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Critique of the “Juridical”: Some Metatheoretical Remarks¹

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In the context of the renaissance of critical legal theory and in particular its growing popularity in Central and Eastern Europe, the paper aims at a preliminary metatheoretical enquiry concerning the identity of critical legal science. In particular, the paper enquires about the identity of critique as applied in critical legal science, as well as about the method and object of that critique. It also highlights the importance of the triangular relationship between the juridical, the political and ideology as the central theme of critical legal science.

Keywords: critical legal science, the juridical, the political, law and critique, ideology.

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*A distinctive feature of critical scholarship is a deep perplexity about law.
We perceive law as involving both negative and positive characteristics.*

Alan Hunt²

Introduction

The renaissance³ of critical legal science⁴ and its growing popularity in Central and Eastern Europe⁵ justify an enquiry into the fundamental conceptual framework of this form of legal research. In particular, it seems necessary to define exactly what is *critical* legal science (also known as 'critical legal theory',⁶ 'critical legal thought/thinking',⁷ 'critical legal studies',⁸ 'critique of law'⁹ or 'law and critique'¹⁰), and how it differentiates itself from other branches of legal science (other specific legal sciences). Only then will it be possible, first of all, to identify which scientific approaches can be deemed to represent critical legal science, and secondly, to undertake such research in full conscience (starting out from criticism, as critique *in itself*, to a critique *for itself*).¹¹

Consequently, the present article will discuss the following conceptual issues. Firstly, it will attempt to give an answer to the question on the nature of legal critique, namely, where the *critical* element of critical legal science is the same as in other critical theories, or is it different (specific for the juridical field). Secondly, it will enquire whether the object of critique undertaken by critical legal science is the form of law or its substance, or its external effects, and what are the relations between these aspects. Thirdly, it will make the claim that ultimately, the main object of critical legal science is a critique of the triangular relationship between law, ideology and the political.

² Hunt, A. The Critique of Law: What is 'Critical' about Critical Legal Theory? *Journal of Law and Society*, Vol. 14, No. 1, 1987, p. 11.

³ See e.g. Stone, M., Rúa Wall, I., Douzinas, C. *New Critical Legal Thinking: Law and the Political*. London: Birkbeck Law Press, 2014; Mangabeira Unger, R. *The Critical Legal Studies Movement: Another Time, A Greater Task*. London: Verso, 2015.

⁴ As Hesselink put it, 'unless legal scholars cannot be said to be *producing knowledge*, their use of the term science seems legitimate' (Hesselink, M. A European Legal Method? On European Private Law and Scientific Method. *European Law Journal*, Vol. 15, issue 1, 2009, p. 21). For an overview of the debate on the scientific character of law see Pietrzykowski, T. *Naturalizm i granice nauk prawnych*. Esey z metodologii prawoznawstwa. Warszawa: Wolters Kluwer 2017, pp. 31–44.

⁵ See especially: Mańko, R., Cercel, C. S., Sulikowski, A. (eds.). *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*. Oxford: Counterpress, 2016. Cfr. Šulmane, D. Grāmata par kritisko tiesību skolu Centrāleiropā. *Jurista Vārds*, 38(992), 12.09.2017.

⁶ See e.g. Hunt, A. The Critique of Law: What is 'Critical' about Critical Legal Theory? *Journal of Law and Society*, Vol. 14, No. 1, 1987, pp. 5–19; Douzinas, C., Perrin, C. *Critical Legal Theory*. London: Routledge, 2011.

⁷ See e.g. Sulikowski, A. Prawa a ideologia. Prawa jednostki z perspektywy krytycznej myśli prawniczej i społecznej (wybrane zagadnienia). *Roczniki Nauk Społecznych*, Vol. 7, issue 4, 2015, p. 19 ('*krytyczna myśl prawnicza*'). Cfr. Stone, M., Rúa Wall, I., Douzinas, C. *New Critical Legal Thinking*, op. cit.

⁸ This term has been particularly popular in the United States and is often used to denote the North American school of critical legal science.

⁹ See e.g. Hunt, A. *The Critique*, ibid.

¹⁰ Akin to 'law and economics', 'law and politics' or 'law and ideology'. Cf. Mańko, R., Stambulski, M. *Law and Ideology: Critical Explorations*. *Wrocław Review of Law, Administration and Economics*, Vol. 5, issue 1, 2015, pp. 1–4. The main journal of British critical legal science bears the title *Law and Critique*, Springer Verlag, ISSN 0957-8536.

¹¹ See e.g. Hegel G. F. W. *Lectures on the History of Philosophy*. London: Kegan Paul, Vol. I, 1892, pp. 20–21.

The nature of the present article is purely theoretical. It situates itself on a metatheoretical level towards critical legal science and aims at theorising about the nature, methods and object of that particular type of legal science.¹² The analysis used in the article is, above all, conceptual analysis. The findings of the article can be useful for critical legal science in its concrete critique of the law, as well as for general jurisprudence in its aim of ordering and classifying the various methodological approaches to legal research. The article has a normative approach (within its metatheoretical scope), and not necessarily a descriptive one *vis-à-vis* the existing critical legal literature. Hence, the concepts and categories, especially dichotomies, used therein do not necessarily reflect the way that critical legal theorists themselves have hitherto conceptualised their scientific endeavour.

1. Identity of Legal Critique: Universal or Particular?

Adam Sulikowski – the chief representative of critical legal science in Poland – claims that the sources of legal critique should be understood broadly, as encompassing the three great critical thinkers of the turn of the 19th and 20th century, namely, Marx, Freud and Nietzsche,¹³ as well as those who later developed their ideas, including Lacan, Žižek or the French School (Foucault, Derrida). Sulikowski characterises critical legal and social legal thought as “a set of emancipatory discourses, whose local legal variation is the critical legal studies movement, not only in its American, but also European version”.¹⁴ Putting together Marx, Freud and Nietzsche could be perplexing, but it was already Paul Ricoeur who linked them, dubbing the three great thinkers as representatives of the “school of suspicion”.¹⁵ Brian Leiter, who used the term “hermeneutics of suspicion”¹⁶ to treat the three authors jointly, points out that “Marx, Nietzsche, and Freud are best read as primarily naturalistic thinkers, that is thinkers who view philosophical enquiry as continuous with a sound empirical understanding of the natural world and the causal forces operative in it. When one understands conscious life *naturalistically*, in terms of its real causes, one contributes at the same time to a *critique* of the contents of consciousness: that is, in short, the essence of a hermeneutics of suspicion.”¹⁷ As Leiter further explains, referring to Marx, Nietzsche and Freud helps to make philosophy “relevant because the world – riven as it is with hypocrisy and concealment – desperately needs a hermeneutics of suspicion to unmask it.”¹⁸ In the words of Tomasz Pietrzykowski, what is common for various schools of critical legal science is “a general research approach and the understanding (...) of the tasks of jurisprudence. The latter should be oriented on the disclosure of the actual origins, the social and economic functions, and the political and cultural entanglements of concrete legal solutions, modes of reasoning and argumentation, as well as the legal ideologies and theories legitimising them.

¹² On the possibility and desirability of theorizing the methods and objects of critical legal science, see e.g. Hunt, A. *The Critique*, *ibid.*, pp. 6–10.

¹³ Sulikowski, A. *Prawa a ideologia. Prawa jednostki z perspektywy krytycznej myśli prawniczej i społecznej (wybrane zagadnienia)*. *Roczniki Nauk Społecznych*, Vol. 7, issue 4, 2015, p. 19.

¹⁴ *Ibid.*

¹⁵ Ricoeur, P. *Freud and Philosophy*. New Haven: Yale University Press, 1970, p. 32.

¹⁶ Leiter, B. *The Hermeneutics of Suspicion: Recovering Marx, Nietzsche and Freud*. The University of Texas School of Law. Public Law and Legal Theory Working Paper, No. 72, 2005. Available: <http://ssrn.com/abstract=691002> [last viewed 02.10.2017].

¹⁷ *Ibid.*, pp. 150–151.

¹⁸ *Ibid.*, p. 153.

The task of the legal researcher is therefore critically to deconstruct their socio-cultural genesis and actual functions."¹⁹

One cannot but agree with Sulikowski, when he points out that various critical theories are not only heterogeneous, but even "openly contradictory".²⁰ Nonetheless, they do have a certain common core, which can be summarised as encompassing the following elements:

- (1) a hermeneutic of suspicion (interpretive aspect);
- (2) an emancipatory goal (normative and praxeological aspect).²¹

This coincides with the classification of sciences put forward by Paweł Skuczyński, according to whom, "If the sciences are to be divided on the basis of the research interests which constitute them, one can identify empirical-analytical disciplines, which have a *technical* interest; historical-hermeneutic disciplines, which have a *practical* interest, and *critical social sciences*, which have an *emancipatory* interest."²² In this sense, critical legal science is a project of developing legal science with an explicit emancipatory goal.²³

Considering the question, whether the notion of critique in the concept of critical legal science/theory/studies denotes a universal form of critique applied locally, or a local (independent) form of critique, which shares only the term, but not the concept, the final answer proposed here is that "critique" in legal critique is a universal form of critique, applied to the legal field.²⁴ Such an answer has fundamental methodological consequences, for it legitimises the use of various critical discourses (from Marx down to Žižek) locally within the legal field. All such attempts will belong to the discourse of critical legal theory.

2. Object of Critique: Form, Substance or External Effects?

The second fundamental problem of legal critique is whether it is a critique of the legal form, or of legal substance, or both, and, in the latter case, what is the relationship between the critique of legal form and of legal substance.²⁵ By legal substance we shall understand here both the normative content of legal rules (the content of law)²⁶ and the effects of law upon other social phenomena, in particular, upon the political, the social and the economic (effects of law).²⁷ Critique of the juridical form means a critique of the juridical (the notion itself will be defined

¹⁹ Pietrzykowski, T. *Naturalizm*, *ibid.*, p. 127.

²⁰ Sulikowski, A. *Prawa a ideologia*, *ibid.*, p. 19.

²¹ Mańko, R. *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018, p. 77.

²² Skuczyński, P. *Typy myśli krytycznej w prawoznawstwie. Od krytyki poznania do walki o uznanie*. In: Zirk-Sadowski, M., Wojciechowski, B., Bekrycht, T. (eds.). *Integracja zewnętrzna i wewnętrzna nauk prawnych*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź, 2014, p. 133.

²³ In parallel, one can also speak of 'radical lawyering', understood as practical participation in the legal discourse (especially judicial) with the aim of bringing about an emancipatory change. Cfr. Skuczyński, P. *Typy myślenia krytycznego*, *ibid.*, p. 134.

²⁴ Mańko, R. *W stronę*, *ibid.*, pp. 77–78.

²⁵ On the dichotomy see e.g. Mańko, R. *Form and Substance of Legal Continuity*. *Zeszyty Prawnicze*, Vol. 17, issue 2, 2017.

²⁶ Cfr. Pietrzykowski, T. *Naturalizm*, *ibid.*, pp. 31–32.

²⁷ See e.g. Šulmane, D. *Versatility of Effects of Legal Provisions*. In: *The Quality of Legal Acts and its Importance in Contemporary Legal Space*. Riga: University of Latvia Press, 2012. On the notion of 'effectiveness' in contemporary sociology of law see Šulmane, D. "Legislative inflation" – an analysis of the phenomenon in contemporary legal discourse. *Baltic Journal of Law & Politics*, Vol. 4, issue 2, 2011, pp. 78–101, at pp. 88–91.

in section 4.2 below) *qua* form,²⁸ i.e. the use of juridical discourse (such as the ‘language of rights’,²⁹ juridical normativity, etc.) in order to express interests of groups and individuals, instead of (or alongside) other discourses (such as moral, ethical, political or economic discourse). The critique of juridical form can either be purely theoretical, or it can also rest on more or less empirical data to show that, for instance, using the language of rights by the oppressed ultimately leads to an acceptance of the *status quo*.³⁰ Critique of the juridical form is therefore closely linked to critical legal science’s quest for a merger of a theoretical *and* practical approach at the same time.³¹ As for the critique of legal substance (the content of legal norms) and their social effects, both have an empirical character and are of paramount importance for the tasks of critical legal science.

3. Perspective: Internal or External?

A third question regarding the nature of legal critique is whether it adopts an internal or external perspective of the law. Conventional Anglo-American legal theory, epitomised in the works of Hart and Dworkin, openly opts for the internal perspective, i.e. that of the judge and lawyer and seeks to defend the law from external critique. Polish legal philosopher Artur Kozak also opted for an internal perspective when he put forward the project of juriscentrism (*juryscentryzm*). A juriscentrist philosopher of law is, according to Kozak, a believer in law (*wyznawca prawa*) and not just a legal expert (*znawca prawa*).³²

Kozak described as external theories of law those, which approach it from an external point of view, such as sociology or political science. Indeed, very often the authors of sociological or politological accounts about law in practice ignore its inner workings, either by design (on purpose) or simply due to their ignorance (lack of specialised legal knowledge), or due to a combination of both. However, any “good ideology critique” is an “immanent” one, using the “norms and values” of the criticised ideology “against their historical realization in specific institutions”, as James Bohman reminds us.³³ Hence, critical legal science cannot simply shun the internal perspective. It needs to factor it in its epistemology. Critical legal scientists need to know not only what judges, legislators and lawyers do, but also how they think and what is their internal perspective regarding the law. Of course, this internalisation of the lawyer’s perspective ends here, otherwise the critical legal science would commit the common error of the mainstream positivism of being “too close to its subject matter”.³⁴ Therefore, to use Kozak’s terms, the critical legal scientist needs to be an excellent expert (*znawca*) and should understand the

²⁸ Cfr. Mańko, R. Form and Substance, *ibid.*, pp. 221–223.

²⁹ One of the first to use this expression seems to be De Búrca, G., The language of rights and European integration. In: More, G., Shaw, J. (eds.). *New Legal Dynamics of European Union*. Oxford: Oxford University Press, 1996. For a recent use of the concept, see Choukroune, L. The Language of Rights and the Politics of Law: Perspectives on China’s Last Legal Ditch Struggle. *International Journal for the Semiotics of Law*, Vol. 29, issue 4, 2015, pp. 779–803.

³⁰ Cfr. Douzinas, C. *The End of Human Rights*. Hart Publishing, 2000. Douzinas makes the truly dialectical claim that the form of ‘human rights’, which initially had a rampant emancipatory potential, ended up as a means of legitimating the status quo.

³¹ Mańko, R. W stronę, *ibid.*, pp. 38–39, 81–82.

³² Kozak, A. Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa. In: Staśkiewicz, W., Stawecki, T. *Dyskrecjonalność w prawie*. Warszawa, 2010, p. 68.

³³ Bohman, J. *Critical Theory*, *op. cit.*

³⁴ Hunt, A. *The Critique of Law*, *op. cit.*, p. 10.

perspective of the legal believer (*wyznawca*), but must remain sceptical about the object of faith of the latter. After all, a legal believer is unaware of the juridical's ideological character.³⁵ In other words, critical legal science must take a truly dialectical approach³⁶ to the object of its critical enquiry: the internal perspective is negated by the external one, but it is their synthesis (the informed critical perspective), which critical legal science needs to adopt.³⁷

Referring the above to the dichotomy of "legal doctrine" (*nauka prawa, Rechtslehre*) versus "legal science" (*nauka o prawie, Rechtswissenschaft*) recently put forward by Tomasz Pietrzykowski,³⁸ critical legal science certainly is on the side of *legal science*, not *legal doctrine*. This is because its object is the phenomenon of law as such, and not just a reconstruction and systematisation of the law in force. In the words of Pietrzykowski, "legal science is oriented upon the explanation of mechanisms regarding the creation of law and its functioning, where law is understood as a certain complex of facts. (...) The object of legal science is the description and explanation of the entirety of empirical aspects of the functioning of the legal order."³⁹ Of course, *critical legal science* is interested not only in the "description and explanation", but also – and above all – in critique with view to emancipation. And precisely due to this reason critical legal science is, in Pietrzykowski's terms, a *legal science (nauka o prawie)*, but one of its ambitions is to influence *legal doctrine (nauka prawa)*, in order to influence legal interpretation and legislation in line with what follows from the emancipation-oriented critique.⁴⁰ Just like it is appropriate to characterise critical legal scholarship as a synthesis of an external and internal approach, so too, its involvement within the doctrinal and scientific aspects of legal study can also be described as dialectical.

4. Method: Theoretical or Empirical?

A further methodological choice that critical legal science is faced with regards its positioning towards empirical research. As Alan Hunt argued, 'empirical evidence has an important role in the critical project through its ability not only to alert us to deficiencies in existing theories but also to open up constructive lines of enquiry and conceptualisation which may contribute to a more satisfactory understanding of those elements of law.'⁴¹ Whilst the deconstruction of conventional theory can be pursued by way of an 'armchair critique', critical legal science would lose too much, if it did not rely on empirical material. The notion of 'empirical research' is used here in two senses: firstly, as 'empirical desk research', i.e. research focused on the critique of texts produced by the juridical, especially judicial decisions and writings of the *la doctrine*; secondly, as 'empirical field research', i.e. research involving interviews or questionnaires, aimed especially at critically evaluating the effects of law on society (for instance, how neoliberal legal policies are leading to growing social inequalities, alienation or subjection).

³⁵ Sulikowski, A. Postmodernistyczne tropy w jursycentryzmie. In: Jabłoński, P. et al (eds.). *Perspektywy jursycentryzmu*. Wrocław, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, 2011, p. 107.

³⁶ In the Hegelian sense as expounded e.g. in *Hegel, G. F. W. Phenomenology of Spirit*. Oxford: Clarendon Press, 1977.

³⁷ Mańko, R. W stronę, *ibid.*, pp. 80–81.

³⁸ Pietrzykowski, T. Naturalizacja, *ibid.*, p. 46–68.

³⁹ Pietrzykowski, T. Naturalizacja, *ibid.*, p. 64.

⁴⁰ Cfr. Pietrzykowski, T., *Naturalizm*, *ibid.*, p. 128.

⁴¹ Hunt, A. *The Critique of Law*, op. cit., p. 16.

Persuasive empirical research can be a powerful tool in furthering the emancipatory agenda, which lies at the heart of critical legal science, at the same time increasing its credibility within scientific legal discourse in general. As regards a specific methodological toolbox, Pierre Bourdieu's critical sociology could be an interest possibility – amongst others – for designing empirical research agendas (in both senses, textual desk research, and fieldwork). Bourdieu's methodology, despite its certain rigidity, has the advantage of putting in the centre of its interest questions of power, cultural capital and ideology (which Bourdieu theorises as *doxa* and as *sensus communis*⁴²), which makes it *prima facie* well suited for a critical research agenda. Of course, as any research methodology, Bourdieu's framework should not be accepted uncritically, especially with a view to its embeddedness in French juridical reality of the 20th century, which may require adequate modifications to suit research of the Central and Eastern European juridical field of the 21st century. Of assistance to critical-empirical legal studies is also, undoubtedly, Berger and Luckmann's sociology of knowledge.⁴³ As for a critical reading of texts – especially produced by the judiciary – various tools can be deployed, especially including elements of Critical Discourse Analysis, various forms of symptomatic or quasi-symptomatic reading, conceptual metaphor theory,⁴⁴ and in general any methods of critical analysis of texts faithful to a hermeneutic of suspicion, be it Marxist, psychoanalytical⁴⁵ or belonging to so-called French Theory (Foucault,⁴⁶ Derrida,⁴⁷ Deleuze & Co.).

Undoubtedly, further empirical critico-juridical research is necessary, especially on the case-law of supranational judicial institutions and the neoliberal ideological agendas, which are hidden behind the purportedly neutral language of law and rights that they employ.⁴⁸ Critical legal science should not shun empirical research, and the answer to the question 'theoretical or empirical?' can only be 'both!'⁴⁹

⁴² See Dębska, H. Law's Symbolic Power: Beyond the Marxist Conception of Ideology. *Wrocław Review of Law, Administration and Economics*, Vol. 5, issue 1, 2016, pp. 5–23.

⁴³ For an application, combined with Bourdieu's critical sociology and critical discourse analysis, see e.g. Dębska, H., Warczok, T. Sacred Law and Profane Politics. The Symbolic Construction of the Constitutional Tribunal. *Polish Sociological Review*, 4(188), 2014, pp. 465–478; Dębska, H., Warczok, T. The Social Construction of Femininity in the Discourse of the Polish Constitutional Tribunal. In: Mańko, R., Cercel, C., Sulikowski, A. (eds.). *Questioning the Past*, op. cit., pp. 106–130.

⁴⁴ For a recent application see e.g. Zalewska, M. Znaczenie metafor pojęciowych na przykładzie prawa autorskiego. *Filozofia Publiczna i Edukacja Demokratyczna*, Vol. 5, issue 1, 2016, pp. 111–128.

⁴⁵ See e.g. Stambulski, M. Edukacja prawnicza na poziomie Wyobraźniowym, Symbolicznym i Realnym. *Krytyka Prawa*, Vol. 8, issue 3, 2016.

⁴⁶ For an application of Foucault for a critical examination of Romania legal history see e.g. Cercel, C. S. Droit et totalitarisme: aspects d'une réflexion biopolitique. *Romanian Journal of Comparative Law*, Vol. 1, No. 2, 2010, pp. 322–339.

⁴⁷ For a use of Derridean concepts combined with conceptual metaphor theory in a critical analysis on contemporary discourse on Roman law see Święcicka, P. From Sublimation to Naturalisation: Constructing Ideological Hegemony on the Shoulders of Roman Jurists. In: Mańko, R., Cercel, C. S., Sulikowski A. *Law and Critique in Central Europe*, op. cit.

⁴⁸ For a seminal attempt in this direction, see e.g. Mańko, R. Symbolic violence in technocratic law and attempts at its overcoming: politicisation through humanisation? *Studia Erasmiana Vratislaviensia* 11, 2017.

⁴⁹ Mańko, R. W stronę, *ibid.*, pp. 82–83.

5. Towards a Social Ontology of the Juridical: Law, Ideology and the Political

5.1. Why Does Critical Legal Science Need Social Ontology?

Social ontology is 'the subfield at the intersection of metaphysics and philosophy of social science that investigates the nature of the social world'.⁵⁰ Its task 'is broader than cataloguing what entities exist: we want an account of how the social world is built'.⁵¹ It is submitted that critical legal science needs to build its own account of the nature of the social world, and specifically of the juridical field, which is in the focus of its interest, in order to organise its research endeavours. Hence, certain structural choices need to be made. This is not to say that the proposed narrative is absolute and universal, just that it is impossible to pursue the tasks of critical legal science without *some presumptions* regarding social ontology, and more specifically, social ontology of the juridical and adjacent phenomena. This is because an *ad hoc* methodological approach, focusing on disjunctive, local narratives will not allow to create an intersubjectively accessible body of critical legal knowledge. If the ambition of critical legal science is not only to understand, but also to change the world, then it must develop its position on social ontology without doubt.

In the following paragraphs I will outline the basic structure of a possible social ontology, which could be adopted as the basis for critical legal science. It rests upon a triangular relationship between the juridical, the political and ideology. In order to approach the problem of social ontology in an orderly manner, I will first approach the question of segmentation of social life, and then move on to the problem of ideology.

5.2. Segmentation of Social Life: the Juridical as a Distinct Field

There seems to be a *communis opinio* of major systems of social science and social theory that social reality is segmented or compartmentalised. However, the exact social ontology of those segments or compartments is conceptualised differently. Not only do different schools of social thought use different terms, but also different concepts of social segments or compartments are expounded. To name but a few, we could mention: Pierre Bourdieu's account of *fields*,⁵² Niklas Luhmann's account of *systems*,⁵³ Peter Berger's and Thomass Luckman's account of *institutional worlds*,⁵⁴ or Alexander Koževnikov's account of *social phenomena*.⁵⁵ From a metatheoretical perspective, all these categories have a common trait in that they attempt to come to grips with the variety of forms of social life in which social actors are involved, and they usually admit *at least* the three following segments as distinct ones: the *juridical* one, the *political* one, and the *economic* one.⁵⁶

It is necessary to make an important terminological, and also conceptual distinction, namely, that between law (*le droit*) and the juridical (*le juridique*).⁵⁷

⁵⁰ Epstein, B. A Framework for Social Ontology. *Philosophy of the Social Sciences*, Vol. 46, issue 2, 2016, pp. 147–167, at p. 147.

⁵¹ *Ibid.*, p. 148.

⁵² Bourdieu, P. La force du droit: Éléments pour une sociologie du champ juridique. *Actes de la recherche en sciences sociales*, Vol. 64, 1986.

⁵³ Luhmann, N. *Law as a social system*. Oxford: OUP, 2008.

⁵⁴ Berger, T., Luckmann, T. *The Social Construction of Reality*. London: Penguin, 1966.

⁵⁵ Kojève, A. [Koževnikov, A.J.]. *Outline of a Phenomenology of Right*. Lanham: Rowman & Littlefield, 2007.

⁵⁶ Mańko, R. W strone, *ibid.*, pp. 119–120.

⁵⁷ Mańko, R. W strone, *ibid.*, p. 151.

What is at stake here is to make a clear ontological distinction between *law* – understood as a set of norms, usually incorporated into texts – on the one hand, and the *juridical* understood as a social phenomenon. Whilst the law is undoubtedly central to the juridical, both epistemologically and praxeologically, the two concepts should not be conflated. In terms of social ontology, both law and the juridical exist, but are distinct from each other.⁵⁸ As regards the concept of ‘law’ (opposed to that of the ‘juridical’), it is submitted that the classical legal positivist definition is most suitable.⁵⁹ The critical endeavour of critical legal science should not lose its energy on positing fancy definitions of law, which would encompass patently non-legal phenomena to make some kind of point.⁶⁰ Being far from negating the plurality of normative orders in society (law, morality, customs etc.), which is an undisputable fact, blurring the law/non-law distinction does not serve anything.

Having made this distinction, I wish to make a minimalist proposal regarding the criteria for identifying the juridical (and differentiating it from other spheres of social life) by referring to the recent programmatic article by Michał Paździora and Michał Stambulski.⁶¹ They have proposed to rely on the binary code characteristic of each sphere in order to outdifferentiate it from others.⁶² The idea is not new, and they refer specifically to Carl Schmitt as their source of inspiration, noting that he did not identify the juridical as a distinct sphere of social life.⁶³ According to this approach, the juridical is characterised by the legal/illegal code, as distinct from the friend/enemy code of the political, the profitable/not profitable code of the economic, the moral/immoral code of morality, and so forth.⁶⁴

The relationship between law (as defined above) and the juridical rests, first of all, in the fact that the juridical’s binary code (legal/illegal) is a direct reference to the law. The juridical produces, sustains and utilises the law, not the other way around. Law would not be possible without the juridical, and the juridical is not possible without the law. Paździora and Stambulski claim that the relationship between politics and the political is, in Heideggerian terms, one of the ontic to the ontological.⁶⁵ They indicate that politics refers to ‘concrete actions’, whilst the political constitutes ‘the conditions of possibility of those actions’.⁶⁶ The same can be said, *mutatis mutandis*, about the relationship between law (concrete norms, in force in a concrete time and space, according to a concrete rule of recognition) and the juridical (conditions of possibility of the law). In light of the foregoing, the first part of the title of the present paper – *Critique of the Juridical* – instead of the usual ‘critique of law’ or ‘legal critique’, becomes evident. The task of critical legal science

⁵⁸ One is tempted to say that the law is different from the juridical, just like politics is different from the political, which will be made explicit later on.

⁵⁹ Cfr. Leiter, B. Marx, Law, Ideology, Legal Positivism. *Virginia Law Review*, Vol. 101, 2015, pp. 1179–1196.

⁶⁰ Contra Hunt, A. The Critique of Law, op. cit., p. 13.

⁶¹ Paździora, M., Stambulski, M. Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań. *Archiwum Filozofii Prawa i Filozofii Społecznej*, No. 1, 2014, pp. 55–66. Cfr. Stambulski, M. Polityczność jako etyka polityczna prawa. In: Dudek, M., Stępień, M. (eds.) *Aksjologiczny wymiar prawa*. Kraków: Nomos, 2015.

⁶² Paździora, M., Stambulski, M. Co może dać nauce prawa polityczność, op. cit., pp. 55–66.

⁶³ *Ibid.*, p. 57.

⁶⁴ Mańko, R. Ideology and Legal Interpretation: Some Theoretical Considerations. In: *Torgāns, K.* (ed.). *Constitutional Values in Contemporary Legal Space*. Riga: LU Apgāds, Vol. I, 2016, pp. 117–126, at p. 118.

⁶⁵ Paździora, M., Stambulski, M. Co może dać nauce prawa polityczność? Op. cit., p. 57.

⁶⁶ *Ibid.*

cannot be limited merely to the critique of concrete normative systems and their social effects (though it is, of course, a very important part of the critical jurist's vocation), but must extend to a critique of the juridical as such.

5.3. No Escape from the Political

If we agree with Pašukanis that law is born out of conflict,⁶⁷ and if we add to this that it is a *social conflict*, i.e. that every conflict is an individual instance of a broader social conflict (consumer-trader, owner of business v. worker, etc.), we cannot escape the ultimate conclusion that law is by its very essence *political*.⁶⁸ In consequence, therefore, one of the primary tenets of critical legal science is that, precisely, for the juridical *there is no escape from the Political*; in Lacanian terms, the political is the *symptom of the Juridical*,⁶⁹ something which the juridical attempts to repress, deny and conceal, but which actually underlies its existence and returns in the form of cracks in the fabric of the juridical's ideological lie.⁷⁰

Therefore, any attempts at building an „apolitical judiciary”, „apolitical legal science” are a typical ideological denial.⁷¹ What is more, they are a dangerous utopia which undermine the very foundations of a truly democratic *polis*. Instead of making steps into the pitfall of this utopia, we should realistically ask about *what political choices* should judges make, as they will inevitably make them, openly or in the guise of ideological masks. The chief task of critical science is, in this respect, firstly, to unmask the genuinely political character of adjudication (hermeneutic of suspicion towards the myth of an apolitical legal science and apolitical adjudication) and, secondly, to advance informed proposals as to the concrete political choices to be made, both in legislation and adjudication. Such choices can and should be informed by solid empirical research revealing the social effects of existing regulations, especially on the working class.

However, for this task to be accomplished, critical legal science needs to perform an effective critique of ideology – both external ideology (like neoliberalism), which enslaves the law, and law's internal ideology (like the positivist myth of separation of law from politics), which continues to pontificate on the law's alleged apolitical character.

5.4. Critique of Ideology

A final point that needs to be made is the role of ideology in the social ontology of critical legal science. The classical Marxian account of ideology boils down to the statement that it is “an inferentially related set of beliefs about the character of the social, political and economic world [that] falsely represents what are *really* the interests of a particular economic class as being in the general interest (...) [which

⁶⁷ Pašukanis, E. B. *Law and Marxism: A General Theory*. London: Pluto Press, 1983, p. 81.

⁶⁸ Cf. Salter, M. G. *Carl Schmitt: Law as Politics, Ideology and Strategic Myth*, p. 30.

⁶⁹ On the concept of a symptom in Lacan's psychoanalytical philosophy, see, e.g. Žižek, S. *The Sublime Object of Ideology*. London: Verso, 1989, p. 85.

⁷⁰ Žižek, S. *First as Tragedy, Then as Farce*. London: Verso, 2009, p. 65.

⁷¹ Anecdotal evidence from Poland indicates how insensitive judges have been e.g. to the victims of evictions by the so-called “cleaners of tenancy houses” (*czyściciele kamienic*) who obtained entire houses from municipal authorities, under highly dubious legal titles, and treated the inhabitants as the “meat filling” (*wkładka mięsna*) that needs to be removed at any cost. The main activist defending the rights of tenants – Jolanta Brzeska – was ruthlessly murdered (burnt alive) near the Kabaty Forest, in the elegant southern district of Warsaw (Wilanów). Of course, neither the prosecution service, nor the police, nor the judiciary showed any interest in finding the perpetrators. See e.g. Woś, R. *To nie jest kraj dla pracowników*. Warszawa: WAB, 2017, pp. 210–213.

is] possible because those who accept the ideology are mistaken about (or ignorant of) how they came to hold those beliefs”.⁷² This classical definition of ideology focuses on the false consciousness of ideological subjects. However, it is increasingly observed that the subjects of ideology *know very well* that the claims of ideology are false, and they also know very well that the ideology *does not serve their interests*, yet they still continue to function *as if* the ideology were true or *as if* they laboured under the two mistakes. Slavoj Žižek provides the way out of this paradox by radically redefining ideology. He posits that ideology “is not a dreamlike illusion that we build to escape insupportable reality; in its basic dimension it is a fantasy construction which serves as a support for our “reality” itself: an “illusion” which structures our effective, real social relations and thereby masks some insupportable, real, impossible kernel (conceptualized by Ernesto Laclau and Chantal Mouffe as “antagonism”: a traumatic social division which cannot be symbolized). The function of ideology is not to offer us a point of escape from our reality but to offer us the social reality itself as an escape from some traumatic, real kernel.”⁷³

What is of particular relevance in Žižek’s concept of ideology is that he stresses the objective, rather than subjective character of ideology, thereby expanding its scope beyond mere false consciousness.⁷⁴ He does so, specifically, by positing Sloterdijk’s formula of the “cynical reason” – “they know very well what they are doing, but still, they are doing it”, instead of the traditional formula of ideology *qua* false consciousness (“they do not know it, but they are doing it”).⁷⁵ Žižek rightly observes that this cynically-ideological approach is typical in modern societies as a way of demonstrating a certain distance towards the hegemonic ideology, and that this distance becomes an integral part of the ideological game itself. Paradoxically, this subjective distancing from ideology not only does not weaken its hegemony, but even strengthens its grip upon society.

With a view to crucial role of ideology in the social ontology of critical legal science, it is necessary that this aspect of research be pursued in all possible directions and using all conceivable methods. Specifically, apart from theoretical research and theoretical critique (showing how conventional legal philosophy is permeated by liberal ideology), there is a large space for empirical desk research unmasking the ideologies at play in judicial decisions and doctrinal writings, as well as in shaping of legislative proposals.⁷⁶ Furthermore, apart from this genetic aspect (ideology and genesis of laws), there is the aspect of instrumentalisation of law (legal texts) by the hegemonic ideology, often done with little consciousness both on the side of drafters and citizens.⁷⁷

⁷² Leiter, B. Marx, Law, Ideology, Legal Positivism, p. 1183.

⁷³ Žižek, S. The Sublime Object of Ideology. London: Verso, 2008, p. 45.

⁷⁴ Maňko, R. ‘Reality is for Those Who Cannot Sustain the Dream’: Fantasies of Selfhood in Legal Texts. *Wroclaw Review of Law, Administration and Economics*, Vol. 5, issue 1, 2015, pp. 24–47, at pp. 28–29.

⁷⁵ Žižek, S. The Sublime Object of Ideology, op. cit., pp. 24–30.

⁷⁶ For a recent case study on the role of ideology in legislation see Šulmane, D. Ideology, Nationalism and Law: Legal Tools for an Ideological Machinery in Latvia. *Wroclaw Review of Law, Administration and Economics*, Vol. 5, issue 1, 2015.

⁷⁷ Cfr. the examples given in Maňko, R. Reality is for Those Who Cannot Sustain the Dream.

Conclusions

1. Critical legal science (otherwise known as 'critical legal studies' or 'critical jurisprudence' or 'critical legal theory') differentiates itself from other branches of legal science (especially the dogmatic ones) by its critical methodology. In other words, the object of study of critical legal science is the same (it is the legal phenomenon), whereas the method of study is different.
2. The critical methodology of critical legal science draws inspiration on the critical methodologies of other critical scientific endeavours, and in particular rests upon the critical legacy of the 'philosophers of suspicion' (Marx, Freud, Nietzsche), as well as their followers and successors in social and political theory (Frankfurt school), philosophy (French Theory) and psychoanalysis (Lacan, Žižek). In other words, critical legal science can be described as a local application of critical theory within the field of the juridical.
3. Critical legal science rests upon a methodological pluralism, where various approaches are bound by two shared elements: firstly, a hermeneutics of suspicion towards the official narratives about the law; secondly, the purpose of expanding human freedom by unmasking and eliminating all forms of domination and violence. Critical legal science is, therefore, in line with Marx's famous 11th thesis on Feuerbach, not only focused on understanding the legal phenomenon, but also at changing it in order to expand the sphere of human freedom (emancipation). Critical legal science is a theoretical practice which aims also at influencing other practices of the juridical, especially legislation (the creation of general legal norms) and adjudication (deciding individual cases). For critical legal science, the links between theory and practice are intimate and all aspects of practicing the critique of law (within the academic field, teaching law, judicial practice) are in its reach.
4. The object of critique of critical legal science extends both to the form of law *per se* and to the substance of law (content of legal norms), as well as to the social effects of the law. The form of law, based on abstraction and formal equality, should be deconstructed by pointing to the actual and concrete inequality and partiality, hidden behind those abstractions. The substance of the law, understood as the content of legal norms, both contained in legislative texts and judicial decisions, is subject to critique especially from the point of view of concrete interests that are protected (the 'haves' vs. the 'have nots') and those interests and perspectives, which are suppressed and subject to symbolic violence. The critique of the social effects of the law, apart from the aforementioned critique, also includes the critique of discrepancies between the officially declared general interest, which legislation is to serve, and the actual effects of legal regulation, which often serves only narrow interests of privileged groups, rather than the society at large.
5. An important aspect of legal critique is the critique of ideology, including the fact of sustaining the hegemonic ideology within the law, and the existence of law's internal ideology, which serves to legitimise the social power of lawyers in society (presented as an impersonal 'rule of law not men'). The critique of ideology is part and parcel of the general critique of law, and needs to take into account that today the so-called 'cynical mode of ideology' prevails, where subjects are fully aware of the falseness of ideology (false consciousness), but nonetheless decide to follow ideology in organising their practical affairs.

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