensions when only the intentions of researchers are taken into account. Theoretical cognition takes place at two levels. At the first level, one seeks to answer the question of what law is; to what category of beings it belongs. Considerations of a philosophical nature may develop into scientific theories which generally have a notional character, or which seek to explain law as an empirically-studied phenomenon. A specific characteristic of such research is that at the outset the researcher does not assume that law is what it is understood to be in a given social practice.

At the second level, this very assumption is adopted at the outset. From this it follows that legal doctrine (a term usually used in this context) is of a normative nature, because it shapes legal practices while at the same time being a legal practice itself. I understand the legal doctrine as the entirety of recognised practical knowledge which is expected to provide an explanation of many things, including what the law is in the practices of state organs, what its content is, and which lawyers' actions should be considered as acceptable in the light of their institutional role. A very important component of the legal doctrine, apart from the findings of the theory of law, involves the findings of legal dogmatics (legal science, *scientia iuris, Rechtswissenschaft*) – a domain which is clearly identified in European legal culture, though named in various ways (Peczenik 2005, 1–2).

The belief that legal doctrine – and especially legal dogmatics – is of a normative nature is one that is held by many researchers. According to Kaarlo Tuori, legal science possesses a particular normativity which separates it from research on law conducted in the spheres of other social sciences, such as sociology or political science. This particular normativity stems from its dual nature: legal science is not only a scientific practice but also a legal one, and it participates in the reproduction and modification of the legal order – its own object of research (Tuori 2016, 285).

The aim of this article is to present some aspects of the normativity of legal dogmatics. I suggest that utterances formulated within legal dogmatics, along with court rulings, positivise the law, i.e. determine its content (3), by formulating patterns of solving legal problems (4), justified in a specific way (5). I also indicate the significance of the hermeneutic explanation of the relationship between knowledge and practice (6). However, I start with some introductory remarks concerning the self-consciousness of lawyers, highlighting the role of their work in shaping the legal order (2)[1].

[1] I was encouraged to write this text by Tomasz Bekrycht, who was working on a collection of articles on legal heuristics, which was not completed. Legal heuristics was then the subject of his keen interest. This article is based partly on my previous work: Leszczyński (2010).

2. THE SELF-CONSCIOUSNESS OF LAWYERS AND THE NORMATIVITY OF LEGAL KNOWLEDGE

Legal doctrine is based upon a certain "image" of what a legal order is, resulting from many sophisticated assumptions, but above all from what is expected by the participants of the discourse. This "image" of law is confronted both with an ideal of law brought into the discourse through theoretical and philosophical reflection and, on the other hand, with everyday facts concerning the practices of state offices and courts. Thus, it can be said that the "image" of the legal order is a product of negotiation. However, this assertion is not encountered in the discourse of legal practices; neither is the notion that law is just an "image". If a given social practice perceives the image of law as inadequate in some of its parts or aspects, then the removal of this inconsistency must take place through a correction of the practice or theory of law. The significant and permanent inadequacy of the doctrinal image of law would be a source of its dysfunctionality due to various social implications, such as those associated with the educational function of the theory of law.

The practical aspect of the theory of law is twofold. In an obvious way, the theory is practical, normatively concentrating the actions of lawyers who arrange the limits of law and its contents, using heuristic criteria deemed consistent with the theory. Such a theory legitimises specific legal practices. In a less obvious way, the theory is also practical, because it constructs lawyers' self-consciousness, drawing on those aspects that create given practices. Somewhat paradoxically, for the same reasons that justify describing this aspect of the theory of law as practical, we can also identify cognitive values in the theory, since they condition one another.

> Legal scholars, of course, differ in their self-understanding, and legal theorists and legal philosophers in particular may deny the normative implications of their statements and the corresponding normative validity claims. Nevertheless, it appears that the legal scholar is not free to choose between a purely cognitive and a performative attitude. She is, to a certain extent, a prisoner of her social position; the implications and validity claims of her statements are affected by her dual citizenship. (Tuori 2016, 292)

The shaping of the self-consciousness of lawyers by the theory of law is a subject often discussed in the literature of modern legal theory and legal philosophy. I treat this paper as a contribution to the debate and propose treating legal dogmatics as playing a key role in the positivisation of law. The positivisation of law is understood here as a function of some legal practices consisting in limiting a multitude of possible solutions to legal problems that arise during the application of law.

3. THE POSITIVISATION OF LAW AND LEGAL DOGMATICS

The concept of the positivisation of law indicates a certain way of solving social problems, namely the fact that legal provisions do not determine, in principle, the way they are applied in court decisions. It is not an issue of the sheer "technical" possibility of applying law, but a question of how this can be accomplished in a way that is acceptable from the point of view of the adopted values and purposes of law. It can be said that the positivisation of law is the result of specific legal heuristics, consisting in combining meanings, expectations, values, and existing practices in solving legal problems and consolidating patterns of these solutions. Thus understood, heuristics does not boil down to a method, but, rather, is a framework, a context, and a set of conditions for cognition aimed at solving practical problems (Hartman 2011, 25). The concept of the positivisation of law is not a concept developed in legal doctrine; it belongs to the legal theory that constructs the self-consciousness of lawyers, explaining and justifying their actions at the same time.

There are at least two meanings of the "positivisation" and the "positiveness" of law. The more traditional one concerns turning a law that already exists in some way (i.e. natural law) into a form of positive law. As an effect of the enactment of law (law-making), the positiveness of law can be described as the positiveness of a legal text. However, this paper concerns the positiveness of law which is achieved in practice, especially in court decisions. Therefore, the issue concerns the positiveness of law in terms of its determinacy with regard to content.

Jan M. Broekman demonstrates that the adoption of linguistic measures alone will not impart stability to a certain way of understanding the contents of law. The action of some institutional mechanisms is essential. According to Broekman, the positivisation of law (the author introduces this concept in the second meaning described above), takes place in legal dogmatics (Broekman 1985). Broekman notices that the auto-referential structure of legal dogmatics, constituting the central core of a legal paradigm, must remain intact to compensate the open and informal character of a legal text. The auto-referentiality of dogmatics remains in a functional relationship to the argument of the open textuality of law. Not only is this relationship a result of philosophical reflection, but it is also a structure – and thus an element of the argumentation structure. This means that when one arrives at some dogmatic conclusions, the argumentation attains the objectivity which cannot be achieved through reference to a legal text alone.

The connection between the positivisation of law and legal dogmatics is clear when one appreciates that legal dogmatics has a practical function. The theory of law often accepts that the cognitive functions of legal dogmatics are secondary to the practical functions connected with the practice of applying and creating law. In reflection on legal dogmatics, there was a distinct idea that, because of its close

connection to practice, dogmatics does not fit the model of humanistic science, or even that it is a form of a practical activity. It has been noted that solving dogmatic problems consists not only in providing an exhaustive description of a legal norm, but also in ensuring that the implementation of such a norm is an appropriate means for achieving the desired objectives. Irrespective of the ideology determining the attitude of lawyers to the interpretation of the law, legal dogmatics subordinates itself – deliberately or unconsciously – to a certain socio-technical task of building trust in the certainty of legal transactions, legal security, and the stability of interpretation (Ziembiński 1980, 26).

Legal dogmatics also has a normative function. It does not restrict itself to the description of binding legal norms: it proposes or suggests criteria for solving legal problems. Systematisation is an important activity of legal dogmatics, and not only for the sake of systematisation itself. Dogmatics plays a more significant social role in providing models for the application, interpretation, and modification of law (Atienza, Manero 1998, 20–21). As Jan M. Smits notes:

> Legal systematisation differs in one important respect from description in other disciplines: it influences the actual application of the law. Because legal academics work on a system that is also used in practice, important normative consequences can follow from their work. Anyone making use of a coherent system will propagate a change of the law if this fits in with the system itself. (Smits 2015, 11)

When viewed in the light of the above-mentioned qualities, legal dogmatics is brought closer to the discourse of applying the law, which leads to the conclusion that the positivisation of law is a result of legal discourse being understood more broadly than it is within the field legal dogmatics. The activities of judges or officials produce real effects which are not brought about by the scientific theses of legal dogmatists. However, this difference results from the power to produce such effects, which are institutionally-attributed to state organs, and to which the roles played by lawyers correspond. Legal scholars do not have such power because the institution within which they act is not thus equipped. However, one should not draw conclusions about the principal differences between these two discourses and the knowledge that constitutes their thematic field on the basis of whether or not such a power exists.

To combine these two discourses and refer to them as a "dogmatic discourse" would constitute a step beyond the traditional distinction between the doctrine (legal dogmatics) and the judicature. The discourse thus understood comprises legal dogmatics and the discourse of applying the law. The leading role of legal dogmatics expressed this way is in line with the belief that the function of articulating the legal worldview is mainly vested in legal dogmatics (Zirk-Sadowski 1998, 70–71).

4. PATTERNS OF SOLVING LEGAL PROBLEMS

The knowledge which positivises the law consists of conclusions concerning various issues: understanding a legal rule, situations to which it applies, the relation of a given rule to another rule, etc. The applicability of a legal rule, as reached through these arrangements, does not mean only that the scope of its application is determined, but also that it is acceptable in the light of the purposes and the values connected with the legal rule. An applicable legal rule becomes a pattern of solving legal problems.

Such a pattern meets the requirements of utility and validity. To achieve utility means satisfying the expectation that the actual situations to which such models apply should be clearly determined. This allows for repeatability in the way legal problems are solved. The requirement of validity is fulfilled when the patterns of solving legal problems are models for the application of law that is relevant in every respect. Validity is related to interpretative directives, to whether the understanding of the provisions is compatible with the content of other legal texts (especially those of a constitutional nature), and, finally – and this is quite problematic – to moral and economic arguments or a legal policy. The validity of the pattern for resolving a legal problem requires that it should be characterised by universality and objectivity. The requirement of universality means that the essence of the problem characterising a given case should be recognised, and an appropriate model for resolving each case containing this essential problem should be formulated. Objectivity (non-subjectivity) can be understood in a two-fold way. On the one hand, the model should not be an individual expression of the lawyer's views, while on the other hand, it is expected to be justified by reference to something that is beyond the lawyers' consideration of the problem. The latter requirement sometimes raises pitfalls when the reference is to discussions in the legislative process.

It is necessary to indicate some objections to the inclusion of this issue in the discourse of the positivisation of law. One could say that to *show* the validity of a norm impartially is one thing, and to *apply* it impartially is entirely another thing. The norm recognised as valid *prima facie* will be the basis of a valid resolution when it is appropriately and impartially applied without any relation to the problematisation of the validity of this norm or the other norms competing with it (Günther 1989, 156 ff). However, the legal rule understood in some way, applied and functioning as the pattern of solving a legal problem, at least in some cases, is not the same legal norm as the one *prima facie* belonging to the legal system (viewed in the abstract).

The application of competing legal principles, based on their balancing, also demands a justification which will function as a precedent for other cases. Robert Alexy argues that claims to validity cannot be repealed through reference to assertions formulated in the discourse of applying the law, and suggests that

for this reason the distinction between the discourse concerning the validity of legal norms and the discourse concerning their application is not firmly grounded (Alexy 1993, 163–164).

5. THE PROPERTIES OF ARGUMENTATION IN DOGMATIC DISCOURSE

The positivisation of law is conducted through reference to a rather generically closed set of arguments which can be divided into two groups. The first one includes references to the legal text, the language of law, and the system of legal norms, while the second one – references to the history of the dogmatic discourse. The properties of the text, language, or the system of norms can be called their attributes; they are decisive for the formulated arguments attaining objectivity. For example: (1) the attributes of facticity, legibility (regardless of its clarity or non-clarity), internal context, and semantics appertain to the text of law; (2) the attribute of intersubjectivity appertains to the language of law, because it is a fragment of a natural language determined by semantic and syntactic rules; and (3) the attributes of the law as a legal system are the relations between norms: hierarchical relations, interim ones, and the ones connected with the content of norms, especially those that concern the consistency of the legal system.

The attributes of the text of law, language of law, system of law and the relations between them, i.e. recognised ways of joining them in argumentation, make up the structure of law in dogmatic discourse. What we are concerned with here is not a system of law in which a structure is a collection of relations between legal norms; rather, a structure is something that is accepted as an objective determinant which grounds an utterance on law in real dogmatic discourse. A structure of law appears at the level of argumentation concerning legal norms and not at the level of the system of legal norms.

Structural arguments are of a fundamental character, because dogmatic discourse treats a structure of law as external to dogmatic argumentation, and due to this arguments which lean towards an adopted method of solving a problem are objectified. This serves to foster and maintain convictions that the structure of law is stable, irrespective of those arguing, and, hence, it does not allow any discretion in argumentation.

As the interpretative directives are derivative in relation to a legal structure, they do not constitute an object of reference in dogmatic discourse. They are "tools" for solving problems. In the practice of dogmatic discourse, these rules come to the foreground; through them, and especially by means of interpretative directives, lawyers refer to the text of the law, the language of the law, and the legal system. Due to the prescriptive nature of these directives, making references to the structures of law is one of the obligations of lawyers. Not all interpretative directives use the objectivity of the object of reference in the same way; the

differences between references to language rules and references to the purposes and intentions of the legislator, or to the function of the law, are evident. These differences are a reason for problematising the values of various methods of interpretation and are associated with general disputes about the values pursued by law or by the application of law. The fact of whether one accepts or rejects the factuality or the objectivity of references to legislative intentions, purposes, functions, etc. has the ideological dimension. Hence, the preference for the priority of linguistic interpretation, which is often justified by methodological reasons, often conceals axiological choices, connected either to types of interpretative directives or directly to the effects of their application.

Referring to the attributes of the text, the language, and the system of law is often not sufficient for justifying the application of a legal provision in a certain way. The reason for this is especially, though not exclusively, the openness of functional interpretative directives (including purposeful ones). The acceptance of the resolution to some legal problems, weakly justified in a legal text or not justified at all, is supported by reference to the history of the dogmatic discourse. In this way, doctrinal utterances, not least those of the judicature, are ascribed the same attributes which primarily belong to legal texts (factuality, legibility, etc.) However, controversies arise due to support for proposals which seek to solve certain problems posed in the dogmatic discourse through assigning such attributes to the utterances of participants of the legislative process.

6. THE RELATIONSHIP BETWEEN THEORY AND PRACTICE

The concept of the positivisation of law is associated with the philosophical issue of the relationship between theory and practice, or between knowledge and practice. The philosophical hermeneutics of Hans-Georg Gadamer draws attention to the bidirectional relation of acquiring general knowledge and its practical exploitation. It follows that the application of a general norm is not a consequence of its understanding, but, rather, is its integral part. Gadamer believes that the cognition of the meaning of a legal text and applying it to a specific legal case are not two separate acts but one and the same process (Gadamer 2004, 308–309). Practicality in the legal sphere means, on the one hand, the possibility of applying the law according to the general knowledge one has acquired, and, on the other hand, the necessity of finding oneself in an unpredictable, specific case of practical reality which reciprocally influences the understanding of what constitutes general knowledge. As models for action, rules are concretised through application. The problem is what makes one application of a rule correct, and not another. One response given to this question (i.e. by Ludwig Wittgenstein) emphasises the role of practice, including customs and institutions, because – as Aristotle held – a rule in itself does not unambiguously determine the way it is applied.

7. CONCLUDING REMARKS

One can notice that the forms of discourse in which law is positivised are stable, and this is certainly the case with legal dogmatics. The failure of attempts to present the development of the dogmatics of law in accordance with the conception of a historically-changing paradigm (in the sense given to this concept by Thomas S. Kuhn) is explained by the fact that legal dogmatics is not only – or perhaps not even primarily – a field of cognition, but is at least equally a sphere of practical action. In this case, assumptions as to the nature of objects distinguished from the point of view of practice, the relations between them, their influence on practice, etc. do not have a theoretical character *sensu stricto*. The assumptions do not form part of an empirical theory in which the objects may have a theoretical explanation as natural objects. What influences the shift of paradigms in the empirical sciences cannot be found here.

While fulfilling the important social function of maintaining the values of justice and legality, legal dogmatics is guided by the necessity of prudence and theoretical self-restraint to avoid the pluralism of ideas and incessant change. The factors limiting potential change are assumptions concerning the object of research, heuristic methods, and the internal values of law. On the other hand, legal dogmatics is a "science of meaning." It follows that the use of conceptual tools for regulating social conduct is justified not only by science, but also by a free and morally-responsible discourse (Aarnio 1984, 31).

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