IVR Congress 2011, Frankfurt a.M.

„Disciplinary Perspectives and Legal Truth"
Special Workshop

The Autonomy of Law Between Sociological, Analytical and Hermeneutical Interpretation

Dr. Maciej Pichlak
University of Wrocław
mpichlak@prawo.uni.wroc.pl

Preliminary remarks: problem with „discipline"

Special difficulty with defining a *signum specificum* of the discipline within a philosophy of law.

No discipline as a given area or a subject of investigation.

What we take under study is a law. But what is the law in itself? Under this term we may understand a system or a structure, a linguistic phenomenon, social institutions or practices, an instrument of violence and domination, a world of values etc.

Problem with „discipline”

The theme and object of research are actually constituted by the motivation of the inquiry. Hence historical research is carried along by the historical movement of life itself and cannot be understood teleologically in terms of the object into which it is inquiring. Such an "object in itself" clearly does not exist at all. This is precisely what distinguishes the human sciences from the natural sciences.

H.G. Gadamer, *Truth and Method*

Problem with „discipline”

In the field of the philosophy of law the subject must be created by scholar her/himself, as an effect of the method or perspective one has chosen.

A term „discipline” cannot but be treated in a different sense:
as a way of proceeding (a method of inquiry).

This is how the term was understood in the ancient Rome:
Disciplina, a Roman goddes worshipped by soldiers, was a personification of military virtues: frugality, sternness, and faithfulness

The main question

The main question of the paper might be fomulated like this:

What are the relations between various methodological approaches we may find within philosophy of law?

Is there any universal Truth among – or over – these perspectives?

Or – less ambitiously – may they be mutually coherent and inspiring?

I will try to give an answer for them, considering the problem of the autonomy of law. Now it's important to realize that the role of the autonomy is solely exemplary here: one may treat in similar way other fundamental concepts and/or institutions of law, as eg. the notion of formal justice, human rights, the doctrine of constitutionalism etc.

Digression: Methodological planes

Discussion on a multiplicity of methodological approaches (planes) in the Polish XX-century legal theory:

- logical-linguistic
- sociological
- psychological
- axiological

The dominant view: an examination of a legal reality should be not constrained to any single one of them but ought to combine various approaches.

The autonomy of law

Giving a precise characteristics is not a goal of the paper. Let me just offer a preliminary definition:

Autonomy of law (AoL): a possibility of differentiating between legal reasons and other kinds of reasons (moral, political, economical etc.) in the area of practical reasoning.

Main objections:

- fictitious
- self-contradictory
- promoting various forms of injustice

The autonomy of law

The idea of autonomy might be examined from various methodological perspectives:

- Sociological
- Analytical
- Axiological (hermeneutical)

The need of a multi-perspective study: Not simply because only then the idea of AoL might be understood properly, but this is also the only way to find a plausible answer for the objections mentioned above.

Sociological perspective

AoL as a component of legal practice: a part of the law-picture that agents share and that may be traced in actions they take.

Within this approach, *the verification criteria* for theoretical claims are most objective – due to the empirical data we posses.

Still there is a problem of interpretation of these data. And the nature of AoL – which is a part of practical, not discursive knowledge, „unconscious" but forming a structure of the whole practice (A.Giddens) – makes the problem even bigger then usually, as one needs to look for traces of AoL in the practice, rather than to „ask about it" in a direct way.

Sociological perspective

Epistemic goal of the study: to prove the presence and significance (practical role) of the idea of AoL within contemporary (European) legal practice

Unable to offer justificatory reasons for that presence, nor to express the precise content of the notion of AoL. We have to look for the answers for these questions within other approaches – first of all in analytical one which tries to offer such answers.

Analytical perspective

The analytical approach is probably the best developed one within legal science. This is also the one within which the notion of AoL has been examined and defended with greatest sophistication and depth. There is no space to present these analyses here, but while I will try to point some limits of this perspective, one should keep in mind that any successful research on the AoL not including it is simply impossible.

Despite that, the verification criteria for theoretical claims, as compared to sociological approach, are far less objective and more controversial.

Analytical perspective

Verification criteria:

- First and foremost formal *(logical coherence)*
- Aesthetic *(elegance and clarity of a theory)*
- Reference to the social practice

  (fit & sinificance: whether a theory properly reflects the common way of understanding and using the terms under study; whether it displays any significant aspects of the practice)

→ Due to the last group, drawing a direct line to the social practice, the analytical inquiry seems to be dependent on the outcomes of sociological research.

Analytical perspective

Epistemic goals:

- To reconstruct a precise content of the concept of AoL
- To present a claim on AoL as an analytical one.

The latter is necessarily dependent on:

- functional (naturalistic)
- or ethical justification

which show the limits of analytical approach „from the other end" of its inquiry.

Analytical perspective

If someone seeks for a justification of AoL and rejects a functional theory as fallacious (as I do), one has no choise but to justify AoL as an ethical idea.

And this is exactly that kind of study where analytical approach shows its limits, for it can only examine logical relations between ethical claims, at the same time being unable to offer any extra-linguistic, primary justification for them. (It is perfectly suitable for an analytical work of metaethics, but not for synthetic one of ethics.)

For that reason, while stepping into the domain of axiology, we need some another approach then purely analytical – and I believe that hermeneutics offers such a suitable perspective.

Hermeneutical perspective

Among all the perspectives offered here, the hermeneutical one is least methodical and most intuitive. That's why hermeneutical research should be based on the less controversial outcomes of sociological and analytical studies.

Verification criteria:

- reference to the tradition
- reference to the existential experience

The need of *sensus communis*: a settlement in the common tradition that still appeals to us (H.G. Gadamer).

Hermeneutical perspective

The idea of AoL might be seen as justified if it may be plausibly described as a part of more holistic vision of law. The vision that includes the most fundamental representations of the law, the common visions of its role in the society and, last but not least, of ourselves as members of that society: who we are due to the tradition and who we might be due to our own imaginations.

Such description becomes a reflection, in the sense that P. Ricoeur gives to this term: a kind of self-understanding on the way that leads through our own creations (the law) back to ourselves.

Summary – mutual relations

Each perspective gives reasons for a significance of the issue - both from practical and theoretical point of view;

each next should base its own research on the outcomes of the former;

each next crosses the limits of the former.