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ON PHILOSOPHY OF LEGAL EDUCATION. AN ANALYTICAL SKETCH

1. INTRODUCTION

The aim of this brief essay is to offer a philosophical reflection about the character and objectives of legal education¹, with special attention given to the role that comparative law, legal history and legal theory could play in this education.

The paper consists of five parts. In the remaining part of the Introduction the character of the analysis is explained. In the first section general observations about the “nature” of legal education are offered and the role of skills in legal practice and scholarship is elaborated. In the second section a more detailed account of the role of comparative law and legal history is given. The third section contains several comments on the role of values and ethics in legal education, stressing the role that comparative law and legal theory might play in this respect. Conclusions follow.

First proposition that must be made explicit is that legal education does not have to be the way it currently is. Legal education is fully designable. Unlike the law itself, about which one can take a non-positivist position², legal education is a fully man-made social construct. Its current form in particular countries got determined by historical and cultural factors and might seem “natural”. But the way in which we currently teach prospective lawyers “what is the law?” and “how to be a lawyer?” is not the only possible one, and is not necessarily the best one.

¹ For the display of the current state of the art see: H. Sommerlad, S. Harris-Short, S. Vaughan, R. Young, *The Future of Legal Education and the Legal Profession*, Oxford 2015. Also compare a monograph A. W. Herringa, *Legal Education: Reflections and Recommendations*, Cambridge 2013.

² For the classical works advancing this position see R. Dworkin, *Law's Empire*, Oxford 1998; J. Finnis, *Natural Law and Natural Rights*, Oxford 2011. For the contemporary discussions compare: J. Aguiar de Oliveira, S. L. Paulson, A. T. Gomes Travessoni, *Proceedings of the Special Workshop 'Alexy's Theory of Law' Held at the 26th World Congress of the International Association for Philosophy of Law and Social Philosophy in Belo Horizonte 2013*, Stuttgart 2015.

The question: “what are the possible ways to teach law?” requires an answer through the method of social science (descriptive sociology) or analytical philosophy (inquiry into potentiality); while the normative question “what is the ‘best’ way to teach law?” requires an argument from normative theory, based on functionalist approach, taking into account purposes that this education would aim to serve.

Starting with the latter, I claim that the purpose of legal education is to equip prospective lawyers with knowledge and skills that will allow them to best perform in a chosen legal profession on one hand, and to be of the highest possible value for the society on the other. Both terms need elaboration.

This piece is not a research paper in descriptive sociology, but an essay in analytical philosophy. I do not aim at presenting empirical data, but rather at contributing to the discussion about the design of legal education in the times of transition, like ours³.

2. SKILLS IN LEGAL EDUCATION AND PROFESSION

The purpose of legal education is to teach students how to think like a lawyer⁴. In consequence, legal education boils down to:

- transmitting a bulk of knowledge, mostly about the substance of currently bidding law; and
- transmitting certain skills⁵, necessary in the legal work.

The latter are arguably more important than the previous. Laws might change. There is no possibility to learn all of them by heart. And there is no need to learn all of them by heart, for legal work nowadays, regardless of a sector, always takes place with an access to a legal database containing legal texts, case law and commentaries⁶. Skills, on the other hand, persist and enable lawyers to do their job: to deal with hard cases⁷, with no obvious answer given directly in a statute; to react when reality takes form unpredicted by the lawmaker. Being a lawyer means much more than just knowing what the law is.

³ A fresh and interesting exposition of that claim in R. van Gestel, H. W. Micklitz, M. Poyares Maduro, *Methodology in the New Legal World*, Florence 2012.

⁴ For the contemporary argument see F. F. Schauer, *Thinking like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge 2009.

⁵ Well exposed in G. Sartor, *Understanding and Applying Legal Concepts: An Inquiry on Inferential Meaning*, (in:) J. C. Hage, C. Jaap (eds), *Concepts in Law*, Heidelberg 2009; J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason*, Oxford 2009.

⁶ In the light of this, Polish law schools’ practice of not allowing legal texts into the exams, as well as of asking students explicitly what are the particular provisions of given statutes, not only rises eyebrows of professors from other countries, but should be given a serious reconsideration.

⁷ First explicitly demonstrated in: R. Dworkin, *Taking Rights Seriously, New impression, with a reply to critics*, London 1978.

Legal skills, at the most general level, could be divided into **vocational** and **academic**. The previous are the skills necessary for the legal practice: identification of sources, interpretation, inferring norms from norms, argumentation, legal drafting etc. The latter encompass theoretical skills of explanation, classification and critical assessment; an ability to bring an order to legislative chaos, capability of explaining why the law is the way it is, and a competence to critically examine the state of play, not just by presenting personal opinions, but within a framework of a rigid normative theory, be it internal to law constitutional morality, or external to law political or philosophical position.

Both a practicing lawyer and a legal academic need to master both types of skills. There is a temptation to say: a practitioner does not need to know philosophy, history or comparative method; what cannot be “billed” on a client is just a fancy, intellectual, but an unnecessary additive. While being a law student, one hears such opinions more than often from fellow colleagues. I want to challenge this claim, two paragraphs below.

The statement that a legal academic needs to master practical skills is much easier to be popularly accepted. One needs to understand, or at least to know, the practice of law, in order to theorize it properly. Additionally, legal academics will often teach undergraduate students, most of whom strive to be practitioners themselves.

Legal research, however, is something more than just writing commentaries on what the law is and what is the court practice. What in Polish tradition sometimes serves as a final product – a description of a legal institution X, in the light of statutory law and judicial discourse – should be a starting point for academic reflection, not the end of it. Legal research should be able to explain why the law is the way it is, to demonstrate underlying patterns, to offer a theory ordering conceptual underpinnings, to point to the inconsistencies, and to reflect upon the questions of whether the law is the way it should be. Legal scholarship requires a much wider set of skills and methods than everyday legal practice. Or it would seem.

For, as I want to argue, a legal practitioner needs to master the skills labeled here as “academic” no less than a legal scholar. Obviously, not every person practicing law will need them, and rarely are those skills indispensable from the market point of view. But what one needs to remember is that practitioners are often important actors in the public discourse regarding the positive law. They write to professional journals (like *Palestra* or *Radca Prawny* in Poland) and newspapers, they express their views in media, they directly and indirectly participate in the lawmaking process. Academic skills are what distinguish the voices being just personal opinions from rigid normative propositions⁸.

⁸ For a good example of the distinction consult B. Leiter, *Why Tolerate Religion?*, Princeton 2013.

From the society's point of view, the most important practitioners should be academically skilled. Society needs academically literate and reflective lawyers. To put it in grandiloquent terms: in the army of practitioners, we need artists standing above the crowd of craftsmen.

Additionally, legal practitioners do encounter provisions and practices that need to be challenged, on constitutional, European or human rights grounds. To demonstrate their invalidity or incorrectness, however, they need to understand the system much better than just knowing what the practice is. The practice might be wrong.

For this reason, I want to challenge the dichotomy of theory vs. practice, according to which, "practice is what practitioners do" and "theory is what theoreticians do". If that would be the case, law schools would not be necessary. It is not inconceivable that lawyers could learn practical skills by vocational training in a law firm, from the very beginning. The danger is, however, that the current practice, for a variety of reasons, is incorrect, to put it in purposively vague terms. Law schools prepare lawyers to grasp this, and to explain why.

Summing this section up, becoming a lawyer encompasses obtaining knowledge and skills; legal skills can be divided into vocational and academic; it is a mistake to claim that practitioners need only the previous and academics only the latter, because successful practitioners, apart from working for their clients, take part in public discourse about law, for which skills of explanation, systematization and most of all, skills of critical assessment and constructive proposing are indispensable.

3. THE ROLE OF COMPARATIVE LAW AND LEGAL HISTORY

In this section I consider the question of the comparative law's and legal history's role in the picture sketched above. Let me start with comparative law as a method⁹, being potentially one of the academic skills taught as a part of the law school's curriculum.

The most important lesson one can draw from doing comparative law is: the law does not need to be the way it is. And simultaneously with that: how else could the law be, through seeing how it actually is somewhere else.

For a person trained just in the Polish legal tradition it might come as a shock that there are civil codes which do very well without a general part, to the extent that e.g. French lawyers find it hard to grasp what a general part is and why it could

⁹ The difference between comparative law as substance and as a method well exposed in: G. Wilson, *Comparative Legal Scholarship*, (in:) M. McConville, Wing Hong Chui (eds), *Research Methods for Law*, Edinburgh 2007.

be useful. What is more, there are jurisdictions, like England, where they do just fine without a civil code at all. There are legal systems very much unlike ours.

One distinction to be drawn already at the beginning is between comparing legal rules and the “deeper tissue” of law: concepts and philosophy¹⁰. To compare rules, one does not need to be very skilled. International law firms do it all the time, creating working compilations of “rules regarding X” in, say, all twenty eight EU jurisdictions. The method for that is an Excel table-questionnaire and sending an email to department X in all jurisdictions. But comparative law is much more than that.

“What is the relation between the concept of property law in common law systems and the concept of law of things in civil law systems?”; “what is the difference between copyright approach of common law and author’s rights in civil law?”; “what underlying principles explain the contrast between the freedom of speech and privacy rights between the US and the EU?” are the types of questions a comparative lawyer would be interested in.

The method needed to answer them almost inevitably draws one to legal history¹¹, legal philosophy and the history of legal doctrines. A lot could be elaborated on that, but the findings boiled just to one sentence will always take form of: “we do it this way because of this; they do it that way because of that”. And one can come to the conclusion that the times have changed and we are much close to “that” than “this”.

A complete lack of this type of approach is visible in the works the Polish Codification Committee for Civil Law, which a few years ago published a proposal for the new general part of the new Polish Civil Code¹². And it is just the same as the old one. “No, there are differences x, y, z!” one will shout immediately. But these are just cosmetics.

The Polish Civil Code is in its structure based on the German BGB. That is common knowledge. But why is the BGB the way it is? One hundred years of debates that led to its creation are absent in the mainstream Polish private law scholarship. Only through doing comparative law can one realize that concepts seemingly obvious and natural to us, like “legal action”, “declaration of intent”, “private legal relationship” etc. are really only one conceptual option from many others. And only through legal history can one trace them back to German idealism, pandectist movement and Savigny’s thought¹³. Instead, we try to re-copy German 19th century thought, completely forgetting that the 21st century has come, with consumer law,

¹⁰ The distinction after M. Siems, *Comparative Law*, Cambridge 2014.

¹¹ The classic example of this type of analysis F. Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*, Oxford 1995.

¹² The project can be accessed at www.bip.ms.gov.pl/Data/Files/_public/bip/kkpc/ksiega.rtf (last access 30th September 2015, Polish only).

¹³ F. Wieacker, *A History of Private Law...*

European law, sector based regulation, separation of C2C, B2C and B2B relations, etc., possibly challenging the initial assumptions in the meantime.

Please, note that the argument above does not rely on the problem of “globalization of law” or “transnational law”. It is very much national-system-centered. The role of comparative law is to make lawyers understand that the law does not have to be the way it is, to open their eyes to possible better options, and to make them think outside of the box. We need to get out of our labels and schemes if we want any progress. Other legal systems can serve as a mirror in which we see the details of our own much sharper.

This, obviously, does not undermine the importance of the globalizing world as a factor to be taken into account. The process of Europeanization, and wider processes of approximation of laws and standards (probably coming through the TTIP on the massive scale quite soon) can be more or less successful or painful. Harmonizing laws will perform better when a harmonizer understands what is to be harmonized, what the similarities are, what the differences are, and where they come from. For law does not exist in social, political and cultural vacuum. On the contrary, it is a product of all these orders, and is embedded in all these orders. To grasp this, however, one needs the tools provided by legal theory.

In addition to all the considerations above, there is a place for comparative law also among the practical skills. Nowadays the chance that a legal practitioner will need to apply foreign law, or draft a contract under foreign law, or get into a trial before a foreign court, is much higher than not such a long time ago. I would not overestimate, however, the ability to do so just after completing a comparative law course or a school of foreign law. Let us be fair, in a difficult case one will always contact a practicing lawyer (or a sister company) from a particular jurisdiction. But even “knowing what is going on” is a valuable asset.

Summing this section up, comparative law primarily demonstrates that the law of a given jurisdiction does not have to be the way it is. Comparative legal history explains why it is the way it is. Knowledge obtained through comparative and historical analysis can be useful both for national purposes, as well as the inter- and supranational processes of harmonization and approximation. For all these reasons, it is desirable that law school students undergo a training not only providing them with knowledge about substantial comparative law and legal history, but most of all, equipping them with skills to perform this type of analyses themselves.

4. VALUES AND LEGAL ETHICS

Until this point the argument of the paper has been construed as if legal scholarship and practice were completely apolitical and value-neutral enterprises.

Lawmaking might be a political process, but law's description and application are, if not automatic, then at least not political. But this is not the case.

We live in a values-driven world, where different viewpoints crush against each other on daily basis, what in liberal democracy is rightly considered a virtue. And in this world, a world of individual and social interests, a world of competing ideologies, where everyone believes in something, wants something and aims at something, the legal practice is embedded.

This might be dangerous. A reasonable person would generally agree that judges should decide the cases based on law and not their private opinions; that law professors should clearly distinguish between describing the law, stating their opinions about law, and offering a normative scientific argument about law; and that practitioners should represent the interests of their clients, but within the frames of the codes of ethics.

But if, for example, a vice-minister of justice of a given country claims that the constitution of that country does not provide reproductive rights, while the ombudsman of that country claims that it does, both of them being law professors, do they engage in a political dispute or a scientific debate? Should it matter that their scientific claims match their personal opinions? How to distinguish between a rigid doctrinal argument and a political position just pretending to be one, though backed up by a scientific title of its maker?

Or when a law professor happens to be a practicing lawyer, representing his or her clients in the court room in the morning, while aiming at scholarly truth and objectivity in the afternoon, and then happens to publish a piece in press, how to distinguish a trial argument from a doctrinal argument?

I am far from telling people what to do. The only claim I make here is: we should be aware of these dangers, and we should prepare prospective lawyers to face them. To do so, however, a rigid theoretical training is necessary, with methodological tools enabling a lawyer to detect and demonstrate that a person claims to do X, while actually doing Y.

What could be the role of comparative law in this training? Ideological background of diverging legal systems is different. For example, a law and economics argument might be an internal-to-legal-morality claim in the U.S. or the UK, where through Locke and Bentham utilitarian considerations became an integral part of the constitutional system¹⁴; while exactly the same argument made in Germany or Poland will be an external-to-legal-morality claim, which apart from a first level prescription about particular provision contains also a meta-prescription of "these values should be given a consideration in our legal system, even if they are not recognized as such yet".

¹⁴ For this claim and other examples see D. J. Galligan, *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham*, Oxford 2014.

Underlying values, however, might seem natural to a person brought up only in a single culture. Only by studying other legal systems can one critically reflect about implicit value judgments contained in her or his own legal system, or in claims made about it.

Further examples could be multiplied here, but there is no use to do so. What I wanted to make clear is: in the world of competing values, where lawyers play different (and sometimes conflicting) social roles at the same time, legal education should equip students with tools enabling them to distinguish between different types of normative claims, objective and subjective, internal and external to law, doctrinal and political. For that, a theoretical training is necessary, and the comparative law can serve as its very valuable element.

5. CONCLUSIONS

In this piece I have argued that legal education should concentrate on transmitting not only the knowledge about the currently binding law, but most of all, skills necessary for legal profession. I have distinguished between vocational and academic skills, and further argued that it is a mistake to believe that practitioners need only the previous, while scholars only the latter. On the contrary, academic skills can be very valuable for practicing lawyers, both from their own, as well as societal point of view.

Within those skills, methods of comparative law and legal history play a pivotal role. Comparative law enables lawyers to understand that a legal system could be constructed in another way, to understand characteristics of one's own legal system better, and with the help of legal history explains why the law is the way it is. That, in consequence, proves valuable both in the global context of harmonization and approximation of laws, as well as national context of legal reform and reflection about law's underlying values.

This essay aimed to be general and universally valuable. Its framework can obviously be applied to particular national models of legal education. Assessment of the Polish one, which I had a pleasure to accomplish two and a half years ago, would need a separate article of a different character. But if I were to boil it down to two sentences, it would be: it essentially does not matter what areas of law we teach as obligatory and what not; what matters is *how* we teach them. In today's world we should more than ever concentrate on skills rather than just knowledge; where comparative method, historical analysis and descriptive and normative theory should play a pivotal role.

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Summary

This essay offers a philosophical reflection about the role and objectives of legal education, with special attention given to the role that comparative law, legal theory and legal history could play in legal education.

The author argues that legal education should concentrate on transmitting not only the knowledge about the currently binding law, but most of all skills necessary for legal profession. He distinguishes between vocational and academic skills, and further argues that it is a mistake to believe that practitioners need only the previous, while scholars only the latter. On the contrary, academic skills, encompassing *inter alia* skills of explanation, systematization and of critical assessment, can be very valuable for practicing lawyers, both from their own, as well as societal point of view.

Within those skills, methods of comparative law and legal history play a pivotal role. Comparative law enables lawyers to understand that a legal system could be constructed in another way, to understand characteristics of one's own legal system better, and with the help of legal history explain why the law is the way it is. That, in consequence, proves valuable both in the global context of harmonization and approximation of laws, as well as national context of legal reform and reflection about law's underlying values.

ANALITYCZNO-FILOZOFICZNE SPOJRZENIE NA EDUKACJĘ PRAWNICZĄ

Streszczenie

Niniejszy esej stanowi próbę filozoficznej refleksji nad rolą i celem edukacji prawniczej. Szczególnie uwzględnia rolę, jaką w tej edukacji mogą odegrać metody prawa porównawczego, teorii prawa oraz historii prawa.

Autor wyraża pogląd, że edukacja prawnicza nie powinna ograniczać się jedynie do przekazywania wiedzy o aktualnie obowiązującym prawie, lecz przede wszystkim powinna przekazywać umiejętności niezbędne w pracy prawnika. Wśród nich autor wyróżnia umiejętności zawodowe i akademickie, twierdząc jednocześnie, że błędny jest pogląd, zgodnie z którym praktykom potrzebne są wyłącznie te pierwsze, a ludziom nauki te drugie. Przeciwnie, umiejętności akademickie, przede wszystkim zdolność do wyjaśniania, systematyzacji oraz krytycznej oceny prawa, mogą być nad wyraz przydatne praktykom zarówno z ich punktu widzenia, jak i punktu widzenia społeczeństwa.

Wśród tych umiejętności metody prawa porównawczego i historii prawa odgrywają nad wyraz istotną rolę. Perspektywa prawnoporównawcza pozwala prawnikom zrozumieć, że dany system prawny mógłby wyglądać zupełnie inaczej, pozwala zrozumieć szczególne cechy własnego systemu prawnego oraz z pomocą historii prawa wytłumaczyć dlaczego

przybrał on taki, a nie inny kształt. Zdolność do tego typu analizy jest przydatna zarówno w globalnym kontekście harmonizacji i zbliżania porządków prawnych, jak i w czysto narodowym kontekście reform prawa oraz refleksji nad wartościami leżącymi u jego podstaw.

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