

ANDRZEJ BATOR¹

Law and Jurisprudence in the Face of Conflict. Between Neutrality and the Political²

Submitted: 23.05.2020. Accepted: 17.07.2020

Abstract

In the article, I contrast the contemporary legal dogma with the challenges underlying the political nature of law and judicial practice. Both the Continental jurisprudence and the judicial decisions issued by European courts are dominated by the dogmatic current – and treated as politically neutral acts. My intention is to carefully verify this quite common belief in this paper. Making use of H. Berman’s views, I assume that the present shape of jurisprudence and the judicial practice based thereon have been established as a result of political conflicts and that the legal dogma is capable of neutralising and solving modern-day political conflicts precisely because of the qualities of the said shape. It is therefore both a political and an apolitical activity. But this paradox is only apparent. In its strive to keep its paradigm alive, the dogma should be flexible in reacting to the challenges occurring in its political environment. It can – and should – modify the “buffer” of the theory upon which it is set in order to retain its core. In the article, I try to answer the question about the boundaries of the possible adaptation of jurisprudence and juridical practice with respect to claims raised by the domain of politics – claims currently articulated as the strongest by the so-called critical theories of adjudication. The final part of the paper is an attempt – based on the example of theses formulated in monograph by R. Mańko, *W stronę krytycznej filozofii orzekania* – to outline the said boundaries.

Keywords: western legal tradition, revolution in law, neutrality of jurisprudence, political conflict, paradigm of legal dogmatics, critical philosophy of adjudication, humanisation of judicial decisions.

¹ Prof. Andrzej Bator – University of Wrocław, Poland; e-mail: andrzej.bator@uwr.edu.pl; ORCID: 0000-0003-4772-7920.

² This research is not financed by any institution.

ANDRZEJ BATOR

Prawo i prawoznawstwo wobec konfliktów. Między neutralnością i politycznością

Złożony do redakcji: 23.05.2020. Akceptacja do druku: 17.07.2020

Streszczenie

W artykule konfrontuję współczesną dogmatykę prawa z wyzwaniami, jakie niesie za sobą polityczność prawa i praktyki orzeczniczej. Prawoznawstwo – zdominowane w tradycji kontynentalnej przez nurt dogmatyczny – a w ślad za nim orzecznictwo sądowe sytuowane są jako działania politycznie niezaangażowane. W tekście niniejszym próbuję to dość powszechne przekonanie poddać ostrożnej weryfikacji. Korzystając z poglądów H. Bermiana (*Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej*), przyjmuję, że obecny kształt prawoznawstwa oraz wsparta na niej praktyka decyzyjna sądów ukształtowały się w wyniku konfliktów politycznych oraz że dogmatyka prawa właśnie dzięki temu posiada potencjał do neutralizowania i rozwiązywania również współczesnych konfliktów politycznych. Jest zatem aktywnością zarówno polityczną, jak i apolityczną. Paradoks ten jest jednak tylko pozorny. Dbając o zachowanie swojego paradygmatu, dogmatyka powinna elastycznie reagować na wyzwania politycznego otoczenia. Może – i powinna – modyfikować „pas ochronny” teorii, na której jest zbudowana właśnie po to, aby zachować swój rdzeń (I. Lakatos). W artykule próbuję odpowiedzieć na pytanie o granice możliwej adaptacji prawoznawstwa i decyzyjnej praktyki sądów wobec roszczeń płynących ze strony politycznego otoczenia – roszczeń najmocniej współcześnie artykułowanych przez tzw. krytyczne teorie (filozofie) orzekania. W końcowych fragmentach artykułu próbuję – na przykładzie tez sformułowanych w niedawno wydanej monografii R. Mańki *W stronę krytycznej filozofii orzekania* – zarysować te granice.

Słowa kluczowe: zachodnia tradycja prawna, rewolucja w prawie, neutralność prawoznawstwa, konflikt polityczny, krytyczna filozofia orzekania, humanizacja orzekania.

The Problem

In the political debates currently taking place in Poland, one tends to encounter the conviction that practising law is in the midst of a crisis. People from almost all social circles are contributing to this critique: from citizens expressing their views in opinion polls through politicians (or at least those who see an opportunity to gain or strengthen their grip on power through programs of radical change), to legal theorists and philosophers of law. It is telling that when it comes to the latter group, disapproval of the existing legal practice is shared both by left-wing researchers associated with the supposedly critical schools of law, and by representatives of the republican-conservative position, who appeal to the ideas of a nation and community. In spite of radically different axiologies, both sides are united in their conviction that it is necessary to restore the idea of the political nature of legal practice, which has been hidden (according to the critical schools) or challenged (according to the conservatists) by the enlightened model of modern science. In the final sections, this paper will address selected statements from the critical school of thought.

The modern, enlightened model of jurisprudence disseminated by academic didactics is responsible for the current shape of the legal practice. According to the critics, its doctrinal basis is grounded in the achievements of the analytical theory of law, which insists on the necessary and thus privileged (expert, undemocratic) position of the lawyer as a 'mediator between text and law'. The scientific (naturalistic) provenance of the analytical theory of law, its inherent axiological neutrality, and thus its apolitical nature, is linked, in critical debates, to the doctrine of liberalism which adds an additional political impetus to the ongoing disputes. The discussion on the need to restore or 'unveil' the political nature of legal practice is thus moving away from the still relatively safe level of the legal metanarrative (the debate on the scientific character of jurisprudence) and is making headway into the very core of the legal life, i.e. to the debate on the political nature of judicial decisions and the accompanying judicial attitudes.

We can highlight two further characteristics of the critical attitudes. In the arguments presented by the opponents of the legal status quo, the legislator and his current activities are almost entirely absent. It was not so long ago that the Polish legal literature expressed concern with regard to phenomena such as the inflation of the law or the proliferation of acts of instrumentalising that law. At present,

attempts to establish the limits of legislative power, however that is understood, have been put on the back burner, in both circles of critics, if indeed they are present at all. The same goes for the concept of the rule of law. Nowadays, the argument is dominated by ideas derived from political philosophy, namely the principles of sovereignty (state, people, nation) and the democratisation of social life. This is no doubt partly due to the fact that in the 1990s, the Polish general legal science failed to consider the 'theory of the state', which during the period of the Polish People's Republic (PRL) had been regarded as having the same importance as the 'theory of law' component of our discipline. It tends to be the case that, at some point, neglected issues will come back with a vengeance, rejecting any moderation in the process. Instead of developing a sensible supplement to the existing achievements of the theory of law – which in the Polish context turned out to be primarily the legacy of its analytical current – the concepts and propositions developed in political philosophy tend to be used to confront legal 'reason'. Therefore, while in the 1980s, it was the achievements of the analytical theory of law – mainly the theory of interpretation – that served as the basis for establishing the scientific basis of the law-making process (thereby setting limits for the legislative policy of the time) nowadays, this symbolic 'reason', which is typically identified with the practice of judicial reasoning, is located in the field of political confrontation.

In the current debates, it is not only the legislator that is being removed from the field of philosophical and political-legal dispute. The same goes for legal dogmatics, at least to some extent. Although it would seem that it is precisely this group of legal disciplines that has the most to lose here – after all, their research field is based on the achievements of the analytical legal theory that is facing criticism, and is directly related to the practice of adjudication – paradoxically, the representatives of legal dogmatics seem to be, for the same reasons, rather limited when it comes to constructing their own arguments in the debates on the political. Dogmatics tends to play the role of a medium: between the analytical theory of law, criticised by political philosophy, and the judicial decisions criticised by the participants of contemporary political life. The dispute over the political nature of the law and the legal practice has thus become a dispute in which the representatives of legal dogmatics are not on the 'frontline'. Their position in the debate is also weakened by a specific 'iuris-linguistic' research style, developed over many years of professional socialisation which prefers to keep a distance from the social and ethical entanglement of the law and jurisprudence, and avoids involvement in ongoing political disputes. Obviously, there is no shortage of engagement in these circles, but the language of such activity is necessarily limited by the experience developed over years of referring to legal texts, or at best – and this can already be considered a significant breakthrough – to constitutional texts and European laws.

As a result, when confronted with the politics of the moment, the representatives of legal dogmatics tend to put forward arguments limited to reiterating the principle of legalism, and emphasising the impartiality of judges and their independence. In this situation, appeals to the principle of the separation of powers may be regarded as the most far-reaching proof of the success of the philosophical-legal education of contemporary Polish lawyers.

It is not my intention to criticise the attitudes of the representatives of contemporary legal dogmatics in this paper. On the contrary, I consider the stability of these attitudes to be a value whose phenomenon needs to be clarified and put forward to counter the charge of the political nature of law which is levelled at legal science and legal practice. However, I also want to treat the postulate of the political with the seriousness it deserves since it is inevitably a part of the activity of jurisprudence and the judicial activity of adjudication supported by it. Thus, if the achievements of the analytical theory of law are on the main frontline of the dispute with political philosophy and its claims, then legal dogmatics and the judicature established on its basis constitutes the field in which – and about which – this confrontation is taking place.

Lastly, there is one more point that I wish to emphasise in my deliberations. Applying the tools developed in the disciplines outside jurisprudence, and especially those so internally diverse with regard to the adopted axiology as contemporary political philosophy, requires great caution on the part of the lawyer; it requires balancing the submitted arguments in such a way that they do not negate either the sense of what the law is or the social role it has to fulfil. A political philosopher or democracy theorist will not usually make an effort to consider what is important for a professor of law, or for a judge. This is completely understandable. Every science and practice based on it has the right to adopt its own point of view. While acknowledging that the postulate of the political nature of law should be taken seriously by legal science and the judiciary, consideration should be given to whether this can be achieved by adapting and modifying certain components of the existing legal culture. In any case, the notion of the political should always be confronted with the legal point of view. Even if we assume that the latter does not withstand criticism, before we announce a 'revolution in law', it is worth considering whether (i) it is really necessary, and if so, whether (ii) the consequences of such a revolution would be acceptable to us, and not just in our role as lawyers. Contrary to the opinion of many politicians, revolutions in Law – the capital letter 'L' is not accidental here – are much less common than in social life.

The Political at the Source of Legal Dogmatics

According to a certain group of historians, it was not the French Revolution or the even earlier radical and political changes in England initiated by Cromwell (three civil wars in the 17th century with the Stuarts), that turned out to be a turning point, a political 'revolution' in European history; it was rather a dispute (conflict, war) over investiture, which had taken place long before the events in England and France. According to the German law historian Gerd Tellenbach, 'a movement to liberate the Church from royal control (...) dating back to 1058 – was a great revolution in the history of the world, and (...) Pope Gregory VII marked the only turning point in the history of Catholicism, perhaps from a spiritual perspective (...). He [the Pope] was at heart a revolutionary; reform in the ordinary sense of the word, which implies little more than the modification and improvement of existing forms, could not really satisfy him.'³ This view is complemented by the British medievalist Richard William Southern who wrote: 'The secular ruler had been demoted from his position of quasi-sacerdotal splendour, the Pope had assumed a new power of intervention and direction in both spiritual and secular affairs (...).' As the Southern states, it was then that 'the expansion of Europe had begun in earnest.'⁴

In terms of jurisprudence, the most important consequences of this event, or, in fact, of the whole sequence of historical events, are presented by Harold J. Berman in his extensive monograph *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard 1983).⁵ In passing, it is also worth mentioning that Berman is also the author of works on the law of Soviet Russia, as well as *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*. Therefore, he can be considered as an author who analysed the problem of historical changes in law and the factors shaping the contemporary image of European legal culture in the greatest depth. Berman states that '[i]n the wake of the Papal Revolution there emerged a new system of canon law and new secular legal systems, together with a class of professional lawyers and judges, hierarchies of courts, law schools (...) and a concept of law as an autonomous, integrated, developing body of principles and procedures' was created. As a result, 'a new system of canon law and new secular legal systems (...) emerged. 'Further, the systematization and rationalization

³ G. Tellenbach, *Church, State, and Christian Society on the time Investiture Contest*, London 1959, p. 164.

⁴ R.W. Southern, *Western Society and the Church in the Middle Ages*, Harmondsworth 1970, p. 34.

⁵ H.J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, Harvard 1983. This monograph triggered a debate among Polish historians and philosophers of law, see: "Państwo i Prawo" 1996, 12; M.J. Leszczyński, *O pewnej (rewolucyjnej) hipotezie Harolda J. Bermiana – prawo i nauka w średniowieczu*, "Acta Universitatis Lodziensis, Folia Iuridica" 2015, 75.

of law were necessary in order to maintain the complex equilibrium of plural competing legal systems. Finally, the right order of things introduced by the Papal Revolution signified the kind of systematization and rationalization of law that would permit reconciliation of conflicting authorities on the basis of synthesizing principles: wherever possible, the contradictions were to be resolved without destruction of the elements they comprised.⁶ According to Berman, the early 'legal studies' were based primarily on case studies, i.e. the study of conflicting circumstances considered in the light of historical decisions.⁷ Contradictions and conflicts, including those which we would describe as political today, have therefore always been an intrinsic part of law. The revolutionary nature of the changes which occurred due to the historical events recounted by Berman was that the focus in resolving court cases was shifted from arguments referring to the 'memory of facts' to the argument from the 'memory of principles' and legal rules. The history of social events, including political events, and the history of legal events – which had hitherto been linked – gained the conditions for mutual autonomy. The need to systematise and rationalise the law opened up space for analysis that was neutral in terms of world view. This also led to the need for lawyers as a specialised professional group.

Berman claims that it was the canonists, freshly trained lawyers in canon law, who gave shape to the political dispute of the time – they did not allow the Pope (and probably the Emperor, either) to gain an excessive advantage; they kept the system in balance, and reconciled tensions. This gave rise to scholasticism proper. *Yes and No* by Peter Abelard, a key work of the period, was to present a method of reconciling various canons. The papal revolution thus also became 'a motive force in the creation of the first European universities, in the emergence of theology and jurisprudence and philosophy as systematic disciplines.'⁸ The law school in Bologna, founded by Irnerius in 1087, is estimated as having had between 1,000 and 10,000 students from all over Europe.⁹ This was also the beginning of modern scientific thought.¹⁰ Berman even claims that this legal thinking anticipated and inspired scientific positivism – not, as it is quite commonly believed, the other way round.

The scholasticism of the medieval university shaped the foundations of modern legal dogmatics. As Berman puts it, 'the legal scientist of the twelfth century, like

⁶ H.J. Berman, *op. cit.*, pp. 114–117.

⁷ *Ibidem*, pp. 120, 182 and 183; see also H. Kupiszewski, *Prawo rzymskie a współczesność*, Warszawa 1988, p. 52.

⁸ H.J. Berman, *op. cit.*, p. 119.

⁹ *Ibidem*, pp. 122 and 581.

¹⁰ *Ibidem*, pp. 150–151.

his counterpart today, was concerned with what was called much later “legal dogmatics”.¹¹ The dispute over universality (nominalist realism) shaped the relationship, so important for lawyers, between the general (rule and decisional formalism) and the individual and concrete (the person, the factual state with claims to equity and contextualism). ‘The nominalists believed that universals are produced by the mind, by reason and will, and therefore can be revised by reason and will, but that at the same time, they inhere in the particulars that they characterize, and can therefore be tested by those particulars.’¹² Moderate nominalism – in Abelard’s version – asserts ‘the whole resides in the parts, holding them together, so that the parts taken in isolation from one another (rather than as parts) are not so great as the parts taken in relation to one another. Thus the parts are not, strictly speaking, derived from the whole (deduction), nor is the whole, strictly speaking, derived from the parts (induction), but rather the whole is the parts interacting with one another. Therefore nominalism such as Abelard’s was congenial to the systematizing and synthesizing of law.’¹³

Obviously, the influence of the Roman law, which was taught in Bologna from the very beginning, on the basis of texts compiled in the 6th century by Justinian (*Codex, Institution, Novels* and, above all, *Digest* – a collection of opinions of Roman jurists), was also important for the breakthrough at that time. It was thanks to the university masters that these incoherent sources were put in order and given a correspondingly uniform exposition – including a new name: *Corpus iuris civilis*.¹⁴ Thus, the needs of academic didactics had a fundamental impact on what would be called the general principles, and on their conceptual order in the system of law. In their efforts to conceptualise legal institutions and systematise law into a coherent body of knowledge, Western universities raised the analysis of the law to the level of a science.¹⁵ In turn, the Greek lineage – based on the ideas of Aristotle – which provided dialectics and rhetoric, and which had already been assimilated by lawyers in Roman times, was widely adopted by medieval law schools, and was taught and used as a basis for the art of judgement. Dialectics, from the Greek theory of cognition of the external world (explaining reality), was transformed into the practical

¹¹ Ibidem, p. 153.

¹² Ibidem, p. 141.

¹³ Ibidem.

¹⁴ ‘Law students in Europe today, who study Roman law as it has been systematized by university professors in the West since the twelfth century, find it hard to believe that the original texts were so intensely casuistic and untheoretical. They are taught to show that implicit in the myriad of narrow rules and undefined general terms was a complex system of abstract concepts’ – Ibidem, p. 128.

¹⁵ Ibidem, p. 119 ff.

ability to conduct disputes and to reach settlements (balancing the arguments of opposing parties in a court dispute or reaching decisions through the confrontation between a general rule and an individual case).

As Berman points out: 'The Papal Revolution ended in compromise between the new and old. If force was the midwife, law was the teacher that ultimately brought the child to maturity. Gregory VII died in exile. Henry IV was deposed (...). The children and grandchildren of the revolution enacted its underlying principles into governmental and legal institutions (...). Only then was it more or less secure for succeeding centuries.'¹⁶ It is thanks to this process, the beginning of which was a strictly political conflict, that what is now called the European legal culture has developed.¹⁷ Even the great national revolutions of the past the Russian Revolution of 1917, the French and American Revolutions of 1789 and 1776, the English Revolution of 1640, the German Reformation of 1517 eventually made peace with the legal tradition that they or some of their leaders had set out to destroy.¹⁸ 'Thus the new systems of law established by the great revolutions transformed the legal tradition while remaining within it.'¹⁹ The Western legal culture is bigger than specific legal systems, so political upheavals and revolutions did not destroy it, but renewed it.²⁰

Harold Berman drew attention to a political conflict that proved crucial for the history of Europe: a conflict which embodies the notion of antagonism contained

¹⁶ *Ibidem*, pp. 105.

¹⁷ Berman lists 10 characteristics of the Western legal tradition: 1) the differentiation of legal institutions (primarily legislation and case law); 2) the professional nature of the staff of the legal institutions; 3) specialised legal education (separate schools, professional literature); 4) law is not perceived only as regulations, but also as the achievements of learned lawyers and judges; reference to 'sophisticated legal knowledge'; 5) understanding the law as a coherent whole, together with the method of creating general concepts; 6) emphasis on the continuity of the law; 7) perception of the 'internal logic' of the law: changes do not occur by chance, but as a result of such interpretation of the past that is to meet current and future needs; 8) recognition of the supremacy of the law over political authorities; and 9) the pluralism of jurisdiction and systems alongside the necessary supremacy of the law; 10) the perception that there is a natural tension between ideals and reality, changeability and stability, transcendence and immanence. This results in periodic tensions, upheavals and revolutions in the legal system (*ibidem*, pp. 37–38). However, when it comes to the hallmarks of the contemporary legal crisis, Berman puts them down to: (i) the weakening of the Western culture and the loss of belief in its universalistic character; (ii) forsaking the individualism of the law in favour of collectivism (a kind of 'return to tribal law'); (iii) an attack on the autonomy of the law and attempts to depreciate the legal profession (see Soviet Russia in the first years after the revolution; China in the 1960s and 1970s) (*ibidem*, p. 37).

¹⁸ *Ibidem*, p. 4.

¹⁹ For instance, '[t]his Lutheran skepticism made possible the emergence of a theory of law legal positivism which treats the law of the state as morally neutral, a means and not an end', and thus to secularization of the law, along with the conviction that final sanctioning of the law gives political coercion (*ibidem*, pp. 28–29).

²⁰ *Ibidem*, p. 9.

in the category of 'the political' – as proposed by contemporary political philosophy.²¹ But it was only one of many conflicts, and one which, from the perspective of general history, is not seen as constituting a breakthrough. After all, with the benefit of hindsight, nobody calls the dispute over investiture a revolution in the social or political sense. It turned out to be a revolutionary event 'only' for jurisprudence and legal practice. However, this happened not only because of the political conflict itself at the time, but also – or rather, above all – because of what happened at that same time, or a little later (finding a compilation of texts of Roman law in the Justinian library in Florence, the reception of Aristotle by medieval theologians, the dispute over universals, the emergence of autonomous universities, etc.). The combination of these diverse, contingent events led to the fact that a certain political conflict – which at its root was, after all, just a certain incidental dispute over the right to nominate bishops – led to the development of such methods of argumentation and appropriate procedures which made it possible not only to resolve the original political conflict, but also to shape a mechanism for resolving similar disputes in the future.

Law and politics are therefore in a permanent relationship: conflict (the political) determines – it can determine – the shape of the law, but at the same time, the law can – and should be used to – solve political conflicts (it is a civilised form of the political²²). In the latter role, the law must retain its apolitical nature, its autonomy from politics, which is necessary for maintaining the authority that determines the resolution of the current dispute and, above all, the acceptance of the consequences of the settlement arrived at, including its political consequences. This is the (apparent) paradox of the political and apolitical nature of the law. However, the paradoxes do not end here. Current and future political conflicts should always teach us – that is, theoreticians and practitioners of law – something. Nothing is given once and for all. But on the other hand, every legal culture needs stability because it maintains the authority of the law, jurisprudence and, above all, the verdicts of courts. It is for this reason that the existing patterns of legal action, generated mainly by the previous achievements of legal dogmatics, are enthusiastically referred to as paradigmatic. One hereby encounters a new dilemma: between the existing paradigm of practising jurisprudence and the need for its possible change.

²¹ See Ch. Mouffe, *On the Political*, Routledge 2005. As Mouffe writes, 'by "the political" I mean the dimension of antagonism which I take to be constitutive of human societies' (p. 9).

²² In my opinion, this is how Ch. Mouffe's sentence should be understood, namely that 'the task of democracy is to transform antagonism into agonism', whereas 'the aim of democratic politics should be to provide the framework through which conflicts can take the form of an agonistic confrontation among adversaries instead of manifesting themselves as an antagonistic struggle between enemies' – Ch. Mouffe, *The Democratic Paradox*, New York 2000, p. 117.

For general jurisprudence, defending the paradigm involves siding with the achievements of the current analytical theory of law, whereas recommending change is to side with the representatives of the so-called critical theory of law.

Apolitical Jurisprudence. The Paradigm of Legal Dogmatics

The phrase 'paradigm' (of legal dogmatics) is borrowed, obviously, from Thomas Kuhn and his *The Structure of Scientific Revolutions*. The terms can only be described as 'borrowed' because Kuhn did not write about the social sciences, let alone jurisprudence.²³ However, some representatives of various disciplines considered this idea so inspiring that they attempted to adapt and apply it to fields outside the natural sciences.

In the field of jurisprudence, Aulis Aarnio attempted to apply the concept of paradigm, subsequently extended with the concept of the disciplinary matrix, to contemporary legal dogmatics.²⁴ As claimed by Aarnio: 'Citizens, officials and lawyers are in need of knowledge of the content of the law and this need can only be met by the research of dogmatics. This means that for social reasons the basic matrix of legal dogmatics is stable.'²⁵ According to this author, there is no theoretical justification for referring to a paradigm shift in legal dogmatics. The observed changes take place rather inside the basic disciplinary matrix which is interpreted in accordance with changing social expectations. In contrast, external change would mean a transformation of legal dogmatics that would ultimately lead to its replacement by, for instance, empirical sociology.²⁶ This would entail the elimination of legal dogmatics.

As Aarnio notes, changes within the theory of legal dogmatics do not have a significant impact on this discipline either. A crisis in theory, such as even a fundamental divergence in the positions adopted with regard to issues which may affect

²³ In the cited work, T. Kuhn only briefly states that 'it remains an open question what parts of social science have yet acquired such paradigms at all' (p. 15). Therefore, it can be concluded at most that the author did not rule out the use of the category of a scientific paradigm outside natural science. See: T. Kuhn, *The Structure of Scientific Revolutions*, Chicago 1996.

²⁴ A. Aarnio, *On Paradigm of Legal Dogmatics – Problems of Scientific Progress in Legal Research*, [in:] P. Trappe (ed.), *Contemporary Conceptions of Law: Proceedings of the 9th World Congress, Basel 27.8.1979–1.9.1979*, Wiesbaden 1982; idem, *Paradigms in Legal Dogmatics*, [in:] A. Peczenik (ed.), *Theory of Legal Science*, Dordrecht 1984, p. 25.

²⁵ J. Leszczyński, *O niezmienności sposobu uprawiania dogmatyki prawa*, "Studia Prawno-Ekonomiczne" 2010, 81, pp. 124–125.

²⁶ A. Aarnio, *Reason and Authority. A Treatise on Dynamic Paradigm of Legal Dogmatics*, Aldershot 1997, p. 252.

the paradigm of dogmatics, does not transfer to practice within the framework of legal dogmatics. Thus, until there is a need to make definitive conclusions concerning the content of the law and its justification, we will probably continue to modify or give nuance to the components of the existing interpretation matrix, and try to find a balance somewhere between methods borrowed from logic and 'looser' ones taken from the theory of argumentation. However, the basic matrix cannot be rejected; it can only be interpreted differently under the influence of the social context.²⁷ As can be seen, the need for relatively stable legal dogmatics seems to be uncontroversial. Jerzy Leszczyński,²⁸ interpreting Aarnio's views, notes that 'the failure to reconstruct a paradigm shift in legal dogmatics is due to the fact that legal dogmatics is not only (...) a field of study, [but] at least as much a field of practical action.'²⁹ Thus, continuity in the way legal dogmatics is practised is not based on theoretical grounds (e.g. the concept of truth prevailing in jurisprudence, a vision of the external integration of jurisprudence, or an approved social philosophy), but it rather stems from the nature of problems solved in the process of applying and interpreting the law.

In turn, Aleksander Peczenik asserted that the phenomenon of the continuity of legal dogmatics is a result of its formalism. In his opinion, no anti-formalist movement in the theory of law is able to produce a paradigm that works effectively in legal practice.³⁰ The price paid for the constancy of dogmatics is its technicisation and, in consequence, the abandonment of deeper reflection. Legal dogmatics thus becomes 'immune' to theoretical and philosophical innovations coming from the outside. Of course, formalism cannot provide a justification for solving all problems concerning the application and interpretation of the law, especially those cases which involve economic, political or moral issues.³¹ However, it is the rationalism underlying legal-dogmatic arguments which can and should be a model for solving non-legal problems, including political problems, and not the other way round. It is evident that the perspectives of Aarnio and Peczenik are essentially similar and lead to the conclusion that it is an illusion to believe that 'the diversity of theoretical views on the law significantly changes the way legal dogmatics is practised.'³² The existing 'interpretative matrix' of legal dogmatics – including its formalism perceived i.a. from the perspective of the politics and the political nature of the law – can and should

²⁷ Idem, *Paradigms in Legal Dogmatics...*, p. 27.

²⁸ J. Leszczyński, *O niezmienności...*, pp. 115–129.

²⁹ Ibidem, p. 125.

³⁰ A. Peczenik, *The Basis of Legal Justification*, Lund 1983, p. 131.

³¹ J. Leszczyński, *O niezmienności...*, p. 128.

³² Idem, *Pozytywizacja prawa w dyskursie dogmatycznym*, Kraków 2010, p. 38.

be criticised, by indicating possible ways it could be modified. However, as long as the law is identified with the legal text, legal dogmatics in its basic form will remain intact.³³

For jurisprudence, changes within the framework of legal dogmatics, made under the influence of social challenges, will only be internal changes, which can be – after Imre Lakatos – called changes to its ‘protective belt’, whereas the ‘hardened core’³⁴ of what constitutes the established way of practising legal dogmatics will be preserved. The way that dogmatics operates, which determines the stability of the continental version of legal dogmatics, is founded on argumentative formalism. The criticism that has been directed at legal dogmatics almost from its beginning argues that legal argumentation needs to be more relevant to the social context; that the existing ‘logocentric’ perspective on the perception of law and legal practice needs to be supplemented, not rejected.³⁵ The majority of authors addressing the issue of the openness of legal dogmatics to external challenges pay attention to the values and judgements adopted in the process of interpreting legal texts. As Jerzy Leszczyński states, ‘it can be assumed without exaggeration that it is characteristic of dogmatics to adopt an evaluative point of view.’³⁶ However, a pragmatic counterpoint to such values and evaluations turns out to be the existing conceptual apparatus, legal thought constructs, and the rules of operation and legal institutions shaped on their foundations.

Zygmunt Ziemiński observes that ‘the apparent simplicity of the paradigm of legal dogmatics’ derives from a simplified image of dogmatics, which depicts it as performing its tasks through the algorithmic execution of rules – above all the rules of exegesis.³⁷ However, according to Ziemiński, the basic tasks of the legal sciences become fully understandable and feasible only ‘on the basis of full knowledge of various elements of the legal culture of a given environment: legal ideologies, existing legal constructions and legal conceptual apparatus.’³⁸ Although ‘the terminology

³³ Idem, *O niezmienności...*, p. 128; J. Wróblewski described this as “characteristic for the dogmatics of law (...) the domination of the legislative text as a source of the law” – idem, *Paradygmat dogmatyki prawa a prawoznawstwo*, [in:] S. Wronkowska, M. Zieliński (eds.), *Szkice z teorii prawa i szczegółowych nauk prawnych*, Poznań 1990.

³⁴ I. Lakatos, *Proofs and Refutations*, Cambridge 1976, Polish edition: *Dowody i refutacje. Logika odkrycia matematycznego*, transl. M. Kozłowski and K. Lipszyc, Warszawa 2005.

³⁵ See: A. Bator, *Systemowość prawa wobec konfliktów politycznych*, “Przegląd Prawa i Administracji, Acta Universitatis Wratislaviensis” 2016, 104(3718), pp. 76–77.

³⁶ J. Leszczyński, *O niezmienności...*, p. 120; see also: A. Aarnio, *On Paradigm of Legal Dogmatics...*, p. 141; J. Wróblewski, *Paradygmat dogmatyki prawa...*, p. 38 ff.

³⁷ Z. Ziemiński, *Szkice z metodologii szczegółowych nauk prawnych*, Poznań 1983, p. 73.

³⁸ Ibidem, p. 74.

and conceptual apparatus of law, some basic mental constructs, the general outlines of some juridical institutions are inherited from formation to formation (...), in the course of this succession, they undergo gradual changes which are not always noticeable.³⁹ Referring to the concept of the rational legislator as an assumption employed in the interpretation (exegesis) of legal text, Ziemiński detects changes taking place over time in legal dogmatics, that is, 'in attributing to this *legislator* different knowledge of social matters, and different systems of evaluation employed by the lawyers of the capitalist state and the socialist state in the course of the exegesis of legal texts (...).'⁴⁰ It is evident that this change does not affect 'some fundamental thought constructions' – i.e. in this case, the assumption of the legislator's rationality, as a formal construction which supports legal argumentation. However, it requires considering 'different knowledge of social issues' and a 'different evaluation system'. The latter components of rationality always change over time, to a greater or lesser extent, and not just under the influence of political revolutions. Ziemiński continues: 'in capitalist and socialist science (...), one can find postulates expressing tendencies to stick more or less rigorously to the existing linguistic rules of meaning, but also to allow for more or less exceptional solutions (...). The difference lies in the accepted value systems and not in the methodological paradigm for solving dogmatic problems.'⁴¹

Back to the Political. Towards a Critical Philosophy of Adjudication

The social engagement of post-modern thought as well as its permanent search for hidden assumptions behind the official declarations and programs of science should be interpreted positively. After all, cognitive curiosity boils down to the fact that theories can reveal what is not palpable and obvious, and what has, or can have, a significant impact on scientific and social practice. Problems with post-modern philosophy arise when (i) one tries to transfer this way of thinking to the field of jurisprudence; and (ii) one turns the search for hidden assumptions and values underlying the statements formulated by science into a normative program for their dissemination and implementation in the social practice. It is not legal science that is placed at high risk due to such external integration of legal thinking. The theory and philosophy of law as general disciplines have a natural inclination to seek

³⁹ Ibidem.

⁴⁰ Ibidem, p. 86.

⁴¹ Ibidem, p. 87.

scholarly inspiration or to consolidate their claims in the external scientific environment. However, legal dogmatics – as we have seen – has developed, due to its social role, certain defence mechanisms against engaging with scientific and philosophical ‘innovations’. In this situation, the field at high risk due to the critical theory’s ‘discovery’ of the political nature and ideologisation of law is jurisprudence.

It may also be worth noting, on the sidelines of these considerations, that the conclusions of critical theories – transferred to the continental culture of statutory law – also tend to be in a kind of synergy with the attempts to reform of the judicial system, which openly aim at politicising jurisprudence. This is clearly visible i.a. in the Polish situation. The statements made by the authors associated with the critical research trend – no doubt unintentionally – favour or may favour the legitimacy of such attempts at reform. All this seems to provide sufficient reason to use the observations made earlier in this article to comment on the proposals formulated by critical theories (philosophies) of adjudication. A good example of this is provided by Rafał Mańko’s *W stronę krytycznej filozofii orzekania* [Towards a Critical Philosophy of Adjudication – own translation].⁴² It goes without saying that the scope of this paper only permits a focus on selected claims from this very interesting monograph.

Let us start with, as this author calls it, ‘a model of the political ethics of adjudication.’ We find there an important postulate which urges that judges should be sensitised to the situation of the ‘other’ as an individual who ‘stands before the law’. The preferred attitude is an expression of ‘post-axiology’. This consists in the fact that instead of the traditional axiologies of law or the theory of justice, which have been built up so far *in abstracto*, it is necessary to shape a judicial ethics oriented towards specific instances of adjudication. However, it should be stressed that this postulate does not aim to eliminate the general rule as such. ‘The relationship here is dialectic in nature.’⁴³ Taking his lead from Costas Douzinas and Adam Gearey, Mańko develops the idea as follows: ‘the operation of justice requires a constant movement between a general rule and a particular example, so that it finds no resting place or point of balance (...).’ Also following Douzinas and Gearey, Mańko adds that ‘the law is necessarily devoted to a form of universality and abstract equality, but it has to respect the requirements of contingency, embodiment and a concrete other (...).’⁴⁴ In his commentary on the these authors, Mańko states that they reduce ‘virtually the entirety of judicial ethics to two orders – firstly, the continuous deconstruction of the law in the name of the coming justice, i.e. the ethical ideal, and

⁴² R. Mańko, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja, “Jurysprudencja”* 2018, 10.

⁴³ *Ibidem*, p. 195.

⁴⁴ *Ibidem*.

secondly, taking into account the individual characteristics and circumstances of the defendant when adjudicating. It is therefore a postulate for a profound humanisation of adjudication.⁴⁵ Although these two postulates are closely related in Mańko's narrative, I am forced to separate them for the purposes of my argumentation and, above all, for the depth of their consequences for the existing practice of adjudication. For the same reasons, I will reverse the order in which they are discussed, starting with the second (the humanisation of adjudication), though the significance of the first postulate seems to be of primary importance for the critical philosophy of adjudication presented here.

The postulate of the humanisation of adjudication ultimately entails not so much replacing the existing ways of legal argumentation, but rather supplementing them. Mańko acknowledges that 'the juridisation of a dispute – subjecting it to the jurisdiction of a third party, i.e. a judge (...) has 'significant consequences for the dispute itself and the rules governing its resolution. It is because law, unlike ethics, is forced to operate with generalisations and abstractions. In consequence, it can *hardly, by definition and necessity*, take account of the specific nature of the case (...).'⁴⁶ This is supposed to lead to the structural injustice of the law. The factor that 'must intervene to restore the ethical dimension of the law is politics. Without this, the law is doomed to formalistic atrophy, will not be cognisant of actual situations and the real people involved in them, with their suffering, fears (...).'⁴⁷ Therefore, Mańko puts forward the thesis that the humanisation of adjudication, the restoration of its ethical dimension, which in the process of adjudicating will allow one to 'respect a particular other', is only possible with the involvement of politics. The alternative is 'formalistic atrophy'. However, it seems that other, simpler paths to the realisation of the submitted postulate are also possible.

After all, the humanisation of adjudication can also be conceived of as an autonomous value of the law, which can be realised without the intervention of politics. In other words, I believe that the humanisation of judicial decisions is possible to implement within the framework of the existing paradigm of practising legal dogmatics and jurisprudence. I do not think that – obviously, except for the extreme supporters of the syllogistic model of a judicial decision – for instance, the doctrines of criminal or civil law would have great difficulty in finding a suitable basis for implementing this postulate in judicial practice. The judge has a full arsenal of potential sources which allow for such a line of argumentation: relevant passages from the texts of the Constitution and ordinary statutes, particularly those in the

⁴⁵ Ibidem.

⁴⁶ Ibidem, p. 190.

⁴⁷ Ibidem, p. 191.

form of principles of law, the democratically shaped *acquis* of the legal doctrine, national and European case law, and guidelines from the theory and philosophy of law, including those from critical currents. The difficulties with the realisation of this postulate would instead be a matter of resistance from what Pierre Bourdieu calls the 'habitus'. As the concept of habitus suggests, 'certain options for action do not exist', not because there are no such options, but because 'the subject is not even aware of them.' The difficult cases inscribed in political conflicts force us to look for non-standard solutions, and should therefore encourage us to have the courage to break the habitus (see, for instance, the concept of the 'dispersed application' of the Constitution, which is spreading in front of us in the Polish doctrine). Therefore, it would be justifiable, and even easier to argue, in my opinion, that it is not 'politics' that must intervene to humanise adjudication, but it is rather the standards applied by the courts, especially those shaped at the level of legal culture, which should subdue and humanise contemporary politics.

Writing these words, however, I am aware that this is not Mańko's main objective since it is not the humanisation of adjudication that is of primary importance here. I just want to point out that – and this is confirmed by Mańko's argumentation which is discussed below – that humanising the legal process is possible by using the means of argumentation already available to us. The idea of anti-formalism and the humanisation of adjudication, postulated by post-modern ethics which does not question the existence of a general rule as such, is well recognised by the philosophy of law and is covered by one of its oldest dilemmas: the tension that arises between the universalism of each rule and the need for individual, situational sensitivity. In *Rhetoric*, Aristotle wrote how the right law could be reached by way of *epieikeia*.⁴⁸ This problem was also reflected in Roman legal practice (the principle of *aequitas*).⁴⁹ It was then taken up in the Middle Ages by the canonists, in the form of questions about 'the relationship of the judge to the written law and about the relationship of the written law to the superior law that preceded it (...).'⁵⁰ This triggered an intense debate on the subject, which, as we have already seen, inspired

⁴⁸ R. Sobański, *Stusznosc w prawie*, "Państwo i Prawo" 2001, 8, wrote that Aristotle 'had already noted the two-dimensionality of language emphasised by contemporary hermeneutics, namely horizontal, rational, conceptual-abstract, and then vertical, i.e. intentional, symbolic-illustrative (...)' (ibidem, p. 4). 'The use of *epieikeia* is justified by the belief that in a particular case, it is necessary – for personal use – to amend a statute in the name of overriding equity. It is not the statute itself that is questioned, but its assignment to a specific case.' (ibidem, pp. 4–5).

⁴⁹ 'It was precisely equity in Rome that became the criterion for the criticism of law, and a tool for dispensing justice to everyone who deserves it. The edicts of praetors aimed at this, by means of which they modified the law, establishing procedure, specifying exceptions, correcting civil law through the consideration of current public use.' (ibidem, p. 5).

⁵⁰ Ibidem, p. 5–6.

Berman to describe this very period as a revolutionary one, which continues to shape the Western legal tradition to this day. The recommendation to humanise the process of making judicial decisions can therefore be considered a postulate to change the proportions between the general rule and the situational-personal context as factors involved in shaping the content of a judicial decision. This would only amount to the recommendation to humanise adjudication being a postulate to rebuild the 'protective belt' of the existing paradigm of legal dogmatics.

Rafał Mańko would probably consider the above argumentation to be based on an 'empty signifier'-type understanding of the humanisation of adjudication. After all, he is not concerned so much with the humanisation of adjudication as such, with considering the situation of an individual in a court case, as he is with a specific direction of its realisation. Therefore, if one wants to look for traces of a revolution in law based on the program outlined in *W stronę krytycznej filozofii orzekania*, one should introduce the concept of political adjudication. Mańko refers to this as addressing the fundamental problem.⁵¹ As he writes, 'an adjudicatory decision will be a political adjudication if and only if two premises are jointly fulfilled: first, the decision will involve some degree of discretionality (i.e. it will be a decision in the strict sense); and, second, if such a decision involves, even if in an individual dimension, a conflict of a political nature, i.e. belonging to the sphere of a particular social antagonism.'⁵² The first political aspect of the decision is – and here Mańko refers to Carl Schmitt and Chantal Mouffe – 'deciding in the field of political undecidability.' After translating this political phrase into the language of legal decisions, one discovers that a decision remains in the political sphere when 'the text of the law cannot be directly applied to the decisions of the entities implementing the law', so that 'the need for a choice arises and, consequently, the need for a decision by the determining authority in the process of applying the law.'⁵³ In other words, because of the binary nature of the legal decision code, also in conditions of the existence of so-called decisional leeway, some decision must be made.

The obligation to arrive at a decision through judicial discretion opens the way to searching for answers to dilemmas which are well-known to the analytical theory of law, being widely discussed therein, and which are also familiar to legal dogmatics and the judicial practice. This is also confirmed by Mańko's work on adjudication: in chapter III 2.3 (*The Concept of Political Adjudication*), the reader will encounter deliberations on H.L.A. Hart's 'semantic shadow' and textual openness,

⁵¹ R. Mańko, op. cit., p. 154.

⁵² Ibidem.

⁵³ The quotation is taken from Tomasz Bekrycht's, *Transcendentalna filozofia prawa. O zewnętrznym obowiązywaniu i uzasadnianiu istnienia prawa*, Łódź 2015, p. 190.

and on H. Kelsen's 'interpretative framework'; as well as on the justifications for deviating from linguistic interpretation, closing loopholes in the law as the creation versus inference of duties, settlement in situations of conflicting norms, and, finally, considering the determination of a court decision by legal materials versus the freedom of interpretation. As can be seen, there is a wide range of doctrinal legal ideas, concepts and constructions, as well as regulatory mechanisms based on the achievements of the analytical theory of law, which are applied in the practice of jurisprudence, with varying degrees of success. Therefore, it is unlikely that the reader will be convinced that there is evidence that the existing paradigm of legal dogmatics has been undermined. The philosophical dilemma of post-modern 'undecidability' is brought down to earth, by Solomon's sword of the lawyer-judge, so to speak.

What a critical philosopher cannot do, or will not do, a lawyer simply has to do. After all, the legal idiom and the idiom of political philosophy are simply different. But let us press on with the search for the legal consequences of the concept at issue here – 'political adjudication'.

The second element of a political adjudication is that the decision must belong to the political sphere. Here Mańko has in mind 'the significance of the decision from the point of view of a certain social antagonism'⁵⁴ revealed by a specific dispute before a court. The following are selected examples of such social antagonisms: (i) 'the court, when interpreting labour law in favour of employers, may take a political decision in favour of the owners of the means of production|'; (ii) 'the court, when deciding on a consumer case, may favour either the interests of consumers or of traders (where the rules are unclear or can be interpreted in two ways)'; (iii) '*a contrario*, however, a murder sentence will not be a political decision because there are no opposing social groups *for* and *against* the murder' (unless, for instance, it is accompanied by, for example, ideological and symbolic antagonism, e.g. the murder was motivated by religious reasons).⁵⁵

Although the examples given will not always belong to the group of 'easy cases', it is likely that experienced judges, employing arguments developed in legal dogmatics, and supported by appropriate expert knowledge, should have little difficulty in recognising and settling them. From the legal point of view, therefore, one continually revolves around the previously considered dilemma of the 'tension' between the general rule (e.g. the prohibition of murder) and the specificity of the case under consideration (e.g. the religious motive of the perpetrator). Hence, it can be supposed that this is not what the real issue is. What concerns the critical philosophy

⁵⁴ R. Mańko, op. cit., p. 166.

⁵⁵ Ibidem, p. 167.

of adjudication is not the situation of judges in their 'field of jurisdiction', as they are able to deal with this, but whether 'a dispute between (...) the parties constitutes an individual manifestation of a more general and abstract collective dispute (antagonism).'⁵⁶ This leads to the conclusion that, in fact, the point is how – using Mouffe's wording – to turn the judicial 'field of decidability', the imposed legal obligation to adjudicate, into the political 'field of undecidability' where such an obligation no longer exists. In the latter area, after all, it is only a matter of articulating diverse attitudes and social interests since any solution would entail political, undemocratic oppression. So as one can see, the critical philosophy of adjudication is neither a philosophy of law nor a theory of law. It is a political philosophy from which one can only try to deduce direct consequences for legal science and legal practice.

So far, I have tried to demonstrate that the judicial practice of adjudication may circumvent these consequences, that jurisprudence and legal culture have created internal mechanisms for neutralising social and political disputes. We are just approaching the border beyond which these mechanisms will have to be suspended.

Judges in the Arena of Political Ideology

Leszek Koczanowicz, a political philosopher from Wrocław, promoter of the non-consensual concept of democracy, is a proponent of the view that social dialogue does not have to lead to agreement, that it is not consensus which is the fundamental value of social life, but rather the very possibility of better understanding through dialogue. The application of this intuition to the perspective relevant for a lawyer leads to the assertion that in a non-consensual democracy, law (a legal process) is a forum for the expression of pluralistic values, 'a medium for improving understanding, not a way to reach consensus. The point of dialogue is therefore not to resolve disputes or (even less) to find a single solution.'⁵⁷ This is due to the fact that social antagonism is an essential component of modern democracies. Legal dispute is only one of the available media for articulating these legal disputes. The courtroom and the cases which take place there form a 'common symbolic space' that allows social antagonisms to become civilised, leading to the transformation of the antagonistic relationship 'between enemies' into an agonistic relationship 'between opponents'.⁵⁸ In post-modern argumentation, therefore, a legal dispute ceases to

⁵⁶ Ibidem.

⁵⁷ L. Koczanowicz, *Polityka dialogu*, Warszawa 2015, p. 197.

⁵⁸ See: Ch. Mouffe, *Introduction: The Democratic Paradox*, [in:] eadem, *The Democratic Paradox*, op. cit., p. 33; see also footnote 22 above.

be a dispute between parties, considered and settled by an independent arbitrator. It is a form of expression that serves to articulate the vision of social emancipation adopted by the participants.

For political philosophers and political scientists, it is entirely legitimate to inscribe law in the space of politics and democracy. Since the starting point and goal is to build the theory/philosophy of democracy, one can – after Wittgenstein – simply treat law (a court case) as one of the many ‘games’ played in a democracy. Undoubtedly, some participants of court hearings may be driven by such a motivation. However, promoters of critical adjudication philosophies go even further. They also place judges in this symbolic space. The actions taken by a judge, including the settlement of the dispute itself, should be a medium for the expression of his or her own convictions. The judge ‘decides for himself’, as Mańko puts it, presenting the views of Duncan Kennedy, ‘in the light of an ideology which he considers to be right in his conscience.’ He is, therefore, as a critical judge, critical of the law itself. He is a judge-activist, Prometheus, ‘who in his work tries to act in the interest of humanity, especially those who suffer from exclusion and domination by others.’⁵⁹ As can be seen, in raising the problem of politics, the post-modern philosophy of adjudication is interested in more than just situating court disputes in relation to social antagonisms. It is also a matter of ensuring that the judge’s decision is itself based on a specific axiology propagated by critical theories. The political nature of the dispute and the social antagonisms inherent in it, which in many situations are inevitable, transform into the ideology of adjudication itself. For such a perspective to become a reality, it is necessary for judges to become emancipated, for them to become aware of their social mission, and then for them to have courage in its realisation (even if one has to practise ‘Ketman’ as a consequence⁶⁰). This will require appropriate ‘ideological work’. Such a conception of the role of judges is already a radical change which will require appropriate education. ‘The ethical imperative is the ideological work of radically changing the master-signifier and interpreting the laws of the empty signifier in the light of the ideology whose hegemony the judges want to ensure – and thus, for instance, moving away from the line of case law based on neoliberal readings to pro-employee and pro-consumer readings that put the interest of the working man before the claims of capital.’⁶¹

In my opinion, at this point, there is no longer a place for legal dogmatics. The previously cited tradition of its cultivation and the paradigm built upon it (the ‘core’ of the theory) is being challenged here. It appears to be an attempt to instigate

⁵⁹ R. Mańko, op. cit., p. 197.

⁶⁰ Cf. Cz. Miłosz, *The Captive Mind*, New York 1953, chapter 3.

⁶¹ R. Mańko, op. cit., p. 213.

a revolution in law, and in legal science and the legal doctrine; and it can be added that it would not be the first one in recent history (see, for instance, the first years of the USSR or the Chinese 'Cultural Revolution').⁶² Observation of the fate of many other political revolutions and their temporary impact on the law and legal practice would indicate that, despite everything, despite understandable anxiety, the representatives of legal dogmatics should feel relatively calm about the prospects of their survival. We should also remember, after Berman, Aarnio and Peczenik, that revolutions in law and the legal doctrine do not tend to be carried out by legal theorists and philosophers of law.

Concluding Remarks

Statutory law arises as an act of political decision. Its creation unfolds in the political sphere: in social conflicts and the disputes which reveal them. This is quite an obvious statement. This not the end of disputes concerning the law, however. Legal text, as a product of this process, is then entangled in the process of its application and interpretation, in social antagonisms, and thus, to a large extent, also in political conflicts. Here, therefore, in disputes before the courts, the category of the political should find its application. The merit of critical theories is that they raise the issue of the political nature of law, and particularly – and in this respect, Mańko's work is invaluable – that they also draw attention to the fact that political conflicts do not come to an end in the streets or in parliamentary halls. The political nature of actions taken in the judicial process, including the political nature of the judge's decisions, is a neglected aspect of science shaped under the influence of the culture of the statutory law and legal positivism – with their scientific complexes, inclination to model analyses and the domination of the logocentric view of law and jurisprudence. The critical theories rightly seek to restore a reasonable balance between the 'imperium of the text' and the 'imperium of political power'. However, they should themselves aim for a reasonable balance in their proposals. They must consider the so-called legal point of view, unless, of course, their intention is to bring about a revolution in the law and jurisprudence. From the perspective of political adjudication, this legal point of view assumes, among other things, that the law – identified primarily with the person of the judge and the symbolic courtroom – is able to neutralise current political disputes. However, a court hearing cannot be used to solve social antagonisms. This is a challenge for real politics, economics or maybe even religion. A courtroom is a place for resolving individual disputes,

⁶² H. Berman also notes this – see footnote 17 above *in fine*.

where it is possible and necessary to preserve the independence of the courts and the impartiality of judges as conditions for neutrality in terms of politics, and not just current politics. This is also something that political philosophers and political scientists could learn from lawyers.

The relationship between the law and the political is a matter of perspective. It is one thing to be aware of the political nature of the dispute being settled by the judge, and another to be aware of the legal reason (general rule) that the judge will invoke to settle the dispute. Awareness of the political nature of the dispute deepens the judge's knowledge of the case in question, allows him or her to become more involved in the dispute, to understand it better, but only so that – following the path of Aristotle's *epieikeia* – he or she can, in an individual case, properly interpret, or perhaps even correct, the general rule in the name of the principle of equity. After all, the political nature of the dispute is only one of the possible reasons for this principle. If the interpretation or correction of the rule is not to be a mere extension of current policy, and if it is not to be a political instrumentalisation of the rule, then an impartial judiciary and independent courts are essential. The final form of a principle for settling a dispute should not be subject to political dispute. It is the domain of judges. The guarantee of the certainty of the rule and the predictability of settlement is a relatively stable position of the analytical theory of law and legal dogmatics. The story described by Berman in *Law and Revolution* teaches us – and Mańko's *W stronę krytycznej filozofii orzekania* could also teach us (if we omit some of its ideologised passages) – that law, legal science, and the views of jurisprudence are born and subject to change when confronted with politics. The wisdom of the legal community should consist in the lessons one can learn from political conflicts how a resolved dispute can change the existing mechanisms governing legal decisions. Does our knowledge, which has been broadened by new experiences, have the potential to solve similar conflicts in the future?

In *W stronę krytycznej filozofii orzekania*, Mańko offered the following story to his readers (pp. 197–198): 'So instead of the judge-pseudo-Hercules from Dworkin's fairy tale, who pretends to have found the "right solution", yet, in fact, tries to satisfy the establishment (i.e. the ruling class or the group currently in power) with his solutions, one should – after Kennedy – promote the figure of the judge-activist who is both morally honest and takes a realistic approach to the limits of his power. He is aware that he has such power, he does not hide (...) behind the screen of an institution which will solve the problem for him with its "imperatives", but decides for himself in the light of an ideology which he believes to be right in his conscience. Hence, this is a critical Judge-Prometheus, who, in his judicial work, tries to act in the interest of humanity, and particularly in the interest of those who suffer from exclusion and domination by others.'

The myth of Prometheus is in itself instructive. Prometheus, as we know, is a symbol of a god (a titan) who rebelled against Zeus, undermining the authority of the 'first among the gods'. Prometheus did this out of sensitivity to human fate: he was guided by the idea of finding a better, more rational, more conscious life for people. And so, to some extent, he implemented a certain program of human emancipation. After Prometheus, the world was never the same again. Things did not return to the starting point: people learned a lot from Prometheus (writings, numbers, crafts, and generally the way how to deal with life). The lesson from the Promethean myth is that great events are able to change the world, but they do not overturn the world. It is worth remembering that it was ultimately Zeus who turned out to be stronger in this conflict, and Prometheus's life ended in an exceptionally cruel way.

Bibliography

- Aarnio A., *Reason and Authority. A Treatise on Dynamic Paradigm of Legal Dogmatics*, Aldershot 1997.
- Aarnio A., *Paradigms in Legal Dogmatics*, [in:] A. Peczenik (ed.), *Theory of Legal Science*, Dordrecht 1984.
- Aarnio A., *On Paradigm of Legal Dogmatics – Problems of Scientific Progress in Legal Research*, [in:] P. Trappe (ed.), *Contemporary Conceptions of Law: Proceedings of the 9th World Congress, Basel 27.8.1979–1.9.1979*, Wiesbaden 1982.
- Bator A., *Systemowość prawa wobec konfliktów politycznych*, "Przegląd Prawa i Administracji, Acta Universitatis Wratislaviensis" 2016, 104(3718).
- Bekrycht T., *Transcendentalna filozofia prawa. O zewnętrznym obowiązywaniu i uzasadnianiu istnienia prawa*, Łódź 2015.
- Berman H.J., *Law and Revolution. The Formation of the Western Legal Tradition*, Harvard 1983.
- Koczanowicz L., *Polityka dialogu*, Warszawa 2015.
- Kuhn T., *The Structure of Scientific Revolutions*, Chicago 1996.
- Kupiszewski H., *Prawo rzymskie a współczesność*, Warszawa 1988.
- Lakatos I., *Dowody i refutacje. Logika odkrycia matematycznego*, transl. M. Kozłowski and K. Lipszyc, Warszawa 2005.
- Lakatos I., *Proofs and Refutations*, Cambridge 1976.
- Leszczyński J., *Pozytywizacja prawa w dyskursie dogmatycznym*, Kraków 2010.
- Leszczyński J., *O niezmienności sposobu uprawiania dogmatyki prawa*, "Studia Prawno-Ekonomiczne" 2010, 86.
- Leszczyński M.J., *O pewnej (rewolucyjnej) hipotezie Harolda J. Bermiana – prawo i nauka w średniowieczu*, "Acta Universitatis Lodziensis, Folia Iuridica" 2015, 75.
- Mańko R., *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*, "Jurysprudencja" 2018, 10.
- Miłosz Cz., *The Captive Mind*, New York 1953.

- Mouffe Ch., *On the Political*, Routledge 2005.
- Mouffe Ch., *The Democratic Paradox*, New York 2000.
- Peczenik A., *The Basis of Legal Justification*, Lund 1983.
- Sobański R., *Słuszność w prawie*, "Państwo i Prawo" 2001, 8.
- Southern R.W., *Western Society and the Church in the Middle Ages*, Harmondsworth 1970.
- Tellenbach G., *Church, State, and Christian Society on the time Investiture Contest*, London 1959.
- Wróblewski J., *Paradygmat dogmatyki prawa a prawoznawstwo*, [in:] S. Wronkowska, M. Zieliński (eds.), *Szkice z teorii prawa i szczegółowych nauk prawnych*, Poznań 1990.
- Ziemiński Z., *Szkice z metodologii szczegółowych nauk prawnych*, Poznań 1983.