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Openness, Inclusion, Egalitarianism. Does it Hold True for Jurisprudence and Legal Education?

The 21st century lawyers still have a burning sense of mission. They continue to claim that they have a special position in the society. As if to confirm it, Art.1.1 of the Code of Conduct of European Lawyers of CCBE RP of 2006 declares "In a society founded on respect for the rule of law a lawyer fulfils a special role"[1].

Their mission is about a fair share in the governance of the country, by participation in the law-making process, interpretation of law and decision-making. Their voice is important in shaping attitudes towards law. Since the antiquity jurisprudence and legal education were highly regarded for their instrumental role in providing cohesion and axiological legitimacy to political systems. They are also a stabilizing factor of the political system of the nation.

Within the legal circles the most important role play those recognized as authorities on law. They are the centre of the legal culture, they act as a political safety brake and they determine the tenets of truth in describing of legal phenomena; they establish the standards of correctness in the interpretation of law. Historically, lawyers have never been egalitarian, on the contrary, the idea of an establishment is of key importance in their hierarchy.

As a rule, the opinions of the privileged few, the authorities, enjoy the highest esteem, thus becoming a leading force in legal discourse. They have the power to cut the discourse off to protect the traditional, recognized paradigms of studies and the strategy of law application.

[1] Quoted from Radca Prawny 2007, No. 1.

Important changes take place in the structure of power. The struggle between authorities takes place only through revolutions and they assume a variety of forms. In the long periods of stabilization the authority-based structure have been well-ordered. What matters is to be respected by one's peers or to be an expert. Those recognized as authorities (and considering themselves as such) in fact expand their position beyond legal sciences. That external, social and political status outside of the academia is sometimes considered to be a taboo.

In Poland, the fundamental rules of interpretation rely on the authority of interpretative decisions of public authorities and on the *communis opinio* (that is of case law and legal science)[2]. According to M. Zieliński, in the course of legal construction one must take into account the principles directly related to the interpretation and interpretative decisions of others (where applicable) if such directives are legally enforceable[3]. Established doctrinal views, if unanimous, should be treated as relatively binding. M. Zieliński goes on: "generally the works of a broadly understood jurisprudence (including court decisions) is auxilliary, however become binding if fully unanimous. They can be overcome by new, powerful arguments. Absolutely binding are only those directives which are effective as legal norms, imposing *modus interpretandi* or demanding recognition of the interpretative decisions of others"[4].

The above raises an all-important question: exactly what arguments are powerful enough to break the unanimous opinion of the legal community? It is worth noting that it is for the addressee of the submitted arguments to admit some of them as relevant and some of them to throw out. What would be the outcome of a discourse if the interpreting authority does not bow to the unanimous opinion of the legal community? Would it be a breach of the norms of legal culture? Can you win a dispute (and in particular – in what persuasive context) by presenting a different reasons? Can the opponent be persuaded and how? In what way and to what a degree the internet determines the outcome of the struggle of authorities?

Furthermore, the issue of hierarchy is affected by the following rules and guidelines for interpretation: unanimous opinion of legal doctrine (including case law) should be expressed in manuals or commentaries; relevant definitions should be evidenced in manuals (relevant for a given

2 Cf. M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warsaw 2002, chapter XX, p. 297.

3 Ibidem.

4 Ibidem.

discipline), commentaries or in monographs and judgments; the understanding of legal terms must be universally accepted in the legal language. The letter can be found in the relevant literature, if prevailing, and in the opinions of experts in the field[5].

Let us consider the last guideline. Scholars (or rather their work) are accepted as authorities in their respective fields if they deal with certain issues in a manner accepted by the academic community. Should there be a one, uniform academic community? Is it possible in our times? It is questionable if one remembers the growing multicentricity of law, pluralism of values encoded therein, changes in the axiology of politics.

Going beyond the legal circles, both in Poland and abroad, different aspects of this special role of lawyers and many critical opinions come to the surface.

"The problem with (...) lawyers", says an American scientist and journalist Jeff Jarvis, "is that they have clients. They must take a stand, whether it is right or wrong. As they are paid to do that, the motives behind anything they say are necessarily suspect. They cannot be transparent, for that might hurt their clients. They cannot be consistent, for tomorrow they may represent a client with an opposite view, so we'll never know what they really think. (...) Lawyers (...) must spin facts to craft victory. (...) It's not their job to help anybody but their clients"[6].

In Poland lawyers also do not enjoy the trust of the society[7]. "Studies show that Poles consider almost all lawyers as an old boys" network. Such opinions are stuck in the Poles' heads", says J. Czapliński[8]. According to a report of 2009 71% of the polled viewed court decisions as unjust, 69% felt that courts are doing a sloppy job, and 55% said corruption plagues of the Polish justice system[9].

Regardless of the lawyers" real, important, and creative role in the political system, in the state apparatus, and in culture, the way they perceive themselves and the way they are perceived by others have collided headfirst since the antiquity.

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5 (Selected) rules and guidelines are quoted from: M. Zieliński, as above, chapter XX. Also, the issue of the role of consensual theory of truth in legal discourse (consensual jurisprudence) and its significance for the ossification of rules of law/versus/changes in law.

6 J. Jarvis, *Co na to Google*?, Wolters Kluwer Polska, Warsaw, 2009, p. 389.

7 Final report on the opinion polling *Making the justice more accessible*, Warsaw 2009. Contractor: Konsorcjum IBC Group& Homo Domini for the Ministry of Justice. Cf. also an interview with J. Czapliński, *Lawyers do not enjoy the trust of the society*, Gazeta Prawna, 17.03.2009.

8 Ibidem, p. 1.

9 Ibidem.

However, *hic et nunc* the assessment of the "special role" of lawyers and their privileged position acquired a new dimension in view of the modern, influential and seemingly fashionable ideas in the political discourse which shake the Western culture. They concern inclusion, egalitarianism and participation in culture and science. It brings us to the question if and to what a degree do they affect jurisprudence and legal education?

Legal authorities co-decide on the content of law and on the its application. In that sense they indeed fulfill a special social and political role. In particular, since "doubt as to what the lawmakers had in mind is of permanent rather than exceptional nature. (...) Due to the permanent ambiguity of the legal language, the need for its interpretation is also permanent"[10].

Accessibility, inclusion and egalitarianism have reached Poland and found their way to scholars and practicing lawyers (though the latter to a lesser degree). Those involved in legal education took particular interest.

In the most general terms, the idea of accessibility means that all creations of human culture (including legal sciences) should be made available to the entire society in a simplest possible way.

Therefore, the policy of accessibility requires that culture makers (including legal culture) and science (including legal science) actively engage in devising effective methods to remove all obstacles to a universal and easy inclusion and social participation. Consequently, any obstacles in the access to culture and science should and can be removed. The removal of obstacles to universal participation is among the most important priorities of many institutions.

The concept of inclusion reflects the opinion that it is necessary to look for the ways to limit the sense of alienation and withdrawal of individuals and to devise ways of making communication on equal terms efficiently. Of particular importance is to establish a working relationship between the elites (the establishment) and the society. The policy of inclusion and universal social participation, involvement of possibly largest groups in various institutions, creation of integrated communities, interactivity should be the objective. Such policy is to serve, first of all, the fight against social exclusion.

The idea of egalitarianism is most frequently understood as a democratic postulate to create equal opportunities for everybody. Its consequence is

[10] M. Matczak, *Summa iniuria. O błędzie formalizmu w stosowaniu prawa*, Wydawnictwo Naukowe Scholar, Warsaw 2007, pp. 27–28.

a search for simple solutions. "The simpler and clearer the design, the better. To be simple is to be direct. To be direct is to be honest. To be human is to converse. To converse is to collaborate. To collaborate is to hand over control"[11].

How these ideas affect the policy of higher education and schooling? Below is an example of typical reasoning that puts the output of science on an equal footing with manufacture: "The world's airlines plan to land their planes with 100 percent safety every time. (...). The world's top car companies spend a fortune to reduce their manufacturing fault-rates from between 2 percent to 1 percent. But most school systems actually expect and plan for a rejection rate that would send any business into bankruptcy. (...) 20 percent product failure rate in any business, anywhere in the world, would be regarded as a financial disaster. Schools are the only organizations to regard that result as a success" wrote Gordon Dryden and Jeannette Vos[12]. Then they found a recipe; they stated that in a society the "suggestiveness standard" is all-important for the equalization of opportunities and inclusion. It follows that the entire social environment propels us to success or failure. Henry Ford had summarized part of the equation many years ago in simpler terms: "If you think you can, or think you can't, you're right". Others have reiterated the message regularly: "We are what we think we are (...)"[13].

The above way of reasoning may seem an expression of "intellectual optimism", aligning the ideas of accessibility, inclusion and egalitarianism. Intellectual optimism is connected with a "horse-sense" attitude to knowledge, i.e. the conviction that common observation is the basis of knowledge and that there is nothing that cannot be "decoded" with commonly accessible tools. A common-sense desire to understand and take control can be satisfied with anything, says T. Hołówka in her book[14]. A common-sense outlook absorbs anything that "domesticates" the world and makes it obedient to laws. Any idea is better than ignorance, a lack of explanations and intellectual hopelessness. Common sense is conveniently accessible thanks to fragmentary, individual experience.

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[11] J. Jarvis, op. cit, p. 208

[12] G. Dryden, J. Vos, *Rewolucja w* uczeniu, Zysk i S-ka, Poznań 2000, pp. 227–268.

[13] Ibidem, p. 273. The concept of a "social suggestiveness standard" comes from the work of G. Lozanov, *Suggestology and Outlines of Suggestopedy*, Gordon and Breach, 1978, quoted from: G. Dryden and J. Vos, op. cit., p. 522.

[14] T. Hołówka, *Myślenie potoczne*, PIW, Warsaw 1986, p. 175.

At the beginning of the 17th century, as the Tudors came to extinction, the English put James, the king of Scotland and son of Mary Stuart, on the throne. Being used to the Scottish absolutism, the King would not accept the limitations on the royal power in England. With particular vehemence he protested against being denied the right to "mess" with the courts. "Do you suppose", he said during a meeting of justices – that I have not enough reason to issue a good judgment?" Then justice Code stood up and said: "God has endowed your Majesty with excellent attributes, but your Majesty is not learned in the laws of the Realm of England. The cases concerning the life and property of your Majesty's subjects, are not to be decided by natural reason, but by the knowledge of law which demands long study and experience'[15].

The critique of the idea of inclusion as expressed by Coke, is based, on a clear distinction between "common thinking", satisfying the natural need to "domesticate" the world, rooted in cognitive features (the mode of thinking and accepting opinions) called a "restricted code" in the meaning proposed by M. Marody and "professional thinking" referring to an "elaborate code", a formalized process of learning, resorting to special methodologies for the inclusion of contents in the body of knowledge[16]. Characteristic features of a "restricted code" include focus of concrete facts, looking for casual surface links, poor generalization skills, inability to relate abstraction and concrete facts. The "elaborated code" is characterized by opposite features.

In professional knowledge calling for intellectual skepticism, criticism and command of the "elaborated code" and the "social suggestiveness standard" will not suffice[17].

Perhaps, it would be fruitful to interview the first-year law students to hear what they think of the Henry Ford" approach and if they understand justice Code's standpoint.

The idea of inclusion is strictly related to the influential concept asserting that knowledge should be treated as a product.

Looking at knowledge as a product, leads to attributing it with the same properties as material goods. It is expected to be inexpensive, readily available, and user-friendly.

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15 I quote the anecdote from: M. Szerer, *Kultura i prawo*, Warsaw 1981, p. 231.

16 M. Marody, *Technologie intelektu*, PWN, Warsaw 1987.

17 Ibidem.

Thus, a scholar, as a knowledge supplier, should efficiently and conveniently provide consumers with portions of his product as if they were slices of pizza. If we perceive knowledge like this, in the common-sense social perception, the exceptional nature and role of science becomes hardly understandable for it no longer has that special, missionary message. Its relationship with the intricate inner workings of the intellect it grew out of is invisible.

Then, why would a first-year student using his common sense see anything special in intellectual work? In this perspective, a professor is not someone special but a service provider, like a car mechanic or a hairdresser.

For legal sciences the proclamation of such an opinion has significant consequences. Law, co-developed by jurisprudence, is a form of a political decision; it organizes social, political and economic life. That the general public is capable of questioning the mission of science, thereby undermining the authority of scholars, on the premise that knowledge is a product, may have a negative impact on the authority of law in general.

If knowledge is a product, then a knowledge provider is no different from the seller of other goods and services. Traditional intellectuals, autonomous, dissociated from institutions propagating the ideas for common good, are gradually being transformed into professionals and experts. Professionals are never entirely autonomous. They are subordinated to the institutions for which they work, their standards, norms and systems of control.

"A critique of the status quo, acting as the conscience of the society or pursuing the truth regardless of the consequences are not what the job of a professional is about", observes F. Furedi[18]. K. Fridjonsdottir adds that "a professional expert might be a critical intellectual but is definitely not expected to behave as one in his role as an expert"[19].

The dissonance between the ethos of a professional and of an intellectual was vividly presented by E. Said: "By professionalism I mean thinking of your work as an intellectual as something you do for a living, between nine and five with one eye on the clock, and another eye cocked at what is considered to be proper, professional behavior – not rocking the boat, not straying outside the accepted paradigms or limits, making yourself

[18] F. Furedi, *Gdzie się podziali wszyscy intelektualiści*, PIW, Warsaw 2008, p. 45.

[19] K. Fridjonsdottir, *The Modern Intellectual: In Power or Disarmed? Reflections...* (43), quoted after F. Furedi, op. cit., p. 45.

marketable and above all presentable, hence uncontroversial and unpolitical and "objective"[20].

Today, lawyers engaged in science and jurisprudence "accepted by the legal community" (as understood by M. Zieliński) are most frequently also engaged in law firms, the government, or private practice what puts in question their independence as mentioned by J. Jarvis[21].

Should we include among the commands of a well-organized state, along with the principle of rationality of the lawmakers, the dogma of intellectual independence of lawyers (a community of lawyers)? Should their ability to oppose the external and internal pressure, to keep a distance from their own political, ideological and moral preferences and professional standards in the name of common good become part of such a state?

Is the accepted dogma of a moral, just lawyer putting forward competent and balanced theses, compliant with the canons of truth if the truth is hammered out by the communit opinio?

Is it possible to reconcile the traditional principle glorifying the special place of lawyers in the social order with the ongoing changes of the role and function of science in the society, displacing legal authorities in and the ubiquitous lack of trust in lawyers? How are the representatives of legal theory to remain autonomous and not subject to any external interests if their authority is clearly related to institutional confirmation and recognition? They are often convinced they can come up with objective scientific statements in a dispute, about own interests and results of their professional work. Their cognitive perspective is somehow to validate the version of truth they represent. Thus, neutrality of a scholar is not beyond doubt anymore, and the research process is not perceived from the positivistic point of view. Behind ontology, epistemology or methodology there is the personal biography of a scholar speaking from a specific standpoint within the social structure[22]. "In doing so each scholar belongs to another interpretative community, which in a specific way shapes the gender and multicultural references of research"[23].

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20 E. Said, *Representation of the Intellectual*, London 1994, p. xii, quoted after F. Furedi, op. cit., p. 45.

21 Cf. quotation at the beginning of this article.

22 More about qualitative research and multicultural background of a researcher cf., e.g. N.K. Denzin, Y.S. Lincoln, *Wprowadzenie. Dziedzina i praktyka badań jakościowych*, in: collective works: N.K. Denzin, Y.S.Lincoln (eds.), Metody badań jakościowych, WN PWN, Warsaw 2009, Vol. I, p. 48.

23 Ibidem, p. 48.

Thus, the epistemological and methodological storm, which during the last 40 years has led to questioning of the scientistic, positivistic, intellectual authority of science and its exceptionalism significance, has become very important for challenging the exceptional mission of social sciences, including legal sciences. Various trends in philosophy of science, referring to relativism, postmodernism, post-structuralism, etc., have undermined the power of traditional, positivist scientific authorities, including legal authorities. Today, each research strategy, method or technique can be approved by at least some part of the academia. Is legal community dispersed and divided in the same way? Is it also with sciences that non-positivist orientation created a context in which each study may be challenged or accepted by representatives of a competing paradigms? Or, is the political pressure of tradition along with conservative lawyers minding their own business, still an efficient guardian of the positivist paradigm? The protection of an accepted paradigm and limitation of methodological discussion allow legal authorities to continue to "own" the discourse. Petrification of a paradigm is well served by the pressure to further institutionalize science, standardize the procedures, strengthen the rules of admitting to the "mainstream discourse" and the rules for bestowing the status of a "renowned scholar" by the peers. Accessibility, inclusion and egalitarianism are the ideas which significantly benefit from the Internet, radically changing and supplementing the forms of practicing science and education. One may ask if this tendency is permanent and if it really includes law?

The effects of churning up still new "portions" of knowledge and opinions combined with instantaneous publication on the web, the pressure to be always present in the cyberspace, to put forward one's own (or someone else's) theses, opinions and proposals, which many scholars and practitioners cannot resist, begins to affect the stability of the internal order and the hierarchy of authorities.

Firstly, in a world of traditional books and magazines time was understood differently. At present, speed gives a competitive edge and becomes a strategic necessity. Expressing an opinion in the internet provides such opportunity which lawyers understand very well.

Secondly, the internet with its portals and blogs, broad availability and, in particular, anonymity is being increasingly used by the legal community for public presentation of texts critical of the writings penned by officially recognized authorities. This raises a question of the progressing destabilization of the establishment and shifts in the position of the

"renowned authorities"? Anonymous authors post their texts on the web presenting their own problems with marginalization, exclusion, being locked in a niche, fighting for access, inclusion, and egalitarianism. Such a process may gradually change the picture of any community. Legal discourse is gradually being transferred to the blogosphere, however it is is far from clear if it is to revive an ancient agora or, rather, teleport us in a noisy bazaar[24]. In any case, a new egalitarian space for public discourse on law is being created for those who so far were not given a chance to participate in it due to the limited access to traditional media and to the legal circles. Thirdly, the internet and other media help to become popular and even famous. In this model of popularity authorities seek additional legitimacy and strengthening of their influence. But there is also a downside: the media blur the line between an authority, a popular person and a celebrity. Thus, those endowed with PR talents find the door to the establishment open.

Fourthly, now some renowned authorities and would-be authorities continuously supply en masse the samples of their "product", i.e. fragments of knowledge, via the internet. In the case of lawyers these samples double as "portions" of legal interpretation. Launched in the cyberspace they are used later by others, particularly if publicized under an established "brand name". Thus, the fame of the provider is what eventually counts. Can an aspiring authority build the name in the internet as well? Will an emerging brand name match the old one in a community where print has traditionally served as a springboard to prominence? And finally, isn't such a fast-delivered product, a strong argument in favor of an easy access, egalitarian and common-sense approach to knowledge? One might think that what is instantaneous is also easy...

The Internet seems to be favored by the egalitarian attitude: everyone can discuss with an outstanding scholar-lawyer running a blog. Here, there is no room for elitism and exclusion. The internet creates an impression of easiness in making of or obtaining knowledge.

Thus, Jean Francois Lyotard could observe that today's professor is "no more competent than a computer memory in transmitting the established knowledge" and he proclaimed "the end the age of professors"[25].

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[24] During a meeting at the Warsaw University in January 2010, bloggers discussed this issue with W. Sadurski who also runs a blog. The spirit of an agora was represented by W. Sadurski, while a bazaar by "Galopujący Major" ("A Galloping Major").

[25] J.F. Lyotard, *Kondycja ponowoczesna. Raport o stanie wiedzy*, Aletheia, Warsaw 1997, p. 148.

Therefore, taken together, relativism, postmodernism and the philosophy of knowledge as product, the use of the internet have made the public opinion to question the intellectual authority of science, its mission and its exceptional place.

The processes signaled in this paper, their impact on the standing of legal sciences and on the manner of educating lawyers, on the codes developed in legal education, the place of egalitarianism and stability of authorities who in turn are a stabilizing factor for the entire system of law serving a political safety valve, deserve further studies.

The position of legal sciences is a product of the tensions between the market demand for legal services, the needs of political class supported by jurisprudence, and independent intellectuals engaged in science as a non-instrumental value. To upheld the prestige of law one should watch which way the pendulum swings...