Legal Scholarship and the Political: In Search of a New Paradigm

Introduction

Introduction[1]

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Paraphrasing the classic, one could say that "a spectre is haunting Polish legal scholarship, the spectre of the political." Following the deep systemic changes of 2015–2020 which effectively dismantled the liberal-democratic institutions created at the turn of the 1980s and 1990s and consolidated by the 1997 Constitution,[2] Poland has reverted, to a certain extent, to its pre-1989 constitutional traditions.[3] The myth of an apolitical Constitutional Court, so laboriously constructed in the 1990s, fell almost overnight.[4] Judges are increasingly perceived not as apolitical technocrats-bureaucrats, but as political actors too, who need to take sides and justify their decisions. Legal scholarship is making great efforts at keeping the pace with those changes. In 2016, the bi-annual conference of Polish legal theorists and philosophers of law, held at the University of Wrocław, was entirely devoted to the political aspects of legal scholarship and legal practice.[5] In September 2019, the bi-annual meeting of legal theorists in Karpacz in the Karkonosze mountains was also, once again, devoted to the issue of *the political*. When back in 2014 Michał Paździora and Michał Stambulski published their seminal text entitled "What can legal scholarship gain from the political?",[6] the works of Carl Schmitt and Chantal Mouffe were rather unknown to the majority of Polish legal theorists. Today, five years on, we are observing a true change of paradigm. One of the editors of this volume published his habilitation book on the "Critical Theory of Adjudication,"[7] explicitly addressing the

[1] The present paper is published as part of National Science Centre (Poland) project no. 2016/21/B/HS5/00164.

[2] For a comprehensive discussion of Poland's systemic transformation since 2015 see Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019), passim.

[3] Russian philosopher Andrey Medushevskiy openly speaks of "constitutional retraditionalisation" ocurring in Eastern Europe (including Poland) and Russia – see Andrei N. Medushevskiy, "Konstitutsionnaia retraditsionalizatsiia v vostochnoi Evrope," *Sravnitel'noe Konstitututsionnoie Obozrenie* 2018, No. 1. See also: Andrei N. Medushevskiy, "Populizm i konstitutsionnaia transformatsiya: Vostochnaia Evropa, postsovetskoe prostranstvo i Rossiya," *Politiya* 2018, No. 3.

[4] Adam Sulikowski, "Trybunał Konstytucyjny a polityczność. O konsekwencjach upadku pewnego mitu," *Państwo i Prawo* 2016, No. 4.

[5] Tadeusz Biernat, "Sprawozdanie z XXII Zjazdu Katedr Teorii i Filozofii Prawa 'Prawo – Polityka – Sfera Publiczna'," Wrocław, 18–21 września 2016 r., *Studia Prawnicze. Rozprawy i Materiały* 2017, No. 1.

[6] Michał Paździora and Michał Stambulski, "Co może dać nauce prawa polityczność? Przyczynek do dalszych badań," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2014, No. 1.

[7] Rafał Mańko, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018).

question of the political in judicial decision-making. Two special issues of legal journals devoted exclusively to the question of the relationship between legal scholarship and the political came out in 2017[8] and 2018[9], respectively. In 2019, an edited volume also came out dedicated to the questions of *Law, Space and the Political*.[10]

In this context, the present monograph seeks to address in a comprehensive way the relationship between legal scholarship (known on the Continent as legal science – *Rechtswissenschaft*, *science juridique*, *nauka prawa*) and the notion of *the political*. Specifically, we intend to examine the crisis of the idea of an apolitical legal science and possible ways out of that crisis. The need for this monograph in our current predicament is obvious. First of all, there is a lack of comprehensive studies regarding the implementation of the Enlightenment idea of the apolitical character of science in the field of legal scholarship. Secondly, the research envisaged within the framework of the present monograph is specific not only as regards to its scope, but also – or above all – as regards to its methodological approach. We want to take into account the value of the idea of an apolitical legal scholarship, as well as its post-structural critique, assuming that the aim of the latter is not to destroy the *status quo*, but rather to trigger modifications enabling an efficient rebuttal of the critique. To paraphrase the view expressed by Artur Kozak, we aim at formulating "post-postmodern" theories justifying the apolitical character of legal science.[11] We are aware that post-structural visions have persuasively targeted the very meaning and notion of the apolitical character of legal scholarship. However, this does not imply that we *a priori* give up the claim that the meaningof the idea of an apolitical science is capable of being defended theoretically. After applying the post-structural critique of modern science, we evaluate which (if any) parts of modernist, positivistic theory of law stand the test of criticism and, therefore, should be preserved and defended.

The research undertaken in the present volume can contribute to the strengthening of the legitimacy of legal science and facilitate the defence of its specific character and autonomy from attacks based on the following argumentative scheme: "Since legal science is political anyway, let it be politicised in line with the ideology of the current dominant political forces." We consider this kind of reasoning to be a step towards totalitarianism. Therefore, we posit that, despite its critique and its implementation in the field of legal scholarship, the idea of the apolitical character of legal science can play an important role in the legitimising legal science and in identifying the forms of *the political* which, within the field of legal science, can be treated as permissible.

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[8] See special issue (2017, No. 110) of *Przegląd Prawa i Administracji*, the legal journal of the University of Wrocław, devoted to "Polityczność nauki prawa i praktyki prawniczej," edited by Professors Andrzej Bator and Przemysław Kaczmarek.

[9] See special issue (2018, No. 3) of *Archiwum Filozofii Prawa i Filozofii Społecznej*, the journal of the Polish section of the IVR, devoted to "Idea apolityczności prawoznawstwa i jej kryzys," edited by Adam Sulikowski, Rafał Mańko and Jakub Łakomy.

[10] Paulina Bieś-Srokosz, Rafał Mańko and Jacek Srokosz, eds., *Law, Space and the Political: An East-West Perspective* (Częstochowa: Podobiński Publishing, 2019).

[11] Cfr. Artur Kozak, *Myślenie analityczne w nauce prawa i praktyce prawniczej* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2010).

The possibility of producing apolitical knowledge is, beyond doubt, one of the chief ideas of modernity. It was implemented in various ways, including in the domain of legal scholarship. Legal scholarship found itself in a peculiar situation because of the object of its study – the law. It is assumed that its, at least partial, instrumentality cannot be free from entanglements, including engagements with *the political*. Any discussion of an "apolitical character" obviously presumes an analysis of the concept of the "political," which is the definitional opposite of "apolitical." We understand the "political" character of science and legal scholarship as encompassing three different dimensions:[12]

1) *the political*, understood as the fundamental antagonism at the foundation of any human society, present in the deep structure of legal theory/philosophy of law and doctrinal legal scholarship (a concept developed in contemporary philosophy of politics by, *inter alia*, Chantal Mouffe);

2) engagement with *politics*, understood as a set of practices and institutions which, in conditions of conflict created by *the political* (in the meaning given above), creates an order enabling human coexistence; this meaning is the closest to the intuitive meaning of *political*, derived from the thought of Max Weber;

3) an influence upon creating *public policies*, understood as a set of principles which need to be adopted in order to pursue a certain aim (e.g. "agricultural policy," "consumer policy" or "defence policy"). This notion is especially underlined in pragmatist legal philosophy, which will be one of the main strands in legal philosophy analysed in our research.

It should be pointed out that legal science accepted the positivistic version of the idea of the apolitical character of its scholarship and produced criteria allowing for the demarcation of political/apolitical, following the modernist paradigm. Obviously, those criteria were formulated in a variegated manner, depending on currents of legal theory and legal culture. The present research monograph, as regards our diagnosis, refers mostly to Civil Law countries (as opposed to the Common Law tradition, which differs to an extensive degree when it comes to the status and self-perception of its legal science/scholarship). Many legal discourses of Civil Law countries (especially those resting on the premises elaborated within legal positivism) accept the assumption that law, following the obviously political legislative process, gains the status of an apolitical subject of research.[13] According to the positivistic *credo*, in a *sui generis* "cult" of mathematical natural science, the first line of the scientific front in legal studies was given to doctrinal researchers – "dogmaticians" (German: *Rechtsdogmatiker*, French: *la doctrine*), considered to be "scientists" (hence the term: "legal science" used on the Continent). Their role was to establish the objective existence of "the law" on the basis of a scientifically sound and impartial method of reading legal texts, free of any form of critique, individual opinions, as well as ideological and/or political engagements.

[12] See: Rafał Mańko, "Orzekanie w polu polityczności," *Filozofia Publiczna i Edukacja Demokratyczna* 2018, No. 2: 67–70; Mańko, *W stronę*, 147–151.

[13] Hans Kelsen, *General Theory of Norms* (Oxford: Clarendon Press, 1991).

The positivistic paradigm within legal science treats the object of its research – the law – as an ontological category.[14] As a consequence, legal research as a cognitive and descriptive activity should consist in the description of the "real" meaning of legal norms treated as binding. This way, legal positivism determines a project of "legal dogmatics" (*Rechtsdogmatik*, *science juridique*) as a science whose object is a strict exegesis of a legal text in line with a scientific spirit.[15] Interestingly, however, the law understood as a set of texts not (yet) subject to a specialistic elaboration by legal dogmatics comprises a chaotic and a systemic material. Therefore, in order for the law to become an *a priori* towards its research, a number of rules had to be developed which would allow to treat law precisely as such an *a priori* existing object. The problem of the positivisation of law is solved, above all, through the institutionalisation of legal dogmatics. It is mainly institutionalised dogmatics that build knowledge according to the standards they accept, thereby granting it legitimacy. Positive law – by definition existing *a priori* and objectively *vis-à-vis* legal dogmatics, gains the two latter features thanks to the very existence of legal dogmatics; and especially through the disciplining (training) of dogmaticians (legal scientists) and limiting the scope of possible interpretive behaviours.

However, in order to maintain and justify the theses regarding its apolitical character, constructs of legal science require support from other sciences (especially linguistics), and from general philosophy. An objective and apolitical knowledge about positive law was to become part and parcel of reliable and complete knowledge.[16] In the meantime, however, the legitimising environment of legal discourses was subject to dynamic changes, which made juristic demarcation constructs more and more problematic. This revealed the greatest paradox of positivism (in the philosophical, not specifically legal sense). Positive knowledge was to become reliable and full knowledge – as Auguste Comte asked: "If we do not allow for free thinking in chemistry or biology, why should we allow it in morality or politics?" However, the progressing disenchantment of the world in a positivistic spirit lead to an increasing undermining of the sense of such a vision. In this context, following Horkheimer[17] and Bauman[18] or the Polish philosopher of law Artur Kozak, one can treat totalitarian regimes as the last spasmatic attempts at regaining reliability and legitimacy according to the rules set out by the Enlightenment. Referring to the legal sciences, one can say that totalitarian regimes were a paradoxical attempt at ensuring the apolitical character of legal science through its radical politicisation (i.e. its subjection to one, the

[14] Zbigniew Pulka, "Interpretacja prawnicza jako rodzaj interpretacji filozoficznej," in *Z zagadnień teorii i filozofii prawa. Ponowoczesność*, ed. Michał Błachut (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2007).

[15] Jerzy Leszczyński, *Pozytywizacja prawa w dyskursie dogmatycznym* (Kraków: Universitas, 2010).

[16] Aleksander Peczenik, *Scientia Iuris. Legal Doctrine as Knowledge of Law and as a Source of Law* (Dordrecht: Kluwer 2005); Aleksander Peczenik, *Wartość naukowa dogmatyki prawa: Praca z zakresu porównawczej metodologii nauki prawa* (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 1966).

[17] Max Horkheimer, "Traditional and Critical Theory," [1937] in *Critical Theory: Selected Essays* (New York: Continuum Press, 1999), 188–243.

[18] Zygmunt Bauman, *Legislators and Interpreters – On Modernity, Post-Modernity, Intellectuals* (Ithaca: Cornell University Press, 1987); Zygmunt Bauman, *Modernity and The Holocaust* (Ithaca: Cornell University Press, 1989).

"only correct" form of the political). Today, as a result of the process known as "learning by societies," liberal democracies are particularly allergic to the totalitarian potential of various phenomena. The problem of the demarcation line separating *the political* from *the apoliticial* becomes, therefore, increasingly significant. Simultaneously, influential currents in contemporary philosophy of knowledge (critical theory, poststructuralism, neopragmatism) cast doubt on the possibility that any kind of knowledge can be apolitical. These philosophical proposals are not without influence upon legal scholarship. Inspired, *inter alia*, by so-called French Theory,[19] various critical streams of legal scholarship criticise the hitherto legal science for obvious, although hidden, entanglements with *the political*. The idea of the "apolitical character" of legal science is presented as a dangerous myth and subject to a persuasive critique.

Until now, legal scientists have attempted to rebut the critique of its latent political engagement. These attempts have been variegated, ranging from proposal of "naturalisation" of legal science, understood as basing legal categories on theses and methods elaborated by sciences considered until today as apolitical, brought under the umbrella of so-called "empirical natural science,"[20] to consciously anti-Cartesian institutional theories, such as juriscentrism[21] and communication theories.[22] One should mention in this context also the economic analysis of law aimed at giving legal scholarship a scientific legitimacy, especially within the realm of private law.

Following critical theory, we accept the view that the political character of legal science cannot be subject to analysis without taking into account the fact that certain research currents within legal scholarship, such as positivism, natural law theory, legal hermeneutics or critical legal studies (more or less openly), adopt determined premises regarding the relationship between law and politics. Such ontological and epistemological assumptions have an impact upon the political character of scholarship as such. In order to frame these complex relationships between law, politics, as well as theoretical and doctrinal reflexion on law in our research, we subscribe to the methodology successfully applied by Mauro Zamboni.[23]

In line with this approach, analysing the relationships between law and *the political* can be analysed the following aspects (dimensions):

1. The *static aspect* – an analysis of how legal science perceives the presence of the political within the law itself. The content of law can, therefore, be more or less politicised or depoliticised. This methodological approach rests on the assumption that a given

[19] François Cusset, *French Theory: How Foucault, Derrida, Deleuze, & Co. Transformed the Intellectual Life of the United States* (Minneapolis: University of Minnessotta Press, 2008).

[20] Wojciech Załuski, *Ewolucyjna filozofia prawa* (Warszawa–Kraków: Wolters Kluwer, 2009).

[21] Artur Kozak, *Granice prawniczej władzy dyskrecjonalnej* (Wrocław: Kolonia Limited, 2002). On Kozak's theory see Rafał Mańko "Artur Kozak's Juriscentrist Concept of Law: A Central European Innovation in Legal Theory," *Review of Central and East European Law* 2020, Vol. 45.

[22] Jürgen Habermas, *Between Facts and Norms* (Cambridge: MIT Press, 1996).

[23] Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory* (Dordrecht: Springer, 2008); Mauro Zamboni, *The Policy of Law: A Legal Theoretical Framework* (Oxford and Portland: Hart, 2007).

assumption of legal science regarding the relationship between law and politics translates itself onto the scope of the perceived political character of legal research.

2. The *dynamic aspect* – focused on the legislative process. Under this methodological approach, legislation becomes as *sui generis* prolongation of the political machinery. Legal scientists' participation at various stages of the process obviously politicises the process of cognition of the law.
3. The *epistemological aspect* – most significant from the perspective of our research, focuses on the condition of the subdisciplines of legal science and aims at answering the following question: what scope of research materials can be taken into account in the research process (e.g. the permissibility of referring to parliamentary documents and discussions, *per se* political, to the policy goals declared by political actors backing a certain law, to the political consequences of given interpretive decisions, etc.)? From this perspective, one can analyse both the detailed methodology of legal sciences, as well as the epistemological presumptions which constitute the deep structure of legal science.

These phenomena take different forms in different juristic sub-discourses. Let us take the example of three of them – constitutional law, European Union law and private law (civil law). Each of the three selected subdisciplines identifies itself in a different way with regard to the various forms of *the political*. The discourse of the dogmatics of constitutional law, without giving up its scientific self-identifications, has treated certain links to the political as necessary (in certain countries constitutional lawyers even used the term "political law" to describe their field of research). In contrast to traditional national constitutional law research, EU law scholarship does not, in principle, declare far-reaching ambitions of being a field of legal dogmatics in the classical, 19th century meaning of the term. EU law researchers usually do not see their mission as reconstructing in a scientific way the "system" of EU law on the basis of a scientific analysis of the legal provisions of EU law and dogmatic concepts. Rather, they limit the self-perception of their mission to an ordering and understanding of the case-law of the Court of Justice of the EU. It should be added in this context that the latter case-law, within the discourse of EU law, is treated as a source of law more or less independent from the traditional sources of written law (treaties, legislation). Another important feature of the academic discourse on EU law is that its participants aspire to participation in a supranational epistemic community, distinct (although intertwined) with national epistemic communities. EU law specialists, whilst underlining their academic apolitical character, nevertheless, as a rule, do take stances in various political conflicts regarding the Union, such as those regarding the legitimacy of the EU and the position of its legal order *vis-à-vis* the legal orders of the member states.[24]

[24] For examples of such papers see: Marija Bartl, "Socio-Economic Imaginaries in European Private Law," in *The Law of Political Economy: Transformations in the Function of Law*, ed. Poul Kjaer (Cambridge: Cambridge University Press, 2019); Marija Bartl, "Internal Market Rationality: In the Way of Re-imagining the Future," *European Law Journal* 2018, Vol. 24, issue 1; Marco B.M. Loos, "Not good but certainly content: The proposals for European harmonisation of online and distance selling of goods and the supply of digital content," in *Digital contents & Distance sales: New developments at EU level*, eds. Ignace Claeys and Evelyn Terryn (Cambridge: Intersentia, 2017); Marija Bartl and Candida Leone, "Minimum Harmonisation and Article 16 of the CFREU: Difficult Times Ahead for

The above descriptions of the EU legal discourse pertain essentially to the mainstream of EU law scholarship, such as that presented, for example, in the *Common Market Law Review* or *European Law Journal*, as well as pursued by the chief research centres of EU law.

Private law scholarship sharply undermines its apolitical character. It should be pointed out that private law has been traditionally perceived – not only from within its discourse, but also by other legal discourses – as the most "technocratic" and "expert" legal field, as opposed to legal fields considered more "political" within the realm of public law. Expert knowledge within the scope of private law finds its legitimacy in a century-old tradition of this legal field which – as the only contemporary legal discipline – finds its direct roots in ancient Roman law.[25] This draws a significant distinction between private law scholarship, on the one hand, and "younger" legal disciplines on the other. The latter include contemporary scholarship of criminal law or administrative law, whose roots go back to the turn of the 18th and 19th century; not to mention contemporary constitutional law scholarship which has, in essence, only a 20th century scholarship (e.g. theories of fundamental rights).

Traditionally, private law scholars have been legitimising their interpretive decisions in hard cases by resorting either to classical methods of code interpretation (especially linguistic and systemic exegesis), or by historical jurisprudence (so-called "dogmatic history," *Dogmengeschichte*, as a method of understanding the "true" meaning of a legal institution or norm). During the last decades, a new scientific spirit has been imported into private law scholarship through Economic Analysis of Law, especially in the field of the law of obligations (contract, tort, restitution) and property law. The use of these scientific discourses within the discourse of private law scholarship has deepened the impression of this discourse's technocratic and apolitical character. The apparently "technical" and "apolitical" discussions undertaken by private law scholars are, in essence, pertinent to the crucial socio-economic interests of people and their economic organisations – employers and employees, consumers and traders, buyers and sellers, etc.[26]

Social Legislation?" in *European Contract Law and the Charter of Fundamental Rights*, ed. Hugh Collins (Cambridge: Cambridge University Press, 2017); Marija Bartl, "Internal market rationality, private law and the direction of the Union: Resuscitating the market as the object of the political," *European Law Journal*, 2015, Vol. 21, issue 5; Marija Bartl, "The way we do Europe: Subsidiarity and the substantive democratic deficit," *European Law Journal* 2015, Vol. 21, issue 1; Marija Bartl, "The Affordability of Energy: How Much Protection for the Vulnerable Consumers?" *Journal of Consumer Policy* 2010, vol. 33, issue 3; Marija Bartl and Candida Leone, "Minimum Harmonisation after *Alemo-Herron*: The Janus Face of EU Fundamental Rights Review: European Court of Justice, Third Chamber Judgment of 18 July 2013, Case C-426/11, Alemo-Herron v Parkwood Leisure Ltd," *European Constitutional Law Review* 2015, Vol. 11, issue 1.

[25] According to Paulina Święcicka, this leads to sublimation and monumentalisation of Roman law. See Paulina Święcicka, "From sublimation to naturalization: Constructing ideological hegemony on the shoulders of Roman jurists," in *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*, eds. Rafał Mańko, Cosmin Cercel and Adam Sulikowski (Oxford: Counterpress, 2016).

[26] Duncan Kennedy, "The Political Stakes in 'Merely Technical' Issues of Contract Law," *European Review of Private Law* 2001, issue 1; Martijn W. Hesselink, "Unjust conduct in the internal market: On the role of European private law in the division of moral responsibility between the EU, its Member States and their citizens," *Yearbook of European Law* 2016, Vol. 35, issue 1; Martijn W. Hesselink,

Admittedly, not all the contributions to this book can be described as belonging to critical legal theory. However, none of them belongs to the traditional analytical paradigm in jurisprudence, epitomised by such names as Hart and Dworkin in the West, or Jerzy Wróblewski in the East, nor to empirical socio-legal studies. If we were to search for a common methodological denominator, it seems that the "post-analytical paradigm" (*postanalityczność*), a notion recently popularised in Polish scholarship by Andrzej Bator, professor of jurisprudence at the University of Wrocław, would come in handy.[27] The notion of post-analytical philosophy of law, used earlier by Raimo Siltala,[28] draws on the post-analytical paradigm in general philosophy, which emerged in the mid-1980s as a reaction towards the stiffness and detachment from social reality typical of analytical philosophy (the latter, in turn, was a reaction to the exuberances of "speculative" philosophy).[29] The most important features of the post-analytical turn in philosophy are also valid for jurisprudence and include, above all, a departure from stifling linguistic and logical rigour, the abandoning of the "scientific" paradigm which imposed the modelling of philosophy or jurisprudence on the natural sciences, and finally the giving up of the improperly understood "professionalism" of philosophers or legal theorists which entailed an isolation of their research from the surrounding social reality. Whereas the analytical features suited well legal scholars living under state socialism who did not want to have to deal with official Marxism-Leninism, following the 1989 transformation, this paradigm found itself in crisis. Andrzej Bator, characterising the post-analytical paradigm in legal theory, lists a number of features. For our purposes, the most significant of those features include the abandoning of the correspondence theory of truth in favour of more narrative approaches and of linguistic and logical rigour, as well as the opening up of jurisprudence to its broader social and economic context.[30] This also includes the researcher's conscious engagement with on-going antagonisms – in contrast to the analytical jurist, the post-analytical legal scholar openly takes sides.[31] From the post-analytical perspective, a legal problem is of importance if it has *social* importance, rather than merely theoretical interest.[32] Disciplinary borders between jurisprudence and other fields are lifted, leading to what Bator dubs the "post-analytical synthesis," bringing together law, ethics, political philosophy, and critique of ideology.[33]

"Could a fair price rule (or its absence) be unjust? On the relationship between contract law, justice and democracy," *European Review of Contract Law* 2015, Vol. 11, issue 3; Martijn W. Hesselink, "Five political ideas of European contract law," *European Review of Contract Law* 2011, Vol. 7, issue 2; Martijn W. Hesselink, "European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?" *European Review of Private Law* 2017, Vol. 15, issue 3.

[27] Andrzej Bator, "Postanalityczna teoria i filozofia prawa, nowe szanse, nowe zagrożenia?" *Przegląd Prawa i Administracji* 2015, Vol. 102, passim.

[28] Raimo Siltala, *A Theory of Precedent. From Analytical Positivism to a Post-Analytical Philosophy of Law* (Oxford: Hart, 2000).

[29] See e.g. John Rajchman and Cornel West, *Post-Analytic Philosophy* (New York: 1985); Bernard Williams, *Ethics and the Limits of Philosophy* (London: Routledge, 2012).

[30] Bator, "Postanalityczna."

[31] Bator, "Postanalityczna," 28.

[32] Bator, "Postanalityczna," 30.

[33] Bator, "Postanalityczna," 23.

Bator's understanding of the post-analytical paradigm actually encompasses features also present in postmodern legal movements, such as a departure from "foundational truths, transcendental values, and neutral conceptions of law," in favour of "a more pluralistic, contextual and nonessential explanation of law."[34] In fact, some elements of the post-analytical paradigm have much in common with critical legal theory as well, in particular the open and personal engagement of the scholar or the broad resort to ethics and critique of ideology.[35] Nonetheless, the post-analytical paradigm is, as a notion, more fuzzy and open-ended than postmodern or, specifically, critical legal theory, as it stops short of making specific methodological commitments, in contrast to the archetypal postmodern legal movements.[36] The post-analytical approach could be actually referred to as "moderately postmodern," especially given that its relationship towards analytical jurisprudence is not one of staunch opposition (as in the case of postmodern legal theory),[37] but rather dialectical. Post-analytical jurisprudence, whilst accepting the negation of many elements of the analytical paradigm, nonetheless strives for a synthesis: its characteristic feature is the desire to save as much as possible from the traditional analytical paradigm. In the words of Andrzej Bator and Zbigniew Pulka:

> The post-analytical approach is a critical response to the idea of order introduced into the language of science by the analytical tradition. It does not *in extenso* undermine the principles and claims of analytical philosophy, but instead seeks to relativize it, bringing the logocentric image of language reality, as founded by analytical philosophy, to one of the available scientific discourses. Post-analytical philosophy does not, therefore, negate the existing practices of language sciences, but rather thrives on their critique.[38]

Although this specific aspect is not common to all contributors to this volume, it is nevertheless visible. This is especially true in the chapter by Michał Paździora and Michał Stambulski, who clearly still see a value in the legacy of analytical jurisprudence, despite its obvious shortcomings. The analytical legacy is also visible in the *style* of writing of our co-authors – we are all much closer to the tradition of linguistic precision, clear structuring and meticulous delimitation of concepts than to the postmodern style of writing, which, admittedly, is not always accessible to scholars from outside that paradigm.

Apart from being post-analytical in the above sense, all of the contributions in this volume share at least three elements belonging to the ontological assumptions of critical

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[34] Garry Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York-London: NYU Press, 1995), 2. Cfr. Douglas E. Litowitz, *Postmodern Philosophy and Law* (Lawrence: University of Kansas Press, 1997), 10–17.

[35] Cf. Rafał Mańko, "Critique of the 'Juridical': Some Metatheoretical Remarks," *Journal of the University of Latvia: Law* 2018, No. 11: 33–34.

[36] Minda, *Postmodern*, 1.

[37] Douglas E. Litowitz, *Postmodern Philosophy and Law* (Kansas: University Press of Kansas, 1997), 2–3.

[38] Andrzej Bator and Zbigniew Pulka, "Introduction," in *A Post-analytical Approach to Philosophy and Theory of Law*, eds. Andrzej Bator and Zbigniew Pulka (Berlin: Peter Lang Verlag, 2019), 7.

jurisprudence.[39] These include, firstly, the assumption about the *political* (or agonistic) nature of the social world, meaning that conflict is inherent in all social phenomena and cannot be definitively removed.[40] Secondly, all authors seem to concur that reality is *socially constructed*, so much so that it is not a subject of passive analysis, but rather something that is created in the discourse, including the academic one, and can therefore be changed by discursive strategies.[41] Thirdly, all papers seem to accept the assumption of *paninterpretationism*, that is the view according to which all social phenomena are subject to interpretation and cannot be perceived before or beyond interpretation by different social actors. Assumptions about the social construction of reality and paninterpretationism imply a claim about the existence of *interpretive communities* within which they are produced in an intersubjective sense.[42] For the authors in this volume, the legal community is both a political community (playing a specific role in solving conflicts in society), but above all an interpretive community which bestows meanings upon legal texts in processes of scholarly analysis and adjudication. The legal community is both a *situs* of ideological conflicts for hegemony within itself (conflicting interpretations and their ideological inspirations) and a subject of conflicts for hegemony within society (*vis-à-vis* other professional and political communities).

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The present monograph consists of nine chapters.

In chapter 1, entitled "Apolitical Jurisprudence: Crisis of an Idea and the Phenomenon of Populism," Adam Sulikowski analyses the current crisis of the idea of an apolitical jurisprudence and the relationship between that crisis and the rise of populism, especially in Central and Eastern Europe. In the first part of the paper, Sulikowski puts forward the claim that the idea of an apolitical legal science is, in fact, a post-theological one. In the second part of the paper, he analyses the impact of the first wave of populism (in the 1930s and 1940s) upon jurisprudence. In the third and final part, he analyses the roots of the present crisis caused by the crisis of demoliberal legality.

In Chapter 2, entitled "Legal Form, Ideology and the Political," Rafał Mańko addresses the issue of the relationship between law and ideology, which is obviously crucial for

[39] Rafał Mańko and Jakub Łakomy, "In search for the ontological presuppositions of critical jurisprudence," *Critique of Law* 2018, Vol. 10, issue 2, passim.

[40] Chantal Mouffe and Eresto Laclau, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics* (London-New York: Verso, 2001); Chantal Mouffe, *The Return of the Political* (London-New York: Verso, 1993). See also Mańko and Łakomy, "In search for," 475–477.

[41] Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (London: Penguin, 1991). See also Litowitz, *Postmodern philosophy*, 11–12; Mańko and Łakomy, "In search for," 477–479.

[42] Stanley Fish, "Working on the Chain Gang: Interpretation in the Law and in Literary Criticism," *Critical Inquiry* 1982, No. 9: 204. See also Litowitz, *Postmodern philosophy*, 13–16; Mańko and Łakomy, "In search for," 480–484; Jakub Łakomy, "The Space of the Political in Legal Interpretation (Some Remarks on The Dworkin-Fish Debate)," in *Law, Space and the Political: An East-West Perspective*, eds. Paulina Bieś-Srokosz, Rafał Mańko and Jacek Srokosz (Częstochowa: Podobiński Publishing, 2019).

the question concerning the political character of legal scholarship. He enquires whether a critique of ideology focused on law should be understood simply as an extension of the general critique of the hegemonic ideology, or should it take into account the specificity of the field. Another issue addressed in the paper is whether the law is totally dependent upon the political, or is it a field of its own and does it only serve the hegemonic ideology, or does it also wage an ideology of its own, something which could be called the "legal ideology." The considerations in the chapter are based on the assumption that law is a form. Just like the political is a certain degree of intensity of a conflict which has a different substantive nature (economic, social, religious, cultural, ethnic etc.), so the juridical is the form in which such a conflict can be expressed with. However, the chapter argues that the content of the juridical is predetermined or filtered through the political.

In Chapter 3, entitled "The Politics of Legal Theory and Legal Education," Michał Paździora and Michał Stambulski, two legal and social theorists from the Centre of Legal Education and Social Theory (CLEST) at the University of Wrocław, argue in favour of retaining certain tools of analytical jurisprudence in the service of a critically-oriented jurisprudence. The latter should focus to a much greater extent on legal education than it is now the case in theoretical models. Admitting the importance of education for the constituting of socio-legal orders and the preservation of a given status quo is clearly a post-analytical intervention. Classical legal education has been treated as a kind of transmission belt that, through stabilised doctrinal conceptions, attempted to arrange the "objective reality" in order to pass on its established vision to future lawyers. Chapter 3 is an example from the point of view of the post-analytical methodology as conceptualised by Bator and Pulka, in the sense that it takes a dialectical approach to the legacy of analytical jurisprudence.

In Chapter 4, Maciej Pichlak addresses "Constitutionalism as a Reflection on Political Identity," proposing a post-analytical, sociologising argumentation for an alternative constitutional discourse in Central and Eastern Europe. Reflexivity, as a category of analysis, is a novelty to Central European constitutionalist discourse. It was only the changes in the philosophical climate of the last 15 years that allowed Pichlak to postulate the conceptualisation of the constitution. In such a spirit, he rejects strict disciplinary divisions, opening his narration to political science and sociology, in contrast to traditional "scientific" reflection on the state and the constitution which still dominates constitutional law scholarship in our region. Amongst his tools and concepts, Pichlak has included the constitutional community as a factor influencing the shape of the political system.

In Chapter 5, entitled "Role Performer in Solid Identity: Towards a Baumanian Theory of Judicial Identity" Przemysław Kaczmarek, a philosopher of law from Wrocław, makes an original contribution to legal theory by applying the concepts from Zygmunt Bauman's social theory to the discussion on the role and functions of judges and, more generally, lawyers. Applying Bauman's moral concepts to the problem of the judge's responsibility within the political-legal system of Central and Eastern Europe, the author relies on the ontological presuppositions of the critical approach to jurisprudence in that he assumes the political nature of the law. This allows him to make proposals on the social role of judges.

In Chapter 6, entitled "Critique of Legal Interpretation: Hermeneutic Universalism, Interpretive Communities and the Political," Jakub Łakomy analyses legal interpretation from the perspective of hermeneutic universalism (paninterpretationism), where every cognition is relativised to the perspective of the subject. This means that all cognition is interpretation, so there is no such thing as knowledge not relativised to any perspective. He shows the influence of poststructuralist and neopragmatist revolution on the thinking about the relation between internal (legal) arguments and political arguments in the process of establishing the meaning of legal texts. This reconstruction serve as a lens through which he shows how the political influences the processes of legal interpretation. This chapter is therefore a tool to reconstruct the beliefs of Stanley Fish in the light of Ronald Dworkin and some other legal philosophers. Łakomy claims that the adoption of the described perspective bears major influence on the ongoing scientific debate on the political character of legal interpretation, including that of courts and tribunals.

In Chapter 7 on "Fundamental Rights from the Perspective of Critical Legal and Social Theory" Adam Sulikowski aims at interpreting in a generalising manner the approach to individual rights in critical legal and social thought. He draws attention to more abstract narrative threads (usually constituting the point of departure and not the point of arrival of critique, something very different), which can be treated as typical for critical thinking and which are strongly connected to the problems of individual rights. He focuses exclusively on three such motives that can described as: the motive of false consciousness; the motive of the ideological character of all rights; and the motive of minoritarianism.

In Chapter 8, entitled "Law, Politics and Ideology in the Aftermath of the Biljana Plavsić Trial," Aleksandra Nędzi-Marek seeks to examine the interconnection of the law implemented by the International Criminal Tribunal for the Former Yugoslavia, with the ethno-nationalist ideology as reflected in the local – often politicised – media outlets of Republika Srpska – one of Bosnia and Herzegovina's two administrative entities.

Chapter 9, entitled "The Influence of Americanisation on Polish Philosophy of Law and Legal Practice After 1989," written by Jacek Srokosz, is an attempt to analyse how the process of Americanisation has influenced the Polish philosophy of law after 1989. Srokosz focuses on the reception of the American way of thinking about law, and some legal practices perceived as objective and undisputable. According to him, the latter have been implemented into the Polish legal reality without any particular discussions and debate as to their target shape.

In Chapter 10, entitled " A Few Comments About the Law and Its Political Nature," Dobrochna Minich notes that the political nature of the law must be distinguished from the instrumental use of the law for political reasons, which manifests itself in situations where a legislative or executive authority seeks to limit the effective operation of the judiciary or to limit existing control mechanisms.

Although the current volume brings together both critical legal scholars and non-critical post-analytical scholars, we nevertheless hope that the present special issue will constitute a further step in the development of critical legal theory in Central and Eastern Europe, following four special journal issues (a special issue of "Archiwum Filozofii Prawa i Filozofii Społecznej" volume 8 issue 1 of 2014, edited by Paweł Skuczyński, devoted to

law and critical theory;[43] a special issue of the "Wroclaw Review of Law, Administration and Economics," volume 5 issue 1 of 2015, edited by Rafał Mańko and Michał Stambulski, devoted to law and ideology;[44] a special issue of the "Archiwum...," issue 3 of 2018, edited by Adam Sulikowski, Rafał Mańko and Jakub Łakomy, devoted to the idea of apolitical legal scholarship; a special issue of "Folia Iuridica," volume 89 of 2019, devoted to critical legal theory in Central and Eastern Europe[45]), as well as two edited volumes (collective monographs): *Law and Critique in Central Europe*, published by Counterpress in 2016[46] and *Law, Space and the Political*, published in 2019.[47] Although it is true that the traditions of critical jurisprudence in our region are not that long – effectively reaching back only to the late 1990s, in contrast to the emergence of American CLS in the 1970s,[48] – it is also

[43] That volume included a translation of a programmatic paper by Costas Douzinas, one of the unquestioned intellectual leaders of the critical legal movement (Costas Douzinas, "Krótka historia brytyjskiej Krytycznej Konferencji Prawniczej albo o odpowiedzialności krytyka," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2014, No. 1), as well as papers on ideological interpellation (Rafał Mańko, "Koncepcja interpelacji ideologicznej a krytyczny dyskurs o prawie," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2014, No. 1), the role of the political in legal theory (Michał Paździora and Michał Stambulski, "Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2014, No. 1), the rise of feminist jurisprudence (Lidia Rodak, "Are we all feminists now? Wyzwania ze strony Feministycznej Jurysprudencji wobec tradycyjnej teorii prawa," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2014, No. 1) as well as the phenomenon of affirmative amnesia in Central Europe (Adam Sulikowski, "Afirmatywna amnezja i konserwatywni crits. Kilka uwag o kondycji krytycznej myśli prawniczej w Europie Środkowej i Wschodniej," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2014, No. 1).

[44] The special issue contained papers devoted inter alia to the the role of ideological fantasies in law (Rafał Mańko, " 'Reality is for Those who Cannot Sustain the Dream': Fantasies of Selfhood in Legal Texts," *Wroclaw Review of Law, Administration and Economics* 2015, No. 5(1)), law and nationalism (Dace Šulmane, "Ideology, Nationalism and Law: Legal Tools for an Ideological Machinery in Latvia," *Wroclaw Review of Law, Administration and Economics* 2015, No. 5(1)) as well as the ideology of human rights (Wojciech Zomerski, "Ideology in Modern Times: Three Ideological Lies Behind Universal Human Rights," *Wroclaw Review of Law, Administration and Economics* 2015 No. 5(1)).

[45] The special issue contains inter alia papers regarding the crisis of liberal legality (Cosmin Cercel, "The Destruction of Legal Reason: Lessons from the Past," *Folia Iuridica* 2019, No. 89), the rise of populism and the possible response of critical legal scholars (Przemysław Tacik, "A New Popular Front, or, on the Role of Critical Jurisprudence under Neo-authoritarianism in Central-Eastern Europe," *Folia Iuridica* 2019, No. 89), the possible contribution of comparative law for critical jurisprudence in the CEE region (Alexandra Mercescu, "What Kind of Critique for Central and Eastern European Legal Studies? Comparison as One of the Answers," *Folia Iuridica* 2019, No. 89), ideological entaglements of certain institutions of private law (Joanna Kuźmicka-Sulikowska, "The Politics of Limitation of Claims in Poland: Post-communist Ideology, Neoliberalism and the Plight of Uninformed Debtors," *Folia Iuridica* 2019, Vol. 89).

[46] Rafał Mańko, Cosmin Cercel and Adam Sulikowski, eds., *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Oxford: Oxford University Press, 2017). The book was reviewed by Wojciech Zomerski, "Czy Europie Środkowej potrzebna jest krytyczna teoria prawa? (artykuł recenzyjny)," *Państwo i Prawo* 2018, No. 9.

[47] Bieś-Srokosz, Mańko and Srokosz, *Law, Space and the Political.*

[48] Rafał Mańko, "Critical Legal Theory in Central and Eastern Europe: In Search of Method," *Folia Iuridica* 2019, No. 89: 6.

true that, thanks to the freshness of our ways of thinking, the impact of critical legal theory can be greater than in the mainstream academia in the West. The present volume, aimed at debunking the myth of an apolitical jurisprudence, is intended as our contribution to this task.