„Krytyka Prawa", tom 10, nr 2/2018, s. 41–68, ISSN 2080-1084, e-ISSN 2450-7938, Copyright by Akademia Leona Koźmińskiego

ANDRZEJ BATOR[1], PRZEMYSŁAW KACZMAREK[2]

What is a law academy's alumnus to be like?
On the prospects of developing a legal education around the constitution

Abstract

This article has originated from observations of the current Polish political and legal disputes over the Constitution. In pursuing the reasons for the different lines of the argumentation presented, we have brought the issue of education in constitutional law to attention. We have covered the issue in two stages. The first stage involves a discussion of education models as expounded in social theory. Our starting point was the structural-functional model and its criticism along the lines of conflict, interpretative, and critical theories. This is followed by a presentation of the evolution of administrative-law institutions in the light of the conflict between the expected openness to ethical and political dimensions and the claims for integrity and coherence. To this end, we followed the proposals of Nonet and Selznick. The second stage includes a review of three conceptions of the constitution and constitutionalism. The views of Kelsen, Schmitt as well as the American *judicial review* doctrine served as model examples. These proposals can be presented as the cornerstones of three visions of constitutional-law education. We did not content ourselves with presenting a set of models of education and covering a reconstruction of the vision of constitutional education. We have also attempted to demonstrate, bearing in mind the nature of the Polish debate over the Constitution, that the judicial review doctrine opens up a promising sphere for a revaluation of both the theory and practice of constitutional law.

Keywords: law, politics, legal institution, education, constitution, constitutionalism

1 Prof. Andrzej Bator – University of Wrocław, Faculty of Law, Administration and Economics, Head of the Department of the Theory and Philosophy of Law; e-mail: andrzej.bator@uwr.edu.pl; ORCID: 0000-0003-4772-7920.

2 Prof. Przemysław Kaczmarek – University of Wrocław, Faculty of Law, Administration and Economics, Department of the Theory and Philosophy of Law, przemyslaw.kaczmarek@uwr.edu.pl; ORCID: 0000-0002-3436-4043.

Ministry of Science and Higher Education Republic of Poland

English-language translation and editing of that article was financed under Agreement No. 645/P-DUN/2018 with funds from the Ministry of Science and Higher Education allocated to the popularization of science.

 DOI: 10.7206/kp.2080-1084.189

Introduction

Education is often presented as a formative process aiming at preparing an individual to perform a specific social role. Florian Znaniecki identifies two research fields of education so understood.[3] The first one concerns the social conditions affecting the process of education, whereas the other deals with the institutional framework. Within those fields an important question arises as to the manner in which an institution's alumni's image is modelled. In this respect, two theoretical dilemmas arise concerning the development of an institution.[4] The first of these regards the relationship between an individual's actions and the social structure. Are the actions we take determined by institutional and social factors, or are they a result of one's own choice? The other dilemma speaks of the tension between the social consensus and conflict. Some authors emphasise the order and social harmony in which actions are taken. In this view, social consensus is a feature of social institutions. Other authors, on the other hand, point to conflict situations in social practice. Even in the absence of outright confrontation, profound conflicts of interests do occur.

How the abovementioned dilemmas are resolved when creating an institution's alumni's image is a question the answer to which is determined by the scope of the following considerations. In pursuing the task so set, we will first take the social aspect into account. To this end, we will refer to the findings of Walter Feinberg and Jonas F. Soltis in setting forth the following three theories of education: structural-functionalist, conflict-theoretical, and interpretative.[5] Subsequently, as part of the institutional aspect, we will discuss the findings of Philippe Nonet and Philip Selznick with regard to the development of legal institutions. The researchers identify three models according to which legal institutions are shaped: repressive, autonomous, and responsive.

The research material so structured, set out in the first part of this article, will then provide grounds for an attempt to specify the conditions of constitutional-law

---

3 F. Znaniecki, *Socjologia wychowania*, Vol. 1, Warszawa 2001, p. 21.

4 A. Giddens, P.W. Sutton (contributor) *Socjologia*, wydanie nowe, Warszawa 2012, pp. 85–90.

5 W. Feinberg, J.F. Soltis, *Szkoła i społeczeństwo*, Warszawa 2000. Such structure is also adopted by Roland Meighan (with contributions from Len Barton and Stephen Walker), *Socjologia edukacji*, Toruń 1993, Part IV; P. Mikiewicz, *Socjologia edukacji. Teorie, koncepcje, pojęcia*, Warszawa 2016.

education, and at the same time, by indicating potential alternatives, to answer the question about the possible directions of its evolution. The idea of application of the abovementioned sociological theories in constitutional law and its teaching has appeared as a result of observation of current political and legal disputes taking place in Poland. The undoubted importance, as well as the virtually rudimentary divergence between the lines of argument followed by the parties to the dispute poses a question about its theoretical and philosophical background. For it is knowledge of the supreme statute as shaped by legal theory and jurisprudence that affects the choice of visions and conceptions (philosophies) of the constitution and constitutionalism that professors will offer to its students, which the latter will in turn apply and propagate in their future professional careers. Students receive academic teaching by way of acceptance and authority of the teaching institution (university), whose academic teachers are an essential component of such teaching. Therefore it is crucial whether students receive a straightforward, dogmatically structured knowledge of an area, or whether they are faced with a discourse of some kind, revealing a complex nature of the area presented, often controversial at the very root of it. The latter path appears now to be the only sensible way of teaching constitutional law. Not only does it create an opportunity for understanding and diagnosing the reasons for the diverging Polish narratives on the constitution, but it also allows one to trace the directions of possible changes to the current standard of research into and teaching of constitutional law. These issues will be the subject of consideration in the second part hereof.

Teaching models and the evolution of legal institutions

Sociologies of education

Three conceptions of education are commonly recognised in social theory, as put forward by W. Feinberg and J.F. Soltis.[6] They describe education from the following perspectives: a structural-functionalist perspective, a conflict theory perspective, and an interpretative perspective.[7] In discussing them, we will begin with a presentation of the structural-functionalist model. We will then view this model from the conflict theory and interpretative perspectives.

---

6 W. Feinberg, J.F. Soltis, op. cit., p.14 et seq.

7 The approaches mentioned above are internally diversified. As an example, the following approaches can be distinguished in the interpretative model: interactive, phenomenological, and ethno-methodological.

 DOI: 10.7206/kp.2080-1084.189

Structural functionalism assumes that acting in an institution realm is based upon an intersubjectively understood consensus. For this reason, institutional structures are characterised by an internal coherence of its elements. This standpoint stems from the assumptions of ontological holism and methodological antireductionism. They form the grounds for a proposition that society is an organism made up of multiple interrelated elements, and institutions are granted the status of social facts. This means adopting a position that structures determine the actions of an individual as well as shape one's perception of reality. In this sense, the social structure affects an individual's personality.

A systemic view of the social reality is complemented by the concept of function, which structuralists use to denote the impact of one element of a system on another. This implies that several parts of a system should not be considered independently of each other.[8] In order to understand them, one must perceive them as fragments of a larger whole. With the aid of both conceptual categories, the operation of an institution is presented as coherent, directed towards the attainment of specific goals. Such assumption means giving priority to what is unchangeable and permanent over what is transient and individual. In this manner, a view of the social reality is construed determining the way of thinking and resolving specific problems. The aim of education from the structural-functionalist perspective is to maintain a balance between the various social practices and to rationalise the social order so understood. To this end, education is attributed with three functions: those of socialisation, allocation, and selection.[9]

The first of those functions assumes an education-related goal. In pursuing the goal, it is assumed that the aim of education is to prepare a citizen to perform a specific social role. Such preparation takes place at the level of both axiology and substantive knowledge. On the one hand, the aim of education for an institution's alumni is to adopt certain values as their own. On the other hand, such socialisation consists in the development of tools to be applied in institutional practice. Recognition of values as intersubjective and knowledge as objectively given contributes to the stabilising function of social practice. A further stage of education involves a specialisation aiming at preparing an institution's alumni to perform a specific job as part of a previously selected social role. This mechanism is well illustrated by legal education whereby studies are to prepare individuals for working in legal and civil-service professions, whereas the state-required training pursued at corporations or professional state associations prepares them to enter a specific profession, such as a barrister or a judge. Completing the consecutive stages of socialisation

8 P. Baert, F. Carreira da Silva, *Teorie społeczne w XX wieku i dzisiaj*, Kraków 2013, Chapter 1.

9 After Piotr Mikiewicz, see *Socjologia edukacji...*, pp. 86 et seq.

entails increasingly entering the world of meanings and values reproduced by professional culture. Such methodical practice assumes that the experience we gain during socialisation becomes fundamental not only to our manner of conduct but also to our identity. It may be argued that the socialisation function is based on the assumption that it is the institution that models the vision of alumni and it is according to that model that the process of education is carried out at its consecutive stages.[10] This is how Piotr Mikiewicz puts it: "School is perceived here as omnipotent. It has the tools, the staff, and the syllabus on the basis of which it moulds individuals (...)".[11]

Another function of education in the structural-functionalist model is allocation. It emphasises the position of an individual in an institutional structure, and specifically the process of obtaining qualifications for a given profession. In order to better illustrate the allocation function, let us turn our attention to the notion of mobility in both the vertical and horizontal aspects. In the former aspect, mobility entails an individual being capable of moving between positions within a hierarchical structure. Horizontal mobility, on the other hand, means that a transfer between various social groups is possible without changing one's social position, e.g. as a result of migration. Structural functionalism concentrates to a larger degree on vertical mobility. Education is its tool. Presenting education as a never-ending process is rationalised by advancing in the social structure. Education is made responsible for supplying the institution with those best prepared to serve specific roles.

The abovementioned aspect of education reveals its selective function. It is the third function ascribed to the system of education in the structural-functionalist model. This function implies that it is an objective of education to evaluate candidates for a given profession. It is for this reason that the education process and the manner in which knowledge is adapted are subject to institutions' judgment. The object of such judgment, or assessment, is a candidate's record of achievements as well as their predisposition to a given profession.[12]

The three abovementioned functions of education are based on the logic of a modern society.[13] It assumes that solutions are standardised and uniform as a designed outcome of the education system. Such a view of education has been criticised from the conflict theory perspective. In presenting the latter view, W. Finberg and J. F. Soltis state that:

---

10 Ibidem, p. 89.

11 Ibidem, p. 90.

12 Ibidem, p. 107.

13 Such characteristic is given by idem, see *Oblicza socjologii edukacji – w stronę syntetycznego modelu analiz*, "Edukacja" 2017, 3, p. 12.

 DOI: 10.7206/kp.2080-1084.189

> Functionalists are convinced that changes in society and education are driven by a progressive strive for technical development and social integration. For the conflict theory, such driving force is the incessant battle among various groups, waged for power and position, with education being an important tool in this battle.[14]

According to the conflict theory, society is not harmonious, and institutions are not founded upon consensus; rather, they form a battlefield for various interest groups. The war they fight is for power, with education being supported by the political centre which holds power and authority. In substantiating this standpoint, the following downsides of the process of education are pointed out as recommended by the structural-functionalist model.[15]

The first allegation is the legitimisation of the political order. Power requires legitimacy and therefore uses education as a tool to shape people's awareness, or – to put it in conflict theory terms – a 'false consciousness'. Piotr Mikiewicz, making a reference to the work of Karl Marx and his followers, describes it as follows:

> False consciousness is the outcome of efforts of elites, who produce ideologies and impose them upon subordinated classes, thus guaranteeing themselves a privileged position and eliminating the potential of social unrest.[16]

For critical theorists, education as described by functionalists is a guardian of the division of powers and the resulting privileges. This claim is linked with another allegation, i.e. that education is a tool used for reproducing the existing social relations. Its aim is to recreate the social hierarchy in the socialisation process. In presenting the mechanism in question, one may refer to the distinction between overt and covert functions. The declarative aim of school is to pass on certain knowledge. Acquisition of that knowledge is to allow alumni to properly fulfil their social roles. In the covert layer, it is emphasised that the content of such knowledge is not neutral. It is to prepare the candidate to perform a predetermined role. Hence, the aim of education is: "to offer people convincing justification for behaving as if otherwise they may not have been willing to behave and so sustain the current system of relations of production and power".[17]

---

14 W. Feinberg, J.F. Soltis, op. cit., p. 44.

15 P. Mikiewicz, *Socjologia edukacji*..., pp. 146 et seq.

16 Ibidem, p. 147.

17 W. Feinberg, J.F. Soltis, op. cit., p. 55. See also D. Kennedy, *Legal Education and the Reproduction of Hierarchy*, "Journal of Legal Education" 1982, 32(4).

One of the authors criticising the structural-functionalist model of education is Pierre Bourdieu.[18] The French sociologist brings to attention the notion of a field as an established game of conventions. In the field of education, the declared function of education is to prepare a human for performing a predetermined social role, whereas the implicit function is a tendency of an individual to get lost in the existing rules of behaviour. The covert goal of the education system is to marginalise of the subjectivity of an individual in a role and to adopt the existing conventions as something objective, unchallengeable. On the other hand, the term of 'disposition to perform a social role' carries covertly the notion of *habitus*, i.e. the socially shaped human nature. According to such metaphors, the actions of an individual are determined by the structural imperatives of the role to be performed. Subjectivity becomes lost in the social structure. Language as the fundamental tool of communication creates a certain vision of reality. It becomes, as a result of the education process, objective reality which we adopt in performing a given role. Achieving the consecutive stages of socialisation entails access to various forms of capital, e.g. economic or cultural. Their acquisition results in the existing rules of the game gaining in importance as ones that allow one to maintain one's capital and – in consequence – the existing social and economic order.[19]

The structural-functionalist mode is also predominant in Polish education.[20] It is being challenged not only from the conflict theories' standpoint but also from the interpretative point of view.[21] Here, in turn, the source of criticism is the macro-social perspective presenting education as a tool for maintaining social balance. The interpretative approach, on the other hand, suggests a micro-sociological perspective. From this perspective, the social reality is explained through the notion of interaction between members of a social group and an individual and the institutional structure. This solution makes it possible to attribute both the subjective and the reproductive character to one's activity. This entails not only a reformulation of the epistemic model of social reality (by overcoming the subject – object of knowledge opposition and linking thought with action) but also an emphasis of the role of an individual in its co-creation. On the ontological level, it challenges the claim according to which an individual and the social structure are separate entities. The dilemma, the individual or the structure, is dispensed with by adop-

18 P. Bourdieu, J.D. Passeron, *Reprodukcja. Elementy teorii systemu nauczania*, Warszawa 2006.

19 E. Neyman, *Wywiad z profesorem Pierre'em Bourdieu*, [in:] P. Bourdieu, J.D. Passeron, op. cit., p. 346; P. Mikiewicz, *Oblicza socjologii edukacji...*, p. 13.

20 Z. Kwieciński, *Dynamika funkcjonowania szkoły. Studium empiryczne z socjologii* Toruń 1995; J. Zapała, *Korporacje prawnicze jako agenda socjalizacji. Rozważania na przykładzie samorządu notarialnego*, [in:] H. Izdebski, P. Skuczyński (eds.), *Etyka prawnicza. Stanowiska i perspektywy 2*, Warszawa 2011.

21 P. Mikiewicz, *Socjologia edukacji...*, Part IV.

 DOI: 10.7206/kp.2080-1084.189

ting a dualistic perspective. It assumes that both of the abovementioned aspects complement each other and that it is not possible to investigate the reality (social, institutional) by reducing it to either of them.

According to P. Mikiewicz, in transferring such considerations to the field of education: "we discover school not as a mechanism of selection and allocation of individuals in the social system, but as a set of people who interact with one another and collectively define the school reality".[22] Thus, we can view schools as structures of social roles whose performers interact with each other. The framework for the pursued activity is provided by the structure of the roles performed, which leaves room for individuality of the social actors and situationality of the case at issue. While the structural-functionalist model emphasises the function of education in a social system, the interpretative approach concentrates on the performance of actors in the process of education. An analysis of the process may focus at uncovering what is hidden as a result of routine actions or institutional thinking in particular spheres of activity. However, another perspective may be adopted, with the aim to describe the standards of activity in social practice. In adopting the former of the said perspectives, Erving Goffman's concept of total institution is adopted, pointing to elements of power of the teacher over students in the teaching process and to the degree to which an individual's life is regulated by the world of institutions in one's everyday life. In the case of schools, similarly to the case of Goffman's total institution, one can see a division into two groups: the controlling and the controlled. It will be useful to distinguish, after F. Znaniecki, between two school models: closed and open.[23] The closed school model is based on a claim whose aim is to affect all spheres of students' activity. On the other hand, the open school model assumes that the education experience is but one of the factors that are to shape a human's identity, regardless of whether they act as a teacher or as a student.

If we look at the framework of studies pursued in the area of the conflict theory and, above all, the interpretative perspective, we will see an increasingly strong position taken by an intellectual trend known by the term of new sociology of education or critical education.[24] This current presents two aspects of school.[25]

Firstly, making a reference to the conflict theory approach, it considers the system of education as a tool of selection of people and legitimisation of a certain political-cultural activity. As pointed out by Peter McLaren, the cultural policy recommended by the system of education: "always favours certain relations of power, social

---

22 Ibidem, p. 203.

23 F. Znaniecki, op. cit., pp. 102–114.

24 P. Mikiewicz, *Socjologia edukacji...*, p. 242 et seq.

25 P. McLaren, *Życie w szkołach. Wprowadzenie do pedagogiki krytycznej*, Wrocław 2015, p. 225.

practices, and forms of knowledge, thus reproducing specific visions of the past, present, and future".[26]

Secondly, it draws attention to school as an institution whose aim is to form the identity of students and teachers. In this line of research, self-awareness of the acting subject is emphasised in favour of the interaction or the situation in which action takes place. Hence, reflexivity becomes a notion of key importance. From its perspective, the notion of interaction is presented not so much in the context of maintenance of human autonomy in the process of education, but rather in that of awareness of entanglement and a necessity to expose axiologically important moments, which render such entanglement dangerous to the individual as well as to the functioning of the education system. In addition to reflexivity, another important notion is that of responsibility.[27] The teacher's and the student's statuses are presented in its light. Both figures of 'teacher' and 'student' are presented in the perspective of retrospective and prospective responsibility. The teacher is responsible not only for covering the syllabus (the retrospective aspect) but at the same time also for the manner in which it is presented as well as for the development of academia (the prospective aspect). In critical education, students are not passive recipients of knowledge, but they should also actively participate in education. Hence, how we teach is becoming more and more important than what we teach. This change of approach is evident from an interest in new methods of education, e.g. case studies, pervasive methods.

It is worth making a point here that the critical approach assumes that:[28]

1) education is a politically engaged activity and can become an indoctrination tool for various ideologies,
2) education is an ethically engaged activity, and by recommending certain values, it can marginalise others,
3) education may be engaged in reproducing and legitimising social relations.

Critical education challenges the validity of the structural functionalist model of education in two of its aspects. Firstly, following the interpretative approach, it recommends a microsociological perspective, which focuses on the relational network in which we participate in the course of education. Secondly, following the conflict theoretical approach, it exposes the ideological dimension of education. In this respect, it draws attention to the ethical and political dimensions of education. The ethical dimension allows one to perceive the situationality and individuality

26 Ibidem, p. 226.

27 P. Mikiewicz, *Socjologia edukacji*..., p. 244.

28 Ibidem, p. 245.

 DOI: 10.7206/kp.2080-1084.189

of relations in which we participate during the didactical process. Moreover, it points to the reflexivity, responsibility, and subjectivity of the main actors of the education process, i.e. teachers and students. With this in mind, critical education questions the structural-functionalist model of education. The source of this questioning is the criticism:

1) of the image of an institution's alumni, whose actions are reduced to conforming to structural role imperatives,
2) of deeming the institutional experience fundamental not only in education but also to the regulation and evaluation of other spheres of both teachers' and students' activity.
3) of covering up the ideological dimension, and therefore of the failure to provide the content of the knowledge presented as engaged in recommending a specific vision of social practice and of the institution's alumni.

In the political dimension, critical education aims at converting antagonism into agonism, i.e. a realisation that opposing interests are inevitable. For this reason, it criticises the ancillary function that the education system performs in the social--economic-political order.[29]

Three models of legal institutions

The standpoint we adopt following F. Znaniecki assumes that the process of education, moulding the image of an institution's alumni, may be described both in the social and institutional aspects. Whereas the views of education discussed above reveal the social aspect, we will now move on to discussing the findings on the other aspect. To this end, we use the proposal of P. Nonet and P. Selznick, setting out the development of administrative law institutions in the light of three models: repressive, autonomous, and responsive. The criterion based on which they are distinguished is the tension, of interest to us, between the degree to which an institution is open to the ethical and political aspects and the maintenance of integrity understood as cohesion of institutional practice.[30] The tension unveils two dilemmas:

---

29 M. Zemło, *Nowa socjologia edukacji*, Białystok 1996, p. 10.

30 P. Nonet, P. Selznick, *Law and Society in Transition. Toward Responsive Law*, New York–Hagerstown–San Francisco–London 1978, pp. 74–76. In this part of our paper we follow the findings presented by P. Kaczmarek in the paper: *Tożsamość prawnika jako wykonawcy roli zawodowej*, Warszawa 2014, pp. 48–53.

1) To what degree should legal institutions be separate, autonomous with regard to other institutional sub-worlds?
2) To what extent should a performer of a professional role have impact upon the manner of action, and to what degree is their behaviour determined by external factors?

In the first case, we are asking a question about the relations between law and other institutional sub-worlds, such as politics and ethics; while in the other, the key question is that about the place of a jurist in the legal sub-world. It is our conviction that these questions are close to the dilemmas relating to the modelling of the image of an institution's alumni in the education process.

The repressive model assumes that law is an expression of the will of a political sovereign.[31] Law is instrumentally subordinated to the pursuit of the policies defined by such political rulers. Thus, the aim of law is to legalise the political order. Civic rights and liberties enjoy protection as long as they are in line with the interests of the political centre exercising authority. Such view of legal institutions views a lawyer as merely a supine tool, subordinated to resolutions of the legislative power. The repressive model involves an adaptation of legal institutions to the political environment. Legal institutions are not independent of other social practices, and the centre of political power exercises full control over law.

The autonomous model, on the other hand, can be presented in the following manner: Firstly, law is to remain separate from the world of politics, in accordance with the separation of powers doctrine. Consequently, political issues will be avoided for the sake of the principle of neutrality. Secondly, the responsibility of a role performer boils down to acting in compliance with the existing rules of conduct, which lay down the proper mode of behaviour. Thirdly, the fundamental aim of law is formal justice.[32]

The autonomous model is developed in response to the repressive model. It defends the separation of the legal sub-world from other social practices.[33] This step is typically justified by the argument of autonomy of law. This thesis is arrived at through a reference to the issue of autonomy of law with regard to morality and politics.[34] A shared advantage of both of the abovementioned theories of autonomy

31 P. Nonet, P. Selznick, op. cit., pp. 14–15. See also E. Kustra, *Rozwojowy model tworzenia prawa*, "Acta Universitatis Nicolai Copernici. Nauki Humanistyczno-Społeczne" 1996, issue 307.

32 P. Nonet, P. Selznick, op. cit., p. 83.

33 Ibidem, p. 76.

34 W. Gromski, *Autonomia i instrumentalny charakter prawa*, Wrocław 2000, pp. 22–29.

 DOI: 10.7206/kp.2080-1084.189

of law is the possibility of presenting institutional practice as a structure that is somewhat independent:

1) of political activities, which frame law as a mechanism of social engineering, with the aid of which the social reality may be created,
2) of social morality, or the character of the man acting within a given institution, which is used e.g. to defend the allegation of law lacking in objectivity and of subjectivity as a factor influencing the decision made.[35]

The relations between the repressive and autonomous models are explained by P. Nonet and P. Selznick in the following way:

> The hallmark of repressive law is passive, opportunistic adaptation of legal institutions to the social and political environment. Autonomous law is a reaction against that indiscriminate openness. Its overriding preoccupation is the preservation of intuitional integrity. To that end, law insulates itself, narrows its responsibilities, and accepts a blind formalism as the price of integrity.[36]

Thus, although the autonomous model offers a response to the 'malady' of the repressive model, the responsive model addresses certain weaknesses of the autonomous model.[37] This is how the authors explain the use of the term 'responsive': "we call it responsive rather than open or adaptive, to suggest a capability for responsible, and hence discriminate and selective adaptation".[38] The above definition is developed in opposition to the autonomous approach, to which legal institutions are to remain independent from other social practices.

The responsive model can be described by means of the following features. First of all, legal institutions should be open to facts and social changes. This is also the reason for which the reflexivity of juridical institutions, whose aim is to respond to social-legal changes, is emphasised.[39] Secondly, openness means that a lawyer's activity becomes ethically and politically involved.[40] The thesis may be interpreted as a sign of acceptance that legal institutions, abolishing the neutrality principle, are

---

35 P. Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community*, Berkeley–Los Angeles–London 1992, p. 464.

36 P. Nonet, P. Selznick, op. cit., pp. 76–77.

37 Ibidem, p. 78.

38 Ibidem, p. 77.

39 Ibidem, p. 73.

40 Ibidem, p. 74.

to become a more dynamic instrument of social change. And this is why a lawyer's activity is determined by the notion of activism, cognitive competences. Unlike, however, in the case of the repressive model, legal practice remains here in a likely conflict with political practice. Thirdly, the aim of legal activity consists in pursuing not only formal justice but also material justice. The responsive model assumes that institutional practice is to respond to social changes and attempt to ensure both formal and material justice.[41]

The responsive model of law is also characterised by an increased role of authority of purpose in legal reasoning at the expense of authority of rules.[42] While rule preference assumes a logocentric view of the social reality, regulated by law, the shift towards purpose seems to result from coming to terms that the social practice is not homogenous. The assumption of the situation of conflict and necessity of situation-depended weighing of values assumes that legal obligations are open to criticism. This is expressed by a shift in the responsive model from an absolute obedience to law to moral responsibility for law. Expectedly, this should prevent escaping into formalism, hiding behind a rule and rationalising the decision being made using this rule.[43] Therefore, according to the responsive model, all forms of diluting power by attributing it to a group of people or impersonal structures are evaluated as negative since they act as a potential source of dangerous tyranny or injustice.[44]

In the light of the above, we can see that the responsive model is in opposition to the autonomous model.[45] The autonomous model in turn, as we have described above, is a response to law being reduced to an instrument in the hands of a political authority. The shift from the repressive model to the autonomous model was to ensure a relative independence of law from political practice. This division is expressed by the postulated separation between law and politics. It resulted, however, in the political sphere being marginalised in lawyers' practice in favour of the rule of law aiming at restricting the arbitrariness of political centres and ensuring legal security to citizens. The price paid for that was falling into formalism, total obedience of a lawyer to the rules. The responsive model, on the other hand, aims to 'deformalise' law. This is expressed by speaking of 'a person in a role', which is to emphasise that in adopting a role, becoming its performer, one does not stop being a subject. In this perspective, it is imperative to create open institutions, the

41 Ibidem.

42 Ibidem, p. 77.

43 Ibidem, p. 78 et seq.

44 Ibidem, p. 110.

45 P. Selznick, *The Jurisprudence of Communitarian Liberalism*, [in:] P. van Seters (ed.), *Communitarianism in Law and Society*, Oxford 2006, pp. 23–25.

 DOI: 10.7206/kp.2080-1084.189

participation in which amounts to a dialectic combination of the institutional dimension with an individual judgement over the manner of action.

Can the three models of legal institution development, as outlined above, be applied to the abovementioned concepts of education? The correspondence hypothesis is made credible by the possibility of viewing the projects in question in the light of two dilemmas concerning the creation of institutions. One of them, let us recall, concerns the position of an individual in an institutional structure, specifically the tension between the actions of an individual and those of the structure, whereas the other dilemma involves a tension between the social consensus and the conflict in the presentation of the vision of social practice.

The autonomous model of legal institution development assumes that law is separated from other institutional sub-worlds. It adopts, in this respect, a logocentric view of the social reality in which particular social practices are of an autonomous character. A lawyer's actions are in turn substantially determined by external social and institutional factors. This manner of resolving the theoretical dilemmas that are of interest to us corresponds with the vision of education recommended by the structural-functionalist model. The professionalisation, or social division of work, argument is present in both discourses. A similar correspondence may be sought in the relations between the responsive model of law and the interpretative conception of education. The responsive model views lawyers as persons responsible for the decisions taken. Nevertheless, their actions are taken within the borders defined by the world of institution. The above dualism is close to the resolutions proposed by the interpretative model of education. The sources of such correspondence may be found in the oppositional quality of the responsive and autonomous models and interpretative and structural-functionalist visions of education, respectively. There is no such direct correspondence between the repressive model and the conflict theory approach. This is not to mean, however, that common points cannot be pursued. The conflict theory view of education, or the critical approach, which makes references to the former, can be outlined as a problematisation of the solutions recommended by the repressive model of law. The exposure of the notions of reflexivity and responsibility in the education process clearly opposes the image of an institution's alumni, which we can reconstruct in accordance with the repressive model.

The three models presented here: i.e. repressive, autonomous, and responsive, can be viewed in the light of the question about the manner in which legal and administrative institutions are built, which we have attempted to demonstrate above. The said models are, however, discussed above all as illustrating the development of law. The repressive model assumes an idealised subordination of law to the political practices in a given state. Such view corresponds to the concepts of

the state and legal order offered by Carl Schmitt.[46] The autonomous model, construed upon the assumption of separation between law and the world of politics, attributes a stabilising function at the expense of remaining neutral to law. Its equivalent would be found in the conception of the rule of law making a reference to legal positivism.[47] In the idealisation of the responsive model, on the other hand, as indicated by Ewa Kustra, "the ideas of subject and object of law's impact change".[48] The change, consisting in an emphasis on the notion of interaction in relationships between the subject and structure, directs us towards the pragmatic-hermeneutic theory of law.

Constitutionalism – Currents and their didactical implications

The issue of didactics of constitutional law

The opinion that a constitution is fundamental to the legal order, or at least occupies a special place in such an order, may be deemed commonplace or even self-evident. Constitutions themselves, at least the so-called written constitutions, typically declare so (as is the case with the Polish Constitution in Article 8(1)). However, a closer look at the academic didactics as carried out at Polish university law departments, leads to a conclusion that the case is no longer that evident. In legal study curricula, the knowledge about constitution, entwined in an elaborate curriculum of several dozen subjects, loses its special character, rendering constitutional law one of many stages in a long way to achieving the status of a qualified lawyer. It is often quite unclear what function the subject plays in the curricula. Do we deal with a general subject merely introducing students to a specialist curriculum in the course of the subsequent semesters (in addition to *Introduction to Jurisprudence*, *Logic for Lawyers*, or history subjects), or with a discipline with its 'own text', i.e. one that allows one to pursue and didactically spread the methodology of work similar to that of legal dogma? In the Polish framework, the former option (i.e. legal theory propaedeutics) would be hardly acceptable to both legal theorists and constitutionalists themselves. The constitution and the constitutional law theory offer neither a conceptual framework, even one aspiring to universality, nor rules of legal discourse that would be

46 E. Kustra, op. cit., p. 8.

47 Ibidem, p. 9; J. Srokosz, *Komunitariańska wizja prawa responsywnego a koncepcja państwa prawa*, [in:] M. Andruszkiewicz, A. Breczko, P. Oliwniak (eds.), *Filozoficzne i teoretyczne zagadnienia demokratycznego państwa prawa*, Białystok 2015, p. 144.

48 E. Kustra, op. cit., p. 9.

 DOI: 10.7206/kp.2080-1084.189

comparable to the analytical knowledge provided by *Logic for Lawyers* or *Introduction to Jurisprudence*. On the contrary, it places the knowledge of constitutional law rather among many – besides standard legal dogma – areas of argumentative application of such general subjects of study. For a researcher engaged in an analytical theory of law and referring its findings during a lecture in *Introduction to Jurisprudence*, constitutional concepts do not differ essentially, at least as regards their structure, from similar concepts appearing in other legal disciplines.

Hence, the only reasonable solution is the other option: the theory and didactics – or teaching – of constitutional law is knowledge and teaching limited in its scope by the text of the constitution and a certain set of constitution-related statutes, international treaties, European law, etc. From this perspective, constitutional law is but a branch of law and, built upon it, a legal discipline that is specialised both theoretically and didactically. The study of constitutional law – from this perspective – becomes a specialised branch of jurisprudence, or even a dogmatic discipline developed over a certain set of texts, with the constitution at its core. This position is not essentially affected by considerations of the autonomy of constitutional concepts, of a unique role of constitutional principles or of the specifics of interpretation[49] of the constitution, all occurring in the theory of constitutional law.[50] For such 'local theories' are present – perhaps to a lesser degree than in relation to the constitution – also in other specialist legal disciplines that do not aspire to a unique character (e.g. in administrative law or public economic law[51]). This direction of development of constitutional law theory, although presumably most popular among jurists, fails to reflect the unique role of the constitution as normatively laid down in the constitution itself. This can only confirm the thesis of (relative) autonomy of the constitution rather than that of its unique character.

Yet a third way is possible. We see it in general knowledge, mainly in that in the areas of philosophy of politics and philosophy of law. It traces can also be found in legal didactics. On the occasion of facultative courses, seminars or lectures in

---

49 Translator's note: Please note that in the Polish language, the words *wykładnia* and *interpretacja* are treated as synonyms in the legal context and translated into English as *interpretation*.

50 See e.g. P. Wronkowska, *O niektórych osobliwościach konstytucji i jej interpretacji*, [in:] M. Smolak (ed.), *Wykładnia konstytucji. Aktualne problemy i tendencje*, Warszawa 2016, p. 15 et seq.; J. Trzciński, *Znaczenie autonomicznej wykładni konstytucji na przykładzie orzecznictwa sądów administracyjnych*, [in:] ibidem, p. 55 et seq.; T. Stawecki, *Koncepcja autonomicznej wykładni pojęć konstytucyjnych: od praktyki do teorii*, [in:] T. Stawecki, J. Winczorek (eds.), *Wykładnia konstytucji. Inspiracje, teorie, argumenty*, Warszawa 2014.

51 W. Jakimowicz, *Wykładnia w prawie administracyjnym*, Zakamycze 2006, p. 182 et seq.; E. Kosieradzka, *Odrębności procesu interpretacyjnego publicznego prawa gospodarczego (ze szczególnym uwzględnieniem fazy walidacyjnej)*, [in:] L. Leszczyński (ed.), *Wykładnia prawa. Odrębności w wybranych gałęziach prawa*, Lublin 2006, p. 33 et seq.

legally-oriented philosophy, law students also learn about different concepts of a constitution, about the divergent currents in constitutionalism, and about the disputes over the interpretation of the constitution. An approach of this kind, i.e. open to philosophical reflection, to constitutional law problems is, understandably, hardly reflected in the professional skill of Polish legal department graduates and hence virtually absent from our public debate. And it would be undoubtedly of much use to the adversaries of the dispute in question. In this part of our paper, we intend to consider precisely this third way and show that the constitution itself and the knowledge about the constitution, free from branch distinction limits, are capable of being "taken seriously", i.e. in a manner correspondent with the conviction that the constitution truly is "the supreme law of the Republic of Poland".

The three conceptions (philosophies) of constitution herein mentioned – naturally only fragmentarily on account of the extent and needs of the present paper – lead us to a conclusion that not every manner of theorising or philosophising about the constitution can provide an equally attractive foundation for the development of academic teaching. Some of them (H. Kelsen) result in the theory and didactics of constitutional law being watered down in a broad range of jurisprudential issues; others, (C. Schmitt) eliminate, or marginalise, the need for lawyers to study constitutional matters; and others still (the judicial review doctrine) seem to be opening – at least as viewed from the Polish perspective – a very promising space for a revaluation of both the study and practice (and hence didactics) of constitutional law.

The previous sections of this paper referred to three 'sociologies of didactics' (namely the structural-functionalist approach, the conflict theory approach, and the interpretative approach), which were subsequently linked to 'three models of legal institutions' as proposed by P. Nonet and P. Selznick. We believe that such coincidences can be continued in (or applied to) the concepts of understanding of the legal function of the constitution (so called models of constitutional control[52]), as present in the literature on the theory and philosophy of law, and relevant to the manner in which the knowledge about the constitution and the results of contemporary constitutionalism are (can be) perceived in legal academic teaching. Following up the triadic argumentation schema, we think that the structural-functionalist conception of didactics, along with the autonomous variant of legal institutions, can be related to Kelsen's model of constitutional control of law; the conflict-theoretical model of didactics and the repressive law model can be linked with the idea of constitutional order similar to the argument offered by C. Schmitt; finally, the

[52] See M. Korycka-Zirk, *Filozoficznoprawny wymiar kontroli konstytucyjności*, Toruń 2017. It is on that paper that we have based the triadic systematisation of constitutional control utilised herein.

 DOI: 10.7206/kp.2080-1084.189

critical variant of education (based on the interpretative approach) and the responsive approach to legal institutions can act as a sociological foundation of the so-called dispersed constitutional review of law, as seen practised in a model fashion in American judicial review.

Knowledge about constitution. Hans Kelsen

Let us begin with Kelsen's variant as, firstly, it is this variant that is most often identified with the continental (including Polish) constitutional law practice,[53] and, secondly – as has been argued in the previous considerations over the structural-functionalist approach to didactics and over the autonomisation of institutions – it is on the criticism of these positions that alternative approaches are founded. In the theory of constitutional law, a similar roles seems to be played by the views of H. Kelsen concerning the place and role of the fundamental law in the legal order.[54]

H. Kelsen's position – if we consider his work only from the most representative period[55] – seems to be clear: law is a system based on a hierarchical structure, a collection of norms properly ordered by the jurisprudence,[56] having a common source of validity. A system of law is a logical unity of norms, based on authorisation (delegation) and structurally tied at the top by the conception of the so-called 'basic norm'. In the practical dimension and in the name of the logical postulates of completeness and consistency of the system, this unity is to be ensured by the constitutional review of the legal instruments located at the lower strata in the hierarchy of the system. A specialised constitutional tribunal thus becomes the 'guardian of the constitution', and at the same time the 'guardian of the system'. "Constitution binds the legal system while at the same time creating it, [however] not in substance, but structurally".[57] The role ascribed to a constitutional judge is similar. It is the competence norm that vests them with 'authority' – an entitlement to undertake reviewing activities. The special role of a constitutional judge is thus not legitimised by their link to the sovereign, but rather by a normative consequence of a special legal competence conferred by the constitution. The judicial specialisation is thus

---

53 See A. Kustra, *Kelsenowski model kontroli konstytucyjności prawa a integracja europejska. Studium wpływu*, Toruń 2015. In the introduction to the paper, the author presents a map of European states dominated by Kelsen's model, and also examples of legal orders oriented at competitive approaches.

54 See e.g. A. Sulikowski, *Współczesny paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności*, Wrocław 2008, p. 40 et seq.

55 M. Zalewska, *Problem zarachowania w normatywizmie Hansa Kelsena*, "Jurysprudencja" 2014, 1, p. 46.

56 J. Wróblewski, *Krytyka normatywistycznej teorii prawa i państwa Hansa Kelsena*, Warszawa 1955, p. 32.

57 M. Korycka-Zirk, op. cit., p. 44 and 46.

twofold: (a) object-based – the constitutional court is a 'court over law', ensuring consistency and completeness of the system rather than an administrator empowered to follow any extra-legal considerations whatsoever (whether moral, economic or political) and (b) subject-based – the constitutional court is an experts' court and should be composed of professional judges, proficient in the mechanisms of application and interpretation of the applicable law. Such mechanisms are to be uniform across the entire system, and consequently the same for the interpretation of the constitution and ordinary laws.[58]

It was Kelsen's intention to create such a theory of law that met the conditions of being scientific, i.e. mainly capable of satisfying the requirements of generality and unambiguity.[59] The best means to that end was traditional logic providing a universal and axiologically neutral foundation for jurisprudence. This meant a preference for the analytic theory of law, mostly in its structural (syntactic) variant, and the primary object of research, deemed indispensable to understanding the entire construction of the legal system, was the notion of legal norm.[60] The pursuit of the so called ideal form (schema) of legal norm is perhaps best explained by Kelsen's famous statement according to which "the science of the essence of law is the science of the legal norm". This approach to the role and objects of science provides solid grounds to the autonomy of jurisprudence with regard to the external (social and academic) environment.[61] Academic teaching, according to the 'pure science of law', does not consist in teaching positive (statutory) law, as its content varies being dependent on the ad-hoc lawmaker entangled in a given current political landscape. To the contrary, it is the teaching of universal concepts, acquisition of theoretical and cognitive conceptual tools,[62] which allow the application of the a priori legal categories acquired e.g. through education to empirical legal material, i.e. to specific texts.[63] Kelsen's theory of law is therefore ultimately a theory of positive law[64] – a law that imposes specialisation into branches or disciplines for practical reasons. However,

58 See. A. Sulikowski, op. cit., p. 41.

59 M. Zalewska, *Problem zarachowania*..., p. 40.

60 J. Wróblewski, op. cit., p. 129.

61 "Speaking of jurisprudence as autonomous against other academic disciplines (...) Kelsen's supreme goal" – M. Zalewska, *Czy pragmatyka jest u Kelsena możliwa?*, "Filozofia Publiczna i Edukacja Demokratyczna" 2013, (2)2, p. 180.

62 The category of concept-tools of legal cognition was used by F. Longchamps – see idem, *O używaniu pojęć w naukach prawnych*, Zeszyty Naukowe Uniwersytetu Wrocławskiego, Prawo VII, Wrocław 1960.

63 A. Peretiatkowicz, *Teoria prawa i państwa H. Kelsena*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1937, 17(4), p. 454.

64 Cf. H. Kelsen, *Reine Rechtslehre*, 1934, reprint: Tübingen 2008, p. 38.

 DOI: 10.7206/kp.2080-1084.189

it is a specialisation required due to a need to comprehend a complex legal reality (multitude of positive law texts). On the other hand, the "legal concepts" subservient to cognition of positive law "(...) are [already] only created by jurisprudence, which – on account of its formal nature – can be termed *geometry of the legal phenomenon*".[65]

Constitution, despite enjoying a unique position in the hierarchy of the legal system, is no exception in this respect. For speaking of conceptual or interpretative autonomy with respect to it would break the formal, logical, and universal character of legal conceptual constructions of the pure theory of law. Constitution ("constitution in the legal-logical sense"[66]) is also merely a justification and guarantee of the logical coherence of the system. And if so, also the "constitutional court functions [only] 'within its range', does not administer globally, although is indispensable to the functioning of the entire system (...). For constitutional review is 'a technical enterprise' in a system of norms, ensuring that the law created is sufficiently coherent".[67]

In Kelsen's view of the science of law, we deal, therefore, with a necessary, though only technical and practical, specialisation at the level of specific legal dogma – including also the dogma of constitutional law – and a universal, conceptual jurisprudence of the theoretical science of law. Accordingly, in the dimension of legal academic teaching, there will arise a need to learn about universal forms of juridical cognition, and hence a need for teaching promoting mainly the juridical applications of logic (*Logic for Lawyers*) and propagation of the conceptual output of analytical jurisprudence (*Introduction to Jurisprudence*). The particular legal dogma will then, according to their own needs and in their respective research domains, apply and develop these general achievements; however, in a manner that will not destroy the logical structure of the whole (the legal system, consistency of the forms of legal cognition). The legal-dogmatic didactics will act here as a specific test of such universal forms on selected fragments of positive law – under a vigilant eye of the theory of law. Another step in the process of bringing science closer to the legal reality ('positivisation' of theory) will be professional legal training lasting until the ultimate confrontation in the courtroom. Thus, science, similarly to the conceptual mapping of the legal system, is a certain hierarchical structure which imposes a specific place and role upon an individual within that structure. Within the framework of a so developed strategy of pursuing the science of law and academic education, one is not in a position to develop constitutional education that corresponds to the unique role of the constitution in the legal order. Admittedly, the relations

65 Idem, *Haupteprobleme der Staatsrechtslehre: entwickelt aus der Lehre vom Rechtssatze*, Aalen 1984, p. 91.

66 A. Peretiatkowicz, op. cit., p. 463.

67 A. Sulikowski, op. cit., pp. 42–43.

of power and knowledge are of similarly hierarchical nature; however, it is the latter that imposes the order of legal reasoning.

From Kelsen's perspective, the value guiding both the study and education of law will be the pursuit of certainty of legal resolutions, providing individuals with a sense of security in confrontation with the state and other participants of the legal system (the formally expressed rule-of-law principle, formal justice, closed system of law, syllogistic model of judicial decision), at the expense of the responsive, discursive openness to social challenges, including the so-called difficult judicial cases. This will be conducive to shaping the image of an apolitical lawyer-expert, equipped with either general analytical knowledge and capable of taking care of the 'whole matter', or a specialist able to apply such general knowledge to particular areas of law. An optimal composition of a constitutional court should be a certain mix consisting of legal theorists, experts in the 'essence of law', useful in matters more complex legally, and representative members of specific branches of jurisprudence versed in the text of the constitution as well as other legal instruments, useful in matters that are less legally complicated.

An analysis of H. Kelsen's conceptions of law and jurisprudence leads, in our opinion, to a fundamental conclusion that it is – using the structural-functionalist terminology – the structure of the legal knowledge that imposes the manner of education, and, as a consequence, also shapes the later roles of lawyers (care over law as a system) and the available manners of justification of the resolutions made (arguments appealing to logic). This builds an expert-type and apolitical point of departure. However, these neutral forms of legal-scientific cognition, acquired in the process of education, will be confronted in legal practice, and in particular in the rulings of constitutional courts, with inevitable politicality.[68] Thus, the political character of law will manifest itself secondarily as a problem of transition between the forms of law to its content, i.e. mainly in the legislative process and in connection with the constitutional review of law. For the rulings of a special constitutional court will clearly (and negatively) affect the statutory positive law. Therefore, a lawyer in the 'structure of authority', as a member of parliament, government or in exercising external control over law will have to be a different lawyer to that who holds a university position or who has been shaped by a university.

---

[68] The political character of constitutional control of law is also recognised by H. Kelsen – see idem, *Istota i rozwój sądownictwa konstytucyjnego*, Warszawa 2009, p. 39. Keslen wrote about a 'functional' difficulty in "separating the judiciary from law-making". The grounds for such separation were to be provided by the distinction between general norms (the domain of legislation) and individual norms (courts). However, as regards constitutional courts, the criterion fails.

 DOI: 10.7206/kp.2080-1084.189

Carl Schmitt's perspective

H. Kelsen's views of the constitution are commonly contrasted with the standpoint of C. Schmitt. Here, the relationships between power (political authority) and the jurisprudence are essentially reversed. What they do have in common, however, is the radical nature of their views. H. Kelsen used to say that "state is a system of norms". C. Schmitt, on the other hand, would say that "state is constitution", that the state exists as something that is, one way or another, constituted. This is an entirely reversed understanding of the ontological dimension of constitution. What C. Schmitt bears in mind in the statement is not constitution in the legal sense of the term – understood as a set of rules limiting the functioning of the state community – but rather the very community itself, as actually existing *hic et nunc*. The state is a certain state of affairs, a state of unity and order, and its (i.e. state's) constitution is a specific life and individual existence. What is referred to is the so-called absolute constitution. It is not the state that is equipped with constitution, according to which the state's will is being shaped. "For the state itself already is constitution, i.e. an existing, ontological character, state, state of unity and order (...)".[69] "For C. Schmitt, the study of constitution is cognition that is more profound and serious while at the same time problematically more difficult. This is a science (...) in its very broad material and ideal context, it is not confined to studying mere legal texts (...), it is a study of so to speak the background of the fundamental law, a study of what the constitution rests upon, what it reflects (...), it shines with reflected light (...)".[70] Thus, we have a real (absolute) constitution, distinguished on account of the subject (the so-called constitutional reality) and a positive constitution – i.e. a legal instrument of a sovereign, majority-empowered authority capable of giving a political community an adequate form. A positive constitution is merely "a conscious decision taken by the political unity – through conducive legislative authority – for itself and given to itself".[71]

A constitutional act is an act of whoever holds political power. Political power manifests its actual strength in conflict situations. It is such exceptional circumstances that demonstrate who the real sovereign in a state is, who is capable of protecting the actual constitutional order against crises, and also who can effectively articulate that order in the positive sense. These will certainly not be apolitical constitutional tribunals or common courts. C. Schmitt's response will rather point to

---

69 C. Schmitt, *Nauka o konstytucji*, Warszawa 2013, p. 4.

70 P. Kaczorowski, *Carl Schmitt, jego nauka o konstytucji i kwestie suwerena-ustrojodawcy*, "Teologia Polityczna" – https://www.teologiapolityczna.pl/ (access: 30.05.2016).

71 C. Schmitt, *Nauka o konstytucji...*, p. 54.

'judicialisation of politics'.[72] The guardian of the constitution will be, for example, the head of the state having a political mandate (directly elected). Law and constitution are thus a 'battlefield', an arena of manifestation of the enemy-friend opposition (an opposition also emphasised in many so-called critical theories of democracy, apparently distant from C. Schmitt's views[73]). The declared apoliticality of courts and tribunals, their orientation at law and civil liberties or reference to the separation of powers – in the opinion of the author of *Constitutional Theory* – not only makes resolution of political conflict more difficult, but is also conducive to their concealment. The handing over of declared power to those who actually hold it and are capable of effectively wielding it should lead to such practices being demystified, to the law being reverted to reality, and hence to the positive constitution being brought closer to the absolute constitution. In the language of K. Marx, this would mean liquidation of 'false consciousness' being the result of work of (modern, liberal) elites and their privileged position.[74]

The idea of studying a positive constitution by revealing what it is founded upon, what it is a 'reflection' of and whether and to what degree it expresses the will of the actual sovereign in its wording adequately is a fundamental change for the jurisprudence, legal practice, and the current curriculum of professional education of lawyers. For it means depriving the constitution of its normative function and leads to the separation of courts and tribunals from the constitution as grounds for their rulings. The teaching of constitutional law thereby ceases to be an essential element of professional preparation of a lawyer to perform their job. Admittedly, what is left is the very text of the constitution. Nevertheless, its jurisprudential techniques of exegesis, disputes over its interpretation, and debates over the statues of constitutional concepts, constitutional principles of law or considerations of constitutional philosophy are no longer relevant. Although we are left with the constitution as a written document, what disappears is constitution as legal instrument together with its academic and cultural surroundings, which forms the output of the so called constitutionalism. This also means a departure from the independent, at least relatively autonomous, legal education, although, naturally, not from education per se. Education – as we mentioned above while referring the so called conflict theory approach – becomes an education serving to legitimise power, and universities, in addition to other institutions, an arena of a battle for power. Teaching is to serve overt functions (impart certain knowledge) and covert functions (provide

72 Ibidem, p. 210.

73 See e.g. Ch. Mouffe, *Paradoks demokracji*, Wrocław 2005, in particular Chapter 2 (*Karl Schmitt i paradoks liberalnej demokracji*) and Chapter 4 (*Agonistyczny model demokracji*).

74 See footnote 14 above.

 DOI: 10.7206/kp.2080-1084.189

justifications and sustain the system of production and power), thus being incorporated in the programme of socially legitimised power. Empirical sociology, revealing the so-called politicality (conflicting nature of modern democracy),[75] political philosophy, history of political and legal doctrines (political system theory), theology (metaphysics), and perhaps social psychology should aspire to the position of scientific fields convergent with the teaching of constitutional law.[76] The idea of legal training in the current shape of curriculum and organisation also appears impossible to keep, and actually unnecessary. In this case, the idea of building education around the knowledge of constitution would be, put mildly, rather difficult to attain. Unless it were an absolute constitution, but even then – on account of the holistic nature of so understood constitution[77] – the point of teaching about the constitution at law departments would be questionable.

The Judicial Review doctrine

The conception of the so-called distributed constitutional review of law seems to be, as compared to the Kelsen-Schmidt exclusive disjunction, a reasonable answer. For the American judicial review is rooted at its theoretical and philosophical foundations, on the one hand – in an assumption, close to Schmitt, of a substantive justification of the constitution's existence. This is because according to the American tradition, the constitution is an expression of the will of a sovereign people,

---

75 Cf. C. Schmitt, *Pojęcie polityczności*, [in:] idem, *Teologia polityczna i inne pisma*, Warszawa–Kraków 2000, p. 31 et seq.; L. Koczanowicz, *Antagonizm, agonizm i radykalna demokracja. Koncepcja polityki Chantal Mouffe*, [in:] Ch. Mouffe, op. cit., p. 7 et seq.

76 To the older generation of constitution researchers and former students of the subject called "Polish State Law" – for it was no coincidence in giving the subject that name at many universities until the 1970s – this train of thought reminds of the debate over the normative vs. ideological character of the constitution. (see P. Rozmaryn, *Konstytucja jako ustawa zasadnicza Polskiej Rzeczpospolitej Ludowej*, Warszawa 1961). An important, or even prevailing, trend among the then-experts in the Constitution of the PRP (although not Rozmaryn himself in the paper mentioned) was in favour of the view that the constitution could be treated, at least considerable parts thereof, as a 'track-record' ("of the stage achieved in building socialism"), 'balance constitution' was also spoken of, etc. Such ideological positioning of the constitution was covered critically by J. Trzciński, *Konstytucja PRL a konstytucjonalizm socjalistyczny*, [in:] K. Działocha (ed.), *Konstytucja PRL po 30 latach jej obowiązywania*, Wrocław 1985, p. 44. A consequence of such an approach was also e.g. a view (P. Rozmaryn, J. Beer) that "in the event of a statute being in contradiction to the Constitution, such statute should be applied as the Constitution does not provide otherwise" – see J. Trzciński, *Konstytucja PRL...*, p. 45.

77 In the introduction to Ł. Święcicki's book, *Carl Schmitt i Leo Strauss. Krytyka pozytywizmu prawniczego w niemieckiej myśli politycznej*, we can find that "they share a holistic approach to reality and primary assumption of the political nature of man, which provide a point of departure for further considerations. Such considerations (...) concern the foundations of the political order and law".

understood as a political community. "In traditional American constitutionalism, the constitution is deemed an ultimate expression of the will of a political society – the sovereign (...)".[78] However, on the other hand – and the analogies with C. Schmitt end here – political will becomes at the same time a criterion for the control of authority exercised on its basis, which requires such a will to be dressed up in relevant legal forms. The order incorporated in legal institutions, along with the constitutional supremacy principle, is to serve to control power and protect equal rights of individuals. M. Korycka-Zirk puts it as follows: "the principle of social consent means the supremacy of the people, but at the same time supremacy of law".[79] The concept underlying the doctrine of American jurisprudence (and known to other jurists, e.g. French ones) of there being two constitutions: written and unwritten is only superficially related to the views of the author of *Constitutional Theory*. An unwritten constitution is to supplement a written constitution based on the findings of constitutionalism, with a major contribution of case law as developed in relation to the common, judicial constitutional control (judicial review).[80]

Following this path we come closer, in a certain way, to the views of H. Kelsen on the legal function of the constitution and the role of lawyers (legal theorists, jurisprudence) in shaping it (bearing in mind, naturally, that fundamental difference, i.e. that this judicial review is distributed and its conceptualisations in the output of constitutionalism will replace Kelsen's vision of centralised control *in abstracto*). Both trends restore, however – as opposed to C. Schmitt – the importance of legal argumentation, and hence bring up the importance of the theory of law and its at least relative autonomy with regard to social environment (in the case of judicial review), and consequently also restore the value of legal education resting on the output of jurisprudence. However, jurisprudence and legal education will be pursuing different goals and values in either approach to constitution and constitutionalism.

If in the case of Kelsen's approach the fundamental value is the certainty of law, in addition to the image of a lawyer-expert, at the expense of responsive openness to social challenges (difficult judicial cases), then in judicial review, vectors are reversed: instead of caring for their place in the institutional system, the lawyer (judge) should concentrate on action having features of interaction within an individual-structure relationship. Structure is a legal order, expressed in legal texts, pre-existing, hierarchical, and horizontal (branched), with the constitution on the

78 M. Korycka-Zirk, *Filozoficznoprawny wymiar...*, op. cit., p. 51.

79 [77] Ibidem, p. 49.

80 See A. R. Amar, *American Constitutionalism – Written, Unwritten and Living*, "Harvard Law Review" 2013, 126, p. 195 et seq.

 DOI: 10.7206/kp.2080-1084.189

top and with an adequate institutional environment (jurisprudence, judiciary). A legal case, on the other hand, poses a challenge to a judge in order to hand down a fair and socially acceptable judgment. Where an immediately available structure (constructed upon legal texts) does not allow for a good solution of a legal issue, the judge should reach deeper, to the knowledge developed in the case law, in jurisprudence, including the theory of interpretation, and even to philosophy of law (constitutionalism). A resolution made on the grounds of such assumptions will reinforce the elements of that structure (the *stare decisis* principle). Where, however, the judge deals with a hard case, then the pre-existing structure may prove insufficient, and then they will be forced to extend it or even modify certain elements of the existing order to the extent that it will allow them to resolve the case and give reasons for the resolution. There is room, then, for judges' activism, as exemplified by judicial precedents filling the gaps in legislation, for creative interpretation of a text or creation of new jurisprudential concepts. The judges' activism is here a 'game' of sorts within the framework of the relation between the general and the specific:[81] between the statute, legal text, pre-existing understanding of concepts on the one hand and a specific, historical judicial issue requiring a fair and socially acceptable judgment on the other. Thus, one can speak here of responsiveness of law with respect to the social reality (including the constitution itself, being developed by way of amendments shaped to a large degree by the feedback from the case law), of responsive interpretation of the constitution and of constitutional concepts shaped under the influence of non-legal factors.[82] Perhaps one might even say, risking a certain oversimplification, that the social and political history of the United States is at least to a certain extent a history of law shaped with a major contribution from American courts, including mainly the Supreme Court; of a judiciary applying the constitution and reciprocally shaping the output of constitutionalism. It is no accident that the so-called living constitution movement has come to being within that very legal culture.

Even if it is assume that constitutional activism is not universally approved[83] among the judicial review jurisprudence, the doctrine allows us to draw a more fundamental conclusion and perhaps one of an even greater importance to the prospects of developing academic teaching on the basis of the constitution and

---

81 Cf. L. Garlicki, *Sąd Najwyższy Stanów Zjednoczonych Ameryki: konstytucja – polityka – prawa obywatelskie*, Wrocław–Warszawa–Kraków–Gdańsk 1982, p. 91.

82 See M. Korycka-Zirk, op. cit. The author uses the term 'responsiveness of constitutional concepts to extra-legal factors' (p. 183) and 'method of responsive construction with respect to the current sovereign' (p. 293).

83 See A. Tomza, *Spór o poprawną interpretację Konstytucji Stanów Zjednoczonych. Od pasywizmu do aktywizmu sądowego*, "Jurysprudencja" 2016, 7, passim.

constitutional thought. For it is worth mentioning that the debates that are fundamental to modern theory and philosophy of law are – whether one likes it or not – disputes over the interpretation of law. In the case of the American market of general reflection on law, such debates have been fought just over the interpretation of the constitution. If Poland's achievements in the area of the theory of interpretation of law so far – actually quite significant – have been shaped by the needs of interpretation of regular statutes, and only secondarily there have been attempts to adapt the results of such achievements to the area of interpretation of the constitution,[84] the cultural background of judicial review favours an opposite conclusion: the point of departure is theory (philosophy) of interpretation of the constitution.[85] It is primarily in the field of interpretation of the constitution – in a pursuit of an adequate method of its interpretation – that the disputes between textualists and intentionalists, between originalists and supporters of the living constitution, essential to the American theory of interpretation, have arisen and are still broadly discussed. And yet all this stemmed from a philosophical and political debate over the fundamental – and not easily reconcilable – values underlying the legal order: sovereignty of the community vs. protection of the rights of an individual, rule of law (authority of judges) vs. rule of parliamentary majority. The dispute over the method of interpretation of the constitution became thereby a dispute over the frontiers of power within the framework of the dynamically (responsively, reflexively) formed principle of its separation. The legal dispute was inseparable from the political dispute, and the dogmatic analysis of the text of the constitution was inextricable from its philosophical grounding. This is perhaps the best object lesson that can be learnt in the legal academic teaching, including in the context of the Polish disputes over the rule of law, the status of constitutional courts or the borders of power based on parliamentary majority.

Thus, from the judicial review perspective, not only will legal education consist in acquiring an ability to recognise the existing structure of knowledge (identification of sources of law, knowledge of exegesis and interpretation techniques, production of jurisprudence), but it should also aim at teaching the ability to shape the same, actively adjusting it to social challenges. Law and practice of law – along with the theory of law registering those domains and the teaching propagating its achievements – are socially, and hence politically, engaged as early as at their point

---

84 A standard phrase used to express the tendency is the term 'specificity' of interpretation or construction of the constitution. Introductory text to the monograph entitled *Wykładnia konstytucji. Aktualne problemy i tendencje* (ed. M. Smolak) by Sławomira Wronkowska bears the title *O niektórych osobliwościach konstytucji i jej interpretacji* (op. cit., p. 15 et seq.).

85 See M. Korycka-Zirk, op. cit., p. 175 et seq.

 DOI: 10.7206/kp.2080-1084.189

of departure. The legal education experience gained from the academia – in line with F. Znaniecki's idea of the so-called open school – seem also to corroborate, from a judicial review's point of view, the conviction that the substantive knowledge acquired through education is but one of multiple factors that should shape a lawyer's professional competence and identity. The remaining part must be acquired by way of collective and individual action, in confrontation with the legal and social reality.

The arguments that a lawyer obtains from the text of a constitution and the constitutionalist achievements available should correspond well to such an active, permanent, and scope-wise unlimited education. For it is to this area of law and legal knowledge that judges and other participants in legal disputes have recourse in the more complicated legal cases. The so-called distributed constitution application doctrine demonstrates that potentially every adjudicating panel, and in fact every other decision-maker (civil servant, entrepreneur, citizen), including parties to private-law relationships (i.e. individual – individual),[86] can find themselves in a situation requiring an interest in the text of the constitution and the achievements of the constitutional thought. The knowledge of the fundamental law, enriched by the findings of constitutionalism, including philosophy of law and social philosophy, should therefore be offered to every graduate of law studies, and on a more elementary level it should become an important part of common education. The importance of knowledge of the so-called normative environment of the constitution[87] should lead to the constitutional law teaching opening to elements of civic studies, to a reflexive analysis of judgments commented on by the public opinion, to the associated lawyers' actions and attitudes, to the principles and values legitimising the law and court rulings, etc. It would be perhaps difficult to provide a better example of the so-called internal (legal knowledge, legal culture) and external (extra-legal knowledge, general culture) integration of legal disciplines and open legal education propagating its achievements. Therefore, the principle of legal supremacy of the constitution can, in our opinion, correspond to a similar idea underlying the shaping of legal academic teaching.

---

86 See R. Alexy, *A Theory of Constitutional Rights*, Oxford 2002, p. 352 et seq.; The so-called radiation of constitution is referred to here, in its so-called horizontal effect. See also E. Łętowska, *Promieniowanie orzecznictwa Trybunału Konstytucyjnego na poszczególne gałęzie prawa*, [in:] M. Zubik (ed.), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, Warszawa 2006, p. 353 et seq.

87 A phrase used by Sławomira Wronkowska, op. cit., p. 24.