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The Epistemology of Law in the Light of the Metaphysical Legitimation of Law

Epistemologia prawa w świetle metafizycznego uzasadnienia prawa[1]

Summary

The problems associated with understanding law as the regulator of social relations involve many separate issues which undoubtedly constitute intellectual challenges for the philosophy of law. In this context, the philosophy of law inquires, *inter alia*, about whether law exists as a universal structure of the category of being, and about the possibility of the objective cognition of law as an ontological and deontological category. However, it transpires that this task is by no means easy, when it comes to questions concerning epistemological and ontological issues in relation to law – and consequently its justification (the metaphysics of law), and then its legitimation – unequivocal answers are not forthcoming.

Keywords: positive law, natural law, legitimacy of law, transcendental philosophy, epistemic justification

Streszczenie

Problematyka rozumienia prawa jako regulatora stosunków społecznych zawiera wiele odrębnych zagadnień, które dla filozofii prawa niewątpliwie stanowią intelektualne wyzwania. W tym kontekście filozofia prawa pyta między innymi o istnienie uniwersalnych struktur prawa, a także o możliwość obiektywnego poznania prawa jako kategorii ontologicznej i deontologicznej. Okazuje się jednak, że

[1] In this paper I make use of the conclusions and fragments of my monograph (Bekrycht 2015).

zadanie to nie jest łatwe, a odpowiedź na pytania o kwestie epistemologiczne i ontologiczne w stosunku do prawa, a w konsekwencji o jego uzasadnienie (metafizykę prawa), a następnie legitymizację przekracza możliwości jednoznacznej na nie odpowiedzi.

Słowa kluczowe: prawo pozytywne, prawo naturalne, legitymizacja prawa, filozofia transcendentalna, uzasadnienie epistemiczne

0. Introduction

The problems associated with understanding law as the regulator of social relations involve many separate issues which undoubtedly constitute intellectual challenges for the philosophy of law. In this context, the philosophy of law inquires, *inter alia*, about whether law exists as a universal structure of the category of being, and about the possibility of the objective cognition of law as an ontological and deontological category.

In this search, the concepts of law *as law* and of positive law must be kept separate from each other. If we set aside this distinction for the time being, then we can state with complete certainty that the great complexity of social structures and the limitations of human cognitive ability, which is not always well-developed, will make this task extremely difficult, due to many questions that take on a transcendental character. For example, does the law itself provide legitimation for, or explanation of, the grounds of its own existence, or should this be sought outside of the law – and, if so, then "where exactly"? It may then be asked whether the identification of such grounds is a necessary and sufficient condition for establishing the existence of a universal (and absolutely binding) obligation to obey the law, or whether this is only a necessary condition, whereas such an obligation is rather decided by its content, as a possible sufficient condition (Raz 1979, 68–69; 277 ff). And also: "How can a legal order appear to be justified or legitimate

from the perspective of all participants if they hold different moral convictions?" (Pfannkuche 2017, 266).

Ronald Dworkin, an eminent representative of contemporary philosophy of law, stresses that in jurisprudence there is a need for reflection that would address issues of the highest degree of generality. What he means by this is that one should expect from every conception of law that it will provide a general justification for applying the sanction of violence by the state (coercive power), justification for the legitimacy of authority, the legitimation of the law and the justification for its observance. In particular, by answering the following questions:

> Why does the fact that a majority elects a particular regime, for example, give that regime legitimate power over those who voted against it? […] Do citizens have genuine moral obligation just in virtue of law? Does the fact that a legislature has enacted some requirement in itself give citizens a moral as well as practical reason to obey? Does that moral reason hold even for those citizens who disapprove of the legislation or think it wrong in principle? (Dworkin 1986, 191)

If we seek to investigate the basis for the existence of law or its legitimation, we of course become involved in a well-known controversy, namely – as Jürgen Habermas, another renowned representative of contemporary philosophy of law, put it – the "[…] foundationalism of epistemology [and] championing the idea of a cognition *before* cognition" (Habermas 1992, 2). Thus, when reflecting on law on a philosophical level, one cannot avoid questions about the epistemology of law, in other words about the issue of the possible ways and means of knowing it. These types of question are immanent to the philosophical-legal domain and always accompany general analyzes. They were, are and will be posed with regard to the possibility of knowing in general, and thus also when it comes to knowledge of law.

At a certain stage in the development of philosophy, beginning with Descartes and ending with Husserl, these questions determined ontological and metaphysical issues to the extent that they were considered, from the methodological point of view, to be the only ones that could lead to valid research results. Husserl himself posited that the first thing to be solved should be the issue of *adaequatio rei et intellectus* and only after this should the remaining analyzes be tackled (Husserl 2001, 169–170). In other words, in the case of establishing the basis for a given ontological category, the necessity of only using cognitive tools after they have been subjected to analysis and criticism, is undoubtedly an indispensable element of all considerations, validating their success.

Thus, epistemological issues should lay at the basis of every fertile cognitive method, i.e. ones which promise to provide legitimate cognitive judgments. If we make use of cognitive tools in a naive, unreflective and uncritical manner, the obtained research results would be easily refuted. Therefore, if we are aware of the epistemological issues and their impact on the problems associated with justifying law in the context of metaphysical analyzes, we should avoid many misunderstandings and errors.

However, it transpires that this task is by no means easy, when it comes to questions concerning epistemological and ontological issues in relation to law – and consequently its justification (the metaphysics of law), and then its legitimation – unequivocal answers are not forthcoming. This problem is seldom raised in the scholarly literature on theoretical and philosophical law. The epistemological issues associated with the knowledge of law are inextricably tied up with that which could be called the cognitive position of the subject, and with the difficulties and limitations that are involved in cognitive problems in general. Issues are revealed here that make us aware of the existence of unbridgeable cognitive relationships and attempts to solve them must ultimately be sought in the currents of transcendental philosophy.

1. The problem of justification in epistemology and the sociology of knowledge

If we begin from basic intuitions, it can be said that the connotations associated with the notion of justification are multiple in content and complex in scope; and, moreover, that the concept is, broadly speaking, condemned to inevitable ambiguity. In everyday language, the word 'justification' takes on numerous meanings depending on the context, both theoretical and practical. It refers to our thoughts, assertions and questions, as well as to actions and their effects. We are talking about the justification of our beliefs, the content of our judgments, our doubts, conduct, deeds, etc. (Ingarden 1962, 153–172).

The soundness and validity of epistemic justification are dependent on the presentation of reasons, evidence, which are to be presented in a reliable process. Yet reasons, evidence and reliable process themselves require justification, in order to establish that they are indeed legitimate reasons, evidence and reliable process. And this leads us to the problem of the justification of a justification, which can be called a 'Catch 22' in epistemology: a justification must contain a justification of its justification – if this is omitted, it is not a justification (Nowakowski 2011, 143). The result is either eternal regress or a vicious circle, and thus a state of eternal doubt. In order to solve this problem, we must posit (assume) a first principle, which will no longer be subject to justification and will not be exposed to accusations of circularity and regression. From the epistemological point of view, such a principle can only be a kind of regulative idea, adopted and supported at best by a criterion taken from outside the domain of epistemology itself. Building a maximalist project of metaphysics from this perspective seems to be simply an unattainable ideal.

Hans Albert presented a classic argument for these claims in his *Traktat über kritische Vernunft* (Albert, 1968), in the form of the famous 'Münchausen trilemma.' According to Al-

bert, the concept of a final justification is impossible, since it either leads to *regressus ad infinitum*, to *petitio principii*, or to dogmatism. The Münchhausen trilemma leads Albert to the conclusion that any attempt at a final philosophical justification will become entangled in one of these three epistemological problems. Albert levels the same charges at Karl-Otto Apel's project of transcendental pragmatics (Albert 1975).

The issue of justification (legitimation) is presented somewhat differently in Peter L. Berger and Thomas Luckmann's phenomenological project focused on the sociology of knowledge. In their social theory, legitimation is treated not as an epistemological problem, but rather as a phenomenon which preserves the objectivity of institutions in the process of interpretation, for those subjects of the social community who did not participate in the initial typification of activities, which in effect means for subsequent generations. The issue is not to answer questions about knowledge and the source of true beliefs, but rather about communication processes that aim to ensure the continuity of the existing social order as a set of institutions. In this sense, justification is not an epistemic process which subjects knowledge, broadly understood, and a set of beliefs to questioning, but is instead an element of socialization which provides functional explanations of the existing social order. The more reliable justification is for social subjects, the more the issue of control and obedience retreats into the background. In this approach, justification is on the one hand an institution, and on the other a meta-objectivization, because as an institution it creates new meanings in order to legitimize existing typifications of activities. Institutionalization thus creates a certain normative network which, supported by justification and sanction, does not allow for deviations from typified activities. It can be said that, from the point of view of the epistemology, justifications in social theory behave like truths in logic, and "[…] any radical deviance from the institutional order appears as departure from reality. Such de-

viance may be designated as moral depravity, mental disease or just plain ignorance" (Berger and Luckmann 1991, 83), even if – we can add – such deviance had its epistemological grounds. "Legitimation 'explains' the institutional order by ascribing cognitive validity to its objectivated meanings" (Berger and Luckmann 1991, 111).

According to Berger and Luckmann's observations, the legitimations for existing and past institutions may, in time, become detached from the initial process of their formation and may be interpreted in such a way that other legitimations will emerge than those that actually existed in the past. This is possible due to the intentional character of typifying actions and generating cultural creations. Further layers of legitimation emerge, as creations of interpretation and reinterpretation, which is typical for myth and stereotype, for example. The process of legitimating institutions generates new meanings and subsequent levels of objectivization so that the social order can be recognized without the expenditure of cognitive effort. Berger and Luckmann distinguish several levels of the legitimation process (Berger and Luckmann 1991, 112–116), and the highest one is the level of symbolic universes, the task of which is to explain something that cannot be explained at the level of specialist theoretical knowledge. We could say that in the traditional language of philosophy, the symbolic universe is the area of metaphysics, as an alternative to the scientific account of the world, and the content of these symbolic universes are exposed to the same objections that are leveled at the contents of metaphysical analyzes.

If we compare the conception of justification in the context of epistemological analyzes and the conception of justification in the sociology of knowledge theory, we could say that on the one hand epistemology is a critique of cognition and, on the other, that it has maximalist ambitions with regard to knowledge, because it seeks an objective criterion of truth and thereby to provide metaphysical experience. However, from

the perspective of the sociology of knowledge, the conception of the symbolic universe performing the function of justification reveals maximalist ambitions only with regard to the integration of a given community. Yet from the point of view of epistemology, it confronts the same problems as the conception of epistemic justification, since you can always ask for further levels of justification, criticize the existing ones and seek a cognitive guarantee or metaphysical support.

2. The issue of justifying the existence of law

The philosophical process of legitimizing the law has two characteristic cores. Historically, the first of these is the legitimizing based on the concept of transcendence, and a transcendent being that is located spatially and temporally "outside" the subject. In other words – metaphorically speaking – the law comes from the outside, meaning that in terms of the source of its existence (onto-genesis) it is based on some being that is, or has always been, beyond or above the subject. The scholarly literature of the subject reveals that two such transcendent sources were identified as external legitimations of the law. The first was identified with God; the second with nature (conceived of in naturalist or non-naturalistic terms). This can be expressed in the following way: the transcendental argument legitimizing law is premised on transcendence in the form of God or nature.[2]

The second core for legitimizing the law is the subject itself (as law-giver), its immanence, i.e. consciousness, rationality, intelligence and reason as the source of law, which is external to and separate from the law itself. Here, the ontological basis

[2] Nota bene there is a rather complicated relationship between them, i.e. between the understanding of God and nature. Added to this is the issue of natural law (of course, usually understood in an anti-naturalistic way), which is often derived from the concept of God, or a concept that "absorbs" this concept.

of law is human beings, understood as creatures endowed with rationality, not necessarily idealized – but in their rationality they are able to actively constitute principles and laws, as a transcendental I "from the inside," as it were.

The issue here is an understanding of human beings which is completely anti-naturalist (despite the fact that rationality is an innate quality of human beings, the quintessence of their human beings). In other words, it is a desubstantialized (noumenal) self, having its center and its ontic nature grounded in purely intelligible subjectivity, a pure self, which we can only posit and think of as a source of self-acting, unconditioned activity (*agency*), devoid of substance and elusive in experience. In this and exactly this sense, one can speak of the transcendental (and immanently human) justification for the existence of law.

From the point of view of the history of philosophy, the shift from the first perspective to the second became possible due to the process of the subjectivization of humanity and the Enlightenment ideal of the disenchantment of nature. On the other hand, from the point of view of the philosophy of law, it came into being along with the transcendental philosophy of Immanuel Kant and Johann Gottlieb Fichte.

If we take a synthetic look at the historical development of legal-philosophy thought, which we could classify as being focused on the issue of justifying the existence of law, from the perspective of scholarly literature on the subject, we can most generally identify six trends which could be said to be final justifications, i.e. those which from point of view of the methodological characteristics indicate some final reason in the chain of its justifications. From a historical perspective, in the first group we could include the mythological tradition, in the second – theological (theistic), in the third – natural law, in the fourth – the Enlightenment, in the fifth – the philosophy of language, and in the sixth – naturalistic. The first three trends could also be referred to as religious traditions, and the second

tradition could be reduced to the third, to encompass both secular and theistic trends.

The function of religion in the justification of law is to present arguments that will provide a coherent and satisfactory explanation of that which is final, and even inexplicable. Niklas Luhmann asserts that the role of religion is to transform a world that cannot be conceptualized (empirically or socially) into accessible forms of meaning, so that this world becomes tolerable and understandable. However, he also emphasizes that all attempts to define religion functionally encounter considerable difficulties, and many of these attempts should be rejected due to fact that the final issues are unknowable and incomprehensible (Luhmann 1982, 9–71).

In every religious tradition, human beings appeal to something that is something beyond them, something that is perfect, ideal, primordial and unattainable – in other words, they appeal to divinity.

However, religious discourse is far removed from what we could describe as science in the empirical sense. It goes beyond the limits of scientifically understood verifiability, as well as beyond the limits of intersubjective communicability. It is connected with the notions of *sacrum* and *taboo*, for which there are no justifications other than those we call religious experiences.

As Walter Pfannkuche stressed:

> This is because most of the time, religious convictions cannot be empirically examined. That a God exists and has issued commands intended for human beings can be neither proven or shown to be false. Also convictions regarding the occurrence of certain events such as the Resurrection or the Last Judgment remain purely a matter of belief. (Pfannkuche 2017, 277)

In the foregoing, I have assumed that religious justification incorporates three traditions from the justification the law, i.e. the mythological, theological and natural-law traditions.

The most enigmatic of these is the tradition of natural law, due to the conceptual difficulties that are encountered when one tries to define the notion of natural law itself. These are, firstly, cognitive problems in determining the ontological status of natural law; secondly, the connection between natural law and the concept of God; thirdly, the problem of its justification; and fourthly, its naturalistic connotations. If we start from Leo Strauss' observation that the idea of natural law appeared with the idea of philosophy, because it came into being when the focus of human reflection changed from treatises on gods to treatises on nature, then, depending on the analytical perspective, natural law can be understood both naturalistically and anti-naturalistically (Strauss 1953, 81–82). The point is that the relationships existing in given communities, connected with their way of life, can be treated in this twofold way. The question as to the explanation of their source may appeal to either divine law or to custom, and explaining the source of custom may also come to a halt at some form of divinity, or at rules existing on the model of the laws of nature, or even identical to them, which again can be based on a divine plan. Therefore, the idea of God can be included within the concept of natural law without any special intellectual effort.

However, as far as the mythological tradition is concerned, it is the oldest form not only of justifying the law, but also of explaining and justifying the universe in general, and as such it always incorporated the idea of God. For this reason, as P. Berger and T. Luckmann suggest, the conceptual apparatus of mythology is situated at the lowest – even naïve – level of the symbolic universe. Hence, the level of theoretical consistency is quite low, which situates its justifications and arguments on a literary rather than a scientific level. As a conception of reality, mythology assumes that the world of everyday experience

is constantly penetrated by sacred powers and that the earthly world is constantly mixed with the divine (Berger and Luckmann 1991, 128–129).

The problems associated with the justification of law in the theological tradition present themselves quite differently. Here there is a high level of theoretical systematization, which entails that the justification is also thus much less accessible to the average person (from a theoretical point of view), because the continuity between the world of everyday life and the sacred area is broken, making it impossible for the average subject to verify empirical data, which results in the necessity of specialists building an abstract conceptual apparatus and the emergence of religious dogmatics, i.e. the professionally elaborated material of religious experience, or the science of theology. According to P. Berger and T. Luckmann, this science

> […] is paradigmatic for the later philosophical and scientific conceptualizations of the cosmos. While theology may be closer to mythology on the religious contents of its definitions of reality, it is closer to the later secularized conceptualizations in its social location. (Berger and Luckmann 1991, 129–130)

With reference to the latter, the last issue of the justification of law based on transcendence is the idea of a naturalized and detranscendentalized concept of the human being, which found its expression in the project of the evolutionary philosophy of law. Here, the question about the nature of law and its metaphysical justification is related to the search for the nature of the human being, as part of the methodological project of naturalism. Therefore, investigation seeks the properties of the human being perceived as an element of nature, and not as a transcendental Self. This does not mean, however, that the human being is treated as radically dual, but that our interest is predominantly focused on the human's biological nature,

assuming the existence of all those properties that are unique for the human being as the creator of culture and a subject qualitatively different from other biological beings. One important theory is the theory of evolution and the vision of human nature that it introduces. Whether this vision is naturalistic or anti-naturalistic depends on the research perspective and the ideological assumptions adopted, though the evolutionary vision of human nature is more compatible with the naturalistic vision (Załuski 2009).

Referring to the ideas mention above, however, an analysis of the literature on the subject also brings a methodological problem to light, because when we are dealing with the issue of legitimizing the law, important categories are not properly separated from each other. These categories are strongly connected to each other, but if they are not separated, they obscure the subject in question, and thus instead of providing satisfactory solutions, they create additional problems. By this I mean that the analysis of the legitimation of the law should separate the following: the legitimation of the law as such, the justification of positive law, justification of the sovereign and legislator, justification of the content of the law (positive), and finally justification for its observance. Only the first and second issues are strictly metaphysical, in terms of legitimizing the law, while the remaining, though falling within the scope of the philosophy of law, involve other areas of intellectual analysis, such as political theory (justification of the sovereign and legislator), ethical issues (justification of the content of the law) and psychological (justification for compliance with the law).

Of course, all these issues in the project of the legitimation the law are in some way related to each other, but they could also become metaphysical and ontological issues, and ultimately purely factual justifications if we were to decide on the specific content of the given legal norms, or about the person of a specific legislator or sovereign. Additionally, when considering the issue of justifying compliance with the law, it would

certainly be necessary to address issues concerning human nature – if we can use such a term – and enter psychological areas associated with motivational mechanisms, cognitive science, politics and the sociology of law.

However, they are not issues associated with justifying law as a strictly metaphysical project, i.e. indicating the basis for its existence; and, furthermore, they concern other categories of being, although they are undoubtedly somehow connected with the concept of law. The fact that in the history of the philosophy of law the issue of the legitimation of the law has constantly been addressed, up to the present day, results from a deficiency due to, on the one hand, the continual attempts to provide unequivocal answers to the questions posed, and on the other the elusive nature of the object of cognition.

This dialectical movement, which has been with us for at least twenty-five centuries, and which from the time of the Enlightenment has been accompanied by the ideal of the scientific knowledge and the program leading to the "disenchantment of the world" (Horkheimer and Adorno 2002, 1), concerns the whole area of jurisprudence – the problem of making it scientific, and the precise definition of its fundamental concepts. On the one hand, the move towards the separation of law and morality, and the devalualization of law, became an opportunity and a basis for forming positive law and making jurisprudence a science, yet on the other hand did not only led to the dehumanization of legal regulations, but it also made it apparent that reaching the essence of the positivity of law, or in other words the concept of positive law, is not an undertaking that can be based on the model of knowledge employed in the natural sciences.

On top of all this, law has lost its divine justification, that *sacrum* which was not only the basis of its existence and the justification for its content, but the real reason for its objectivity, and thus an argument for its recognition and observance. Of course, this is not only due to the lack of a consistent

methodological approach, but – as the history of philosophical thought shows, or the history of the idea of natural law, and political and legal doctrines – the fact that positive law would seem to be a fleeting and elusive subject of investigation. This subject somehow eludes analysis, escaping either towards the concepts of law in general, or the concept of the normativity of the law, or the concept of a legal norm itself, or in the direction of issues concerning values and morals, or, finally, towards the general issues of theoretical and normative ethics.

To this can be added the observation that much effort was devoted in jurisprudence to searching for the ideal content of law so as to reach the unattainable ideal of righteous law. Of course, this is understandable and desirable, which is why not only historically but also nowadays many intellectual analyses pursue this path and no doubt such searches will continue. However, as the history of ideas shows, this is simply unattainable, due to the many tensions between what is generally good, what is good for a single individual, and finally what is good for a given society. This triangle cannot be divided in two: you cannot take both an internal and external position, you cannot be – as Claude Levi-Strauss put it – simultaneously an actor and a viewer when you want to evaluate others and for others.

> How could we announce that these societies were 'important', if our judgment were not based on the values of the society which inspired us to begin our researches? We ourselves were the products of certain inescapable norms; and if we claimed to be able to estimate one form of society in its relation to another we were merely claiming, in a shamefaced and roundabout way, that our society was superior to all the others. (Levi-Strauss 1961, 383)

These issues, however, belong to a different sphere of reflection in the philosophy of law than those that relate to the problem of the existence of positive law and it legitimation, but the conclusion regarding cognitive abilities and formulating what

we call objective judgments also applies to the issue of identifying the basis of being and grasping the phenomenon of positive law.

3. Conclusion

The classical approach to the issue of the legitimation of the law, as a project which indicates the transcendent and transcendental foundations of its existence, is based on a typical, historically constructed investigation into the philosophical and legal literature. However, it leads to misunderstandings, and to an approach and solution to the issue of legitimizing law which is, in my opinion, not entirely correct. I would lay the blame for this state of affairs on an erroneous methodological approach, according to which the source of the law's justification determines the concept of such justification. In other words, the concept of law should first be precisely defined and only then should the issue of its legitimation be addressed, because only then is it clear what is being legitimized. One should beware of the reverse strategy, namely constructing the procedure for the justification of the law in order to reveal its essence. If the correct methodological approach is adopted, it becomes apparent that the issue of legitimizing law (i.e. the justification of its existence in a metaphysical, ontological and epistemological project) is entirely different from the justification of the sovereign legislator, authority, legal coercion, the legitimation of the state, legitimation of the content of the law, and finally the justification for adherence to the law. These various issues can be separated only when we adopt a methodologically correct approach, i.e. a fully critical one.

The point is to thoroughly answer the question – *what is the object of legitimation*? If the subject matter is the law, then the question may arise of whether we must separate the legitimation of the law from the justification of positive law, and subsequently from the justification of the sovereign, the jus-

tification of the legislator, the justification of the content of the law, or the justification for observance or relationship of power. The key question can only be answered if each of these concepts is analyzed. It may turn out that when analyzing the concept of law, all or some of these issues should be treated together, because it is impossible to separate the problems of legitimizing the law *as law* from the question of legitimizing positive law, or its content, or the legislator. The solution to this problem first requires extensive ontological analyses, and then metaphysical ones.

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