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The Legal Method in the Context of Futurology

[Metoda prawnicza w kontekście futurologii]

Abstract

The article discusses the limitations of the legal method adopted in the culture of statutory law—the exegesis of normative acts—considering civilisational developments in the digital age. The legal method guarantees the scientific autonomy of jurisprudence and was developed at the end of the 19th century as a formal-dogmatic method. With the development of law and European integration, its classic formula, developed in an era of strongly national legal systems with limited mutual relations, is becoming anachronistic. The article highlights these limitations and outlines possible further directions for its development.

Keywords: legal interpretation, theory of law, civil law legal culture, general jurisprudence, legal futurology.

Introduction

This article deals with the evolution of the legal method considering civilisational changes related primarily to the dynamic growth in the importance of communication technologies.¹ This is the main, though not the only, subject of interest in legal futurology – a research area of general jurisprudence that emerged because of intensive technological and social transformations initiated by the digital and mainly communication revolution.² This revolu-

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² A. Toffler, *Trzecia fala* [The Third Wave], trans. E. Woydyło, Warszawa 1986 (1st ed., censored), p. 39.

tion dates to the second half of the 20th century and is characterised, among other things, by shorter intervals of technological changes affecting law and jurisprudence than in previous eras.³ Due to the limited scope of this publication, this paper is intended as a contribution to the discussion, essentially of a journalistic nature. This remark applies to the entire argument but needs to be emphasised in relation to the general concept of legal method characterised in the next point, which is an extremely broad issue, and in this study the subject had to be condensed as much as possible.

The importance of this issue does not seem to be debatable. No one denies either the dynamics of the technological foundations of civilisational changes or the fact that their relationship to law as a social phenomenon and jurisprudence as a science that has them as its subject is causal in nature.⁴ The development of foresight methods (forecasting the future in the specific context of social sciences) has also made it possible to take legal futurology “seriously”, which at the beginning of this century was absent from scientific discourse or was treated as alchemy in relation to chemistry or astrology in relation to astronomy,⁵ i.e. as a pseudoscience. The impact of the digital revolution on law and jurisprudence is undeniable, and the pace of new phenomena accompanying it boils down to the research question: when and in what direction will the methodological assumptions of jurisprudence change, rather than whether this will happen at all? The phenomena of incorporating digital technologies into law and jurisprudence can only be mentioned here as examples; it is a question of the role of the Internet and search forms for broadly understood legal information, the availability of legal knowledge through professional and popular digital sources (digitisation of sources of law, legal doctrine texts, etc.), the phenomenon of information overload – also in relation to law, huge changes in private law, including in the area of making declarations of will (digital signatures, etc.), methods of contracting, the need to criminalise new acts, and many other phenomena that cannot be listed in a closed catalogue.⁶

³ B. Debaenst, *The Digital Revolution from a Legal Historical Perspective* [in:] *Law, AI and Digitalisation*, K. de Vries, M. Dahlberg (eds.), Uppsala 2022, p. 27.

⁴ The issue of digital technologies in the context of law is extensively discussed in the literature, which is already very extensive. See, for example: A. De Franceschi, R. Schulze (eds.), *Digital Revolution – New Challenges for Law*, Baden-Baden 2019, *passim*.

⁵ S. Lem, *Solaris*, Warszawa 2012 (1st ed. 1961), pp. 125 and 126.

⁶ See a more detailed discussion of these issues in the monographs: Internet. *Globalne gry* [The Internet: Global Games], A. Gryszczyńska, G. Szpor, R. Wiewiórowski (eds.), Warszawa 2022, *passim*, and: Internet. *Solidarność cyfrowa* [The Internet: Digital Solidarity], A. Gryszczyńska, G. Szpor, R. Wiewiórowski (eds.), Warszawa 2024, *passim*.

Legal Method

Traditionally, it is taught that the basic legal method in the European legal tradition (the civil law) emerged in the second half of the 19th century as a significant achievement of early legal positivism. It is known as the formal-dogmatic method and is specified as the exegesis of a normative act, which is carried out through the application of a specific, directive theory of legal interpretation. In Anglo-Saxon culture (common law), its equivalent is analytical philosophy of law, also known in statutory law systems as conceptual analysis. It is used both for statutory law and for texts in the field of legal doctrine. The theory of interpretation in the continental sense has an auxiliary function there, it is less formal than in civil law states, although its importance is constantly growing, as is the role of statutory law in the area of its sources. Also, it should be noticed that “in an appropriate case there is nothing to prevent a court from taking proposed legislation into account when exercising its powers.”⁷

The debate on legal methodology has been fundamental to continental legal culture over the last two hundred years.⁸ Its definition determined the scope of the entire field of jurisprudence.⁹ On the one hand, it was a matter of responding to the paradigms of general scientific methodology that emerged in the 19th century and reducing the classic problems of legal reasoning associated with the natural susceptibility of language to ambiguity and the subjectivity of conclusions in the process of reconstructing normative meanings.¹⁰ Hence, there was a shift towards formal logic and an attempt to develop various theories of legal interpretation, which were supposed to organise the entirety of legal reasoning responsible for determining the meanings of normative expressions. However, it proved impossible to develop a directive theory of interpretation that would lead to certain conclusions in the understanding of formal logic (it should be added that this would have resulted in a significant reduction in the demand for legal services). It was also impossible to avoid departing from fundamental assumptions – axioms, which is contrary to the concept of practising naturalistic, scientific and aphiloosophical science modelled on the natural and exact sciences, in which cognition is

⁷ D. Bailey, L. Norbury, Bennion, Bailey and Norbury on Statutory Interpretation (8th ed.), London 2020, p. 30.

⁸ It also stemmed in part from the metatheoretical perspective, which is also important in Polish legal scholarship, i.e. the connections between ‘broadly understood legal theory and general philosophy’ – P. Jabłoński, *Postawa filozoficzna i afilozoficzna w namyśle nad teorią prawa. Rzecz o aktualności metateoretycznych ustaleń Jerzego Wróblewskiego* [Philosophical and A-philosophical Approaches in Reflections on Legal Theory: A Discussion of the Relevance of Jerzy Wróblewski’s Metatheoretical Findings], *Acta Universitatis Wratislaviensis*, Wrocław 2011, Prawo 312, 3337, p. 303.

⁹ K. Opałek, J. Wróblewski, *Prawo – metodologia, filozofia, teoria prawa* [Law: Methodology, Philosophy, Theory of Law], Warszawa 1991, p. 12.

¹⁰ K. Opałek, J. Wróblewski, *Prawo...*, p. 26.

completely detached from its object.¹¹ The formalisation of legal reasoning focused on the exegesis of normative acts had to be based on the dogmas of the validity and systematic nature of law. This presupposed the fundamental assumption of the entire positivist narrative about law, namely the validating opposition of legal norms to other types of rules.

The question of whether the formal-dogmatic method exhausts the catalogue of ways of understanding the phenomenon of law secondarily determines the accepted scope of jurisprudence. Only pure theory of law – as a radically positivist philosophy – accepts this assumption. Even for the “original” positivists (in XIX century), it was clear that, to a certain extent, it was necessary to study the empirical manifestations of legal norms that apply in a specific social reality. After the condition of the theoretical validity of law, the question of the social effectiveness of law was, for positivists, the second requirement that made it possible to define the subject of legal science. “It is a matter of revealing the legal normative sphere, which is contained only in the linguistically identified content of the sovereign’s act of will.” As a result, “the law is relatively easy to identify.”¹²

The division of legal methods is often based on analytical or synthetic criteria, depending on how the truth of the statements constituting a given theory of law is determined. Colloquially, this division is called analytical or empirical jurisprudence. The former refers to a legal methodology focused on the ontological assumption that the essence of law is a linguistic statement with a specific structure, manner of creation, characteristics of the speaker, etc. Since the sources of law are linguistic in nature, this is obviously the dominant field of legal research – at least in continental legal culture. It comprises the entire dogmatics of law. The methodology adopted in it must therefore focus on the semiotic properties of legal and auxiliary legal language. The reconstruction of meanings in the former is the responsibility of the theory of exegesis (interpretation of law), while in the latter it is the responsibility of conceptual analysis, which is nothing more than the use of logic and linguistics to determine meanings in a normative (obligatory) context.¹³

Empirical jurisprudence was already known in the 19th century, although in Europe it was obviously of secondary importance.¹⁴ Research of this kind also has a secondary status today and dominates in the so-called empirical

¹¹ M. Zirk-Sadowski, *Sposoby uczestniczenia prawników w kulturze* [Ways in Which Lawyers Participate in Culture], ‘Ruch Prawniczy, Socjologiczny i Ekonomiczny’ [Poznań Journal of Law, Economics and Sociology] 1994, 4, 56, p. 48; *idem*, *Pozytywizm prawniczy a filozoficzna opozycja podmiotu i przedmiotu poznania* [Legal Positivism and the Philosophical Opposition of the Subject and Object of Cognition] (in:) *Studia z filozofii prawa* [Studies in the Philosophy of Law], J. Stelmach (ed.), Kraków 2001, *passim*.

¹² M. Zirk-Sadowski, *Analityczna filozofia prawa* [Analytical Philosophy of Law] (in:) *Filozofia prawa. Normy i fakty* [Philosophy of Law: Norms and Facts], J. Hołówka, B. Dziobkowski (eds.), Warszawa 2020, p. 44.

¹³ M. Stambulski, *Wiadomość od cesarza. Pojęcie prawa w teorii analitycznej i postanalitycznej* [A Message from the Emperor: The Concept of Law in Analytic and Post-Analytic Theory], Warszawa 2020, p. 44.

¹⁴ R. Sarkowicz, J. Stelmach, *Teoria prawa* [Theory of Law], Kraków 1996, pp. 20–26.

disciplines of jurisprudence (sociology of law, selected penal sciences such as criminology, criminalistics, legal psychology, etc.). There are used methods incorporated into jurisprudence from other sciences. These include surveys, questionnaires, case studies, interviews and, less frequently, observation. Empirical methods also include so-called case file research and case law analysis. The status of the latter as independent scientific methods is debatable. They are permutations of classic empirical methods, such as case studies or questionnaire surveys. They are not structurally homogeneous but are based on sets of activities from other methods, combining them and constituting a combination thereof. Above all, however, they do not allow conclusions to be drawn on their own, which is a *sine qua non* condition of scientific method. They allow specific observations to be aggregated, which are then organised and described using specific methods of analysis, such as statistical description, database creation, etc. There is no need to develop this topic further in such a short study. One can only point to the arbitrariness of concepts and ideas concerning empirical research in legal sciences. This is sometimes due to the low methodological sensitivity of lawyers themselves, but it is also the result of the smaller share of such studies in the field of legal sciences, which is dominated by exegesis or, more broadly, conceptual analysis as part of the analytical jurisprudence (which is not the same as the John Austin's conception of analytical studies over the case law.¹⁵) Another issue is the correctness of classifying file research and case law studies as empirical. In the strict sense of the word, they do not meet this criterion, as they do not (or do so to a limited extent) lead to the construction of a theory composed of synthetic propositions, i.e. those that can be verified without conceptual entanglement. Nor are they, in fact, standardised and do not ensure the replication of results. To meet these requirements, various procedures are used to eliminate these difficulties, such as the participation of experts evaluating individual observations, strict operationalisation of variables, or favouring statistical description, in the assumption that it is in which conclusions are objectified in numbers. However, it is forgotten that these studies are strongly entangled in the conceptual conditions of jurisprudence itself. The latter is a characteristic feature of legal sciences, in which the way of understanding legal phenomena is embedded in a specific philosophical and legal perspective.

The last issue that should be addressed is the methodological autonomy of jurisprudence. Although today the requirements for a separate area of analysis and independence of the research method are not contested in relation to jurisprudence, this issue has been controversial for years. The subject of dispute has always been the status of the formal-dogmatic method in terms of its fulfilment of the requirements of the scientific method assumed by na-

¹⁵ J. Austin, *The Province of Jurisprudence Determined*, London 1832, *passim*.

turalistic positivists. It was intended to counteract the speculative nature of legal reasoning. However, given the inherent susceptibility of language to polysemy and the axiological and evaluative context of law, jurists remained powerless, and the only thing that proved possible was to formalise, i.e. systematise, legal reasoning in the form of legal interpretation directives.¹⁶ These, in the form of first-, second- and third-degree directives, constitute a specific theory of interpretation. These, in turn, vary, and although in continental legal culture certain boundaries are formulated for such reasoning (the concept of *ius interpretandi*), but they have little to do with formal logic.

The second feature is the mentioned dogmatic nature of the legal method. Without basing it on specific philosophical and legal assumptions (specifically, positivist ones), it is impossible to construct a theory of legal interpretation, i.e. a set of propositions on how to reconstruct normative expressions. It is worth noting that representatives of non-positivist philosophies of law use a formal-dogmatic method, the latter component of which is based on the assumptions of the positivist concept. This concerns the acceptance of the assumptions of the theoretical validity of law, the primacy of statutory law in the catalogue of sources of law, the systematic nature of law, etc. In this sense, non-positivist philosophies of law from the *ius naturale* group (this remark does not apply to sociological and psychological concepts) do not offer a legal method that would guarantee the epistemological autonomy of jurisprudence in order to meet the general requirements of scientificity. They adopt, albeit with some resistance, the formal-dogmatic method, enriching it with specific additional assumptions. They thus become more theories of interpretation, without providing a method in the logical sense.

The Future of the Legal Method

It would be a truism to say that it is difficult to examine the evolution of the formal-dogmatic method. On the contrary, it is easy, because the symptoms of its limitations in the version from the period of its creation, and later enriched with basic principles of an axiological nature, resulting from the linguistic shift in jurisprudence after the Second World War, are now easily discernible. The assumptions of the entire linguistic apparatus of legal research were

¹⁶ This problem is also revealed by the issue of the instrumentalisation of law and its instrumental (purposeful) use. In this sense, the legal method plays a functional rather than a descriptive and explanatory role, which weakens the scientific status of jurisprudence. W. Gromski, Akty instrumentalizacji prawa i ich granice [Acts of Instrumentalisation of the Law and Their Limits], 'Przegląd Prawa i Administracji' [Review of Law and Administration] 2018, 114, Acta Universitatis Wratislaviensis, Wrocław 2018, 3833, p. 95; idem, Autonomia i instrumentalny charakter prawa [Autonomy and the Instrumental Nature of the Law], Wrocław 2000, *passim*.

developed in the era before globalisation, at a time when the fundamental relations between national legal systems were much weaker. International law did not play as important role as it does today, and the axiological standards of human rights or selected elements of constitutional law were developed after World War II as part of the construction of a normative security system to prevent the return of totalitarianism. To simplify somewhat, it can be said that the formal component of the legal method has remained unchanged in its material content (directives of a certain degree and their types). However, certain exclusionary conditions have been formulated, limiting the conclusions that these operations can lead to. A good example here is Radbruch's formula, but also the basic principles that shape the contemporary concept of a democratic state governed by the rule of law, such as the entire theory of fundamental rights, proportionality, procedural guarantees, etc.

On the other hand, the "dogmatic" component of the legal method has remained essentially unchanged. It is supplemented by assumptions concerning the validity of rules outside the national legal system, i.e. international and European legal orders. It is therefore a question of the multicentricity of law, although the position on this subject is not uniform and the concept itself is sometimes understood in different ways. It is not only a question of the multiplicity of legal and normative orders (national, international, European), but also – which is unthinkable in a monocentric concept – of the overlapping of national and supranational law enforcement bodies and their coexistence in a common normative space.¹⁷ We do not yet have a coherent theory of this phenomenon, but in the practice of law-making and law enforcement, these issues are easily discernible. Examples include the overlapping competences of the Court of Justice of the European Union and national constitutional courts, the coexistence of cassation courts and international courts (such as the European Court of Human Rights), and the implementation and harmonisation of European law into national law. The traditional, positivist concept of a closed legal system is difficult to maintain today. We are currently witnessing the significant role of legal principles, axiology, programmatic norms and, above all, legal argumentation, which is often difficult to distinguish from the directives of legal interpretation, which serve not as premises for decision-making, but as elements of its justification.¹⁸

The basic objection to the traditionally understood formal-dogmatic method boils down to its adequacy in a theoretical sense. An incomplete picture of a given phenomenon is a serious methodological shortcoming. However, it

¹⁷ E. Łętowska, *Multicentryczność współczesnego systemu prawa i jej konsekwencje* [The Multicentricity of the Contemporary Legal System and Its Consequences], 'Państwo i Prawo' [The State and the Law] 2005, 4, pp. 3 and 4.

¹⁸ L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* [Key Issues in Contemporary Philosophy of Law: The Law in a State of Flux], Warszawa 2003, p. 201.

can vary in scale. It may boil down to an incomplete picture of a given phenomenon, but without affecting the correctness of the reasoning. In this sense, the formal-dogmatic method in its traditional, positivist understanding is sometimes assessed as adequate for easy or ordinary cases. There is no room here to expand on this topic. It can still be maintained in relation to simple syllogistic reasoning. It can be assumed that they rely on the homogeneity of the validation basis (a uniform normative order and the absence of complex relationships between rules) and the lack of need to apply legal reasoning, in particular that which modifies the meaning of the adopted validation basis from the principles of law. More such conditions can be derived, but this would require a separate study. In this approach, the classical formal-dogmatic method breaks down in difficult cases, however we define them. The problem, of course, is that in the highest courts, it is precisely such cases that constitute the majority of interpretative problems (situations of interpretation as a results of polysemy).

In broader terms, the inadequacy of the method negates its cognitive usefulness, i.e. the requirements for describing and explaining a given phenomenon. Failure to grasp the whole picture may affect the correctness of the conclusion regarding the area that is within the researcher's perception using the method applied. In other words, what is not recorded may change the picture of what has been observed if it were to be considered. Can such an objection be made against the formal-dogmatic method? It is difficult to answer this question, as legal reasoning is not subject to verification according to the criterion of truth and falsehood. One can, of course, imagine a situation in which the open nature of the contemporary legal system is denied from a position of power, European law is lost sight of, and the influence of the international order on national law is minimised. However, the result of such reasoning, and thus of the formal-dogmatic method defined and applied in this way, will be the weak argumentative power of the conclusions drawn on its basis. Thus, they will not find approval among a wider audience. In order to maintain the normative power of decisions made in this way, it will be necessary to have political, i.e. forceful, legitimacy for such law (both in terms of its enactment and application). This then has little to do with the rule of law and democracy.

The limitations of the traditional formal-dogmatic method are already apparent. The following elements of this method are being modified in terms of formal reasoning:

- ◆ the position that the rules for reconstructing normative meaning are universal and uniform across different validation orders (national, EU as a special form of international law and international law itself) and different branches of law (civil, criminal, administrative, constitutional issues, etc.). This assumption was formulated in relation to a monocentric legal system, which

consisted of norms established by a single decision-making centre. Due to the semantic uniformity of normative expressions, the adaptation of their sets, classified as first (interpretative methods), second (preference rules between methods) and third degree directives (rules of inference), to different branches of law was denied, despite the observable diversity of primarily second degree rules (preference directives) in the practice of operative interpretation, e.g. in the area of civil and criminal law (in the former, the functional method was considered almost equivalent to the linguistic method, while in the latter, such an approach requires particular caution for reasons of guarantee. Criminal law – substantive law – has always paid homage to the primacy of linguistic interpretation and its strictly observed literal limits);

- ◆ limiting the division of interpretation directives to the triad proposed by von Savigny in the form of linguistic-logical, systemic and purpose-functional methods (first degree interpretative directives mentioned above). Currently, there is an increase in the number of interpretation directives that are difficult to classify under their existing typology. These include directives of interpretation that are friendly to European law, the constitution, the taxpayer (in *dubio pro tributario*) and many others which, as already indicated, do not fit into this traditional division of interpretative directives;
- ◆ the blurring of the difference between legal argumentation *topoi* and interpretation directives, as the former are increasingly used as a means of obtaining meaning, and not just its justification, established on the basis of first-degree directives;
- ◆ treating elements related to the axiology of law (principles, values, sometimes programmatic norms of this kind) as sources of apragmatic interpretation. This issue is very important, as it leads to a redefinition and perhaps even a distortion of the core meaning of the formalisation of legal reasoning. Due to the influence of the naturalistic paradigm of legal scholarship, the formal-dogmatic method was intended to reduce the subjective attribution of meaning to normative expressions and to shape the process of understanding textual sources of law in the manner of empirical perception. However, for obvious reasons, it is impossible to achieve this. What is feasible, however, is to organise legal reasoning and systematically limit the decision-making leeway of the interpreter. Therefore, theories of legal interpretation were designed as a set of pragmatic actions. For example, the creators of the most famous in Poland such theories were very strongly attached to this assumption.¹⁹

The formal-dogmatic method will undergo intensive modification, as this is necessitated by dynamic civilisational transformations. The question of a futurological diagnosis of this process remains. Foresight studies are primarily conducted in the form of a specialised survey addressed to experts

¹⁹ M. Zieliński, *Osiemnaście mitów w myśleniu o wykładni prawa* [Eighteen Myths in Thinking About the Interpretation of Law], 'Palestra' 2011, 3–4, pp. 29 and 30.

in a given field.²⁰ They are questioned in several rounds of surveys. Foresight research differs from traditional surveys in that the results from the previous stage are disclosed to the respondents in the form of a summary of responses. This procedure is at the heart of forecasting the future, thanks to the anonymous structuring of responses and the possibility for respondents to compare their own forecasts with the opinions of other project participants. This method is sometimes referred to as *Delphi analysis* and is considered an effective tool for formulating specific types of forecasts, but also for harmonising positions in complex decision-making processes (e.g. in the creation of marketing policy, long-term strategy, etc.).

Artificial intelligence and progress in software of legal databases, information search and processing constitute a separate category of development in legal methodology. However, these issues are not directly related to the development of the legal method itself, understood in this study as a scientific method that guarantees the autonomy of jurisprudence. It is also important to note the need to distinguish between the impact of new technologies on legal practice and the development of legal reasoning itself, which, as indicated, ensures the scientific status of jurisprudence in a specific form. The advancement of AI or software used to process legal information is the result of general technological progress and, contrary to popular belief, does not have much to do with the development of the legal method itself. This does not mean, of course, that it does not develop law itself as a social phenomenon or influence the specific nature of scientific research in the legal sciences.

Summary

It is impossible to discuss all aspects of the anticipated evolution of legal science methodology in such a short text. First, apart from the formal-dogmatic method, the development of the entire field of empirical jurisprudence has not been addressed. Another issue is the impact of information technology according to the hotly debated issue of the mentioned progress of AI on legal science. This article has only touched upon the problem of the inadequacy of the traditionally understood formal-dogmatic method, which ultimately guaranteed the methodological autonomy of jurisprudence. However, the current dynamics of civilisational change reveal its limitations. The question with which this synthetic reflection can be concluded concerns whether legal doctrine will be able to develop a coherent position on the redefinition of its basic assumptions, mainly under the influence of the development and im-

²⁰ A. Kotowski, *Legal Futurology – Potential of Foresight Research in Legal Sciences*, 'GIS Odyssey Journal' 2022, 2, pp. 100–103.

pact of information technology on jurisprudence, or whether legal practice will overtake the academic community and refer less to traditional theoretical assumptions.

Abstrakt

Artykuł omawia ograniczenia metody prawniczej przyjętej w kulturze prawa stanowionego – egzegezy aktów normatywnych – w kontekście zmian cywilizacyjnych ery cyfrowej. Metoda ta gwarantuje autonomię naukową prawoznawstwa i została opracowana pod koniec XIX wieku jako metoda formalnodoğmatyczna. Wraz z rozwojem prawa i integracją europejską jej klasyczna formuła, opracowana w epoce silnie znacjonalizowanych systemów prawnych o ograniczonych wzajemnych powiązaniach, staje się anachroniczna. Artykuł podkreśla te ograniczenia i nakreśla możliwe dalsze kierunki jej rozwoju.

Słowa kluczowe: wykładnia prawa, teoria prawa, cywilistyczna kultura prawna, ogólna nauka o prawie, futurologia prawna.

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